were immediately below the falls two sets, I think, of salmon cruives, and these were very deadly to the salmon, and very few comparatively got up; and the case becomes still stronger when we see that besides using cruives, which was quite within his right, the Lord Lovat of these times seems to have narrowed the yairs and the meshes of the net to an extent greater than the law allowed. It is said that this was illegal, and so it was; but its illegality does not make it the less an important element in showing what the possession was. Practically, the result was that Lord Lovat by means of these cruives, with the additional assistance of the illegal meshes, could take all the salmon he wanted below the falls instead of going up above them; as expressed in argument, he took his crop of salmon at that point, but the crop he took there was that of the whole river. That, whether legal or not, is perfect possession of the whole river; and if there had been anybody above who had right to the salmon, it is impossible to imagine that they would have remained passive, and not objected to that mode of dealing with the salmon in this river. It is a valuable salmon stream, and if it belonged to different proprietors, upper and lower heritors, or even to the Crown, I think it may be said that they never interfered in the least with the entire possession which Lord Lovat and his ancestors had of the whole salmon upon this river. I have come without difficulty to the conclusion that there is here a possession and title sufficient to give Lord Lovat the salmon-fishings in this stream. But under his titles I think Lord Lovat cannot claim the salmon-fishings beyond the limits of his barony. It would require something very express in his title to give him a right to fishings, locally situated it may be in another man's barony, or at all events in another man's lands, and, separately, I do not think there is sufficient proof of possession outside the defender's barony."

But from this it follows that the Lord Advocate is right on the subordinate point, and that there should be such an alteration in the interlocutor as will prevent its being at any time contended that it is *res judicata* that the Crown has no right to grant the salmon-fishings *ex adverso* of the parts of the barony of Commermore which come down to the river. I do not think it necessary to inquire whether possession by the Lords Lovat of the fishings in the barony of Commermore from time immemorial could have explained these titles so far as to embrace more than was within the barony of Lovat, for no evidence sufficient to raise that question is given.

Interlocutor appealed from affirmed, with the qualification that after the words "*quoad ultra* sustain the defences" there be added the words "without prejudice, however, to any right of the Crown or its grantees to the salmon-fishing *ex adverso* of the lands of the ancient barony of Comarmore." Appellant to pay to respondent the costs of the appeal.

Counsel for Appellant—Lord Advocate (Watson) — Dean of Faculty (Fraser) — Pearson. Agent—T. W. Gorst, Solicitor.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents — Grahames, Wardlaw, & Currey, Solicitors.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, and Lord Blackburn.)

DUNDAS *v.* WADDELL.

(In the Court of Session, *ante*, Dec. 13, 1878, 16 Scot. Law Rep. 340, 6 R. 345.)

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. No one contesting that, 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, again calling upon the lands in question. The Court of Session, by a majority of four Judges to three, held 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. *Held* (*reversing* judgment of Court of Session) that as it was not incompetent for the Court to decide at any stage of the proceedings in a process of augmentation, modification, and locality that particular lands were teind free, and as that question had been fairly raised here in the presence of all parties and determined, the plea of *res judicata* fell to be sustained.

The questions for decision in this case arose in a process of augmentation, modification, and locality brought by the Rev. Walter Waddell, minister of the parish of Borthwick, against the heritors. Objections were lodged by Robert Dundas of Arniston to the state of teinds and scheme of locality. These objections were repelled by the Lord Ordinary (Rutherfurd Clark), and on appeal a Court of Seven Judges, by a majority of four —Lord Deas, Lord Gifford, Lord Shand, and the Lord President (Inglis) — to three (the Lord Justice-Clerk (Moncreiff), Lord Ormidale, and Lord Mure dissenting), affirmed the Lord Ordinary's interlocutor,—Dec. 13, 1878, 16 Scot. Law Rep. 340, 6 R. 345.

Mr Dundas appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, in this case, on the question of *res judicata*, which is the only question for the determination of your Lordships, the Lords of the Second Division of the Court of Session consulted with the Judges of the First Division; and your Lordships have the judgments of the Lord Justice-Clerk, Lord Ormidale, and

Lord Mure supporting the plea of *res judicata*—and the judgments of Lord Deas, Lord Gifford, and Lord Shand repelling it. With these latter judgments the Lord President concurred, and the Court accordingly rejected the plea by a majority of four to three.

My Lords, I should have felt great hesitation in dissenting from the opinion of the Court of Session, or even of a majority of the Court, if the question had been a question of Scotch teind law. In the view, however, which I take of the case, the question appears to me to be rather one of the proper construction to be put upon certain proceedings of the Court nearly a century old—a question upon which it is not unnatural, as indeed is shown by the division in the Court below, that judicial minds should differ.

The present proceeding is an action of augmentation, modification, and locality raised by the minister of the parish of Borthwick against the heritors of the parish. The appellant is one of those heritors—and the question is, whether 81 acres of land in the parish belonging to him are or are not teind free? The appellant alleges that in a former proceeding of augmentation, modification, and locality, which was commenced in the year 1795, at the instance of the then minister of the parish, it was *res judicata* that these 81 acres of land were teind free; and it is upon the validity of this allegation or plea of the appellant that the learned Judges of the Court of Session were, as I have said, divided in opinion.

The interlocutor of the Court in the proceedings of 1795, which is said to have established as *res judicata* that these lands were teind free, was made shortly after the commencement of the proceedings; and one of the points strongly argued in the Court below and before your Lordships was, that no adjudication on such a question is usual at that stage of the proceedings.

My Lords, I can understand many reasons why as a general rule it would be more convenient to postpone the decision of such a question to a later stage of the proceedings. The minister wishes to have an augmentation of his stipend, and for this purpose to show that there is a sufficient quantity of free teinds in the parish. He has no object in entering on a litigation as to the amount of the augmentation which the different heritors should as among themselves bear; nor, provided there are sufficient teinds for his purpose arising from other lands, has he any object in opposing a heritor who says his lands are altogether teind free. In like manner, the heritors at the outset may well be disinclined to litigate among themselves as to whether particular lands are teind free, or as to the amount which each must bear, until they find that the minister has succeeded in obtaining an augmentation, and know what the amount of the augmentation is.

On the other hand, there are obvious reasons which would make it convenient that a heritor who can show his lands to be teind free should establish this as soon as possible; for if he can establish it, it relieves him, especially if he have no other land in the parish, from the trouble and burden of watching or intervening in the further progress of the litigation.

But, my Lords, what is important is, that I do not find that any of the learned Judges who have repelled the plea of *res judicata* anywhere say that it was not competent to the Court, if the minister and heritors properly raised the question, to decide at the outset that particular land was teind free. They say "it was not usual to do so;" "the consideration of the question might have been adjourned;" "the Court might have refused *in hoc statu* to entertain it;" or "the Court might have ordered a proceeding of declarator to have the question decided."

But the learned Judges nowhere say that if the Court should entertain and decide the question in the first stages of the proceedings the decision would be invalid.

Bearing this in mind, I will now point out to your Lordships what actually took place in 1795. On the 12th of March of that year the summons for augmentation, modification, and locality at the instance of the Rev. John Clunie, the minister, was signeted. The whole of the heritors of the parish were cited, including the ancestor of the appellant. Along with the summons, the minister produced a rental of the parish of Borthwick, containing, among other lands, the 81 acres in question.

An interlocutor of the Teind Court, dated the 17th of June 1795, was pronounced in these words—"The Lords allow the lawyers for the heritors to see the process in the clerk's hands till the next Court-day, and appoint parties' procurators to be then ready to debate." The next entry on the proceedings is of the 2d Dec. 1795. On that day a minute was given in "for Dundas of Arniston and the other heritors" (Dundas of Arniston being the predecessor of the appellant), which "represented that the following lands"—*inter alia* the 81 acres—"were holden by Dundas of Arniston *cum decimis inclusis*, and therefore craved that these lands might be struck out of the rental." Your Lordships therefore have here, in language as to which there can be no doubt, the ancestor of the appellant alleging, and all the other heritors of the parish concurring in the allegation as against the minister, that these 81 acres were teind free, and calling on the Court because they were teind free to strike them out of the rental.

The issue as to whether the lands were or were not teind free was thus distinctly presented. The Court might have refused to entertain or to decide it, or the minister might have called upon the Court to adjourn the consideration of it. On the other hand, the Court had power to decide the question if it thought fit, and if no sufficient reason was given why the decision should not take place.

The next entry we have is the note endorsed on the minute, that "John Clerk," who was the advocate for the minister, "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." On the same day the Court pronounced this interlocutor—"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, . . . 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 rentals libelled; and remit to the Lord Glenlee to prepare the cause."

Accordingly the 81 acres were struck out of the rental, and did not again appear in any of the subsequent proceedings.

My Lords, I cannot put any construction upon these words other than this, that there was an issue raised by the ancestor of the appellant, with the concurrence of the other heritors, that the 81 acres were teind free, and *ergo* ought to be struck out; that this issue was raised and adjudicated upon in the presence of all proper parties, and that the Court, by striking out the 81 acres, pronounced the judgment which the heritors had called for.

My Lords, I observe it is said by some of the learned Judges that there were no materials before the Court for effective discussion—that there was not any discussion or any inquiry. What amount of discussion there was—what materials were before the Court—what inquiry was made, or how far the Court or the parties may have had in their own knowledge such information as to the title of land in the parish as to make inquiry unnecessary—we cannot tell; but I cannot imagine anything more unsafe than to attempt to cut down the effect of judgments or interlocutors, distinct and absolute upon the face of them, on a surmise that the case was imperfectly considered, or that the Court had not proper materials for a judgment. Especially does it appear to me unsafe to enter on such speculations after the lapse of nearly a century, when every source of information except what is written in the interlocutors themselves has been dried up by lapse of time.

My Lords, I am therefore of opinion that the plea of *res judicata* ought to have been sustained, and the reclaiming note for the appellant allowed; and that the appellant as objector should have his costs in the Court of Session and in this House.

Lord Hatherley—My Lords, it appears to me that this case turns entirely upon what was before the Court at the time when the augmentation was decreed, and what is the effect to be given to the great lapse of time which has occurred since. If any doubt existed—and I cannot say that I think a doubt can reasonably be said to exist—upon the only two questions which arise upon the proceedings—namely, whether or not all the proper parties were before the Court, and whether the proper time had arrived for deciding the point,—we should have to consider how far the lapse of time ought or ought not to have the effect of shutting the door now to any further inquiry in a case which appears to have been decided in the presence of all the parties interested in having a decision arrived at.

A process of augmentation, modification, and locality seems, according to the ordinary course of proceeding, to have been divided naturally into two parts. The augmentation and modification took place more frequently at one time; and the locality, especially the final locality, took place at another time, when it had been ascertained that there ought to be an augmentation (that is to say, that there ought to be an increase of the stipend of the minister) and a modification.

The augmentation having settled the fact that there was to be some increase, and the amount of that increase being settled by the modification, then came the third process, namely, that of locality. Its proper order was at that time. When the Court had decided upon the augmentation, and when the Court had decided upon the amount by the modification, then the Court also decided upon the question who was to bear the burden. That was undoubtedly the usual course.

My Lords, all the learned Judges agree in this, that there can be no question that the facts were before the Court in 1795. Whether they were considered or not is a question which has given rise to considerable difference of opinion amongst the learned Judges in Scotland. But you have, in the first instance, what is called "the minister's rental" brought in—that is to say, his statement when he makes his first application for an augmentation; and you have this order intervening before the final locality when they came to localise the payments amongst the different heritors. You have before the Court the fact that the minister had brought in a rental in which he had stated the rental of the parish, and that the heritors had brought in their rental also, in which the claim of the predecessor of the appellant in this case (Mr Dundas) to exemption under titles *cum decimis inclusis* was stated; and that was done in the presence of the minister. There is no question of all the parties having been summoned; there is no question of all the parties having attended the various proceedings upon the process of augmentation and locality; there is no question that, they having been all present, an order was made (I will not say how or upon what consideration) which directed the striking out of these lands of Arniston, as being subject to such a grant as was set up, by a joint representation of, I may say, all the parties concerned, for nobody seems to have raised a dispute about it. All the parties concerned having made that representation, the course taken was the liberating of these particular lands from the rental.

Now, I apprehend that in no litigation whatever, in order to justify a plea of *res judicata*, is it necessary to prove that the case was fully entered into and discussed either by oral or by written testimony where no question was raised, but where all the persons interested declared themselves satisfied on the point. The parties may not have been at one particular time all interested together—that is to say, as having an immediate interest. The heritors, no doubt, were most interested in the question of locality, and therefore were naturally not so much interested until that question arose, and that question of locality is usually the last part of the process. But at any stage of the proceedings, when you are ascertaining whether there shall be augmentation and modification, or when you are in the ultimate stage of the proceedings ascertaining what locality there shall be if all the parties, for the sake of saving expense, in a matter with which they must have been much better acquainted in the year 1795 than either the Judges or any other persons could possibly be at that moment before the final inquiry was made—if, I say, all the persons interested in the inquiry say (and that is the effect of such a proceeding as took place in this case) that they are satisfied and convinced, and that they know as a fact, that these lands are exempt and have been conveyed *cum decimis inclusis*, and if a decision is given by the Court directing them to be struck out on that account, it appears to

me to be too late now, eighty-five years after that order was made in the presence of all the parties interested, and when that order has been acquiesced in from that time downwards, to raise any question of irregularity in this proceeding which is not apparent upon the face of the transaction.

Now, my Lords, the case has not been brought up to that point. As my noble and learned friend the Lord Chancellor has observed, not a single one of the learned Judges who took the opposite view to that which I have now taken, and which has already been taken by my noble and learned friend who preceded me, has said that the process is irregular on that account. When I say "irregular," I mean irregular in the sense of voiding the proceedings. Of course if a case is decided in the absence of one of the principal parties interested—which has happened in more than one teind case that has come before this House since I have sat in it—that is an irregularity which, being apparent upon the face of the proceedings, would be fatal. The ground would be that it would be shown that a decision was come to in the absence of a party who ought to have been present. But when you have the fact that all the parties were present, it is not necessary that the course of proceedings should be the usual course. The ordinary course (as is shown by the text-books which were cited in the course of the argument, and as to which I apprehend there is no doubt) is to have first an augmentation and then a modification; or if those two processes be taken together, to have an augmentation and a modification together, and to postpone the locality, which may be the occasion of serious contest between the heritors, until you have settled that the augmentation shall take place, and until you have settled by the modification what the amount of that shall be. Until you have done that, any further expense would be futile; therefore the common and usual course is to postpone the locality until the last moment. But not one of the learned Judges says that that must be done, nor do the text-books say that that must be done, and that unless that be rigorously done the process is vitiated. I see no principle upon which it ought to be vitiated.

I see no reason why the persons interested should not say—"We do not want a long litigation about this. We do not want this question postponed, because as to the lands of Arniston we all know what the facts are, and therefore we will take a decision of the Court at once to strike them out." I do not see that any one of the learned Judges who took the opposite view to that which I take says that it is a necessary consequence of the course which was taken in this case that the proceeding was vitiated. It seems to have been settled at an early stage of the proceedings, in the presence of all the parties, that the question was ripe for decision, and I think we have no right to presume any inattention (as one of the learned Judges, I think, seems to do) or want of proper attention to the circumstances of the case which ought to have preceded a regular decision to that effect. So far from presuming that, we ought to presume the contrary, where everything admits of the presumption, where everything is in favour of the presumption, and where it is consistent with the documents before us.

It seems to be perfectly consistent with all that appears, that this question may have been as fully considered as any other case, beyond this, that nobody would ever think of invoking the aid of a court of justice to determine adversely that which everybody was prepared at the earliest possible opportunity to concede from their own knowledge of the state of facts. If everybody was so concerned, the liberating one party from the proceeding was a general benefit to all, though of course, if they were not so concerned, the case might arise of some mishap in the administration of justice.

But how can it ever be said that that which was decided in the year 1795 (decided at all events by a decretal order being made that they were to strike out these 81 acres) is now, after this long interval of time (85 years), to be set aside in consequence of its being presumed that this not being the ordinary period at which such a decision should be come to, there had not been a full and fair consideration of the case. That appears to me to be very difficult to reconcile with the authorities which have been decided in this House, some of them upon this very matter of teinds. This does not at all amount to saying that there can be any exemption of teinds or the like by a lapse of time—that, of course, has not been held. It is simply a case of having a decision come to at an earlier stage of the proceedings than is usual or ordinary, but at the same time with all the requisities of justice—namely, the presence of all the parties interested; statements made upon the record with which all those parties interested agree, and an order which they submit to. There can be no rule of jurisprudence whatever that can compel proceedings of a hostile character to be taken where everybody is willing to have the matter determined upon their own knowledge of what are the real facts and circumstances of the case, which we cannot tell now at this distance of time (and that is the value of the element of time in assisting us to a conclusion). We cannot now tell what induced that departure from the ordinary course of proceedings. But unless authority was cited to me to show that that was absolutely a fault which vitiated the whole proceedings, I should be extremely slow, and I think your Lordships would be extremely slow also, to hold that the mere circumstance of the order, although it was made in everybody's presence, being made some months, or it might be years, before the final order in the locality, could vitiate the proceedings which had taken place. No such authority has been adduced at your Lordships' bar, and no such authority is cited by the learned Judges who took a different view from that which I am now expressing.

I think, therefore, my Lords, that the course proposed to your Lordships by my noble and learned friend the Lord Chancellor is the course which your Lordships are compelled to adopt in the decision of this case.

Lord O'Hagan—My Lords, I am of the same opinion, and substantially for the same reasons. Any anxiety which I have felt about this case has arisen from the rather remarkable balance of opinion amongst the learned Judges in the Courts below, who have been divided four against three. If it had not been so, and if the learned Judges had been, either by a large majority or unanimously, of one opinion or the other, I should

have been exceedingly slow to differ from them. The law of teinds in Scotland is not familiar to us; and the practice with regard to it is very peculiar. With both the learned Judges must have been thoroughly acquainted, and great deference ought to be paid to their opinions.

But as those opinions differ so widely, we must do the best we can to decide between them; and after a good deal of hesitation and difficulty, and a full consideration of the judgments delivered in the Courts below, I have come to the same conclusion at which my noble and learned friends have arrived.

My Lords, we have here, I think, almost every element which in an ordinary civil case would be necessary to establish *res judicata*, and I am not aware that a teind case differs in that respect from any other, or that the same principles may not be legitimately applied to both. We have first a meeting of all the persons really interested in the matter—the minister on the one side, and the heritors on the other. We have these people formally convened, and we have their proceedings formally conducted—every opportunity given to all the parties to make their respective cases, and those cases they manifestly did make, with apparently very competent legal assistance. It does not seem to have been controverted, either by the learned counsel or the learned Judges in the Courts below, that the tribunal was perfectly competent to decide the issue raised, which was whether the lands of Arniston were or were not liable to teind because of the title being *cum decimis inclusis*. Then, before a tribunal admittedly competent, we have a distinct issue knit between the parties, with the assent of both of them, in the plain words of the minute of 2d December 1795. It is impossible that the point in dispute could have been put more clearly. Mr Dundas demands that the eighty-one acres shall be struck out of the rental, and this because, and only because, they were lands held *cum decimis inclusis*.

We have next to consider whether that issue being so knit between all the persons affected by and free to assert their respective rights, there was a final adjudication upon it. An adjudication was made, in fact, exactly in the terms of the issue—[*reads interlocutor as in the Lord Chancellor's opinion, supra*]—following the very words in which the demand had been made to the Court.

Having thus a clear issue and an adjudication, what have we further? We have, as between all the parties interested, a deliberate acting upon that adjudication for a great length of time. The minister, according to the law of Scotland, is, as I understand, in a position to bind his successors. If this was a valid judgment binding the minister when it was made, it binds equally the existing minister. But there is still more in the case. The same minister who had been acting in the process of 1795 had another teind process in the year 1807; and looking at the pleadings in the second process in 1807, and the case made in it by the minister, it is perfectly manifest that that whole proceeding went on the assumption that an adjudication had been made in 1795, and that it was a valid and final adjudication. That was distinctly conceded, and it seems to be a very strong thing to say, at this distance of time, that an adjudication so immediately acted upon by those who had an interest in resisting it, when all the facts were recent and known to everybody concerned, was really no adjudication at all, either because the Court had not considered the subject of it, or had not proper materials on which to found a judgment.

Further, Lord Mure informs us—and his statement is not contradicted—that the adjudication according to the law of Scotland was liable to appeal. It is plain that the minister at that time was alive to his legal rights, and ready to assert them. He repeated his processes. He did his best to get as much out of the parish as he could, and it is difficult to conceive that if an adverse decision could have been assailed before an appellate tribunal, he would have allowed it to remain unchallenged, unless on the supposition that there was no real ground to challenge it with a hope of success; and so things have remained without question for a period of about seventy years.

Can we disturb a settlement of rights so solemnly established and so long maintained? Can we assume that the competent Court, dealing with the plain issue, did not apply its judicial mind to a consideration of that issue? Can we regard the suggestion that, according to the custom of the time, the adjudication as to liability to teind did not always precede the ascertainment of its amount? Or can we venture to affirm that adequate materials for adjudication were not available when judgment was pronounced?

These are the suggestions on which the respondent mainly relied; but they seem to me to admit of satisfactory answers, whatever may have been the usual or occasional course of proceeding in other cases—in point of fact, an adjudication took place in this. We do not fully know what materials for judgment were before the Court at the end of the last century, but that Court was *ex concessis* competent. It could not have done its duty if it made an adjudication without sufficient investigation of all facts and documents pertinent to the issue before it; and we are bound, I think, to assume that it did its duty, and made such inquiries as were needful for the purposes of justice. Can we, at such a distance of time, and in default of evidence, pronounce either an absence of judicial consideration or of grounds for the conclusion to which the Court was led in the case before it? The presumption, I conceive, should be all the other way; and we should act on the principle indicated by Lord Gifford, one of the Judges who favour the respondents, when he says—"It is safe to presume that everything was urged that could be urged, and that all parties were satisfied with the resulting judgment." Manifestly they were so satisfied in this particular case.

Upon the whole, my Lords, though not, I repeat, without difficulty, I concur in the judgment of the Lord Chancellor.

Lord Blackburn—My Lords, this case was argued at your Lordships' bar just before the conclusion of last session, and I considered it very carefully during the recess.

The Court of Session in 1795 had before them all the parties concerned—the heritors and the then minister, whose personal interest was only to have an augmentation during his time, but who was also entitled and bound to protect the interests

of his successors; and therefore I think that if the Court of Session did then decide the 81 acres were teind free, this was *res judicata*.

But in the question whether the proceedings in the Court of Session did sufficiently prove that there was a decision, there was a great difference of judicial opinion below. Three elaborate opinions were given on each side. The seventh Judge did not write an opinion of his own.

After reading these six opinions more than once, the state of my mind was that I could not say either side was right, and certainly could not say that either side was wrong. I think if I had had to decide in the first instance, I should have given judgment against the *res judicata*, on the ground that I could not see that it was made out that there had been a decision on the point. If I had been sitting alone to decide in a Court of Appeal, I should have affirmed the decision below, whichever way it was, on the ground that I could not say it was wrong. This would not have been satisfactory. I am glad that I am not alone, and that the noble and learned Lords who heard the argument are able to come to a decision.

I need hardly say that, in such a state of mind as I have described, I do not dissent from the result to which they have come.

Interlocutor appealed from reversed, and plea of *res judicata* stated for Mr Dundas sustained with costs.

Counsel for Appellant--Lord Advocate (Watson) — Kay, Q.C. — Moncrieff. Agents — Connell, Hope, & Spens, Solicitors.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents--Grahames, Wardlaw, & Currey, Solicitors.

COURT OF SESSION.

Friday, February 20.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

NISBET AND OTHERS *v.* MITCHELL-INNES.

Sale—Heritable and Moveable—Fixtures in a Sale of a House.

In a question arising under the sale of a mansion-house and grounds, *held* (1) that tile-hearths which were laid on the hearthstone and bedded in cement, &c., and plants growing in the kitchen garden, were fixtures, and passed along with the house; but (2) that grates and gas-brackets fastened in the ordinary way, and fireclay vases in the gardens, attached by stucco to stone parapet walls, and plants in pots which were bedded in the ground, were not fixtures, as they could be removed without injury to themselves or to the heritable property.

Consuetude—Proof of Custom of what are Fixtures in a Sale of Heritage.

A proof of local usage or custom that articles were usually or universally considered to be moveables, and so did not pass with a sale of heritage, *refused*.

The estate of Parsons Green, near Edinburgh, the property of W. S. Mitchell-Innes, and at the time in his occupation, was advertised for sale in September 1877, and on the 25th September an offer of £25,000 was made for it by Messrs Curror & Cowper, S.S.C., on behalf of John Nisbet and others, who were the complainers in this action. The offer was made for the estate as advertised, including "vineries, greenhouses, and fernery." It was accepted on behalf of Mr Mitchell-Innes upon various conditions, the 3d of which was "That all plants in the fernery, greenhouses, and forcing-houses, and also all iron railings about the grounds, be excepted from the disposition."

A dispute afterwards arose as to certain articles in the house and grounds which the purchasers claimed as being of the nature of fixtures, and the purpose of the present suspension and interdict was to prevent Mr Mitchell-Innes from selling or removing "any of the grates, hearth and fireplace tiles, gasfittings, gas lustres and brackets, and picture rods, situated within the said mansion-house, or in any of the offices, conservatories, fernery, greenhouses, or lodges in connection therewith; as also from selling, removing, or taking away any portion of the stock or plants within the kitchen garden, or any of the ferns within the fern-house, or from selling or removing the trellis-work within the said fernery; and further, to ordain the respondent to restore to the said mansion-house and offices the following articles which may already have been removed from the said mansion-house or others, viz., dining-room and lobby lustres, dining-room wall gas-brackets, the two brackets in the boudoir, the drawing-room grate, and two stone lions, the ferns and other plants which were in the vineries at the time of the sale," &c.

The complainers averred, *inter alia*—"(Stat. 5) The whole grates and tile-hearths or linings of the fireplaces in any of the houses or buildings upon the estate, in so far as the same are built in by cement, lime, stucco, or putty, or other similar adhesive substance, also the gas cooking-stove in kitchen, and all the lustres and gas-brackets which are affixed to any of the walls or other parts of the building, together with the picture-rods, and also all the vases throughout the grounds, which are also fixed to buildings in the grounds by cement, stucco, putty, lime, or other adhesive substance, together with the two stone lions, are all of the nature of fixtures, and were included in and passed with the said subjects sold as aforesaid by the respondent to the complainers in terms of the missive before narrated. (Stat. 6) The complainers also maintain that there were sold to them, along with the estate and pertinents, the whole produce of the kitchen garden, together with the whole plants, shrubs, and trees of every description which were not contained in the fernery, greenhouses, and forcing-houses, and so excepted from the sale to the complainers."

The respondent averred, *inter alia*—"(Stat. 1) By the universal usage in Edinburgh, which usage was well known to the complainers and their agents, articles of the nature of those against the removal of which the complainers sought interdict, are not held, without special mention, to be included