and the 18 bolls black oats subset to Morton's author from 1703 at 3s. 4d. tack-duty, with power to him to raise inhibitions, pursue spuilzies, &c. This we thought was a total dereliction of the valuation, and therefore assoilzied from the approbation. The pursuer reclaimed, for that the grain paid was truly in money of less value; 2dly, That here there was a rental, and where that is, the valuation is not by proof of the full rent, stock and teind, but the rental bolls are the valuation with deduction of the King's ease. But we thought that the use of payment was a passing from the Sub-Commissioners valuation, and that rental bolls bound neither party longer than they pleased, and therefore were no sufficient objection to a valuation in the usual form; and upon answers refused the petition. But upon the other conclusion of their libel, that at least we should value their teinds, allowed both parties a proof. This second was agreeable to our judgment 20th June 1744, College of Glasgow, (No. 19.)

No. 36. 1753, July 4. BEATTIE, Minister of Marytown *against* HERITORS.

In a process of augmentation the defence was,—a stipend was modified in 1718 of 6 chalders, 13 bolls, 3 firlots victual, and 100 merks, and 40 merks of communion-elements. But the decreet was so recent, and though the victual was much better than 100 merks the chalder, and the heritors offered L.5 the boll, yet because it wanted two bolls and one-fourth of eight chalders or 800 merks, and no cause mentioned in the decreet for going beneath the *minimum*, and it was a decreet of consent, we repelled the defence, and modified seven chalders and a half victual and 250 merks stipend, and L.60 Scots communion-elements.

No. 37. 1753, July 20. SPALDING *against* HERITORS OF KIRKMICHAEL.

SPALDING of Ashintully in 1615 got a charter from Exchequer of his lands and of the patronage of Kirkmichael, a Church which belonged to the Abbey of Dunfermline. In 1677 he got a charter from King Charles (the signature superscribed by him) on his own resignation, containing a *novodamus* of his lands, and the patronage of this Kirk *cum decimis tam rectoriis quam vicariis ejusdem.* Ashintully some years ago sold the patronage to the Duke of Athol, and disponed the bygone teinds to Spalding of Bonny-mill,—who pursues the heritors for the teinds. The defenders objected to his title both of the patronage and of the teinds, that the charter 1615 not superscribed by the King could not give the patronage unless he shewed a prior right, and the charter 1677 was obtained by obreption, and could convey no more than he had right to before; and that the teinds as part of the Abbey of Dunfermline were disponed to Queen Anne (King James VI.'s Queen) and her right ratified in Parliament and now belong to the King as succeeding to her. The pursuer founded his right to the teinds first on the charter 1677, and secondly on the acts 1690 and 1693. The case was reported by Drummore, and we agreed that the charter 1615 gave no right to the patronage, but that the *novodamus* in the charter 1677 gave good right to it. But the Court was divided on the other two points. I thought the clause *cum decimis* was but a clause of stile in a charter of patronage, that the expression might be constructed either giving *patronatum ecclesæ et decimarum ejusdem,* and then it would give no right to the teinds, or giving *patronatum ecclesiæ et decimas ejusdem,* and then it

would convey the teinds, and that such clauses were inserted in Royal charters where no right of teinds was intended to be conveyed. I quoted a charter of Marquis of Annandale, mentioned in the case 16th December 1748 betwixt the Marquis and Irvine of Bonshaw,* and that it appeared plain to me they were not intended here to be conveyed, for that in the after part of the charter the patronage is with the lands erected into a barony, but not a word of the tithes. In their *tenendas* the patronage is mentioned but not the tithes, and the same in the dispensation for taking sasine. 2dly, I thought the acts 1690 and 1693 gave him no right, because they were lawfully disponed to Queen Anne, and though they were now in the Crown as heir to her, yet still they were no part of the benefice. That as parsons have right commonly to all the tithes in the parish, and the patron had the choice of the titular, he commonly made a bargain with him, and leaving him a sufficient stipend, took from him tacks of all the rest, so that though the right of tithes was formally in the parson, yet they were substantially in the patron. That as the patron behoved to lose this when the right of presentation was taken from him, therefore the Parliament did no more than justice in giving the patron right to the teinds so far as exceeded a competent stipend. But then they neither were in justice bound or could give him more than what belonged to the benefice, and would have belonged to the parson, and therefore they excepted teinds heritably disponed, and these teinds though now in the Crown were no more a part of the benefice than if a subject had succeeded to Queen Anne. That the act 1690 was on the same plan with the act 1649, only the expressions varied, and there the case was plain, the patron is thereby enabled to dispose of them in the same manner, as the parson and he together could have done before. That the same thing appeared by the next clause in the act 1690 touching superiorities and feu-duties, where in express words "because of the benefit the patron might have had by these feu-duties," therefore they are given to him, but the superiorities by which he could have no benefit were given to the Crown, and by the pursuer's argument, even teinds belonging to Bishops, which were in 1690 in the Crown, would, where the Churches were patronate, belong to the patron. Justice-Clerk thought that the pursuer had no right to the teinds by the charter 1677 but that he had by the act 1693. Others thought both titles good; and it carried to sustain his title, *renit. tantum* Kames, *et me*. Kilkerran did not vote, 17th January. 20th July, Adhered, wherein Kames, Kilkerran, and I agreed, because

* This case is thus mentioned in the manuscript notes.—In a sale of tithes, the Marquis produced a charter in 1663, of the patronage *cum decimis tam rectoriis quam vicariis*. The Lords found that the charter gave him no right to the tithes, where it did not appear that the Crown ever had any right to the tithes; and therefore found him only entitled to six years purchase. There had been likewise a process of modification and locality raised, and the Marquis insisted that he might retain as many teinds unsold as would free his own tithes of stipend, and as he could allocate upon the pursuers of the sale. We thought the demand reasonable; but the difficulty was, that it does not appear what stipend we shall modify, and consequently we cannot know what proportion can be allocated on these heritors; therefore we delayed further procedure till 2d Wednesday in June, that the modification and locality might come in.

of the terms of the doquet of the signature 1678 and act of Parliament, which comprehend these teinds themselves.

No. 38. 1753, Nov. 21. LORD ADVOCATE, &c. *against* PRESBYTERY OF SELKIRK.

THE Presbytery pursued a declarator that Long-Newton was a parish by itself having 1000 merks stipend, kirk, and glebe, and that therefore it ought to have a Minister to serve the cure, or at least be annexed to . Sir William Scott defender produced many strong documents to prove that it had in 1684 been annexed to Ancrum by the Court of Commission, and 500 merks of stipend allocated to the Bishop of Brechin, and the rest continued till the Commissioner should give orders touching it, which they never did; and produced a copy of the decreet, but could not produce any extract, the records being burnt; but produced three discharges of the 500 merks by two different Bishops of Brechin, and since 1688 it has been constantly paid to the Crown. The pursuer replied that the copy was no evidence; that any decreet that had been pronounced was afterwards stopped, and no decreet extracted, and that the defender behoved to prove the tenor of his decreet, for which all his adminicles were insufficient. The Lords found sufficient evidence that the kirk was in 1684 annexed to Ancrum, and therefore assoilzied from that conclusion of the libel, and found no necessity of proving the tenor.

TENOR.

No. 2. 1735, Dec. 2. CHANCELLOR *against* GRAY.

THE tenor was fully proved of the heritable bond, and the adminicles were the sasine and scroll of the bond which were both sworn to; but the difficulty was the *casus amissionis*, as to which the notary said; he after the sasine returned the bond to Mr Bogle his employer, at least sent it to his wife; and Mr Bogle swore he did not remember that he had ever seen it after he gave it to the notary. There was another circumstance, that they went to the West Indies, and so could not retire it, but this was not proven.

No. 3. 1736, July 10. ANDREW MANN *against* ISOBEL MANN.

IN a proving of a tenor of a postnuptial contract, the only adminicle produced being a copy taken of the alleged contract by a stranger, and the said tenor offered to be proven by the writer of the contract, and by the person who took that copy; but no special *casus amissionis*, but that either the wife gave it to her husband, and he lost or destroyed it, or that it was *casu fortuito* lost by herself;—the Lords gave an act for proving, though the contract contained extraordinary clauses, viz, the fee of the husband's whole present