Friday, February 1.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE (CHEAPE'S FACTOR) *v.* THE LORD ADVOCATE AND THE UNITED COLLEGE AND ST MARY'S COLLEGE, ST ANDREWS.

Teinds—Stipend—Locality—Under and Over Payments—Titular.

In defence to an action brought by an over-paying heritor under an interim locality against under-paying heritors, and the Crown as titular of the teinds of the under-paying heritors, it was pleaded by the under-paying heritors that they had paid their whole surplus teind to the Crown or its tacksman. *Held* that, in respect there was no evidence of payment to the Crown, the heritors were liable, and that in the circumstances no action lay against the titular.

Opinions (*per* Lords President, Deas, and Shand) that no such action by an over-paying heritor is competent against a titular, even although he were shown to have received the surplus teinds, because it is by an implied transference of the minister's right that the over-paying heritor sues, and it is the heritors, not the titular, that are the proper debtors to the minister for his stipend.

This was an action for the recovery of certain over-payments of stipend, brought by Kenneth Mackenzie, C.A., judicial factor on the estate of the late Mr James Cheape of Strathtyrum and Balgone, in the parish of St Andrews. A process of augmentation had been raised in the parish in 1810, and another in 1830. In the first of these the pursuer's lands of Strathtyrum were localled on for stipend under the interim, but exempted under the final locality. The lands of Balgone were localled on in both processes by the interim localities, but finally they also were exempted.

The pursuer originally raised an action on 2d July 1870 against the Crown as titular of the teinds of the parish of St Andrews, in respect that it had received the benefit of these over-payments, having drawn the teinds primarily liable in stipend, and also, if it did not so draw the teinds, that it alone had the power of protecting the interests of all parties by drawing the surplus teinds during the dependence of the locality, and was not now entitled to throw the burden of proceeding against a multitude of small under-paying heritors upon the pursuer.

The Crown pleaded—"It is only against the under-paying heritors, and not against the Crown as titular, that the pursuer has any claim for repayment." The pursuer then, by minute of date 13th July 1871, agreed to proceed against the principal under-paying heritors, and craved that the action against the Crown might be sisted *hoc statu*. He then raised an action on November 30, 1871, against the United College of St Salvator and St Leonard and the College of St Mary in St Andrews, as proprietors of the lands of the Priory Acres and other lands in the parish of St Andrews (1) for the sum said to be due by them down to 5th April 1865 (the date to which the states of the over and under-payments had been brought down) in respect of over-payments by Mr Cheape; and (2) for a sum said to be due in respect of an account due to the Teind Clerk for preparing these states. These lands had been originally exempted in the interim localities, but localled on in the final localities, in both the processes referred to above.

The Colleges pleaded, *inter alia*—"The defenders are entitled to absolvitor from the conclusions of the summons in so far as applicable to the teinds of the Priory or Prior's Acres, in respect that they have not received or intromitted with the teinds of these acres, the same having been drawn by the Crown as titular, or by its tacksman as aforesaid."

These actions were conjoined, and the Lord Ordinary (MACKENZIE), on 21st June 1872, allowed the pursuer a proof. The Lord Advocate, for the Crown, reclaimed, and on 10 July 1872 the Court remitted to Roger Montgomerie, Esq., advocate, to inquire into the matters at issue and to report. On July 20, 1877, Mr Montgomerie, made his report.

It bore that the reporter was satisfied that the pursuer's authors had made over-payments of stipend. There had been produced to him, besides the processes of augmentation and locality, a document entitled "Statement showing the surplus teinds in the parish of St Andrews for last half of crop and year 1809, crop 1859 and intervening crops, and the amount of teinds received by the Crown for crops and years 1832–1859 and intervening years."

The reporter, with regard to this document, said—"The statement is divided into three periods—the first from 1809 to 1825, during which the interim locality in the augmentation of 1809 was in force; the second from 1826 to 1829, during which the rectified interim locality in that augmentation was in force; and the third from 1830 to 1859, during which the interim localities in the augmentations of 1809 and 1830 were in force. The surplus teinds during each period are given, but it is only from the year 1834 onwards that the amount received by the Crown is given, and even in this period the sums set down as having been received are few and far between, and in no case are they in conformity with the sums set down as due. In most cases the sum received is smaller than that due, although in a few the sums received are in excess of those due. From 1809 to 1825 the surplus teind amounted to £12,512, 19s. 2¾d.; from 1825–29 it amounted to £3972, 10s. 10d.; and from 1830–59 it amounted to £19,823, 19s. 6½d.; whilst during the last period the statement shows that the Crown received £3855, 6s. 4½d.

"In the 'statement' the teinds of the Prior's acres are said to have been 'let on tack to the University of St Andrews from 1763 to 1838, at a rent of £53, 15s. 6d. per acre. In 1839 the tack was put an end to. Mr David Berwick held a sub-tack from the University, and insisted on retaining possession for some years. After a litigation there was received from him a sum of £213, 1s. 5d. In 1842 the Crown took the management of the teinds of the Priory Acres into its own hands, and collected the same from the various heritors.' A statement of the sums received and the stipends paid by the Crown in respect of the teinds of the Priory Acres, which is subjoined in the 'state-

ment,' shows that since 1834 the Crown, after deducting payments, has a balance in its favour from the teinds of the Priory Acres of £939, 14s. 8d., which is included in the sum said to have been received by the Crown from 1830 to 1859. Except as regards the tack-duty from these Priory Acres, this statement does not give any information as to the receipts of the Crown prior to 1834."

He further added—"In regard to the action against the Colleges, it has been urged upon the reporter that the Colleges have never touched the teinds from these lands, that every penny was paid either to the tacksman or the Crown receiver, and this is consistent with the statement produced by the Crown, so far as it goes, and with the presumption that the tacksman would uplift all the teind due. It is clear that the Colleges were under-paying heritors, and the benefit of these under-payments must have accrued to the titular or his tacksman. The two Colleges and the University are separate corporations, so that the fact of the University having held from the Crown a tack of the teinds of lands belonging to the Colleges during the time in which the under-payments of stipend took place in no way affects the present case.

"The reporter in conclusion reports that the lands held by the United Colleges consisted partly of Prior's Acres, the teinds of which were set in tack by the Crown, and partly of other lands, the surplus teinds of which must be assumed to have been uplifted by the Crown receiver, as no books or accounts showing what was actually received have been produced, and no account of the receiver's intromissions have been given notwithstanding repeated calls for such books and accounts.

"That the lands held by St Mary' sCollege consisted of Prior's Acres, the teinds of which were set in tack by the Crown to the University.

"If the reporter is right in assuming that the Crownas titular must be held to have uplifted all the surplus teinds in the case of the College lands, in respect of the non-production of books and accounts, the same assumption will apply to the case of all other lands in the parish of which they are entitled to uplift the teinds."

When the case came again before the Court the Crown argued—A claim of this kind had never been made against a titular. The proper defender was the under-paying heritor, for the titular was not debtor to the minister, and could not therefore be called to account by one claiming in the minister's right, which was the position of the over-paying heritor. But there was no evidence that the Crown had received the surplus teinds. The payments made had been made in rental bolls, the principle of which payment was that they were held equivalent to the full teind—Erskine, ii. 10, 25. The surplus teind had all been drawn by the heritors, and recourse must be had against them. It would be seen from the case of *The University of St Andrews* v. *The Crown*, July 10, 1838, 16 S. 1350, that the principle of the tacks given by the Crown as titular in St Andrews was to throw all liability for stipend on the tacksman.

The pursuer argued—It might be that there was no instance of such a claim against a titular, but it was a principle of law that the true debtor was the teind, and all intromittors therewith were liable—Connell ii., 459. The heritor was merely the hand by which the titular paid to the minister. The minister was, so to say, the assignee of the titular's debt. The titular, therefore, was *in titulo* to receive the whole surplus teind, and there was a presumption that he did so. If he did so, he was clearly liable to the overpaying heritor. All that was contended for by the Crown in the case referred to by the pursuer, and all that was established there, was, that free teind must be localled on before rental bolls; there was no decision of any question between the titular and his tacksman in general.

The Colleges argued, with the pursuer, that the titular was liable. The Colleges were not *lucratæ*, so that there was no equitable claim against them; for they had paid in tack-duty or rental bolls all the value of their teinds to the Crown. Rental bolls had this peculiarity, that they were what the titular agreed to accept as full value for the teinds due to him. The Court could not now go back on that bargain and try to ascertain what the value of that teind was.

At advising—

Lord President—It appears that there were two interim schemes of locality framed in the parish of St Andrews—one in the year 1812, and the other in the year 1830—and upon these interim schemes the heritors paid stipend down to the year 1860, when at length a final scheme of locality was approved of; and, as usual in such cases, it was found when the final scheme was completed that some of the heritors had been paying too much and some of them had been paying too little stipend, and accordingly there arose the necessity for an accounting between these two bodies of heritors, for the purpose of rectifying these improper payments. That was accomplished in the usual way, as I understand, by a remit to the teind clerk; and among other heritors who had been over-paying was Mr Cheape of Strathtyrum.

This action has accordingly been brought by the judicial factor on the estate of Strathtyrum for the purpose of recovering the amount of the over-payments made by that heritor, and the course which he has adopted is, in the first place, to raise an action to recover these over-payments against the titular the Crown, in which he concludes that the titular shall reimburse him, upon the footing that the teinds which ought to have gone to the minister in place of the payments made by Mr Cheape went to the titular, and are now in the titular's pocket, That action was raised on the 2d of July 1870, and it was met by the titular with this among other pleas—"It is only against the under-paying heritors, and not against the Crown as titular, that the pursuer has any claim for repayment." In consequence, apparently, of that plea having been stated, the pursuer put in a minute, in which he stated, that without prejudice to his plea, and while he was still uninformed what teinds were alleged not to have been received by the Crown, he was willing, before further proceeding, to sue the principal under-paying heritors for the proportion of over-payments due to him and effeiring to the lands belonging to such heritor; and, in case the said heritor should successfully establish in defence that he had paid his surplus teinds to

the Crown, he craved that the present process might be sisted *in hoc statu*, to afford him an opportunity of proceeding against the under-paying heritors or their representatives. Now, the view upon which the pursuer seems at that time to have proceeded was this—Recognising that there was great weight apparently in the defence which had been put forward by the Crown, that the pursuer's remedy lay against the under-paying heritors and not against the titular, he asked that this action should be sisted in the meantime that he might bring an action against the principal under-paying heritors, and see whether they would state in defence and establish that they had paid the teinds to the Crown, thereby implying, I suppose, that unless they established that he would take his remedy against the under-paying heritors and give up his pursuit of the titular.

But when the under-paying heritors were brought into Court they seem to have adopted the hint the pursuer gave them in his condescendence, and stated that the Crown had received all the surplus, and accordingly that they were not liable. In that state of matters the Lord Ordinary, on the 21st of June 1872, conjoined the actions, and allowed the pursuer a proof, and it was by a reclaiming note against that interlocutor that the cause was brought here. It appeared to the Court at that time that a proof, in the ordinary sense of that word, was not a very satisfactory way of having an inquiry in such a case as this, and they recalled the Lord Ordinary's interlocutor, and remitted to Mr Roger Montgomerie to make an enquiry and to report, and Mr Montgomerie's report is now before us. It is the result of a very lengthy investigation apparently, and one that has been protracted for a very long period of time, I do not know why, or by whose fault. But we have it at last, and the question comes to be, What remedy is the pursuer to have, and against whom? I am quite clear that the pursuer must have his remedy, because it is a well-established rule in the practice of this Court, that where, under interim schemes of locality, heritors have been made to pay more than their proper share of minister's stipend, when that is found out, and the locality rectified and finally adjusted as a final scheme, the over-paying heritor has a claim against the under-paying heritor for reimbursement; of that there can be no doubt. It has been settled in a great variety of cases.

But the first question here is, Whether the over-paying heritor has also a claim against the titular, and if he has, upon what ground, in point of fact and of law, does that claim rest? It appears to me that it can rest upon nothing else than this, that the teind which ought to have gone to the minister has gone into the pocket of the titular. Even if that fact be established, I must take leave to observe that this is quite a new and unprecedented claim upon the part of the pursuer as made against the Crown in the character of titular. The learned counsel were asked if they could cite any precedent for such an action as this, and the answer which we got was that there does not appear to have been any trace of such an action ever having been raised before. That is a little startling in itself, and if we required to decide absolutely upon the question of competency it might involve considerations of great difficulty. I am not prepared to affirm that even upon the ground of the teind having been paid to the titular, an action will lie directly by the over-paying heritor against the titular—there being in this case, for example, where Mr Cheape has an heritable right to his teinds, no connection whatever between him and the titular in regard to any matter concerning teinds. Mr Cheape is the titular of his own teinds. He is the proprietor of the teinds of his own land, and his teinds are not payable to the titular. The titular has no claim against him in any event, and neither, in any event, so far as I can see, can the heritor have any claim against the titular in regard to the teinds of his parish. If, therefore, a claim lies against the titular, it seems to be upon this ground, that the person who is true debtor to Mr Cheape has paid to somebody else. Now, that is a very strange ground of claim in point of law, and in the ordinary case would not be listened to. Certainly a debtor does not cease to be a debtor to his true creditors because he has paid his money to somebody who is not his creditor; and therefore, if it were necessary to deal with the pure question of the competency of this action, I should entertain the greatest possible doubt of its competency.

But really that is not at all necessary, because, to say the least of it, if such a claim is to be maintained, it must be maintained upon the ground that the under-paying heritor did in point of fact pay the teind which he ought to have paid to the minister to the titular, and that must be established as matter of fact by ordinary evidence. Now, I suppose in this nineteenth century, even in the earlier years of it—so far back as 1810—people were not in the habit of paying money without taking receipts; and therefore if this teind was paid to the Crown, there must be receipts for it, and these are not to be had, and, so far as I can see, from beginning to end of Mr Montgomerie's report there is nothing like evidence that the teinds in question had been paid to the titular or received by him. And therefore, upon these grounds, I come without any difficulty to the conclusion that this action against the Crown cannot be maintained, and that the Lord Advocate, as representing the Crown, is entitled to absolvitor.

The claim of the minister for payment of his stipend is a claim which the law gives against the heritors of the parish—against the party who holds the land, and who is answerable for the teind. It gives him no claim against the titular. The minister cannot sue the titular; he can only sue the heritor, or do diligence against the heritors on his decree of locality; and therefore in a case where the heritor has not paid his debt to the minister the claim subsists against him, and that claim is, according to the practice of the Teind Court, and of this Court, held to be transferred to the over-paying heritor, so as to prevent an unnecessary circuity of actions, and the over-paying heritor thus comes to be the creditor of the under-paying heritor. He comes, as it were, in place of the minister in making that demand, but the demand must be made against the party who is in default—who ought to have paid and did not pay. If the under-paying heritor has paid the full amount of his teind to the titular, deducting only that portion of the

stipend which he actually paid to the minister, I do not doubt he will have a claim of relief against the titular to that extent, but of course he will be bound to instruct the fact that he did pay that money to the titular; and that, I suppose, in the ordinary case, can only be done by production of receipts. But in the meantime, as far as this action against the titular by the over-paying heritor is concerned, I think it is not only unprecedented, but that it is utterly inconsistent with ordinary legal principle.

That being so, it only remains for consideration what is to be done with the other action—the action which Mr Cheape's factor has brought against the under-paying heritors. There are other under-paying heritors, I presume, in the parish besides those who are called in this action, but the two Colleges of St Andrews, who are the defenders, are the principal under-paying heritors, as we are given to understand, and the question is, Whether there is any good defence against a demand made by Mr Cheape's factor? Now, their defence seems to resolve simply into a re-statement of the pursuer's case as against the Crown. They say, "We paid to the titular, and therefore we cannot be asked to pay again;" to which the reply immediately occurs, "If you paid to the titular you did wrong, but in the first place be kind enough to show that you did pay to the titular;" and there again there is no evidence to instruct the matter of fact, and even if it were proved, I doubt exceedingly whether it would afford a good ground of defence.

Now, that being so, I am of opinion that we must decern against these two Colleges, and the amount for which the decree will go out against them has been quite well ascertained by the report of Mr Montgomerie. He tells us in the conclusion of his report that if the Court shall hold that the pursuer is entitled to recover from the under-paying heritor, then the sum due to him from the United Colleges is £271, 9s. 0¾d., and from St Mary's, £31, 13s. 6¼d. That, I presume, therefore, is the sum for which decree must go out in that action.

Lord Deas—I am of the same opinion. The claim of the minister for his stipend is a claim against the heritors, and not against the titular, and that claim is preferable to the claim of the titular. That I think goes far to solve the whole matter, and I am of opinion with your Lordship that the over-paying heritors are entitled to recover directly from the under-paying heritors, and that being so, we find the materials for whatever else is necessary to be done in the action in Mr Montgomerie's very elaborate and distinct report. He says—"The pursuer is entitled to recover these sums, and the question for decision is—Whether he is to do so from the under-paying heritors, or from the titular, who must have drawn or is entitled to draw the teinds of these heritors?" He then mentions the sums which the pursuer is entitled to recover alternatively from the under-paying heritors and from the titular.

Lord Mure—I come to the same conclusion. The ordinary case is quite fixed, that the over-paying heritor is entitled to recover from the under-paying heritor, and I do not think it necessary to give any opinion one way or other as to the competency of the claim raised in the present action against the titular, or whether the plea-in-law for the Crown to that effect is well or ill founded, because there is no distinct evidence that the Crown actually received these teinds which should have been paid by the under-paying heritors to the minister of the parish. I think it was necessary to prove that by the clearest and most distinct evidence. If there had been clear and distinct evidence of that I should then have been prepared to consider the more general question raised by the plea-in-law; but there has been a total failure to prove that even during the later period.

If these teinds were paid, the under-paying heritors will have their receipts from the Crown, and in the proceedings against them by the pursuer they will have their remedy against the Crown for the amount erroneously paid to the Crown.

Lord Shand—I am of the same opinion. The ground upon which the action is maintained against the Crown is, that in point of fact the surplus teind has been paid to the titular; but I am of opinion that this has not been proved. Evidence to that effect would in any view require to be of the most satisfactory character in making such a claim. I do not say that receipts would be the only proper or satisfactory evidence. There might be entries in books or other evidence of a general kind which would be sufficient; but I do not find in this process sufficient evidence to show that the Crown received the surplus teind at all.

But, apart from that question, I concur with your Lordship in thinking that it is more than doubtful whether such a claim can be maintained, even if the payments were made out. The stipend which is paid under a locality is a proper burden on the heritors upon whom the stipend is localled; it is a proper burden on them as proprietors of the lands; and the minister's claim is a claim not against the titular in the locality, but against each of these heritors for the proportion of stipend payable by him. If, then, there has been for a long period of time, under interim localities, over-payments by one set of heritors and under-payments by others, the proper adjustment of that burden arises, not in any question with the titular of the parish, but as between the heritors themselves, on the ground that certain heritors, who, as the proper debtors to the minister, ought to have paid a due proportion of the stipend, but have not done so, must pay to the over-paying heritors, who have in the meantime discharged their burdens.

It may happen that in many cases the titular, whoever he may be, may have had transactions with the under-paying heritors in regard to the surplus teind, by which they have arranged as to the disposal of such teind amongst themselves in a manner not necessarily in terms of their respective rights and obligations. It may happen that the titular has even abandoned or discharged a claim although he was entitled to enforce it; and if we were to sustain an action of this kind, the next claim insisted in might be maintained on the ground that, although the titular had not actually got the teind, he had thought fit to discharge it. Actions like the present would introduce inquiries of

a kind which are entirely novel, and I can only say that, taking the case upon the argument we have had, I am not satisfied that a titular is liable to an action of this kind at all, or that an over-paying heritor is entitled in this way, as I may say, to trace the surplus teind, and to get beyond his own proper debtor in order that he may affix liability for a long arrear of over-payments of stipend against a titular who is not his proper debtor. On these grounds, I concur with your Lordship, both on the fact and the law, in holding that the claim here is not good against the titular, although it is good so far against the under-paying heritors, against whom your Lordship proposes to give decree to a limited extent.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, with the report of Mr Roger Montgomerie, No. 270 of process, in the conjoined actions, and heard counsel—In the action at the instance of the pursuer against the Lord Advocate, assoilzie the defender from the conclusions of the summons, and decern; Find the pursuer liable to the defender in the expenses incurred by him in the said action, so far as the same remain undisposed of: And, in the conjoined actions, also find the pursuer liable in the expenses incurred by the defender the Lord Advocate, in these actions; and remit to the Auditor to tax the account of the expenses now found due and to report: And in the action at the instance of the pursuer against the United College of St Salvator and St Leonard, and against the College of St Mary, St Andrews, decern against the said defenders the United College of St Salvator and St Leonard for payment to the pursuer of £271, 9s. 0¾d., with interest thereon at 5 per cent. per annum from 5th April 1865 till payment, and against the said defender the College of St Mary for payment to the pursuer of £31, 13s. 6¼d., with interest thereon as aforesaid from 5th April 1865 till payment: Further decern against the said United Colleges of St Salvator and St Leonard for payment to the pursuer of £12, 9s. 4d. as concluded for, with interest at 5 per cent. per annum from 16th May 1866 till payment, and against the said College of St Mary for payment to the pursuer of £1, 9s., as concluded for, with interest as aforesaid from 16th May 1866 till payment: And find no expenses due to or by either of the parties last mentioned in the said last-mentioned action, or in the conjoined actions."

Counsel for Pursuer—Lee—Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for the Colleges—Balfour — Low. Agents—W. & T. Cook, W.S.

Counsel for the Lord Advocate—Lord Advocate (Watson)— Solicitor-General (Macdonald)—T. Ivory. Agent—Donald Beith, W.S.

Saturday, February 2.

SECOND DIVISION.

[Sheriff of Inverness-shire.

ROSE *v.* JOHNSTON.

Process—Warranty—Act 31 *and* 32 *Vict. c.* 100—*Court of Session Act* 1868, *sec.* 29—*Act* 39 *and* 40 *Vict. c.* 70—*Sheriff Courts Act* 1876, *sec.* 24.

In an action for repetition of the price of a horse, on the ground that it was not conform to warranty, the action in the Sheriff Court was laid upon breach of a written warranty.—*Held*, under section 29 of the Court of Session Act 1868, and section 24 of the Sheriff Courts Act 1876, and distinguishing the case from that of *Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 Rettie 1001, that it was competent for the pursuer to amend his condescendence by alleging that a verbal warranty had been given by the seller.

Horse—Warranty.

Terms of communications between seller and purchaser which were held to amount to an express verbal warranty of a horse.

Observations per Lord Justice-Clerk on the case of *Robeson* v. *Waugh*, October 30, 1874, 2 R. 63.

Writ—Subscription to a Warranty by Mark.

Observed that although a mere mark adhibited by a party unable to write to mandates or docquets has been sustained as sufficient, there is no authority to the effect that that would be sufficient to constitute an obligation of warranty.

The pursuer in this action, Major Rose of Kilravock, on 19th March 1877 bought a horse from the defender James Johnston for £46. The pursuer paid for the horse on the following day, getting a receipt therefor in the following terms —"Clephanton, 20th March 1877.—Received from Major Rose of Kilravock £46 stg. for grey horse 'Sharp,' which I hereby warrant sound and free from vice or shying. "ALEX. GRANT, witness,

"20 March 1877.

his

"JAMES X JOHNSTON."

mark.

The defender was unable to read, and stated that this receipt was never read over to him, and that he was unaware of the introduction of any warranty into the receipt.

The horse upon being tried by the pursuer was found to be vicious, and on one occasion when being driven in a dogcart shied and ran off with the pursuer and his coachman, and broke the dogcart. The pursuer intimated this to the defender, and the defender caused a letter to be written to Mr J. H. Brown, the pursuer's agent, which is quoted in the Sheriff-Substitute's note.

The pursuer thereupon placed the horse at livery, and raised the present action for repayment of the price, and for damages.

The second and fourth articles of the pursuer's condescendence, which contained the only allegations as to a warranty, were as follows—"(Cond. 2) On 20th March 1877 the pursuer paid to the defender the said price of £46, and received a receipt therefor. In said receipt there is a warranty by the defender that the said horse was sound and free from vice or shying. (Cond. 4) The pursuer duly intimated the discovery of said