from the beginning of the process of locality, he might have had his remedy against others than the defenders, because for the period prior to 1874 there is no final decree of locality except that of 13th March 1874. No doubt there is hardship in any view of the case, but the defender has herself to blame for not looking after her interests in the process of locality.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Craighill, and only add a few sentences on the principles on which this judgment proceeds.

The right and jurisdiction of reviewing final localities by way of reduction has been exercised by the Teind Court ever since it was established, but it has been exercised from the first as a process of rectification only; and while the ordinary reductive conclusion was necessary in order to leave the Court at liberty to settle the rights of parties as might seem to be equitable, they always retained the power, and frequently applied it, of qualifying in the end the absolute terms of the decree as might appear to be just.

Accordingly, it is very clearly proved by the excerpts furnished by the Teind Clerk from the records of the Teind Court that the terms of the ultimate deliverance of the Teind Court in actions reducing final localities have varied according to the wrong immediately complained of. In some cases the Court have given a retrospective effect to the decree of reduction and to the ultimate locality, to the date of the locality reduced, which of course drew back to the date of the original process of augmentation from which it flowed, sometimes to the date of the summons of reduction, and sometimes, as in this case, to the date of the decree of reduction, that is, crop and year 1878, four years after the date of the reduced decree.

The Teind Court in reducing a final decree of locality have generally declined directly to consider or decide any question relative to the rights of heritors *inter se* consequent on the reduction, holding that to be a matter proper to the Civil Court, although the practice on this matter has not been uniform. But they seem to have asserted the same power by regulating the period at which the new locality to be supplied by the reducing heritor is to receive effect. The date so fixed necessarily regulates the interests of the heritors who have paid under the old locality, because if the rule of payment be neither the old locality nor the new, the heritors' liability remains undetermined, which is at variance with the principles on which the processes of augmentation and locality proceed. In the ordinary case interim decrees of locality simply afford the minister ready process for exacting his stipend, leaving the ultimate liability of individual heritors to be adjusted when the final decree has been pronounced, as that decree draws back to the commencement of the process. When a final decree is reduced, if the effect of the decree is not qualified, the final decree becomes that approving of the reducing heritors' substituted locality, and the reduced locality will only operate as an interim decree until the new decree is approved of. The question of over and under payments will then necessarily be regulated by the terms of the new decree if unqualified, because it becomes the rate of payment from the commencement of the original process. But when the new locality is declared to take effect only from a date posterior to that of the reduced decree, it can have no effect on payments made prior to the commencement of its operation, and the old locality is necessarily left to take effect on the intervening period, because the reduction reaches no further.

After careful study of all the authority on this matter to which I have access, I am satisfied that this is the import of the practice of the Teind Court in this matter. I am the more confirmed in this that the contrary view maintained in the argument was that the date assigned to the new locality was of no consequence, and was mere surplusage. That it is not so is proved to demonstration by the excerpts from the teind records, in which more than one example is to be found of the date having been made the subject of keen controversy, and indeed one need not go beyond the present case to show that it may be so, for the pursuer of the reduction demanded that the new locality should draw back to 1876, which was refused.

We were referred to the case of *Weatherstone*, in the 12th vol. of Shaw's Reports, p. 1, which undoubtedly fixed some important points as to the effect of reducing a decree of locality; but this was not, and could not be among them, as the ultimate decree of locality consequent on the reduction in that case does not appear to have been limited.

The reason for limiting the effect of the final decree of locality in this case is sufficiently obvious. The pursuer of the reduction asked for nothing more than protection for the future, both in his summons and in his record. Besides, his reduction proceeded on a valuation obtained by him after his process of reduction was raised, which could not have qualified the decree under reduction, and which therefore was quite rightly left to affect only the future payments.

The Court recalled the Lord Ordinary's interlocutor, and granted decree for the principal sum, in terms of the conclusions of the libel, with interest at 4 per cent., and remitted the case to the Lord Ordinary to proceed.

Counsel for Pursuer—(Reclaimer)— Mackintosh—Darling. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders (Respondents)—Keir—Pearson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SIMPSON (MINISTER OF BONHILL) *v.* WATSON AND OTHERS.

Teinds—Disjunction and Annexation quoad omnia *—Right of Minister to Reclaim Teind from Annexed Lands.*

Certain lands in the parishes of Luss and Kilmaronock were in the middle of the 17th

century disjoined and annexed *quoad omnia* to the parish of Bonhill by a decree of the High Commission. The minister of Bonhill having obtained an augmentation which the teinds of Bonhill were unable to satisfy,—*held* that he was entitled to have the teinds of the annexed lands given to him, and taken away from the ministers of the parishes of Luss and Kilmaronock, there being free teind in these parishes to supply the place of the stipend of which these ministers were thus deprived.

Rule of the *North Leith* case, M. 14,834, applied. *Observations* on the cases of *Abbotshall*, November 22, 1815, F.C., and *Ballingry*, July 20, 1869, 7 Macph. 1078.

Teinds—Sub-Valuation.

In 1616, A, the proprietor of Ladrishbeg, in the parish of Kilmaronock, feued out the mill and mill lands to B. In 1630 the Sub-Commissioners of Teinds valued lands in the parish of Kilmaronock, and, *inter alia*, the lands of Ladrishbeg "pertaining to" A. The mill and mill lands were not valued as a separate subject. In 1650 certain lands, including Ladrishbeg, were disjoined from Kilmaronock and annexed *quoad omnia* to Bonhill. The lands of Ladrishbeg were described in the decree as belonging to A. The mill and mill lands were not mentioned in the decree, but they lay in the centre of the disjoined lands, and were always treated as disjoined. In a question whether the mill and mill lands were included in the valuation—*held* that as the term Ladrishbeg was wide enough to cover the mill and mill lands for the purpose of disjunction and annexation, it was wide enough also for the purpose of valuation.

In the year 1813 a summons of augmentation, modification, and locality was raised at the instance of the minister of Bonhill, in the Presbytery of Dumbarton, against the heritors, and on 26th January 1814 the stipend was modified at 15 chalders, with £8, 6s. 8d. for communion elements, which was stated in the interim scheme of locality to be equal in all to £375, 5s. 10½d. The scheme of locality in force at the date of this case was made and approved interim by the Lord Ordinary on 2d June 1827, and showed a deficiency of teind amounting to about £75, 16s. 3$\frac{4}{10}$1., as compared with the modified stipend. According to this interim locality, teind to the amount of 1 boll of meal, 6 bolls of bear, and £6, 1s. 2d. of money (equivalent in all to £7, 9s. 2d.), was paid by the lands of Stonefield, Stonefield's part of Napierston, and Balloch, contained in the interim locality, to the parish of Kilmaronock, and teind to the amount of 38 bolls 2 f. 2 p. 3½ lips. of meal, and 6 bolls of bear, and £1, 8s. 4d. of money (equivalent in all to £85, 10s. 4½d.) was paid by the lands of Auchindennan, Auchindennan Dennistoun, Stockrogart, and Cameron, also entered in the said locality, to the parish of Luss. Objections were now lodged by the Rev. William Simpson, present minister of the parish of Bonhill, to this interim scheme of locality, which raised two questions—1st, Whether the objector, the minister of Bonhill, was entitled to teind from the above-mentioned lands which were originally situated in the parishes of Kilmaronock and Luss respectively, but now formed part of the parish of Bonhill, in virtue of a decree of disjunction and annexation of the High Commission? and 2d, Whether the teinds of certain lands known as Haldane's Farm, and situated in or about the centre of the annexed lands, were valued or not?

The decree of disjunction and annexation of the lands in the parish of Luss, which it was shown must have been in the year 1648, had been lost, but a copy of the decreet of disjunction, annexation, and locality of the lands in the parish of Kilmaronock was extant. This was proved to be a genuine copy, having been annexed to the memorial for Mr William Stewart, minister of Bonhill, in a process of augmentation of Bonhill in 1793, which is referred to in the interlocutor of the Teind Court of 2d December 1794, quoted *infra*. It commences with the tenor of the summons—"At Edinburgh the 23d day of January 1650 years, anent the summons raised before the Lords Commissioners for plantation of kirks and valuation of teinds, at the instance of Mr William Stewart, minister of Bonhill, within the presbyterie of Dumbarton, against the heritors of the lands in Luss and Kilmaronock to be disjoined, and against Mr Archibald M'Lachlane, parson of Luss, and Mr Stirling, minister at Kilmaronock;" and proceeds on a narrative of the Act 1641:—"That where by ane late Act of Parliament, holden at Edinburgh in anno 1641 years, his Majesty and the Estates having granted power and commission to the Lords and other Commissioners for valuation of teinds to value and cause value the teinds, personage and vicarage, of whatsomever lands within this kingdom whilks as are yet unvalued, and to modify, set down, and appoint to each minister ane constant and local stipend, as likewise to disjoin and seperate too large and spacious parochins and plant them severally, and to disjoin and dismember such parts and portions of parochins lyand contigue, and whereof any part is far distant fra the proper paroch kirk and mair near to the next adjacent paroch kirk fra their own proper paroch kirk fra the whilks they lay far distant, and to unite and adjoin them to the other parish kirk, and that upon special recommendation of the Presbytery Synod or General Assembly to the saids Commissioners for that effect, as the said Act of Parliament more fully bears. And seeing that the teinds, personage and vicarage, of the said paroch of Bonhill are not valued as yet, and although the said teinds were valued yet nevertheless the samin are not sufficient for making up of ane competend stipend to the said minister and his successors furth thereof, there being but ane small quantity of teinds within the said parochin, and seeing the town of Dumbarton has twelve boll of teinds as yet furth of the said paroch, and furth of the lands of Noblestoun, Naperston, and Hiltown, it is necessary the same be assigned to the minister as ane part of his stipend. Necessary therefore it is and expedient that ane just valuation be made of the teinds of the hale lands within the said parochin, and for the better provision of the said kirk with ane competent stipend, that the lands after mentioned lyand within the parochins respective underwritten, pertaining to the persons after nominate, lyand far distant fra their paroch kirks and more near and awest to the said kirk of Bonhill, in manner following, viz.—The lands of Auchendennan-Dennistown,

pertaining to Mungo Lindsay of Bonhill; the lands of Auchindennan-Rii, pertaining to Robert Napier of Kilmachew; the lands of Cameron, pertaining to Sir Umphray Colquhoun of Balvie; the lands of Stockrogert, pertaining to James Lindsay of Stockrogert; the lands of Tillichewn Meikle Tillichewn, pertaining to our right trusty cousin James Duke of Lennox, lyand within the parochin of Luss, being some six, some seven, some eight miles distant from the paroch kirk thereof, and near and awest to the said kirk of Bonhill by the space of ane mile and ane half at farthest; and the lands of Milntown, pertaining to John and Robert Napier of Kilmachew; the lands of Balloch, pertaining to our said deceast cousin James Duke of Lennox; the lands of Ladresbeg and Blairwhass, pertaining to Sir John Haldane of Gleneagles; the lands of Ballagan, pertaining to the College of Glasgow, lyand within the parochin of Kilmaronock, being three miles and more distant fra the kirk thereof, and within a mile at farthest to the foresaid kirk of Bonhill, be disjoined and dismembered fra the said kirks respective and parochins thereof wherein they now ly, and be adjoined and annexed to the said kirk of Bonhill, whereunto they ly awest, as said is—for the ease and comfort of the people and inhabitants of the said lands, the heritors of the whilks lands have supplicate the presbytery for disjoining thereof fra their saids proper paroch kirks and adjoining of the samen to the said kirk of Bonhill, whilk the said presbytery have recommended to the saids Commissioners, and the samen lands ought and should be disjoined and annexed in manner foresaid for the reasons and causes following. . . . And the said lands lyand within the said several parochins being sua disjoined fra their saids proper paroch kirks respective and annexed to the said kirk of Bonhill, ane just valuation ought to be made of the teinds thereof. Lykeas for the more speedy trial of the worth of the teinds of the lands within the said parochin of Bonhill and lands foresaid craved to be annexed thereto, and for eschewing longsome process therein, the said minister is content to refer both stock and teinds of the samen to the heritors' oaths of verity simple to the effect that ane valuation being made by the saids Commissioners of the said paroch of Bonhill and lands craved to be annexed thereto as said is, the saids Commissioners may proceed and modify and set downe ane competent and local stipend and provision to the said minister and his successors serving the cure at the said kirk of Bonhill and grant an sufficient maintenance for an reader and schoolmaster thereat."

Here the narrative of the original summons ends, and the decreet commenced—"Whilk being oft and divers times called, and lastly this day, and the said minister compearand be John Pitcairn advocate his procurator who craved dismemberation and annexation of the saids lands of Balloch, Milntown, Little Ladrish, Blairwhoss, and Ballagan lyand as said is conform to the foresaid recommendations of the said presbytery and to ane new recommendation for that effect for annexing of the saids lands formerly annexed and also craved the agreement whereby the Laird of Luss has augmented him in 200 merks to be approven by the saids Commissioners, and also craved augmentation out of the lands to be annexed conform to the rental given in by him and that the remainder defenders heritors might be holden as confest thereupon. And the Duke of Lennox compeared by Mr Peter Wedderburn advocate his procurator and the remainder defenders being oft times called and not compearand the reasons and allegations of both parties compearand being read heard and considerat be the saids Commissioners and they being therewith well and ripely advised the said Commissioners disjoined dismembered and divided the said lands pertaining to the foresaids persons lyand within the said parochin of Kilmaronock and unites and annexes the samen to the kirk and parochin of Bonhill to remain therewith as a part of the said parochin in all time coming, and decerns and ordains the inhabitants to resort and repair to the said paroch kirk of Bonhill as proper parochiners thereof in all time coming, and sicklike the saids Commissioners ratifies allows and approves the said agreement underwritten and interponed and be their presents interpones their decreet and authority thereto in all points whereof the tenor follows. Sir John Colquhoun of Luss is content and condescends that out of the teinds of the lands lately disjoined from the kirk of Luss and unite to the kirk of Bonhill and the privileges thereof be two hundred merks money yearly locallit to the minister of Bonhill in satisfaction of all further stipend or augmentation can be imposed upon the tiends of the saids lands. . . . And lykeways the saids Commissioners holds the heritors of the paroch of Kilmaronock as confest and added and augmented likeas they be thir presents add and augment to the minister's former stipend of four chalders victual and fourteen bolls and two hundereth merks granted by the Laird of Luss and the fourtie three merks for the vicarage of the old paroch allowed for the elements, two hundred merks of money and two boll victual two part meal and third part bear furth of the annexed lands of Kilmaronock, making in haill five chalders victual of the quality foresaid, of the whilk five chalders victual two boll thereof is by the saids Lords Commissioners converted into money at £6, 5s. the boll whilk extends to £12, 10s. money and is decerned and ordained be the saids Lords to be added to the foresaid sum of two hundred merks payable out of the above annexed lands of Kilmaronock, and to be divided proportionally amongst the heritors thereof, conform to the localitie underwritten, and four hundereth merks of money and 43 merks for the vicarage of the old parochin allowed for the communion elements, whilk stipend foresaid the saids Commissioners decerned and ordained, and be thir presents decerns and ordains to be paid to the said minister and his foresaids out of the teinds of the said lands within the said old and new unite parochins of Bonhill locallie, be the persons after mentioned and their successors in the of the teinds of the saids lands ilk ane of them for their own parts thereof conform to the division and localitie following."

Then comes the locality by which the proportion of the augmentation of Bonhill to be paid by the Kilmaronock lands is localled on each of the heritors owning the annexed lands, and the Luss lands are thus dealt with:—"Furth of the lands of Meikle Tillichewan, pertaining heritably to James Duke of Lennox, the Laird of Luss, titular of the tiends thereof, four score pounds; furth of the lands of Meikle Tillichewan, pertain-

ing heritably to the said James Duke of Lennox, and the said Laird of Luss, titular of the tiends thereof, four score merks; furth of the lands of Balloch, pertaining heritablie to the said James Duke of Lennox, 31 merks eleven shillings eight pennies, with five pounds viccarage; furth of the lands of Blairwhase, belonging to Sir John Haldane of Gleneagles, and in feu to of Blaramachan, fiftie-five pound four pennies, with five merks of viccarage; furth of the lands of Ladreshbeg, belonging to the said Sir John Haldane, and in feu to John and John Ewings elder and younger, and to John Logan, threttie-four pound seven shilling, with fortie shilling of viccarage; furth of the lands of Milntown, pertaining to Robert Naper of Kilmachew, twentie pound fourteen shillings, with fortie shillings of viccarage; furth of Ballagan, fortie-three shillings eight pennies of viccarage."

The minutes of the Presbytery of Dumbarton, dated November 27, 1649, contain the following:—"Do therfore *de novo* recommend the annexation of the sd lands wtin the paroch of Kilmarinnok to the paroch of Bonhill and the augmentation of the sd stipend furth of the sd lands formerlie belonging to the parochin of Luss and of the sd lands yet belonging to the parochin of Kilmarinnok"—which showed that the disjunction and annexation of the Luss lands must have been before the disjunction and annexation of the lands in Kilmaronock.

In a locality of Luss in 1793 the minister of Bonhill appeared, contending that the lands annexed to Bonhill should be withdrawn from the locality of Luss, but retired from the process after the following interlocutor had been pronounced:—

"*Edinburgh, 2d December* 1794.—The Lords having advised the memorial for the minister of Bonill, memorial for Sir James Colquhoun of Luss, and heard parties' procurators thereon, in respect there is sufficient evidence that the lands of Auchindinnan, Denniston, Auchindinnan-Rii, Stockrogert, Cameron and Tillishewans were annexed to the parish of Bonhill *quoad omnia*, Finds that the rent of these lands must be struck out of the rental given in by the minister of Luss."

In the locality of Bonhill (1795-1807) the annexed lands were not localled on for stipend. There was then free teind in Bonhill sufficient for the augmentation then granted.

The extent and nature of the usage of payment is seen from the opinion of the Lord President, *infra*.

The second question was, as already stated, whether the teinds of Haldane's Farm were valued or not. This property is composed of two feus, the Spittal of Ballagan, and the mill and mill-lands of Ladrishbeg.

The records of the Sub-Commissioners of Teinds (Presbytery of Dumbarton) contain the following entries:— "26th February 1630.

"*Item*, the lands of Ballagan appertaining to the Colladge of Glasgow, ly and wt. in the said parochin of Kilmaronock, is valuit to be worth yeirlie in stok and parsonage teynd to

23 bolls meill,

wt. 40/ of viccarage.

probin be witness at the instants of Mr George Young, and of the regents of the Colladge of Glasgow, and als be Jon Conyngham of Dumquhassie, takisman of the teynds of the said parche kirke, conform to the process.

. . . . . .

Item, the lands of Lytil Laderish ptaining to the said Laird of Glenegles, is valuit to be worth in stok and teind to

27 bolls 2 p. meill,

wt. 40/ of viccarage,

yeirlie probin be witness at the said fiscal's instants."

The titles relating to the Spittal of Ballagan are narrated in the Lord Ordinary's opinion, *infra*.

A precept of *clare constat* of 1686, referred to in the Lord Ordinary's opinion, contains the following:—"Nec non pro salutione prestatione observatione et impletione mihi meisque antedict omnium reliquorum divoriorum servitorum actorum clausularum provisiorum et conditionum particulariter et ad longum specificat et content in originali carta feudifirmæ concess per quondam Jacobum Halden de Glenneglis quond. Gullielmo M'Kechnie avo predicti Gullielmo dict mollendini terrarum mollendinarium aliorumque suprascript cum pertinen de data apud Leuricke in Monteith ultimo die mensis Junii anno Domini Millesimo sexcentesimo decimo sexto."

On this part of the case the minister contended that the teinds of Haldane's Farm were unvalued. Mr Orr Ewing, the proprietor of the subjects, contended that they were valued.

On 16th June 1882 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause in the question between the minister and Archibald Orr Ewing and others, Finds that the mill and mill-lands of Ladrishbeg, now belonging to Mr Orr Ewing, are unvalued, and to that extent sustains the objections for the minister, and *quoad ultra* repels the objections stated for him, and appoints the cause to be enrolled for the purpose of ascertaining the value of the lands now found to be unvalued," &c.

"*Opinion.*—Two questions are raised under the objections to the interim locality for Mr Simpson, and answers for certain of the heritors. The first question is, Whether the minister is entitled to teind from certain lands originally situated in the parishes of Kilmaronock and Luss, but now forming part of the parish of Bonhill, in virtue of a decree of disjunction and annexation of the High Commission made in the year 1648?

"The second question is, Whether the teinds of Haldane's Farm, the property of Mr Orr Ewing, are unvalued?

"I. It is proved that the subjects annexed to Bonhill by the decree of 1648 (which I need not enumerate) have paid stipend to the ministers of Kilmaronock and Luss respectively notwithstanding their disjunction from those parishes. The usage of payment has been continuous from the date of the disjunction and annexation, as the proceedings in subsequent processes of locality clearly show. The heritors successfully defended themselves in the locality of Bonhill (1795-1807) against the claim of the minister to teinds out of the subjects in dispute, including the subjects paying stipend to the minister of Kilmaronock as well as the subjects paying to the minister of Luss. Moreover, when the minister of Bonhill entered appearance in 1793 in the locality of Luss (an unusual step), and endeavoured to reclaim the teinds from the minister and heritors

of Luss he had only an apparent success. Because although by the interlocutor of 2d December 1794 the subjects in dispute were ordered to be struck out of the proven rental, yet when the locality of Luss was afterwards made up the lands in question were entered in it for the amount of the old stipend which had been in use to be paid to the minister of that parish, and I understand that the old stipend exhausts the teinds of those lands.

"In these circumstances I think justice will be done by applying the principle laid down in the cases of *Abbotshall* and *Ballingry* [cited *infra*]. The learned Judges who took part in these decisions did not doubt that the High Commission had jurisdiction to reserve to the minister from whose charge the lands were taken away his right to the stipend which had been in use to be paid from the teinds of such lands. It appears from these cases that this power was frequently exercised by the High Commission, and in the present case I think it must be presumed that the disjunctions from the two parishes were made under reservation of the minister's rights. A copy of this decree is printed. In the memorial to which the copy is annexed it is stated that the original is not extant. But it is referred to in the interlocutor of Court of 2d December 1794, and for the purposes of the present decision I accept the copy as authentic. The decree is entitled 'Decree of Disjunction, Annexation, and Localitie.' After disjoining the lands in question from Kilmaronock and Luss, and annexing them to Bonhill, the decree proceeds to allocate the stipend of the minister of Bonhill, and gives him nothing out of the annexed lands. It is true that the decree does not contain in terms a reservation of the rights of the ministers of Kilmaronock and Luss. But the omission to assign a stipend to the minister of Bonhill out of the annexed lands is significant, and is, in my opinion, sufficient evidence of the intention of the High Commission, when followed by a usage of payment for more than 200 years, to support the plea of the heritors that they are under obligation to pay stipend to the ministers of the parishes from which their lands were disjoined. I may also observe that the decree narrates an obligation by Sir John Colquhoun to pay a sum of 200 merks to the minister of Luss, apparently in lieu of teinds which might otherwise be due from the annexed lands. In the decerniture this sum is allocated to the minister of Bonhill as part of his stipend. This sum converted into sterling money (£11, 2s. 6d.), and charged on the lands of Tillichewan, appears in the note of the old stipend of Bonhill reprinted from the locality of 1792.

"II. The question whether the teinds of Haldane's Farm are valued is twofold. This little property has been formed by the union of two feus, named respectively the Spittal of Ballagan and the mill and mill-lands of Ladrishbeg. I shall consider the two cases in their order.

"(1) I hold that the teinds of the Spittal of Ballagan are valued—that they are in fact included in the valuation of the teinds of Ballagan, of which the 'Spittal' was then a part. The valuation was then by the Sub-Commissioners for the Presbytery of Dumbarton. It is quoted in the record, and bears date 26th February 1630. The lands are there described as pertaining to the College of Glasgow. Twenty-five years thereafter the College of Glasgow disponed Ballagan to Sir John Colquhoun of Luss, and in 1768 a charter of resignation and confirmation of the Spittal of Ballagan was granted by Sir James Colquhoun, heir of Sir John, to John M'Allister, in which the intermediate titles are narrated. From this document it appears that Ballagan and the Spittal of Ballagan had been feued out as one subject by Sir John Colquhoun (the grantee of the College) to Donald M'Kechnie, by whom they were divided. The disponee is accordingly taken bound to pay ten merks as his proportion of the *cumulo* feu-duty, and also to pay a proportion of the sum of forty merks, being the composition payable for the entry of heirs and assignees of the said Donald M'Kechnie. Thus it is proved that the Spittal of Ballagan is part of the estate of Ballagan, valued in 1630, acquired by Sir John Colquhoun in 1655, and feued out by him prior to 1661, when the Spittal was for the first time made the subject of a separate conveyance.

"(2) I hold that the mill and mill-lands of Ladrishbeg are unvalued. It is true that the lands of Ladrishbeg, or Little Ladrish, pertaining to the Laird of Gleneagles, were valued by the Sub-Commissioners in 1630. But the mill and mill-lands had been feued out by the Laird of Gleneagles in the year 1616, as appears from the reference to the original charter contained in a precept of *clare constat* dated 1686. The valuation of the lands of the Laird of Geneagles, made by the Sub-Commissioners of Teinds, would not, in my apprehension, cover estate of which Gleneagles held only a bare superiority. It is noticeable that in the county valuation made a few years later by the Commissioners of Supply Ladrishbeg and the mill thereof are entered as separate subjects, while there is only one entry applicable to Ballagan. This is in accordance with what we have seen to be the actual state of the titles at that date (County Valuation 1657)."

The minister reclaimed against this interlocutor, but acquiesced in the finding with regard to the Spittal of Ballagan.

In the course of the debate a remit was made on 14th November 1882 to the Teind-Clerk to inquire and report whether there was any free teind in the parish of Luss, and what was the amount, and what was the amount in 1814. On 20th November the Teind-Clerk reported that the free teind amounted to £573, 7s. 10d., and that in 1814 it amounted to £249, 14s. 3d.

Argued for the minister—The minister of Bonhill is entitled to reclaim from the annexed lands teind sufficient to give effect to his augmentation, even though there should be no free teind to recompense the minister of the parish from which the lands had been disjoined, the right of the parish minister being pre-eminent. (This contention was not insisted in after the report of the Teind-Clerk had been lodged.) At any rate, he is entitled to do so if there is sufficient free teind to recompense the minister thereby deprived. The general rule is to give effect to a reservation of teind contained in a decree of disjunction and annexation if it be expressed, but there has been no case in which such a reservation has been presumed except in *Abbotshall*, where the circumstances were special. There is here no reservation in the Kilmaronock decree, and none can be

presumed in the Luss decree. Not only would it be contrary to practice to presume such a reservation in the case of Luss, but there could in point of fact be none, since Luss was a parsonage, and the parson drew the whole teind. Moreover, the minutes of Presbytery (quoted above) show a clear desire to augment the stipend of the minister of Bonhill—Connell on Tithes, i. 442, ii. Ap. p. 15; Connell on Parishes, p. 60; *Johnson* v. *Heritors of St Cuthbert's* (*North Leith* case), M. 14,834; *Common Agent in Locality of Abbotshall* v. *The Minister of Kirkcaldy*, November 22, 1815, F.C; *Pennell* v. *Malcolm* (*Ballingry* case), July 20, 1869, 7 Macph. 1078; *Earl of Mansfield* v. *Sir A. D. Stewart*, January 30, 1880, 7 R. 552; *Duke of Athole* v. *Lord Advocate*, February 23, 1880, 7 R. 583. As regards the objections for the heritors of the annexed lands in the locality of Bonhill (1795-1807), it was quite right they should be sustained, because none of the annexed lands should have been localled on until the free teind in Bonhill was exhausted; the minister did not then offer any opposition to the heritors' contention, and therefore those proceedings could not make the present question *res judicata*. With regard to the Luss locality in 1793, the minister was successful in all he wished, viz., to have the annexed lands struck out of the proven rental—the basis of the augmentation—and having got this done he then retired, having no further interest or title. The mill and mill-lands of Ladrishbeg must be held to be unvalued as they were feued out in 1616, whereas the decree of valuation by the Sub-Commissioners of the lands of Ladrishbeg was not until 1630.

Argued for the heritors of Luss and Kilmaronock—The rule of the *North Leith* case could not be applied in the case of a proper parsonage, because the parson differs from a stipendiary minister in drawing the whole teind as stipend. The lands were disjoined from Luss in 1848, and therefore the agreement between Sir John Colquhoun and the minister of Bonhill in 1650 can only be explained by assuming a reservation in the decree of disjunction.

Argued for Sir James Colquhoun, the titular of Luss—In Kilmaronock the stipend was localled on the whole disjoined lands, but in Luss on the Tillichewans. It was to be presumed that in the decree of annexation there was a reservation in favour of Luss of the teind belonging to the parish in consideration of 200 merks yearly—*Lochore and Capeldrae Coal Company* v. *Common Agent in Locality of Ballingry*, March 15, 1878, 5 R. 763; Connell on Tithes, ii. Ap. pp. 16, 78; *Fogo* v. *Colquhoun*, December 6, 1867, 6 R. 105.

Argued for Mr Orr Ewing—If the name of Ladrishbeg was enough to carry the mill and mill-lands in the case of annexation, then it was enough to carry them in the case of valuation—Connell on Tithes, ii. Ap. p. 95; *Nicol* v. *Paul* (*Banchory Devenick* case), May 14, 1867, 5 Macph. (H. of L.) 62; *Deans of the Chapel Royal and Her Majesty's Advocate* v. *Johnstone, &c.*, March 18, 1869, 7 Macph. (H. of L.) 19.

At advising—

Lord President—The first question which has been decided by the Lord Ordinary here is, whether the minister of Bonhill is entitled to have his augmentation allocated upon certain lands which were originally situated in the parishes of Kilmaronock and Luss, but were disjoined from these parishes respectively, and annexed to the parish of Bonhill by a decree of disjunction and annexation made by the Commissioners of Teinds about the middle of the seventeenth century. The original decree is not extant, but there is a copy of the decree by means of which the Kilmaronock lands were disjoined and annexed, which I think has been pretty conclusively shown to be a faithful copy, and is supported by the contemporary proceedings in the Presbytery, and has throughout the argument been dealt with by the parties as a genuine and complete copy. And therefore I think we may accept it as being the proper foundation of our judgment in this case. The Lord Ordinary has formed an opinion adverse to the minister, and thinks that the case is ruled by the principles laid down, as he says, in the cases of *Abbotshall* and *Ballingry*, and he does not think that the case of *North Leith* is applicable. Now, that depends upon a consideration of the terms of this decree and what has followed upon it. His Lordship says in regard to the decree, that after disjoining the lands in question from Kilmaronock and Luss, and annexing them to Bonhill, "the decree proceeds to allocate the stipend of the minister of Bonhill, and gives him nothing out of the annexed lands. It is true that the decree does not contain in terms a reservation of the rights of the ministers of Kilmaronock and Luss. But the omission to assign a stipend to the minister of Bonhill out of the annexed lands is significant, and is in my opinion sufficient evidence of the intention of the High Commission, when followed by a usage of payment for more than 200 years, to support the plea of the heritors that they are under obligation to pay stipend to the ministers of the parishes from which their lands were disjoined. "I may also observe," he adds, "that the decree narrates an obligation by Sir John Colquhoun to pay a sum of 200 merks to the minister of Luss, apparently in lieu of teinds which might otherwise be due from the annexed lands." Now, I cannot help thinking that the Lord Ordinary has misunderstood the terms of the decree, because I think it will be found that the "omission to assign a stipend to the minister of Bonhill out of the annexed lands" is an entire mistake on the part of the Lord Ordinary; and further, I think he misunderstands the nature of the agreement with Sir John Colquhoun of Luss, which did not interfere with the lands in the parish of Luss being localled on for the part of the stipend of the minister of Bonhill. That will appear more clearly when we come to examine the terms of the decree itself. It sets out—as all extracts at that time did—the tenor of the summons, and I think it is very fortunate that these old extracts were so full, because they often give us an amount of information that we could never derive from an extract in the more economical and short form to which we are now accustomed. The summons is raised by the minister of Bonhill; he is the pursuer; and the defenders called are the heritors of the lands to be disjoined in the two parishes of Luss and Kilmaronock. He calls also the parson of Luss and the stipendiary minister of Kilmaronock. The action is laid upon the Statute 1641, and it is there narrated that the Lords Commissioners are appointed by that statute to annex and disjoin

lands, and to value teinds, to modify, set down, and appoint to each minister a constant and local stipend, "as likewise to disjoin and separate too large and spacious parishes and plant them severally, and to disjoin and dismember such parts and portions of parishes lying contigue, and whereof any part is far distant fra their own proper paroch kirk, fra the whilks they lie far distant, and to unite and adjoin them to the other parish kirk, and that upon special recommendation of the Presbytery Synod or General Assembly to the said Commissioners for that effect." Then the summons proceeds to narrate the insufficiency of the teinds of the parish of Bonhill to supply a sufficient stipend to the minister of that parish; and then, further, it goes on, "and for the better provision of the said kirk (that is, the kirk of Bonhill) with a competent stipend, that the lands after mentioned lying within the parishes respectively underwritten, &c., be disjoined and dismembered." It is important to observe here that one object of the disjunction and erection is to provide a more sufficient stipend for the parish of Bonill, and the other is to annex the lands to a parish the church of which is more convenient for it. The two objects are kept in view throughout these proceedings. Then the lands are mentioned—some of them in Luss, and some of them in Kilmaronock. Then it is narrated that "the heritors of the whilk lands (that is, the lands to be disjoined) have supplicate the Presbytery for disjoining thereof fra their said proper parish kirks, and adjoining of the same to the said kirk of Bonhill, whilk the said Presbytery have recommended to the said Commissioners;" and then reasons are set out for the disjunction and annexation. It is then further mentioned that the said lands lying within these several parishes being disjoined and annexed to the kirk of Bonhill, "a just valuation ought to be made of the teinds thereof; likeas for the more speedy trial of the worth of the teinds," the minister refers both stock and teind to the oath of the heritors, and the valuation being made by the said Commissioners, the said Commissioners may proceed to modify and set down a competent and local stipend and provision to the said minister and his successors serving the cure at the said kirk of Bonhill, and grant a sufficient maintenance for a reader and schoolmaster thereat. Now, that is the entire summons, and the scope and object of it is, I think, very apparent. The first purpose is to have the lands disjoined and annexed, and the second is, as a consequence of that, to give the minister of Bonhill a more sufficient stipend than he had before, for the purpose of modifying which the minister refers the value of the stock and teind of the annexed lands to the oath of the heritors. Now, the extract proceeds, that this summons being called, there compeared John Pitcairn, advocate, procurator for the minister, and craved dismembration and annexation of the said lands of Balloch, &c., "and also craved the agreement whereby the Laird of Luss has augmented him in 200 merks, to be approven by the said Commissioners, and also craved augmentation out of the lands to be annexed conform to the rental given in by him, and that the remainder defenders heritors might be holden as confessed thereupon." Then the Duke of Lennox appears, and the other defenders do not appear, and "the Commissioners being well and ripely advised, disjoined, dismembered, and divided the the said lands," naming them—now these are the lands in the parish of Kilmaronock only,—"and unites and annexes the same to the kirk and parish of Bonhill, to remain therewith as a part of the said parish in all time coming, and decerns and ordains the inhabitants to resort and repair to the said parish kirk of Bonhill." Then they proceed to deal with the agreement of Sir John Colquhoun—"The said Commissioners ratifies, allows, and approves the said agreement underwritten, and interpones their authority thereto." Now the full tenor of the agreement follows — "Sir John Colquhoun of Luss is content and condescends that out of the teinds of the lands lately disjoined from the kirk of Luss and unite to the kirk of Bonhill, and the privileges thereof, there be 200 merks money yearly localled to the minister of Bonhill in satisfaction of all further stipend or augmentation can be imposed upon the teinds of the said lands." That is the whole agreement. Now it must be observed, Sir John Colquhoun did not undertake to pay 200 merks—nothing of the kind—but he consented that a stipend to the amount of 200 merks should be localled to the minister of Bonhill on the lands disjoined from Luss. These lands were not disjoined by this decree, but had been disjoined by a previous decree, proceeding however on the same summons. That is proved by the contemporary minutes of the Presbytery, to which I need not particularly refer. There can be no doubt about the fact.

Then the next part of the decree is this—the Commissioners hold the heritors of the parish of Kilmaronock as confessed—that is, of course, proceeding on the reference to oath contained in the summons—"and added and augmented, likeas they by thir presents add and augment, to the minister's former stipend of four chalders victual and fourteen bolls and two hundereth merks granted by the Laird of Luss and the fourtie three merks for the vicarage of the old paroch allowed for the elements, two hundred merks of money and two boll victual, two part meal and third part bear, furth of the annexed lands of Kilmaronock, making in hail five chalders victual of the quality foresaid, of the whilk five chalders victual two boll thereof is by the saids Lords Commissioners converted into money at £6, 5s. the boll, whilk extends to £12, 10s. money, and is decerned and ordained be the saids Lords to be added to the foresaid sum of two hundred merks payable out of the above annexed lands of Kilmaronock, and to be divided proportionally amongst the heritors thereof, conform to the localitie underwritten, and four hundereth merks of money and 43 merks for the vicarage of the old parochin allowed for the communion elements, whilk stipend foresaid the saids Commissioners decerned and ordained, and be thir presents decerns and ordains, to be paid to the said minister and his foresaids out of the teinds of the said lands within the said old and new unite parochins of Bonhill locallie be the persons after mentioned and their successors." And then follows a locality by which the augmentation that the minister of Bonhill received is localled on the annexed lands. The locality extends over pages 43 and 44 of the print before me, and it proceeds in the first place to local the part of the augmentation that was to be paid by the Kil-

maronock lands on each of the heritors owning the annexed lands, and when it comes to the lands of Luss the matter stands thus—There is to be paid "furth of the lands of Meikle Tillichewan, pertaining heritably to James Duke of Lennox, the Laird of Luss, titular of the teinds thereof, fourscore pounds; furth of the lands of Meikle Tillichewan, pertaining heritably to the said James Duke of Lennox, and the said Laird of Luss, titular of the teinds thereof, fourscore merks; and these sums together amount precisely to 200 merks, the sum which by the agreement with Sir John Colquhoun was to be laid on the lands disjoined from Luss and annexed to Bonhill. But so far from the thing standing on the agreement merely, and being a mere personal contract with Sir John Colquhoun, the stipend is here allocated in due form upon each separate parcel of lands, according to the valuation which had been fixed by the reference to the oaths of the heritors, and the decree holding them as confessed. Now, the result of all this is that the very same decree which disjoined the lands of Kilmaronock and annexed them to Bonhill, following upon the previous decree which had disjoined and annexed the lands of Luss, proceeds to deal with these lands and the teinds of these lands as being now a proper part of the parish of Bonhill, and lays the augmentation which the Commissioners granted to the minister of Bonhill proportionally upon the annexed lands both of Luss and of Kilmaronock, which shows, I think, that the ground of judgment of the Lord Ordinary is founded upon an entire misreading of this extract. His Lordship seems to think that there was no part of the stipend of Bonhill laid upon these lands, whereas it is clear that there was both on the annexed lands from Luss and on the annexed lands from Kilmaronock.

But his Lordship I think is also in error still further in supposing that the usage which has followed upon this disjunction and annexation is adverse to the minister. Part of that usage is the payment of the augmented stipend to the minister of Bonhill out of the annexed lands. That cannot be adverse to the minister. The other part of the usage is the payment to the ministers of Luss and Kilmaronock respectively of the stipend that was in use to be paid to them before the annexation. That is not in the least degree adverse to the minister of Bonhill, because his only right in regard to that part of the teinds which is given as stipend to the ministers of the old parish is to displace these ministers when it becomes necessary for the purpose of augmenting the stipend of Bonhill. When the teinds of Bonhill are otherwise exhausted, it is then for the first time that the right arises to the minister of Bonhill to insist upon having the stipend of the ministers of Luss and Kilmaronock removed as a burden from the disjoined and annexed lands, and placed upon other teinds in their parishes, if there be any such. If there be none such, then the ministers of these parishes of Luss and Kilmaronock cannot be displaced, and the stipend must continue to be paid to them; but if there is free teind in their parishes to provide for them otherwise, then the legal right of the minister of Bonhill is to have the whole of the teinds of the annexed lands given to him as stipend, if it be necessary for him, and the ministers of the other parishes compensated for that by transferring that portion of their stipend to the other free teind of their own parishes. So that it appears to me that the usage of payment after this disjunction and annexation is not in the least degree unfavourable to the claim of the minister now. The claim of the minister could not be made until now, because it is only now that it becomes necessary to have these teinds of the annexed lands used for the purpose of augmenting his stipend.

But his Lordship says further in the course of the note appended to his interlocutor, that "the usage of payment has been continuous from the date of the disjunction and annexation, as the proceedings in subsequent processes of locality clearly shows. The heritors successfully defended themselves in the locality of Bonhill, 1795-1807, against the claim of the minister to teinds out of the subjects in dispute, including the subjects paying stipend to the minister of Kilmaronock as well as the subjects paying stipend to the minister of Luss." Now, there seems to have been no proposal against which they had to defend themselves, because if we turn to the locality of the parish of Luss, we find that there is nothing laid upon these lands except the old stipend of the minister of Luss, and that continues throughout. There could not be in the locality of Luss any proposal to augment the stipend of the minister of Bonhill, or to place any part of the stipend upon these lands. That could only arise in the locality of Bonhill itself. But in that locality there seems to have been no proposal against which the heritors had to defend themselves. The question there as to the annexed lands was a question among the heritors themselves, in which, there being free teind in Bonhill, the minister had no interest. And then his Lordship says further—"When the minister of Bonhill entered appearance in 1793 in the locality of Luss (an unusual step), and endeavoured to reclaim the teinds from the minister and heritors of Luss, he had only an apparent success. Because although by the interlocutor of 2d December 1794 the subjects in dispute were ordered to be struck out of the proven rental, yet when the locality of Luss was afterwards made up, the lands in question were entered in it for the amount of the old stipend which had been in use to be paid to the minister of that parish." Now, I do not know exactly what his Lordship means by apparent success, because the minister succeeded in everything that he asked for. He asked that the annexed lands should be struck out of the locality of Luss, and he as minister of Bonhill could ask nothing more in the locality of Luss. He could not ask to have the stipend given to him in the locality of Luss. But the effect of striking the lands out of the scheme of proven rental was a decided gain to the minister of Bonhill, because if they had not been struck out of the proven rental they might have been localled upon for an augmentation of stipend of the minister of Luss, and that was not done in consequence of their being struck out of the scheme of proven rental. The old stipend payable in the parish of Luss remained as a burden on these lands, and nothing more. The interlocutor to which his Lordship refers is an interlocutor of the Teind Court of date the 2d of December 1794, in which, having considered the memorial for the

minister of Bonhill, and the memorial for Sir James Colquhoun of Luss, and heard parties' procurators, they find that there is sufficient evidence that the lands of Auchindinnan, &c. (these are the lands annexed to Bonhill) were annexed *quoad omnia:* "Finds that the rent of these lands must be struck out of the rental given in by the minister of Luss." And accordingly we have the new locality of the parish of Luss of June 1798; and there it clearly appears that while the augmentation is laid upon all the other lands in the parish of Luss, there is no part of the augmentation laid upon the lands which have been disjoined and annexed to Bonhill.

Now, in these circumstances the question comes to be, whether the rule to be applied to this case is the rule of the *North Leith* case, or the rule of the subsequent cases of *Abbotshall* and *Ballingry*. The rule of the *North Leith* case is simply this: The lands there—the lands of Newhaven—had been originally part of the parish of St Cuthberts, and a part of the stipend of the minister of St Cuthberts had been laid upon these lands while they remained part of their parish. But the lands came to be disjoined from St Cuthberts, and annexed to *North Leith.* The minister of North Leith got an augmentation of stipend, and he could not find in his parish enough teind to furnish the augmentation unless he went against the lands which had been disjoined from St Cuthberts; and accordingly he demanded that a portion of his augmentation should be laid upon these annexed lands, and in that he prevailed. The ministers of St Cuthberts did not oppose him, for the very good reason that there was abundance of free teind in their own parish which could afford to compensate them for the loss which they sustained by the claim of the minister of North Leith. Now, that is the simple case, and it proves this, that the minister of a parish to which lands have been annexed, with stipend payable out of them to the minister of the old parish from which they have been disjoined, is entitled, when it becomes necessary, to have the teinds of these lands given to him, and taken away from the minister of the old parish, if there be free teind in the old parish to supply the place of the stipend which the minister of the old parish thus loses. That rule seems to me to be directly applicable to the present case, if there be sufficient free teind in the parishes of Luss and Kilmaronock to supply the place of the teinds which the minister of Bonhill now claims. It was disputed originally at the discussion before us whether there was free teind in the parish of Luss, but upon a remit to the Teind-Clerk we have a report which clearly proves that that is so, and it is not disputed that there is free teind in Kilmaronock.

It appears to me that the two cases of *Abbotshall* and *Ballingry* are essentially different from this. In the case of *Abbotshall* it is stated in the report that the parish of Kirkcaldy being very large, a part of it was disjoined in 1650 and erected into the parish of Abbotshall by a decree of disjunction since lost. After this disjunction, the teind left in what continued to be the parish of Kirkcaldy, according to a valuation taken in 1629, amounted only to 23 bolls 2 pecks 3 lippies in victual, and 20 merks money, which was not sufficient to pay the existing stipend of the minister of Kirkcaldy. There was therefore no free teind in Kirkcaldy. And then it is stated further that on the same day on which the disjunction took place the Teind Court granted to the minister of Kirkcaldy a stipend out of the teinds of the disjoined lands of 115 bolls 3 firlots 3 pecks and 2 lippies, and £4, 13s. 4d. sterling money, "which the minister of the parish continued to draw down to the present time." Now, the Court, upon that evidence, came to the opinion—and I do not see how the conclusion could be resisted—that the purpose and object of giving that augmentation by the very same decree, at least on the very same day as the decree of disjunction and annexation, was to reserve in all time coming the teinds of the disjoined lands to the minister of the parish, for the very sufficient reason that without reserving these teinds to him he could not have a sufficient stipend. He had already a stipend modified to him which could not be paid unless the teinds of these lands were retained, and at the same time they gave him an augmentation which apparently seems to have been sufficient to exhaust the whole teinds of the lands. Nothing could more clearly show than that that it was the intention of the Commissioners that the minister of the parish of Abbotshall should have no right to these teinds at all. And so the Court found. As to the case of *Ballingry*, it was a very peculiar and a very intricate case; but we came to the conclusion, upon a consideration of a variety of historical evidence, that there was sufficient proof that there was in the last decree of disjunction and annexation a reservation of the teinds to the minister of the old parish. Now, in order to make that case applicable here, we would require to find some evidence of an intention upon the part of the Commissioners of Teinds to reserve the teinds of the annexed lands here to the ministers of Luss and Kilmaronock. But in place of that we find upon the very face of the decree the stipend of the minister of Bonhill localled upon the annexed lands, no doubt leaving the old stipend of the ministers of Luss and Kilmaronock there too; but surely it was not by any means intended that the teinds should be reserved to the ministers of Luss and Kilmaronock, but only the old stipend which they had been in use to enjoy before the disjunction and annexation took place.

That remained as a matter of course until the minister of Bonhill was in a position to say—Now, I must have these teinds, for I have exhausted all the other teinds in my parish. It appears to me therefore that the minister is entitled to prevail in this part of his objections.

The only other question which has been argued before us regards the valuation of the mill and mill lands of Ladrishbeg. The Lord Ordinary states it in this way—"It is true that the lands of Ladrishbeg, or little Ladrish, pertaining to the Laird of Gleneagles, were valued by the Sub-Commissioners in 1630. But the mill and mill lands had been feued out by the Laird of Gleneagles in the year 1616, as appears from the reference to the original charter contained in a precept of *clare constat* dated 1686. The valuation of the lands of the Laird of Gleneagles made by the Sub-Commissioners of Teinds would not, in my apprehension, cover the estate of which Gleneagles held only a bare superiority. In short, the lands which were feued out under a different name altogether, and the lands which remained under the title of Ladrishbeg in the hands of the Laird of Gleneagles,

were called thereafter, just as they had been before, Ladrishbeg." Now, if that was the whole case, I should be very much inclined to agree with the conclusion that the Lord Ordinary has come to. But there is an element for consideration which I think has not been mentioned by his Lordship, and perhaps was not brought under his notice. The contention of the heritor here is that the description of the lands called Ladrishbeg does in effect comprehend the mill and mill lands, and the mill lands have always been comprehended within that name. The decree of sub-valuation is applicable to the lands of Little Ladrishbeg and nothing more. But it would be very difficult to say that the sub-valuation having been made after the mill and mill lands were feued out, and nothing remained in the Laird of Gleneagles but the superiority, that valuation had covered them. But then, unfortunately for the minister here, these lands of Ladrishbeg are part of the lands disjoined from Kilmaronock and annexed to Bonhill by the decree of disjunction and annexation; and if Ladrishbeg, which is the name given to them in that decree, does not comprehend the mill and mill lands, then the mill and mill lands, —which, as I understand, lie in the very centre of the annexed lands, are not covered by the decree of disjunction and annexation. Now that, I think, it will hardly do for the minister to maintain. He is asking to have his stipend laid upon the teinds of the mill and mill lands as unvalued. But if they are unvalued because they will not pass under the description of Ladrishbeg, then they are not disjoined because they will not pass under the description of Ladrishbeg.

The description in the valuation and the description in the decree of disjunction and annexation is precisely the same. I think, therefore, that as it is quite clear that the mill and mill lands were intended to be disjoined and annexed under the general name of Ladrishbeg, we must hold that the same construction is to be applied to the decree of sub-valuation. It will not do, in short, to give to the name Ladrishbeg one meaning in the decree of disjunction and annexation, and to give it another meaning in the decree of valuation. And therefore I am disposed on this point to differ from the Lord Ordinary, and to hold that the mill and mill lands of Ladrishbeg must be held to be valued.

Lord Mure—I have come to the same conclusion, and your Lordship has so fully explained the whole details of the decree of annexation that I think it is quite unnecessary to go into particulars farther. I concur in your Lordship's interpretation of that decree, and on the question raised under the first branch of the Lord Ordinary's note it seems to me to resolve substantially into this, whether the rules laid down in the decision of the *North Leith* case or those laid down in the cases of *Abbotshall* and *Ballingry* (reported as *Pennell*) are to prevail here. Now, I agree with your Lordship that in the circumstances of this case the rule laid down in the case of *North Leith* applies quite clearly and distinctly, and that there is no ground for supposing that the rule laid down in the cases of *Abbotshall* and *Ballingry* applies. One of the main questions in the case of *Pennel* was whether there was sufficient evidence of the reservation in the decree of annexation to which the Lord Ordinary refers in his note. He seems to think that there was a presumption acted upon in the cases of *Pennell* and *Abbotshall* that there was always a reservation of that sort. But in the case of *Pennell* there was evidence apart altogether from any such presumption as to the probability of there being a reservation contained in the decree, for there was evidence in the old records and in the authorities stating the fact that there had been a reservation in the decree, so that there was evidence of this *aliunde*, and the Lord Ordinary is mistaken in assuming that there was such a presumption.

The second question is as to the valuation of the mill and mill lands of Ladrishbeg. Now, in the decree of valuation we find expressions almost the same as those in the decree of annexation; and the question in these circumstances comes to be whether the property called the mill and mill lands of Ladrishbeg is to be presumed to have been valued at the same time that the other lands round about were valued. Now, I understand that in point of fact the mill lies in the centre of admittedly valued lands, and therefore it appears to me that there is no presumption, and that we may infer from the description in the annexation and in the valuation being substantially the same that the lands were in point of fact valued. I have the less hesitation in adopting this view because in the *Banchory Devenick* case, in the House of Lords, Lord Westbury and Lord Colonsay laid down that in all cases "a very liberal interpretation should be given to old decrees of valuation, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of parties having an adverse interest." It appears to me that these observations are applicable to the circumstances of the present case. We have an old decree of valuation which admittedly contains all the lands round about those in question, and I think that though there is no direct evidence of it, the presumption is that at that time those particular bits of land were valued. On that ground I concur with your Lordship.

Lord Shand—I am of the same opinion on both points. In regard to the first, the effect of the judgment which is now to be pronounced will be to make the teinds of the lands which were annexed to the parish in 1650, and which have been part of that parish ever since, liable to the payment of stipend in that parish—that is to say, to pay the proper burden which such lands ought in ordinary circumstances to do. That certainly is the natural and fitting arrangement, provided always that no injury is done to the charge of the parish from which the lands were taken. If it had appeared that the teinds of these lands were required in order to make up the stipend payable to the minister of the parish of Luss, then I think there would have been a good answer to this claim, but since the case was disposed of by the Lord Ordinary it has been demonstrated that in Luss there is ample free teind, so that there will be no injury to the minister of that parish from making these teinds payable to the minister of the parish in which the lands lie. And therefore that element is out of the case. The cases of *Abbotshall* and *Ballingry* are, in my view, exceptions from the general rule to which we are to give effect in this case. It was clear in both of these cases that at the time of the annexation the Commissioners had, either expressly or by

the mode in which they dealt with the teind, indicated that the footing on which the annexation took place was that the teinds of the annexed lands should remain in all time coming payable to the minister of the parish from which the lands were taken; and if there were in this case anything of that kind—anything that would indicate a reservation at the time of the annexation of the teinds of the lands which were being annexed to the minister of the parish from which the lands were being disjoined—then I should hold that the minister must fail in his case. But I must confess I have been unable to find anything in the terms of the decree, or in anything that has followed the decree, which will support that contention. I should have felt that there was very great force in the argument for Sir James Colquhoun, who has the right to the teinds in the parish of Luss, if the Lord Ordinary had been right in his view on the two matters of fact which are observed upon in his note, and to which your Lordship has specially referred. If it had been the case that at the time when the lands were disjoined from the parishes of Luss and Kilmaronock and annexed to Bonhill there had been no stipend allocated to the minister of the parish out of the annexed lands, I would have agreed with the Lord Ordinary in thinking that a very significant fact, and one of great weight in this question. And if that had been followed by this, that in the subsequent proceeding in the locality of Luss in 1793 the minister of Bonhill had appeared and maintained that the effect of the allocation was to make the disjoined lands liable in stipend to him, and had been unsuccessful in that contention, there again we would have had a very strong element in favour of the argument for the respondents in this reclaiming note. But the fact as appearing upon the documents on both of these points is quite the other way. There was a stipend allocated out of the annexed lands at the time, or shortly after the annexation, in favour of the minister of Bonhill, and the proceeding of 1793 appears to me really to afford a strong argument in support of the claim of the minister now. It is presented by the Lord Ordinary as a difficulty in the way of the minister. I confess I think it a very strong argument in support of the minister. For what was that proceeding? The minister of Luss brought an augmentation, and included these disjoined lands as lands which were liable to him in stipend, and the rental of which he desired should be brought into view in giving him his augmentation and in allocating the augmented stipend which he expected to obtain. The minister of Bonhill appeared in that process and said,—"These lands are in Bonhill; they have been annexed *quoad omnia.*" And the meaning of that was this, that having been annexed *quoad omnia*, they were no longer liable to pay additional stipend to the minister of Luss; any additional stipend to be laid on these lands must be given to the minister of Bonhill, who appeared to demand that they should be struck out of the rental. The Court ordered memorials, they became satisfied that the lands were annexed *quoad omnia*, and they sustained the claim of the minister of Bonhill to have these lands struck out of the rental of Luss. The only footing on which that could be done was that the minister of Luss was not entitled to get additional stipend out of them, and that the minister of Bonhill was to treat them as lands liable to him in stipend. It appears to me therefore that that proceeding in 1793 is a strong element in favour of the view to which effect is now to be given in the judgment to be pronounced; and I cannot help saying that I think if the Lord Ordinary had regarded these two matters of fact in the same light in which they appear after the explanation and argument given from the bar, we should probably have had a different judgment in the result, and that the Lord Ordinary would have pronounced the judgment on this part of the case which the Court will now do.

Upon the question of valuation, the observations which fell from the noble Lords in the cases of *Banchory Devenick* and the *Deans of the Chapel Royal* are, I think, very clearly applicable. There was there indicated what appear to me,—if I may humbly say so,—to be very sound views on this matter,—that it will not do at this time of day to rake up objections to old valuations which have been given effect to for centuries, and on which a usage has followed for centuries, unless the persons impugning the effect of these valuations are able to make out a very clear case, Now has that been done here? I apprehend not. The simple element upon which the Lord Ordinary's judgment proceeds is this, that in a deed of 1686 there is mentioned a previous deed of 1616, which narrates that a feu of the mill and mill lands of Ladrishbeg had been given by the Laird of Gleneagles. It is said that when in 1630 the Laird of Gleneagles came to have the teinds of his lands valued, that could not include lands which he had so feued, and that therefore the general name of Ladrishbeg will not cover the mill and mill lands of Ladrishbeg. The words of the decree are given in the record, and the lands are valued under these words—"*Item*, the lands of Little Laderish pertaining to the said Laird of Gleneagles." Now, it is said that that description will not cover the mill and mill lands. That was in 1630, fourteen years after the date of the supposed feu contract. But in 1648 this annexation took place, and what are the words of the decree of annexation? They are given in the print; and there the lands are annexed under this name, "the lands of Ladresbeg and Blairwhass, pertaining to Sir John Haldane of Gleneagles,"—being the same general description as in the decree of valuation. It is admitted, and indeed alleged, by the minister that these words and that description annexed these lands at once to Bonhill, including the mill and mill lands. But if that general description was enough in 1648 to carry the mill and mill lands, why should the same words not be sufficient to cover the mill and mill lands in a valuation? I confess I am unable to see an answer to that observation. The fact that the feu had been granted was just as much a fact in 1630 as in 1648. It had been granted in 1616. But the general description was enough to annex the lands. I do not doubt that the general description must be held as sufficient to include the mill and mill lands also in this valuation. Whether the explanation may be that the feu-contract had never been feudalised or acted upon, or whatever the explanation may be, it would be a hopeless task to attempt to solve; but after such an enormous lapse of time, combined with the fact that these lands have never been separately charged with teinds in the locality, I am satisfied

that this is one of the class of objections to which the Court ought not to give effect. And therefore I am of opinion that we should hold that these lands are included in the valuation.

The Court recalled the interlocutor of the Lord Ordinary, and sustained the objections for the minister, with the exception of that relating to the Spittal of Ballagan not insisted in by him, as above mentioned.

Counsel for the Minister (Reclaimer and Objector)—Pearson—Graham Murray. Agents—Mylne & Campbell, W.S.

Counsel for Archibald Orr Ewing and Others (Respondents) — J. P. B. Robertson — Low. Agent—F. J. Martin, W.S.

Counsel for Sir James Colquhoun, Bart. (Respondent) — Mackay — Rankine. Agents—Tawse & Bonar, W.S.

Saturday, December 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE PROVOST AND MAGISTRATES OF ELGIN, PETITIONERS.

Trust—Mortification—Power of Trustees to Feu—Trusts Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3.

In a petition by trustees acting under a permanent trust for charitable purposes, for authority to feu mortified lands—*held* that they had power to feu at common law, and petition *dismissed* as unnecessary.

This was a petition by the Magistrates of Elgin for authority to feu certain lands of which they were trustees for charitable purposes under a deed of mortification. The following narrative is taken from the report of Mr Black, W.S., to whom a remit was made to inquire into the circumstances set forth in the petition:—"The petition is presented by the magistrates and treasurer of the burgh of Elgin, trustees or patrons under a deed of mortification executed by Mr William Coming of Auchray on 12th October 1693, with consent of Mr James Cumine of Rattray, the heir of Mr William Coming.

"It appears unnecessary to refer to the purposes of the mortification further than to say that it has for its object the maintenance of four decayed merchants, inhabitants of the burgh.

"The application is presented for authority to approve of certain feus already granted by the petitioners in the circumstances noted below, and to empower them to feu out the remainder of the lands held by them as patrons of the mortification. These lands are held by the petitioners, as such patrons, under two dispositions and assignations granted to their predecessors in office, the first on 3d June 1696 by John Donaldson, and the other on 26th May 1696 by John Innes with consent of his wife. . . .

"In 1851 the magistrates of Elgin feued a portion of their lands to a Mr George Morrison for a feu-duty of £5, 0s. 6d., and again in 1860 a further portion thereof to Mr Robert Morrison, at a feu-duty of £2, 16s. 8d. The charters creating these feus were granted by the magistrates as representing the burgh and community of Elgin, and an objection having been raised to the validity of the title of Mr Alexander Morrison, who came to hold both feus, he obtained, on 30th August 1876, a charter of novodamus and confirmation from the proper superiors, the magistrates and treasurer of Elgin, as patrons of the mortification created by Mr William Coming, under which he was duly infeft by registration in the appropriate register of sasines.

"At the time Mr Alexander Morrison got this novodamus he also obtained from the said magistrates and treasurer, as patrons of the mortification, a feu-charter, dated 30th August 1876, of two other pieces of ground, part of the mortified lands, for payment of a total feu-duty of £17, 8s. 10d. (being at the rate of £9 per acre). It is to be remarked here that though the petition states that Mr Morrison's ground is feued 'for nursery purposes,' the charters contain no restriction or prohibition whatever as to the use for which the ground may be applied.

"The petition states that these various feus have been granted erroneously, 'and without adverting to the necessity of obtaining authority to feu said lands,' and that it would be very much for the interests of the beneficiaries that the magistrates should obtain the authority of the Court to feu the ground, and prays the Court to sanction and interpone their authority to the feus already granted to Mr Alexander Morrison, and to authorise and empower the petitioners to feu out the whole of the lands contained in the said two dispositions and assignations forming their title as above mentioned. And the petition is founded upon section 3 of the Trusts (Scotland) Act 1867.

"The question at once arises, Is the present a case that comes under the provisions of that Act? The petition sets forth that 'there is no power to feu the lands belonging to the mortification,' and there is undoubtedly no express power of feuing given either in the deed of mortification or in the two relative dispositions and assignations. On the other hand, there is, as the reporter reads them, nothing in any of these deeds of the nature of a prohibition against feuing.

"Now, prior to the passing of the Trusts Act of 1867 the patrons of mortification were, in the absence of any prohibition to the contrary (express or implied), entitled at common law to feu out the mortified lands without authority from the Court, and the petitioner's title in the present case contains or implies no such prohibition, so that unless some change has been introduced into the law by the Act referred to, the petitioners are entitled to feu their estate without any consent. It appears to your reporter that the object of the Trust Act, as expressed in its preamble, was to give 'greater facilities for the administration of trust estates in Scotland,' and not to restrict powers which trustees already possessed. He is therefore inclined to think that the Act can only apply where trustees have already no power to feu, and that the sanction of the Court is not necessary in the present case." . . . Your reporter is of opinion that the petition is unnecessary.

Mr Morrison appeared by counsel and argued that the petition should be dismissed as unnecessary.