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

The other judges concurred.

Interlocutor recalled, and objections repelled.

Agent for the Crown—W. H. Sands, W.S.

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

Friday, January 17.

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

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

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

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

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

The common agent reclaimed.

COOK and HALL for him.

LORD ADVOCATE (GORDON) and GLOAG in reply.

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

muir cleared and tried," that, in the course of the inquiry, the procurator-fiscal produced a rental on which he desired the heritor and titular to be held confessed in respect of their non-compearance after due citation, which rental "affirmed" the part of the muir under valuation "to have been worth in time byegone, to be presently worth, and to be in all time coming only worth, in *constant rent*, the said sum of 20 merks money foresaid," and that the Sub-Commissioners held the parties *pro confesso* on the said rental, and therefore "found and declared the stock and vicarage teind conjunctim of that part of the muir," &c., "having no pasturage teinds therein, in regard the same never was tilled nor laboured, was, is, and may be worth only in all time coming, 20 merks money of this realm."

I am of opinion that this report values the entire rent of the subject at 20 merks stock and teind, and that the Sub-Commissioners not only proceeded quite regularly in framing their report in this way, but that it was the only way in which in the circumstances they could properly proceed. The instructions to the Sub-Commissioners in 1629, under which the Sub-Commissioners of the Presbytery of Haddington were acting in the year 1632 (the date of the report under consideration), give no authority to value teinds separately from the stock, except where the teinds have been drawn severally from the stock by the titular or his tacksman for seven years out of the then last fifteen years at the least, in which case they are to value the teinds both great and small—that is, both parsonage and vicarage. But where the teinds have not been drawn separately from the stock, the only course prescribed to them by the instructions, is "to try and inform themselves by all the lawful means they can," "of the true worth of the lands of each parish, stock, and teind in times bye-gone; and what the lands pays presently, and what they have paid in times bye-gone, and what they may pay in constant rent of stock and teind in time coming; and that they report to our General Commission the true worth and value thereof in constant rent, according to their judgment."

The subject of valuation in this case being muirland, it of course had never yielded parsonage teinds, as the Sub-Commissioners very properly mention in their report. They do not say that the vicarage had ever been actually drawn, and it would be a most perverse and unfair assumption to hold that it had in fact been drawn, in the face of the valuation of stock and teind conjunctim. If, then, the teind had never been separately drawn, the sub-commissioners had no choice but to follow the very course they did in making this report. If they had done anything else, they would have been violating the instructions of 1629, under which they were acting. A good deal of misconception is introduced into discussions such as we have heard in this case, by a failure to attend to two simple matters of historical fact, viz., (1) that the Commissioncrs and Sub-Commissioners, under the instructions of 1629, were not intrusted with the duty of effecting any commutation of teinds for a money payment, but were only desired, where the teinds, parsonage and vicarage, were drawn for seven out of the fifteen years immediately preceding at least, to value these separately on an average of years; and where they were not drawn separately, to ascertain the rent of the lands, stock, and teind, and to report these valuations, without in the latter case ascertaining or reporting anything about the teinds at all; and (2) that the commutation of teind, where it was not in use to be drawn severally into one-fifth of the rent of the land, was an artificial rule subsequently introduced by the King and Parliament. Under the instructions of 1629, nobody was entitled to know, or even to surmise, what the rate of conversion or commutation was to be, which then was, or was supposed to be, locked within the breast of the King and his advisers.

The Act 1633, c. 19, directed the High Commission to receive the reports of the Sub-Commissioners, who had been appointed by the former Royal Commissioners, and who had made their inquiries under authority of these appointments, and the instructions, "and to allow or disallow the same, according as the same shall be found agreeable or disagreeable from the tenour of their Sub-Commissions." The report in the present case being in all respects conformable to the instructions of 1629, must, if it had been brought before the parliamentary commission of 1833, have been approved and given effect to; and it must command equal respect and receive equal effect from the present High Commission. The only remaining question, therefore, is what effect it ought to receive. The common agent contends that the lands were liable to vicarage teind in 1632, and, as the amount or value of that vicarage cannot now be ascertained, the report of the Sub-Commissioners affords no available data for fixing the value of the teind, parsonage and vicarage; because it is necessary, in such a valuation, to deduct, from the fifth of the rent, a definite amount of stock for the vicarage; and reference is made to *Earl of Galloway* v. *M'Guffog* in 1706 (M. 15, 736), in which the Lords found that the teind must be "a fifth of the rent, deducting a stock for the vicarage, which must be proved what it will amount to, the same being local and consuetudinary, different in general parishes, according to custom and the use of payment."

But it must be observed that in that case, which was an action for bye-gone teinds, the pursuer, the Earl of Galloway, was tacksman of the parsonage teinds only, and had no right to the vicarage, which belonged to a different titular. It was obvious therefore that as the vicarage for the period in question had either been drawn or paid, or was still due to the party in right of it, the heritor was only liable for the bye-gones of the teind, estimated at one-fifth of the rental after deducting the amount of the vicarage; and the pursuer could not liquidate his claim without proving the amount of the vicarage. But this reasoning altogether fails where the teinds, parsonage, and vicarage belong to one and the same titular, as is admitted to have been the case in this parish, when the Sub-Commissioners' report of 1632 was made, and which must necessarily continue to be the case still, if that were of any importance in a question with the heritor of the land in a locality. The rule introduced by the King's decreet-arbitral and the Act 1633, is, that for a payment of one-fifth part of the constant rent the heritor is entitled to be relieved of the entire burden of teinds, parsonage and vicarage. A difficulty was at one time felt, and many disputes arose, as to how far, under the system thus introduced, lands which had never been under tillage were, on a valuation, to be considered liable for parsonage teinds, and therefore to be burdened to the extent of one-fifth of the constant rent, or were liable only to the extent of the vicarage according to its actual value, as it was in use to be levied and paid. But it has been conclusively settled that there is but

one rule of valuation where the teind was not severally drawn—viz., that all lands, whether grass-lands or corn-lands, should have their teinds, parsonage and vicarage, commuted to one-fifth of the constant rent.

Three valuable judgments, pronounced by the Commission of 1707, have been collected by Mr Buchanan in his recent work on Teinds, from the Registers of Decrees, which clearly establish this proposition. They occurred in the years 1710, 1723, and 1725 respectively. But it is sufficient to cite one for example, the case of *Tannadice*, in which it was expressly found "that when the teind, parsonage and vicarage, belonged to one titular, they were to be jointly valued, and that the fifth of the cumulo rent, both of laboured land and grass, was teind, parsonage and vicarage." But even where the parsonage and vicarage belong to different titulars, the position and liability of the heritor are not altered. Be the amount of the vicarage what it may, it is only the balance of the fifth part of the constant rent after deducting the vicarage, that is the parsonage teind. For, in the case of the *Duke of Douglas* v. *Officers of State*, reported by Elchies, under date July 16, 1740, this very point was decided, and though the reporter, Lord Elchies himself, was originally against the judgment, thinking that as neither parsonage nor vicarage, though separate benefices, had ever been drawn, "the values of both behoved to be proven separate from the stock," yet he says—"Upon considering the decreets-arbitral in 1629, I was more and more confirmed in the interlocutor, and that the several valuations spoken of where teinds were drawn, were meant a valuation of the teinds separate from the stock; but the separate valuation mentioned in the end of the Act 1633, where there are different titulars of the parsonage and vicarage, was meant only to distinguish the value of the parsonage from the vicarage, and that in all cases the heritor should pay a fifth part of the rent for teind, parsonage and vicarage."

This, then, is the rule of commutation introduced by the decreets-arbitral and the Act 1633, and ever since prevailing in the law and practice of Scotland. And whenever the Commissioners of Teinds have presented to them a sub-valuation "agreeable to the tenor" of the instructions of 1629, they are bound to apply this rule for the benefit of the heritor, whatever may be the effect of its application on the titular or titulars. Of course, no sub-valuation could well be "agreeable to the tenor" of the instructions, if, in the case of teind not drawn, it did not report the constant rent of the entire estate valued. But when it does so the application of the statutory rule is simple and absolute. There can, I think, be no doubt that the sub-valuation with which we are dealing in this case is "agreeable to the tenor" of the instructions under which it was made, and must receive effect as a valuation of the entire constant rent of the lands, one-fifth part of which is the limit of the heritor's liability for teind, both parsonage and vicarage. I am therefore for adhering to the Lord Ordinary's interlocutor.

The other judges concurred.

Agent for Reclaimer—James Macknight, W.S.

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

Friday, January 17.

SECOND DIVISION.

ISMEREDES *v.* COCHRANE & CO.

Sale—Delivery—Breach of Contract—Usage of Trade. Circumstances in which *held* that there had been no breach of contract in the times when certain goods were delivered or offered to be delivered, and that no usage of trade had been proved inconsistent with the manner in which the contract had been executed. Action for the price of goods delivered or offered to be delivered accordingly sustained.

This was an advocation from the Sheriff-court of Lanarkshire of two actions brought by Messrs J. I. Cochrane, & Co., merchants in Glasgow, against Antonio Ismeredes, commission merchant in Glasgow, concluding for certain sums alleged to be due by the latter under a certain contract of sale.

It appeared that on 7th February 1865 the defender entered into a contract with the pursuers, through their agent, Mr W. G. Miller, for the supply of a quantity of shawls of different specified colours, the quality to be conform to samples, and delivery to be in "about four months." Under this contract, the defender received from the pursuers various quantities of shawls prior to the month of April 1865; but on 11th April 1865 he wrote to the pursuers, complaining that, owing to the want of assortment in the colours, and the irregularity of the deliveries, his correspondents in Manchester threatened to cancel the contract with him, and stating that, if that were done, he (the defender) would be under the necessity of doing the same as regarded his contract with the pursuers. The pursuers, in reply, promised to execute the order with greater regularity in future, and deliveries of parcels of shawls continued to be made up to 10th May 1865. After that date, the defender refused to accept further deliveries, alleging that the contract had fallen by the failure of the defenders to execute it properly.

In these circumstances, the pursuers brought these actions against the defender for the price of the goods delivered, and also for the price of those of which delivery had been tendered and refused. After a proof as to the practice of trade in these matters, the Sheriff-substitute (Glassford Bell) pronounced an interlocutor finding for the pursuer in terms of the conclusions of the summons. His lordship added the following note, which more fully explains the circumstances of the case, and the details as they were disclosed in evidence.

"Although a voluminous and protracted proof has been led under the interlocutor of 25th October 1865, there is in reality nothing difficult or complicated in the questions raised in this action. The document No. 6 instructs that the defender gave the pursuers a very large order for lappet shawls on 7th February 1865, the only condition of the order being, that it was to be implemented in "about four months." The shawls were to be of power-loom manufacture, and the first thing the pursuers had to do, after receiving the order, was to purchase yarn and send it to the dyer, and then to get ready the necessary number of looms, amounting ultimately to sixty. It was thus impossible to begin to give delivery for a good many weeks; and the quantities deliverable would gradually increase as the looms came to be fully supplied with material. Strictly speaking, the pursuers were not