provision for ascertaining the price to be paid by arbitration. And the special Act provides that the arbitration shall be proceeded with under the provisions of the Lands Clauses Act, so that the only difference between this and the Lands Clauses Act is that it is settled by the Act itself that a certain property shall change hands, and the arbitration is special, but is to be proceeded with under the general Act. The compensation being ascertained, the next step is under the 29th section of the special Act. "On payment of the compensation," Sir James Alexander "shall grant a conveyance of the said water-works to the company; and, on such conveyance being granted, the said water-works, for all the rights of the said Sir James Edward Alexander, or his heirs or successors therein, shall form part of the undertaking of the company, and shall be vested in, and may be held, used, and disposed of by the company for the purposes of this act." Under this section nothing can be done except on payment of the compensation; and, on payment, Sir James "shall grant a conveyance." That is imperative. I should be inclined to say that a tender of the compensation was sufficient. But then, supposing that the compensation is tendered, and that Sir James does not grant the conveyance, the company have no help from the special Act at all. It stops there, and gives them no farther power, and therefore they must go to the General Act. No doubt they might have an action against him, and compel him to grant the conveyance, and there might be grounds for adjudging the property, but that would be a cumbrous proceeding, and accordingly the promoters found it necessary to go to the Lands Clauses Act, which is incorporated with the special Act, and they say that they have, under the provisions of that Act, constituted in them a right to obtain possession of this property. It rather seems to me that if we sustained that plea we should be doing something inconsistent with the clauses of the Lands Clauses Act on which we went in the previous case. I should not be afraid to do that if I thought it right, but unfortunately I remain convinced that the ground of that judgment was sound, and sufficient not only to dispose of that point, but of this also. In construing the 89th section of the statute under which the promoters proceeded in their other case, we came to this conclusion, that the only case or cases in which the promoters might go to the Sheriff to ask an order for possession, were cases in which, according to the provisions of this or the special Act, they were authorised to take possession. Now, we considered what were these cases, and we could find only two, and I have not yet seen any other pointed out. It is said that there are other clauses which imply a right to take possession, but certainly there is no direct authority. In the 84th section we have the provisions as regards *interim* possession, and in the 76th as regards permanent possession. I know no other case. In the present case we have nothing to do with the 84th section, and that, therefore, may be thrown out of view. The only case in which there can, in this instance, be any authority given by the statute to take possession is under the 76th section, and I hold that under that section two things are necessary in order to give the company a title of possession. There can be no possession without a title, and the promoters must not only consign, but they must expede a notarial instrument in terms of the section. It is said that it must be a matter of indifference to the landowner whether a notarial instrument is expede or not, if he has got his price consigned. I cannot assent to that. The party may be in such a position as that he will not grant a title, because he is not satisfied, and he leaves them to make their title, and the statute is precise as to what is to be in it in order to make it valid. There are many points in which the owner has a material interest, and therefore it is not indifferent to him whether a notarial instrument is expede or not. But whether he has an interest or not, it is enough that the statute has so said that it is only by expeding that notarial instrument that the right shall vest and possession shall follow. The authority, therefore, obtained from the 76th section to enter into possession is conditional on the title being completed.

It is said, farther, that when the price has been ascertained and is consigned, it is only fair that the promoters should be put into possession, and that no one has any interest to prevent it. But it must be recollected that we are dealing with heritable estate, and it is one of the best ascertained rules of law that no one can take or maintain possession without a title. I do not mean a complete feudal title, because possession may he had under a temporary title, or a title of mere security, but there must be a title of some kind. There is no title that can belong to the promoters under this Act but a statutory title, and, therefore, though the statute may say, you shall not take posession until you have consigned, it would be rash to say that, as soon as you have done that, you may take possession. That only means that payment or consignation shall be one condition, but by no means the only one. I therefore go on the assumption that the price has been ascertained and consigned, and I care nothing about the reduction. I go entirely upon this, that the promoters have not got in their own person any statutory title of possession, and, without that, they have taken possession; and, therefore, the interdict must stand, unless they can show that they have got the consent of the proprietor. It would certainly be a curious result, that after it has been judicially determined by the Sheriff that these parties have not put themselves in a position under the Act to ask an order for possession, they should yet be allowed to take possession by recal of this interdict *via facti*. They can have no other conceivable object. They must suppose that the recal of this interlocutor will legally prevent Sir James Alexander from opposing their entry. But I only say that as illustrative of the general ground on which I proceed.

Lord Curriehill—I take the same view, and shall state my opinion in a single sentence. It having been decided in the former case that the promoters are not entitled to obtain possession by judicial authority, it appears to me to follow *a fortiori*, that they are not entitled to take possession, *brevi manu*, without judicial authority.

Lords Deas and Ardmillan concurred.
Agent for Advocators—A. J. Dickson, S.S.C.
Agents for Respondent—H. & A. Inglis, W.S.

Friday, January 17.

LORD ADVOCATE *v.* GORDON'S TRUSTEES AND TAILYOUR.

Teinds—Stipend—Locality—Onus—*Mensal Kirk.*

For more than a century the whole burden of

stipend in a parish was laid on teinds in the hands of heritors not having heritable rights, the Crown acquiescing in this mode of allocation in several localities. In a new locality the Crown craved that the augmentation should be laid *primo loco* on the teinds held on heritable right, alleging that all the other teinds in the parish (with a small exception) were bishop's teinds belonging to the Crown, and so not liable to the burden of stipend until the teinds held on heritable right were exhausted. *Held* (1) that the *onus* of proving that the former mode of allocation was erroneous lay on the Crown; and (2) that the Crown had not discharged the *onus*.

This was a question, arising in the locality of Montrose, between the Lord Advocate, on behalf of her Majesty and the Commissioners of Woods and Forests, and the trustees of the late Harry Gordon, Liverpool, and Thomas Renny Tailyour, of Borrowfield and Newmanswells. In the rectified locality the teinds of the parish were localled on in the following order:—(1) Teinds which have been held to be surrendered and exhausted; (2) teinds to which the heritors have no heritable right; (3) teinds to which heritors have, as is alleged, heritable right; (4) college teinds. The Lord Advocate alleged that the whole teinds in classes 1 and 2 were bishop's teinds, belonging to the Crown, and objected to the locality in so far as by it the whole augmentation had been laid on these teinds, and no part on the teinds held on heritable right, whereas the teinds so held upon heritable right should have been localled on *primo loco*, and exhausted, before any part was laid on the bishop's teinds. He craved that the locality should be altered. The heritors denied that there were any bishop's teinds belonging to the Crown in the parish. Any teinds which formerly belonged to the bishop were of insignificant amount, and were exhausted in former localities, or were now held on heritable rights. Besides, the heritors pleaded *mora* and acquiescence, and prescription.

The Lord Ordinary found that the teinds of the parish to which the heritors could not instruct an heritable right, with the exception of the teinds of the lands and barony of Kinnaber, being the teinds belonging to St Mary's College, St Andrews, were bishop's teinds belonging to the Crown: sustained the objections for the Lord Advocate, and remitted to correct the locality.

The heritors reclaimed.

Cook and Lee for them.

Solicitor-General (Millar) and Kinnear in reply.

At advising—

Lord Curriehill—The question in this case relates to the mode of allocating the augmentation of stipend awarded to the minister of Montrose. It appears from the last locality, which is printed, and which we have had before us, that the teinds of this parish are in this situation. There are enumerated 64 parcels of land, comprehended within the parish, and of these, the teinds of eight parcels are described as having been surrendered and exhausted. Other ten parcels are described as held on heritable rights by heritors. Four are described as belonging to St Mary's College of St Andrews, and all the rest are described as being held without heritable rights. The question is, how is this augmentation to be allocated on these different parcels.

It appears that, according to the mode of allocation adopted not only in the immediately preceding augmentation, but in all the localities for the century from 1759 down to the present time, the allocations have been made on the footing of laying on the numerous parcels of lands in the hands of heritors not having heritable rights the burden of the whole augmentation. The teinds of the ten parcels of land held by heritors having heritable rights were not burdened with any stipend. How long matters were conducted on that footing we do not know, but it was for a century at least. The allocation was not made in absence of the Crown, because we have evidence that the Crown was called as a party to all these processes, and appeared in some of them. But though this practice has proceeded for a long time, the Crown has now appeared and insists that that order of allocation shall be reversed, and that the augmentation shall be imposed upon the teinds of those heritors who have heritable rights, and the teinds of the Crown shall be entirely exempted unless the others be insufficient to afford the amount of stipend. This is opposed by the class of heritors who have heritable rights, and the question is, which contention is right?

The ground upon which the Crown proceeds is, that the teinds of those parcels of land belonged to a mensal church of the Bishop of Brechin, and that no part of the stipend could be allocated on the Bishop under the submissions and Acts of Parliament; and that the Crown, having succeeded to the right of the Bishops, has the same privileges that the Bishops themselves had. This raises a very important question; but the difficulty is not in point of law, but as to matter of fact. We thought it very desirable that some of the facts should be cleared up by evidence, but we must now deal with the case as a concluded case. The parties have brought a considerable amount of evidence; they have no more to offer us; and we must therefore deal with the case on the evidence before us. I may say, at the outset, that it is impossible to doubt that the greater part of the teinds of this parish belonged at one time to the Bishop. But it does not appear that the whole teinds had at any time belonged to him, but some always to others. The evidence does not go farther back than 1661, but from that time we have a good deal of evidence; and it appears that, from the earliest times, portions of the teinds of this parish had belonged to certain friars, and other portions to canons. Others had belonged to the College of St Mary's, and that is the case still. Now, these exceptions are not very easy to reconcile with the doctrine of the Crown that this was a mensal parish. Considerable obscurity is attached to that doctrine by the fact that the whole teinds did not at any time belong to it. But there is a more serious difficulty than that—namely, that ten portions of land in the parish are held by heritors with heritable rights. The very existence of these heritable rights creates a difficulty. How is this to be reconciled with the claim of the Crown to have it assumed that this was a mensal parish, and that the whole teinds belonged to the Bishops? It was distinctly admitted that there was no evidence to show how these teinds were acquired. But it is a still more serious difficulty that, so far back as we can trace the matter, the owners of these heritable rights have exercised them by getting the immunity that belongs to owners having heritable rights, and getting that in preference to the Crown. The Bishops, so long as prelacy existed, and the Crown afterwards, as in their right, having immunity so long as there were

other teinds, the owners of these heritable rights claimed their immunity, and effect has been given to that claim for a century at least, and, so far as we see, from time immemorial. It is incumbent on the Crown to explain this, but they have admittedly failed to do that. The fact is apparently inconsistent with the right of the Crown, and, while they occasionally appeared in the processes, they acquiesced in that arrangement. No explanation is given by the Crown, and in the absence of that, I think there is great difficulty in holding that the Crown has now given evidence sufficient to establish their case. I do not think it was maintained that it was impossible to reconcile the existence and exercise of these rights of the owners with the claim of the Crown. Suppose the Bishop himself, at any time after the decrees of Charles I., and before 1637, had granted these heritable rights, or that after 1637 the King had made grants of these ten parcels of land with heritable rights, or that the Bishops, after being restored in 1661, had granted such rights, or the Crown after 1689, in all these cases there might have been a question as to the power to make such grants, but the subject of the grants would have been Bishops' teinds, and the parties who granted them would not have been at liberty to allocate them to stipend. That is illustrated by the case of *Straiton* v. *College of St Andrews*, M. 14,801 (and 10,824). But I merely mention these as modes in which these rights may have been obtained, and that being possible, I think, in the circumstances, it was incumbent on the Crown to exclude this claim by showing that there were no heritable rights, or that the teinds were not Bishops' teinds. I think the Crown has failed to discharge the *onus* which lay upon them, and therefore, on this ground, I think the interlocutor ought to be altered, and that the owners of these heritable rights ought to have the same immunity as in previous localities.

The other judges concurred.

Interlocutor recalled, and objections repelled.

Agent for the Crown—W. H. Sands, W.S.

Agents for Heritors—Mackenzie & Kermack, W.S.

Friday, January 17.

HOUSTON *v.* COMMON AGENT IN LOCALITY OF HADDINGTON.

Teinds—Valuation. A report by the Sub-Commissioners in 1632 "found and declared the stock and vicarage teind conjunctim" of a certain muir in a parish, "having no parsonage teind, in regard the same was never tilled or laboured, to be 20 merks." The report was approved by the High Court. *Held* that the sub-valuation was agreeable to the tenor of the instructions of 1629, and must receive effect as a valuation of the entire constant rent of the lands, one fifth part of which was the limit of the heritor's liability for teind, both parsonage and vicarage.

This was a question arising in the locality of Haddington between the common agent and certain heritors in the parish. The ministers of the first and second charges of the parish of Haddington having obtained an augmentation of stipend, a proportion of the augmentation was localled upon Colonel Houston for that part of the lands of Gladsmuir known as Heathery Hall; upon Sir Thomas Buchan Hepburn, for his lands of Gladsmuir; upon Lord Elibank, for part of the lands of Gladsmuir known as Nairn's Mains; and upon Robert Ainslie, for part of Gladsmuir called Hopefield. The teinds of these lands were dealt with as unvalued. These heritors now objected to the scheme of locality. Their lands had formed parts of the Muir of Gladsmuir, formerly the property of the magistrates of Haddington. In 1632, the heritors alleged, the muir, so far as lying in the parish of Haddington, was valued by a report of the Sub-Commissioners, which "fand and declared the stock and viccarage teind conjointim of that pte of the muir of Gladsmure lyand within the parochin and presbyterie foresaid, pertayning heritablie to the provost, councile, and communitie of the said burgh of Haddington, haveing noe personage teinds, in regard the samen was never teillit or laboured, was, is, and may be worth only in all time coming 20 mks money of this realme." This report, so far as regarded the lands of Heathery Hall, was approved of by the High Court of Teinds in 1826. The objecters alleged that this report had received effect as a valid and sufficient valuation of the teinds of their lands in all previous localities of Haddington parish, and objected to the scheme of locality in so far as it did not give effect to the said report.

The common agent contended that the parsonage teinds of the Muir of Gladsmuir at the date of the report founded on, were not and could not be held to be valued by finding that there was no parsonage teind; that, even if the report were approved of, he would be bound to refuse to give effect to it as a valuation of parsonage teinds; that the parsonage teinds of Gladsmuir being unvalued, these lands were liable to be localled on for stipend according to one-fifth of their present rent, or at least they were so liable, subject to such deduction as was proper, in respect of the valuation of their vicarage teinds.

The Lord Ordinary (BARCAPLE) repelled the plea of *res judicata* as regarded the whole objectors; but held that, in terms of the decree of approbation of 1826, the fifth part of the sum of twenty merks Scots must be taken to be the amount of the valued teinds of the lands of Heathery Hall, and that, as regards these lands, the locality fell to be rectified, reserving consideration of the question with the other objectors.

The common agent reclaimed.

COOK and HALL for him.

LORD ADVOCATE (GORDON) and GLOAG in reply.

LORD PRESIDENT—The question to be determined under this reclaiming note is, whether the report of the Sub-Commissioners of the Presbytery of Haddington, dated the 16th of April 1632, is a good and valid sub-valuation, affording the requisite materials for fixing the value of the teinds of that part of the Muir of Gladsmuir to which it refers, and in which the objector, Houston, of Clerkington, is interested. It is contended by the common agent that the report values only the stock of the vicarage teind, or, in other words, ascertains what was the amount of the vicarage, and fixes what proportion of the stock or entire rental corresponds to or represents the value of the vicarage. This, however, is a perfectly inadmissible construction. The report bears that the proceeding was at the instance of the procurator-fiscal against the heritor of the lands and the titular of the teinds, "to hear and see the true worth and constant rent in stock and vicarage teind conjunctim of the said