It may also be pointed out that before the lunatic was sent to Selkirk for trial on 15th May 1899 he had been certified to be of unsound mind by Sir Henry Littlejohn and Mr Henry Hay, medical officer for the prison of Edinburgh, and therefore might at once have been committed to an asylum without being sent to Selkirk.

Therefore Selkirk's only connection with the lunatic was that he was sent to Selkirk for trial on 15th May 1899, found to be unfit for trial, and taken back on the same day to the prison of Edinburgh, whence he came.

Looking to the whole history of the case I cannot hold that the lunatic was taken in or sent from the parish of Selkirk to the pursuers' asylum. In my opinion the 78th section was intended to apply to the simple case of a lunatic, dangerous or otherwise, being found at large in the one parish, and taken thence direct to a district asylum in another.

LORD YOUNG and LORD TRAYNER concurred.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute, and of new assoilzied the defenders.

Counsel for the Pursuers and Appellants—Rankine, K.C.—W. K. Dickson. Agent—Alex. O. Curle, W.S.

Counsel for the Defenders and Respondents—Dundas, K.C.—Constable. Agents—Constable & Johnstone, W.S.

COURT OF TEINDS.

Tuesday, March 4.

(Before the Lord President, Lord Adam, Lord M'Laren, and Lord Kinnear.)

MINISTER OF INVERKEILLOR *v.* THE HERITORS.

Teinds—Diversion of Teinds to Extraneous Parishes—Competent Stipend to Minister of Parish First Charge on Teinds of Parish—Right of Minister to Reclaim Diverted Teinds—Decimæ debentur parocho.

The Teind Commissioners in the years 1631-1636 made allocations of stipend to the ministers of certain extraneous parishes from the teinds of X parish, and the ministers of these parishes had continued to enjoy the stipend so allocated without interruption since the date of these allocations. In none of these extraneous parishes was any free teind available to make up the stipends to the amount enjoyed in virtue of the allocations from the teinds of X parish. On 17th November 1899 the Court of Teinds granted an augmentation of four chalders to the minister of X parish. The interim locality made up by the common agent showed that the free teind of X parish was inadequate to provide the augmentation granted by the Court of Teinds. The minister of X parish lodged objections to the interim scheme of locality, and maintained that he was entitled to reclaim from the ministers of the extraneous parishes such proportion of the teinds of X parish which had been allocated to the ministers of these parishes as was necessary to enable him to obtain payment of his full stipend as augmented by the Court of Teinds.

Held (1) that, as it did not appear that the minister of X parish was a party to any of the proceedings by which portions of the teinds of his parish were allocated to the ministers of the extraneous parishes, and as he had not, up to the date of the augmentation in November 1899, any interest or title to object to such allocations, the right of the minister of X parish to reclaim the teinds in question was not barred by prescription or acquiescence; (2) that on the principle that the teinds of a parish are at all times subject to the burden of providing a suitable stipend for the minister of the parish, the allocation of portions of the teinds of X parish to the ministers of extraneous parishes was necessarily subject to the claim of the minister of X parish to payment of a competent stipend from the teinds of his parish, and (3) that consequently the minister of X parish was entitled to have his stipend, as augmented, made up to him from those portions of the teinds of his parish paid to the ministers of the extraneous parishes.

The observations of Lord President Inglis in the *Bonhill* case—*Simpson* v. *Ewing*, December 8, 1882, 10 R. 313, 20 S.L.R. 235—are applicable only to payments made from lands, which having been originally part of the parish to which the payments were made, had been disjoined from that parish and annexed to another parish, and had no application to the case of payments made from lands, situated in another parish, which had never formed part of the parish to which the payments were made.

Process — Teinds — Reclaiming Diverted Teinds—Locality.

Procedure where in a process of augmentation, modification, and locality, the minister reclaimed teinds which had been diverted to extraneous parishes.

Expenses — Teinds — Reclaiming Diverted Teinds — Ministers of Extraneous Parishes Defending Benefices.

Where in a process of augmentation, modification, and locality the minister reclaimed teinds which had been for nearly 300 years diverted to extraneous parishes, and the ministers of the extraneous parishes, having appeared and been sisted as parties to defend their benefices, had reclaimed unsuccessfully against an adverse interlocutor pronounced by the Lord Ordinary, who

had found no expenses due to or by any of the parties, the Court *refused* to interfere with the Lord Ordinary's decision as to the expenses in the Outer House, but *found* the reclaimers, the ministers of the extraneous parishes, liable in expenses since the date of the Lord Ordinary's interlocutor.

On 17th November 1899 the Court of Teinds, after hearing counsel for the minister and for the heritors in opposition, granted an augmentation of four chalders to the minister of Inverkeillor, bringing up the stipend of Inverkeillor from eighteen chalders to twenty-two chalders. The heritors admitted that there was a small amount of free teind, but alleged that it was not sufficient to make up the stipend as augmented. The amount of free teind being thus in dispute, the following proviso was added to the interlocutor of augmentation:—"But declaring that this modification, and the settlement of any locality thereof, shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose."

The common agent lodged an interim scheme of locality which showed that there was not sufficient free teind to meet the augmentation awarded to the minister of Inverkeillor, the deficiency amounting to one and three-eighths chalders. The state of teinds prepared by the common agent showed that payments of a total annual money value of £114, 4s. were made from the teinds of the parish of Inverkeillor to the ministers of the following parishes:—Dunnichen, Carmyllie, and Kingoldrum.

The question in the case ultimately came to be, whether these payments formed a good deduction from the amount of the teinds available to satisfy the augmentation granted to the minister of Inverkeillor.

Objections were lodged for the minister of Inverkeillor to the interim scheme of locality lodged by the common agent, and answers to these objections were lodged by the common agent.

On 23rd November 1900 the Lord Ordinary (Low), in the question between the minister and the common agent, closed the record on the said objections for the minister and the answers thereto for the common agent.

In respect that the heritors of Inverkeillor had met and had resolved not to intervene, as their position was sufficiently stated in the answers of the common agent, the Lord Ordinary found it unnecessary to order intimation of the proceedings to the heritors of Inverkeillor.

In the objections by the minister of Inverkeillor to the interim scheme of locality it was stated, *inter alia*, that there was sufficient free teind in the parish of Inverkeillor to meet the deficiency of $1\frac{3}{8}$ chalders required to meet the augmentation of 4 chalders granted by the Court of Teinds to the minister of Inverkeillor, and leave a surplus of free teind amounting to £108, 2s. 9d. The payments made from the teinds of Inverkeillor to the ministers of the parishes of Dunnichen, Carmyllie, and Kingoldrum were set forth in detail. The objector reserved any objections competent to him against the ministers and heritors of the said parishes in the event of their being allowed to compear in the process. He further stated as follows:—"(Obj. 6) The objector was not a party to the diversion of the teinds of his parish. It is believed that they were begun to be diverted from Inverkeillor in the seventeenth century by James, Marquis of Hamilton, as titular of the teinds of Aberbrothock, at a time when the teinds of Inverkeillor were sufficient to provide a competent stipend to the minister thereof for many years to come. Subsequent encroachments have been made from time to time, but the minister of Inverkeillor never was a party to any process or proceeding in which teinds now required for his own stipend were decerned to be paid to the ministers of the said other parishes. As long as his modified stipend was provided for by the teinds of his own parish, which has been the case up to the date of the present decree, the objector and his predecessors had no interest or title to object to any use to which the remainder of the teind or any part thereof might be applied, either by the act of the titular or by decree of the Lords Commissioners. Whatever therefore was done by the titular or Lords Commissioners in his absence cannot affect the right of the objector and his successors to a competent provision from the teinds of Inverkeillor, and to resume diverted teinds when the necessity for such resumption arises or is sanctioned by the Lords Commissioners. The objector therefore claims that the whole of the said diverted teinds form a fund of unexhausted teind liable to satisfy the decree of augmentation pronounced in his favour."

The common agent, in his answers to the objections, admitted that the objector (the minister) was not a party to the diversion of the teinds from his parish, and in a statement of facts stated—"(3) The payments made by the heritors to the parishes of Dunnichen, Carmyllie, and Kingoldrum are made under decrees of the Court. These decrees have not been reduced or set aside by the present objector. The parties interested are the heritors referred to in the objections, and the ministers of the parishes presently drawing the teinds of the lands referred to. These parties are not defenders in this process, and have not been called hereto. The common agent does not know that there is any free teind in the said parishes out of which the existing stipends of the ministers of those parishes could be drawn if they ceased to draw stipends from the said teinds of Inverkeillor."

The objector (the minister) answered, *inter alia*, as follows:—"(Reply 3) Explained that the minister has no duty to raise the actions here indicated. The only persons possessing any title or interest to do so are the heritors paying teind out of Inverkeillor to other parishes than Inverkeillor, and whose names are specified in the objections. The minister requires no declarator that the teinds of his own parish are liable

to pay the decree of a competent stipend pronounced in his favour as aforesaid. Furthermore, the common agent is not the proper party to raise the questions set forth in his answers and pleas. He represents the whole body of the heritors of Inverkeillor, and as a body they have no interest or title to raise questions of liability which affect" only those heritors who are paying Inverkeillor teinds to other parishes.

The objector (the minister) pleaded, *inter alia*—"(1) The common agent has no title to represent individual heritors, and he ought to be found liable in the expenses of this record and the procedure thereon. (2) In respect the common agent is not the proper respondent to the objections stated to his state of teinds, his answers ought to be held incompetent, and the said objections sustained, or alternatively the process ought to be intimated to the heritors paying teind to the ministers of other parishes out of Inverkeillor. (3) The objector having shown the existence of free teind in his own parish, and he being entitled to the free teind, no further action by him is competent or necessary, and the first, second, and fourth pleas stated for the common agent ought to be repelled. (6) The unexhausted teinds, so far as not diverted, being insufficient for the payment of a competent stipend to the objector as decerned for by the Lords Commissioners, the objector is entitled to decree for so much of the said diverted teinds as may be necessary to satisfy said decree, and the interim locality and state of teinds ought to be amended accordingly. (7) The said payments of teinds out of the parish of Inverkeillor having been made in the absence and without the consent of the objector or his predecessors cannot be pleaded as a bar to the objector and his successors from claiming said teinds whenever the necessity to do so emerges, and the interim locality and state of teinds ought therefore to be amended accordingly. (8) The lands in the parish of Inverkeillor never having formed part of any one of the parishes of Dunnichen, Carmyllie, and Kingoldrum, and the minister of Inverkeillor never having been made a party to payments from said lands to the ministers of Dunnichen, Carmyllie, and Kingoldrum, the minister of Inverkeillor is entitled to payment of his full modified stipend out of the teinds of his own parish irrespective of the disposal of free teind by the titulars or tacksmen or other intromitters with said free teind, and irrespective of the state of teinds of other parishes or the interests of the ministers of the same."

The common agent pleaded, *inter alia*, as follows:—"(1) The present process is incompetent so far as directed against the common agent. (2) The parties interested in the question raised by the minister not being parties in this process, the process should be sisted until the objector raises an action in which the case can be properly determined. (3) The teinds paid by Lord Dalhousie and others out of Inverkeillor to the parishes of Dunnichen, Carmyllie, and Kingoldrum, being paid under decrees of Court, the common agent has no power to include them in his state of teinds, out of which the stipend of the minister of Inverkeillor falls to be paid. (4) A remit should be made to the Teind Clerk to report whether there is any free teind in the parishes of Dunnichen, Carmyllie, and Kingoldrum out of which the stipends of the ministers of the said parishes might be paid, so as to obviate the drawing of part of their stipend out of teinds effeiring to the parish of Inverkeillor."

On 25th January 1901 the Lord Ordinary (Low), before answer, remitted to the Clerk of Teinds to inquire and report—"(1) Whether there is any free teind in the parish of Inverkeillor to make up the stipend as augmented by the Court, and (2) under what circumstances the payments to the ministers of the other parishes mentioned in the record were made and continue to be made."

Opinion.—"The object of the minister of Inverkeillor in lodging these objections to the interim scheme of locality is to have included in the locality certain payments which have been in use to be made out of the teinds of the parish to the ministers of the parishes of Dunnichen, Carmyllie, and Kingoldrum. The objector has been granted an augmentation of his stipend, and unless he can reclaim the teinds which are now paid to these other parishes, there is not, according to the locality prepared by the common agent, sufficient free teind to meet the augmentation.

"Answers have been lodged for the common agent, and he pleads that the present process is incompetent in so far as directed against him. To a certain extent the objector seems to take the same view, because he pleads that the common agent is not the proper respondent to the objections, and that the answers should be held to be incompetent and the objections sustained. He pleads alternatively that the process should be intimated to the heritors by whom the payments to the other parishes are made. I should have adopted the latter course, but it was stated at the bar that the heritors have had a meeting and have resolved not to intervene, in view of the answers which had been lodged by the common agent.

"In regard to the plea that the answers ought to be held incompetent and the objections sustained, I am of opinion that it was quite competent for the common agent to lodge answers as representing the body of the heritors, and as the author of the locality and state of teinds under challenge, although he is not bound, and probably not entitled, to take up questions affecting particular heritors only.

"The common agent, however, pleads that this is not a competent process in which to determine the objector's right to reclaim the teinds paid to other parishes, and that the proceedings should be sisted to allow the objector to raise an action calling all parties interested. The action suggested is, I understand, one of reduction

of the decrees under which the payments to the other parishes are made. Now, I think that it must be regarded as settled that a question of this sort can be competently raised in a process of locality, but it does not follow that it is not necessary to convene the ministers and heritors of the parishes to which payments have been made. That could be done by intimation of the proceedings to them.

"I should have thought that that was the proper course to follow if it had not been for the cases of the *Minister of Rescobie* v. *Carnegy* (7 Macph. 514) and *Pennel* (minister of Ballingry) v. *Malcolm* (7 Macph. 1078).

"In the *Carraldston* case (1 Connell on Tithes 442) the minister of that parish, in a process of modification of stipend, claimed certain teinds which were in use to be paid to the ministers of other parishes. It appears that the ministers of these parishes had been made parties to the process, but the heritors of Carraldston pleaded that the heritors of the other parishes also should be called, and the Court found—'That before any part of the stipend in use to be paid out of his parish to the ministers of Aberlemno, Novar, and Brechin, could be affected by the pursuer, the heritors of these parochs must be called.'

"That is, I think, the only case (prior to those of *Rescobie* and *Ballingry*) in which the point was made a matter of judgment, but in all the other cases in which the minister of a parish sought directly to reclaim teinds paid to other parishes of which I can find a report, the ministers and heritors of these parishes were in some way made parties.

"Further, upon principle and in accordance with the general practice of the Court, I should have thought that all parties directly interested should be brought into the process. Although the maxim *decimæ debentur parocho* expresses the general rule, there may be circumstances under which a minister is not entitled to teinds which have been paid to the minister of another parish, and if such a question is decided in the absence of the minister of that other parish, the judgment would not be *res judicata* against him. The heritor, therefore, whose lands were in question might be forced to meet a re-trial of the question, and the result might be to saddle him with payment to both ministers, and that although his teinds might be exhausted by payment to one alone.

"In the *Rescobie* case the main question was whether certain lands of Over Turin were in Rescobie or in Aberlemno. They were described in the titles as being in the latter parish, and had been localled on for the full amount of the valued teind for payment of the stipend of that parish. The question was raised by the minister of Rescobie by way of objections in a process of augmentation and locality, and Mr Carnegy, the heritor of the lands, lodged answers and pleaded that the minister was bound to raise an action of reduction and declarator, in which the minister of Aberlemno should be called. The Lord Ordinary (Barcaple) held, although with hesitation, that it was competent to try the question upon the objections and answers in absence of the minister of Aberlemno, and the Second Division adhered. The interlocutor was that the lands of Over Turin were situated in the parish of Rescobie, 'and that the teinds thereof therefore fall to be localled on for the stipend of that parish.' It was therefore decided that the minister of Rescobie was entitled to reclaim the teinds which had been paid to the minister of Aberlemno, although the latter was not a party to the process.

"In the *Ballingry* case, also, the question raised was whether certain lands were in Ballingry or in the adjoining parish of Auchterderran. It was held that the lands were in Ballingry, but in the interlocutor a reservation was inserted of the rights of the minister of Auchterderran to the payments which he had been in use to receive in respect of the lands. That was a case, however, in which the lands had been disjoined from Auchterderran and annexed to Ballingry, under reservation of the minister's right to the stipend which he was drawing from the teinds at the date of the disjunction.

"I find also that in two old cases, reported in Shaw's Teind Reports, namely, *Dunlop* v. *Hannay*, p. 42, and *Butler* v. *Oliphant*, p. 85, questions as to whether lands were situated in one parish or another were tried without calling the minister of the parish in which the lands had been dealt with in previous localities as being situated.

"Judging therefore by the reported cases, it would appear that there has been a practice to try questions as to whether lands are situated in one parish or in another in proceedings to which the owners of the lands and the minister claiming that they are situated in his parish alone are parties, while in cases of a direct claim by the minister of a parish to teinds which have been in use to be paid to another parish the practice has been to convene all parties interested.

"I confess that I do not think that there is any substantial difference between the two classes of cases, and it seems to me that I must regard the case of *Rescobie* as a considered judgment affirming the competency of determining such a question as that with which I am dealing without calling the minister or the heritors of the parishes to which payments have been in use to be made. I think, however, that no absolute rule was intended to be laid down, but that each case must be dealt with in view of its special circumstances, and although in deference to the judgment in *Rescobie* I do not propose to appoint intimation to the ministers of the other parishes at this stage, it may be necessary to do so later on.

"What I propose to do now is to make a remit to the Teind Clerk. The objector avers that the payments to the other parishes were first made in the seventeenth century by the titular, and that up to the present time the ministers of Inverkeillor

have had no interest to challenge the payments, as there has always been free teind sufficient to meet their stipend. If that was truly the origin of the payments, and if there is now no free teind to meet the recent augmentation at Inverkeillor, then it may be plain enough that the objector is entitled to demand that the payments should now be made to him. The common agent, however, does not admit the objector's averment in regard to the origin of the payments, but says that all that he knows upon the subject is that they have been made under decrees which he was not entitled to disregard."

The Clerk of Teinds, in his report, reported, *inter alia*, as follows:—"The Clerk has examined the state of teinds prepared by the common agent. . . . The teinds included in the state are paid partly to the ministers of Dunnichen, Carmyllie, and Kingoldrum, and these payments are deducted in computing the free teinds. . . . In all these cases there is no free teind to make up the present amount of the stipends were a portion withdrawn to make up the stipend of Inverkeillor. . . . There are no other teinds in the parish of Inverkeillor beyond what have been given to the minister in the interim locality unless he is found entitled to recover the teinds which have been diverted to other parishes for over two centuries and a-half. . . . Attention may be drawn generally to the practice of titulars making over the teinds for a specific purpose, other than the stipend of the minister of the parish. There are numerous instances in which this transfer has taken place, the parties thus acquiring them becoming titulars. In the case of the Crown there have been grants to the universities, to the Deans of the Chapel Royal, and to other educational and religious purposes. These have been burdened, or liable to be burdened, with such further augmentations to the minister of the parish from which the teinds were drawn as might be granted by the Court. In some of these cases the grants have been materially diminished by the augmentations thus granted. . . . The Teind Commissioners, under the Act 1633, c. 19, on 14th July 1634, pronounced an order in these terms—'The Lords find that the titular may not take the teinds of the paroch to provide the minister of another, but that ilk minister be provided with his own.' The Commissioners, however, did not adhere to the rule of limiting the stipend to the teinds of the parish, and in 1634 Carmyllie, in 1635 Kingoldrum, and in 1636 Dunnichen, were respectively allocated a portion of their stipends from the teinds of other parishes. The explanation probably is that there were no other sources available at that time, and if the titular did not concur in the appropriation of the teinds to other parishes he does not appear to have opposed it. . . . The payment to Kingoldrum appears to have originated in a decree of the Commissioners acting under the Act of 1633, c. 19, and was dated 15th July 1635, as referred to in the course of proceedings raised in 1792. . . . The greater part of the parish of Dunnichen had been feued out by the Commendator of the Abbey of Arbroath by charter dated 10th October 1558, with a clause *cum decimis inclusis*, leaving only a small vicarage of £2, 16s. 4d. exigible from the estate, and the teinds of the remaining lands in the parish were of small amount. In these circumstances the Teind Commissioners, on 22nd July 1636, awarded a stipend payable not only from the parish but also from Inverkeillor and other parishes. . . . In Carmyllie there was an augmentation of stipend and decree of locality dated 9th February 1715. It refers to a decree dated 21st July 1618, whereby Carmylie was united to Panbride, and the minister of Panbride was to have a colleague to officiate at Carmylie, and also narrates the subsequent proceedings by which, on 9th July 1634, a stipend was provided for Carmylie partly from Inverkeillor. . . . So far as the reporter has observed, there is no case where the teinds have been reclaimed from another parish in circumstances like the present where there are no funds or lands to make up the loss that must be occasioned." . . .

On May 31st, 1901, the Lord Ordinary appointed the objector, the minister of Inverkeillor, to intimate his objections to the ministers of Dunnichen, Kingoldrum, and Carmylie, and allowed them to lodge answers. On June 21st, 1901, the Lord Ordinary sisted the ministers of Dunnichen, Kingoldrum, and Carmyllie as parties to the process.

The minute lodged in process for the Rev. George Anderson, minister of Carmylie, the Rev. Hugh Macmaster, minister of Dunnichen, and the Rev. James C. Jack, minister of Kingoldrum, stated, *inter alia*, that the ministers were all stipendiaries holding public offices, the emoluments of which vested in them on induction to their respective benefices; that part of these emoluments consisted of payments of the teinds here in question, which were assigned by a Commission of Parliament for the support of the ministers of these parishes nearly three centuries ago, and had since been continuously enjoyed by them under localities which had repeatedly been ratified by the Court of Teinds; that no case had ever occurred in which teinds so assigned had been withdrawn, except where there were other teinds from which the deficiency on the modified stipend could be made good; that it must be presumed that the assignation of these teinds to the ministers of these parishes was conceived as a permanent one, and that if they were to be revindicated by Inverkeillor it must be upon the ground of the initial illegality of the locality; that there was no certain knowledge of the circumstances under which this procedure was adopted, and it must be presumed to have been done regularly and lawfully.

The answers lodged by the objector, the minister of Inverkeillor, made reference to objection 6, *supra*, lodged by him to the interim locality. Use and wont payments had been inserted in subsequent localities of

the ministers' parishes without opinions being expressed on the competency of the gift and through the concurrence of the titular. These grants, which "were contingent on the teinds not being required by the minister of Inverkeillor, were sometimes made on misrepresentations by the minuters' predecessors. For instance, in or about 1635 Henry Patullo of Carmyllie obtained a grant on the representation, which turned out to be quite mistaken, that there were no teinds in Carmyllie. Teinds were subseqnently found both in Carmyllie and Kingoldrum." Neither the Crown nor the Court of Teinds could grant or decree the teinds of one parish for the support of the cure in another parish without the assent of the titular, express or implied, and the consent of the minister sought to be deprived when his necessity emerged. Any gifting of the teinds of one parish for the support of the cure in another was subject to the radical and inalienable right of the minister of the parish to the teinds thereof when and so long as he required them. The minister of Inverkeillor had no obligation to revindicate what was vested in him, and had not been parted with by him or his predecessors. His right and title to make objection to the diversion only arose in 1900. "(Ans. 6) The lands in Inverkeillor paying teinds to Carmyllie, Dunnichen, and Kingoldrum were never disjoined from these parishes and united with Inverkeillor. They are and always were part of the parish of Inverkeillor, and situated many miles distant from the said parishes, two of which indeed are in other presbyteries, viz., Dunnichen and Kingoldrum. Nor is the claim now put forward by the ministers of these strange parishes made in respect of lands either disjoined from them and united with Inverkeillor or *vice versa*."

On July 16th, 1901, the Lord Ordinary (Low) pronounced this interlocutor— . . . "Finds that the pursuer is entitled to have the stipend awarded by the Court made up to him from the teinds of his parish paid to the ministers of the said parishes of Carmyllie, Dunnichen, and Kingoldrum, and sustains the objections for the pursuer to said effect, and remits to the Clerk to allocate a proportional part of the teind required to make up the stipend upon the teinds paid to the ministers of said parishes, and finds no expenses due to or by any of the parties, and decerns."

Opinion:—[After stating the facts]—"It is conceded that the claim of the minister of Inverkeillor is not barred by the length of time during which the payments have been made, because until the recent augmentation he had no interest to object, as the teinds paid to the other parishes were not until then required for payment of his stipend. It is contended, however, that the claim should be disallowed, 1st, because the payments were made under decrees of the commissioners, which are final and cannot be set aside, and 2ndly, because there is no free teind in any of the parishes to which the payments are made out of which the stipends of the ministers could be made up in the event of the payments from Inverkeillor being withdrawn.

"This is not a case in which the teinds paid to the other parishes are in respect of lands originally forming part of these parishes but disjoined from them and annexed to Inverkeillor, because although it does appear that some lands which are now in the parish of Carmyllie were at one time situated in Inverkeillor, the payments which are made to Carmyllie are not in respect of these lands, but of lands which always formed part of Inverkeillor.

"It is, however, the case that if the payments are withdrawn from Dunnichen, Kingoldrum, and Carmyllie, the stipends of the ministers of these parishes will be diminished by that amount, as the teinds of the parishes are exhausted. I do not think that the question of a minister's right to reclaim teinds paid to another parish has ever arisen in similar circumstances, because, so far as I can ascertain, in all previous cases there were teinds in the parishes to which the payments were made, out of which the stipends of the ministers of these parishes could be made up.

"It was contended that the fact that there are no free teinds in the parishes in question is fatal to the claim of the minister of Inverkeillor, and a passage in the judgment of Lord President Inglis in the case of *Simpson* v. *Ewing* (10 R. 313) was referred to. In that case the Commissioners of Teinds had in 1648 disjoined certain lands from the parishes of Luss and Kilmaronock and annexed them to Bonhill *quoad omnia*. The annexed lands thereafter paid augmented stipend to the minister of Bonhill, but continued to make the same payments of stipend as before the annexation to the ministers of Luss and Kilmaronock. In course of time, however, the minister of Bonhill obtained an augmentation which the teinds of his parish were not able to meet, unless he was entitled to reclaim the payments which had been made to Luss and Kilmaronock. It was held that he was entitled to do so, but in giving judgment the Lord President said—'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 these 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 free teind of their own parishes.'

"Now, that is a very clear statement of the law applicable to the case with which

the Court was dealing, but it does not follow that it is applicable to a case like the present, where the payments are not in respect of lands originally forming part of the parishes to which they are made.

"I think that it is undoubted that a parish minister has no claim for stipend out of any teinds except those of his own parish, and under all the old Acts the Teind Commissioners were authorised to modify stipends only out of the teinds of each parish. The commissioners, however, did sometimes assume jurisdiction to modify to ministers part of their stipends out of other parishes. The present case is an example of that.

"The decrees under which the payments out of the teinds of Inverkeillor are made were pronounced in 1634, 1635, and 1636, and were therefore decrees of the Commissioners appointed by the Act 1633, c. 19. The Commissioners under that Act were authorised to 'appoint, modifie, and set down a constant and local stipend and maintenance to ilk minister, to be paid out of the teinds of ilk parochin.' It is difficult to read these words as authorising the Commissioners to modify a stipend to one parish out of the teinds of another parish, but as I have said, they sometimes did so. Then the Act declares that all decrees pronounced by the Commissioners shall 'have the strength, force, and authoritie of a decrete sentence and Act of Parliament.' That probably refers only to decrees granted within the scope of the authority given to the Commissioners, but if, in order to sustain the claim of the minister, in this case it were necessary to hold that the decrees were *ultra vires* and fell to be set aside, I should have great difficulty. I have, however, come to the conclusion that the decrees cannot be regarded as inconsistent with or as barring the minister's claim.

"In the first place, I think that the inference from the circumstances brought out in the Teind Clerk's report is, that the Commissioners found that no adequate provision could be made for the ministers of Dunnichen, Kingoldrum, and Carmyllie, out of the teinds of these parishes, and that accordingly, either with the consent of the titular, or the titular not opposing, they decreed certain payments to be made out of the surplus teinds of Inverkeillor. But it seems to me to be a settled principle of teind law that, with certain exceptions, such as cases of *decimæ inclusæ* rights, teinds, into whosoever hands they may come and by whatever title they may be held, are always subject to the burden of a suitable provision to the minister of the parish in which the lands are situated. I think that that is the principle upon which a minister has been found to be entitled to reclaim teinds paid to another parish, however long the payment may have continued, and I am unable to see any sufficient reason why the fact that the teinds of that other parish are exhausted should make any difference. I regard the decrees as giving the ministers of the other parishes a perfectly good title to the teinds with which they deal, but subject to the inherent burden under which all teinds are possessed.

"I shall therefore give effect to the objections in so far as may be necessary to enable the minister of Inverkeillor to obtain payment of the full amount of his stipend, and shall remit to the clerk to rectify the locality accordingly."

Argued for the reclaimers—Although the maxim *decimæ debentur parocho* expressed the general rule, the circumstances in this case were altogether exceptional. The payments sought to be reclaimed had been made from the teinds of Inverkeillor to the ministers of Dunnichen, Kingoldrum, and Carmyllie, under decrees of the Commissioners appointed by the Act 1633, c. 19, and they had continued to be paid without objection for nearly 300 years. Under the Act 1633, c. 19, the decrees of the Commissioners under the Act had the strength and authority of an Act of Parliament. It was not uncommon for the Teind Commissioners before the Union to modify to ministers part of their stipends out of the teinds of other parishes—Connell on Tithes, i. 442-444. It must be presumed that the decrees pronounced by the Commissioners were *intra vires* and regular and lawful. The onus lay on the minister of Inverkeillor to show that these decrees were irregular and that the ancient localities should be disturbed. There were probably good reasons—though these reasons could not now be accurately ascertained—for the decrees in question having been pronounced. These decrees were probably the result of an adjustment of the several parishes which prior to the Reformation had been under the common ecclesiastical administration of the Abbey of Aberbrothock, which rendered the allocation of the teinds as was done by the Commissioners equitable and proper—Duncan's Parochial Law, p. 5; Connell on Parishes, p. 13. The acquiescence of the ministers of Inverkeillor for nearly 300 years in the arrangement given effect to in these decrees barred the present incumbent of the parish from now questioning the validity of these decrees. It was also an important element that there was no free teind in any of the reclaimers' parishes out of which the stipends of the reclaimers could be made up in the event of the payments from Inverkeillor being withdrawn—*North Leith* case (*Johnston* v. *Heritors of St Cuthbert's*), March 3, 1802, M. 14,834; Connell on Tithes, i. 444; *Eyemouth* case (*Smith* v. *Hunter*), March 5, 1823, F.C.; Shaw's Teind Cases, p. 49; *Common Agent in Locality of Abbotshall* v. *Minister of Kirkcaldy*, November 22, 1815, F.C.; the *Ballingry* case (*Pennel* v. *Malcolm*, July 20, 1869, 7 Macph. 1078), and the *Bonhill* case (*Simpson* v. *Ewing*, December 8, 1882, 10 R. 313, *præsertim per* Lord President Inglis, at 325, 20 S.L.R. 235), showed that the right of a minister to reclaim teinds depended on whether the stipends of the extraneous parishes could be made up from other teinds in these parishes. There was no case where teinds had been reclaimed from another parish if there did not exist teinds or other funds in that parish from which

the loss could be made up. In the *Rescobie* case (*Minister of Rescobie* v. *Carnegy*, February 5, 1869, 7 Macph. 514) the question was not raised. In the *Portpatrick* case (*Ferguson* v. *Officers of State*, June 29, 1824, Shaw's Teind Cases, p. 73) there was an Exchequer Fund from which the loss to the minister by the withdrawal of the teinds was made up. The Exchequer Fund allowed by Parliament was now exhausted, so that the loss to the reclaimers could not be made up from that source.

Argued for the respondent, the minister of Inverkeillor—The Act of 1633, cap. 19, empowered the Commissioners to modify stipends out of the teinds of each parish only. The decrees of the Commissioners making allocations of stipend to the ministers of Carmyllie, Kingoldrum, and Dunnichen from the teinds of Inverkeillor could not affect the paramount right of the minister of Inverkeillor to a competent stipend from the teinds of his parish. The maxim *decimæ debentur parocho* had always been regarded as the rule. The burden of providing a suitable stipend to the minister of the parish was inseparable from the teinds of the parish—*per* Lord Robertson, *Prestonkirk* case, Connell on Tithes, ii. 334, App. No. 120. The diversion of the teinds of Inverkeillor to provide stipends for the ministers of those extraneous parishes was probably the result of the assent given by the Marquis of Hamilton, as titular of the teinds of Aberbrothock, in his own interest. At that time, and for many years afterwards, the remaining teinds of Inverkeillor were sufficient to provide a competent stipend for the minister of that parish. As long as this was the case the minister of Inverkeillor and his predecessors had no interest or title to object to any application of the surplus teinds either by the act of the titular or by decrees of the Lords Commissioners. That being so, the minister of Inverkeillor was *non valens agere*, and it was clear that what was done by the titular or the Commissioners could not bar the right of the minister of Inverkeillor to object, as he now did, immediately such objection became competent to him, *i,e.*, as soon as, in virtue of the augmentation of his stipend, the remaining teinds became inadequate to furnish the stipend as augmented. No amount of possession of these teinds by the ministers of the extraneous parishes could result in their acquiring an absolute right to these teinds. They had held them all along subject to the contingent claim of the minister of Inverkeillor, as soon as the occasion arose when he had an interest to reclaim these teinds. The ministers of the extraneous parishes, as assignees of the teinds, could have no better right than their authors, the titulars, and the estate of titularity was always subject to providing an adequate stipend to the minister of the parish—*Johnston* v. *Heritors of St Cuthbert's*, *supra;* the *Eyemouth* case, March 5, 1823, F.C., Shaw's Teind Cases, 49. The *Bonhill* case, *supra*, and the *Ballingry* case, *supra*, were not in point, as they dealt with payments of teinds of ands disjoined from one parish to another. But the lands in Inverkeillor paying teinds to the extraneous parishes were never disjoined from these parishes and united to Inverkeillor. The cases of *Eyemouth*, *supra*, and *Portpatrick*, *supra*, were instances in which teinds had been reclaimed though there was no teind in the other parish from which the loss could be made up. Reference was also made to the reclamation of teinds by the minister of *Meigle* from the parishes of Dunkeld and Dowally, recorded in the Teind Records. There was, on the other hand, no record of any case in which the appropriation of the teinds of one parish to make up the stipend of another parish had been sustained to the prejudice of the minister of the parish whose teinds had been diverted.

LORD PRESIDENT—The question in this case is whether the minister of the parish of Inverkeillor is entitled to reclaim from the ministers of the parishes of Dunnichen, Carmyllie, and Kingoldrum certain teinds of Inverkeillor which had been allocated to the ministers of these parishes under decrees of the Lords Commissioners of Teinds, the teinds claimed by him being essential to make up the stipend awarded to him by the Court of Teinds on 17th November 1899.

The Teind Commissioners, under the Act 1633, cap. 19, pronounced on 14th July 1634 an order in the following terms:—"The Lords find that the titular may not take the teinds of the paroch to provide the minister of another, but that ilk minister be provided with his own,"—and I think that, apart from any authority which this order may derive from its having been made by the Commissioners, it is a correct expression of the law as it stood at the time. It appears, however, that the Commissioners did not always adhere to the rule thus laid down, and they made allocations of stipend in 1634 to Carmyllie, in 1635 to Kingoldrum, and in 1636 to Dunnichen from the teinds of other parishes, including Inverkeillor. The reasons for these allocations cannot now be ascertained, but it is suggested with probability that there were no other sources of stipends for these parishes available at the time, and the Marquis of Hamilton, who was then titular of the teinds of Inverkeillor, may have assented to, or at all events may not have opposed, what was thus done.

It appears from the interim locality made up by the common agent in the present process that the teinds of Inverkeillor are not adequate to provide the augmentation granted by the Court of Teinds, the deficiency amounting to one and three-eighth chalders. The minister of Inverkeillor has thus for the first time an interest to reclaim, and he does now reclaim, so much of the teinds of his parish as were allocated to the ministers of Dunnichen, Carmyllie, and Kingoldrum, with a view to making up the stipend awarded to him by the Court of Teinds.

Although the maxim *decimæ debentur parocho* has not uniformly received full

effect in the law of Scotland, it is well settled that the teinds of a Scottish parish are primarily dedicated towards providing a stipend for the minister of the parish, and a heavy onus rests upon anyone claiming teinds against the minister of the parish where they are requisite to provide a stipend awarded to him by the Court of Teinds, to show some right preferable to his right.

The first question is, whether the right of the minister of Inverkeillor to reclaim the teinds in so far as necessary to make up his stipend is barred by prescription or acquiescence, and I am of opinion that it is not. It does not appear that the minister of Inverkeillor was a party to any of the proceedings in which portions of the teinds of his parish were allocated to the ministers of the parishes of Dunnichen, Carmyllie, and Kingoldrum, and therefore there is no room for a plea of anything like *res judicata* against him. It is further to be observed that the minister of the parish of Inverkeillor at the time had no interest to object to the appropriation of part of the teinds of it towards providing or augmenting the stipends of the ministers of the other three parishes when nothing was taken from him, nor has any interest emerged to him until now which would give him a title to interfere. So long as his stipend was duly paid he had no interest in what the titular did or allowed to be done with the balance of the teinds not required to provide his stipend, and if the titular, either expressly or by acquiescence, allowed teinds in which he was, but the minister of Inverkeillor was not, at the time interested, to be applied in augmenting the stipends of the parishes of Dunnichen, Carmyllie, and Kingoldrum, the minister of Inverkeillor could not object to this. In such a case the really effective authority for the application of the teinds is the consent of the titular, and if they were, expressly or by acquiescence, assigned by him to the ministers of the other parishes or to anyone else his assignees could not have a better right to the teinds than he had, and they would be liable to be allocated on in so far as necessary to provide a stipend for the minister of Inverkeillor in the hands of his assignees as well as in his hands. In other words, the titular could only give a right to the teinds defeasible by a claim for stipend by the minister of the parish. The minister of Inverkeillor was *non valens agere* in the matter at the time when the Inverkeillor teinds were allocated to the ministers of the other three parishes, and ever since, until the augmentation of his stipend gave him an interest to claim these teinds, or so much of them as might be requisite to provide his augmented stipend. I am therefore of opinion that the claim of the minister of Inverkeillor is not excluded either by prescription or by acquiescence. But further, it appears to me that the proper inference in regard to such a transaction is that it was carried out without any purpose or intention of derogating from the rights of anyone else, or, in other words, that the allocation of the Inverkeillor teinds to the other three parishes was *de bene esse*, with an implied reservation of any rights which might subsequently arise to the minister of Inverkeillor in them. For these reasons, I am of opinion that there was no negative prescription running which would exclude the right of the minister of Inverkeillor to claim the teinds of his parish when necessary to provide his stipend. It therefore appears to me that *prima facie* the claim of the minister of Inverkeillor to so much of the teinds in question as may be requisite to make up his augmented stipend is well founded.

It was, however, maintained on behalf of the ministers of Dunnichen, Carmyllie, and Kingoldrum, that the minister of a parish had never been held entitled to reclaim teinds of his parish which had been allocated or assigned to the ministers of other parishes unless there were teinds in these other parishes which would make good to the ministers of them the loss which they would suffer from the claim receiving effect. It may possibly be that this is so in fact, but, on the other hand, I am not aware of any case in which such a claim as that now made by the minister of Inverkeillor has been rejected on the ground that there were not teinds in the other parish or parishes to make good the loss which would result to the minister or ministers of it or them from his claim being sustained, and it is difficult to see any reason or principle for holding that such an appropriation of the teinds of a parish, when the minister had no interest to object to it, should be rendered final by what appears to me to be for the purposes of this question the accidental circumstance that there are no other available teinds in the other parish or parishes. I concur with the Lord Ordinary in thinking that the opinion of the Lord President Inglis in the *Bonhill* case (*Simpson* v. *Ewing*, 10 R. 313), was not intended to lay down, and did not lay down, any law to this effect. It does not appear to me that his Lordship's dictum in that case would in principle be applicable to a case like the present, where the payments are not in respect of lands which originally formed parts of the parishes to which they were made, but of lands which always formed part of the parish to which the teinds belong.

The general doctrine that the minister's right to a suitable stipend is paramount to other claims upon the teinds of his parish is well illustrated by the case of *Johnston* v. *The Heritors of St Cuthbert's* (M. 14,834), in which the Court found on 27th May 1801 "that in allocating the pursuer's stipend as modified after continuing the old stipend drawn by him, as conform to use and wont, and after exhausting any other free teind in his parish, the pursuer is entitled to all or as much of the victual presently paid out of the teinds of Newhaven to the minister of St Cuthbert's as may be necessary for completing his said modified stipend." The *Eyemouth* case (*Smith* v. *Hunter*, March 5, 1823, F.C., Shaw's Teind

Cases, 49), also appears to me to support the views now expressed, as it was there found that although the minister of one parish has drawn part of the victual teind of another parish for a period of years past the memory of man, the minister of the parish from which the teind was drawn is entitled to reclaim it upon the teinds of his own parish being exhausted, and that a previous judgment of the Court repelling a similar claim before the teinds were so exhausted, followed by upwards of forty years' possession, did not operate as a *res judicata* to bar his action. I am not aware of any case in which a final appropriation of the teinds of a parish to the prejudice of the minister of the parish has been sustained.

For these reasons, I think that although it may be true that in all previous cases of reclamation by the minister of teinds belonging to his parish which had been allocated to the minister of another parish, the means existed of making up the loss to the minister of that parish, I do not think that this is essential to the validity of the claim in the circumstances of the present case, and I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM—I agree with your Lordship.

LORD M'LAREN — I am of the same opinion. Without going over the arguments again, I would say that in my view the foundation of the minister's claim is that while the titularity is an assignable right, yet it is a quality of the estate of titularity that it is held subject to the obligation of providing a stipend to the minister of the parish. It is an estate which may be disponed, excambed, pledged in security, or adjudged, but the transferee, whatever may be the nature of his title, is in no better position than his cedent the titular. There are cases where the *ex facie* owner of an estate may give to a disponee a better title than he has himself, but this is certainly not one of them. The ministers of extraneous parishes here represented, as their right to the teinds is derived from the decree of a competent court, are practically in the position of adjudgers. As such they can only take the right as it was in the person of the titular from whom it was judicially transferred. It follows, in my opinion, that no lapse of time can make any difference in the rights of parties, or strengthen the claim of the extraneous parishes in a question with the minister of the parish to which the teinds pertain, because the rights in question are not conflicting rights, the one is subordinated to the other. The right of the extraneous parishes is exactly the right which a titular would have, and therefore when the other teinds are exhausted it follows that these may be reclaimed by the minister of the parish to which they belong. If the result of this is to diminish the stipends of the extraneous parishes, that is just a consequence of the precarious title under which they came to have an interest in these teinds.

LORD KINNEAR—I have come to the same conclusion. The case is one which involves some hardship to one minister or another, and therefore it is perhaps fortunate that we are not called upon to weigh the interests of one set of ministers against those of the other, but are confined to the strict application of the settled rule of law. I have no doubt that the rule of law is exactly as your Lordship has stated. I do not think that it is necessary to consider how far the maxim *decimæ debentur parocho* was observed in the old law of this country before or immediately after the Reformation, because it does not appear to me to be necessary or apposite to go further back in the history of the law than the new settlement which was effected in the reign of Charles I., which forms the basis of our existing law, and puts the relative rights of the Church and the landowner upon an entirely new footing. The result of that legislation is very familiar; no minister, after the passing of this series of statutes to which I refer, has any longer the right of a parson of the parish to draw the teinds of his parish as such; but every minister has right to a competent stipend for his maintenance to be provided for him out of the teinds of his own parish, and the whole teinds of his parish are answerable to meet his claim for such maintenance as the first charge to be made upon them. The general rule of law is stated very clearly and very forcibly by Lord Robertson in the *Prestonkirk* case (Connell, vol. ii. Appex. No. 120, at p. 334), where his Lordship says—"Teinds, in whatever hands they may be, or under whatever title they may be possessed, are never held as absolute property, but are at all times subject to the burden of a suitable provision to the minister. This burden *inhaeret ossibus*, and is in the eye of the law perfectly inseparable from the teinds. This I consider as a fundamental proposition in the law of teinds. It is laid down as such by all our lawyers. It is a proposition which is universally true, and which admits of no exception nor any limitation whatever." That his Lordship is there speaking, not of a right in the Church generally, but of the right inherent in each minister to be maintained out of the teinds of his own parish, is, I think, pretty clear, not only from the language used in the passage I have quoted, but from the whole course of the argument in the case, and also from the perfectly clear and distinct language of the statutes which the learned judge was referring to, because it is expressly enacted in the Act of 1633, cap. 17, that the teinds shall be burdened with the stipend of the minister serving the cure of the kirk for his maintenance; and again in the Act of 1633, cap. 19, the Commissioners are empowered "after the closing and allowance of ilk kirk and parochin of the valuations thairof to appoint, modify, and set down a constant and local stipend and maintenance to ilk minister, to be paid out

of the teinds of ilk parochin according to the tenor of the Acts above specified." The plain meaning of these words is that the minister of each parish is to have sufficient maintenance out of the teinds of his own parish; and there can be no doubt that the first Commissioners acting under this statutory authority understood the rule to be as it is expressed in the statute, and acted upon that understanding, because it is pointed out in the report of the Teind Clerk that on 14th July 1634 they pronounced an order in the terms your Lordship has quoted:—"The Lords find that the titular may not take the teinds of the paroch to provide the minister of another, but that ilk minister be provided with his own." I am rather disposed to think that, reading the words according to the usage of language in Scotland at the time, the words "but that" are equivalent to "unless," and that the meaning of the order was, that although a titular might give the teinds which were his own to the minister of another parish if he pleased, he must not do so unless and until the minister of the parish to which they properly belonged had been sufficiently provided for. And if that be the meaning of the Commissioners' order, then I agree that we are not entitled to assume that they departed from the rule provided by the statutes and laid down by themselves. It is perhaps not immaterial to note that the order was issued by the Commissioners at the time when the titular had right to give in a locality. It was his absolute right, when the Commissioners fixed the amount of the stipend, to local it at his own pleasure, subject to the one condition, that he must provide the minister with the stipend modified to him out of the teinds of his parish. If, therefore, the Commissioners sanctioned the allocation of teinds of one parish to payment of ministers of other parishes, it necessarily follows that that must have been done because at the time they had already provided sufficiently for the minister of the parish to which the teinds properly belonged; and the only question which could then arise as to the effect of their appropriation of any part of the teinds to other parishes would be whether the provision which had already been made for the minister was final and exhaustive, or whether it was subject to increase from time to time as necessity arose, with a right on the part of the minister to go against the whole of the teinds of the parish to meet the augmentation which might be awarded to him. Now, that is not a question which is open to discussion, because it was finally settled in the *Prestonkirk* case, where it is demonstrated by the opinions of Lord Robertson, Lord President Blair, and Lord Justice-Clerk Hope, who was afterwards Lord President, that throughout the whole period from 1633 onwards, the modification of stipend to the minister of a parish was never final except in so far as it might be made practically final by exhaustion of the teinds; but that ministers were always entitled to come back when occasion arose and ask increases of stipend, the stipend originally allocated being liable to no diminution, but subject to increase if there were sufficient occasion for increase. Now, it appears to me to follow that if that is the law, then the appropriation of teinds to the stipend of ministers of other parishes was necessarily subject, just like the appropriation of the teinds to anybody else, to the contingent claims of the minister of the parish when occasion should arise. And I do not think we can construe the allocations founded on by the complainers as involving anything but provisional appropriation to the ministers of the outside parishes to last so long, and so long only, as the teinds given to them were not required for the maintenance of the proper parish. If that be so, I think it is clear that there is no room for any plea of prescription or acquiescence, because the ministers of the outside parishes were put in possession of teinds of which it is an inseparable qualification, as Lord Robertson puts it, that when the minister of the parish requires them they are subject to his paramount claim for a sufficient maintenance, and no amount of possession subject to the qualification that under certain contingencies the possession must cease, can result in the acquisition, whether by prescription or acquiescence, of an absolute right. From the first I think the right was provisional, and the contingency upon which the adverse right of the parish minister would emerge has now occurred.

I agree with your Lordship also, and with the Lord Ordinary, that the observations of the Lord President Inglis in the case of *Bonhill* have really no application to the present question. The question which his Lordship was there considering concerned the effect of the disjunction and annexation—of the disjunction from one parish and the annexation to another—of lands which had already been burdened with stipend to the minister of the original parish. Now, the minister of that parish, when the stipend was allocated to him, was not in the enjoyment of any provisional right, but of an absolute right. These were his teinds, the teinds of his parish, and the question therefore, whether when the lands were disjoined from his parish and annexed to another, his claim for stipend should be affected or not, might very well depend, as the Lord President points out, on whether the stipend could be made up by other teinds in the original parishes; and if it could not, then it is perfectly reasonable that any disjunction of lands must be held to be qualified by what was already an absolute right. This can have no application to cases in which a right adverse to the minister's claim to stipend is not absolute.

I therefore agree with your Lordships.

Counsel for the respondent, the minister of Inverkeillor, moved for expenses, and argued—The common agent must bear the expenses of unnecessary procedure.—Act of Sederunt, November 12, 1825;

M'Leod v. *Heritors of Morvern*, November 22, 1865, 38 Jur. 39; *Buchanan* v. *Gilmour*, October 29, 1883, 11 R. 59.

Counsel for the common agent maintained that he having all along contended that the real question at issue was one solely between the minister of Inverkeillor and the reclaimers, the common agent was not liable in the expenses of determining that question.

Counsel for the reclaimers maintained that they had been brought into the process by the interlocutor of the Lord Ordinary (June 21, 1901), and the minutel odged by them was a necessary act in defence of their benefices.

LORD PRESIDENT—This is a somewhat peculiar question. Apart from the Lord Ordinary's judgment I should have thought that the successful minister would have had a strong claim to at least a part of the expenses in the Outer House. But the Lord Ordinary, who has dealt with all the questions between the parties, and is fully conversant with all the facts, has found no expenses due to or by either party up to 16th July 1901. I should be slow to interfere with the decision of the Judge before whom the case in all its details has been examined upon a question of expenses. I therefore propose that we should not interfere with his Lordship's interlocutor in so far as it finds neither party entitled to expenses up to 16th July 1901; but I think we should give expenses to the successful minister since that date. Undoubtedly there has been a strong conflict between the parties since then, and I see no reason why the expenses of that conflict should not follow the result.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree. I see no sufficient reason for interfering with the Lord Ordinary's decision as to expenses up to 16th July 1901. As to the expenses in this Court, the only possible question is that raised by Mr Clyde. The ministers were not only entitled but perhaps even bound to appear before the Lord Ordinary to defend their benefices, and so far their resistance may have been justified. But they were not bound to persist after the Lord Ordinary's judgment. Accordingly, though they may have been well advised to reclaim, they must do so upon the ordinary condition that they must pay expenses if they are unsuccessful.

The Court refused the reclaiming-note and found the reclaimers liable in expenses to the objector since the date of the Lord Ordinary's interlocutor,

Counsel for the Reclaimers—Clyde, K.C.—C. N. Johnston. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondent, the Minister of Inverkeillor—Crabb Watt—P. Balfour. Agent—William Porteous, Solicitor.

Counsel for the Respondent, the Common Agent—Cooper. Agent—John C. Couper, W.S.

COURT OF SESSION.

Friday, January 31.

OUTER HOUSE.

[Lord Kyllachy.

SIMPSON'S TRUSTEES *v.* MACHARG & SON.

Writ—Testamentary Disposition—Typewriting—Title to Heritage—Typewritten Instrument Forming Part of Title—Sale—Sale of Heritage—Objections to Title—Expenses—Act 1593, *c.* 179—*Act* 1681, *c.* 5—*Titles to Land Consolidation* (*Scotland*) *Act* 1868 (32 *and* 33 *Vict. c.* 116), *sec.* 149—*Conveyancing* (*Scotland*) *Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 38—*Interpretation Act* 1889 (52 *and* 53 *Vict. c.* 63), *sec.* 20.

A truster left a trust-disposition and settlement duly subscribed by him and by the instrumentary witnesses, but wholly typewritten, and two codicils relative thereto, the earlier in date being typewritten and the later in date being written by hand, both referring *in gremio* to the settlement. The trustees acting thereunder having sold certain house property which formed part of the trust estate, the purchaser refused to accept the title to the property tendered by the trustees, on the ground that the trust-disposition and settlement forming part of the title was typewritten.

In an action by the trustees for implement of the sale, *held* (1) that, assuming the validity of the title depended upon sec. 149 of the Titles to Land Consolidation (Scotland) Act 1868, as modified by section 38 of the Conveyancing (Scotland) Act 1874, the trust settlement as a whole, including the two codicils—one of the codicils being written by hand—was a deed partly written and partly printed within the meaning of sec. 149; (2) that, irrespective of sec. 149 of the Act of 1868, the provisions of sec. 38 of the Conveyancing (Scotland) Act 1874 and of sec. 20 of the Interpretation Act 1889 had so modified the old Scots Acts 1593, c. 179, and 1681, c. 5, that all possible objections to deeds wholly or partially not written by hand, including typewritten deeds, had ceased to be of any force; and therefore (3) that the title tendered was valid, and decree *granted*, with expenses.

The Titles to Land Consolidation (Scotland) Act 1868 (32 and 33 Vict. cap. 116), sec. 149, enacts as follows—"All deeds and conveyances, and all documents whatever mentioned or not mentioned in this Act, and whether relating to land or not, having a testing clause, may be partly written and partly printed or engraved or lithographed: Provided always that in the testing clause . . . the name and designation of the writer of the written portions of the body of the deed or conveyance or document shall be expressed at length, and all such deeds, conveyances,