tors of the 8th July and 18th Nov. 1752 be reversed, and that the interlocutor of the 26th July, 1755, after the words (sole and exclusive right of salmon fishing,) these words (in the sea) be inserted; after the words (within the bounds and limits of the lands of Kirkside,) the words (at all times of the tide) be left out; and that after the words (through the Wynd Path down the sea,) these words be inserted (but has no right of salmon fishing in the river Northesk, so far and at such times as the stream or water of the said river can be distinguished from the water of the sea.) And it is hereby further ordered and adjudged, that with these variations, the last mentioned interlocutor, and the interlocutor of the 9th August, 1755, adhering thereto, be and the same are hereby affirmed."

1755. *November* 26. DAVID FORBES, minister at Bayne, *against* JOHN MILLER, factor upon the sequestrated estate of Carleton.

THIS case is reported in the *Faculty Collection, (Mor.* p. 5127,) where the facts and arguments of the parties are stated. Lord KILKERRAN has the following note of the decision:—

"June 21, 1755.—Found that the minister, being already possessed of glebes to a greater extent than a legal glebe, he is not entitled to more, and dismissed the action.

"The President took occasion to say that if there only be kirklands in the parish that are arable, then there is L.20 given, but if there are no kirklands in the parish, he has no right to the L.20 at all.

"There is indeed one decision which seems to favour a different doctrine from that which the Lords have established by the decisions now given. It is observed by Dury, 22d January, 1631,—Where the minister of Innerkeithing, who had no glebe at Innerkeithing, where he resided, and was found entitled to have designed to him, notwithstanding of his having the glebe of another parish that had been annexed to Innerkeithing; but the Lords were now of a different opinion from that decision, not moved by the only argument that occurred for it, that a glebe does not answer the purpose unless it be contiguous to the minister's residence; that argument having, as the President observed, been often overruled when pled for a minister to have his glebe brought together, which lay discontiguous, and the utmost length they could go could only be for an excambion."

1756. *January* 13. M'ALLUM *against* Sir RO. GORDON, &c.

"JOHN M'ALLUM as executor creditor, confirmed to Mr. John Bouer, late minister of the parish of Duffus, pursued Archibald Dunbar of Newton, the patron of the parish, and Sir Robert Gordon as heritor of certain lands in the parish before the sheriff of Elgin and Forres, for payment of certain bygone stipends, due to the said deceased Mr. Bouer, and libelled the arrears due for each particular year,

from Mr. Bouer's admission at Michaelmas 1737, till his death in 1748; and obtained decreet against both the defenders, conjunctly and severally, for a pretty considerable sum; these arrears having amounted to about 200 bolls of victual, of which decreet both Sir Robert and Newton obtained suspension.

"This suspension coming to be discussed before me, I deferred giving judgment upon it till a dispute then depending before the commission between Sir Robert and Newton should be determined; as upon the decision of that question it appeared to me to depend which of the two was liable for these arrears, nor was there any injustice done to M'Allum by this delay, though he complained much of it, because the very defence or argument which they pled against each other, was in like manner competent to be pled by either of them, why they could not be liable to the minister or his executors.

"The question between them was this, whether a locality, which Newton the patron gave in in the year 1750 upon Sir Robert's lands, should take effect *retro*, from Michaelmas 1737, or if it should take effect only from the time that it was given in, which was in the year 1750, without any retrospect; and if it should be found to take effect *retro*, Sir Robert would be liable, and the minister's executors could have no claim against Newton, the patron; and if it should be found only to take place from Newton, he would be liable, and no claim lie to the minister's executors against Sir Robert; and for that reason, it was that, as I have said, I deferred giving judgment in the suspension of M'Allum's decreet till this question between Sir Robert and Newton should be determined.

"And, accordingly, when it was determined and found by the commission that the locality was to take place *retro*, from Michaelmas 1737, I, according to the view I had of the matter, pronounced the interlocutor recited in the information for the patron, and found that it being now finally determined in the proper court that the locality was to take place from Michaelmas 1737, Sir Robert was liable for the teinds in question from that period downwards, and found the letters at the executors' instance against him orderly proceeded.

"Of this interlocutor Sir Robert Gordon complained, by a representation, praying an alteration, or at least that I might lay the case before your Lordships, which I complied with, the rather that if Sir Robert shall be overruled in this question, it will, in my poor opinion, not be because the point of law stands against him, were it entire, but because the decreet of a Court stands against him, whose proceedings we cannot review.

"Meantime, before I proceed to state the argument for Sir Robert, why his defence should be thought yet entire, this decreet notwithstanding, I cannot, in justice to either party, omit to state to your Lordships the proceedings before the Commission upon which the decreet followed.

"Your Lordships will then know that the parish of Duffus was a parsonage; the patronage whereof Archibald Dunbar of Thunderton acquired from the Lord Duffus about the 1709. The family of Duffus, as it would seem, not the most attentive to their affairs, had allowed the parson to draw the whole teinds of the parish, which he was entitled to continue to do by the act 1693, ay and while the patron should obtain a just and reasonable stipend modified and settled upon him by the Commission.

"But Thunderton, more attentive to his interest, in 1710, immediately after his purchase of the patronage, brought a process of modification before the Commis-

sion, wherein he also concluded a locality, to the end that he, as patron, might be entitled to the possession of the teinds: And accordingly, upon a proof being led, a stipend was modified to the parson, with this quality, that he should continue in possession till an extracted decreet of modification was delivered to him, which accordingly was done in 1712.

"And then Thunderton, the patron, entered into the possession of the teinds of his own and of the other heritors' lands, by drawing them *ipsa corpora*, and particularly he drew the teinds of Sir Robert Gordon's lands of Rosile, as long as they produced a teindable subject, that is, as long as they were laboured and produced grain; but about the year 1732, being all thrown into grass, the patron could draw no teind, as there were none to be drawn. And in this state matters continued till the year 1741, that Mr. Dunbar of Newton, who had succeeded to his uncle Thunderton, in the patronage, wakened the locality which had been libelled in the same summons with the modification in 1710, and during the dependence of this wakened process, Sir R. Gordon pursued a valuation of his lands of Rosile, Stanwood, and others, and obtained a decreet of valuation in 1744, and since that time he has paid the valued duty.

"The process of locality having, for reasons unnecessary to mention, hung on till the year 1750, Mr. Dunbar, the patron, upon the 13th of December, in that year, gave in a locality, whereby he laid a certain stipend upon Sir Robert's lands of Rosile, Stanwood, and others; and this locality bore that it was to commence *retro* from Whitsunday 1737, and so to continue downward in all time coming. The reason of fixing upon that period was this; if he could give the locality any retrospect at all beyond its date, he might as well have carried it back to the 1710, the date of the summons of locality; but as there were no more arrears of stipend due to the executors of Bouer the minister, who died in 1748, than from and since Michaelmas 1737, which was the date of his admission, Mr. Dunbar gave the locality retrospect to that term, that he might thereby subject Sir R. Gordon to the arrears now pursued for by M'Callum, the minister's executor. The locality itself Sir Robert did not object to, as the stipend laid upon his lands did not exceed the valued duty; but the retrospect he objected to; and, not to mention some general arguments, why a locality, when not pursued by the minister, who must always have it from the date of his summons, as he has nothing else to live upon, but by the patron, should have no retrospect before its date, he insisted on the following particular objections:—

"And 1st. As to his lands of Rosile, that there was no ground in law upon which he could be subjected to the teinds of these lands more early than the 1744, when he became subject to the valued duty.

"As heritor simply no man is by law liable without adding that he was intromitter.—Intromitter he could not be, for more reasons than one, for as, till the 1712, the parson had intromitted by drawing the teinds *ipsa corpora*, so from the 1712 downwards, the patron had, in like manner, drawn the *ipsa corpora* while there were teinds to be drawn, and when there were none, there could be no intromission; and to avoid all pretence of any implied intromission, Sir Robert had all along, in his tacks, taken care to set the stock only, and not the teind. That it may be true that in 1732, these lands of Rosile produced no grain,

they lay in grass, but what then? the titular, nor even the minister, have no power to direct an heritor how he shall manage his ground, whether he should use it by tillage or by letting it lie in grass. If the titular think himself hurt by the heritor letting his lands lie in grass, he has, since the 1633, a remedy, he may pursue a valuation; but if he omit that remedy, whatever prejudice he may be at, he has himself to blame, and in so much is this true, that before the 1633, though a whole parish should be laid in grass, the parson himself could have no teind, because there were none; and the law gave him no remedy. But in the 1633, a remedy was given him; he was by that act impowered to pursue a valuation, which if he omits to do, he can have no teind, though he should starve; and if this was the case of the parson himself, much less could the titular burden an heritor with teind when he was liable in none.

"All this notwithstanding, the commission approved the locality, with the retrospect, till Michaelmas 1737, though for what reason they did so, I have neither memory nor judgment to inform your Lordships. Nor have I any assistance given me for doing it from the information; for Newton in this case, when all he says for justifying the judgment of the commission, is a cry of hardship, that the patron suffered by Sir Robert laying down his lands in grass, and the benefit Sir Robert had by it, as thereby he got his teinds valued at so much less than otherways they would have been. To which Sir Robert makes this answer; if the patron suffered a prejudice, he had himself to blame, and if Sir Robert had a benefit, it was a legal benefit, of which the patron had no cause to complain; but Mr. Dunbar rests his plea upon a *res judicata*, which, right or wrong, your Lordships are bound by.

"But this judgment of the commission, notwithstanding, Sir Robert contends, that the same defences which was pled before the commission against the locality having a retrospect are entire for him to plead before your Lordships why he should not be liable for the arrears pursued for.

"Sir Robert admits, that the commission are a proper court for modifying a stipend, and for allocating a stipend, and both these have been done; but then says he, they neither did nor could determine what individual person is liable to pay that stipend, therefore, when the commission has sustained the locality, with a retrospect, still the question is entire for your Lordships' cognizance, who is the person liable to that locality. Sir Robert supposes that he had purchased the lands of Rosile in the year 1740, the very year before he pursued the valuation, and puts the question, would your Lordships find him liable in consequence of this locality for years prior to his purchase? and he pleads the case to be the same, that as little can you find him liable for teind, during the years that the patron drew the teind, or was the only person entitled to draw it, while no body else did, as you could find him liable in the supposed case for years prior to his purchase.

"He states another case, and which occurred in the procedure of the commission in this very case; I have told you what were his objections with respect to the lands of Rosile; he made another objection against the retrospect with respect to his lands of Stanwood, that these lands paid rental-bolls, and which accordingly had been paid, either to the patron or to the minister, by his appointment, till 1744, that the teinds thereof were valued; and, therefore, pled, that the loca-

lity could have no retrospect as to these. Nevertheless, the retrospect was approved as to these also; now, says Sir Robert, the effect of that cannot be to subject me to a second payment, and for the like reason says, as little can the effect of it be to subject me to the teinds of lands which yielded none; that, therefore, it must still remain entire for your Lordships to determine who is the person that is liable, the patron himself or Sir Robert.

"That it may be true the patron does not insist for this; but he is just as well entitled to insist for the teinds of Stanwood as he is for the teinds of Rosile.

"*Query*, What if Sir Robert had made no objections to the retrospect, would it not have been competent to plead as he now does? and if it would, what worse is he for having pled it before the commission?"

"*January* 13, 1756.—Found it not competent to review the judgment of the commission."

1756. *January* 23. PATRICK SOUPER *against* J. FORREST, JOHN INGLIS, and OTHERS, Creditors of ALEXANDER SMITH.

ALEXANDER SMITH, having become insolvent, called a meeting of his creditors, and with the approbation of those who attended the meeting, addressed the following letter to John Watson, writer in Edinburgh:—"I hereby empower you to cause roup and sell the furniture of my house, and liquors in my cellars, for the behoof of my creditors."

The agent of John Inglis, above mentioned, one of the creditors, was present at the meeting.

After Mr. Watson had taken possession of the goods and sold a part of them, arrestments were used in his hands by Souper, a creditor who had not been present at the meeting.

On the same day on which the arrestments were used, another arrestment was used by Mr. Inglis. The execution of Souper's arrestment bore that it had been used betwixt the hours of two and three, and Mr. Inglis' arrestment was between the hours of three and four.

Mr. Inglis further proceeded to poind the liquors remaining in Mr. Watson's possession.

In this situation Mr. Watson brought a multiplepoinding.

Pleaded for Inglis and the general creditors, *primo*, That the money received by Mr. Watson as the price of that part of the goods which he had sold, was not arrestable by Souper as a creditor of Smith, because Watson was trustee for the creditors, and having sold the goods for their behoof, was accountable to them only, and not to Smith. And farther, that supposing that Mr. Watson was not by this commission trustee for the creditors, but was factor for Mr. Smith only; still, in this view the arrestment was equally an inept diligence; for Mr. Watson was on that supposition factor for Smith, and his possession was Smith's possession, and an arrestment, in Smith the debtor's hands, can get no preference by the established rules of law; and the only diligence competent in such case was