No. 34.
augmentation in consequence of a subsequent law.

progress, he pursues recourse, upon the warrandice, against the Lord Balmerino; who alleged, Absolvitor, because the augmentation was granted by a subsequent law, viz. by the act of Parliament 1633, extending ministers' stipends to 8 chalders of victual; and warrandice can never be extended to burdens incurred by a subsequent law, as is observed by Durie, in the case betwixt the Countess of Dumfermline and the Earl, her son. See WARRANDICE.

The Lords found, That in respect of the conception of the clause, being special, as to the ministers' stipends, in all time coming, and that the *quota* of stipends was not *casus incogitatus*, by a subsequent law, but that the King, by his decree-arbitral, *anno* 1629, before this disposition, had determined the *quota* of stipends, which was ratified in the Parliament 1633, thereafter, they sustained the recourse, and modified nine years purchase for the teind, conform to the act of Parliament, with annual-rent since the distress; and if the pursuer could instruct a greater price paid to Balmerino for the teind, they sustained the same price.

Stair, v. 2. p. 266.

1676. *June.* 9. BURNET *against* GIBB.

No. 35.
A glebe found teind free, though mortified to a chapel without designation by process.

Alexander Burnet having right to a tack of the teind-sheaves of the burrow-lands of Aberdeen, granted by the Bishop of Aberdeen, pursues thereupon William Gibb for the teinds of that piece of land, called Fittismire, and of the craft of Fittie, possessed by him. The defender alleged Absolvitor, because as to Fittismire, it was a piece of overflowed and marsh ground, as the name expresses; and he drained the same, and did inclose it, and did sow upon it victual at first, and since hath made it a yard for kail, carrots, and herbs; so that there hath no victual grown upon it during the years libelled, and therefore he can demand no teind-sheaves thereof: And albeit he had right to both parsonage and vicarage, yet vicarage is local, and due only according to custom; and there is no teind for kail, herbs, and roots in that place, or any other place in Scotland. The pursuer answered, that he offered to prove that the land had been accustomed to be plowed both before and after the draining, and to have borne victual, and so was liable to parsonage teind, which being a just and favourable right, cannot be taken away by the proprietor at his pleasure; but the pursuer hath as good right to the teind as the heritor hath to the stock. It was replied for the defender, that teind is only a right affecting the crop, and not the ground, until a valuation be led, which liquidates the teind, *communibus annis*, and therefore is due, though it were waste, and no more is due, though the crop were so plentiful that the teind-sheaf were ten times better; but so long as the teind remains in its proper nature, and *ipsa corpora* are set and drawn, it is but casual according to the crop, birth, and fruits, and puts no servitude nor restraint upon the proprietor or his tenant, but he may freely dispose of his land as he pleases, and may make it all corn, or all grass, or all gardens, orchards, or yards, and

may put only yeild goods upon the grass, for which no teind will be due; or where before he had kine or sheep that paid vicarage, he may put on mares and horse, who commonly pay none. No. 35.

The Lords found the defence relevant, that albeit this piece of land had been accustomed to be sown with victual before, or after the draining, the heritor or his tenant might change it at his pleasure, *sine dolo*, and that kail, herbs, and roots, were not teindable, unless it had been so by ancient custom.

The defender alleged further absolvitor from any teinds for the acre of Fittie, because it is a glebe. It was answered, that glebes are only teind-free where they have been anciently free, and new glebes which are legally designed; but here there is no kirk but a chapel erected by the town of Aberdeen, who have given it this glebe upon their own accord.

The Lords found it relevant that this piece of land was mortified for a Glebe, whether for a kirk or chapel, wherein there was divine worship, to free it from teind, though it was not designed by process or course of law, but of consent, as many glebes are.

Stair. v. 2. p. 425.

*** Dirleton reports this case:

The Lords, in a spuilzie of teinds, pursued at the instance of Alexander Burne, against William Gibb, found, That the defender, or his author having inclosed a piece of marsh ground to be a yard, and having made no other use of the same since, but for carrots and roots; he was not liable to the Bishop titular, or his tacksman of the parsonage teinds, for payment either of the value of the parsonage teind, or for the vicarage teind, which was found by plurality of one or two voices.

Those that were for the decision did found their opinion upon these grounds, viz. 1*st*, That the heritor *potest uti jure suo*, and that the titular has no tie nor servitude upon him, but he may either labour or not his own ground; if he do it not *in fraudem* or *æmulationem*, of purpose to prejudge the titular; 2*do*, That the defender, in order to his own interest, having thought fit to inclose his ground, and to make use of it for carrots and roots, for which, by the custom of the country, teind is not due, neither to parson nor vicar; the defender is not liable for teind, seeing vicarage-teind, and the payment of it, is regulated according to custom.

It was urged by the Lords that were of another opinion, That the titular of the teinds had an *interesse partiarium* as to teinds, so that albeit the heritor may *uti jure suo*, it is to be understood, that he should use the same *sine injuria*, without prejudice of the titular; and if, of purpose to prejudge the titular, he should not labour, but suffer his lands to lie waste, he will be liable to the titular for the value of the teind that was formerly payable, or might have been gotten, as was found in the case of the Laird of Polwart against the Minister of Polwart. For, if he should inclose all or a considerable part of his ground that was arable land, and whereof the teind was either paid to or led by the titular, it

No. 35. were hard that it should be in his power to prejudge the parson to the advantage of the Vicar; but in that case the small teinds would be considered as great and parsonage teinds, *quia surrogatum sapit naturam surrogati:* And far less it ought to be in the power of an heritor to prejudge altogether the titular or the Minister, who is provided out of the teinds, as in the case in question, by inclosing ground formerly arable, and making that use of it, that neither the titular nor Parson can have any benefit of teind; it being unjust, that the titular should be prejudged, and that the heritor should advantage himself, and by his own deed should free himself of teind; and albeit, by the custom in some places, teind is not paid for carrots and roots in yards, the same being looked upon as inconsiderable, and the bounds where the same are sown or planted being small parcels of ground, for the private use of the heritor's own family; yet, when a considerable tract of ground is inclosed and parked, so that the heritor has the same if not more profit than he has of his other laboured ground, by selling the roots and fruits of the same, as about Edinburgh, or other great cities where great parcels of corn land are taken in, and inclosed to the use foresaid; as by the common law teind is payable, even for such fruits and profits; so by our law the titular ought not to be prejudged; and the custom that teind is not payable for roots and such like, ought to be understood of such as grow in yards about houses as said is, for the proper and domestic use of heritor or tenant, but not where a great parcel of ground is taken in, and destinated for profit and advantage, by sowing or setting, and selling herbs and roots.

Dirleton, p. 169.

1677. *July* 13. The EARL of ERROL *against* HAY.

No. 36.
Extent of the patron's right in the teinds.

In anno 1649, all presentations were taken from patrons, and in place thereof they were declared to have right to the teinds, over and above the competent stipend to the incumbent; but by the 9th act Parl. 1661, That whole Parliament 1649 was rescinded, and particularly that act anent patronages; but it was declared, "That it should be lawful to laic patrons or heritors, to agree with the beneficed persons for tacks of their teinds, according to the laws of the kingdom, being but prejudice of the stipends modified, or to be modified to these beneficed persons: Declaring also, That the present Ministers, during their service, shall claim no right or possession to the teinds of their said kirks, more than they had formerly before this act rescissory, they having a sufficient maintenance." By a posterior act *in anno* 1662, "All Ministers who came in without presentations, by virtue of the act of Parliament 1649, were ordained to call for presentations from their patrons, otherwise to be excluded from their benefice." Mr. William Hay being admitted Minister of Cramond *in anno* 1655 did, according to the act 1662, obtain a presentation from the late Earl of Errol, and gave him a back-bond, "That he should give such right to the Earl of the teinds of his own lands as