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-

blish a right and title to a lease of the said 3 acres and 21 poles.

The farm of Brakenhill was part of the entailed estate of Mauldslie, of which in 1845 Sir W. C. Anstruther was the heir in possession, and a portion of the estate, including the farm, was then liferented by Lady Anstruther, the widow of the former heir, during the life of the said Sir W. C. Anstruther. In 1803 the Earl of Hyndford, the proprietor of the property, granted a lease of the farm, for two lives, to one Robert Hamilton and his eldest son William Hamilton, excluding assignees and sub-tenants, and binding the tenant to reside on the farm. In 1845 William Hamilton was the liferent tenant, but resided in America; and the farm during the year 1844–45 was occupied by one Gibson, whose sub-lease from Hamilton had expired in 1844.

On the 21st October 1845 the Railway Company served on Sir W. C. Anstruther a notice to take 3 acres and 21 poles of the farm, and on 25th December 1845 a similar notice on Lady Anstruther. The Company had previously entered upon the farm for the purpose of setting out the line of their works, and had cut the centre rut. The side ruts were afterwards cut, and the Company paid Gibson for the damage thereby occasioned. On 24th December a verbal agreement was made between Mr Denholm, factor on Mauldslie estate (subject to the approval of Sir W. C. and Lady Anstruther), Mr R. Hamilton, the liferent lessee's brother, on his behalf, and Mr Barr, by which Mr Barr was to get a sub-tack of the farm for twenty-one years from Martinmas 1845 and Whitsunday 1846; and the Anstruthers were to guarantee it for that period in the event of Hamilton dying sooner. On 26th January 1846 the approval of the Anstruthers to the proposed subtack was communicated to Mr Barr by letter from Mr Denholm, their factor, and Mr Barr entered upon the farm; but he never possessed the 3 acres and 21 poles, which were fenced off and used for the construction of the railway during the ensuing summer. Between January 1846 and February 1847, drafts of a sub-tack and separate obligation by the Anstruthers were prepared and revised for all parties, but were never executed. Mr Barr remained in possession, and (the sub-tack duty being greater than the rent in the liferent lease) he paid the rent due under the liferent lease to Mr Denholm, and the additional rent to Mr Hamilton. It was part of the arrangement of the parties to this subtack that Mr Barr should take the whole farm, and settle with the Railway Company for the compensation due for the land taken by them. On 11th July 1846 the Company served on Mr Barr a notice to take the ground. In 1850 the Railway Company settled the claims of Sir W. C. and Lady Anstruther, and undertook to settle the claims of the tenants, for which purpose it was arranged that the Company should draw, during the currency of the respective leases, the interest on the compensation money due to the Anstruthers, which was accordingly deposited in bank. The Company then got a disposition to the ground, with entry as at Martinmas 1845.

Mr Barr having died in 1859, a claim for compensation against the Company was made by his trustees, and was ultimately insisted in in 1869, when they served a notice, claim, and requisition on the Company, claiming an annual payment of £12, 3s. 1d. for the twenty-one years from 1845 to 1866, with periodical interest, in respect of the purchase money and compensation for the yearly damage caused, and a further single payment of £8, 10s. as compensation in respect of the formation of new head-ridges, with interest; and they nominated an arbiter on their behalf. Thereafter the Company, under protest, nominated an arbiter, and an oversman was appointed by the arbiters. Mr Hamilton was not a party to these proceedings.

The delay in making the claim arose from Mr Barr, and afterwards his trustees, being unable to produce the liferent lease of 1803, which could not be found, and of which they had only a copy, and also from the want of an executed sub-tack.

In these circumstances the Railway Company, *inter alia*, pleaded that Mr Barr was not entitled to claim compensation, in respect that he was not lessee under a written lease prior to the Company's entry at Martinmas 1845, as at which date they had settled with the proprietor and occupant; and that, even assuming the drafts, sub-tack, and obligation to constitute a valid lease, they were entered into after the Company's entry to the lands; and further, that proceedings should be suspended or stayed till all having interest had been called, or till the question of title was judicially determined. The respondent's Barr's Trustees, *inter alia*, pleaded that possession and *rei interventus* having followed on the drafts, sub-tack, and obligation, &c., a good lease was constituted; that they, being in right of the original liferent lease of 1803, were entitled to compensation; and that the Company having settled with the landlord on the footing that the lands were under lease, and that separate compensation was payable to the tenants, were barred from objecting.

After proof, the Lord Ordinary (JERVISWOODE) found that Mr Barr held and possessed the lands under a written contract of lease for the period of twenty-one years from Martinmas 1845 and Whitsunday 1846; and that the Company had failed to establish facts, as averred on the record, relevant and sufficient to support the grounds of suspension; and therefore repelled the reasons of suspension and refused the note.

The case was heard on a reclaiming-note by the Railway Company, when it was maintained that the sub-tack was equivalent to an assignation to Mr Barr by Mr Hamilton of his claims for compensation against the Company. Further hearing was adjourned in order that the evidence of Mr Hamilton in America might be got as to the existence of the original liferent lease, and also as to his appearing in the case. A letter from Mr Hamilton was subsequently produced, which satisfied the complainers that the original lease had been lost, and that the copies of it put in during the proof could now be received as evidence. A minute was then put in for R. Hamilton, son of and factor for William Hamilton, craving leave to be sisted as a party to the process, and expressing his willingness to become a party to the arbitration.

The complainers having refused to proceed with the arbitration on that footing, an assignation in favour of Barr's Trustees was executed by R. Hamilton on behalf of Wm. Hamilton, of all claim for compensation competent to him, as liferent lessee, against the complainers, and a minute was lodged for Barr's Trustees, stating that they agreed to have the compensation due to them and to Hamilton settled in the arbitration, on the footing that they claimed in their own right, and as in right of Hamilton under the assignation, the value of Hamilton's liferent right in the land taken by the

Company from Martinmas 1845, with interest, as in full of all claims competent to them and Hamilton against the complainers, and that they proposed to amend their claim in the arbitration accordingly. The debate on the case was then concluded, the complainers having refused to accede to the offer above mentioned, on the ground that the whole nature of the claim was altered from being a claim for Barr's Trustees for twenty-one years certain (leaving open Hamilton's claim for the remainder of his tenancy) to a claim for the value of Hamilton's life interest as at 1845, and that thereby the arbitration would cease to be under the statute, to which they were not bound to agree.

At advising—

Lord Justice-Clerk — Hamilton sub-set the subject of the liferent lease to Barr, to have an endurance of twenty-one years, but not till after the Railway Company's notice. The result is that the right of Hamilton to grant a right to the ground embraced in the notice was extinguished, but the obligation on Hamilton to make over to Barr his interest in the damages to be got from the Company is unquestionable. There then followed the notice by the Railway Company to Barr, the negociations between them, and ultimately this arbitration. The present application is to suspend the arbitration proceedings, on the ground that Barr's Trustees have no title. The twenty-one years have now expired; Hamilton is still alive; and so Barr's Trustees have claimed damages for these years, leaving over the surplus of the liferent lease to form a separate claim for Hamilton. That was a great difficulty in the arbitration, and the Company were not bound to submit to it. But Barr's Trustees have now got a full assignation and power to discharge, and are thus now, but only now, in a position to proceed with the arbitration. It was said that it is not competent to alter the nature of the claim, but if the claim for the twenty-one years be beyond the respondents' right, there is no objection to its being restricted, which is now proposed to be done, and there is therefore no objection to the arbitration proceeding in regard to the claim as so restricted.

Lord Neaves concurred. It was, in consequence of the sale to the Railway Company, incompetent for Hamilton by a lease to create any new right in Barr, but then Hamilton could, by giving a lease subsequent to sale, assign to Barr his claim against the Railway Company, on the principle of inferred or implied assignation. From the first Barr was an assignee, and had a good basis for a claim, but his title, as it originally stood, was complicated, and the Company were entitled to have it cleared up; and that has now been done.

Lord Cowan and Benholme concurred.

The Court found the respondents liable to the complainers in expenses, which were modified to one-half of the taxed amount.

Counsel for Complainers—Mr Watson and Mr R. Johnstone. Agents—Messrs Hope & Mackay, W.S.

Counsel for Respondents—Mr Shand and Mr J. C. Lorimer. Agents—Messrs Duncan, Dewar, & Black, W.S.

Friday, November 10.

FIRST DIVISION.

MAITLAND'S TRS. *v.* MISS MARGARET MAITLAND AND THE REV. WILLIAM KEITH.

Testament—Holograph—Insanity. In the repositories of a deceased was found an envelope containing a deposit-receipt. On the envelope was written, "To my executors.—Miss Margaret Maitland. This nine hundred pounds belongs to her; five hundred to be sunk for her, and the remaining four to be given her. —Thomas Maitland." It was proved that only the signature and address, "To my executors," were in the handwriting of the deceased. *Held* (diss. Lord Deas) that the writing was not entitled to the privileges of a holograph writing, and that the bequest was invalid.

Held further, unanimously, that the granter was not of sound mind at the date when he subscribed the writing.

The late Mr Maitland of Pogbie died on 27th January 1870, leaving a trust-disposition, dated 12th April 1853, by which he conveyed his whole estate, heritable and moveable, to trustees, of whom the raisers of the present multiplepoinding are the survivors.

The purposes of the trust were—In the first place, the payment of the truster's debts, &c. In the second place, for payment of any legacies or donations the truster might choose to leave, and particularly of the several legacies therein mentioned. In the third place, for payment of the whole free rents of the truster's lands, and the interest of the residue of the trust-estate to the truster's son Thomas Maitland the younger. In the fourth place, upon the death of Thomas Maitland the younger, for payment of certain provisions to the child or children of the said Thomas Maitland the younger, other than his eldest son (£2000 if only one child; £3000 if two or more). And lastly, upon the death of the said Thomas Maitland the younger, the trustees were directed, after satisfying the other purposes of the trust, to dispone the lands of Pogbie, and whole residue of the trust-estate, to the heirs-male of the body of his son Thomas Maitland the younger, and failing such issue, then to the truster's sister Mrs Christian Graham Maitland or Keith, spouse of Dr James Keith, and the heirs whatsoever of her body, whom failing to the truster's nearest heirs and assignees whatsoever.

Thomas Maitland the younger predeceased his father, without male issue, but leaving one daughter, Miss Margaret Maitland. Mrs Keith also predeceased the truster, and the Rev. William A. Keith, as her eldest son, became entitled, under the destination in the trust-deed, to the estate of Pogbie and the residue of the trust-estate.

In July 1862 a petition was presented to the Court for the appointment of a *curator bonis* to Mr Maitland, as being incapable of managing his affairs. The Court appointed a *curator bonis*, and Mr Maitland continued under curatory till his death, on 27th January 1870. At the time of the appointment, among Mr Maitland's papers was found an envelope containing a deposit-receipt for £900, dated 24th April 1861. On the back of the envelope was written—