

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 Balimenoeh, 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., Stronmallinoh, Letterowal, Letterowalmore, Stuckiedow, Auchingaich, Meikle Ballernick, Tombuy, Finnart, Portincaple, Feorlinebreck, Malligs, Castle Kirk-michael, Stuck, Easter Ardincaple, Drumfad, Little Drumfad, Stronrattan, Little Ballernick, Gairlochhead, Auchinvennelmore, Ardincaple,

East Kilbride, Laggarie, Ardenconnell, Let-ruelbeg, Stuckiehoich, Blairvattan, Blairvaddick, Blairvrior, Blairnairns, Middle Kilbride or Ballemeanoeh, and Gortan, amounting in whole to 92 bolls, 1 peck, 3 lippies, and $\frac{7}{5}$ of a lippie meal; 23 bolls, 2 firlots, 3 pecks, 2 lippies, and $\frac{1}{4}$ of a lippie bear; and £93, 18s. 4 $\frac{6}{8}$ money sterling, under deduction of the teind or stipend of the said lands of Auchingaich, 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 Kirk-michael 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 $\frac{7}{8}$ money, leaving as the amount of the surrendered teinds 54 bolls, 2 firlots, 3 pecks, 1 lippy, and $\frac{7}{5}$ of a lippy meal; 22 bolls, 1 firlot, 3 pecks 2 lippies, and $\frac{1}{4}$ of a lippy bear, and £75, 17s. 8 $\frac{1}{2}$ 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 $\frac{5}{8}$ d.; Stucknaduff, 5 bolls meal and 7s. 5d.; West Kilbride 1 boll, 3 firlots, 2 pecks meal, and 8s. 11 $\frac{3}{8}$ d.; and Auchinvennelwilling and Ballecknock 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

Walker & Co., or to any of the partners of that firm, or to any one on their behalf, by Thomas Harrison or Matthew Duncan, their foreman, or other person or persons employed by them in connection with the machinery mentioned on record, relating or referring to said machinery, or to the articles or things supplied by Hannay & Sons to Tannet, Walker & Co., or to any matter mentioned or referred to on record in either action prior to 19th April 1872." "(4) All letters, memoranda, telegrams, or written communications between Mr Benjamin or Walker, of the firm of T. W. & Co., to his other co-partners in the firm or to the firm, or by the firm or any one or more of the co-partners thereof to him, relating to the machinery mentioned on record, or to the furnishing or fitting of the same, prior to April 19, 1872."

The pursuers objected to these two articles.

At advising—

LORD PRESIDENT—The case of *Livingstone v. Dinwoodie* is an important authority, because it was deliberately considered, and after consultation with the other Division; but it is a case which differs from the present, and I am quite satisfied with the distinction drawn by Mr Watson. The letters of workmen which are asked for, if not evidence of themselves, may be made so, and therefore I think the rule laid down in *Livingstone v. Dinwoodie*, does not apply. But if these letters can be made evidence, they may be very important. As regards the fourth article of the specification, however, I do not feel disposed to allow it. I don't think that communications between the partners can be recovered except on very special grounds, and none such have been assigned here. If one of the partners had been sent to another country with certain instructions, it might have been necessary to discover from correspondence what these were, but nothing of that kind is suggested here, and I am for refusing article four.

The other Judges concurred.

Counsel for Tannet, Walker & Co.—Solicitor-General (Clark), and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Hannay & Sons.—Balfour and Watson. Agents—Webster & Will, W.S.

Saturday, July 19.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

MILLER'S TRUSTEES v. THE LEITH POLICE COMMISSIONERS.

General Police and Improvement (Scotland) Act 1862—Private Street—Common Access—Right of Appeal.

Where a piece of ground situated within a Burgh was in an open condition, accessible to foot passengers or carts going to premises, the entrance to which was on either side of the piece of ground, and where the premises were severally occupied, and a lamp had been placed for the convenience of the public resorting to the place.—Held (1) That the piece of ground was a private street, as defined by the General Police Act. (2) That the Commissioners hav-

ing entered upon the piece of ground and executed certain works upon it without objection from the proprietors in the manner pointed out by the Police Act, their procedure was final.

This suit, raised at the instance of the trustees acting under the marriage contract of Christian Miller, merchant, Montrose, and Miss Watson, against the Leith Police Commissioners, concluded that "It ought and should be found and declared, by decree of the Lords of our Council and Session, that all and whole that piece of ground lying within the lines of Pattison Street, Leith, and which had been intended to form a continuation of that street towards Poplar Lane, extending in length from a line drawn at right angles across Pattison Street at the eastern gable of the tenement of houses on the north side of that street onward to Poplar Lane, pertains heritably to the pursuers, but jointly and in common with the successors of John Hutton, merchant in Leith; and the defender ought and should be decreed and ordained to cede possession of a portion of the said piece of ground extending from the fore-said line a distance of eighty-five feet or thereby onward towards Poplar Lane, taken possession of by the said commissioners, and formed or attempted to be formed into a continuation of Pattison Street, and to restore the same to the condition in which it was previous to its having been taken possession of as aforesaid."

The pursuers' statement of facts was,—“the pursuers are proprietors of and are infest in certain subjects near Pattison Street, Leith, and *inter alia*, they are proprietors, but jointly and in common with the successors of John Hutton, merchant in Leith, of all and whole that piece of ground lying within the lines of Pattison Street, and which had been intended to form a continuation of that street towards Poplar Lane, extending in length from a line drawn at right angles across Pattison Street at the eastern gable of the tenement of houses on the north side of that street onward to Poplar Lane. It was provided that the said joint-proprietor should have full right and liberty to use the said piece of ground either as a private enclosure or as a private road communicating to their own properties, to which no one else should have right, or to throw it open as a public thoroughfare, communicating between Poplar Lane and Elbe Street, their using it in one way by no means precluding them from afterwards using it in any other way they may choose, and their having thrown it open as a public thoroughfare not even precluding them from resuming close and private possession thereof; but declaring that any one of their number should have at any time right to insist upon the said piece of ground being thrown open as a public thoroughfare and continuation of Pattison Street in the manner originally intended. At a distance of about 9 feet east from the eastern gable before referred to, a wall was built across the intended line of Pattison Street, having a gate for the convenience of those having right of access. This gate was removed some years ago, but the piece of ground was never thrown open to the public. It remains the private property of the joint-proprietors, none of whom have ever consented or wished that it should be thrown open as a public thoroughfare. Sometime about the end of June or beginning of July last, the Police and Improvement Commissioners of