from the evidence of several witnesses. Therefore, on the whole case, I do not think it necessary to go further than this, for surely if the husband and wife are untrustworthy there is an end of it. It is clearly possible, and even probable, that the child should be that of the husband, and taking along with this their untrustworthiness I think the defender must be assoilzied. As to the evidence against the defender, I saynothing about that; it might be sufficient in a simple case of paternity, and it might not. We have nothing to do with it in the view I have taken of the case. I think therefore that the interlocutor of the Sheriff should be affirmed.

LORD ORMIDALE—The case of *Gardner* v. *Gardner*, May 14, 1877, L.R. 2 H. of L. Apps. 723, was characterised by the Lord Chancellor as "one of the most remarkable that has ever come before a Court in Scotland;" and I rather think the same observation is in a great measure applicable to the present case. The present case may, indeed, be considered a more remarkable one than that of *Gardner*, in this respect, that while in the latter the conduct and motives of the spouses might be accounted for on intelligible grounds, it is scarcely possible to say as much for the pursuers in the present case.

The child whose paternity is in dispute having been born about three months after the marriage of the pursuers, the brocard *pater est quem nuptiæ demonstrant* is not strictly applicable. And if it could be taken as true that neither of the pursuers were aware of the pregnancy of the female pursuer prior to the birth of the child, the difficulty of establishing their case against the defender would be considerably diminished. But as ignorance of the pregnancy on the part of the pursuers depends exclusively upon their own statements, it comes to be of the greatest importance to ascertain what degree of credence is to be given to these statements; for although it may be possible that the pursuers were not aware of the condition of the mother of the child till it was born, it is, to say the least of it, highly improbable that such was the case; and if from proved facts and circumstances the pursuers are shown to have made false statements regarding other important matters, the truth of which could not fail to have been known to them, their statements to the effect that they did not know of the pregnancy till the birth of the child must be also disregarded, and if so, no case against the defender would remain.

Now, I think it is proved beyond all doubt that not only had the pursuers opportunities of intercourse for more than a year preceding the birth of the child, but also that during that time familiarities took place between them of such a character as would, I apprehend, have been quite sufficient in an action of filiation to have established the paternity of the child against the male pursuer—[His Lordship then examined the evidence]. I cannot, therefore, avoid the conclusion that the pursuers' statements to the effect that they had no sexual intercourse prior to their marriage and were not aware of the pregnancy of the female pursuer cannot be relied on. And if so, the spouses in the present case may be fairly held to be within the principles of decision in the case of *Gardner*, where it was ruled that the presumption of fact of the husband's paternity of the child was all but insuperable, that the *onus* of establishing his denial of the paternity lay on himself, and that he had wholly failed to discharge that *onus*. Without going into details, there are here, I think, as in *Gardner's* case, facts and circumstances proved sufficient to establish against the male pursuer the paternity of the child in question. And I am unable to see how this conclusion is met and avoided by the fact—assuming it to be one—that there are also circumstances which, along with the female pursuer's oath, might in an ordinary action of filiation be sufficient to establish the paternity against the defender. In the words of the Lord President in the case of *Jobson* v. *Reid, &c.* (19th January 1830, 8 S. 345)—"The presumption of the law is that the parents of a child that is born during wedlock are the married parties—a presumption not only supported by favour towards the child, but well founded also in that daily experience which proves that after parties, particularly among the lower classes, have had intercourse in consequence of which the woman becomes pregnant, a marriage, whether previously promised or not, is the common consequence, and the natural reparation by the father of the injury he has done to the mother of his child."

In the whole circumstances, and for the reasons stated, I am for dismissing the appeal, and affirming the interlocutor of the Sheriff Principal appealed against.

LORD GIFFORD concurred.

Appeal dismissed.

Counsel for Pursuers (Appellants)—Trayner—Young. Agents—Boyd, Macdonald, & Co., S.S.C. Counsel for Defender (Respondent)—Lord Advocate (Watson)—Rhind. Agents—Begg & Murray, W.S.

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*Saturday, February 8.**

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary in Teinds.

LOCALITY OF BORTHWICK—DUNDAS *v.* WADDELL.

(Before Seven Judges).

Teinds—Res judicata—*Process of Augmentation and Locality.*

In a process of augmentation and locality brought in 1795 the minister produced a rental of the whole lands in the parish, in which 81 acres belonging to one of the heritors were entered as teindable. The heritor in question subsequently lodged a minute stating that these subjects were held *cum decimis inclusis*, and craving that they might be struck out. The Court then pronounced an interlocutor, dated 2d December 1795, ordaining them to be so struck out. A stipend was then modified, and a locality prepared, to which the heritors lodged objections. The 81 acres were not inserted in any of the schemes which were prepared, but before that process was terminated a new process of augmentation and locality was brought, taking up the first where it had been left and going on to a final decree.

* Decided Friday, December 13, 1878.

Held, by a majority of seven Judges (*diss.* Lord Justice-Clerk Moncreiff and Lords Ormidale and Mure), that the decree of 2d December 1795 was not *res judicata* as regarded the 81 acres, it having been pronounced upon the minister's rental, and having related solely to the augmentation, which was a different proceeding from the locality.

Observations per curiam upon procedure in processes of augmentation and locality.

Teinds—Decimæ inclusæ *Right.*

To establish a valid *decimæ inclusæ* right, *inter alia* the claimant must produce written titles, which must be traced to one of the orders of churchmen who had the privilege of exemption from teind, and which must expressly bear that the lands are held *cum decimis inclusis,* with the additional words *nunquam antea separatis,—i.e.,* that they have never been in any other position; and there must further never have been a separate reddendo for lands and for teinds.

This was a question arising in a process of augmentation raised by the Rev. Walter Waddell, minister of the parish of Borthwick, against the heritors, in which objections were lodged by Robert Dundas of Arniston to the state of teinds and scheme of locality. Objection was taken to the scheme as localling stipend upon 81 Scots acres of the lands of Schank, on the ground (1) that the title of the lands in question was held *cum decimis inclusis et nunquam antea separatis.* The lands, the objector averred, were part of the Mains of Arniston, and originally as temple lands exempt from payment of stipend. The history of the titles was set forth with some detail to support this contention. The Mains of Arniston and these 81 acres were further, the objector said, always held exempt from payment of stipend in respect of the titles. This branch of the case is fully dealt with by Lord Gifford on the merits, *infra.*

The second ground taken by the objector was stated by him as follows:—In March 1795 the Rev. John Clunie, then minister of the parish of Borthwick, raised a summons of augmentation and locality, and produced a rental of the whole lands in the parish belonging to the heritors, in which these 81 acres were entered as teindable. On 2d December 1795 a minute was given in by Dundas of Arniston and other heritors, in which they represented that the following lands, viz., the lands and town of Arniston, called the Mains of Arniston, those fourscore and one acres of the lands of Schank, part of the Mains of Arniston, and the lands called the Park of Halkerston, were holden by Dundas of Arniston (the objector's ancestor) *cum decimis inclusis,* and therefore craved that these lands might be struck out of the rental. On the same date counsel for the pursuer having craved avizandum with the decreets of approbation and valuation produced and condescended on, and that the heritors who had no decreets of valuation be held as confessed on the rental, the following interlocutor was pronounced:—"The Lords ordain the lands and Mains of Arniston, those fourscore and one acres of the lands of Schank, part of the Mains of Arniston, and the lands called the Park of Halkerston, to be struck out of the rental; . . . . hold the heritors who have no decreets of valuation as confest on the rental libelled, and remit to Lord Glenlee to prepare the cause." On 13th January 1796 a stipend was modified to the minister, and it was remitted to Lord Glenlee to prepare a locality and to report. A common agent was then appointed, and a locality having been prepared, objections were lodged thereto by various heritors. These were disposed of and a rectified locality was prepared. To this locality Mr Dewar of Vogrie lodged objections; and these having been answered by the common agent, the Lord Ordinary on 10th June 1797 repelled the objections as to allowing the old stipend of Harvieston, but sustained the objection as to the rental of Catcune, and found that the then rental thereof must be the rule for striking the teind and allocating the stipend, and remitted to the clerk to rectify the locality. A rectified locality was accordingly prepared. To this rectified locality Mr Dewar of Vogrie also lodged objections, in which he objected to the large amount of stipend thereby laid upon him; and while he admitted that the Mains of Arniston and the 81 acres of Schank, which had been originally part of the Mains, were held *cum decimis inclusis,* and fell to be exeemed, he contended that the lands which had been acquired by Arniston in exchange for these 81 acres of the Mains, as well as other specified lands, had not been valued, and were liable for stipend. Answers were lodged for Lord-Advocate Dundas, and a long litigation ensued, subsequently to which, on 17th June 1800, Lord Glenlee, "having considered the rectified locality of the parish of Borthwick, these objections thereto, answers, replies, duplies, triplies, and quadruplies, and whole process, repels the objections." The 81 acres of Schank, originally part of the Mains of Arniston, were not mentioned or included in any of the schemes of locality above mentioned. In 1807 another summons of augmentation, modification, and locality was raised by the Rev. John Clunie. In consequence of the proceedings in the previous locality, the 81 acres were not inserted in any of the schemes of locality prepared in the new process, but were dealt with as teind-free. The fact, however, of the said lands and others in the parish being held *cum decimis inclusis,* and so being teind-free, was strongly founded on by the heritors as a reason why an increase of stipend should not be granted. But on 10th June 1807 the Court modified the pursuer's stipend at nine chalders, &c. Thereafter a petition was given in by the heritors objecting to so large an augmentation being granted, in which, among other objections, the following was stated—"But what is of still greater importance, the teinds of several of the heritors were exhausted by the augmentation in 1795, and a very great proportion of the very best land in the parish is held *cum decimis inclusis.* Hence the present augmentation will fall principally upon Mr Mitchelson of Middleton and Mr Dewar of Vogrie." The petitioners then proceeded to show that, dealing with these lands as teind-free, the free teind in the parish was not sufficient to satisfy the augmented stipend, making due allowance for fluctuation in the prices of victual. To this petition the minister lodged answers, in which he did not dispute the exemption claimed in respect of these lands, but argued that the fact of such exemption existing was no answer to his claim to an augmentation out of the free teind. The Court having advised the petition and answers on 9th March 1808, altered their former interlocutor to the effect of fixing the stipend at eight chalders and £70 sterling, with £8, 6s. 8d. for communion elements, thus giving

effect to the heritors' representations. In the condescendence thereafter given in by the heritors the 81 acres are entered as being held *cum decimis inclusis*, and they were accordingly omitted from the scheme of locality.

The objector pleaded—"(1) *Res judicata.* (2) Acquiescence, homologation, and adoption by all concerned. (3) The objector is entitled to the exemption claimed, in respect that he has in virtue of his title possessed the said 81 acres, and the teinds thereof, free from payment of stipend from time immemorial, or at least for the prescriptive period. (4) The respondent's objections to the objector's claim of exemption are cut off by the negative prescription. (5) The said 81 acres are not liable to be localled on, in respect that they are held by the objector under titles *cum decimis inclusis et nunquam antea separatis*, or at least sufficient to exempt them from liability to be localled on for stipend."

The minister pleaded—"(1) The objector has not produced, and does not possess, a valid title to the lands in question, *cum decimis inclusis et nunquam antea separatis*, so as to exempt the teind thereof from stipend. (2) The objector is not entitled to found upon the contract of excambion and charter mentioned in the first objection, in respect he has not produced titles connecting him therewith. (3) The said contract of excambion and charter following thereon are ineffectual to exempt the lands conveyed from the burden of teind or stipend, in respect, 1st, that they were not granted by a churchman of a privileged order; and 2dly, that they were not confirmed by the Crown prior to the Act of Annexation. (4) The said lands not being exempt from liability for stipend, the objections are unfounded and ought to be repelled."

The Lord Ordinary (Rutherfurd Clark) pronounced an interlocutor repelling the objections for Mr Dundas, who thereupon reclaimed. The case was first argued before the Second Division, but was ultimately heard before Seven Judges.

Argued for him—The lands in question formerly belonged to the Knights Templars, and in their hands were exempt from the payment of stipend; but the whole matter was *res judicata*, and could not now be opened up.

Authorities—*Thomson* v. *Lord Advocate*, June 31, 1872, 10 Macph. 849; *Graham-Bonar* v. *Lord Advocate*, Nov. 3, 1870, 9 Macph. 58; *Lady Willoughby d'Eresby* v. *Speirs* (*Locality of Muthill*), Dec. 14, 1876, 14 Scot. Law Rep. 162; *City of Edinburgh* v. *Montgomery* (*Locality of St Cuthberts*), Oct. 16, 1872, 11 Macph. 14, 10 Scot. Law Rep. 4; *Duke of Buccleuch* (*Locality of Inveresk*), Nov. 10, 1868, 7 Macph. 95; Forbes on Tithes, 281, 445; Keith's (Spottiswood's) Scottish Bishops, 435–9; Connel on Teinds, ii. 4–9; *Stewart* v. *Officers of State*, July 20, 1858, 20 D. 1331; Buchanan on Teinds, 91; *Day* v. *Common Agent in* [*Locality of Alyth*, Feb. 7, 1810, F.C.; *Earl of Dalhousie* v. *Somers*, July 15, 1864, 2 Macph. 1349; Thomson's Acts, iii. 432; *Lord Blantyre* v. *Kennedy* (*Locality of Haddington*), Dec. 4, 1838, 1 D. 148, 4 Bell's App. 34.

Argued for the respondents—No case could be shown in which the mere statement of a plea to which the mind of the Court had not been applied was sufficient to found a plea of *res judicata*. [Lord Justice-Clerk—That the minute of 1795 bore *cum decimis inclusis* would not come to much if the titles were not produced.] The cases quoted were all plainly distinguishable from the present in these points—(1) either the claim of exemption or the title of the heritor had been made a subject of discussion among the heritors in the locality and the mind of the Court had been applied to this; (2) if there was not a discussion, there was at any rate full consideration and investigation by the heritors and common agent upon which the Court proceeded to give judgment. In the *Locality of Crail* the result attained was practically that the mere act of localling on lands was not the same as a judgment finding them liable, and that this was true even although a claim of exemption should have been made and withdrawn, and although the decree of locality might be said in one sense to have followed upon that withdrawal. Again, *Lord Zetland's* case found that even where there was a properly pronounced judgment given between the heritors this would not bind the minister nor be *res judicata* in the locality, and accordingly the lands still might or might not be liable in teinds. An exemption in the case of privileged religious orders did not operate in favour of their successors unless there were the words *cum decimis inclusis et nunquam antea separatis*. The essentials to exemption were—(1) That the title should be connected with churchmen prior to the Act of Annexation in 1587; (2) That it should bear to be a grant of lands *cum decimis inclusis et nunquam antea separatis;* (3) That the grant so expressed and connected with an ecclesiastical body should have been confirmed either by the Pope or by the Crown subsequently. This particular judgment did not affect the minister of Borthwick, because, in the first place, the then minister was not a party to it, and, secondly, it was not a final judgment—(*Locality of Glenluce*). To create *res judicata* the same matter must have been controverted between the same parties, and must have formed the subject of the judgment. Here, on the other hand, parties stood by and looked on, and, as regarded them, it was not *res judicata*—(*Marquis of Huntly*). The obvious principle was that of consent binding representatives (*Lord Blantyre—Earl of Strathmore's Trs.—Lord Advocate* v. *Cheape*). The requisite for *res judicata* was that some one having an interest should have joined issue and obtained a judgment—(*Locality of Inveresk*). A judgment of consent was binding only of course against the consenting party—(*Hopetoun*). [Lord President—Suppose there has been litiscontestation, and then one party abandons his suit, and subsequently a judgment is pronounced, would that be binding as *res judicata?* Not save against him who gave his consent]—(*Thomson* v. *Earl of Zetland*).

Authorities—*Sir T. Erskine* v. *Common Agent* (*Locality of Crail*), Nov. 15, 1864, 3 Macph. 49; *Thomson* v. *Earl of Zetlund*, Nov. 10, 1868, 7 Macph. 99; *Minister of Barrie*, 1737 M. 15,721; *Leslie*, M. App. *voce* "Stipend," 2; Buchanan on Teinds, 131; *Locality of Glenluce*, Nov. 9, 1874, 2 R. 76; *Marquis of Huntly* v. *Nicol*, Jan. 9, 1858, 20 D. 374; *Lord Advocate* v. *Cheape*, Jan. 11, 1871, 9 Macph. 377; *Lord Blantyre* v. *Lord Wemyss*, May 22, 1838, 16 S. 1009; *Lord Strathmore's Trustees*, 8 S. 505, *aff.* 2 W. and S. 107—also May 24, 1838, 11 S. 644; *Hopetoun* v. *Ramsay*, March 22, 1846, 5 Bell's App. 69; *Elder* v. *Fotheringham*, Jan. 8, 1869, 7 Macph. 341; *Bowden*, referred to in 1 Connell 533; *Dickson* v. *Common Agent*

(*Locality of Biggar*), July 8, 1828, Shaw's Teind Cases, 174; *Jenkins* v. *Robertson*, April 5, 1867, 5 Macph. H.L. 27; *Magistrates of Elgin* v. *Gatherer*, Nov. 7, 1841, 4 D. 25.

At advising, before Seven Judges (on the preliminary plea of *res judicata*)—

Lord Justice-Clerk—In this case, which has been very ably argued, my brother Lord Ormidale has prepared a full opinion, in the general results of which, and the grounds on which it proceeds, I concur. I shall content myself with summarising the views on which I proceed.

I cannot doubt that if this process of augmentation, modification and localitywhich commenced in 1795 had been followed out to a decree final, the judgment pronounced in the contention between all the heritors on the one hand, and the minister on the other, in regard to the 81 acres of the Mains of Arniston, would have been *res judicata* in any subsequent locality, nor would it have been of any moment that the special grounds of challenge now insisted on do do not appear on the face of the proceedings or even that they were not in view of the parties. The cases of the *Duke of Buccleuch*, *Bonar*, and *Speirs of Culdees* are conclusive in that respect. In the latter case, indeed, unless I am deceived by my memory, even the titles on which the ultimate challenge proceeded were not produced or known in the former process, the judgment in which was in question. But if it had been necessary for the plea in this case, it is manifest from the proceedings that the titles were not only produced in the course of the subsequent proceedings, but were thoroughly examined by those acting for the parties, and that while the claim to a *decimæ inclusæ* right on the part of Mr Dundas was held to be fixed by the judgment of the Court in the augmentation, the extent of it under the writs produced was anxiously canvassed in the locality.

It is however objected, *first*, that the discussion and decrees *in foro* (which they certainly were), took place only on the minister's rental, which it is said is a mere estimate or vidimus, and can conclude nothing; and *secondly*, that the decree related solely to the augmentation and modification, and could not affect the locality, in which the minister had no interest. I think neither of these views well founded.

As to the minister's rental, I do not doubt that if no objection had been taken to it, it might have been, as such rentals often were, treated merely as the plea of the minister, or a general *talis qualis* view of the teinds, and that it would have been open to the heritors in the course of the subsequent proceedings to have maintained their right without regard to it. But it was beyond doubt competent to the heritors to move that any lands should be struck out off the rental, and if, as in this case, they all united on this demand in regard to particular lands, rested on the ground that they were not liable in teind, and if their plea received judicial effect by a judgment in *foro contentioso*, and by a final decree of augmentation consequent on that judgment, it was in my opinion impossible for any of the heritors or for the minister again to reopen the question in that process. Of course if there had been no final decree of augmentation there could have been no *res judicata* founded on the previous judgments, for the simple reason that they were not final.

As to the second ground, it seems to be untenable. The minister has a direct interest in increasing the amount of teindable land in the parish, even for the purposes of the particular augmentation in hand, as the discussion in this case shows. Besides, he is the pursuer of the whole process, both in the stage of fixing the amount of stipend and in that of apportioning the amount among the heritors, as the Act of Sederunt 1809 clearly proves. He represents the benefice, the decree of locality is his, and is his warrant for collecting the stipend from the individual heritors.

I have assumed in these remarks that the decree of augmentation was final. It necessarily was so, for until the total amount was fixed the process of allocation could not commence, and it is hardly maintained that after a scheme of locality has been approved *ad interim* the minister or the heritors could again reopen the question as to the amount of the augmentation. In the present case I think it clear that they could not have done so, and therefore the decree of augmentation was final as regarded that process, and if so, final in perpetuity as regarded that augmentation. Neither in the augmentation nor in the locality—that is, neither in fixing the amount of the augmentation, or in allocating the proportion payable by the heritors—can the immediate effect of any decree, although final, reach beyond the process. But it has been long fixed that although such is the nature of the two branches of this process, yet if a general question affecting the rights and interests of the respective heritors or the minister be once raised and decided in *foro contentioso*, the matter is set at rest and passes into *res judicata*.

The difficulty in the case, however, and it is technical rather than substantial, is, that the allocation among the heritors was undoubtedly not final. It was *interim* only, and before the process was terminated a new process of augmentation and locality was brought. It is therefore maintained that nothing which was determined in the former process could pass into *res judicata*. It seems, however, that this view, which presents the only formidable obstacle to Mr Dundas' plea, is sufficiently met by two considerations. In the first place, if the decree of augmentation was final, the procedure which led up to it was final also; and if the individual heritors were foreclosed in the locality from going back from the judgment they had collectively obtained in settling the augmentation, it is of no moment that other questions between the heritors still remained open. But the consideration which has weighed with me most strongly is, that the new process, which interrupted the first, took up the proceedings where the old process left them, and went on to final decree on the footing, not assumed only, but asserted by all having interest, that these lands of Mains of Arniston were not liable to teind. So far therefore as the final decree of 1811 proceeded on the determination of the Court *causa cognita*, in the former process, and gave effect to that judgment, it matters not whether it was called in question in that process or no, and the final decree in the second process is conclusive.

Lord Deas—In the process of augmentation, modification, and locality presently in dependence at the instance of the minister of the parish of Borthwick, the minister on 17th January 1876 obtained an augmentation of his stipend, which was modified to six chalders, and the process was remitted to prepare a locality in the usual way. The question we have now to deal with is a question in the locality.

A scheme has been prepared, to which Mr Dundas of Arniston has lodged objections in so far as it locals upon what he describes in the closed record as 81 Scots acres of his lands of Schank, which he alleges to be held *cum decimis inclusis et nunquam antea separatis*, and consequently to be teind free. Besides that plea on the merits, Mr Dundas pleads that the point is already *res judicata* in his favour, and this last plea is the only one on which we have been consulted by our brethern of the Second Division, and with which alone we have now to deal.

The lands for which the privilege was meant to be claimed are not now and never were part of the lands of Schank, as we shall by-and-bye see. They are part of the Mains of Arniston, and if they are entitled to the privilege claimed, the whole Mains of Arniston must be entitled to the same privilege. But I shall pass over this error of description in the meantime, and deal with Mr Dundas' objections as if the lands in dispute had been correctly described as 81 Scots acres of the Mains of Arniston.

Taking the case so, the plea of *res judicata* is here rested upon two grounds, which it has been said may be considered together, but which, it appears to me, fall to be considered separately—first, upon an interlocutor of the Teind Court pronounced on 2d December 1795 in a process of augmentation, modification, and locality raised by the Rev. John Clunie, the minister of that day, in March of that year; and secondly, upon the subsequent proceedings in that process, and in a second process of augmentation, modification, and locality raised by the same incumbent in 1807, in each of which processes the minister obtained an augmentation, and in neither of which was any portion of the stipend localled upon any part of the Mains of Arniston.

The interlocutor of 2d December 1795 is in these terms:—"The Lords ordain the lands and Mains of Arniston, those four score and one acres of the lands of Schank, part of the Mains of Arniston, and the lands called the Park of Halkerston, to be struck out of the rental; make avizandum with the decreets of approbation produced and condescended on; hold the heritors who have no decreets of valuation as confessed on the rental libelled, and remit to Lord Glenlee to prepare the cause."

This interlocutor was apparently preceded by a minute bearing the same date (2d December 1795). But the interlocutor, it will be observed, does not mention the minute, the terms of which I shall quote immediately.

Meantime it is most important to keep in view the nature and objects of the procedure according to our law and practice in processes of augmentation, modification, and locality, and the stage of that procedure at which the interlocutor just quoted was pronounced, namely, before the question of augmentation and modification had been considered and decided.

Such a process consists of two different branches, which, at the period when these processes depended, were often pursued and disposed of separately, and which were then, and indeed still are, just as separate in their objects as if they were two different processes. The object of the first is to settle whether the minister shall have any, and if so what, augmentation; and the object of the second is to settle in what proportions the stipend shall be laid upon the different heritors, so long as the final scheme of locality, sanctioned in the particular process, shall not be superseded by a new scheme in a subsequent process.

The forms of procedure in use during the dependence of these processes of 1795 and 1807 have been improved in some respects by Acts of Sederunt, passed both before and since the Judicature Act, 6 Geo. IV. cap. 120, by which Act it was provided that the procedure in Teind causes should be assimilated as nearly as might be to the procedure in other causes. The objects to be attained remain however substantially the same as before.

These objects are described in the familiar and authoritative work of the late Mr Buchanan as objects to be dealt with in the order in which he states them, viz., first, To decide whether there is to be an augmentation, second, If there is, then to modify, that is to fix the amount, third, To local that amount among the different heritors.

The two first objects may be conveniently enough classed under one head, viz., the augmentation and modification, because if an augmentation is sanctioned the amount of it is always modified at the same time. But the third object, namely, the localling, is usually a subsequent and always a separate proceeding.

For the purposes of the augmentation and modification it is neither necessary nor usual that the title deeds of the heritors should be produced. What is called the proven rental is fixed provisionally at that stage, but only to the effect of seeing that there appears *prima facie* to be free teind enough to cover the proposed augmentation. If an augmentation is awarded, then a remit is made to the Lord Ordinary to prepare a locality, in other words, to ascertain and settle the different proportions of the stipend to be paid by the different heritors, and under that remit an order on the heritors to produce their rights or titles, if they have any, to the teinds of their lands within a prescribed period, with certification that otherwise a scheme localling the stipend in accordance with the proven rental will be approved of as an interim scheme. At same time, the Lord Ordinary ordains the heritors to meet and choose a common agent for conducting the preparation of the scheme, and it is only when this interim scheme has been circulated among the heritors that an interlocutor allowing objections and answers to be lodged is pronounced, or a *viva voce* discussion ordered, so as to afford grounds for a judgment by the Lord Ordinary upon claims either to postponed liability or to total exemption from liability for the stipend which has been modified.

While all this is going on, the minister has the option either to ingather his stipend according to the interim scheme, or to go against any heritor or heritors to the extent of his or their teinds as

indicated by the proven rental, leaving such heritor or heritors to seek relief ultimately so far as a final scheme when approved of may show him or them to be entitled to that relief from the other heritors. Until a final scheme of locality is approved of all questions of legal liability are open for discussion and reconsideration, and it is only when decree of approval of a scheme as final is pronounced that the different heritors become personally liable to pay the proportions of stipend therein laid upon them, and nothing beyond these proportions, during the subsistence of that locality.

The late Lord Ivory, in his Forms of Process, states the difference between the object and effect of a decree of augmentation and modification and a decree of locality in much the same way as was afterwards stated by Mr Buchanan. Lord Ivory says (vol. ii. 445)—"The object of the augmentation is to obtain an increase of the minister's stipend—by the modification the amount of the increased stipend is ascertained—and the locality fixes the proportion in which the stipend is to be paid by the different heritors." He further says (*ib.* 448)—"Though the locality be joined to the conclusions of the summons as to the augmentation and modification, yet the pursuer may extract his decree of modification without proceeding to it. In virtue of this decree, which orders the stipend to be paid in general terms out of the teinds, parsonage and vicarage, of the parish, the minister is entitled to make his stipend effectual against any of the heritors to the extent of their teinds, reserving to them their relief against the other heritors in so far as they may have paid beyond what they were due. But when the stipend has been localled such heritor is only liable to the extent of his own proportion." For this he cites Stair ii. 8, 30, and Ersk. ii. 10, 47.

Before proceeding to point out the important bearing of all this upon the nature and effect of the interlocutor of 2d December 1795, it will be satisfactory to show that the rules of procedure and consequent results were at the date of that interlocutor, and throughout the dependence of the processes of 1795 and 1807, substantially the same as they now are, so far as affecting a question of *res judicata*.

Thus, Mr Russell, who published his Form of Process in 1768, says (p. 239-40)—"The action in this (the Teind) Court at the instance of a minister for his stipend consists of two distinct branches; one a modification, and the other a locality. The effect of the first of these is to have the quantum of stipend ascertained; the effect of the other is to rate the proportion paid out of each heritor's teinds." And (at p. 241) he says—"Though the two conclusions in this action are contained in one libel, yet a decreet may be obtained in the modification without proceeding to the locality, the effect of which is to make the stipend a real lien on the tithes of the whole parish *in solidum* to payment of the stipend to the amount of their several intromissions, but after a decreet of locality is extracted each heritor is only liable for his own proportion."

But we find still higher authority on these points when we go further back to the institutional work of Forbes on Tithes, published in 1705, which is the edition I quote from. He says (at p. 387, sec. 4)—"Sometimes the commission only modifies a minister's stipend, which is called a decreet of modification; sometimes, again, they not only modify, but also divide and proportion the stipend among the heritors, and that we term a decreet of locality."

At p. 424, sec. 5, he says—"When a minister's stipend is only modified it affects the whole tithes out of which it is modified, and may be extracted from any heritor intromitting or possessor whose tithes will go so far, or to so much on't according to the extent;" but (p. 426) "when the tithes of certain lands are allocate for payment of it intromitters with these tithes are liable."

Sir John Connell, who made an elaborate investigation into the teind records, ancient and modern, goes much more fully than either of these writers into the nature and effect of the procedure in processes of augmentation, modification, and locality. At p. 444 (of the last edition) he explains that such a process is competent at the instance of the minister, or, in case of a vacancy, at the instance of the moderator of the presbytery and the agent for the church, or at the instance of the titular or patron having right to the tithes. He had previously explained (p. 393) that no process of augmentation can proceed without calling the titular.

At p. 445 he says—"The object of the augmentation is to obtain an increase of stipend—by the modification the amount of the increased stipend is ascertained—and the locality fixes the proportions in which the stipend is to be paid by the different heritors."

It is, as Sir John distinctly explains, with a view to the augmentation and modification alone that the amount of the proven rental is ascertained at the outset of the process. With that view, valuations may not only be produced, but may even be led incidentally at that stage, the object being to ascertain tentatively whether, assuming one-fifth for teind, there appears to be free teind enough to cover an augmentation. Accordingly Sir John adds—"Nevertheless, the only effect of such proceedings was to afford a datum for fixing the stipend, and was not equivalent to a valuation" (p. 450). An apparent excess of free teind beyond the augmented stipend is only, as your Lordships know, a small consideration among the many elements of which a bird's-eye view is somewhat loosely taken in awarding augmentations, the more pregnant considerations being the amount of the emoluments enjoyed by neighbouring clergymen, a comparison of their necessary expenditure in the one parish and in the other, the wealth of the district, and the general increase in the cost of living. Accordingly Sir John observes (p. 450)—"The use and custom of leading a probation of the extent of the tithes was not introduced to fix a rule of payment, for otherwise there had been no use for separate valuations, but when the several laws came in for establishing a fixed stipend to the ministers of every parish the meith by which the commissioners for the plantation of kirks were to walk was and still is to take a *talis qualis* view of the circumstances of that parish with respect to the tithes, in order to modify out of them stipend to the minister."

He adds (p. 459)—"Where no objection is made to these rentals interlocutors are pronounced holding the heritors confessed on them. But where they are objected to it is not thought necessary to retard the process by a formal in-

vestigation;" the reason of this being that nothing is understood to be really fixed at that stage except the augmentation and modification. All questions as to by whom and in what proportions the stipend is to be paid come afterwards, and for these ample opportunity is allowed in the course of preparing the successive schemes of locality, interim, rectified, and final, under a practice which commenced immediately after the Act 1707, c. 9 (*ib.* p. 473.)

So entirely are these questions disjoined from the augmentation and modification of the stipend that originally the summons of augmentation and modification contained no conclusion for locallling the stipend at all. It was only when ministers found it for their interest to insist upon having localities that they began to insert a conclusion to that effect (Connell, p. 467–68); and even then it was common to stop short with a decreet of augmentation and modification, and at a subsequent and sometimes distant period to institute a separate process of locality (*ib.* p. 469, top), and Sir John mentions an instance or instances where the stipend had been modified in 1650 without a locality, which was only obtained in a process brought for the purpose after the Restoration (p. 471).

According to the more modern practice, every summons of augmentation and modification concludes also for a decreet of locality. But it admits of no doubt that in ordinary course all questions in the locality are understood to be open for investigation and decision under the remits granted for the preparation of a scheme after decree of augmentation and modification has been pronounced.

We have hitherto had no instance that I know of of an interlocutor pronounced otherwise than in the course of the locality which has been regarded as *res judicata* upon a matter of heritable right involved in the locality. It is not necessary for the present purpose to say that there never could be such an interlocutor. But it is, I think, very clear that such at all events was not the character of the interlocutor in dispute of 2d December 1795.

One conclusive objection to holding that interlocutor to be *res judicata* is that the mind of the Court was obviously never applied to the question whether Mr Dundas held his lands in dispute *cum decimis inclusis*, and consequently teind free or not. That is always an abstruse question requiring careful investigation into very ancient title-deeds, and in this case no title-deeds were before either the Lord Ordinary or the Court when the interlocutor of 2d December 1795 was pronounced. The usual interlocutor finding the teind to be one-fifth of the proven rental was pronounced on 12th January 1796. The decreet of augmentation and modification and remit to the Lord Ordinary to prepare a locality and report followed next day. On 20th May 1796, on the craving of the patron and some of the heritors, the Lord Ordinary named a common agent to furnish the minister with a locality, and in this interlocutor, which was pronounced between five and six months after the interlocutor of 2d December 1795, the heritors were for the first time ordered to produce their rights to their teinds in the clerk's hands in ten days. At what particular period Mr Dundas produced his titles the printed papers before us do not enable me to say; but it is not alleged that they were produced anterior to the interlocutor of 2d December 1795, and certainly they were never considered either by the Lord Ordinary or the Court with reference to the question whether the lands were held *cum decimis inclusis* and teind free, upon which question therefore no judgment *causa cognita* could by possibility have been pronounced.

Nor can the minute lodged of the same date with the interlocutor be construed even as a personal bar against any of the other unnamed heritors, who are represented in it as concurring with Mr Dundas in craving that the lands of Schank, (as the lands are therein erroneously called) should be struck out of the rental. As regards the minister, he had no power to bind his successors by anything short of a *res judicata*, for, as Mr Forbes expressly says, (p. 389) even an express transaction with the minister for a certain stipend will be binding only during his incumbency. Nor is there the least reason to suppose that either the minister or the innominate heritors had any other object in the minute than to weaken the sort of make-weight which the minister frequently attempts to create at this stage by swelling the apparent amount of the rental in aid of his claim to a liberal augmentation. The heritors had all the same interest with Mr Dundas to reduce at that stage the apparent amount of the rental as bearing upon the question of augmentation. Accordingly, they all concurred in craving that effect should be given to each other's valuations, of which there was an extensive production, although upon the merits of these valuations their individual interests were altogether hostile, as came to be apparent in the subsequent locality. The craving in the minute was to give effect to these valuations, and "that the rental of the whole foresaid lands before specified, contained in the respective decreets of valuation and approbation above mentioned, ought to be restricted accordingly."

Nor did the minister seem to dispute that as regarded the *prima facie* amount of the rental these valuations should receive effect, for his counsel simply "craved avizandum with the decreets of approbation and valuation produced and condescended on, and that the heritors who have no decreets of valuation may be holden as confest on the rental libelled."

Nevertheless none of these valuations did receive effect in the locality, except in so far as it was found that they could be supported on their own merits.

By the time the minute of 2d Dec. 1795 came to be given in it had become apparent that although the proven rental was to be restricted as craved in that minute, one-fifth of that restricted rental would still yield free teind enough to cover any augmentation the minister could expect to get, and consequently that he had no personal interest to undertake an expensive litigation either with Mr Dundas upon the obscure question of total exemption, or with the heritors who asserted the validity of their valuations. It is not surprising therefore that Mr Clunie, the minister of that day, did not embark in that litigation for the sake of his remote successors in the benefice, who have only now become personally interested in the question raised by Mr Dundas in consequence of the large augmentation of six chalders awarded and modified to the present minister Walter Waddell, on

17th January 1876 (3 Rettie 361), a decision of great importance in this question, as recognising the rule that settling the proven rental is to be presumed to have been for the purposes of the augmentation and modification only, and not for the purposes of the locality.

Mr Dundas on the occasion—I am now referring to 1876—objected to the condescendence of the free teind that it was calculated upon a rental including part of his lands of Mains of Arniston which were held by him *cum decimis inclusæ et nunquam antea separatis*, and craved that the process might be sisted that the minister might bring a declarator to try the validity of the *decimæ inclusæ* right. The rubric bears—"*Held* that as there was free teind apart from that of the objecting heritor, the minister was entitled to an augmentation, and that the objection of the individual heritor would fall to be disposed of in the locality.

The Lord President, who delivered the judgment of the Court—distinguishing the case from that of the minister of Glenluce, where it depended on the *decimæ inclusæ* right whether there was any free teind at all—said, "But we cannot refuse the minister here an augmentation, because, independently of the teinds, about which there is this disputed question, he has shewn that there is free teind to a material extent. In any view of the case, therefore, we must give him an augmentation. If Mr Dundas is found in the locality not to hold these lands *cum decimis inclusis*, there will be all the more free teind out of which the minister can draw his augmentation. If, on the other hand, Mr Dundas' title to these lands *cum decimis inclusis* is as clear as he asserts, the first step in the locality will be to hold Mr Dundas free from any additional stipend, but that will not free the other heritors from liability to augmentation. I think therefore that we ought to grant an augmentation on the footing of there being the amount of free teind alleged by the minister. If it comes out that there is not, as has been the case in many instances, then he will simply be unable to draw the full amount of the stipend." The Court accordingly granted an augmentation of six chalders.

The minister, I presume, is now doubtful whether there will be free teind enough to cover the whole of this large augmentation, if the alleged *decimæ inclusæ* title be given effect to, but whatever may be his reason for objecting to that title, I am of opinion, on the grounds I have stated, that the interlocutor of 2d Dec. 1795 is not *res judicata* in that question.

As regards the procedure subsequent to the decree of augmentation and modification, it is quite true that neither on the locality approved of in the process of 1795, nor in the locality which followed on the process of 1807, was any stipend laid upon the lands of Mr Dundas so far as these had been represented to be held *cum decimis inclusis*. But it would be quite a novelty in teind law to hold that because the lands had not been locallled on in these processes, or in any former process, that was conclusive of a right to be exempted, when a new locality came to be proposed in a new process. Non-locallling in previous localities resolves simply into a case of non-exaction of teind, which can never infer a title to exemption either from teind or stipend if there be no such title. There can be no exemption from stipend unless there be exemption from teind on which stipend is a burden. It is trite law that all lands in Scotland are subject to teind, unless a title to exemption be instructed. Prescription cuts off the claim of the titular to arrears of teind, and consequently the claim of the minister to arrears of stipend, but not the right itself. Thus Mr Forbes, following Lord Stair (2. 11. 22), observes, (p. 331) "There is no negative prescription of parsonage tithes. That is, no course of time doth sopite or extinguish the obligation to pay such tithes." Accordingly, in the recent case of *Burt* v. *Home*, before the whole Court, 12th Jan. 1878, (5 Rettie 445), the class of heritors found liable to be locallled on for stipend had never been locallled on in previous localities. None of the Judges suggested that this fact excluded consideration of the question there raised, which was accordingly decided, with much difference of opinion, on its merits.

In like manner, neither in the case of *Glenlyon*, 15th Nov. 1842, (5 D. 69) nor in the case of *Learmonth*, 1st June 1859, (21 D. 890) nor indeed in any case that I am aware of, was it ever held that the fact of the lands not having been locallled on in previous localities was sufficient to prevent them being locallled on in a new process of locality if otherwise liable.

Now, after it had been seen that, in the parish we are now dealing with, that there was, in my view, free land enough to cover the augmentation and modification of 1795, nothing took place either in that process or in the process of 1807 affecting the present question except to go on as formerly on the assumption of the validity of Mr Dundas' alleged *decimæ inclusæ* right, which nobody had then called in question. How that could convert the interlocutor of 2d December 1795 into a *res judicata*, if it was not a *res judicata* in itself, has not, to my mind, been made even intelligible, and I reject that idea without any hesitation whatever. Personal bar, supposing such to apply to particular parties, would not be *res judicata*, which, if good at all in a process of this kind, must, I freely concede, be good against all interested. How personal bar, if there were such, against the minister of 1795, could bind his successor and the benefice in 1878, has not been shown, but that is not the present question. What we have to look to here is, that the mind of the Court has never been appealed to and applied to the question of validity of the alleged *decimæ inclusæ* title since the interlocutor of 2d December 1795, any more than it had been before, or at the time when that interlocutor was pronounced.

It is true that in the course of preparing the scheme of locality under the process of 1795 a discussion arose between Mr Dewar of Vogrie, and Mr Dundas. But that discussion did not involve any challenge of Mr Dundas' *decimæ inclusæ* right. To see what it did involve it is necessary to attend to the separate processes of titles by which Mr Dundas had by that time come to hold the lands now popularly known as "the estate of Arniston." It luckily happens that sufficient information for this purpose is to be got from the inventories of titles in the print of documents "for the objector," dated 23d February 1878, which at the same time show very clearly that the parties to the minute of 2d December 1795, including Mr Dundas himself and his advisers, had at that time, and even when they

consented to close the present record, very imperfect and erroneous notions as to how these titles really stood.

The minute bears that counsel "for Dundas of Arniston and the other heritors represented that the following lands, viz., the lands and town of Arniston called the Mains of Arniston, these fourscore and one acres of the lands of Schank part of the Mains of Arniston, and the lands called the park of Halkerston, all lying in the said parish, were holden by Dundas of Arniston *cum decimis inclusis*, and therefore craved that these lands might be struck out of the rental."

Now, the fourscore and one acres so often mentioned throughout the present proceedings were not then, are not now, and never had been, part of the lands of Schank at all—nor were the lands of Schank at any time part of the Mains of Arniston.

What had occurred was this:—In February 1598 Sir James Dundas excambed 81 acres of the Mains of Arniston for the lands and barony of Schank belonging to John Elphinston and Elizabeth Edmonston his mother, in liferent and fee respectively.

The contract of excambion bore that Sir James "dispones to Elizabeth Edmonstoun, Lady of Schank, in liferent for all the days of her life, and to the said John Elphinstoun of Schank, her son, in fee, her heirs and assignees whomsoever, all and sundrie, the said Sir James, his fourscore and one ackers of his Manes of Arnistoun, with the tyndis of the samen includit, and all their pertinents lyand next adjacent to the pendicle of the Schank, and to the pendicle of the Bulzeon, and pendicle of the Cockhill, boundit, meithit and merchit" as therein mentioned.

On the other hand, and in consideration of the above conveyance, John Elphinstoun and his mother disponed by the contract to Sir James Dundas and his heirs certain lands, of which the full description is not in the print, but which I understood to have been, or to have included, the lands and barony of Schank.

In 1753 Robert Dundas, younger of Arniston, advocate, reacquired from the successors of John Elphinston and his mother the 81 acres of the Mains of Arniston, and at or about the same time he acquired from their successors the lands and barony of Schank.

In 1754 Robert Dundas conjoined the lands and barony of Schank with the 81 acres of the Mains of Arniston in Crown title, which I need not particularise, but under which the aggregate lands and estate have descended to the present Mr Dundas.

No *decimæ inclusæ* right had ever been, or was then, asserted for the lands and barony of Schank, but it was contended for Mr Dundas in the process of 1795 that the whole of his lands which were not held *decimis inclusis* were included in a valuation of this parish in 1629–30. Other valuations of portions of his lands were also afterwards founded on by Mr Dundas. The applicability of these various valuations was disputed by Mr Dewar, who contended that it was incumbent on Mr Dundas to condescend upon what his other lands referred to were, and what he alleged to be the valued teinds thereof.

In support of this contention, Mr Dewar stated, in his objections to the rectified scheme of locality in the process of 1795, "a rectified scheme of locality has been made up and has been adopted as an interim locality, by which above 30 bolls of the augmentation are laid upon the objector, while the remaining 18 bolls only are laid upon the other two-thirds of the parish. The reasons given for this are, that the bulk of the Lord Advocate (Dundas') lands being held by his Lordship *cum decimis inclusis*, fell to be wholly exeemed, and that the teinds of some of the other lands in the parish are exhausted." The conclusion drawn by Mr Dewar from these statements was that—"It is therefore incumbent upon the Lord Advocate to show what teinds are truly comprehended under the word 'Mains;' and the teinds of the rest of his estate of Arniston must be brought forward to take a share of the stipend."

As the lands of Schank had been conjoined with the 81 acres of the Mains of Arniston in the same Crown titles from 1754 downwards, and the whole of Mr Dundas' lands had apparently been possessed and dealt with as substantially one estate, it was no easy matter to comply with the demand Mr Dewar made in these same objections for an articulate rental "showing (1) the general names of Mr Dundas' lands taken from his title deeds; (2) the particular farms and possessions comprehended under these general names, and the names of the present tenants and rents; (3) whether the teinds have been valued, and if "there is an heritable right to them?"

The printed papers do not enable me to say what was done to satisfy this demand, but on 17th June 1800, Lord Glenlee (Ordinary) after having (as his interlocutor bears) made "avizandum to himself with the objections for James Dewar of Vogrie, answers for the Lord Advocate, replies, duplies, triplies, and quadruplies," pronounced an interlocutor on 17th June 1800, repelling these objections. The interlocutor was, I presume, either acquiesced in or affirmed by the Court, although I do not find this expressly stated in the prints. The material thing is to see that these objections were directed to different objects altogether, and did not impugn the validity of the *decimæ inclusæ* right, upon which Lord Glenlee's interlocutor was no judgment whatever.

Mr Dewar repeated the substance of the same objections at different stages of the process of 1807, the course of which process it is not necessary for the present purpose to follow, further than to observe that Mr Dundas and the other heritors continued to a late period under the same error as to the titles of the lands of Schank which I have already pointed out in the minute of 2d December 1795, and repeated it in their condescendence of 1808, in which they say, "Of the lands of Schank belonging to the Lord Chief Baron, 81 acres are held *cum decimis inclusis*," and which error illustrates, I think, the danger which might arise from dealing with an interlocutor such as that of 2d December 1795 as *res judicata*, in place of regarding it simply as a step in the *talis qualis* inquiry, which usually precedes an augmentation and modification of the stipend, so that the minister may at once obtain the addition which he probably very much requires to his means of livelihood, leaving all questions of proportionate liability to be discussed among the heritors themselves in the subsequent locality or localities which may happen to remain in dependence beyond the probable lifetime of the minister, of which we had an instance yesterday in the united

parishes of St Andrews and Lhanbryde, where the localling of the stipend modified in 1814 was still in dispute among the heritors at the distance of sixty-four years after the augmentation had been awarded and the amount of it modified.

In the case of the parish of Banchory-Devenick —*Paul* v. *Thomson and Others*, 1st July 1863, 1 D. 1014, and H. of L. 14th May 1867, 5 Macph. 62—an exceptional course was, no doubt, adopted, but that was in very unusual circumstances. The teinds had for time immemorial been held to be exhausted, and upon that footing the stipend had been supplemented by a Government allowance under the Statute 48 Geo. III. c. 138. But in 1863 the minister brought a process of augmentation, modification, and locality, averring and offering to prove that the old valuations did not comprehend certain lands which he specified, and consequently that there was abundance of free teind. A report by the Teind clerk was favourable to this supposition, whereupon the report of the case bears, "To-day the Court unanimously granted the augmentation, being of opinion that a *prima facie* case had been made out, but stating that they gave no decision upon the point whether such free teind really existed—a question which would have to be decided in the course of the locality."

The Court accordingly augmented and modified the stipend to such an extent as would afford a stipend of 20 chalders victual, and remitted "to the Lord Ordinary to prepare a locality, but declaring that this modification and the settlement of any locality thereof shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose."

The concluding declaration in the interlocutor was a variation from usual form which I do not remember to have seen adopted in any other case either before or since. The reason for it no doubt was, that in place of there being, as there was in this parish of Borthwick in 1795, what Mr Forbes significantly calls *talis qualis* evidence of a case of free teind, there was simply alleged and made out to be a *talis qualis* or *prima facie* case for inquiring whether there was any free teind or not. The declaration in the interlocutor was superfluous, because the minister, as your Lordship in the chair observed in the present process on 17th January 1876, could in no event have recovered more under his locality than the amount of the free teind. The declaration, however, could make no difference to the then incumbent, although it might possibly be some embarrassment to his successors, and I quite recollect that, when suggested he readily acceded to it.

But the *Banchory-Devenick* case remains a striking instance, sanctioned as it was by the House of Lords, that inquiry is competent at any distance of time into the rights and titles of parties in a new locality, however many localities, formed on a different footing may have intervened, and this without any process of reduction, unless it may be in the single case excepted by your Lordship in the chair (then Justice-Clerk) in that case, of an objection impugning the jurisdiction of the Court which pronounced the decree objected to (3 M'Pherson, p. 490, foot).

Throughout the whole history of the teinds of the parish we are now dealing with I find nothing to sanction Mr Dundas' title to exemption from liability for teind and stipend as regards the lands now in dispute, except the fact that, with the acquiescence of all interested, these lands have not hitherto been localled on, in consequence of its being assumed, it is now said erroneously, that they were held *cum decimis inclusis et nunquam antea separatis*. That fact, if no title can be instructed, is, according to all the authorities, quite insufficient for that purpose. The interlocutor of 2d December 1795 was not pronounced *causa cognita*, and neither was nor was intended to be a judgment on the question of *decimæ inclusæ* title. There were no contending parties on that question before the Court, and no materials for deciding it if there had been. Throughout all the proceedings in the two subsequent processes there was the same absence of contention on that important question, and no interlocutor of any kind touching it was pronounced. Unless therefore there can be a *res judicata* without a judgment, it appears to me that the plea of *res judicata* must here be repelled.

Lord Ormidale—According to my impression of this case it will not be necessary for me to enter upon a review, long or short, of the forms of process, ancient or modern, in teind causes.

The question to be determined relates to 81 acres of what are called the lands of Schank, part of the Mains of Arniston, belonging to the reclaimer Mr Dundas. He maintains that these 81 acres are held by him *cum decimis inclusis*, and not liable to be localled upon for minister's stipend, and that this is *res judicata*. He accordingly lodged objections in the present process of augmentation and locality at the instance of the minister of the parish of Borthwick to the 81 acres in question being localled upon for the minister's stipend. The Lord Ordinary has not stated upon what grounds he proceeded, but the grounds upon which Mr Dundas supported his reclaiming note at the debate which took place before the Judges of the Second Division of the Court were two—1st, That it was *res judicata* in a former process of augmentation and locality that the 81 acres of land in question were held by him *cum decimis inclusis*, and therefore exempted from liability for minister's stipend; and 2dly, that even if this had not been *res judicata*, it is shown by his titles that such is the case. If the matter be *res judicata*, it is unnecessary to enter into a consideration of the titles, as bearing upon the merits, many of which are very ancient in date; and, as was suggested at the debate, any such inquiry could not now, from the lapse of time and loss of titles, be satisfactorily followed out.

The plea of *res judicata* being therefore preliminary and prejudicial, falls to be first taken up, and on this plea it was thought advisable to have the case debated, as it has been before seven Judges.

As maintained by the reclaimer Mr Dundas, the plea of *res judicata* is supported by the interlocutors and decrees which were pronounced in two previous processes of augmentation and locality at the instance of a former minister of the parish of Borthwick, the first of which commenced in 1795, and the second in 1807. That the effect of these interlocutors and decrees as constituting or supporting the plea of *res judicata* may be duly appreciated, it is of importance to bear in mind that to both processes the titular and tacksmen of the teinds, the heritors

and liferenters, and all others having or pretending to have interest were cited as parties—the minister of the parish being himself the pursuer. It has further to be noticed that when the cases came into Court all reasonable precautions seem to have been taken against anything being determined till after every one interested had the most ample opportunity of being heard.

The first process was, as has already been mentioned, instituted in 1795, and it continued in dependence till 1800. Copies of some, although not of all the proceedings in the case, are to be found in what are called "First and Second Additional Prints of Documents for the Objector." From the second of these prints it will be observed that, following the summons and execution in the first action, there is an interlocutor in these terms —"*Edinburgh, 17th June* 1795.—The Lords allow the lawyers for the heritors to see the process in the clerk's hands till next Court day, and appoint parties' procurators to be then ready to debate." There next follows the rental of the parish represented to be liable in stipend, which the minister, who was the pursuer of the action, gave in, as he was bound to do; and the parties concurred in stating at the debate that this rental included the 81 acres of land now in question. It could not be well disputed therefore, and has not been disputed, that the minister did in point of fact submit to the Court that these 81 acres were liable to him in stipend. There is next a minute which was lodged for Mr Dundas of Arniston (a predecessor and author of the present objector), and for the other heritors, representing, *inter alia*, that the 81 acres as also the Park of Halkerston were holden by Mr Dundas *cum decimis inclusis*, and "therefore craving that these lands should be struck out of the rental."

The very question whether the 81 acres were exempt from minister's stipend was in this way distinctly raised for the consideration and determination of the Court. It will, accordingly, be observed that there is added to the minute a craving by Mr Clark as counsel for the minister, the pursuer of the action, that avizandum should be made; and that then follows an interlocutor by the full Court, of date 2d December 1795, ordaining the 81 acres as well as the Park of Halkerston to be struck out of the rental. All concerned were parties to this interlocutor. Not only Mr Dundas and the other heritors, but also the minister as pursuer of the action. Whether they were heard orally before the interlocutor was pronounced does not appear, and is, I apprehend, of no consequence, for if there was no oral debate it must have been because they were content to leave the matter for the determination of the Court on the minute for the heritors, and the rental and other proceedings in the process. I rather think, however, that the parties must have been heard before the interlocutor was pronounced, for they had been by the preceding interlocutor of 17th June appointed "to be ready to debate;" and, at any rate, it is clear that the interlocutor which followed was of the nature of a judgment pronounced, not in absence, but *causa cognita* and *in foro*. That it is to be dealt with as having been pronounced *in foro* has not been disputed, but it was argued that the Court did not apply its mind to the subject of it. But this is mere assertion and nothing more. How has it been discovered, after the lapse of upwards of 80 years, that the Court did not apply its mind to a matter which was decided by them? Every presumption is the other way. As was remarked by Lord Gifford in *Thomson* v. *The Lord Advocate* (which will be afterwards more particularly noticed)—"It is safe to presume that everything was urged that could be urged, and that all parties were satisfied with the resulting judgment."

What, then, must be held to have been the object and effect of this interlocutor or judgment? It was said, as I understood the argument for the minister, that it was merely provisional or tentative, till the augmentation, if any, should be granted, and that this being done, it was no longer binding upon any party or to any effect. But the plain and obvious answer to this view of the matter is that the interlocutor or judgment itself does not in its terms admit of any such construction; it does not bear to be *ad interim* or provisional, or tentative. Besides, in reason and good sense, I cannot see how it should be held effective merely till the question of augmentation was disposed of, and then dealt with as a nullity. Any such view would obviously be most unjust to the minister. It was important for him to show, previous to the amount of augmentation being fixed, as large a fund of free teind in the parish as possible, as it might depend very much upon the amount of free teind whether the Court would award to him any and what augmentation. I can therefore see no reason or justice in the Court first striking out of the rental certain lands, and then, after having disposed of the minister's claim for an augmentation on the diminished rental, allowing the lands which had been struck out to be dealt with in the same manner as lands which had not been struck out. I know of no instance in which such a course was followed, and notwithstanding the vague generalities which have been indulged in on this point, I venture to affirm that no trace of any such case is to be found. That was certainly not the way in which the Court proceeded in the case of *Paul, the Minister of Banchory Devenick* v. *Thomson and Others*, 1st July 1863, 1 Macph. 1014. There a question arose as to whether the teinds of certain lands had been valued and exhausted or not. But the Court, in place of at once disposing of this question, as if their interlocutor doing so would only be provisional or tentative, "remitted to the Lord Ordinary to examine and report whether there appears to be any free teind in the parish." The Lord Ordinary having made a very specific report, founded chiefly on the investigation of the teind clerk, to the effect that there were undoubtedly free teinds in the parish, the question then arose whether the teinds of certain lands had been valued and exhausted or not. The Court, however, in place of even then disposing of this question affirmatively or negatively, on the assumption that their interlocutor doing so would be merely provisional and tentative, modified an augmentation, but subject to the express declaration that "this modification and the settlement of any locality thereof shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose." But in the present case the Court did not declare that the augmentation granted or to be granted to the minister was to depend in any degree or to any extent upon its turning out

that the 81 acres of land in question were or were not teind free. No such course was followed, for the obvious reason, as it appears to me, that all the parties, the minister as well as the heritors, were agreed that the judgment of the Court should be at once taken on the subject. And that judgment being unqualifiedly to the effect that the lands in question were held *cum decimis inclusis*, there was an end of the matter. It became *res judicata*. As a test of this being so, let it be supposed that Mr Dundas had no other lands than the 81 acres in the parish, he would surely in that case have been entitled, after and in respect of these acres being in terms of an unqualified interlocutor of the Court struck out of the rental as teind free, to retire altogether from the process. He would, indeed, have had no right or interest to continue a party to it.

Mr Dundas, however, continued to be a party to the process because he had other lands in the parish, but although a great deal of further procedure appears to have taken place, I do not observe that any alteration of the interlocutor of 2d December 1795 was ever made. On the contrary, there is much in the procedure which followed confirmatory, as it appears to me, of that interlocutor. I find, among other things, that in so far as the augmentation was concerned, the Lords by an interlocutor of date the 13th January 1796 approved of a scheme of the rental, not including the 81 acres, which had been prepared and reported to them by the Lord Ordinary, and modified, decerned, and ordained a certain amount of stipend, consisting partly of money and partly of meal and bear, to be paid to the minister for crop and year 1795, and to be yearly thereafter paid to him "and his successors in office, ministers serving the cure of the said kirk and parish, by the titulars and tacksmen of the teinds of the said parish." This was the last and final interlocutor in the process so far as the modification of the minister's stipend was concerned, but the case was remitted to the Lord Ordinary to prepare a locality, and to report. There then followed, on 23d June 1797, an approval by the Lord Ordinary of a scheme of locality, again on the footing of the 81 acres being excluded from the rental, and this was reported by him to the Court, with an opinion that it ought to be approved of as an interim rule of payment "until the controversies among the parties be settled and a final locality established." But the question whether the 81 acres was teind free was not one of these controversies, and could not have been, seeing that it had been previously considered and disposed of by the interlocutor or judgment of 2d December 1795. Accordingly, on 5th July 1797 "the Lords having advised the within locality with the Lord Ordinary's report, approved of the same." Proceedings were thereafter resumed before the Lord Ordinary, who on 16th January 1800 "allowed all concerned to give in objections to this locality betwixt and next calling." Objections were under this allowance given in for one of the heritors—Mr Dewar—in which he alluded to the exemption from liability for stipend of the 81 acres of land in question. But so far as I can discover he did not attempt to disturb the settlement which had been made of that matter by the judgment of the 2d December 1795. Mr Dewar's objections were followed by answers for Mr Dundas' author, and by other papers, with the result that by interlocutor of 17th June 1800 the Lord Ordinary repelled the objections. And in this state of matters the locality in the first of the two processes has been allowed ever since to remain. It is not easy, therefore, to understand how, even supposing that nothing further had occurred, it could now be maintained that it was not found in the first process that the lands in dispute were held *cum decimis inclusis*, and therefore exempt from payment of minister's stipend. The interlocutor or judgment to this effect was pronounced not by the Lord Ordinary merely but by the Court; and considering that seventy-eight years have since elapsed, it is out of the question to contend that the interlocutor could now be disturbed, the more especially when the proceedings in the second process of locality, to be immediately noticed, are kept in view. Even had the interlocutor of the Lord Ordinary been one in absence in place of one *in foro*, as it undoubtedly was, so long as it stands unreduced and unaltered it would operate as a bar to any contrary judgment, as was held by the House of Lords in *Wilson and M'Lellan* v. *Sinclair*, 4 W. and S. 398. So much for the first of the two actions of augmentation and locality.

The second action, which was instituted in 1807, only terminated after a great deal of procedure and discussion by a final decree of the Court in March 1809. An extract of that decree has been produced. It sets out, according to the practice of the time, all the procedure which had taken place in the action, and portions of it are printed in the appendix, to which reference has been already made. It would have been desirable that it had been printed in full. It shows that on February 11, 1807, the Court, after hearing the heritors and the minister as well, modified his stipend at seven chalders of victual, besides a certain sum of money, that thereafter, on considering a reclaiming petition for the minister, in which he submitted that he was entitled to nine chalders of victual, and answers for the heritors in which, amongst other arguments against any increase of victual stipend being allowed, they founded on the exemption of the 81 acres of land in question as increasing the teind on those lands which were not exempt, the Court altered the interlocutor reclaimed against to the effect of modifying the minister's stipend at nine chalders of victual. The heritors then in their turn reclaimed, and in their reclaiming petition again adverted to the 81 acres of land which had been exempted from liability as a ground for lowering the augmentation. The minister having been allowed to answer this reclaiming petition did lodge answers, in which, as the decree bears, he, after referring to the various reasons put forward by the heritors, says, in relation to the 81 acres—"The next reason assigned by the petitioners (the heritors) for reducing the stipend is equally groundless. It is that the teinds of several of the heritors are exhausted, and that a great proportion of the best land in the parish is held *cum decimis inclusis*, owing to which the augmentation will fall principally on Mr Mitchelson of Middleton and Mr Dewar of Vogrie. If your Lordships are to listen to such arguments as this, there will be an end at once to augmentations in almost every case, for the respondent

will venture to say that in no one parish in Scotland do all the heritors stand on the same footing in respect to their teinds. Some of them hold the land *cum decimis inclusis*, some have purchased their teinds in the ordinary way, and some hold them in lease from the titular. But surely nothing of this kind ought to have the smallest weight with your Lordships in fixing what is a proper stipend for the clergyman. Upon this point the respondent knows only of two considerations which can come under the view of your Lordships, viz.—First, What is the amount of the free teind of the parish; and Second, What will be an adequate stipend for the incumbent? In many cases the whole of the augmented stipend falls upon the titular, who has just as good a right to his teinds as the heritors have to their lands, but the respondent never heard before that there was any hardship in such a case. If the lord chief baron (Mr Dundas, the reclaimer's author) in the present instance had such a right to his teinds as will free him from paying any part of the augmentation, the presumption is that he or his ancestors paid so much greater a price for the lands, and, on the other hand, if Mr Mitchelson and Mr Dewar hold their teinds by a less favourable tenure, the presumption is equally clear that a smaller price in proportion was paid for their lands. Most assuredly at present their lands are worth so much less in proportion to the inferior right they hold their teinds by, but certainly this can afford no reason for denying a proper augmentation to the respondent, any more than if they held their lands in lease from the titular, where the whole would fall to be exhausted before any part of the augmentation could be laid on these heritors who had a right to their teinds." The result was that the Court on March 9, 1808, altered their former interlocutor, and fixed the victual stipend at eight chalders.

These are the circumstances in which the reclaimer's plea of *res judicata* has now to be disposed of. And having regard to these circumstances it cannot, I think, be disputed—(1) That exemption of the 81 acres of land in question from liability for stipend to the minister on the ground that they were held *cum decimis inclusis* was fairly raised and submitted to the Court for consideration and decision in the first of the two processes of augmentation and locality which have been referred to. (2) That the exception was given effect to, not in absence, but by an interlocutor pronounced *in foro* upwards of 80 years ago, and never since attempted to be opened up by reclaiming petition or reduction, or in any other way. (3) That this determination of the matter was assumed by all parties to have been conclusive, and so acted upon in the second process of augmentation and locality in which a final decree was pronounced so long ago as 1809. And (4) that the extract of this decree accordingly expressly bears that it was only "on the summons and writs produced with the debates after mentioned, interlocutor holding the haill heritors as confest on the rental libelled, with the scheme and prepared state after set down, condescendence, objections, petitions, answers, and localitys under written, being all at length read, heard, seen, and considered by the said Lords, and they therewith being well and ripely advised," that an augmentation was granted and the locality settled on the footing that the 81 acres of land in question were held *cum decimis inclusis*, and therefore exempt from minister's stipend. And in addition to all this, it is only now in the present process of augmentation and locality, after the lapse of nearly a century, during which the interlocutors and decree ln the former localities have been acquiesced in, that they are sought to be disturbed.

That the plea of *res judicata* here in dispute would be good and effectual in a question between the heritors themselves is, I think, clear, not only on principle but on the authorities referred to by Mr Connell at pages 522–3 of the first volume of his work on tithes, and the numerous subsequently decided cases which were cited at the debate. Accordingly, the question of the exemption of the 81 acres of land from payment of minister's stipend has not been raised by any of the heritors in the present process. The minister alone has raised it, and alone resists Mr Dundas' reclaiming-note. But notwithstanding the able argument which was addressed to the Court on behalf of the minister, I cannot come to any other conclusion than that the plea of *res judicata* is well founded. It appears to me that the interlocutor of the Court of 2d December 1795, pronounced in the first action of augmentation, must be held to be effectual not only against the pursuer of that action, but also against his successors in the benefice, including the present pursuer. It is obvious that to come to any other conclusion would lead to the result that no decree in an action of augmentation can be binding on the minister's successors. If, indeed, the question of the exemption of the reclaimer's lands had not been raised in the previous locality at all, there could be no *res judicata* on the subject. But as I have shown, the very question of the exemption now in dispute was raised and determined in the first of the previous actions to which the minister and all the heritors had been duly made parties, and in which also the minister and heritors appeared and took part. Nor would it be correct to say that the minister, although he appeared and was a party to the proceedings, did not join issue with the reclaimer's author in the question of exemption of the 81 acres of land from payment of minister's stipend, for it has been shown that the minister did take a part in the discussion, or, in other words, joined issue with the heritors on that very question. He on the one hand included the 81 acres of land in his rental, while on the other hand Mr Dundas and the other heritors submitted that these lands should be struck out of the rental as being teind free. It may be true that in the second action the minister did not again directly raise the question, but rather assumed that it had been determined, as it truly was, in the previous action. And it is not unimportant in this view to bear in mind that both actions were at the instance of the same individual, the reverend John Clunie, and that the second was raised within seven years after the litigation in the first had been brought to a conclusion. It is therefore only what might have been expected that the minister as well as the heritors shall have acted as they did in the second process on the footing that the 81 acres in question were teind free. It rather appears to me that this in the circumstances affords as strong a support to the plea of *res judicata* as if the ex-

emption had in the second process been given effect to after being denied and disputed. To hold that it is not would be tantamount to holding that every claim of exemption which appears to the parties interested to be so clear as to be beyond dispute can never form the subject of *res judicata*. I think that any such view is so plainly unreasonable as to be wholly untenable.

There is a series of decided cases in which the plea of *res judicata* was sustained in circumstances which I am disposed to think were not more favourable for it than those of the present case. In the case of *Lord Hopetoun* v. *Ramsay*, as decided in the House of Lords (27 March 1846, 5 Bell's App. 69), it was held that a decree pronounced of consent in a process of augmentation and locality, whereby the lands of certain of the heritors were declared not to be liable in payment of stipend on the ground of their being held *cum decimis inclusis*, was binding upon the general body of the heritors although the consent was not given with their express authority, but merely by the common agent acting for them in the process. In the case of *The Duke of Buccleuch in the Locality of Inveresk* (10th November 1868, 7 Macph. 95), judgment was pronounced by this Court to the same effect in circumstances very similar to those which occur here — that is to say, in circumstances where the disputed question, which was said to be *res judicata*, had been decided not after a contest on the point, but merely in consequence of the parties having by their mode of pleading allowed it to be assumed. And the still more recent cases of *Bonar* v. *The Lord Advocate* (9 Macph. 58) and *Thomson* v. *The Lord Advocate* (10 Macph. 849) are also, I think, precedents to the same effect. And these two last cases are all the more important considering that although the Crown, against whom the plea of *res judicata* was sustained, had not appeared or taken any part in the locality in which the *res judicata* occurred, it was nevertheless held that the plea was good against the Crown, on the principle that a question fairly raised and determined as between some of the parties in one locality is *res judicata* against all concerned in another and subsequent process. In the former of these cases Lord Gifford is reported to have observed (p. 63)—"All parties interested must be held bound by judgments in a locality *in foro* pronounced *causa cognita*, whether they choose to appear in the discussion or not." And in the latter case (*Thomson* v. *The Lord Advocate*), Lord Gifford, after adverting to the difficulty or rather impossibility of ascertaining what may have been precisely the nature of the pleas and discussions in old processes, remarked—"It is safer to presume that everything was urged that could be urged, and that all parties were satisfied with the resulting judgment." These remarks of Lord Gifford in the two cases referred to appear to me to be very apposite to the present case.

It is only further necessary for me before concluding to advert in a few words to the argument which was strongly pressed at the debate on the part of the objectors, to the effect that as there were sufficient free teinds for the minister in the former actions, independently of the 81 acres of land, he had no interest to contest the present disputed question, the decision of which therefore, whatever it may have been as against the heritors, cannot be *res judicata* as against the present pursuer. But this reasoning I apprehend to be clearly and entirely fallacious. The minister —that is to say, the pursuer's predecessor in the benefice—was pursuer of the former actions, and in both it was his duty to submit to the Court a state of the rental and of the lands liable in teind duty. He accordingly did so in both processes, and in the first it was stated by a judgment *in foro* that the lands in question were teind free, and they were therefore ordered by the Court to be struck out of the rental. Neither is it said, nor so far as I can see could it be said, that there was any irregularity in the manner in which the two former actions were brought into Court, or in the proceedings which took place in them after they were in Court. Not only were they conducted with all due formality, but also with perfect fairness—nothing having been done collusively or improperly. Why, therefore, the resulting judgments should not be binding, not only on the parties immediately concerned as litigants, but on their successors and representatives, I am unable to understand. The decided cases to which I have already referred appear to be conclusive on this point, and in addition to these cases I may refer to those of *Lord Blantyre* v. *The Earl of Wemyss*, 22d May 1838, 16 Sh. 1009, and 3 Bell's Appeals 34, and *Smith and Robertson* v. *The Duke of Argyll*, Mor. 12,215. The former of these cases occurred between heritors, but in the latter it was held that a decree *in foro* approving of a sub-valuation to which the minister was a party cannot be called in question by his successor. In the case, again, of *Thomson* v. *The Lord Advocate*, already noticed, one of the questions involved was whether a judgment which was binding on the heritors was not also binding on the titular, and it was held to be binding,—Lord Gifford—whose judgment as Lord Ordinary was affirmed by the Court—remarking that if the judgment was binding on the heritors it was difficult to hold that it was not binding on the titular and the holder of the bishop's teinds.

Judgment on this principle and to this effect was also very recently given in the case of *Lady Willoughby D'Eresby* v. *Speir*, 14th December 1876 (14 Scot. Law Rep. 162), where the Lord Justice-Clerk remarked—and his views seem to have been concurred in by the rest of the Court—"It was ingeniously argued that in these proceedings"—the proceedings in a former locality—"the other heritors were not concerned, but I think that where the question was actually raised and discussed upon its merits that was enough to make it *res judicata* against all.

I am therefore, on the grounds I have now stated, of opinion, in concurrence with the Lord Justice-Clerk, that in the present case the reclaimer's plea of *res judicata* ought to be sustained.

Lord Mure—As I concur with the Lord Justice-Clerk and Lord Ormidale, and as Lord Ormidale has explained very fully and exactly the steps of procedure in the old process of augmentation and locality, which in his opinion form a good foundation for a plea of *res judicata*, I shall follow the course taken by the Lord Justice-Clerk, and endeavour to state shortly the grounds of my opinion.

The question which we are called on to decide is raised by Mr Dundas of Arniston in his objections to a state of teinds prepared by the common agent in the locality of the parish of Borthwick,

in which a portion of his property has, as he considers, been improperly inserted as liable to be localled on for stipend. I understand that this property has never been localled on before, and it is said that the reason why it has been so dealt with up to this date is that it was decided in a process of augmentation and locality raised in 1795 that the property was held under a *decimæ inclusæ* right, and was not liable in stipend. This claim of exemption is now opposed on the part of the minister of the parish, but is not, as I understand, resisted by any of the heritors, and the question for consideration is whether the proceedings in the previous augmentations and localities of 1795 and 1807, in the former of which the lands in question were ordered by the Court to be struck out of the rental given in by the minister because they were held under a *decimæ inclusæ* title, and in the latter of which the fact that the lands were so held was alleged or admitted by all parties in the question there raised between the heritors and the minister, are sufficient to constitute a *res judicata*.

In the first augmentation of 1795 the question whether Mr Dundas' lands were held under a *decimæ inclusæ* title is raised and stated in a simple and very distinct shape in a minute of objections of the 2d December 1795 relative to the rental founded upon by the minister as the basis of his claim to an augmentation, which is in these terms:—"Mr Dundas of Arniston and the other heritors represented that the following lands, viz., the lands and town of Arniston, called the Mains of Arniston, these four score and one acres of the lands of Schank, part of the Mains of Arniston, and the land called the Park of Halkerston, all lying in the said parish, were holden by Dundas of Arniston *cum decimis inclusis*, and therefore craved that these lands might be struck out of the rental; as also represented that the teinds of the lands of Harvieston and pendicles thereof called Bog End and Haughead, pertaining partly to Dundas of Arniston and partly to Cranstoun of Harvieston, were valued conform to decreet of approbation approving of the valuation of the sub-commissioners, &c. Therefore craved that the rental of the whole foresaid lands before specified contained in the respective decreets of valuation and approbation above mentioned ought to be restricted accordingly."

Appended to this claim there is the following statement made on the part of the minister—"John Clerk, for the pursuer, craved avizandum with the decreets of approbation and valuation produced and condescended on, and that the heritors who have no decreet of valuation may be holden as confest on the rental libelled."

The leading question therefore which was here submitted to the Court for consideration was whether the lands of Mr Dundas' predecessor should be struck out of the rental. This was done on the motion of the minister, the pursuer of the augmentation, with consent of the other heritors, and it is, in my opinion, most important to observe that in the minute the question is distinctly raised for consideration whether in respect of the lands being held as alleged *cum decimis inclusis* they should be struck out of the rental?

That minute having been lodged with the crave made by the counsel for the minister, the Court pronounced an interlocutor ordaining "the lands and Mains of Arniston, those four score and one acres of the lands of Schank, part of the Mains of Arniston, and the lands called the Park of Halkerston, to be struck out of the rental," thereby giving effect to Mr Dundas' claim; and they at the same time made avizandum with the "decreets of approbation produced and condescended on, held the heritors who have no decreet of valuation as confest on the rental libelled, and remitted to Lord Glenlee to prepare the cause." By this interlocutor, therefore, as I read it, the lands of Mr Dundas here in question were struck out of the rental founded upon by the minister on the assumption and for the reason expressly stated by him in the minute, with the concurrence of the other heritors, viz., that they were held *cum decimis inclusis*, and to the proceedings following upon which minute the minister was admittedly a party.

Now, we have here, as I humbly think, all the elements necessary to establish a *res judicata*. The question is raised between parties who are respectively the predecessors of those now before us. It was done in competent form, viz., by regular minute given in for the heritors, duly submitted to the Court for consideration, and given effect to by their interlocutor; and if this had been done in any other than a teind process I have not been able to see any grounds on which the plea of *res judicata* founded on such proceedings could be successfully resisted.

It was argued that there was here no decision or *judicium*, because what the Court did was done, not after discussion, but on a mere minute or motion, and because the mind of the Court was never applied to the judicial consideration of the merits of the question. Now, as matter of fact, there is no evidence to show that the mind of the Court was not applied to the consideration of the question raised in the minute, and the presumption, as I apprehend, is and must be that it was so applied. They are expressly asked in the minute to apply their minds to the question in order to decide it, and they decide it after making avizandum with that view.

It is, however, in my opinion, a mistake to say, as has been argued in this case, that the plea of *res judicata* cannot be maintained except where there has been a *judicium* in the sense of the Judge applying his mind to the judicial consideration of the merits of the question raised between the parties in the original proceedings. That may have been the rule, or there may at anyrate have been an impression that it was so, prior to the decision in the case of *Lord Hopetoun* v. *Ramsay*, March 2, 1841, 3 D. 685, and 5 Bell's App. 69, in which that rule was strongly contended for in this Court and in the House of Lords upon appeal; but since that decision I have always understood it to be settled the other way. For in that case there was certainly no such consideration of the merits of the question raised between the parties on the titles, when the interlocutor on which the *res judicata* was rested was pronounced. There, as here, there was a claim made to have the lands exempted from stipend as held under a *decimæ inclusæ* right, but it does not appear that any titles were produced. That claim was answered and disputed, but ultimately the common agent did not insist on his objections, and the interlocutor was pronounced of consent, which was held to be *res judicata*. Now, this was done

on a mere motion at the bar, and without the Judge having seen and considered the titles in the case, and the circumstance that at the time the interlocutor was pronounced the titles, which it was alleged did not constitute a valid *decimæ inclusæ* right, had not been seen by the pursuers of the reduction, was made a special ground of reduction, while the circumstance that there had thus been no *judicium* by the Judge was strongly rested on in the pleadings in this Court and in the appeal case as a reason why the interlocutor should not be held to constitute a *res judicata*.

But interlocutors of consent are not the only interlocutors which have been held to be sufficient to constitute *res judicata* although there has been no consideration by the Judge of the merits of the case. The same rule has been applied in the case of interlocutors by default, as was decided in the case of *Lumsdaine* v. *The Australian Company*, December 18, 1834, 13 S. 215, where there was beyond doubt no judicial consideration by the Judge of the merits of the questions raised. And it has also been acted on substantially in cases where a party proceeding upon erroneous information has allowed the Court to pronounce a decree against him on the footing that the information was correct—*M'Alister*, June 29, 1827, 5 S. 871, and 4 Wilson and Shaw, 142. The interlocutor here in question is not one by default. Neither does it bear to be one pronounced of consent. But it is one which evidently proceeded upon the assumption that neither the minister nor any of the heritors objected to the accuracy of the statement in the minute that Mr Dundas' lands were held *cum decimis inclusis*. For they all substantially assented to the Court dealing with the case on that footing when it was moved that avizandum should be made with the minute.

Such being the rules relative to the plea of *res judicata* which have been applied in ordinary civil actions, and also to interlocutors pronounced in processes of locality, the question here arises whether there is any good reason why they should not be applied in other teind processes, and in particular to interlocutors pronounced in an augmentation. There is no abstract incompetency that I can see in the Court entertaining the question in an augmentation process whether certain lands are to be exempted from stipend by reason of a *decimæ inclusæ* title. It is for the Court itself therefore to consider in each case as it arises whether they will dispose of such a question in dealing with the augmentation, or reserve it for discussion in the subsequent locality. But I see no incompetency in their taking the former course should it appear to them proper to do so. Now, in the augmentation of 1795 the Court did entertain the question, and gave effect to the claim of exemption; and I am unable to see any sufficient reason why a decision so pronounced in a process of augmentation, when it is fairly raised and entertained by the Court, should not be held to be binding and conclusive between the parties who obtained it and agreed to take the decision of the Court upon their rights at that stage of the cause. It is just as expedient—indeed I rather think that in many cases it might be much more expedient—to do so then, and to dispose of it at once if distinctly raised, as the Court did in 1795, than to let it stand over for the tedious and always protracted proceedings in the locality, which have been referred to.

It was suggested at the discussion as an objection to this view that such a decision could not be appealable. That, however, is a mistake, as in the case of *Milligan*, July 8, 1784, 2 Pat. App. 621, it was decided by the House of Lords that that House had jurisdiction to review the judgment of the Court of Teinds pronounced in an augmentation process. So that if this Court was wrong in the course they took in 1795 their decision might have been appealed.

It was further contended that the minister had no interest to raise or maintain the question. That, I think, is also a mistake. He has plainly a material interest in all processes of augmentation to make the teindable rental as large as possible. We need not go further than the proceedings in the augmentation of 1807 to be convinced of this. For the pleadings show that the fact of its having been decided in the augmentation of 1795 that the lands were held *cum decimis inclusis*, and should be struck out of this rental, was founded upon as a reason why the augmentation of 1807 should not exceed, or rather should be reduced to, 8 chalders, and the fact that it was so decided was given effect to in the judgment then pronounced.

On these grounds, I concur with the Lord Justice-Clerk and Lord Ormidale.

Lord Gifford—The question before us is confined to the plea of *res judicata* stated for Mr Dundas of Arniston, and that is the only plea which falls to be disposed of at the present stage of the cause.

The question arises upon objections stated by Mr Dundas of Arniston to the state of teinds and scheme of locality prepared by the common agent, in which state of teinds and scheme of locality the common agent proposes to local upon the teinds of certain lands belonging to Mr Dundas, being 81 acres of the lands of Schank, part of the Mains of Arniston, the teinds of which the common agent holds to be unvalued and available for the stipend. Mr Dundas objects to the teinds of the said lands being included in the locality, on the ground that the lands of Mains of Arniston, of which the 81 acres are part, are teind free, being held upon a valid title to the lands *cum decimis inclusis et nunquam antea separatis*. The validity of the alleged *decimæ inclusæ* right however is challenged, and the minister who has now in the present process and for the first time an interest to have these teinds included in the locality in order to make good his stipend as recently augmented, supports the common agent's view, and maintains that the heritor has no valid *decimæ inclusæ* right. The validity of the alleged *decimæ inclusæ* right therefore forms what may be called the merits of the question, and upon this the parties have also joined issue, but Mr Dundas has taken the preliminary plea that the validity of his alleged *decimæ inclusæ* right has already been judicially tried and determined in his favour in a previous process or processes of locality, and he insists that it is not competent for the common agent or for the minister to object to the validity of the *decimæ inclusæ* right in this process or in any other process, the question having been finally tried and determined, as he says, once for all in the beginning of the present century. The question is of some importance, both to Mr Dundas and to the minister, and it is said to affect not

only the 81 acres now in question, but the whole of the lands of Mains of Arniston, which are of considerable extent.

I am very clearly of opinion that the plea of *res judicata* is ill founded, and ought to be repelled, and that the validity and effect of Mr Dundas' right of *decimæ inclusæ*—that is, the merits of the question between the parties—have been competently raised and must be decided in the present process. It appears to me that there never has been in any of the former processes of locality any *res judicata*, any discussion, or any judgment whatever regarding the validity of Mr Dundas' right, and that it is perfectly open for the minister or for the common agent now to object to the *decimæ inclusæ* right, and to obtain, I think for the first time, a judgment upon that question.

Of course I concede to the fullest extent that if the question regarding the validity of the alleged *decimæ inclusæ* right has really been tried and judicially determined in previous processes of locality or in any of them, this will be binding on both parties, and the Court will not try the same question over again merely because this is a new process of locality, or because the minister has got a new or augmented stipend. This was admitted on both sides of the bar. Whenever in a competent process of locality a question of this kind is really tried and really decided judicially *causa cognita*, the judgment will be binding between the same parties or their representatives, not only in the particular locality in which the decision was pronounced, but in all subsequent localities of the same parish. I take this for granted, and the only question therefore is—Was there really a judgment—a *judicium*—a *res judicata* in the former process of locality determining the very same question which is now sought to be raised. If so, then the plea of *res judicata* must be sustained.

Now, in order to see whether there was really a *judicium* or judgment on the merits of the question now sought to be raised, it is necessary and very important to keep in view what that question really is,—we must see conclusively that the question now sought to be raised is the same question which is said to have been raised, tried, and decided in a former locality, and farther, we must see that there was in the former locality a real and true decision of that very question. Unless both these requisites concur, there can be no effectual *res judicata*.

The question which is said to have been decided in the beginning of the present century is that Mr Dundas' author, then the Lord Advocate of Scotland, had a valid and effectual *decimæ inclusæ* right to the teinds of the Mains of Arniston, comprehending *inter alia* the 81 acres now in dispute. The validity of a *decimæ inclusæ* right depends upon a great variety of considerations and in quiries, all of which are attended with difficulty and delicacy. Indeed, the question whether a *decimæ inclusæ* right is valid or not is always one of the most difficult and intricate questions in the law of teinds. The right must be shown to have existed as such prior to the Act of Annexation; the lands must be shown to have belonged to one of the privileged orders of churchmen—to the Cistercians, Hospitallers, or Templars. It must be shown that there never was any separation between the lands and the teinds, and this for a continuous period of centuries. The words or precise terms of the titles are subjected to the most rigorous scrutiny, and it is not sufficient to show from the title and from all the titles that the teinds are described as *decimæ inclusæ*, it must also be shown that they were continuously held under deeds describing the teinds as *nunquam antea separatis*. If the teinds were once feued out separately for ever so short a time, this will utterly destroy the *decimæ inclusæ* right. Questions like these, and a great many similar questions, form the merits upon which the validity of a *decimæ inclusæ* right ultimately and always turns, and when a *decimæ inclusæ* right is said to be *res judicata*—that is, the subject of a final and conclusive judgment—it is important to see—I think it is necessary to see—that all these questions (for we see they all arise in the present case) were competently raised, and were either in the view of the Court or were at least disposed of by the Court in pronouncing the judgment founded on as *res judicata*. No doubt parties may make a binding compact or bargain without going into the merits of a question, and a bargain fairly made will be binding as such according to its true terms and import, but this is a totally different thing from a *res judicata*, and will have different effects. I shall advert to this distinction again, for I think it has led to some of the confusion in the present case. In the meantime I only notice that a bargain between litigants in a particular process will in general only bind the litigants in that process and in reference to the particular and limited conclusions thereof. It will not, unless it is specially so expressed, bind the party beyond the conclusions of the action, or to any wider or greater extent than that reached by the action itself. Hence a mere compact in any locality differing herein most materially from a *res judicata* will only bind the parties in reference to that locality, and will not be applicable to future or new augmentations, unless there be an express covenant to this further effect.

Now, what is the judgment, or what are the judgments if there are more than one, upon which Mr Dundas founds as *res judicata*—that is as a judgment or judgments conclusively determining that his alleged *decimæ inclusæ* right is valid and effectual, and that his 81 acres are teind free. Of course I confine myself to the 81 acres, for however it may be with the general lands of Mains of Arniston, the only question in this process is regarding these 81 acres alone.

The first interlocutor on which Mr Dundas founds was pronounced on 2d December 1795 in a process of augmentation and locality which had been raised by the then minister of Borthwick in March 1795. I say this interlocutor of 2d December 1795 is the first interlocutor on which Mr Dundas founds his plea of *res judicata*, but I must add that I cannot find any other interlocutor either in the augmentation and locality of 1795 or in the subsequent locality of 1807 which has the slightest bearing on the question — I mean which can in any way be said to decide the question now sought to be raised. It is essential, then, to see what was done on 2d December 1795, for to my mind the interlocutor of that date is the only interlocutor which has any bearing on the validity of the alleged *decimæ inclusæ* right.

In 1795, then, the minister of Borthwick brought a process of augmentation and locality—that is, he sought an augmentation of his stipend

—and concluded that the augmentation if granted should be localled, that is, apportioned among the various heritors liable therefor. The first question in every augmentation is, Whether or not the minister is to receive any augmentation of his stipend, and if so, how much, and it is only in the event of an augmentation being granted that the question of locality—that is, of its apportionment among the heritors—arises at all. If the augmentation be refused, there is no need for, and there cannot be, any process of locality. The old stipend and the old locality thereof remain untouched.

In the augmentation and locality of 1795 the minister, in conformity with the uniform and invariable practice, gave in a rental showing to the best of his knowledge and belief the whole teindable rents of the parish. This is called the minister's rental, and the giving in of this rental by the minister is the first step in every augmentation. It is intended to afford the Court one of the *data* on which they are to proceed in giving or refusing an augmentation. Of course the minister in giving up the rental must proceed upon very imperfect information. In general he knows nothing of the state of the titles of the various heritors in the parish. He only knows the lands and the state of their occupation, and unless he happens to have information to the contrary, he assumes, and is entitled to assume, that all the lands are subject to the payment of teind. Accordingly the minister's rental most commonly is just a rental of the various farms in the parish. So it was in the present case; the rental given in by the minister included as subject to teind the 81 acres part of the Mains of Arniston. The rent of these acres was included in the slump rental of Mr Dundas' lands—that is, of the lands which then belonged to the Lord Advocate, who was the predecessor of the present Mr Dundas. On 2d December 1795, and before any augmentation of stipend was granted, a minute was lodged for the then Mr Dundas of Arniston and other heritors, in which it was stated that certain of the heritors held valuations of their teinds, and that their rentals would fall to be reduced to their valued rents. It was further stated that certain lands, and in particular the 81 acres now in question, should be struck out of the minister's rental as being held *cum decimis inclusis*.

The counsel for the minister thereupon craved avizandum with the decreets of approbation and valuation, and asked that the heritors who have no decreets of valuation might be holden as confessed on the rental libelled. Thereupon the Court of Teinds pronounced the following interlocutor on 2d December 1795, being the same day and probably at the same time at which the minute was lodged—"The Lords ordain the lands and Mains of Arniston, those four score and one acres of the lands of Schank, part of the Mains of Arniston, and the lands called the Park of Halkerston, to be struck out of the rental; make avizandum with the decreets of approbation produced and condescended on; hold the heritors who have no decreets of valuation as confest on the rental libelled; and remit to the Lord Glenlee to prepare the cause." (Sigd.) "ILAY CAMPBELL, *I.P.D.*" This is the first interlocutor upon which Mr Dundas founds, and I think it is the only interlocutor on which he can found in any view as constituting *res judicata* that the 81 acres are teind free. The date of the interlocutor, which is written on the minute itself, is that of the lodging of the minute, 2d December 1795, and so far as appears no discussion of any kind took place; most certainly, as I shall show immediately, there were before the Court no materials for effective discussion.

Now, the first question is, Does this interlocutor of 2d December 1795 form a *res judicata*, to the effect that the Mains of Arniston, including the 81 acres now in question, are teind free. I will afterwards consider whether there is any subsequent interlocutor which can have this effect. It appears to me that the striking the 81 acres out of the minister's rental on 2d December 1795—and this was all that was done—was not in any sense a judgment on the validity of Mr Dundas' alleged *decimæ inclusæ* right.

In the first place, no such point could be decided at that stage of the process. The adjustment of the minister's rental is not intended to settle the rights of any of the heritors even finally or even *ad interim*. Its only purpose is to furnish to the Court data or *prima facie* data upon which the Court may decide whether any augmentation of stipend shall be granted at all, and if so, to what extent, and accordingly it was not till after the minister's rental was so adjusted that the Court by interlocutor of 13th January 1796 granted the augmentation and fixed the amount of the stipend. If the augmentation had been refused, there would have been an end of the process altogether, and nobody has contended that in that case there could have possibly been any *res judicata* at all excepting only the judgment of the Court that *hoc statu* the minister had a sufficient stipend without any augmentation at all. It appears to me that the case is not different, so far as the heritors' rights are concerned, that an augmentation was granted. The mere circumstance of the granting an augmentation cannot convert the interlocutor of 2d December 1795 into a *res judicata* if it would not have been *res judicata* had the augmention been refused. It is explained in Mr Connell's Work, and we all know it to be the universal practice, that the adjustment of the minister's rental is a mere step to give the Court a *talis qualis* view of the teinds to enable them to judge of the augmentation, and for no other purpose.

In the next place, the 81 acres were struck out of the minister's rental without any inquiry, and, so far as appears, without any discussion, on the same day that the minute for Mr Dundas was lodged. What was done was really at the very most, and in a most favourable view for Mr Dundas, a protest that his 81 acres were teind free, and that he should not be held as confessed thereon, and accordingly he was not held as confessed, for his lands were taken out of the minister's rental while other heritors were held as confessed thereon. But holding heritors as confessed is not and can never be *res judicata* as to any of them in the locality where their true rental is ascertained.

The proven rental, that is, the rental upon which the heritors are held as confessed, or which is adjusted by the Court in any other way, although conclusive on the question of augmentation, is no farther binding upon anyone either in that process or any subsequent process of locality. Accordingly, when the augmentation is granted, and

a common agent is appointed, it is the duty of the common agent to make up the interim scheme of locality. In doing so he is not bound to adopt the proven rental either in whole or in part. It is the duty of the common agent to obtain the title-deeds of the lands and to make inquiries for himself. He may, if he see cause, omit lands upon which the heritors have been held confessed, or he may vary, either by increasing or diminishing, the rental given up by the minister. He may insert heritors or lands which the minister had omitted. In short, he may and must make up the scheme of interim locality for himself. All this is matter of familiar practice, and is done every day. It is only after the common agent has prepared an interim locality that the time has come for the heritors or any of them raising and trying any questions regarding their teinds—questions regarding either their exemption from teind or their liability for stipend. Such questions are raised by objections to the interim locality. On such objections a record may be made up, and questions of the greatest importance tried and decided. Judgments in such cases *causa cognita* will almost always form *res judicata*, but there is the strongest distinction between such judgments and a mere adjustment of the minister's rental.

In truth, the effect of striking out the 81 acres from the minister's rental is exactly the same as if the minister had not given up these 81 acres in his rental, but had simply omitted them therefrom from any reason whatever. Now, the simple omission of lands from a minister's rental can never be *res judicata* of anything, for issue has never been joined upon any question, and no judicial inquiry or judgment has followed thereon. This is precisely what took place in the present case.

Still further, the striking the 81 acres out of the minister's rental on 2d December 1795 cannot be *res judicata* of anything, because there were then no materials before the Court for any judgment. Mr Dundas' titles, on which alone the validity of his alleged *decimæ inclusæ* right must turn, were not produced with the minute in 1795, and were not produced or lodged in process at all till two years afterwards, and they were then produced for a different purpose altogether. How could the Court on 2d December 1795 adjudicate upon the nature or validity of titles which were not then before them, and which neither the minister nor anyone else except Mr Dundas himself had ever seen, and which were not at that time referred to for any purpose whatever. A minister suing for augmentation knows nothing whatever about the state of his heritors' titles. He gives up the rental of the parish because that is a material element in fixing the stipend or any addition or augmentation thereto, and if there is enough of teind in the parish to pay the augmentation which is awarded, it is a matter of entire indifference to the minister out of what lands the augmentation comes.

This circumstance really explains how in the present case the 81 acres were struck out of the rental without any objection from the minister. There was plenty of teind apart from the 81 acres to satisfy not only the existing stipend but any augmentation thereof which might be granted, and it would have been utterly unreasonable in the minister to have raised a question in which he had no pecuniary interest whatever. The state of teinds made up by Lord Glenlee shows that there was abundant free teind not only to satisfy the augmentation granted in 1796, but also to satisfy the next augmentation granted in 1807, and that without anything being laid upon the 81 acres now in question, and accordingly the then minister of Borthwick and his successors for 70 years have enjoyed both these augmentations, and no part thereof has been levied from the 81 acres now in question. It is only the augmentation recently granted in 1876 which has made it necessary for the present minister of Borthwick to have recourse to the mains of Arniston, and to raise the question for the first time whether they have any legal or valid right of exemption, and this is the question which he now asks us to answer.

I need scarcely remark, in passing, that all interlocutors in the augmentation and locality, if acquiesced in or if affirmed on review, are binding and final in that process, and for the purposes of that process, just as all interlocutors are in all processes. But this is a totally different thing from such interlocutors forming *res judicata* so as to bar the parties from thereafter raising questions of right. To constitute a *res judicata* there must be issue joined by the same parties in a competent process for the final determination of the question. The judicial mind must be applied to the question, and a judgment given determining the same. Judgments by default, judgments in absence, orders of all kinds in a process, however binding, are not in the strict sense of the word *res judicata* unless there has been issue joined and judgment given *causa cognita*. Such orders may be and are all binding and final in the process in which they were pronounced, but where there has been no real *judicium* they can never constitute *res judicata* in any subsequent process which involves, as in the present case, different conclusions, wider claims, and wider liabilities.

It remains now to be seen whether there is any subsequent interlocutor or interlocutors after December 2, 1795, on which the plea of *res judicata* can be rested, and passing over various immaterial procedure the next interlocutors founded upon by Mr Dundas are those of January 12, 1796, January 13, 1796, June 23, 1797, and July 5, 1797. By these interlocutors the augmented stipend was modified—that is, fixed—and an interim rule of payment thereof among the heritors was established—an interim rule, that is, a rule of payment to be observed until the exact proportions payable by each heritor were finally determined in the locality. I do not think it can be said that any of these interlocutors constituted *res judicata* on the question now raised. They could not do so for the simple but sufficient reason that they were mere interim interlocutors, binding only until inquiry was made and until a final locality was adjusted. None of these interlocutors can touch the present question, because the 81 acres, part of the Mains of Arniston, which were struck out of the minister's rental in 1795, were never brought back into the locality at all. They were never replaced in the scheme of locality and payment—they were never inserted in any amended rental, and no part of the stipend or augmentation was ever proposed to be allocated upon them. In short, no question whatever was raised with respect to them, and the interlocutors refer to other matters. A ques-

tion that was not raised could never be judicially decided or constitute *res judicata.*

It is true various questions were raised in the locality and various decisions were pronounced, but none of them had the remotest resemblance to the question, whether the 81 acres, part of the Mains of Arniston were teind free, or whether they were held on a valid and sufficient *decimæ inclusæ* right. Questions arose between Mr Dundas of Arniston and Mr Dewar of Vogrie, who objected to the rectified scheme of locality—that is, to the scheme of locality which had been made up after the 81 acres were struck out. But it was no part of Dewar of Vogrie's objections that these 81 acres should be replaced or put in again as proper teindable subjects. Vogrie never asked this to be done. On the contrary, he confined himself to insisting that certain other lands which were not parts of the Mains of Arniston should be included, and in particular that a part of the lands of Schank which had originally been got in exchange for the 81 acres should be included in the locality and localled upon. There were also questions as to what Mr Dundas was bound to show as to the extent of the Mains, and on these points a record was made up by objections, answers, replies, duplies, triplies and quadruplies, and the result was a judgment by Lord Glenlee on 17th June 1800, when his Lordship repelled Vogrie's objections. But this judgment and the objections repelled had no reference whatever to the 81 acres now in question or to the title thereto, and however final Lord Glenlee's interlocutor might be it could never decide the point now raised as to the 81 acres of Arniston, for that question was not before the Court. At the same time, it does not appear to me that Lord Glenlee's interlocutor of 17th June 1800 was *res judicata* of anything. At that period, and according to the then constitution of the Teind Court, Lord Glenlee was a mere commissioner to report to the Court, and as no report was ever made and no judgment of the Court was ever taken, it is difficult to see how any *res judicata* could ever arise. But all this is in addition to the essential want, the want of the present question ever having been truly raised and truly tried anywhere.

In the locality of 1795 no final judgment was ever pronounced at all. There was no approval of a final state and no final decree of locality. There was a great deal of procedure with a view to adjusting a final locality, with which we have nothing to do in the present case, but there never was a final locality approved of. Matters were allowed to remain on the footing of the interim locality, and so they stand for aught that appears at the present moment. In short, the process, for anything that appears therein, is still a depending process. The truth is, it was merged in the subsequent augmentation brought by the minister in 1807, in which the minister got a second augmentation, and this virtually superseded the augmentation and locality of 1795. In strictness an interim locality which has never been approved as final is not a judgment at all but a mere interim arrangement. It is always competent after whatever lapse of time to object to a mere interim locality. Though it may be binding as to bygone, an interim locality can never be final as to the future.

Nothing done in this second locality and augmentation of 1807 can avail the present objector Mr Dundas of Arniston, for this simple reason, that the 81 acres now in question were not given up in the minister's rental in the augmentation of 1807, and nobody ever moved to have them inserted either in the minister's rental or in the subsequent locality. Accordingly the question was never raised and never adjudicated upon at all in the locality of 1807 or anywhere else, till it has been raised in the present locality.

None of the authorities or decided cases referred to by the reclaimers are at all applicable to the present. The case which seems to come nearest to the reclaimer's contention is that of the *Duke of Buccleuch* v. *The Common Agent in the Locality of Inveresk*, 10th November 1868, 7 Macph. 95. In that case a plea of *res judicata* stated for the Duke of Buccleuch was sustained, on the ground that the question had been decided in a former process of locality. But in that former process of locality the question had been raised, not in adjusting the minister's rental as in the present case, but upon formal objections to the interim locality, and upon this objection a record had been made up. With his pleadings in the early locality the Duke had produced his titles, and it was upon advising the pleadings with the titles that the Lord Ordinary sustained the *decimæ inclusæ* right and exempted the lands. This was a judgment upon the very point raised, given in competent form at the proper time and *causa cognita.* But the matter did not rest there. The common agent represented against this interlocutor which had disposed of various other points, but he expressly acquiesced in the decision as to the lands of Smeaton being the lands to which the *decimæ inclusæ* right applied. On this representation the interlocutor was recalled except as to the lands of Smeaton, and thus the *decimæ inclusæ* right applicable to Smeaton was finally given effect to. This judgment was held to be *res judicata*, and quite properly so, but the case forms a contrast to the present one and is in no sense a precedent in favour of Mr Dundas.

On these grounds, I am of opinion that the plea of *res judicata* must be repelled, and that the Court must proceed to consider upon its merits the validity of Mr Dundas' alleged *decimæ inclusæ* right.

Lord Shand—I am of opinion that the judgment of the Lord Ordinary repelling the plea of *res judicata* stated by the objector Mr Dundas should be adhered to. I concur also in the grounds of the opinions to that effect which have been given by Lord Deas and Lord Gifford.

I shall only therefore—following the course taken by the Lord Justice-Clerk—endeavour to summarise the reasons upon which I have come to that conclusion.

It is important for the decision of this case to keep in view the distinction which exists in questions of this kind between the plea of personal bar arising from the conduct of a party in a litigation, and the plea of *res judicata.* A party may so act as to bar himself from maintaining a particular contention or plea—he may contract to that effect in the course of a litigation by the terms of his pleadings, and he may even carry that so far that the contract may, as Lord Gifford has observed, not only apply to the particular action in which the pleadings have taken place, and to the conclusions of that action, but to future actions to which he becomes a party, and

which distinctly relate to the same matter. But I apprehend that a plea of *res judicata* which shall exclude a party from taking the judgment of the Court upon any question that has arisen in a litigation must be determined on very different considerations. I agree with Lord Deas and Lord Gifford in thinking that it is essential to *res judicata* that there shall have been a question of right determined by the Court—that the mind of the Court has been applied to the point decided upon issue joined between the parties—in short, that there has been a judgment of the Court *causa cognita.*

Applying these views to this case, it appears to me that the objection of *res judicata* cannot apply. Personal bar is of course out of the case, and, indeed, is not pleaded. The present minister of this parish cannot be bound by the mere course of pleadings by his predecessor in an action at his instance, or by concessions on questions of law made by him which could affect himself only. *Res judicata* appears to me to be equally out of the case, upon the ground that there is nothing in the proceedings founded on which can be regarded as a judgment of the Court taken on the question of the validity of the objectors' alleged *decimæ inclusæ* right.

The plea for the objector is founded, if not exclusively, certainly mainly, upon the interlocutor of 2d December 1795 in the process of augmentation, by which the Lords ordained the lands of Arniston to be struck out of the rental. That interlocutor was pronounced in the course only of the proceedings for disposing of the minister's application for an augmentation of his stipend. I think such an interlocutor in a process of augmentation cannot be regarded as a judgment which could have effect in the process of locality which followed, or which can have effect in the present process of locality, which follows on an entirely different decree of augmentation.

Lord Deas has fully explained the distinction between the process of augmentation originating in an application by the minister for an increase to his stipend, which is heard before the Commissioners of Teinds, who exercise really an administrative rather than a judicial function in determining whether, in the whole circumstances of a parish, any augmentation of stipend should be given, and, if so, how much, and the separate process of locality, which arises only if an augmentation be given, for the purpose of allocating the new stipend among the heritors, and is carried on before the Lord Ordinary, and thereafter, if necessary, brought by way of review before one or other of the Divisions of the Court. I venture to say this is the first case in which it has been suggested that the interlocutor of the Court, with reference to the minister's rental, which occurs in every augmentation, should be held as final in questions arising even in the after process of locality which immediately follows, much less as conclusive in a subsequent process of locality following on another augmentation.

In order to enable the minister to obtain an augmentation he produces with his application a statement of the teindable rental showing that there is free teind to meet the augmentation asked. This rental is laid before the Court, not for the purpose of settling any rights or obligations as between the heritors liable to pay stipend, but simply to give the Court a general view of the state of the teinds in the parish. It humbly appears to me, and I have always so understood, that the minister has no real interest in the rental beyond this, that he can show the Court that there is sufficient free teind to meet the addition to his stipend that is asked. In the particular case before us, taking Mr Dundas' lands as struck out of the proven rental, there was enough of free teind left to meet not only the augmentation which was given in the process of 1795, but also the augmentation given in the subsequent process of 1807. Where, then, was the interest of the minister to litigate with Mr Dundas as to whether his lands were held under a *decimæ inclusæ* right or not, or to take a judgment of the Court on that question? It is said that it is of some advantage to the minister to be able to say there is a great deal of free teind instead of showing merely that there is sufficient free teind or, as in the case before us, double the amount of free teind required to meet the augmentation. But there is really no substance in this observation. It can only be justified in the view of treating the Court as a jury not dealing with questions of legal right. The primary object of all teinds is the provision of an adequate stipend to the minister serving the cure, and if there be free teinds in the parish the minister is entitled to have them whether there be much or little, should the circumstances of the charge be such as to satisfy the Court that he is entitled to an augmentation. Accordingly, I venture to say that as matter of practice it is not by any means unusual when a minister applies for an augmentation on a rental which he has given in, that if certain of the heritors, alleging either that the teinds of their lands are valued or held under *decimæ inclusæ* rights, appear and ask that these lands shall be taken out of the rental, the minister, and if he knows there is free teind enough for the augmentation asked, he accedes to the request, knowing that he has no reason or interest to resist it, and that anything done in this way in the proceedings to fix the amount of stipend cannot affect the rights of parties in the process of locality, in which alone questions determining the legal rights and obligations of the heritors are determined.

It would lead to an entire change in the practice, and lay a serious burden on ministers, if the objector's contention were sustained, and an interlocutor ordering lands to be struck out of the proven rental were held to be *res judicata* in the process of locality. In that view it would become necessary for the minister in the interest of himself and his successors, before moving for an augmentation to contest every question raised by heritors as to the lands to be included in the rental. This course would infer often expensive and protracted litigation, which ought not to be thrown on the minister, and that on questions in which frequently he has no real interest.

A conclusive argument against the contention of the objector will, I think, be found in the proceedings which actually occur in by far the greater number—I should say in nine-tenths—of the processes of augmentation that are disposed of. In these cases the usual interlocutor of the Court, pronounced on a Court day before that on which the augmentation is heard, is, "to hold the heritors as confessed on the rental libelled." If

the argument of the objector were sound, this interlocutor must be *res judicata* in favour of the minister, and none of the heritors included in the teindable rental could be heard to maintain in the process of locality following, or in a subsequent process of locality, that the teinds of any lands of his included in the rental were valued or held under *decimæ inclusæ* rights. It is sufficient to observe that such a contention was never heard of, and that it is matter of frequent and inveterate practice that heritors whose lands are included in the teindable rental instruct, by production of their rights and titles in the process of locality, that these lands are not liable to any part of the augmentation, but are either valued and have the teinds exhausted by prior augmentations, or are held teind free. So also in the converse case, heritors lodge a minute claiming that the teinds of their lands are valued and accordingly should be struck out of the minister's rental. This is acceded to, there being apparently free teind otherwise to meet the augmentation, and a *prima facie* case that the teinds of the heritor are valued. But in the process of locality, when the rights of parties undergo examination, all questions as to the validity of decrees of valuation, and their application to particular lands are open, and are discussed and decided without any reference to what took place before granting the augmentation. The true principle, which appears to me to be conclusive of the present question, is, that the interlocutor fixing the rental has the effect of determining the amount solely for the purpose of the process of augmentation—giving one of the various elements to be taken into view in the question whether an augmentation should be granted, and if so, of what amount,—and for no other purpose.

These considerations in my judgment dispose of the interlocutor of 2d December 1795. I am at a loss to understand what effect is meant to be attributed to the subsequent proceedings. There was certainly no judgment of the Court in any of these proceedings to the effect that the objector held his lands under a valid *decimæ inclusæ* right. The argument rather seems to be, that these proceedings are confirmatory of the previous interlocutor of 2d December of 1795. But if that previous interlocutor be *res judicata* in itself, it requires no confirmation, and if it be not *res judicata*, the subsequent proceedings will not give it that effect.

What occurred in the subsequent proceedings was simply this, that all parties thought fit to make up a locality on the footing that the lands were held under a *decimæ inclusæ* right. The minister had no interest to raise the question. There were teinds enough to meet his demand. That state of matters is just what is met with in almost every locality in which questions are raised with the effect of imposing a new liability on one or more heritors who have hitherto escaped, because either the minister has had no interest to raise a question, or other heritors have been content to acknowledge alleged rights without sufficient investigation, or under a mistaken view of the law. In so far as liability under former decrees is concerned, the parties are bound by such acts and conduct. But a plea of *res judicata* will not avail to deprive them of their rights in regard to burdens or obligations arising out of a new augmentation where the point in controversy has really not been the subject of a judgment by the Court.

The case is one, unfortunately too common in recent years, in which a proprietor from his past immunity from the payment of stipend has had reason to believe he had right to be free in all time coming, but in which further discussion may show that this right does not exist. It is unfortunate that advantage was not universally taken of the legislation of 1633 so as to settle for all future time the limit of the burden of teind on all lands in the kingdom. The Court cannot by their judgment in any way make up for that omission. I can only express the hope that the great urgency for amendment of the law in reference to teinds in this country may lead to legislation on the subject at an early date.

Lord PRESIDENT—I agree with those of your Lordships who are in favour of repelling the plea of *res judicata*, and my views have been so fully expounded, particularly by Lord Deas and Lord Gifford, that I have nothing further to add.

The Court therefore repelled the plea, and subsequently on the merits—

At advising—

Lord GIFFORD—It has now been finally determined, in conformity with the opinions of the majority of the seven Judges, that Mr Dundas' plea of *res judicata* is not well founded—that is, that there has been no final and conclusive judgment of the Court affirming the validity of the *decimæ inclusæ* right on which Mr Dundas founds.

The preliminary plea of *res judicata* having been disposed of, it is now necessary to consider and decide what may be called the merits of the question raised on this record—that is, we are now to determine whether the *decimæ inclusæ* right claimed by Mr Dundas is or is not valid and effectual, and whether in virtue thereof the 81 acres of the Mains of Arniston are or are not teind free and exempt from any allocation for stipend in the present locality.

I am clearly of opinion that Mr Dundas has not established any valid *decimæ inclusæ* right to the 81 acres now in question, and therefore these 81 acres must be allocated upon in the present locality. I really cannot say that I have found much difficulty in reaching this conclusion.

It is always a very difficult thing to establish a valid *decimæ inclusæ* right. The general rule is that all lands in Scotland are subject to teind, and in all cases where exemption from teind is claimed the whole *onus* of proof lies on the party making the claim. Where the exemption is founded on an alleged *decimæ inclusæ* right then the claimant must produce written titles instructing all the requisites of such a right, and he must show historically that the land for which exemption is claimed had belonged to the proper religious orders and were of the description necessary to secure the exemption claimed. I may mention, quite generally and without detail, some of the leading requisites which are necessary to the validity and effect of a *decimæ inclusæ* right. The titles of the land must be traced to a churchman, and to one of the orders of churchmen who had the privilege of exemption from teind—the Cistercians, Hospitallers, and Templars. The titles must bear expressly that the

lands are held *cum decimis inclusis et nunquam antea separatis*, and this title must go back to a period anterior to the Act of Annexation. Both branches of the cabalistic words are necessary. The "*cum decimis inclusis*"—that is, the assertion that the lands were teind free in the hands of a privileged churchman and as privileged lands; and there must always be the additional words "*nunquam antea separatis*"—that is, the additional assertion that they never had been in any other position—that they never had been held by a separate tenure, but had always been either *labores* or *novalia*. Further, the privilege will be destroyed if it appear anyhow that there ever was a separate reddendo for lands and teinds. I need not notice other requisites, or go into further detail.

Now, on almost every point the present claim for a valid *decimæ inclusæ* right fails. Mr Dundas has not produced titles instructing the various particulars which are requisite to constitute a valid right of the nature claimed, but not only is a valid *decimæ inclusæ* right not instructed by the titles produced, but when carefully examined these very titles destroy the alleged right. The earliest title produced is the charter of 24th January 1563 by Queen Mary to James Sandilands, Lord St Johns of Torphichen. This charter contains the teinds, that is, it dispones them, but it does not contain a single word of their being "included;" still less is there any assertion that they were *nunquam antea separatis*. This of itself is fatal, for if the original title flowing from the Crown does not contain the "included" right, no subsequent subject proprietor had any power to create it. For Lord Torphichen or any of his sucessors to insert a *decimæ inclusæ* right in their subinfeudations when they had not such right in their own charter was manifestly incompetent. Indeed, it was a fraud upon the church—an attempt to make lands teind free which were not so. There is no charter either from the Crown or from the Pope conferring or confirming the right of exemption, and this of itself would be fatal.

But the charter of Queen Mary of 1563 absolutely extinguishes Mr Dundas' claim in another way equally conclusive. It contains separate reddendos for the lands and for the teinds. For the lands a money feu-duty is stipulated at two terms in the year. For the teinds, and as a reddendo for the teinds, Lord Sandilands is to support habile and fit ministers, according to the law and usage of the kingdom—that is to say, the teinds are to pay and be allocated upon for minister's stipend. It is hopeless, with such a provision of payment from the teinds, to maintain that the lands are teind free. I do not wonder that Mr Dundas clung with all his energy to the plea of *res judicata*—he really had no other hope—and perhaps the absolute hopelessness of this plea on the merits sheds a reflex light on the plea of *res judicata*, for I could not easily hold that the Court decided *causa cognita* that a *decimæ inclusæ* right was valid, which on the face of the very first and only Crown charter was so hopelessly and utterly untenable.

To go into other objections after this utter failure on the Crown title of 1563 is really needless. The first Lord Torphichen was not a churchman, but a mere titular, and the title has not been traced back to a privileged churchman. The lands have not been shown to be privileged lands either *labores* or *novalia*. The subaltern titles, which do speak of an *inclusæ* right, were never confirmed either by Crown or Pope, and they were ultimately extinguished by resignation *ad remanentiam*. Even in these subaltern titles the cabalistic words are incomplete— sometimes they want the "*inclusæ*" and sometimes they want the "*nunquam antea.*" Indeed, in the infeftments for 200 years the second part of the clause—the "*nunquam antea separatis*"—are awanting, as well they might be, seeing the separation is demonstrated by Queen Mary's charter of 1563. It is superfluous to say more. It seems to be true that in all the localities extant so far as we can trace them these 81 acres have been omitted—they have never actually paid teind; but this is not enough to give perpetual exemption. There is no prescription of immunity from teind, or from stipend, and if the minister has now at last discovered lands which will afford him augmentation, Mr Dundas may be well satisfied that he has escaped so long.

Lord Ormidale—I concur with your Lordship, and in addition I have only to remark that while it is settled law that in support of the exemption contended for by Mr Dundas there should be produced a title bearing date prior to the Act of Annexation, 1587, cap. 29; that it should be granted by a churchman of one of the regular orders of clergy; and that it be confirmed by the Pope before the Reformation, or by the King before the Act of Annexation—those requisites are awanting in the present case.

The Lord Justice-Clerk concurred.

The Court adhered.

Counsel for the Minister — Kinnear — Keir. Agents—Adamson & Gulland, W.S.

Counsel for the Objector — Lee — Moncreiff. Agents—J. & F. Anderson, W.S.

Saturday, February 8.*

FIRST DIVISION.

[Lord Adam, Bill Chamber.

SYMONS (M'MILLAN'S TRUSTEE) *v.* SMYTH AND M'MILLAN.

Right in Security—Bankrupt—Effect of unrecorded back letter by bankrupt acknowledging whole debt, where two bound ex facie *as principals under a bond.*

Certain subjects belonged to the extent of three fourths to a party who had become bankrupt, and the remainder to his brother. Both were bound conjunctly and severally in a bond over the whole estate, but there was a back-letter by the former acknowledging that the whole debt was his. This back-letter was not recorded.

Held—reversing the Lord Ordinary (Adam)

* Decided January 29, 1879.