are not teindable subjects; so that the rule will not hold generally, that where the subject is not teindable there is no teind paid, but only in certain cases where the greatest part of the rent is paid for a teindable subject, such as corn, and only a small part of it for subjects not teindable, such as moss, cot-houses, &c.; and this I take to be the foundation of all the deductions allowed in valuations of tithes.

1752. *November* 16. STIRLING, &c., Merchants in Glasgow, *against* ———.

[Elch. No. 12, *Society*, and No. 28, *Bankrupt.*]

IN this case the Lords reduced, on the Act of Parliament 1696, declaring notour bankrupts, a payment made by a debtor to his creditors, by delivery of goods to them in place of money, after which the debtor within 60 days became bankrupt, in terms of the statute: This the Lords did with great unanimity, though they had found, in January last, in the case of *George Forbes*, merchant in Aberdeen, that payment made by a bankrupt in money does not fall under the statute. The reason of the difference seems to be, that money in the debtor's pocket cannot be affected by any form of diligence known in our law, and he may squander it or do with it what he pleases; so that by giving it in payment to one creditor he is not supposed to prejudice the rest; whereas goods in the debtor's possession may be carried off by poinding, so that the debtor by giving them away in payment to one creditor is understood to give him a partial preference,—which falls within the meaning of the statute, though not within the words, for these only mention *deeds*, such as dispositions, assignations, &c.

In this case the Lords also found, but only by a majority of one vote, *dissent.* Elchies, that a private trading company could be properly cited by citing only the principal person whose name the company bore, and that the process might go on, even though he should die, without calling his heirs or anybody else.

1752. *November* 18. FULLARTON of KINNABER *against* STRAITON of KIRKSIDE.

[Elch. No. 3, *Salmon-fishing;* Kaimes, No. 33.]

THE said Fullarton of Kinnaber stands infeft in the salmon-fishing of the river of Northesk, *tam intra fluxum maris quam extra,* in every part of the said water opposite to his lands of Kinnaber, with the whole fishing on the sea-coast from the river of Northesk to the river of Southesk. Kirkside is infeft in his lands of Kirkside, *cum piscaria salmonum infra limites dictarum ter-*

rarum. Both parties possessed in terms of their respective rights; Kinnaber the fishing in the river, both above and below the tide, and Kirkside in the sea opposite to his lands, till of late that the river left its former channel at that place where it runs into the sea, which was through Kinnaber's lands, and made to itself a new channel, running into the sea there where Kirkside has the right of fishing in the sea, opposite to his lands; and as this new channel is through very flat lands, the river, at low water, only is visible where it runs into the sea; but at high water, when the sands are overflowed, there is no distinction betwixt sea and river. This being the state of the fact, Kirkside brought a process to have it found and declared that he had a right to fish where the river now runs into the sea, being that part of the sea where, by his charter, he had a right to fish, and had been in practice of fishing: and the Lords, by their first interlocutor, found that he had an exclusive right to the fishing in the mouth of the river as it now runs, as far up as the highest flood-mark, *quatenus hibernus fluctus maximus excurrit,* and that Kinnaber had only right to fish above that mark, which in this case was of little or no value. But this day, upon advising a reclaiming petition and answers, Lord Elchies said that there were here two questions: 1*mo*, Whether the grant of a fishing, *tam intra quam extra fluxum maris,* gave a right to fish in the mouth of a river as far down as the lowest sea-mark or mark of lowest ebb? And, 2*do*, What must be the consequence of a river leaving its channel and running upon another man's ground? or, as in this case, upon another man's fishing? As to the first question, he was of opinion that such a grant of salmon-fishing entitles to fish down to where the line which the sea makes upon the coast cuts the river at low water, that is, to the lowest sea-mark; and it must be so understood, especially in this case, where Kinnaber has also a sea-fishing bounded by this very river. With respect to the other question, he was clearly of opinion that a fishing of salmon in a river,—being a *separatum tenementum,* having a separate infeftment by a separate symbol, with a separate reddendo, and being often separately valued, and paying cess distinct from lands,—was not an accessary of lands though comprehended under a barony; and therefore though the river should leave its former course, and make itself a new channel through another man's lands, the fishing would follow the river and still belong to the former proprietor. What made the only difficulty in this case, he said, was, that the river had not diverted on another man's lands but upon another man's fishing: As that was the case, he thought it most equitable to give them both a joint fishing from the lowest to the highest sea-mark, in the time of high-water, beginning from that part of the new channel where the river runs into the sea opposite to the lands of Kirkside; so that, according to his opinion, it was the same case as if one river had left its channel and run into the channel of another river; and so the Lords found.

28*th July* 1755.—Altered this interlocutor upon a pleading, and found that Kirkside had the exclusive right along the coast of his own land.

Dissent. Minto and Kilkerran. (See Kilk. 9th August 1755.)