behalf. Any communication therefore now from your Lordship on the subject I should have expected to have been far otherwise than that I have now the honour to acknowledge, which I now do, although perhaps tardily, and that only out of deference and respect for your Lordship.

"Your Lordship is under a misapprehension in stating that in my appeal to your Lordship I admitted the justice of my 'sentence.' On the contrary, I considered and still consider it, as stated in my petition to the Court, to be excessive, and beyond the just and equitable requirements of the case; while I have also submitted to the Court whether your Lordship had power to pronounce an order of indefinite suspension. In making my appeal to your Lordship I virtually admitted, as I still frankly admit, that whether I had ground or not for complaint against the Sheriff-Substitute, I had committed an act of indiscretion and impropriety, and perhaps also technically, although not intentionally, an act of disrespect to the Court by inserting in the reclaiming petition the objectionable passage, and, as you are aware, I offered to make an apology for doing so in any terms you might dictate, but you have rejected the offer. My Lord, it is unnecessary, and can serve no useful purpose, to say more on this head. The matter is now under the consideration of the Court, who will shortly decide the justice of the question between us.

"With regard to the other matters adverted to in your Lordship's letter, which have nothing whatever to do with the reasons of the suspension as then existing, yet evidently wished to be mixed up with them, I grieve to observe that your Lordship has thought proper upon *ex parte* information and inquiry to characterise my conduct as 'fraudulent.' Your Lordship might have withheld such a harsh and grave imputation, one which has caused me much sorrow and wounded me severely in my feelings, and suspended your judgment until at least you had given me an opportunity of being heard; but to assume, as you apparently do, the truth of the matters commented on by you, and then ask me for an explanation, is, to say the least, not a very fair or equitable proceeding; and therefore, while denying the accuracy of your Lordship's information and judgment, I must out of self-respect, and with all deference and respect for your Lordship, decline to vindicate myself from an accusation which your Lordship seems to think has been already established to your satisfaction.—I have the honour to be respectfully, my Lord, your Lordship's most obedient humble servant,

"ROB. BROATCH."

At advising—

LORD PRESIDENT (in delivering the judgment of the Court)—Nobody can doubt on reading this petition that the offence committed by the petitioner is a very serious one, and just as little can one doubt that the Sheriff was well entitled to visit him with a sentence of suspension. The petitioner is mistaken in supposing that this sentence is necessarily permanent. It is not a sentence of deprivation, but of suspension. That may be removed on cause shown by an application to the Sheriff. No such application has been made as yet, and one cannot help seeing that any such application must be couched in very different terms and in a very different spirit to that in which the petitioner has hitherto addressed himself to the Sheriff. We are not prepared to interfere at present. We shall take this course, viz., supersede consideration of this petition till the petitioner shall, if so advised, apply to the Sheriff, by petition of course, to be reponed.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and heard counsel for the petitioner, Supersede consideration of the petition, to give the petitioner an opportunity, if so advised, to apply by petition to the Sheriff to be reponed."

Counsel for Petitioner—Nevay. Agent—W. N. Masterton, S.S.C.

Saturday, March 2.

SECOND DIVISION.

[Lord Young, Ordinary.

EARL CAWDOR *v.* M'GILLIVRAY AND OTHERS AND THE LORD ADVOCATE.

Teinds—Titularity—Bona fide *Perception—Where Surplus Teind paid* bona fide *to wrong Titular.*

The Crown as titular claimed payment from the heritors of a certain parish of surplus teinds, and the claim was admitted and paid. Thereafter it appeared that another party, not the Crown, was the true titular. *Held*, in an action at his instance against the heritors of the parish and the Crown for payment of, *inter alia*, the teinds paid to them as above, that the Crown were in the position of intruders, and that in the circumstances they were not entitled to shield themselves either by a plea of *bona fide* perception or by the allegation that the titular was bound first to proceed against the heritors, leaving to them their remedy against the Crown.

Observed that it would have been a conclusive answer for the heritors as against the Crown in such an action to say that they had paid in good faith to the Crown, whose discharge was good to them against the pursuer.

Observations per Lord Justice-Clerk on the case of *Oliphant*, 1790, M. 1721.

Bona Fides.

Question whether the plea of *bona fide* perception and consumption is available to the Crown.

Opinion contra per Lord Young.

This was an action raised by Lord Cawdor against Neil John M'Gillivray of Dunmaglass and others, conjoined with a supplementary action raised by the same pursuer against the same defenders, and also against the Lord Advocate. The original summons concluded against the first defenders for two different sums, being the surplus teinds due and payable to the pursuer as titular of the teinds, parsonage and vicarage, of the parish of Dunlichity, out of two divisions

of the parish which were therein specified, for crops and years from crop 1835 to crop 1866 inclusive. No final scheme of locality had been adjusted for the years which followed, and the pursuer specially reserved his claim for these.

Lord Cawdor, the pursuer, averred that in virtue of his titles he was titular of the teinds of the parish of Dunlichity, in the parish of Inverness, the right to which had been hitherto claimed and exercised exclusively by the Crown without opposition. Dunlichity was now united to the parish of Daviot, of which the Crown was believed to be titular as coming in the place of the Bishop of Moray, and the parishes were known as the united parishes of Daviot and Dunlichity. The Crown had sought and obtained payment of the surplus teinds for the lands in question for the period 1841–1853 from the heritors.

In these circumstances, the defenders pleaded, *inter alia*, that all parties interested were not called, and the Lord Ordinary (YOUNG) thereupon afforded the pursuer an opportunity of making the Crown a party to the action.

The pursuer then raised an action of declarator against the Crown, in which he obtained decree in absence, finding that the Crown was not titular of the teinds of the parish of Dunlichity, and had no right to the surplus teinds therein.

The Lord Ordinary having intimated that he did not consider the decree in absence a sufficient answer to the defenders' plea, a supplementary summons, calling the Crown as a defender, was raised, and to this action the already depending process was conjoined. The conclusion of the summons as directed against the Crown was, that in the event of its being found that the surplus teinds for the years 1835–53 had been paid to the Crown, that the Crown should be ordained to pay them back.

The Crown, *inter alia*, averred that the lands in question were in Daviot parish, and that they had acted throughout on this view in *bona fide*.

The pursuer pleaded that he was entitled to decree against the defenders M'Gillivray and others, and alternatively against the Crown, in the event of its appearing that they had taken payment of the surplus teinds rightfully his.

The defender the Lord Advocate, *inter alia*, pleaded—"(1) The Crown being titular of the teinds of the lands in question, is entitled to absolvitor. (2) The Crown having received payment of the said surplus teinds in *bona fide*, and under a colourable and undisputed title, is entitled to absolvitor."

The other defenders pleaded, *inter alia*—That they had paid the teinds in question in the *bona fide* belief that the Crown was titular, and without objection on the part of the pursuer and his predecessors.

The Lord Advocate was allowed a proof of his averment that the lands in question were in Daviot, but eventually, by minute, he withdrew his first plea-in-law.

The Lord Ordinary's interlocutor was thereafter pronounced, finding the Lord Advocate liable for the amount of the surplus teinds from 1841–1853, and the other defenders similarly liable for the amount of them from 1854–1866; and further finding the Lord Advocate liable to the other defenders and to the pursuer in expenses. He added this note, which explains the grounds of the decision:—

"*Note.*—The surplus teinds, which were erroneously paid to the Crown, who admittedly had no right to them, are now demanded by the pursuer, who also admittedly had, and that alternately, either from the heritors, who erroneously paid them, or from the Crown, who erroneously received them. The heritors resist the demand, on the ground that they paid in good faith to the Crown, whose discharge is, they contend, good to them against the pursuer, whose right, neglected by himself, they were not called upon to discover and urge in answer to the Crown's claim. The Crown resist the demand on the plea of *bona fide* perception and consumption.

"I incline to think, although in the view that I take of the case it is unnecessary to decide, that the answer of the heritors is good, on the assumption that they have no claim against the Crown for repetition. On that assumption it would be unjust, in my opinion, to compel them to pay over again to the pursuer, who, no doubt from ignorance of his right, made no claim, and so left them, who were equally ignorant, without the answer to the Crown's demand which he alone could furnish. But I think the assumption is erroneous, being of opinion that the heritors who paid to the Crown in error have a good claim for repetition as upon *condictio indebiti*, to which *bona fide* perception and consumption is no answer. It is clear, and is admitted, that the heritors were not indebted to the Crown, and that their payments were made in error. This being so, I think the *condictio indebiti* arose on discovery of the error, and would have been available although the true creditor had continued passive and abstained from making a claim, They were entitled to have their money back whether their true creditor was moving or not, and even although he had discharged them—for it is, I think, clear that they, and not the Crown, were entitled to the benefit of such discharge. So also if, after paying erroneously to the Crown, they had paid over again to the true creditor, I think it equally clear that they might, as on *condictio indebiti*, recover what they had erroneously paid to the Crown.

"Applying these views to the actual facts, I think the pursuer has in virtue of his title a good claim against the heritors, who on their part have, on *condictio indebiti*, a good claim against the Crown. But if so, a direct claim by the pursuer against the Crown may be sustained on the principle of avoiding circuity of action—a principle which governs our procedure wherever it can be acted on, without injustice or detriment to any legitimate interest. The case may be simply stated thus:—A having paid in error to B what he truly owed to C, C sues both alternately for the amount, and there is no question of B's ability to make restitution. The right to restitution is of course formally in A, who made the erroneous payment, but circuity is avoided, and complete justice is done by implying an assignation of this right to C, and giving him decree directly against B, who erroneously got from A the money which ought to have been paid to C, and which in his hands would be available to pay him.

"I have indicated, perhaps superfluously, an opinion to the effect that, if the heritors had no legal claim against the Crown for repetition, the pursuer would be barred by reason of his negligence from enforcing his claim directly against

them, to the effect of making them pay over again. Had the payment in error been made to a party who was in fact unable, though legally liable, to make restitution, the same consideration of hardship induced by the pursuer's negligence might, and I think probably would, have operated to protect the heritors from second payment. Having no doubt of the Crown's liability to repeat, and the pursuer being content to take directly against the Crown, on the footing of an implied assignation of his debtor's right to enforce it, I am not embarrassed by these considerations, which, under other circumstances, might have been more or less difficult to deal with.

"Having the views of the particular case which I have stated, it is unnecessary for one to express or form any opinion on the availability to the Crown of the doctrine of *bona fide* perception and consumption. I may, however, observe that the Crown revenues under the charge of the Woods and Forests, although in a sense patrimonial estate of the Crown are in truth during the present reign, as they have been in former reigns, simply, and that by statute, part of the public revenues, so that the plea is here in fact urged on behalf of the nation against a private citizen. Now, I venture to doubt whether the doctrine on which the plea rests, and which is in its character a benignant doctrine, having for its object the avoidance of private and individual hardship, (though it may consistently extend to companies and associations), is available to the nation or to the Crown officers acting for the nation. It was urged on behalf of the Crown that the doctrine has been enforced in favour of individuals against the Crown; but that is obviously consistent with its character and policy. I merely notice the point as doubtful in my opinion—for I think that there is here no room for the plea in question. Had a private person pretended right to these teinds, and exacted payment precisely as the Crown officers did, having in truth no right, I should have held against him, as I now do against the Crown, that *bona fide* error was no answer to a *condictio indebiti*. Upon the doctrine of *bona fide* perception and consumption, relied on and urged by the Crown under somewhat similar circumstances, I had occasion to express an opinion, and indeed pronounce a judgment, in the case of *Graham* v. *The Lord Advocate*, in 1874 (not reported), and I refer to what I then said as expressing the views which I still, on consideration, retain.

I shall therefore give the pursuer decree against the Crown for the teinds erroneously drawn by its officers between 1841 and 1853, and against the heritors for the teinds yet unpaid between 1854 and 1866. I can say nothing as to any teinds prior to 1841, having no admission or evidence regarding them. As to expenses, I think the Crown ought to pay all expenses incurred in the supplementary action, and in both actions since the conjunction, and that *quoad ultra* there should be no expenses to any party."

The Lord Advocate reclaimed.

Argued for him—Lord Cawdor's remedy really was against the heritors, by whom the teind was paid away, not against the Crown. The heritors might seek their own remedy, but Lord Cawdor could not sue the Crown. Again, the pursuer's remedy was barred by *bona fide* perception and consumption.

Authorities—*Haldane* v. *Ogilvy*, Nov. 8, 1871, 10 Macph. 62; *Duke of Buccleuch* v. *Hyslop*, Nov. 13, 1822, 2 S. 6 (N. S. 5), and 2 Sh. App. 43; *Easton* v. *Stirling*, Feb. 27, 1733, 1 Paton App. 90; Stair, i. 7, 12; Erskine, ii. 1, 25, 26; *Lord Advocate* v. *Drysdale*, Feb. 24, 1872, 10 Macph. 499, 1 R. (H. of L.) 27; *Countess of Cromartie*, July 14, 1871, 9 Macph. 988.

Argued for Lord Cawdor—The plea of *bona fide* perception and consumption was one never entertained in favour of the Crown. To found such a plea possession was necessary. This was not the case of a creditor who had had his debt paid. A titular was just a creditor in a money debt, especially when for years he had allowed the arrears to accumulate, and had taken payment in a slump sum.

Authorities—*Oliphant*, 1790, M. 1721; Erskine, ii. 1, 25, and Ivory's note there; *Duke of Buccleuch* v. *Magistrates of Sanquhar*, Dec. 13, 1865, 4 Macph. 198.

Argued for the heritors—The only argument pressed against the Crown was that it did not matter what the *bona fides* of the Crown was, seeing that it ought to know. Such an observation would not apply to a heritor, who was entitled to recognise the right claimed by the Crown as having the radical right to everything.

At advising—

Lord Justice-Clerk—In this case the facts are very imperfectly stated in the record; but I gather from it that the officers of Woods and Forests, on the part of the Crown, exacted from the defenders M'Gillivray and others in 1854 two sums of money, in name of arrear of teinds, for certain lands belonging to him, said to lie in the parish of Daviot, of which they alleged the Crown was titular, as coming in place of the Bishop of Moray. It now turns out, and is admitted by the Crown, that these lands are not in the parish of Daviot, that the Crown is not titular of the teinds, that the lands lie in the parish of Dunlichity, and that Lord Cawdor is the titular of the teinds of that parish. Lord Cawdor has brought an action against the heritors for payment to him of the teinds thus erroneously paid to the Crown; and they having defended themselves on the ground of their payment having been in *bona fide*, Lord Cawdor has brought a supplementary action against them and the Crown for payment to him, *inter alia*, of the sums thus improperly drawn. The only question with which I find it necessary to deal is the Crown's liability under the conclusions of this action.

It is pleaded for the Crown that Lord Cawdor has no title to sue directly against the defenders, and that his only remedy lies against the heritors who have paid away the teind, leaving them their relief against the Crown. I am quite satisfied that there is no foundation for this plea. It may quite well be that Lord Cawdor's claim against the heritors may be excluded by the defence of *bona fide* payment, but it is not, in my opinion, necessary to consider that question here. The Crown has levied these teinds from the heritors (who held them for the true titular) on an alleged right of titularity, which it is now admitted that the Crown did not possess. It is in this respect a simple case of intromission with the teinds

without a title; and the true titular is entitled to follow and recover them. Nor does it in this part of the case make any difference either that the teinds were valued or that they were in arrear.

If this be so, I am equally clear that the defence of *bona fide* perception and consumption is not excluded by reason that the claim resolves into one of *condictio indebiti.* Lord Cawdor's claim is not of that nature. It is an action by a titular against an intromitter with the teinds on a pretended right of titularity, and is not an action of debt to recover back that which had been paid in error. In this view the case of *Oliphant* (M. 1721), which was so strongly founded on, has no application. But I am inclined to think that this case does in no respect warrant the doctrine founded on it. I apprehend that a titular is as much in possession of his right when he draws the conversion of the valued teind as if he drew the teind itself. I also think that the fact of the heritors being in arrear of the conversion is of no moment. The fruits of the titularity are in the heritors' hands for the titular, not as a creditor, but in virtue of his titularity; and though the heritor is in arrear, this no more alters the nature of the funds in his hands than the rents of a real estate cease to be fruits reaped by the proprietor because not received or not demanded at the term. The case of *Oliphant* belongs to an entirely different category. There the titular had never received the teinds. They were reaped and consumed by the heritor, who never accounted for them. The titular brought an action for the accumulated amount, and having obtained decree, adjudged the heritor's land, and entered into possession, not on his title as titular, but on his title as adjudger. It so happened that the estate adjudged was the same as that the teinds of which he claimed, but it would have made no difference if it had been one over the teinds of which he had no right; and the case was precisely the same as it would have been if the titular had adjudged an urban tenement belonging to the debtor against whom he had obtained his decree. Thus the titular had never been in possession of these teinds from the first; he had reaped and consumed no part of them, but had drawn as an ordinary creditor the rents of land belonging to his debtor, which occurred long after the teind had fallen due. But here what the Crown drew was the teind itself, on the alleged or assumed right of titularity.

These two matters being cleared, there still remain some important questions. It is said, first, that the plea *bona fide* consumption is not competent to the Crown; and secondly, that neither the title nor the possession founded on will support it.

It is maintained in support of the first of these pleas, that as these teinds now form part of the ordinary revenue of the country, the equitable considerations on which the plea is founded cannot apply, seeing that the deficiency created by repayment of what was unduly levied can always be supplied from other public sources. To the extent of regretting that the Crown officials should have departed from the well-established practice of not seeking to retain what they find they levied unjustly, I have entire sympathy with the plea. I think the duty of all revenue officials in such cases is that of prompt and immediate restitution, and I cannot understand why the Crown has not in this instance followed that course. The plea has also some solid foundation on which to rest. For the Crown is in this matter simply trustee for the taxpayers; and it is in their interest solely that this plea can be stated. Now, the additional amount levied on the individual taxpayer which would result from the repayment of this unjust exaction is so inappreciable as not to be worthy of the cognisance of a Court of Justice, and the equity, it may be said with truth, turns the opposite scale.

But I feel unwilling, unless it is necessary here, to define the extent to which as matter of right the Crown can plead equities of this kind which are competent to ordinary litigants. But there are other difficulties in the way of giving effect to this plea in favour of the Crown of a serious kind. In one view the Crown may be said never to have a merely colourable title to real rights. If the right be truly in another, it is there by reason of the Crown's grant; and as the Crown never dies, the case must always be one in which the same party who granted the true right pleads on the false one. So also with good faith. It is not the good faith of any particular official which will constitute good faith in the Crown. If at the date of the granting of the true right the Crown could not in good faith have made the claim, it may be said that the mere lapse of time will never justify the attempt, although all trace of the original transaction may for the time have been lost.

These views are wider than the case requires. The Crown has no title at all to these teinds. It has a title to the teinds of the parish of Daviot. But these teinds are not in the parish of Daviot, and when the Crown granted them to Lord Cawdor it must be held that this was known to the Crown advisers of that day. The colourable title alleged is not a title to these teinds, for the Crown has none but reasonable grounds for believing that, in point of fact, they were the teinds of lands in the parish of Daviot, which it turns out they were not. I greatly doubt, however, whether the Crown had any sufficient reason for this belief. They knew that no teind had been levied by the Crown from these lands for 100 years. It now appears, although this was not known to the Crown advisers, that the old tacks of the Crown teinds of Daviot contain some indications that prior to 1727 these teinds were included in them. But the fact that the Crown's possession ceased from that date raises a presumption the other way, and it is now proved that at a subsequent, and after a not very long interval, these teinds were drawn by the predecessor of Lord Cawdor. I think the presumption of law is that this was done with the cognisance of the Crown; and if so, that knowledge must be held to have continued until now. But in any view, when the Crown asserted its right in 1854, it had not been ascertained that the teinds lay in the parish of Daviot. It was known to be a question of doubt; and while I do not say that until Lord Cawdor proved his right the Crown was not entitled to make the claim, it was made at the risk of being obliged to repeat if it turned out that the fact was otherwise. In no aspect of the case do I think that the plea of *bona*

fide perception and consumption can avail. Indeed, no such case is relevantly stated on the record. If that which constitutes the colourable title consists in a reasonable and honest belief that the lands lay in the parish of Daviot, I find no statement made on the record of the grounds of that belief, nor can I gather from the documents what they were. On the contrary, when these payments were exacted the Crown, as far as I see, had no evidence whatever in their hands on which such a conclusion could be reached, as all the documents now produced by Lord Cawdor were unknown to them. They have not explained why they did not draw these teinds after 1854, or why they did not do so prior to 1841. In these circumstances, dealing with the Crown as an ordinary litigant, I am of opinion that the Crown never possessed these teinds, or reaped and consumed them *bona fide;* that the Crown had no title at all, nor any reasonable proof or evidence that they had; that they were substantially intruders without a title, and in the full knowledge that their claim was not proved. If the Crown had even been in possession for a series of years at the date of these payments, the case would have been different; but here the bow was drawn at a venture, and as the shaft has missed its mark, the risk must be borne by the unsuccessful assailant.

Lord Ormidale—Some of the questions which have been debated by the parties in this case are, in certain views that might be taken of them, not unattended with difficulty. But, attending to the actual circumstances of the case, it does not appear to me that there is much, if any, difficulty in regard to the result which should be arrived at.

As regards the technical objection that the pursuer's claim for repetition of the surplus teind-duties in question could only be insisted in as against the heritors, by whom these duties were directly and properly due, and that it is not maintainable by the pursuer against the Lord Advocate, between whom and the pursuer there is not now, and never has been, the relation of debtor and creditor, I have no hesitation in disregarding it. In the first place, all the parties interested in the question—that is to say, the pursuer as titular, the heritors, who were primarily the proper debtors in the surplus teinds, and the Lord Advocate as representing the Commissioners of Woods and Forests, to whom, in place of the pursuer as titular, the surplus teinds were paid by the heritors—are parties to the present process. In the second place, it is not, and could not well be, said that every plea that could possibly be available to each and all of these parties might not be maintained in the present process, as it stands equally well and to the same effect as in two separate actions—one at the instance of the heritors against the Lord Advocate, and the other by the pursuer against the heritors. And, in the third place, such a technical plea as that in question must, I think, be held to have been waived, and cannot now be entertained, seeing that in place of having been taken *in initio litis*, as it ought to have been, if it was to be taken at all, the record was allowed to be made up and closed without any mention or notice of it being given. I am satisfied therefore, for these reasons, that the Lord Ordinary has rightly disregarded any such technical plea, and decided the real matter in controversy altogether irrespective of it.

The only substantial question which requires to be decided on the merits is, not whether the surplus teinds sought to be recovered by the pursuer are properly due to him as the true titular, but whether these teinds, having erroneously been paid by the heritors to the Lord Advocate as representing the Commissioners of Woods and Forests, the defence of *bona fide* perception and consumption now taken to their repetition is well founded. In regard to this question, I am not prepared to hold that the Lord Ordinary is right in the conclusion which I understand him to have arrived at, that such a defence, if otherwise well and clearly established, is not available to the Crown, although it might be good and effectual as against the Crown. I am unable to see any sound reason upon which this principle can be maintained, and no authority was cited in support of it. But it is unnecessary to determine the question in the present case, and I would rather be held as reserving than determining it; for, in the view I take of the circumstances which here occur, there are not grounds sufficient for holding that the Commissioners of Woods and Forests have shown that they were ever, in reference to the surplus teinds in dispute, in a position to plead *bona fide* perception and consumption, or, in other words, that they ever had a colourable title in respect of which such a plea could be maintained. All that is to be found on the subject in the record is in the answer for the Lord Advocate to the third article of the pursuer's condescendence in the supplementary action, where it is said that "the lands in question are situated in the parish of Daviot, of the teinds of which the Crown is titular, and neither the pursuer nor his predecessors made any claim to the surplus teinds of the said lands until the year 1871. The Commissioners throughout acted in *bona fide*, on the footing and in the belief, which was shared by all interested, that the teinds in question belonged to the parish of Daviot." But while this is the statement of the Crown—and very general it is—no reference is made to anything giving rise to the alleged *bona fides* of the Crown in requiring payment of the surplus teinds in question, and keeping them after receiving payment of them. Again, although by interlocutor of 7th June 1877 the Lord Advocate was allowed a proof of his averments that the lands were situated in the parish of Daviot, in place of adducing such proof, he, by minute dated 17th July 1877, withdrew his first plea-in-law, which was to the effect that the Crown is titular of the teinds of the lands in question. And even then it was not explained why or for what reason the colourable title of the Crown—if there ever was one—and consequent *bona fide* perception and consumption, had ceased to operate.

In these circumstances, and notwithstanding that mention is made in some of the title-deeds, or rather copy excerpts from title-deeds, produced by the pursuer, of the lands in question, or part of them, being situated in the lands of Daviot, I feel myself unable to see that the Crown has any sufficient ground, or any ground at all, for supposing that these lands were situated in the parish of Daviot. The officers of the Crown could not have thought so in consequence of anything

in the title-deeds or excerpts produced by the pursuer, for that has not been stated, and it does not appear that these title-deeds or excerpts had been seen by them before the surplus teinds in dispute were taken payment of by them, or indeed till they were produced by the pursuer in the present process at the conclusion of the proof.

I am therefore, without entering into further detail or a consideration of any more of the points which formed the subject of discussion at the debate, of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

Lord Gifford—I concur, and have nothing to add to the exhaustive opinions pronounced by your Lordships.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Lord Advocate (Defender and Reclaimer) — Solicitor-General (Macdonald) — Ivory. Agents—Murray, Beith, & Murray, W.S.

Counsel for other Defenders—Lee—Rutherfurd. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, March 2.

SECOND DIVISION.

SPECIAL CASE—BRUCE (BRYCE'S TRUSTEE) AND OTHERS.

Husband and Wife — Jus administrationis *where* jus mariti *excluded.*

Held, where a husband's right over the bequest of an annuity was not excluded, but the *jus mariti* was, that the exclusion of the former was not necessarily to be implied, and that the husband must be a concurring party in any payments which were made to his wife; and *observed* that if he should refuse to concur, the Court, on cause shown, would authorise her to act without him, or name another curator.

Observed (*per* Lord Gifford), that the principle of the *jus administrationis* of a husband implies that it must be exercised solely for his wife's behoof, and to save her from being hurt by her own acts.

Succession—Conditio si sine liberis decesserit.

A testator in his trust-disposition left £100 to each of several nephews and nieces who predeceased him. In a codicil he left (1) £1200 "to the family" of one of these nephews, and (2) £500 to another nephew. He died unmarried, and his nephews and nieces or their children were, with the exception of a housekeeper and a natural son, the whole beneficiaries under his settlement. None of them were omitted, although they were not called as a class or equally favoured. *Held* (1) that these provisions were cumulative; and (2) that the circumstances being such that the testator must be held to be *in loco parentis* to all his nephews and nieces, the *conditio si sine liberis* applied, and that the children of those who had predeceased were entitled to take their parents' provisions.

Succession—Bequest in a Codicil of Residue Proportionally to Amount of Legacies Bequeathed—Jus mariti *of Husband.*

A testator having in his trust-deed left certain provisions to various parties, and in a codicil left them other provisions, which were held to be cumulative, stated further in the codicil that the residue of his estate was to be divided proportionally among "the above-named legatees and annuitants."—*Held* (1) that the beneficiaries under the deed and the codicil were entitled to a proportional share of the residue corresponding to the *cumulo* amount of their provisions under both deeds, and that the bequests of the liferent of a house and furniture and of annuities fell to be valued for that purpose similarly with pecuniary legacies; and (2) that when the *jus mariti* or right of administration of the husband of any female beneficiary was excluded with regard to the provision to her under the deed or the codicil, it was also excluded with regard to her share of residue.

Succession—Testament—Falsa demonstratio.

A testator left "£3000 to J. B., and to each of the other three children of my brother £2000." Her brother had in fact four other children, and the five were all specially named as sole residuary legatees in the residuary clause in the trust-deed.—*Held* that this was a case of *falsa demonstratio*, and that each of the four children was entitled to the legacy of £2000.

Counsel for the Parties—Dean of Faculty (Fraser) — Kinnear — H. Johnston — White—Maconochie, &c. Agents—George Bruce, W.S. —John Whitehead, S.S.C.—Hope, Mann, & Kirk, W.S., &c.

Tuesday, March 5.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MONTGOMERY (COMMON AGENT IN SOUTH LEITH LOCALITY) *v.* SMITH SLIGO'S TRUSTEES (HERITORS).

Teinds — Process — Locality—Objection to locality being approved final.

A rectified scheme of locality had formed the rule of payment for nearly three years, and was then approved final on the motion of one of the heritors. Against this interlocutor the common agent reclaimed, on the ground that it was his intention to allocate the stipend due from certain lands among some feuars who had acquired their rights since the date of the preparation of the interim scheme. The reclaiming note was *refused.*

Observations on delay in teind processes.