case, though you have no jurisdiction in the first instance, to judge of the qualifications of freeholders, in order to their being enrolled on the roll of freeholders, yet *ubi justitia est denegata* by those whose duty it is, your jurisdiction arises *ob denegatam justitiam:* and other instances are condescended on, wherein, though you have no jurisdiction in the first instance, yet you have in the second, *ob denegatam justitiam.*

"It is ANSWERED,—That it may be true that in some cases wherein your Lordships have no jurisdiction in the first instance, yet you may have it *ob justitiam denegatam,* but, then, that is only in such cases wherein your Lordships have an original jurisdiction. But here you have no original jurisdiction,—no jurisdiction but what is given you by statute; for that all matters relating to the qualifications of freeholders, in order to their being put upon the roll of freeholders, are only cognoscible by part, and by your Lordships, no otherwise than in the cases in which jurisdiction is conferred upon you by statute, whereof that in question is none; and similar instances are condescended on, such as the case of the turnpike roads, where, if the trustees refuse to meet, your Lordships have no jurisdiction; or in the case of Commissioners of Supply, should they refuse to meet, your Lordships cannot lay on the cess,—your Lordships cannot divide valuation.

"And, *separatim,* besides this general objection to the jurisdiction of the Court, it is *separatim* objected, that suppose you could interpose, the gentlemen could not be found fault with for not meeting, as no day had ever been fixed for the Michaelmas meeting in this shire, as the law directs. *2do,* At no rate could the application to your Lordships be by a summary complaint, such method of application to the Court being only competent in the particular cases mentioned in the statute. *3tio,* Though they had met, at no rate could Mr. M'Kenzie complain of any thing but of his not being put upon the roll; because, while he was not on the roll, he could not object to any body's being continued on it, neither could vote, as he had not taken the oaths. But the great and total objection is to the jurisdiction of the Court.

"*Dec.* 20, 1753.—The Lords dismissed this complaint as being groundless.

This case is reported by *Elchies (Member of Parliament,* No. 60.) and in *Fol. Dict.* 3—428, *(Mor.* 8830.)

1754. *January* 9. GEORGE TURNBULL *against* HIS MAJESTY'S ADVOCATE.

"THE Lord Pitsligo, as patron of the parishes of Pitsligo and Aberdour, by his obligation in the 1665, bound himself, and his heirs and successors deriving right from him to the said parish churches and teinds thereof, from time to time, to procure to Alexander Frasers, elder and younger of Philorth, Sir William Baird of Auchinnedden, Fraser of Tyry, and others therein mentioned, and to their heirs and successors to them in their teinds in the said parishes, tacks of the teinds of their lands, by the ministers presented to the said kirks by him, or his heirs and successors, with consent of him or his successors, patrons thereof for the time, for yearly payment to the minister of the particular tack duties therein mentioned, and that during the lifetime of the respective incumbents. And, farther, he became obliged, that in case of any supervenient law, or change, or alteration of

the law, as it then stood, whereby patrons had power to cause intrants give tacks of their teinds to what persons they please, or in case of augmentation of stipends, or any imposition on the teinds, that he or his foresaids should procure such rights, and do such deeds in favour of the above persons, or their successors, as he or they may do for themselves in relation to the teinds of their own lands, providing the same be not extended to the debursement of sums of money in procuring thereof; and that augmentations or impositions shall be equally proportioned according to the several rents of the patron, and of the foresaid persons and remanent heritors of the said parish.

"Your Lordships know, that by a supervenient law, viz. the Act 1690, the law which obtained at the date of this obligation was since altered, and thereby the patron, in place of having right to the superplus teinds in the bout gate way, by causing the incumbent grant tacks, the Lord Pitsligo came himself to have right to the superplus teinds of the said parishes *jure proprio*, as patron. And as the Lord Strichen is successor to Fraser of Tyry, William Baird of Auchinnedden, as successor to Sir William Baird, and Cuming of Pitully, as successor to Philorth, in the lands which then belonged to them in the said parishes, they now claim, that as the Lord Pitsligo, had he not been forfeited, would have been obliged to communicate to the claimants such rights to their teinds as should be competent to him by law for the time, and, consequently, to communicate to them the right which he acquired by the Act 1690, that is, a right to the superplus teinds of their lands, remaining after the minister is sufficiently provided, subject still to their proportion of future augmentation, the crown, as come in his place, by his forfeiture, should be found subject to the like obligation.

"It is answered for his Majesty's advocate, that he does not admit the premises, that the Lord Pitsligo was bound to communicate to the claimers the right to the tythes given him as patron by the Act 1690, 1*st*, Because there are no words in the obligation that could ever entitle the claimant to this claim against Lord Pitsligo.

"All that by the words of the obligation he is bound to, is to procure such right, or to do such deed as he might do for himself in relation to the teinds of his own lands; but so it is, no such change in the law has happened as is here provided, for, by the change that has happened, there is no occasion for the patron to procure any right, or to do any deed, with relation to the teinds of his own lands when he has by the Act 1690 got an absolute right; and, therefore, by the terms of the obligation, he is not obliged to procure any right or do any deed in favours of the claimants.

"2*dly*, For this other reason, the patron was not, by this obligation, bound to communicate the right which he acquired by the Act 1690, that the obligation bears this condition, that nothing therein should be extended to the debursement of sums of money for procuring such right to the claimants; but so it is, was the acquired right to the tythes by the Act 1690 for an onerous cause, viz. his right of presentation, which by the same act was taken from him; and, therefore, according to the true sense and meaning of the condition in the obligation, he was no more bound to communicate the right which he got by the Act 1690 to the tythes, than if he had purchased them by debursement of money.

"As to the first of these answers, the claimants think it unnecessary to make any other answer than to oppone the clause, *he gives all the right he had at the time;* and the obligation in case of an alteration of the law, *to procure such or do*

such deed as he might do in relation to the teinds of his own lands, is, in other words, an obligation that, in case of an alteration in the law, he should communicate such right as by the law he should have for the time, with this only exception, that he should not be obliged to procure such right, if it required the debursement of money.

"Which leads to the reply to the second, that it is a mistake that he got the right to the tythes, in consideration of the patronage being taken from him; for it is plain by the Act 1690, that the right of presentation was thereby sold to the heritors for the price of 600 merks, and the grant of the teinds was in consideration of the patron's antecedent right to the teinds; and for illustrating this, it is observed for the claimants, that the patron's title to cause the intrants give tacks for such a tack-duty as should be a sufficient maintenance to the minister, whereby the patron had right to the superplus rents of the benefice, was no imposition upon the intrants, which the law only tolerated or winked at; no, it was a right in the patron approved by various Acts of Parliament, particularly the Act first Parliament, 21. James VI., where it is declared lawful for the patron to make such agreement with the presentee, provided a competent maintenance be reserved to the minister; and, in consequence of this, when, by the rescinded Act 1649, the patron's right of presentation was abolished, their right to the teinds was declared good and valid, not as a new grant, but as their former right, subject to the minister's stipend; and when, upon the restitution of episcopacy, the Act 1649 was rescinded, the patron's right to enjoy the superplus teinds by tacks from his presentee is supposed to revive, particularly by the Act ninth Sess. 1st Parl. 1. Ch. II. In fine, and in like manner, when by the Act 1690, the right of presentation is taken from the patron and given to the heritors, upon their paying 600 merks as the price thereof, it is at the same time declared, that the right to the teinds shall belong to the patron, with the burden of the minister's stipend. From all which, it is plain, that truly the patron got no right to the teinds but what he had before, with which it is inconsistent to say that the teinds were given by that Act as a recompence for the right of presentation; but that they were then given, or rather continued with them, as what by law they had right to before.

"Though before the Act 1690, patrons had no direct right to surplus teinds over a suitable maintenance to the minister; yet they had it in effect, as they were in use, when they gave presentations for valuable considerations, to procure from the incumbents tacks to the heritors, of the surplus teinds; and to oblige the presentee to cause the several intrants give tacks for such a tack-duty as should be a sufficient maintenance to them, which accordingly the patrons obliged them to procure when they gave the presentation. Here was then an imposition upon the intrants, which the law only tolerated or winked at, for it was a right in the patron, approved by the Acts of Parliament, particularly the Act 15th Parl. 21. James VI. where it is declared lawful for the patron to make such agreement with the presentee, provided a competent maintenance be reserved to him; so that when the Act 1690 gave the superplus teinds to the patron, it only gave him a direct right, in place of the right he formerly had thereto in a bout gate way. And upon this ground it was, that upon the forfeiture of the Lord Pitsligo, the predecessor had come under such agreement with the predecessors of Fraser of Strichen, Baird of Auchinnedden, Cuming of Pitully, their claim entered in the name of the said G. Turnbull, their factor, was sustained against the crown,

as come in place of Pitsligo, to communicate to them the right which Pitsligo had to the teinds, by the Act 1690, as that was no new right given to the patron, but a continuation of the former right which his predecessor had at the time when he entered into the foresaid agreement, though in a different form. And so this matter has been constantly understood, that such obligation granted before the Act 1690 bound the patron, having right by that act, to grant an heritable right to the heritor of his own teinds. So it was adjudged *December* 3, 1698, *Laird of Allardice* v. *Viscount of Arbuthnot*, and so it has been held ever since."

1754. *January* 25. MARGARET ANDERSON, Relict of JAMES GIBSON, and RACHAEL GIBSON, her Daughter, *against* JAMES GIBSON and CURATORS.

"THIS was a process of aliment against James Gibson, grand-child to the eldest sister of Bailie Jack, and as such, heir portioner with the bailie's youngest sister in his heritable estate, at the instance of Gibson's mother and sister, which came in by course of the summer roll; whereon you found no aliment due to the sister, as the defender had not succeeded to the estate as heir to his father, but to his grand-uncle; but on that consideration gave the larger aliment to the mother. You gave her L.50 by way of locality, but with this quality that she was to be relieved of repairs.

"The defender reclaimed, and on calling the cause you restricted it to 600 merks, she to be liable for wastes and repairs, with liberty to the defender, in case the circumstances of his mother should alter, to apply for restricting or discharging the aliment.

"Mother and daughter now both reclaim; the daughter but faintly; but for the mother, she complains, 1*st*, Of the quantum, and next of its being a locality.

"As to the quantum, she represents the estate as clear L.200, which will bear L.50 of aliment; and as to the locality, observes that the whole subject is possessed by the heirs-portioners, *pro indiviso*. A locality must subject the mother to a proportional part of the expense of management of the whole, and withall is a thing uncertain and precarious.

"ANSWERED,—1*st*, That the petition is not within the days, which, as to the sister may be true; but as to the mother, is not, if I count right. 2*dly*, As to the daughter, there is no foundation in law for her claim; and as to the mother, the claim is admitted to be founded; but as to the *quantum*, L.50 would be exorbitant, as the estate consists in houses, which is not like land-rent. And, 3*dly*, Whatever it be she gets, a locality is the equal thing, as either party should bear the expense on their several interests."

N.B. This case is reported in *Fac. Coll.* (*Mor.* 427,) as to the claim of the daughter for aliment.