1797. *May* 23.

The SOLICITOR of TITHES, *against* The EARL of MORAY.

No. 89.
Teinds formerly held by the arch-dean, or other member of the Bishop's chapter, do not belong to the Crown as bishops teinds, but to patrons, under the act 1690, C. 23. and 1693, C. 25.

The church of Forres belonged to the arch-dean of the bishoprick of Moray. The patronage of it was, in 1589, given by James VI. to Lord Spynie, in whose right the Earl of of Moray now stands. The Earl having refused to take a lease of his teinds in that parish from Exchequer, the Solicitor of Tithes brought an action of spuilzie against him

Parties were not agreed whether the grant to Lord Spynie included the teinds as well as the patronage, nor with regard to the possession of the teinds subsequent to the grant. But on the supposition that the patronage only was given by it, the general question occured, Whether the teinds belonged to the defender, under the acts 1690, C. 23. and 1693, C. 25. as patron, or were vested in the Crown as Bishops teinds?

Pleaded: There is no distinction as to this question between mensal churches, or those the teinds of which were allotted for the maintenance of the Bishops, and common churches, or those whose teinds were destined, either for the general uses of the chapters, or for the maintenance of the arch-dean, or other individual member of it; Forbes, p. 74; 1617, C. 2. In the first species of the teinds of common churches, the Bishop had evidently a very material interest, and his consent was necessary even in the administration of the latter. Indeed, the Bishop and his chapter formed a sort of corporation, whose interests were inseparably connected. In so much, that when Bishops were abolished soon after the Reformation, their chapters fell as a matter of course. The revenues of both were vested in the Crown, and grants were made of them without distinction. The act 1606, C. 2. which restored Bishops to their revenues, expressly mentions "common kirks" as a constituent part of the bishoprick. In like manner, Episcopacy having been abolished during the Usurpation, the act 1662, C. 1. restored the Bishops, and though nothing was said of the chapters, they immediately resumed their rights; and when Episcopacy was finally abolished at the revolution, the teinds of both fell to the Crown.

By the act 1693, C. 23. it was declared that teinds vested in the Crown, in right of the Bishops, cannot be sold; and it is a settled point that patrons have no right to them under the acts 1690 and 1693. The reason of the exception as to Bishops teinds was, that Episcopacy might be more easily restored upon a favourable opportunity, if the teinds remained with the Crown, than if they had been vested in the proprietors of the lands; and there was the same reason for an exception as to teinds belonging to chapters. Indeed, from the inseparable connection between them, they were properly included under the general description of "teinds which formerly pertained to Bishops."

Besides, the acts 1690 and 1693, relate only to those parishes in which the rights of patron and titular were united. In them the patron had right to the teinds during a vacancy, and although they belonged to the presentee after his induction, the Legislature had repeatedly recognised the right of the patron to re-

No. 89.

tain a patrimonial interest in them; 1612, C. 1. 1649, C. 9.; 1661, C. 9.; Stair, B. 2. T. 8. § 35.; Kames' Eluc. art. 38.; and of this interest, it was thought unjust to deprive them, though patronage was abolished. But, on the supposition that the grant to Lord Spynie did not include the teinds, he had no prior interest to plead for obtaining them.

Answered: It is a mistake to suppose, that churches allotted for the maintenance of the Bishop, and those belonging to the members of the chapter, are in any respect in the same situation. In the former, the Bishop himself was the person, and he did not present another to the benefice with right to draw the revenue, but named a substitute to officiate for him, with such an allowance from the teinds as he thought proper. They were not therefore *patronate* but *collative*: Hope's Min. Pract. T. 2. § 2.; Stair, B. 2. Tit. 8. § 28. On the other hand, although some of the churches belonging to the inferior dignitaries were collative; Stair, B. 2. T. 8. § 35.; many of them were patronate, and the patronage of them was vested in the Crown, a Bishop or a layman. By the act 1594, C. 199. common churches were declared to be of the nature of parsonages, and conferred by presentation of the lawful patron; Bankt. B. 2. T. 8. § 9. 12. The act 1606, C. 2. which restores the estates of the Bishops, indeed restored them to their "common kirks." But the statute meant merely to restore their ecclesiastical jurisdiction over them, not to restore the revenues to the chapters; otherwise the act 1617, C. 2. restoring their revenues, would have been unnecessary; and this statute contained a reservation of such teinds or patronages as had been lawfully granted by the King, and consequently, it did not affect the right of Lord Spynie.

In the rescinded act 1641, C. 30. the distinction between teinds belonging to Bishops, and those of the chapters, is still kept up, and the act 1662, C. 1. which restored Episcopacy, did not restore the chapters, as is evident from the Bishops being directed by it to act with the advice of such of the clergy as they should think proper to consult: Whereas, the members of the ancient chapters were their counsellors *ex officio*, and independent of their choice.

The act 1690, C. 23. which abolished patronage, contained in return a general enactment, giving all patrons, without distinction, a right to teinds not already heritably disponed. This enactment did not apply to the teinds of Bishops. These were not patronate; they remained vested in the Crown, and were, by 1693, C. 23. declared not subject to sale. The teinds of the chapters, however, so far from being included under this exception, were those to which the act 1690 particularly related. For, notwithstanding the broad terms of that statute, doubts were entertained if it gave patrons the teinds of parsonages and vicarages, and therefore the act 1693. C. 25. extended their right to them. But, if the act 1690, neither applied to the teinds of Bishops, nor to those last mentioned, the teinds of chapters alone remained for its application; 5th February 1799, Officers of State against Sinclair (not reported.) See APPENDIX.

The Lord Ordinary reported the cause on informations.

No. 89.

The Court were clearly of opinion, that the distinction made by the defender, between the teinds of Bishops and those belonging to the members of chapters is well founded, and that the latter have none of the privileges of the former, but belong to patrons under the acts 1690 and 1693.

The Lords (18th November 1796), assoilzied the defender.

And upon advising a reclaiming petition, with answers, they unanimously "adhered,"

Lord Reporter, *Glenlee*. Act. Solicitor of Tithes *Balfour, W. Robertson*.
Alt. *Rolland, Rae*. Clerk, *Sinclair*.

D. D. *Fac. Coll. No.* 26 *p.* 61.

1797. *June* 7. DR. LAMONT *against* The HERITORS of URR.

No. 90.
A proprietor who purchases his teinds, during the dependence of a locality, is liable for stipend only *pari passu* with those heritors who have previously acquired heritable rights to their teinds.

In 1794, the Minister of Urr got an augmentation of his stipend, to commence with crop 1792. At this time, Dr. Lamont, one of the heritors, had no right to his teinds, which belonged to the Earl of Selkirk, who was titular of the parish, but not an heritor in it.

Dr. Lamont, however, afterwards raised a process of valuation and sale, in which a proof was allowed, in May, 1795. Before this, two different schemes of locality had been rejected.

In July, 1795, the Lord Ordinary approved of a third scheme of locality, in which the teinds of Dr. Lamont, and other two heritors, was first exhausted, as being free teinds.

In November, 1795, Dr. Lamont obtained a voluntary disposition of his teinds from the Earl of Selkirk, which he produced in the locality, as making him liable in stipend only *pari passu* with heritors who had previously acquired heritable rights to their teinds.

The Lord Ordinary adhered to his former interlocutor.

Dr. Lamont reclaimed; and

Pleaded: The maxim, *pendente lite nihil innovandum*, applies only where the interest of the pursuer is affected, and does not prevent the defenders in a process from taking steps to alter their situation *inter se*. Accordingly, it is a settled point, that a judicial competition of creditors does not prevent them from acquiring preferences by arrestment or adjudication; 18th November, 1779, M'Haffy against Maclellan *; December, 1784, Maconochy against Marshall *; 12th July, 1785, Massey against Smith, No. 73. p. 8377.; 22d November, 1785, Grierson against Douglas, Heron, and Company, No. 44. p. 274.; 22d June, 1791, Peirce against Limond. No. 16. p. 244. The same principle must regulate the present case. The Minister, or perhaps, more properly speaking, the titular, is the pursuer in a process of locality. Neither of them has any interest to oppose the present demand; and the heritors in a locality have the same faculty of acquiring

* These two cases not reported; see APPENDIX.