tuitous alienation which would prejudice the heirs of the marriage, but that in all other respects, unless he has bound himself to infeft trustees or to put them in possession of moveable subjects, he is the uncontrolled owner of his estate.

On the first question I am clearly of opinion that no ground has been shown for appointing a judicial factor to administer Mrs Hagart's estate, because the children have not satisfied me that they have any right to the estate, or what is substantially the estate in question—the proceeds of the sale of the heritable property—until their parents' death.

Then as to Mr Hagart's estate, if there were here a body of trustees administering the estate, I should say that they ought to be left to carry out the will, there being no reason for displacing them. It is said that the trustees have never acted, and that with the consent of the family the two estates have been massed together and left in the hands of Mrs Hagart during her viduity. Well, if that has been done with the consent of the family—and I think that consent may be presumed—so long a period has elapsed without challenge of Mrs Hagart's right, that I do not think we ought to interfere in this summary mode to alter the existing state of possession.

We are given to understand that there is an action in dependence for constituting this trust, and it may be that if the trustees were to refuse to act it would be necessary to appoint a factor, but that case has not yet arisen. Therefore I am of opinion that the application ought not to prevail even in regard to the father's estate, in which apparently the children have a certain immediate interest. I agree with Lord Adam that the petition ought to be dismissed.

Lord Kinnear — I am of the same opinion. I think it clear that we cannot deprive this lady of the administration of her estate upon the grounds alleged by the petitioners, which are personal to herself —that is to say, upon their statement that she is of great age and in impaired health, and ready to give way to the importunities of one of her children. If it had been said that she was incapable of managing her affairs in consequence of her age and infirmity, the proper course would have been to apply for the appointment of a *curator bonis*, by whom her affairs would be managed for her; but that is not alleged, and it was made very clear by the statement of counsel at the bar that they did not intend to aver that this lady was incapable of managing her own affairs in any such sense as would justify the appointment of a curator. Now, if she is capable of managing her affairs, then I am unable to see any ground which would justify the Court in depriving her of the administration of her estate. And I confess that I see very great difficulty, even if there were such grounds, in giving effect to the prayer of the petition for the appointment of a judicial factor, because I am unable to tell—and counsel were unable to tell me—what the powers and duties of a judicial factor would be. The duties of a *curator bonis* are perfectly well fixed, and they are founded upon the incapacity of his ward. The duty of a judicial factor who holds estate vested in somebody else for her, and I suppose for her only, except in so far as her children have certain greater or lesser rights of succession, would appear to me to be a very difficult thing for one to understand. If Mrs Hagart is entitled, notwithstanding the conditions of her marriage-contract, to dispose of her estate during her life at her pleasure, then I am unable to see how a judicial factor could prevent her doing so, or could refuse to give effect to her conveyances if she granted them, unless the appointment were made on the footing of her being incapable of managing her own affairs for herself. I am therefore of opinion that that part of the petition cannot possibly be granted.

With reference to the other ground, I agree with Lord Adam and Lord M'Laren, and I do not think it necessary to add anything at all except with reference to what Lord M'Laren has said upon the case of *Wyllie*, and as to that I quite concur in his Lordship's observations. I do not think we intended in that case to lay down any rule in opposition to the settled rule that a conveyance—a general gift of *acquirenda* —in a marriage-contract would not deprive the husband of the power of administration during his life. The point which required attention in that case was the distinction between a conveyance of profits — of *acquirenda*—and an undertaking to give not everything that the husband might acquire or the wife might acquire during their life, but only what might be left at the time of his or her death. Therefore I quite agree with what Lord M'Laren has said.

The Lord President concurred.

The Court dismissed the petition.

Counsel for the Petitioners—H. Johnston —Dundas. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Respondent—Jameson—Salvesen. Agents—Bruce & Kerr, W.S.

Friday, July 20.

FIRST DIVISION.

[Sheriff of Edinburgh.

MACRAE *v.* ASSETS COMPANY, LIMITED.

Teinds—Payment of Arrears of Teinds—Bona Fide Consumption.

Held that the plea of *bona fide* consumption is irrelevant on the part of a proprietor of lands who admits that he has never paid teinds because he thought they were exhausted by the stipend, but who does not aver any

colourable title to them in his own person, and that he consumed them in the belief that he was the owner.

Horatio Ross Macrae, W.S., Edinburgh, judicial factor on the trust-estate of the late Neil Griffiths Buchanan of Knockshinnock, and as such proprietor of the teinds, parsonage and vicarage, of the lands of Little Udston, lying in the parish of Hamilton, brought an action in the Sheriff Court, Edinburgh, against The Assets Company, Limited, proprietors of said lands, for payment of £25, 12s. 1¾d., with periodical interest thereon, being the amount of free teind of the lands from 1884, the date of the defenders' entry, until 1893. The defenders admitted that the pursuer was proprietor of the teinds and that they had not paid any of the free teinds since the date of their entry, but explained "(1) that the defenders, since the date of their entry, have regularly paid their proportion of stipend which they believed exhausted the teinds; (2) that no claim was made by the pursuers, or anyone else, against the defenders for free teinds until 11th January 1892, and that the pursuer had no title to uplift or discharge the teind till 5th November 1892; (3) that the defenders have regularly since 1884 divided the whole available revenue of the company among the shareholders every half-year, and that the free teinds now claimed have thus been consumed in *bona fide*."

They pleaded—"(1) The defenders having in *bona fide* consumed the free teinds for the crops 1884 to 1891 inclusive, should be assoilzied from the pursuer's claim therefor, and *quoad ultra* the petition is unnecessary, and should be dismissed, with expenses."

Upon 7th February 1894 the Sheriff-Substitute (RUTHERFURD) pronounced the following interlocutor:—"Finds that in the circumstances of the case there is no room for the defenders' plea of *bona fide* perception and consumption: Therefore repels the defences: Ordains the defenders to make payment to the pursuer of the principal sum of £25, 12s. 1¾d., with interest thereon at the rate of £5 per centum per annum from the date of citation until payment, and decerns, &c.

"*Note.*— . . . The only defence to the present action for recovery of surplus teind, since the defenders' entry to the lands in July 1884, is the plea of *bona fide* perception and consumption. Now, the Sheriff-Substitute sees no reason to doubt that the defenders, or rather those who acted for them, acted in perfect good faith, on the mistaken assumption that after paying the proportion of stipend due to the minister the teind was exhausted. That indeed is not disputed by the pursuer. But the Sheriff-Substitute is not aware of any instance in which the plea of *bona fide* perception and consumption has been sustained, unless the party either had some colourable although defective title, to which his intromissions could be ascribed, or had been in use for a period of at least forty years, with the tacit acquiescence of all concerned, to make payment of a customary teind duty to a person understood to have a full title to the teinds. The case cited by the defenders' agent, of *Stirling* v. *The Feuars of Denny*, 1731, Dict. 1717, and 1 Paton's App. 90, affords an illustration of this. It was there held that a heritor, until he was interpelled by the true titular, was a *bona fide* possessor, because although he had erroneously intromitted with the teinds of his lands he did so in virtue of a grant from another as tacksman; while in a different branch of the same case a number of feuars who for time immemorial had paid a certain rate to the successive incumbents of the parish, which they had reason to believe exhausted their teinds, were also held by the House of Lords to be *bona fide* possessors, reversing upon this point the judgment of the Court of Session. In similar circumstances a like judgment was pronounced in the case of *Sir John Scott* v. *The Heritors of Ancrum*, 1795, Dict. 15,700, and reference may also be made to the *dicta* of the Judges in *Haldane* v. *Ogilvy*, 1871, 10 Macph. 62, and the *Lord Advocate* v. *Drysdale*, 1872, 10 Macph. 499, *aff.* 1 R. (H. of L.) 27. There is nothing in these decisions to warrant the conclusion that, irrespective of immemorial usage or a colourable title, a heritor intromitting with the teinds of his lands will be entitled to plead *bona fide* assumption in a question with the titular claiming byegones.

"The only other matter to be disposed of is the pursuer's claim for periodical interest on the arrears, which raises a question not altogether free from difficulty. But it is always a question in which the discretion of the Court must be exercised according to the special circumstances of the case. There is no room for supposing that those who acted for the defenders were not in good faith in assuming that the teinds of the lands were exhausted by the payments made to the minister. It is true that they do not seem to have made any special inquiry into the matter, and even if they had done so, they might have had some difficulty, and incurred considerable expense in ascertaining the state of the title. On the other hand, the titular could have none, and as Lord Benholme said, in such a case, 'The proper remedy is to deny interest to the titular, who for years delays to demand his teind duty'—*University of Glasgow* v. *Pollock*, 1868, 6 Macph. 884."

The defenders appealed to the Sheriff (BLAIR), who adhered.

"*Note.*— . . . But if the defenders have no title, or apparent or colourable title, to the teinds, their defence of *bona fide* perception and consumption cannot be maintained. The defenders referred to the case of the *Lord Advocate* v. *Drysdale*, 10 Macph. 499, 1872, *aff.* L.R., 2 S. & D. App. 368, in support of their contention. In that case the predecessors of the defender had held a lease of the teinds and of certain feu-duties from the Crown, which commenced in 1780 and expired in 1799, but was thereafter continued by tacit relocation till 1838, when an action of removing

was instituted so far as regarded the feuduties, and in the following year an inhibition was taken out to put an end to the lease so far as regarded the teinds; but it was admitted that this inhibition was invalid, and nothing more was done till 1871, when a fresh inhibition was executed, which put an end to the tacit relocation. In this case the defenders have no title corresponding to the lease followed by tacit relocation which was successfully put forward as the basis for the pleas of *bona fide* perception and consumption in the case of the *Lord Advocate* v. *Drysdale*. In *Watt's Trustees* v. *King*, 8 Macph. 132, the decision turned on the construction of a feu-contract by which the superior feued out the lands as possessed by a tenant, who presumably had possession of both stock and teind, and excepted from the warrandice clause, 'cess, teind, and public burdens.' After the feu had been granted the vassals were localled upon in several localities as proprietors of the teinds, and it appeared that the superior had never asserted any right to any surplus teinds, so that while the terms of the feu-contract were ambiguous, usage had interpreted it from the first in favour of the vassals' contention. In the present case the pursuer avers, and it is not denied, that the free teinds were paid to the pursuer's predecessors prior to 1864. Although no payments on account of free teinds have been made by the defenders or their predecessors since 1864, the Sheriff does not think that in the absence of any title in the defenders that this is any defence to the pursuer's claim — see *Lord Advocate* v. *Duke of Athole*, 1885, 12 R. 882, Lands of Pitdornie."

The defenders appealed to the First Division, and argued—(1) They had a title to the teinds which supported their plea-in-law. (2) The titular of the teinds had himself to blame for not claiming, and should not now get decree. The Court did not regard claims for arrears of teind with favour.

Argued for respondent—The argument upon title was irrelevant. There were no statements on record in support of it. The defenders' one plea was *bona fide* consumption, but that was only maintainable where there was a colourable but defective title. The judgments of the Sheriffs were right upon the grounds stated, and the authorities cited by them.

At advising—

LORD ADAM—It is admitted by the defenders that the pursuer is proprietor of the teinds in question, that they have intromitted with these teinds, and that they have not paid free teind since the date of their entry. These admissions are in my opinion sufficient to entitle the pursuer to decree, unless the defenders have set forth some relevant defence. The only defence is *bona fide* consumption. Now, that defence applies where a person not being the true owner of a subject, but being in the *bona fide* belief, under some colourable title, that he is the true owner, consumes the fruits. But in this case the defender does not aver that he was in the *bona fide* belief that he was the owner of the teinds and in that belief consumed them. His defence is of quite a different kind, viz., that he thought the stipend exhausted the teind, and that there was no free teind. That is to say, merely, that he thought no debt was due. That does not appear to me to be a case for the application of the doctrine of *bona fide* consumption at all, and is not a relevant defence.

We had, however, a long argument on the construction and effect of the titles of the parties, for the purpose of showing not only that the defender had a colourable title to the teinds, but was in fact the true owner. Not only, however, are there no averments on record to support any such plea, but they are contradictory of the admissions and averments on record.

I am consequently of opinion that we cannot consider these pleas, and the defenders did not ask to be allowed to amend their record. I am therefore of opinion that the interlocutor appealed from is right, and that the appeal should be dismissed.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer and Respondent—H. Johnston—Neil J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defenders and Appellants—W. Campbell—Cullen. Agent—J. Smith Clark, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LUNDIE *v.* MACBRAYNE.

Reparation — Wrongous Apprehension — Liability of Shipowner for Act of his Servant — Merchant Shipping Act Amendment Act 1862 (25 *and* 26 *Vict. cap.* 63), *secs.* 35 *and* 37—*Form of Issue.*

A person brought an action of damages against the owner of a steamship on the ground that he had wrongously been given into custody by one of the defender's servants for travelling without a ticket. *Held* that the pursuer had stated a relevant case, and that the proper form of issue was "Whether on or about 10th August 1893, on board the defender's steamer, . . . at Fort-William, J. L., an officer in the service of the defender, acting within the scope of his authority, wrongfully and illegally caused the pursuer to be apprehended and taken in custody to the police office at Fort-William, to the loss, injury, and damage of the pursuer. Damages laid at £250."