Thursday, July 17.

FIRST DIVISION.

[Lord Shand, Ordinary.

SIR JAMES FERGUSSON OF KILKERRAN, BARONET, PETITIONER.

Improvement of Land Act 1864, 27 and 28 *Vict. cap.* 114.

This was a petition by Sir James Fergusson, for authority to proceed with an application under the Improvement of Land Act 1864. The petitioner is heir of entail in possession of the lands of Kilkerran and others. By section 18 of the Act it is provided that the Improvement Commissioners shall not "make any provisional or other order, sanctioning the improvement of any land, in the case of which the landowner or the husband of the landowner shall be the father of the person or persons entitled, either at law or in equity, to any estate in such land, or any part thereof, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance, and such person or persons, or any of them, shall be an infant or infants, or a minor or minors, unless or until such an order (of sanction) as hereinbefore mentioned shall be made by such Court (the English or Irish Court of Chancery, or the Court of Session) as aforesaid." The Improvement Commissioner's Inspector, Mr A. Jardine, having reported that the proposed improvements, consisting of drainage, building of workmen's cottages and farm steadings, and planting for shelter, would in his opinion add to the permanent yearly value of the estate an amount exceeding that of the yearly amount proposed to be charged thereon in respect of the improvements applied for, the petition came before the Lord Ordinary (Shand,) who made a remit to Mr H. B. Dewar, S.S.C., who reported in favour of granting the application. The Lord Ordinary thereupon reported the matter to the First Division, who granted the prayer of the petition.

Petitioner's Counsel—Marshall. Agents—J. & T. Anderson, W.S.

ROBERT VANS AGNEW, PETITIONER.

This was a petition of a precisely similar nature to the above, for authority to subscribe for shares in the Wigtownshire Railway Company. The procedure was the same, and the Court granted the application.

Counsel—Campion.
Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 18.

FIRST DIVISION.

[Lords Gifford and Mackenzie.

FOGO *v.* COLQUHOUN.

Teind—Surrender—Over-payment—Prescription.

An heritor holding certain lands in a parish the teinds of which had been valued,—*held* no entitled, by a surrender of his teinds, to free himself of the obligation to continue certain overpayments which had been in use to be made to the minister during the period of prescription.

This was a case which arose in connection with the locality of the parish of Row. Sir James Colquhoun, Baronet of Luss, sought to surrender his teinds. The minister objected.

The following interlocutors were pronounced:—

"*Edinburgh, 4th July* 1871.—The Lord Ordinary having heard parties' procurators, and having considered the condescendence and surrender for Sir James Colquhoun of Luss, Bart., and the answers thereto for the Reverend John Lawrie Fogo, minister of Row, Nos. 65 and 66 of process, with the old localities and proceedings—Finds that for a period greatly exceeding forty years the condescender, the said Sir James Colquhoun, and his predecessors and authors, have, under final decrees of locality, paid to the successive ministers of the parish of Row amounts of stipend considerably exceeding the amount of the value of the teinds contained in the decrees of valuation held by the said Sir James Colquhoun and his predecessors and authors, and now proposed to be surrendered: Finds, in point of law, that the minister of Row, for himself, and his successors in office, has by such prescriptive over-payments acquired a right to insist that said payments shall be continued, notwithstanding the decrees of valuation: Finds that the said Sir James Colquhoun is not entitled by surrendering his teinds to free himself from the obligation to continue to make the over-payments in the same way as has been done during the prescriptive period, and decerns: And before further answer, appoints the cause to be enrolled, with the view of ascertaining the precise amount of the prescriptive over-payments, reserving meantime all questions of expenses.

"*Note.*—It was quite fairly and candidly admitted by the counsel for Sir James Colquhoun that his object in insisting in a surrender in terms of his condescendence and surrender, No. 65 of process, was to free himself in future from all over-payments of stipend, and that notwithstanding that such over-payments had been made under final decrees of locality for a period greatly exceeding forty years.

"It was not disputed that such over-payments had been made for more than forty years, although their precise amount was disputed, and thus the question of law was fairly raised, Whether Sir James Colquhoun, by now surrendering the exact amount of his valuations, can now get rid of such over-payments in all time coming.

"There was a subordinate question, Whether, even supposing that the over-payments are still to continue, Sir James Colquhoun may still, notwithstanding, surrender his valued teind, subject to the continuance of the over-payments. This question, however, is of little importance, being rather a question of form than of substance, and at most only affecting Sir James' liability for a share of the expenses of future localities.

"The Lord Ordinary is of opinion that, by reason of the prescriptive over-payments under final decrees of locality, the minister has acquired a right thereto, and that the heritor is not entitled to shake himself free of his liability by surrendering the mere amount of his valued teind. The Lord Ordinary has thought it better to decide this important point of law by substantive findings, rather than by sustaining the surrender under a

declaration or qualification. This course is the more expedient, as the exact amount of the prescriptive overpayments is in dispute.

"It is now finally fixed that a decree of valuation of the High Court cannot be derelinquished even by prescriptive overpayment, but the precise effect of such over-payments has perhaps not been fully determined by the decided cases. The leading cases are:—*Locality of Fearn* (*Munro*), 21st Nov. 1810. F.C. 38; *Maxwell* v. *Blair* (*Eastwood Locality*) 3d July 1816, F. C. 182; *Locality of Maderty* (*Moray*), 9th July 1817, F.C., 371. Reference may also be made, as bearing upon the question of surrender, to Connel i. 521, and *sub*, and cases quoted, Buchanan on Teinds, p. 216 and *sub*; *Locality of Lamington*, 24th May 1798, F. C.; *Tawse* v. *Earl of Glasgow* (*Locality Paisley*), 20th June 1821, Shaw, T. Cases, 8; *Cuthbert* v. *Waldie*, (*Ednam Parish*), 24th Nov. 1824, Shaw, T. C. 75; *Baird* v. *Minister of Polmont*, 3d July 1832, 10 Shaw, 752; *Richmond* v. *Common Agent in Orwell*, 8th March 1866, 4 M. 554.

"It appears to the Lord Ordinary to be finally decided by the case of *Maderty*, above cited, that a minister may acquire a right to overpayments by prescription, notwithstanding a High Court decree of valuation. This case was very fully argued and decided upon informations to the Court, and it seems to determine the substantial question raised in the present case. The Lord Ordinary feels himself bound by this decision, which he does not think is inconsistent with the previous cases of *Fearn* and *Maxwell*, and which he cannot hold to be over-ruled by the case of *Baird* v. *Minister of Polmont*. No doubt, in this last case Lord Moncreiff remarks upon the case of *Maderty* as a special case, and the ground of the decision in *Polmont* case was that the decree of locality on which the alleged over-payments proceeded had been *tempestive* reduced, so that the over-payments were really without a title.

"In the present case the old decrees of locality, in virtue of which the prescriptive payments have been made, have never been reduced, and it is impossible to reduce them, because they are long ago protected by prescription. It is vain to say, as was ingeniously urged by the counsel for Sir James Colquhoun, that every new augmentation operates *eo ipso* as a decree of reduction of all the old localities, however long they may have stood, or although they have been pronounced in litigated causes. This is not so. The old localities and *res judicatæ* therein are all final, either as *res judicatæ*, or as decrees unchangeable after the prescriptive period, and all that can be settled in such augmentation is how the augmentation is to be localled, otherwise there would be no finality at all in teind causes. It is quite fixed that judgments in one locality are final in all subsequent ones, and there is no different rule for decrees protected by prescription.

"The minister's right to prescriptive over-payment seems also to rest on sound reason. His title to the benefice, and his decree in the locality, constitute a good title on which to found prescription, and where the heritor under such a title pays the amount decerned for for forty years without challenge, there seems no ground for allowing him after that to open it up. He is barred, both by the positive prescription in respect of possession by the minister, and by the negative prescription, which cuts off the heritor's right to challenge the old decree. The decree of valuation will protect the heritor from all future augmentations, for it has not been derelinquished; but it will not protect him from the law of prescription, which prevents him from challenging a decree which he has implemented without objection for more than forty years.

"As to the subordinate question, or question of form, the Lord Ordinary is inclined to think that, notwithstanding the prescriptive over-payment, the heritor may still surrender, provided it is made clear that, besides the surrendered teind, the heritor is still to pay the fixed and prescriptive over-payment. In this way the Lord Ordinary reconciles the cases of *Fearn* and *Maxwell* with that of *Maderty*, but the over-payments must be fixed, and with this view the Lord Ordinary has appointed the case to be enrolled.

"The Lord Ordinary was referred to an unreported decision of Lord Barcaple in the case of *Auchterlony*, 22d December 1866, which was acquiesced in, and in which Lord Barcaple refused to sustain a surrender where there had been over-payments. In that case, however, it was only a portion of the valued teind which was proposed to be surrendered, and there had been no apportionment fixing its amount. This by itself would support Lord Barcaple's judgment, and his Note shows that it was rather the form of the surrender than its substance which was considered objectionable.

"Surrenders were introduced by the Court in the case of *Lamington*, see Connell, i., 521. Their primary object was to save heritors from over-payments in a new locality by reason of increased value of victual, when the valuation of the teinds was in money. Their practical effect was to save the heritor, whose payment was fixed and unalterable, from taking part in localities, and from the expenses of a process in which he had no interest. If, in the present case, Sir James' constant payment is fixed and unalterable, there seems nothing in principle to prevent him from giving up that payment so as to save him from the trouble and expense of taking part in future processes of locality."

"*Edinburgh, 24th July* 1872—The Lord Ordinary having heard parties' procurators on the condescendence and surrender by Sir James Colquhoun, and answers thereto for the minister, with special reference to the teinds of the lands of Kilbrides; Finds that the sub-valuation of the teinds of the lands of Kilbrides, dated 7th January 1629, approved of by final decrees of approbation dated 20th February 1793 and 10th March 1813, must be held to apply only to the teinds of the lands of Easter Kilbride and to the teinds of the lands of Wester Kilbride, and not to the teinds of the lands of Middle Kilbride: Finds that the teinds of the lands of Middle Kilbride have been separately valued by decree of valuation dated 3d June 1870. Finds that the amount of the valued teinds of Easter Kilbride and of Wester Kilbride, as contained in the said sub-valuation and decrees of approbation, has always been paid by the proprietors of these lands to the minister of Cardross, under the original arrangement, when the present parish of Row was disjoined therefrom: Finds that, in considering and fixing the over-payments to which the minister of Row is entitled by reason of prescriptive possession thereof, the payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter Kilbride and Wester Kilbride, to the teinds of which lands alone the final decrees of approbation

apply; and finds that all sums paid to the minister of Row for the full prescriptive period, in respect of the lands of Easter Kilbride, Wester Kilbride, or Middle Kilbride, must be held to be over-payments over and above the valued teinds of Easter Kilbride and Wester Kilbride; and finds that the said payments made to the minister of Row for the full prescriptive period must continue to be paid without deducting therefrom any part of the valued teind paid during the same period to the minister of Cardross; and, with these findings, appoints the case to be enrolled, that the amount of the prescriptive over-payments may be fixed and adjusted, reserving all questions of expenses.

"*Note.*—The condescendence and surrender by Sir James Colquhoun of Luss, Bart., and the answers thereto for the minister of Row, raise a great many questions of much difficulty, both in point of principle and in matters of detail.

"The Lord Ordinary, by his interlocutor of 4th July 1871, disposed of the chief question of principle as to which the parties were at issue. He found that an heritor who, notwithstanding old decrees of valuation, has for forty years and upwards, under final localities, paid more than the amount of the valued teind, is bound to continue such over-payments, although the decrees of valuation are not thereby derelinquished, and that such heritor cannot get quit of such over-payments merely by surrendering his valued teind, This judgment has in the meanwhile been acquiesced in, and parties were further heard upon the questions of detail as to what the amounts of the prescriptive over-payments really were.

"There are a great many lands, and the facts as to some of them are rather intricate, but ultimately both parties explained to the Lord Ordinary that they thought they could adjust all mere questions of amount, excepting as to the lands of Kilbrides, of which there are three parcels, Easter Kilbride. Wester Kilbride, and Middle Kilbride. The ascertainment of the amount of over-payments for these lands depends upon questions of principle, which were argued before the Lord Ordinary, and he has now endeavoured to dispose thereof.

"The question chiefly turns upon the effect of the old sub-valuation of 1629, as explained or affected by the two decrees of approbation thereof of 1793 and 1813. It may be quite true that the sub-valuation of 1629 was originally intended to apply to the whole three Kilbrides, and not merely to two of them. The Lord Ordinary is of opinion, however, that it is too late now to maintain this, but that it is finally fixed by the two decrees of approbation of 1793 and 1813, both of which are now unchangeable, and that the old sub-valuation only applies to Easter and Wester Kilbride, and thus leaves the teinds of Middle Kilbride unvalued. This conclusion is confirmed, if confirmation were necessary, by the fact that in 1870 Sir James Colquhoun led before the High Court a new and independent valuation of the teinds of Middle Kilbride.

"The incidence and application of the different valuations being thus fixed, the next question is, From the teinds of what lands was stipend paid to the minister of Cardross? Now the stipend paid to the minister of Cardross for more than a century is the exact amount, even to a fraction, of the valued teind contained in the sub-valuation and two decrees of approbation. The Lord Ordinary thinks that the inference is irresistible, that it was the valued teinds of the lands of Easter and Wester Kilbrides that have always been paid, and are now payable to the minister of Cardross. It would be a very forced and violent conclusion to hold that although the exact valuation is paid, it is not paid in respect of the teinds valued, but in respect of certain other teinds which are not valued. Possibly this might be made out by evidence, but certainly there is every presumption against it, and not a particle of evidence was adduced or referred to by Sir James. The Lord Ordinary was not asked to grant any proof, and indeed proof could hardly be otherwise than by documents, and the parties had none to produce. Viewing the matter as one of presumption, the Lord Ordinary can come to no other conclusion than that the valued teind paid in Cardross was the valued teind of Easter and Wester Kilbrides, and that no part of it was the unvalued teind of Middle Kilbride.

"It follows that all the prescriptive payments made in Row in respect of Easter and Wester Kilbride, are over-payments which must continue to be made to the exact amount fixed by prescription.

"In this view there is no question about Middle Kilbride. The teind thereof is fixed by the valuation of 1870, and the whole amount of that valuation is now to be unconditionally surrendered, but no deduction can be made therefrom in respect of the payments made in Cardross, for these payments were made, not for Middle Kilbride at all, but for Easter and Wester Kilbride alone.

"In like manner, the exact over-payments for Easter and Wester Kilbride must be fixed upon the evidence, and, as prescriptive over-payments, must continue to be made notwithstanding the old valuations.

"The Lord Ordinary trusts the parties will now by joint minute apply the above findings and exhaust the matters of detail connected with the surrender."

"19*th March* 1873.—The Lord Ordinary having considered the condescendence and surrender for Sir James Colquhoun of Luss, Bart., and the answers thereto for the Reverend John Lawrie Fogo, and heard parties' procurators—Sustains the surrender in so far as concerns the teinds, parsonage and vicarage, of the following lands, viz,—Faslane, Stronmallinoch, Letterowal, Letterowalmore, Stuckiedow, Auchingaich, Meikle Ballernick, Tombuy, Finnart, Portincaple, Feorlinebreck, Deorling, Malligs, Castle Kirkmichael, Stuck, Easter Ardencaple, Drumfad, Little Drumfad, Stronrattan, Little Ballernick, Auchenvennelmore, Ardencaple, East Kilbride, Laggarie, Ardenconnell, Letruelbeg, Stuckiehoich, Blairvattan, Blairvaddick, Wester Kilbride, Auchenvennelvoulin and Ballecknock, Blairvrion, Blairnairns, Middle Kilbride, or Ballemeanoch, and Gortan, amounting in whole to 115 bolls 2 firlots 1 peck 2 lippies and 13-15ths of a lippy of meal, at 9 stones per boll, 25 bolls 2 firlots 3 pecks 2 lippies and 1-5th of a lippy bear, and £89, 18s. 2½d. sterling, under deduction of the teind or stipend of the said lands of Faslane, Auchengaich, Meikle Ballernick, Deorling, Meikle Drumfad, Little Drumfad, Stronerattan, Little Ballernick, Auchenvennelmore, Auchenvennelvoulin, and Ballieknock, Blairnairn, and Easter and Wester Kilbrides, payable to the minister of Cardross, and of the lands of Auchintaal, payable to the minister of Roseneath, amounting in whole to 72 bolls 2 pecks and 2 lippies of meal, and 3 bolls 1 firlot of bear, and £3, 7s. 2$\frac{8}{12}$d

sterling, leaving as the amount of the surrendered teinds 43 bolls 1 firlot 3 pecks and 13-15ths of a lippy of meal, 22 bolls 1 firlot 3 pecks 2 lippies and 1-5th of a lippy of bear, and £86, 10s. 11½d. sterling of money: Also sustains the surrender of the teinds of the said lands of Gairlochhead and Stucknaduff, but without prejudice in any respect to and under reservation of the prescriptive right of the minister of Row to a stipend of 6 bolls of meal and 5s. $1\frac{6}{12}$d. sterling of money out of Gairlochhead, and 5 bolls of meal and 7s. 5d. sterling out of Stucknaduff, which stipend is hereby reserved entire to him: Further, finds and declares that the surrender of the said teinds of Faslane, Deorling, East Kilbride, Wester Kilbride, Auchenvennelvoulin, and Ballecknock is not to prejudice or in any way affect the prescriptive right of the minister of Row to a stipend in excess of what is paid to the minister of Cardross, of 8s. 4d. sterling out of Faslane, 1 firlot of meal and 7s. $9\frac{5}{12}$d. out of Deorling, 3 firlots 3 pecks and 1 lippy and 4-5ths of a lippy of meal and 4s. 2d. sterling out of East Kilbride, 2 bolls 1 firlot and 1 lippy and 8s. $11\frac{3}{12}$d. sterling out of West Kilbride, amounting in all to 3 bolls 1 firlot 3 pecks 2 lippies and 4-5ths of a lippy of meal, whereof 1 boll 1 firlot 1 peck 2 lippies and 4-5ths of a lippy, at 8 stones per boll, the rest being 9 stones, and £1, 9s. $3\frac{5}{12}$d. sterling money: Remits to the clerk to prepare a rectified locality and state of arrears of stipend: Finds the minister entitled to expenses, subject to modification: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and to report."

Sir James Colquhoun reclaimed.

At advising—

LORD PRESIDENT—There are three interlocutors brought up by this reclaiming note. The earliest is that of July 4th 1871, in which Lord Gifford finds "that for a period greatly exceeding forty years the condescender, the said Sir James Colquhoun, and his predecessors and authors, have, under final decrees of locality, paid to the successive ministers of the parish of Row amounts of stipend considerably exceeding the amount of the value of the teinds contained in the decrees of valuation held by the said Sir James Colquhoun and his predecessors and authors, and now proposed to be surrendered: Finds, in point of law, that the minister of Row, for himself and his successors in office, has by such prescriptive over-payments acquired a right to insist that said payments shall be continued, notwithstanding the decrees of valuation: Finds that the said Sir James Colquhoun is not entitled by surrendering his teinds to free himself from the obligation to continue to make the over-payments in the same way as has been done during the prescriptive period, and decerns." The Lord Ordinary has not specified to what particular lands his findings apply, but we know from Lord Mackenzie's interlocutor of March 19, 1873, what these lands are. They are specified in a minute on page fourteen, and consist of seven different parcels. Now these lands are not all in the same position, except to this extent, that the valuation of them is a sub-valuation made in 1629, and afterwards approved of by the High Court, but payments far in excess of the sub-valuation were made for a period greater than the period of prescription, before the approbation. In fact, the sub-valuations have been disregarded, and if derelinquishment had been pleaded, the plea must have been successful. It appears to me that as regards these lands the case of *Maderty* is directly in point, and that we have no choice but to give effect to it. The lands of Deorling and Easter Kilbride stand in the same position so far as concerns over-payments made under the locality of 1748, and if there had been no other locality they would have been in exactly the same position, but part of the payments were made under the final locality of 1803, and though that makes no difference as regards the rest of the lands, it does make a difference as regards these. As regards Deorling, the decree was in 1794, and as regards Easter Kilbride in 1793. Now the over-payments under the locality of 1803 being necessarily subsequent to that date, it is plain that the case of *Maderty* has no direct application, for there the over-payments were on a decree long antecedent, so that, as regards the over-payments under the locality of 1803, while that authority does not apply, neither does the principle on which it proceeded. A decree pronounced in the face of a sub-valuation is held to represent the true value of the teinds, and so a decree following after forty years necessarily approves of the valuation effected by the final locality. But after the valuation is fixed over-payments will not have the same effect, or enable the minister to obtain payments out of stock. I am of opinion that these payments, which are of very small amount, are not to be regulated in the same way, and to that effect differ from the interlocutor of July 4th 1871. There remains for consideration the case of Gairlochhead, which differs from that of the other lands. There was a sub-valuation, but it was never approved of, and was completely derelinquished, and is out of the case altogether, and certain stipends were paid under the decree of 1748 greatly in excess of the sub-valuation, down to the present day. But there was a decree of valuation of the High Court in 1794, and it is contended that a decree of the High Court fixes finally and conclusively the amount of the teind, and no payment of stipend can be allowed in excess of it. The Lord Ordinary seems to be of opinion that a decree of valuation of the High Court is the same as a decree of approbation of a sub-valuation. Now the case of *Maderty* does not decide that. In that case the teinds of Ballyclone were surrendered by the heritor. The common agent objected to the surrender on the ground that the sub-valuation had not been acted on. Now, in these circumstances, if Lord Robertson's interlocutor had been a final judgment there might have been more to be said for the Lord Ordinary, for Lord Robertson found "That the report of the sub-commissioners of the presbytery of Muthill was approved of in so far as it relates to the respondent's lands of Ballyclone by a decree of the High Commission of date 6th February 1760; and that said decreet has remained unchallenged beyond the years of the long prescription, and that therefore it cannot now be challenged on account of any over-payments of stipend alleged to have been made prior to the date of the said decree: Finds that the benefit of a decree of approbation of the High Commission cannot be derelinquished by any over-payment, however long continued; although, when over-payments of stipend have been made and continued during the years of the long prescription, the minister will have right to such surplus payment in time coming." Now, it looks as if Lord Robertson meant to hold that a right might be acquired by

prescription notwithstanding a decree of the High Court, but that was not the view of the Inner House. They found "that the subvaluation in the year 1629 never was acted upon; on the contrary, that a decreet of modification and locality was pronounced in the year 1650, whereby the teinds of Ballyclone, belonging to Abercairney, were rated higher than by the said sub-valuation, and that he continued to pay stipend according to the locality of 1650 from that period down to 1760, when he obtained an approbation in absence by the High Commission of the sub-valuation 1629: Find that by the possession following on the decreet 1650, the minister acquired a prescriptive right to the surplus teind beyond the sub-valuation 1629, and that the approbation 1760 must be limited and qualified by said prescriptive right, and that the minister has right to the teinds as modified to him by decreet 1650, without prejudice to the valuation in other respects; and find that this seems to have been the understanding of Abercairney himself, who from the year 1760 downwards has continued to pay stipend according to the decreet 1650, and not according to the sub-valuation 1629." Now, it is obvious that the view of the Court was that the amount of teind was to be taken as appearing in the final locality of 1750, and that the sub-valuation could only be approved of on that footing, and this is a complete avoidance of the question of encroachment on stock. Now, in the present case we have not the same circumstances, for we have a decree of valuation of the High Court, dated 1794, and a decree of valuation of the High Court is in many respects different from a decree of approbation of a sub-valuation. In the first place, the amount of teind is not necessarily the same thing at all times, except after a decree of valuation has been pronounced; it will vary according to the nature and condition of the lands until a decree of valuation has been obtained. It is usually taken as one-fifth of the rental, but after a final decree of valuation there is no longer room for enquiry as to the amount, and all beyond that is stock. Now a sub-valuation is a proceeding of a peculiar kind; it must be taken once for all and previous to 1633. Though it may be made effectual by the Court, it is not so unless approved and acted on, but if it be not acted upon but acted against, it falls and can never receive effect. But a decree of valuation of the High Court does not require to have been made at a particular time in the seventeenth century. It may be made at any time, and it is the heritor's right to obtain it, but his teind is valued as at the date when the process is brought. It is well known that an old valuation is more valuable than a new one, and a valuation is a thing every heritor is entitled to. After that is obtained it cannot be derelinquished; no amount of over-payment will deprive the heritor of it. What is here proposed is that there shall continue in all time an excess of payment because it has been made since 1748. As regards payments before the decree of valuation, the valuation cannot now be gone upon. The teinds were not then valued, and both parties acted on the belief that this was their value, but as regards over-payments after the decree of valuation, they were payments out of stock. The case of *Maderty* was decided on the footing that the payments were made out of teind, for otherwise the Court would not have sanctioned them. I am of opinion that the first interlocutor is erroneous so far as concerns Gairlochhead.

The second interlocutor is that of July 24, 1872, and applies to another matter, viz., to the lands of Kilbride. The Lord Ordinary finds, first, "that the sub-valuation of the teinds of the lands of Kilbride, dated 7th January 1629, approved of by final decrees of approbation dated 20th February 1793 and 10th March 1813, must be held to apply only to the teinds of the lands of Easter Kilbride and to the teinds of the lands of Wester Kilbride, and not to the teinds of the lands of Middle Kilbride: Finds that the teinds of the lands of Middle Kilbride have been separately valued by decree of valuation dated 3d June 1870." Then he finds further "that the amount of the valued teinds of Easter Kilbride and of Wester Kilbride, as contained in the said sub-valuation and decrees of approbation, has always been paid by the proprietors of these lands to the minister of Cardross, under the original arrangement, when the present parish of Row was disjoined therefrom: Finds that, in considering and fixing the over-payments to which the minister of Row is entitled by reason of prescriptive possession thereof, the payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter Kilbride and Wester Kilbride, to the teinds of which lands alone the final decrees of approbation apply; and finds that all sums paid to the minister of Row for the full prescriptive period, in respect of the lands of Easter Kilbride, Wester Kilbride, or Middle Kilbride, must be held to be over-payments over and above the valued teinds of Easter Kilbride and Wester Kilbride; and finds that the said payments made to the minister of Row for the full prescriptive period must continue to be paid without deducting therefrom any part of the valued teind paid during the same period to the minister of Cardross." Now the history of these lands is peculiar. The sub-valuation of them is taken in this way:—

"Kilbrydes, then belonging to John Colquhoun of Luss, 9 bolls meal.

"Vicarage, 1 merk for ilk merk land."

Now this means that while 9 bolls were payable for the whole lands 1 merk was payable for each merk land, and we see from the titles that there were nine merk lands of Kilbride, so that the valuation of the whole three lands is 9 bolls and 9 merks in money. On the face of the sub-commissioners' report the Lord Ordinary is not justified in holding that the decree of approbation of the sub-valuations of Kilbride applied only to Easter and Wester Kilbride, but the mistake was committed in the approbations. Easter Kilbride belonged in 1793 to Herbert Buchanan of Arden, and Wester Kilbride to Andrew Buchanan. Now Herbert Buchanan, in pursuing an approbation of sub-valuation, proceeded on the notion that this Easter Kilbride was one-half of the Kilbride which had been valued by the sub-valuation and libelled accordingly, and in 1813 the proprietor of Wester Kilbride fell into the same mistake. It is true that the approbations go on the footing of dividing equally between Easter and Wester Kilbride, but that is not conclusive of this question, for the question really is whether in fact payments were made to the minister of Cardross in respect of the lands of Kilbride or of Easter and Wester Kilbride only. Whatever difficulty they got into by mis-

take will not affect the question of fact, nor the question whether the Lord Ordinary is right in finding that "the payments of the valued teind to the minister of Cardross must be held to have been solely in respect of the lands of Easter Kilbride and Wester Kilbride, to the teinds of which lands alone the final decrees of approbation apply." In order to ascertain that, we must look into the locality of Cardross and other documents. Now, first we have a scheme of the rental of Row, which shows the payment in use to be made to the minister of Cardross. That was quite necessary, because it showed the value of the lands at the time. Now, it is obvious that according to this scheme Easter Kilbride paid one-third of the valuation, and Wester Kilbride paid one-third, but in the same rental we have the lands of Balimenoch, which are the same as Middle Kilbride, so that you have a portion of the teind of 9 bolls and 9 merks necessarily laid on these lands. If that is true, then the Lord Ordinary must be wrong; and we have a confirmation of this, for in the Common Agents' Report in 1836 we have as follows, "Kilbrides, Easter, Wester, and Middle, £190." and further, "Kilbrides, Easter, Wester, and Middle, 9 bolls meal and 10s. sterling." It is clear, therefore, that the whole three Kilbrides had to contribute to the payment of that stipend. Then, again, in the rectified locality of 1859 we have the Kilbrides entered as yielding 9 bolls and 10s. as surrendered teind, and that was made on a decree of approbation of a sub-valuation of 1837, and so there again it is clear that there are three subjects chargeable. I am of opinion that the interlocutor is not well founded. It does not matter whether the heritor did obtain a separate valuation of Middle Kilbride in 1870. That cannot affect the question whether *de facto* the minister of Cardross has received payment out of two subjects or three. The result is that while most of Sir James' surrender may be sustained, there are some parts of it which cannot, owing to prescription. With regard to Easter Kilbride and Deorling, I differ so far that I think the payments made under the locality of 1803 cannot be sustained, and as regards Gairlochhead, no payments in excess can be sustained at all. But the interlocutor of March 19, 1873, sustains the surrender in respect of various lands; this is a new form of interlocutor. In case of a surrender it must either be sustained or not. It makes the minister titular in all time coming; he becomes a parson. It is impossible to make him parson of that which is not surrendered. But he never can receive over-payments as titular. I would suggest that we should recall all the interlocutors and frame one new one.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recall the interlocutors of 4th July 1872, and 24th July 1872, and 19th March 1873; sustain the surrender in so far as concerns the teinds, parsonage and vicarage, of the following lands—viz., Stronmallinoch, Letterowal, Letterowalmore, Stuckiedow, Auchingaich, Meikle Ballernick, Tombuy, Finnart, Portincaple, Feorlinebreck, Malligs, Castle Kirkmichael, Stuck, Easter Ardincaple, Drumfad, Little Drumfad, Stronrattan, Little Ballernick, Gairlochhead, Auchinvennelmore, Ardincaple, East Kilbride, Laggarie, Ardenconnell, Letruelbeg, Stuckiehoich, Blairvattan, Blairvaddick, Blairvrion, Blairnairns, Middle Kilbride or Ballemeanoch, and Gortan, amounting in whole to 92 bolls, 1 peck, 3 lippies, and $\frac{7}{15}$ of a lippie meal; 23 bolls, 2 firlots, 3 pecks, 2 lippies, and $\frac{4}{5}$ of a lippie bear; and £93, 18s. $4\frac{6}{12}$ money sterling, under deduction of the teind or stipend of the said lands of Auchengaich, Meikle Ballernick, Meikle Drumfad Little Drumfad, Stronerattan, Little Ballernick, Auchinvennelmore, Blairnairns, East Kilbride, and Middle Kilbride, payable to the minister of Cardross, and of the lands of Kirkmichael and Auchintaal, payable to the minister of Roseneath, amounting in whole to 37 bolls, 1 firlot, 2 pecks, 2 lippies meal; 1 boll 1 firlot bear, and £18, 0s. $7\frac{7}{12}$ money, leaving as the amount of the surrendered teinds 54 bolls, 2 firlots, 3 pecks, 1 lippy, and $\frac{7}{15}$ of a lippy meal; 22 bolls, 1 firlot, 3 pecks 2 lippies, and $\frac{4}{5}$ of a lippy bear, and £75, 17s. $8\frac{11}{12}$ money sterling: Refuse the surrender in so far as regards the teinds of the lands of Faslane, Deorling, Stucknaduff, West Kilbride. Auchinvennelwilling, and Ballecknock, and find the minister has acquired right by prescription, following on the locality of 1748, to the undermentioned payments from these lands—viz., From Faslane 8s. 4d., Deorling 7s. $9\frac{5}{12}$d.; Stucknaduff, 5 bolls meal and 7s. 5d.; West Kilbride 1 boll, 3 firlots, 2 pecks meal, and 8s. $11\frac{9}{12}$d.; and Auchinvennelwilling and Balleckhock 19s.; and has also acquired right by prescription, following on the locality of 1803, to a farther payment from West Kilbride of 1 firlot, 2 pecks, 1 lippy meal (at 8 stone to the boll): Find neither party entitled to expenses; Remit of new to the Teind Clerk to prepare a rectified locality and state of arrears of stipend; and remit to the Lord Ordinary to proceed with the cause."

Counsel for Reclaimer — Watson and Hall. Agents—Tawse & Bonar, W.S.

Counsel for Respondent—Solicitor-General and Balfour. Agents—W. H. & W. J. Sands, W.S.

Friday, July 18.

FIRST DIVISION.

TANNET, WALKER & CO. *v.* HANNAY & SONS.

Diligence.

Where one of the parties in a jury trial asked for a commission and diligence to recover "all letters and memoranda, telegrams, reports or written communications" sent to the other parties by their foreman or workmen in reference to the subject in dispute, as also all similar documents sent by one of the firm to his co-partners,—*held* that the former might be recovered, but the latter could not.

This was a case in which issues had been adjusted, and the defenders asked for a commission and diligence to recover certain documents. Among other articles of their specification were the following;—

"(2) All letters and memoranda, telegrams, reports, or written communications sent or made to Tannet