and insist upon a lengthy and expensive investigation.

But I agree that the Sheriff-Substitute was right in this particular case. And I am farther disposed to agree with your Lordship that the result of his deliverance was, that the trustee must go back on the whole claims and reconsider the general objections to them all. I do not see how it could have been otherwise. I do not see how this creditor could possibly have brought up his objection to the other claims on the footing that the deliverance on his own was final, when the same objection lay *ex facie* against it, as against them.

Lord Ardmillan—I am of the same opinion upon both points. It is clear that the trustee's deliverance admitting or rejecting claims is liable to appeal to the Sheriff; and I think that the Sheriff is bound to require evidence sufficient in law to set aside the general rule of prescription. His judgment may be appealed to this Court, and we are bound to do the same. And I cannot think that the law has entrusted to the trustee, and to him alone, a discretion so wide that he may reject or sustain claims *ex facie* prescribed, merely on being satisfied of their justice.

On the second point I am equally clear that the appeal to the Sheriff was so expressed as to bring up Mr Smith's own claim as well as those of the other creditors. I think that both in form and phrase it has done so, and I do not do him the injustice to suppose that he meant to stand upon the trustee's decision in his favour, and at the same time to dispute that decision in the case of the other creditors. I would rather be inclined to suppose that he intended to proceed upon that footing of equality which is the root of all bankruptcy practice.

Lord Kinloch—I agree in thinking that the Sheriff was wrong in limiting the inquiry to the writ of the bankrupt, and think that his note must therefore be held *pro non scripto*. I am further of opinion with your Lordships that the Sheriff's interlocutor is generally well-founded. It was plainly incumbent on the trustee to make inquiry into the grounds upon which the claims rest. And nothing could be wilder than the view that the trustee is entitled at his own discretion to admit or reject claims irrespectively of their being duly supported at law.

The only difficulty is, whether the trustee is bound to examine into Mr Smith's claim as well as those of the other claimants. I have difficulty in being of opinion that the meaning and intention of his appeal was to bring up his own claim with the others. I can hardly give him that credit. But there may be cases in which the consideration of the objector's own claim is a necessary element of the redress which he seeks against the admission of the claims of others. I think, on considering the whole circumstances, that the trustee did not inquire as he ought to have done into the admissibility of any one of these claims; and on that ground I am inclined to hold with your Lordships that the inquiry now to be made must comprise the claim of Mr Smith as well as the others.

Lord President—To prevent any mistake arising out of an apparent difference of expression in one of your Lordships' opinions, I must add, that I conceive the trustee, in giving effect to the triennial prescription, that is, in dealing with certain claims as falling under it, does not cause and cannot cause any expense to the estate. He deals with the claims at once as *ex facie* prescribed, and the expense of getting them sustained falls exclusively on the persons in right of them.

The Court accordingly sustained the appeal, and sustained the interlocutor of the Sheriff-Substitute, on the understanding that the inquiry ordered embraced the claim of the respondent as well as those of the other creditors.

No expenses awarded to either side.

Agent for Appellant—W. K. Thwaites, S.S.C.

Agents for Respondent—Lawson & Hogg, S.S.C.

Wednesday, November 8.

SECOND DIVISION.

HALDANE *v*. OGILVY.

Teinds—Bona fide *Perception and Consumption*. A heritor was not aware that his lands were situated in a certain parish, or that he was liable to pay teind, but his titles disclosed the minister's right. *Held* that the minister was entitled to sue for arrears of teind; and the heritor's plea of *bona fide* perception and consumption *repelled* as irrelevant against a stipendiary minister, and not pleadable by an heritor whose titles disclosed the minister's right.

The question in this case arose in a process of locality of the parish of Kingoldrum. The facts appear sufficiently from the interlocutor and note of the Lord Ordinary (Gifford):—

"*Edinburgh, 29th March* 1871.—The Lord Ordinary having heard parties' procurators in the question between Thomas Wedderburn Ogilvy, Esq., and the Reverend James Ogilvy Haldane, and having considered the closed records, proof, and whole process—Finds that the objector Thomas Wedderburn Ogilvy is not liable to pay to the Reverend James Ogilvy Haldane the arrears of stipend shown in the state of arrears prior to the stipend due for crop and year 1869, and to this extent sustains the objections for the said Thomas Wedderburn Ogilvy to the said state of arrears; but finds that the said Thomas Wedderburn Ogilvy is liable to be localled upon, and to pay to the minister in respect of the lands of Auldallan, situated in the parish of Kingoldrum, the sum of £7 per annum for crop and year 1869, and for all subsequent crops and years until a new locality is made: Further, and in regard to the expenses incurred in all the questions between the minister and the said Thomas Wedderburn Ogilvy, part of which were reserved by interlocutor of 9th July 1869, finds, in the circumstances, no expenses due to either party up to the present time, and decerns.

"*Note.*—The main question argued before the Lord Ordinary, and as to which the proof was led, was whether the objector Thomas Wedderburn Ogilvy was liable in the arrears of stipend prior to 1869, claimed by the minister in respect of the objector's lands of Auldallan, situated within the parish of Kingoldrum. The objector Mr Wedderburn Ogilvy has admitted that he is liable to pay stipend for crop and year 1869, and subsequent years, and the amount of stipend to be paid was fixed by interlocutor of 9th July 1869, at £7 per annum, so that the only question between the

parties since 9th July 1869 has been the liability for arrears.

"Against the claim for arrears two pleas are relied upon by Mr Ogilvy:—*First*, That in point of form the claim for arrears cannot be enforced in the present process, but that the claim must be made and tried in an ordinary action; and *second*, and on the merits, that the arrears cannot be claimed in respect that, down to 1869, the whole teinds now allocated as stipend were *in bona fide perceptæ et consumptæ* by Mr Ogilvy. It was in reference to the question of *bona fides* that a short proof was led on 17th March current. All other matters of fact either appear on the face of the documents or are admitted.

"The whole questions as to the arrears claimed are, in the Lord Ordinary's view, attended with much nicety and difficulty. The ground on which the Lord Ordinary's judgment proceeds is chiefly, indeed almost exclusively, the plea founded upon *bona fide* perception and consumption, but it may be right shortly to notice the other questions also.

"(1) The question as to the form in which the arrears are claimed depends mainly upon the terms of the Acts of Sederunt 5th July 1809, and 20th June 1838. The first of these Acts provides for the preparation of an interim scheme of locality, 'according to which the minister's stipend shall be paid, aye and until a final locality shall be settled.' The second Act, that of 20th June 1838, provides that in certain cases a new interim scheme of locality may be prepared, and also a state of arrears; that on the new scheme and state of arrears being approved of, the Lord Ordinary shall give decree for the arrears, and the new or rectified scheme shall subsist as a new interim rule of payment till set aside by any other rule which may be afterwards granted on cause shown.

"In the present case the original scheme of locality did not allocate the whole stipend modified to the minister, the minister being unable at the time to point out teinds from which his full modified stipend could be drawn. Only a part of the stipend therefore was localled under the interim scheme approved of on 7th March 1821, and under this interim scheme the stipend so partially localled was drawn by the present minister and his predecessors down to 1869. This interim locality took effect from 1811, when the stipend was modified, and thus subsisted as a rule of payment for fifty-eight years.

"In 1869 the present minister sisted himself to the process, and having discovered that a portion of Mr Ogilvy's lands of Auldallan were in the parish of Kingoldrum, and that although the teinds of that portion were unvalued, they were not included in the interim locality of 1821, he lodged objections in February 1869; and ultimately, after making up a record with Mr Ogilvy, his objections were sustained of this date (July 9, 1869) to the effect of finding that the lands in dispute were to be localled upon, all questions, however, as to arrears being reserved. Thereafter, a new interim locality was made up and approved, and a state of arrears, bringing out a sum, with interest, due to the present minister since his induction in 1836, amounting to £419, 12s. 4d. This includes, however, the stipend for crop 1869, being £7, which Mr Ogilvy does not dispute, so that the real question between the parties relates to the arrears prior to 1869, amounting to £412, 12s. 4d. The question of form is, whether supposing this sum due, decree can be given therefor in the present process.

"The objector's contention is, that the Act of Sederunt of 1838 does not apply to the present case; that the original locality has not become ineffectual by any of the causes mentioned in the Act. On the contrary, it has been completely effectual for the whole sum thereby localled, just as effectual as it was when it was pronounced. He urged that the omission of lands from an interim locality, whether accidental or intentional, was no reason for getting a new interim locality, and that at all events no new interim locality could be given which would have the effect of making a new heritor a party to the process, so as to subject him to payment of arrears.

"The Lord Ordinary, if it had been necessary to dispose of this question, is inclined to think that, if arrears were really due by Mr Ogilvy, they could competently be decerned for in the present process. It would be with extreme reluctance that he would remit the minister to an ordinary action to make good arrears of stipend included in the final decree of modification. Such action may be necessary where parties not heritors are sought to be made liable for arrears, or otherwise; but supposing Mr Ogilvy the proper debtor, as heritor, it would be very hard that, with the proper parties in Court, and with the whole elements for decision available, the minister should be denied his remedy in the action, which has for its very object the fixing the stipend, and determining the liability therefor, and that from the date of the decree of modification.

"The construction of the Act of Sederunt of 1838 contended for by Mr Ogilvy seems to be too strict and critical. The evil to be remedied was the non-recovery of 'the stipend awarded,' that is, modified, not the non-recovery of a portion only of the stipend localled. The 'efficacy' which is spoken of in the Act is the efficacy to make good to the minister the modified stipend, and an error by omitting an heritor altogether, seems as good a reason for a new interim scheme as an error in the teind stated, or as a deficiency caused by a surrender of teinds. In short, where, during the tedious process of a locality, a re-adjustment may be made, so as to prevent the minister suffering deficiency 'to a considerable extent,' there would seem to be a fair case for the application of the remedial Act of Sederunt.

"On the other hand, however, the Lord Ordinary is clearly of opinion that all fair objections and all equitable defences against payment of arrears must be open in the present process, just as they would in any ordinary action. In this view, the Lord Ordinary cannot give effect to the minister's plea that the interlocutor of 9th July 1869, fixing £7 as the teind of Mr Ogilvy's land, is *res judicata* fixing the amount, not only for the future, but also for the past, and that the same, coupled with the approval of the new interim locality, implies decree for the arrears sought, saving only questions of calculation. It seems conclusive against this view, even were there nothing else, that all questions as to arrears were expressly reserved by the interlocutor of 9th July 1869; but, on a broader ground, the Lord Ordinary thinks that if arrears may be competently decerned for at all, all equitable objections must be open for consideration.

"(2) On the question of *bona fide* perception and consumption there is much difficulty, and much room for argument.

"As to the matter of fact, the Lord Ordinary thinks that it is sufficiently proved that Mr Wed-

derburn Ogilvy was entirely ignorant that any part of his lands was situated in the parish of Kingoldrum, or that he was liable in any part of the stipend of that parish. Until a question arose about a division of commonty a few years ago, he never heard it alleged that any part of his estate was in Kingoldrum, and even then he understood it was only a small patch, trifling in extent, and still more trifling in value. It is also proved that Mr Ogilvy, after paying stipend in Lintrathen, which he understood to be out of his whole lands of Auldallan, spent the rents on the footing that there was no further claim against him.

"Of Mr Ogilvy's personal *bona fides* therefore there can be little doubt, but as he himself explains that he is entirely ignorant regarding his title-deeds, and regarding documents relating to his property, leaving everything to his agents, it is necessary to inquire whether the parochiality of the portion of Auldallan in Kingoldrum was a matter of notoriety, which ought to have been known to Mr Ogilvy or his agents. Here also the proof is clear enough. The local factor Mr Forrest, the tenant in the lands Mr Mackay, and the Edinburgh agent Mr Mackenzie, were examined. They all say that they never heard of the claim for Kingoldrum stipend till the present question was raised. The tenant in the lands, born at Auldallan, and whose father was previously tenant therein, while paying schoolmaster's salary, road money, and parochial burdens in Lintrathen, has until recently paid none in Kingoldrum. The older titles down to 1826 describe the lands in dispute as in Lintrathen, and not in Kingoldrum, and the whole tacks down to that granted in 1867 describe the lands as in Lintrathen parish. It is true that in the valuation rolls from 1856 downwards a portion of the lands is entered as in Kingoldrum, but this seems to have arisen from the knowledge of the valuation assessor, and cannot be held as importing a knowlege of the present claim in Mr Ogilvy.

"Still further, Mr Ogilvy held a decree of valuation of the teinds of Auldallan, and this valuation was exhausted by the stipend paid in Lintrathen. Mr Ogilvy seems to have believed in *bona fide* that no further teind was payable for his estate, and even when he and his factors came to know that a small corner of the estate was in Kingoldrum parish, there was nothing to disturb their belief that the whole teinds were nevertheless valued. It was only when a copy of the decree of valuation was recovered from the record by Mr Mackenzie, after the present question arose, that he became aware that a portion of Auldallan, in Kingoldrum parish, was not included in the decree of valuation. No copy of that decree of valuation was among the estate papers, and none was ever seen by Mr Mackenzie till he sent to the teind office. As for Mr Ogilvy himself, he never saw the decree of valuation at all. It may be added that down to 1868 or 1869 the minister of Kingoldrum himself did not know that any part of Auldallan was within his parish.

"On the whole, therefore, the Lord Ordinary thinks it may be held that Colonel Ogilvy drew and spent the free rent of his lands, including the teinds in Kingoldrum, to which he has an heritable right, and that in entire ignorance of the present claim, and in the *bona fide* belief that no such claim was running up against him.

"The question of law remains, does the *bona fide* perception and consumption of teinds bar the claim of a minister who is ultimately found to have a right to stipend out of these teinds? The Lord Ordinary thinks that, without laying down any general rule, this question must be answered in the affirmative in the present case.

"There are certainly cases where the *bona fide* consumption of teinds does not bar a claim for arrears. Thus, where payments of stipend are made under an interim decree of locality there is an implied judicial contract, that when final decree is pronounced over and under payments will be adjusted, going back to the commencement of the process, and all pleas, either of prescription or of *bona fide* consumption, are excluded; *Weatherstone* v. *Marquis of Tweeddale*, 12th November 1833, 12 S., 1.

"This case was strongly founded on by the minister as conclusive of the present question, and as applicable to a claim for arrears by the minister as well as to claims of relief among the heritors. The Lord Ordinary cannot so read the judgment. The minister is no party to the judicial contract among the heritors, who are *correi debendi*, each to the extent of his teind, and it may well be that if he fails to make a demand at all, his claim for arrears may be met by the plea of *bona fide* consumption, when no such plea would avail against an heritor claiming relief for over-payment. Such over-payments are necessarily made under the interim decree, and relief cannot be got till the final locality. The claim of relief is necessarily reserved, and all the heritors parties to the process are bound to know thereof, and to act accordingly.

"But the main speciality in the present case is, that neither Mr Ogilvy nor his author were ever personally made parties to the present process, or were ever made aware that they had any interest either actual or contingent therein. No doubt all the heritors in a parish are cited edictally at the parish church, and so constructively made parties to the process of locality. But this is not enough in a question of *bona fides. Mala fides* can only be induced by personal and individual knowledge.

"The Lord Ordinary is by no means sure that the plea of *bona fide* consumption would not avail even in a question with the other heritors; for while there is a judicial contract between heritors who underpay and overpay that they will adjust accounts at the end of the day, it would be very strong to hold that there is such a judicial contract with an heritor who was never asked to pay at all, and whom everybody supposed to have nothing to do with the matter—a supposition that was acted on for sixty years.

"But the plea applies with stronger force against the minister. He made no claim against the absent heritor, because he honestly believed that no claim existed. The omitted heritor had the same honest belief. It is out of the question to suppose that as between them there was a judicial contract of any kind, far less a contract that arrears might run up at 5 per cent. interest, and that all objections, prescription as well as *bona fide* consumption, should be excluded.

"But then it was said by the minister that, apart from *Weatherstone's* case, teinds are not a subject which can be *bona fide* consumed, and an ingenious argument was submitted that every one interfering with them must be held to know that stipend is due therefrom. The Lord Ordinary thinks that the minister's argument on this point is not well founded either in principle or in authority.

"Teinds, though they are *debita fructuum*, are

recognised as a heritable right of property. Mr Ogilvy is undoubtedly the heritable proprietor of his teinds in Kingoldrum, although they are not included in his decree of valuation. It can hardly be disputed that a supposed proprietor of teinds may uplift and consume them in *bona fide*, just as a supposed proprietor of lands may uplift and consume the land rents. No doubt teinds are subject to payment of stipend, but land rents also are subject to certain burdens, which may or may not be extinguished. The fallacy of the argument for the minister lies in assuming that all teinds must every year pay stipend, and that to their full extent, so that there must be a *conscientia rei alienæ* in every one who intromits therewith. But it is not true that teinds are always liable in stipend. There is an order of liability among teinds, and it is not till those primarily liable are exhausted that any liability for stipend attaches to the postponed classes.

"Still further, the argument for the minister forgets that the *bona fides* of Mr Ogilvy consists in the honest belief that the lands were in Lintrathen, and that he had paid stipend out of them in that parish. *Bona fides* may be founded on any honest belief leading to the conclusion that the annual proceeds belong to the consumer. An honest belief that there were no teinds due would do, as will be shewn immediately. A *decimæ inclusæ* title, which, though bad in law, the holder believed to be good, would be a fair foundation for *bona fide* consumption, and the *bona fide* belief in the non-parochiality of lands seems an excellent foundation for acting as if the minister of a foreign parish has no claim.

"Indeed the very fact that teinds are *debita fructuum*, to be drawn year by year from the fruits, and are never *debita fundi*, or permanent burdens on the property itself, is a reason why the principle of *bona fide* consumption should apply to teinds with peculiar force. The intromitter with teinds may fairly hold that claims upon them will be made year by year, and may safely consume the free balance.

"But there is authority for holding that the principle of *bona fide* consumption applies to teinds as well as to other subjects; and Bankton, II, viii, 141, expressly does apply to teinds. The principle as laid down by Erskine, II, i, 25, and *post*, says that a heritor, 'if the lands immemorially out of use of the payment of tithes will be free from bygones preceding the date of citation, though he should be subjected in time coming; and if the minister's title was not limited by a decree of locality, use of payment to him will be deemed a consideration for the whole tithes, and free the heritor from bygones to the titular or patron.'—See various old cases cited by Bankton.

"In the case of *Stirling* v. *The Feuars of Denny*, 25th June 1731, M. 1717, it was expressly held that a small payment to the minister, without challenge by the titular, was a *bona fide* payment for the whole teind, and barred the titular's claim for arrears. This is a decision of the House of Lords. See Report, 1 Paton, Craigie and Stewart, p. 90.

"In *Elder* v. *Fotheringham*, 8th January 1869, 7 Macph. 341, where an alleged *decimæ inclusæ* right was found to be invalid, it was sustained as a good title as founding *bona fide* consumption, and the minister was held not entitled to bygone arrears of stipend, but only to have it found that the lands should not be exempted in future.

"In *Cuthbert* v. *Waldie*, 24th January 1840, 2 D. 447, *bona fide* consumption of teinds was sustained as a good defence for bygones prior to the date of reduction of a final decree of locality, which was found to be erroneous and inept. No doubt here there was a final decree of locality, and the case forms a contrast to the case of *Weatherstone;* but it is quite conclusive that *bona fide* consumption may be applicable to teinds. Reference may also be made to *Scott* v. *The Heritors of Ancrum*, 25th February 1795, M. 15,700; *Haldane* v. *Adamson*, 11th December 1804, M. "*Bona et mala fides*," App. 3.

"In the whole circumstances, the Lord Ordinary has found himself constrained to sustain the plea of *bona fide* consumption in the present case. It need hardly be added that though consumption seems to be proved in the present case, perception would have been enough."

The minister reclaimed.

WEBSTER and NEVAY for him.

The Solicitor-General (CLARK) and BALFOUR for respondent.

At advising—

LORD BENHOLME—This reclaiming-note submits to the review of the Court an interlocutor of Lord Gifford, whereby his Lordship has sustained the defence of *bona fide* perception, stated by Mr Wedderburn Ogilvy, to a claim by the Rev. Mr Haldane, the minister of the parish of Kingoldrum, to a considerable sum of money, as arrears of stipend lately allocated to him by a corrected scheme of locality. Without at present adverting to the particular circumstances of the case, I observe that, in order to support this interlocutor, your Lordships must be prepared to decide two questions in favour of the objector Mr Ogilvy—*First*, whether the said defence is relevant at all against the claim of a stipendiary minister? and *secondly*, whether the objector has qualified a sufficient case of *bona fides?* The former of these is by far the more interesting, involving an important and general point of law, and, in my opinion, turning upon distinctions in the law of Scotland of a fundamental character.

The proper range and application of this defence are suggested by the very terms in which it is announced. It deals with *fructus percepti*, the fruits of land that are capable of being reaped, and where no such fruits are in issue it can have no application. Its normal application is, where land has been possessed and its fruits reaped or enjoyed upon a colourable but imperfect title. When the infirmity of such title is ultimately discovered and ascertained, the true proprietor, whilst he successfully vindicates his right to the principal subject, and to its future fruits, is liable to be met with this special defence as to bygones.

In sharp distinction to the claims of such proprietor stands that of a mere creditor, who sues upon a *nomen debiti*—whose rights extend to nothing else and to nothing more than the recovery of a sum of money. The debt may be secured upon land. It may be due by heritable bond. It may be a *debitum fundi*. But the security, which is a mere accessory, does not alter the essential character of the principal claim. That claim is exclusively pecuniary. It is a claim for a sum of money that may be counted, and not for fruits that may be reaped.

It is believed that this prominent distinction has never been disputed or overlooked in reference to what I have termed the normal application of this defence. It remains to consider its application to the subject of teinds.

The Lord Ordinary is undoubtedly right in holding that the defence of *bona fide* perception may apply to arrears of teinds. His Lordship's error appears to me in not observing the true limitation of its application. The distinction already noticed between a proprietor vindicating a landed estate, and a mere creditor claiming a sum of money, is strictly analogous to the distinction in the case of teinds between a titular and a mere stipendiary. Against a proper titular, who is the legal proprietor of the heritable, and, in general, feudal estate of teinds, the defence of *bona fide* perception—the perception of those fruits which are the subject of his right, and the object of his claim—is directly and peculiarly applicable. Against the stipendiary, on the other hand, who, under his modification and locality, has no other than a claim for an annual payment of money, the defence has no application. The source of the Lord Ordinary's misapprehension in this respect becomes apparent from the manner in which he accounts for the established principle, that in the final adjustment of the accounts of over and underpaying heritors, under an interim locality, the defence of *bona fide* perception cannot be admitted. His Lordship bases this principle upon the somewhat artificial hypothesis of a *quasi* contract of ultimate restitution among the heritors. And as an under-paying or a non-paying heritor cannot be supposed to be a party to any such *quasi* contract with the minister, so his Lordship concludes that the same law cannot be held to exclude the defence in question as between them. I cannot help thinking that this is a somewhat narrow, if not a mistaken, view of this subject. The claim of an over-paying heritor against an under-paying heritor is strictly and simply a claim of debt. It is a claim for money, and for nothing else—for money advanced by the creditor for the debtor at a time when their respective pecuniary liabilities were misunderstood. During the subsistence of the erroneous interim locality the one heritor has had in his pocket the money of the other, and money being the only thing that he has to restore, he cannot defend himself upon the allegation that he has been reaping and consuming fruits.

The claim of the minister for his bygone stipends is precisely of the same kind. Just as the claim of the over-paying heritor is for money which he has advanced, and of which he claims restitution, so the claim of the stipendiary is for money which he ought to have received from the heritor. It is a claim for money, and money alone, and he cannot be dealt with as if his claim were for the fruits of the earth. In what cases then has it ever been held that this defence applies to teinds? The answer seems plainly to be, that it applies to the claim of a proper titular, and to his claim alone. It is a titular, and a titular only, who has a good claim to those fruits of land which constitute teinds—a good claim to that which is the subject, and consequently the basis of this defence.

All the cases referred to by the Lord Ordinary, when carefully examined, appear to support the view of the law I have suggested, and there are others to which his Lordship has not adverted, which run directly counter to the grounds of his decision.

In the case of *Stirling* v. *The Feuars of Denny*, referred to by the Lord Ordinary, it was a titular against whom the defence was sustained. The case of *Cuthbert* v. *Waldie* turned upon the effect of a final locality. And the claim was not one at the instance of a stipendiary.

The only case in which it might, at first sight, be supposed that this defence was held applicable to the claim of a stipendiary is the case of *Elder* v. *Fotheringham*, 8th Jan. 1867, 7 Macph. 341. This case is twice referred to by the Lord Ordinary in the course of his note. His Lordship (p. 7) announces as law that "a *decimæ inclusæ* title, which, though bad in law, the holder believed to be good, would be a fair foundation for *bona fide* consumption." And he afterwards refers to the case of *Elder* v. *Fotheringham* as one in which, "where an alleged *decimæ inclusæ* right was found to be invalid, it was sustained as a good title as founding *bona fide* consumption, and the minister was held not entitled to bygone arrears of stipend, but only to have it found that the lands should not be exempted in future."

The Lord Ordinary appears to have been a good deal moved by this decision, in which undoubtedly a stipendiary was the claimant. But, on examining the case, it will be found that the heritor's main defence was founded on the protection of a final interlocutor, which, as to bygones, the minister was not allowed to open up, he having acquiesced in it for several years after his induction. None of the judges founded their opinion upon *bona fide* perception, which indeed is not mentioned by any of them except Lord Kinloch, who is careful to observe—"I do not so hold on the ground of the rule applicable to *fructus bona fide percepti*, a rule somewhat difficult of application in the case of an inherent burden, such as that which lies on teind."

No case then can be referred to in which the claim of a stipendiary has ever been successfully met by this defence—and, if I mistake not, it was admitted at the bar that the interlocutor under review is the first that has ever been pronounced to that effect. But this is not all, for there is more than one case in which the opposite doctrine has been authoritatively established; and the clear distinction between property and debt—between a titular and a stipendiary—has been given effect to.

The distinction between a claim for money unduly retained, and one for bygone teinds reaped upon a colourable title, was well brought out in the case of *Oliphant* v. *Smith*, 30th Nov. 1790, M. D. 1721.

The faculty report bears as follows—"In 1750 the predecessor of Mr Smith obtained a decree against the predecessor of Mrs Oliphant for payment to him, as titular, of the teind-duties of the lands of the latter, for thirty-nine years preceding, and then deduced an adjudication against the estate for the amount, being a considerable sum. Many years afterwards, during which period Mr Smith continued in possession of the teinds, Mr Oliphant, in consequence of the recovery of title-deeds showing his right to them, prevailed in an action of reduction of the above mentioned decrees for payment and of adjudication. It came then to be a question how far the possession on the part of Mr Smith, which was admitted to have been *bona fide* held, could avail him; whether the whole sum of arrears understood as *fructus percepti*, or at least the annual rents of that sum as accumulated in the adjudication, should be found to belong to him; or if he was to retain only the teind-duties subsequent to the decree in his favour, which he had levied."

The ultimate finding of the Court repelled Mr Smith's claim to retain the sum contained in the adjudication, or its interests—as being simply a debt; but held that "the defence of *bona fides* is

applicable to the teind-duties uplifted by Mr Smith, from the date of the decreet, 1750, to the date of citation to this action." The report of the case bears that—"In a reclaiming petition it was endeavoured to show, by the following authorities from the civil law, and from the law of Scotland, that a *bona fide* possessor is not bound to restore the interest of money *indebite solutum*, any more than the natural fruits of other subjects." Then follows a list of authorities, which, however, produced no effect upon the Court, for the petition was refused without answers.

It is proper to refer to one other case, because it relates to teinds, and brings out in striking language the distinction between the claim of a titular and that of a stipendiary. It is the case of *Beg* v. *Rig*, July 3, 1751, M. D. 1719. This was an action at the instance of the widow of a stipendiary for arrears of stipend due to her deceased husband. The report bears—"The defence was *bona fide* possession and consumption, the lands being held *cum decimis inclusis;* for so was found in *Douglas* v. *Wedderburn*, 19th July 1669; *Stirling* v. *The Feuars of Denny*, 25th June 1731—Pleaded for the pursuer: the decisions were betwixt titular and heritor, which does not apply to the case of a minister. The rights of titular and heritor are exclusive of each other; but an heritor's right to teinds does not exclude a minister's stipend."

The Court ultimately repelled the defence, thus negativing the pretention of the heritor in pleading *bona fide* perception against a stipendiary. This case, which for more than a century has ruled the practice of the Court, sets forth in the argument of the successful party the true ground of judgment, in terms both logical and satisfactory.

I am therefore of opinion that the Lord Ordinary is in error in holding that the defence of *bona fides* is relevant in this case.

But, further, I am of opinion that, as to the matter of fact, the objector has not, or rather cannot, qualify any proper case of *bona fides*. And here I may say that I do not go upon any suspicion as to the personal truthfulness of the objector. No one who knows Mr Wedderburn Ogilvy will be disposed to doubt or disbelieve the judicial statement that he makes as to his ignorance that any part of his lands lie in the parish of Kingoldrum. But this does not exhaust the case. The question is this, whether was he, in the circumstances of his case, entitled to be ignorant of a fact which was declared on the face of his most important titles—his investiture under the Crown and the valuation of 1799, accessible to him on record, if not contained in his charter chest—a valuation led with special reference to the subsequent locality under which he and his predecessors have been relieved from the burden of unvalued teinds in the parish of Lintrathen, and which contained *in gremio* a conclusive proof that the party, his predecessors, who led it, had other lands in the parish of Kingoldrum. No man seems entitled to be ignorant in such a case, when that ignorance is to be made to affect the rights of others. It occurs to me that the doctrine of *res noviter veniens in notitiam*, as adopted in our practice, affords an analogy of some utility in this case. It is not enough for a party pleading *res noviter* to say that in point of fact he was not aware of what at a late stage of a case he wishes to found upon and to prove, more especially if the information was within his power, and bore materially on his own rights and interests in conflict with those of a competitor.

But perhaps the most unfavourable view for the objector which can be taken upon this part of the case is suggested by asking the question—Upon what title the objector had right to reap and to enjoy the teinds of his lands in the parish of Kingoldrum? His title plainly was his Crown charter and infeftment, and these writs bore on the face of them the parochial situation of these lands. The objector's own title was conclusive against himself, and it would be contrary to all principle for him to found upon his title as to one effect and to ignore it as to another. In conclusion, I have to say that I agree with the Lord Ordinary in thinking that it is competent to decern for the arrears of stipend in this depending conjoined locality without rendering it necessary to raise a new action. Just as an over-paying heritor would have his remedy in the adjusted locality without a separate action, so the minister is entitled to recover his arrears due under the adjusted locality without raising a separate action.

I have to propose to the Court that the interlocutor of the Lord Ordinary should be altered; that objector's defence of *bona fide* perception should be repelled; and the cause proceeded with as to the question of interest, and also as to the value to be adopted as the measure of the teinds in the earlier years of this accounting.

The other Judges concurred.

Agents for the Minister—Richardson & Johnston, W.S.

Agents for Mr Wedderburn Ogilvy—Mackenzie, & Black, W.S.

Saturday, October 28.

CALEDONIAN RAILWAY CO. *v.* THOMAS BARR'S TRUSTEES AND OTHERS.

Liferent Lease—Sub-lease—Assignation—Railway Compensation—Claim—Notice—Arbitration under Lands Clauses Acts. A liferent lessee's claim to compensation for damages for land taken by a Railway Company *held* to have been effectually assigned, for the period embraced in the sub-lease, to a sub-tenant by a sub-lease entered into after the Railway Company's notice to the land-owner. Circumstances in which a claimant having offered to amend a claim for compensation, an arbitration under the Lands Clauses Act was allowed to proceed.

This was a suspension and interdict at the instance of the Caledonian Railway Company against the arbiters and oversman and the trustees of the late Thomas Barr, contractor, Uddingston, to interdict the arbiters and oversman from taking, or authorising any further proceedings to be taken, in an arbitration under the Lands Clauses Act, 1845, between the Company and Barr's Trustees, in reference to a claim by the latter for purchase money and compensation for the damage caused by reason of 3 acres and 21 poles imperial measure of Barr's farm of Brakenhill, Carluke, having in 1845 been taken by the Company for the purposes of their railway; or at least to interdict further procedure being taken in the arbitration till Barr's Trustees should, by judicial procedure or otherwise, esta-