ney between Dunkeld and Kenmore, much more on a larger journey, arrangements might be made materially affecting the legal position of matters; as, for instance, if half way on the journey, or say at Aberfeldy, the mail bags, having up to that point been carried in the strictly statutory vehicle, were removed into another carriage constructed for passengers. But the case with which I have to deal is not that of a change of carriage. It is where the same carriage performs the whole journey from Dunkeld to Kenmore, being from the first a carriage constructed for passengers, and taking these in a mile out of Dunkeld for the whole remaining 21 miles. It is to a carriage so constructed and so employed that I think the statutory exemption inapplicable.

If I am right in supposing that the Act requires not merely the employment, but the construction, of the carriage to be such as excludes its occupation by passengers, there arises no difficulty from considering either the length or character of the journey. In that view the point of time to be taken may be assumed to be that at which the carriage passes the toll-gate on the bridge. The carriage now in question was at that moment a carriage constructed for passengers, and not a carriage constructed for merely carrying the driver and mail-bags. It was so before the eyes of the tollman, without the necessity of any minute investigation. I consider this to have been the very case in which the tollman was entitled to exact his tolls, and to reject any plea of exemption.

I am of opinion that the Lord Ordinary's interlocutor should be altered; that the pleas in defence should be repelled; and the Postmaster-General found liable in the bridge tolls claimed for the period in question.

The Court accordingly recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuer as against the Postmaster-General.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agent for Defender—John Cay, W.S.

Thursday, November 3.

SECOND DIVISION.

LOCALITY OF CAMERON.

Teinds—Locality—res judicata—*Bishop's Teinds.*

In 1817 final localities of a parish were approved of by the Court, which were regulated on the footing that all the teinds in the hands of the Crown were bishop's teinds, entitled to postponement in the allocation for stipend to the teinds of the parish which were held upon heritable rights. In a subsequent locality, in 1840, one of the heritors contended that these teinds were not bishop's teinds, but prior's teinds, and brought a reduction of the former decrees of locality of 1817. It was pleaded that the question was *res judicata*, in respect of the decree in the locality of 1817, and the plea was sustaind. In a subsequent locality, the successor of the heritor objected to the scheme of division, on the ground that the teinds in question, not being bishop's teinds prior to the Reformation, were not entitled to be postponed. *Held* that that question had been decided by the judgment of 1846, and the plea of *res judicata* sustained.

Opinions by all the judges, that general questions decided in one locality would regulate future localities of the parish.

This was a question between Mr Bonar of Greigston, and the Lord Advocate on behalf of Her Majesty, in the locality of the stipend of the parish of Cameron. The present parish of Cameron was formerly included in the landward part of the parish of St Andrews. It was disjoined therefrom and erected into a separate parish by the Act of Parliament 1592, chapter 20. The Act provided that the new parish thereby erected should be called in time to come the parish of South St Andrews, but the name was afterwards changed to Cameron, which it bears to this day. Prior to the Reformation, the teinds of the said parish of Cameron, in common with the other teinds of the parish of St Andrews, as then constituted, belonged to the Priory and Abbacy of St Andrews. By the Act 1587, chapter 29, the teinds of the parish of Cameron, then forming part of the parish of St Andrews, were annexed to the Crown. They were in the year 1606 granted by King James VI. to the Duke of Lennox, and, along with the greater part of the lands and other properties which had formerly belonged to the said Priory and Abbacy of St Andrews, erected into a temporal Lordship in his favour. The subjects of the grant to the Duke of Lennox, including the teinds of the present parish of Cameron, were by him resigned into the hands of King Charles I., who, by charter under the Great Seal, dated 21st May, in the year 1635, mortified and disponed the same to the use of the Archbishopric of St Andrews. On the abolition of Episcopacy by the Act 1689, chapter 3, the teinds of the present parish of Cameron reverted to the Crown, and the Crown is now titular of the teinds, and proprietor thereof, in so far as not held by the heritors under heritable rights. The teinds, in so far as not held under heritable rights, or allocated for payment of the minister's stipend, are regularly uplifted by the Crown, and form part of the hereditary revenue of Her Majesty, which are subject to the control and administration of the Commissioners of Woods and Forests.

Mr Bonar alleged that the teinds were not bishop's teinds, and, in so far as held by the Crown, were not entitled to the privileges of bishop's teinds in a question of allocation. The objector, Mr Bonar, was proprietor of the lands of Greigston, situated within the said parish of Cameron, under titles importing an heritable right to the teinds of the said lands, and also importing an obligation on the part of the Crown to free and relieve him from any payment of teind or stipend which might be exacted therefrom.

The objector further alleged that it was on all hands believed that the proprietors of Greigston had right, under the terms of their Crown titles, to exemption from payment of teind and stipend in all time coming, at least so long as there were free teinds in the hands of the Crown which had formerly belonged to the Priory and Abbacy of St Andrews, and accordingly no part of the stipend was ever allocated upon the lands of Greigston, or paid by the proprietors thereof to the minister of Cameron, except a small sum of 10s. 6d. sterling in name of vicarage. This exemption continued until the localities were prepared in the augmentations of 1795 and 1808.

By decree of the Lords Commissioners of Teinds, dated 14th January 1795, the minister

of the parish of Cameron obtained an augmentation of his stipend, and on 21st March 1808 a farther augmentation was awarded to him by decree of the Lords Commissioners. The processes of locality resulting from these two decrees were afterwards conjoined. In the conjoined processes of locality the Lord Ordinary held that the present objector's author, proprietor of the lands of Greigston, had sufficiently instructed an heritable right to the teinds of these lands.

The objector alleged that in the present interim scheme "the teinds of the lands belonging to a majority of the heritors of Cameron who do not hold, and do not pretend to hold, heritable rights to the same, have been placed in the class of bishop's teinds in the hands of the Crown, and as such postponed in the allocation to the teinds of the objector's lands of Greigston. The teinds so postponed are not bishop's teinds, and they are liable to be allocated upon *primo loco*, and before the teinds of the objector's said lands of Greigston, which, as above stated, are admittedly held on heritable right. The teinds of the parish of which the Crown is proprietor, and to which the heritors have not acquired heritable rights, are amply sufficient to pay both the old stipend and the augmentation recently awarded. The objector therefore not only claims to be exempted from the payment of any part of the said augmentation, but he also claims a rectification of former decreets of locality, in so far as they allocated any portion of the stipend on his lands, and he is willing, if insisted on by the Crown as necessary in point of form, to repeat a reduction of the said decreet."

The objector pleaded—"(1) The teinds of the parish of Cameron having before the Reformation belonged to the Priory and Abbacy of St Andrews, are not bishop's teinds, and they are not entitled to the privileges of bishop's teinds in a question of allocation. (2) The said teinds are, in any event, not entitled to the privileges of bishop's teinds in the hands of the Crown, in so far as they have been disponed to the heritors, and are held by them under heritable rights. (3) The said teinds, in so far as in the hands of the Crown, are liable *primo loco* for payment of the minister's stipend. (4) The objector having an heritable right to the teinds of his lands of Greigston, is entitled to have the same postponed in the localling of the present augmentation to the teinds of the said parish, which are in the hands of the Crown, and to have the interim scheme of locality rectified accordingly."

The Crown replied—"(1) It is *res judicata* that the teinds of the parish, except such as are held on heritable right, are bishop's teinds in the hands of the Crown, and entitled as such to be postponed in the order of allocation to teinds held on heritable right. (2) The teinds in Class 3 of the Scheme of Locality, being bishop's teinds in the hands of the Crown, no part of the augmentation can be laid on them till the teinds held on heritable right have been exhausted."

The Crown alleged that two rectified schemes were prepared for the stipends modified in 1796 and 1808. In these the augmentations were allocated—first, on surrendered teinds; secondly, on teinds held on heritable right, and the bishop's teinds were entirely exempted. These schemes were repeatedly allowed to be seen and objected to by all concerned. On February 22, 1817, the Lord Ordinary reported that they ought to be approved as final; and on March 5, 1817, the Court pronounced an interlocutor finding that both localities ought to be approved as final, and decerning accordingly. The said localities were afterwards reduced in 1827 by decree of reduction obtained by William Lindsay of Fiddinch against the heritors, on the ground that an amount of stipend had been laid on the teinds of his lands of Langraw exceeding the value of the said teinds. The present objector was called as a party to the said action. Thereafter, rectified schemes of locality were prepared for the stipends modified in 1795 and 1808, and on 16th June 1827 approved final. The rectified schemes were made out on the same principle as those which had been reduced, allocating the stipend on teinds held on heritable right, and exempting the bishop's teinds. A process of augmentation was raised on May 13, 1840, by the Reverend Andrew Brown, then minister of the parish, against the heritors and the Lord Advocate on behalf of Her Majesty. An augmentation was granted, and a remit made to the Lord Ordinary to prepare a locality. Condescendences were lodged for various heritors, setting forth that the teinds of their lands were bishop's teinds, and had been found to be so in the previous localities. A condescendence was thereafter lodged for John Graham Bonar, the predecessor of the present objector, which was answered by the common agent. The objector maintained that he held his lands *cum decimis inclusis;* that in the previous localities an error had been committed in assuming the teinds of certain lands to be bishop's teinds, whereas, in point of fact, they were prior's teinds, and he claimed to be exempted from any portion of the new augmentation, and also that a rectification should be made of the former decree of locality, in so far as it allocated any portion of the stipend on his lands.

The said John Graham Bonar also raised, and repeated in the process of locality, a summons of reduction against the heritors and the Lord Advocate, for the purpose of reducing the decree of augmentation, modification, and locality, dated 9th March and 11th June 1817, in the two conjoined processes above-mentioned. The reduction was founded on the same grounds as the condescendence above referred to, and on December 2, 1842, the reduction and locality were conjoined. The Lord Ordinary pronounced the following interlocutor:—"*Edinburgh, 5th June* 1846.—The Lord Ordinary having heard parties' procurators, repels the first and second reasons of reduction libelled, and in so far assoilzies the defenders, reserving all questions of expenses, and decerns: Farther, appoints parties to debate on the third reason of reduction at next calling." Parties having been further heard, his Lordship then pronounced the following interlocutor:—"*Edinburgh, 3d July* 1846.—The Lord Ordinary having heard parties' procurators, sustains the plea of *res judicata*, assoilzies the defenders from the whole conclusions of the libel, and decerns." A scheme of locality had been previously prepared, by which the augmentation was laid *primo loco* on teinds held on heritable right, and the teinds held in the previous process to be bishop's teinds were exempted. On November 20, 1846, the scheme was approved as a final scheme. The teinds mentioned in class 3 of the scheme of locality now objected to are bishop's teinds in the hands of the Crown. They were found to be bishop's teinds, and entitled to the privilege of being postponed in the locality to teinds held on heritable right in the processes of locality above mentioned.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor and note:—

"*Edinburgh, 14th June* 1870.—The Lord Ordinary having heard counsel for Henry John Cowan Graham Bonar, Esq., objector, and for the Lord Advocate, respondent, and having considered the closed record between these parties, closed by interlocutor of 22d October 1869, subsequent minute and answers, and whole writs and proceedings founded on—sustains the plea of *res judicata* insisted in by the respondents to this effect, that the objector cannot now dispute that the teinds of the parish of Cameron, now belonging to the Crown, are bishop's teinds, and as such are only liable to be localled on after the teinds of the parish held upon heritable rights are exhausted, and to this extent repels the objections of the said Henry John Cowan Graham Bonar: Finds the Lord Advocate entitled to expenses occasioned by Mr Bonar's objections, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report, and decerns.

"*Note.*—The only question argued before the Lord Ordinary, and disposed of by the preceding interlocutor, is, whether the objector, Mr Graham Bonar, is or is not barred by the plea of *res judicata* from now raising and trying the question whether the teinds of the parish of Cameron, which, on the abolition of Episcopacy in 1689, belonged to the Archbishopric of St Andrews, and which now belong to the Crown, are or are not to be postponed in the allocation for stipend to the teinds of the said parish held upon heritable rights.

"The objector maintains, in point of law, that, although the teinds now in the hands of the Crown belonged to the Archbishopric of St Andrews in 1689, they are not entitled to the privileges of of bishop's teinds in allocation, that is, to be postponed in allocation to teinds held on heritable rights, because they did not originally belong to the Archbishopric of St Andrews, but were only mortified and granted to that Archbishopric by King Charles I. in 1635. The objector maintains that the only bishop's teinds entitled to the privilege of not being localled upon till teinds held on heritable right are exhausted, are teinds which were bishop's teinds at the Reformation, or at least long prior to 1635. He contends that the teinds of the parish of Cameron were not bishop's teinds at the Reformation, but were prior's teinds, which were afterwards granted by King James VI. to the Duke of Lennox, and that the mere circumstance that they happened to be held by the Archbishopric from 1635 to 1689 does not entitle them to any privilege in allocation. See *Officers of State* v. *Christie*, 16th July 1788, Mor. 14,818; see also *Prestonkirk Locality*, 14th November 1846, 9 D. 61.

"The respondent, the Lord Advocate, as representing the Crown, disputes the doctrine founded on by the objector, but, as a preliminary plea, maintains that the objector cannot now raise the question, because it has been finally decided in reference to the teinds in question in former processes of locality, and in a process of reduction at the instance of the objector's author, that the teinds of Cameron, in the hands of the Crown, are bishop's teinds in the sense entitling them to the privilege of postponement in allocation. The Lord Ordinary has sustained this plea of *res judicata.*

"The proceedings and judgments which are referred to and founded on as establishing the plea of *res judicata*, are somewhat complicated, so much so that Lord Mure, Lord Ordinary on the Teinds, by interlocutor of 18th March 1870, allowed a proof before answer of the "averments bearing upon the plea of *res judicata.*" This proof, however, resulted merely in the respondent's putting in the proceedings and judgments upon which he founds, and in both parties declaring that "they had no parole evidence to adduce." In the view of the present Lord Ordinary, the competency of parole evidence in such a case is more than doubtful.

"In the present case the plea of *res judicata* has a somewhat uncommon peculiarity, for not only is it said that the question which the objector wishes to raise is *res judicata*, but it is maintained that there is actually a judgment holding it to be *res judicata*, and that the judgment sustaining a former plea of *res judicata* is itself in its turn *res judicata*, so that the objector, to get at the question, has two steps to take,—he has to set aside not only the original judgments, but a later judgment finding that these original judgments are not to be opened up.

"The original judgments founded upon by the respondent were prononnced in the conjoined processes of locality of Cameron, beginning the first with the decree of augmentation, dated 14th January 1795, and the second with the further augmentation of 21st March 1808.

"The judgment sustaining the plea of *res judicata*, and which in its turn is now founded on as being itself a *res judicata*, was pronounced by Lord Wood on 3d July 1846, in a process of reduction at the instance of the late William Graham Bonar of Greigstown, the objector's author, against the heritors of Cameron, the Lord Advocate as representing the Crown, and others. This judgment was pronounced after full discussion on a closed record in the reduction, which was held as repeated in the then depending process of locality, but the only parties to the closed record in the reduction seem to have been Mr Bonar, the objector's author, and the common agent.

"It will be necessary very shortly to recapitulate the proceedings and judgments upon which the plea of *res judicata* now sustained depends.

"In the process of locality following upon the augmentation of 14th January 1795, an interim scheme of locality was prepared, in which none of the teinds of the parish are stated as bishop's teinds, and no privilege of postponement in allocation is accorded to any of the teinds. Various objections to this locality were lodged, the objector's author, among others, claiming that he had an heritable right, and that the free teinds must be first exhausted. This objection was sustained on 16th May 1797, but a further point, whether Mr Bonar had or had not a *decimæ inclusæ* right, seems to have stood over.

"On the 17th January 1799, a representation for the Officers of State as representing the Crown, Titular of the Teinds, 'as having come in the place of the Archbishop of St Andrews,' was lodged, in which representation the Crown, *inter alia*, maintained that 'if any of the heritors shall be successful in establishing a real right to their teinds, in that event the locality must also be rectified by laying the whole augmentation upon the heritable rights, *primo loco*, and the remainder, after exhausting the heritable tithes, will fall to be localled upon those belonging to the Crown in right of the Archbishop, agreeable to the fixed and established principles adopted by your Lordships in such cases.' This representation was, of this date, (Jan. 17, 1799), appointed to be answered, but no answers seem to have been lodged till 22d December 1809

when a mere *pro formâ* answer is put in, consenting that the discussion upon the heritable rights should proceed. The representation for the Crown, however, fairly and distinctly raised the claim that the teinds in the Crown's hands as titular were bishop's teinds, entitled to be postponed in allocation to teinds held upon heritable right."

"In the meantime, discussion with various individual heritors had been going on, and some of these heritors who had not heritable rights pleaded that the teinds of their lands were bishop's teinds in the hands of the Crown, entitled to postponement; and there are interlocutors allowing these averments to be instructed. It cannot be disputed, therefore, that the question of the postponement of the Crown teinds as bishop's teinds in the allocation of stipend, was raised both by the Crown and by individual heritors in the locality which followed on the augmentation of 1795.

"In 1808 a new augmentation was granted, and the new locality was conjoined with that already depending.

"In the conjoined processes various individual heritors appeared, some of whom claimed a heritable right to their teinds, and some claimed (for example, Rutherford of Radernie) that the teinds of their lands were bishop's teinds in the hands of the Crown. The proceedings are voluminous, but there seems to have been no judgment or decree bearing upon the privilege of bishop's teinds in any way, till 23d January 1810, when the Lord Ordinary 'finds it unnecessary, *hoc statu*, to allow any farther time for the Officers of State to object to the heritable rights claimed, until it shall appear whether the teinds on heritable rights are sufficient for the augmentation of the stipend: Finds that certain heritors have instructed a sufficient heritable right to the teinds of their lands, and remits to the clerk to prepare a locality accordingly.' This interlocutor, though it contains no express finding, really assumes that the teinds in the hands of the Crown are bishop's teinds entitled to postponement, for it contemplates the allocation being made solely upon teinds held on heritable right, which may be 'sufficient.'

"Accordingly, two new schemes of locality were prepared, in which no part of the augmentations was laid upon the teinds in the hands of the Crown, but the whole upon teinds held by heritable right, thus giving effect to the privilege claimed by the Crown.

"In this state of matters all parties seem to have assumed that the teinds in the hands of the Crown were bishop's teinds entitled to postponement, and various heritors upon this footing disclaimed having heritable rights, and maintained that the teinds of their lands were bishop's teinds entitled to postponement. In particular, the heritors of Radernie, of Priorlethen, of Craigton, and of Braeside, lodged objections, stating that the teinds of their lands were bishop's teinds in the hands of the Crown, and entitled to be classed as such. The Common Agent, as representing the whole heritors, admitted this claim in so far as concerned Radernie, Braeside, and others, and remits were taken to rectify the locality accordingly. The authors of the present objector took part in these discussions. They first maintained that their lands of Greigston were held with a *decimæ inclusæ* right. This plea was repelled on 29th May 1813. They then maintained that some of the heritors claiming that their teinds were bishop's teinds were not entitled to the privilege, in respect that although they made payments to the Crown they were feu-duties and not teind-duties. On this plea no special deliverance seems to have been pronounced; but the representation by heritors having heritable rights, including, apparently, the objector's authors, implies an admission that bishop's teinds in the hands of the Crown were to be postponed.

"Ultimately, on 5th March 1817, on the report of the Lord Ordinary, final localities were approved of by the Court, in which the teinds in the hands of the Court were entirely exempted as bishop's teinds.

"Now, supposing that no reduction had been brought of these localities in 1842, and that the question had now arisen whether the judgments in these localities were final, and excluded any heritor from now maintaining that the teinds in the hands of the Crown are not entitled to the privilege of postponement, the question would have been one of much nicety.

"On the one hand, as contended for by the objector, the question of law as to whether the privilege of bishop's teinds really belongs to teinds in the position of the Crown's teinds of Cameron, was really never raised by any one, and was never adjudicated on by the Court. It was taken for granted that, simply because the teinds had once belonged to the Archbishop of St Andrews, and were then in the Crown, they were entitled to the privilege. The mind of the Court was never applied to the question, and there is no judgment *in terminis* finding that the privilege exists, or determining the grounds thereof.

"On the other hand, great weight has always been given to judicial admissions made in a process of locality, and admissions by a Common Agent have been held to bind the whole heritors. Thus, in the case of the Duke of Buccleuch in *Locality of Inveresk*, 10th November 1868, an admission by a Common Agent in a locality as to the exemption of certain lands on a *decimæ inclusæ* right was held binding on all the heritors in a subsequent locality. This case gave effect to the principles established in the *Earl of Hopetoun* v. *Ramsay*, as decided in the House of Lords, 22d March 1846, where a consent by a Common Agent was held binding on the whole heritors, although no express authority had been given. It was settled previously in *Blantyre* v. *The Earl of Wemyss*, 22d May 1838, that a judgment in one process of locality is binding not merely in that locality, but forms *res judicata* in subsequent localities of the same parish.

"On the whole, if it had been necessary to decide the point, the Lord Ordinary would have been inclined to hold that the admissions of the Common Agent, followed by the approval of final localities exempting the Crown teinds, formed *res judicata* that the Crown teinds are bishop's teinds, to be localled on only after teinds on heritable rights are exhausted. It would be difficult to distinguish between Crown teinds, as to which the special admissions were made of Radernie, Braeside, and others, and the other Crown teinds of the parish. And the fact that the Common Agent did not think it worth while to raise the question of law which the objector now seeks to try, will not prevent his admission from being binding on his constituents and their representatives, and, among others, on the present objector.

"The case, however, does not rest here, and the Lord Ordinary's opinion is founded chiefly on the

effect of Lord Wood's judgment of 3d July 1846, which expressly finds that the proceedings in the old localities form *res judicata* against the present objector.

"On 16th June 1842 Mr William Graham Bonar of Greigston brought an action of reduction against the whole heritors of the parish of Cameron, against the Lord Advocate, as representing the Crown, and against the presbytery of St Andrews, concluding for reduction of the decree of augmentation, modification, and locality of 1817. This summons was repeated in the process of augmentation and locality of 1840, and a record therein was made up. The record was closed. Lord Wood, by interlocutor of 5th June 1846, repelled the first and second reasons of reduction, and so far assoilzied the defenders, and thereafter, on the 3d July 1846, he sustained the plea of *res judicata*, assoilzied the defenders from the whole conclusions of the libel, and discerned.

"Now, beyond all doubt the very question which the objector now seeks to raise was raised by the summons of reduction which his uncle brought on 16th June 1842, and the very arguments and pleas which are urged by the present objector were urged by his author before Lord Wood in 1846. Whether Lord Wood was right or wrong in sustaining the plea of *res judicata* is not the question. In sustaining that plea Lord Wood really decided that is was not competent for the objector to go back upon the localities of 1817, and try the question whether the Crown teinds were bishop's teinds in the sense entitling them to postponement in allocation. The objector's uncle failed in raising that question in 1846, Lord Wood's judgment against him having become final. Why should the objector, who represents his uncle, be allowed to raise the question again in 1870?

Now the only ground on which the objector maintains that Lord Wood's judgment of 1846 is no bar to his trying the question now, is, that the Crown was no party to the record made up in the reduction. This in one sense is true. The answers to the reasons of reduction upon which the record was closed, are answers for the Common Agent alone, and the original defences are defences for Lindsay, 'and others, heritors,' and for Robert Smith, the Common Agent. The objector's plea is that Lord Wood's judgment of 1846 is, *quoad* the Crown, *res inter alios acta.*

"The Lord Ordinary cannot adopt this view. He thinks that the judgment of 1846, which is undoubtedly *res judicata* as between the objector and all the other heritors of the parish, is also *res judicata* in a question with the Crown.

"(1) The Crown, though not expressly a party in the closed record in the reduction, was called as a defender in the action, and was a party in the locality in which the reduction was repeated. All parties interested must by held as bound by judgments in a locality *in foro*, pronounced *causa cognita*, whether they choose to appear in the discussion or not.

"(2) The plea maintained by the Common Agent was really a plea on behalf of the Crown, The plea was, that it had been finally found that teinds in the hands of the Crown were bishop's teinds, entitled to the privilege of postponement in allocation. Strictly speaking, this was a plea competent to the Crown alone, but all through the localities many of the heritors in their own name pleaded the Crown's privilege, they having, it is supposed, tacks or other rights from the Crown, either express or implied. It was only as Crown tacksman, or as holding in some way or other the Crown's teinds, that the heritors could be allowed to plead an exemption or privilege only claimable by the Crown. The Crown allowed the plea to be stated, and maintained by the heritors as in its right, and a judgment *in foro contentioso* having followed, and having been acquiesced in by all parties, the Crown, it is thought, was bound on the one hand, and entitled to plead the judgment on the other.

"(3) It would be a very anomalous thing to hold that Lord Wood's judgment was binding *quoad* the whole heritors (which it admittedly is, but not binding *quoad* the Crown); this would lead to the absurdity that an heritor, tacksman of the Crown teinds, would be entitled to insist that the teind must be allocated upon *ultimo loco*, but that the Crown itself could not claim such a privilege. If the judgment is not to be binding *quoad omnes*, it is difficult to see how it is to be binding on any one.

"(4) It is not necessary to constitute a *res judicata* against a pursuer or petitioner that all or any of the defenders or respondents shall appear and contest the case. A pursuer may make a *res judicata* against himself *ex parte*—see Erskine's Inst. 4, 3, 6. He may insist upon leading evidence and taking the judgment of the Court, and if that judgment should be adverse to him, it would be binding on him though the absent defenders may have right to open it up; so in petitions, consistorial actions, provings of the tenor, and other cases in which the Court, even in absence, is bound to proceed upon evidence, and to take judicial cognisance of the rights of parties, a judgment adverse to the pursuer or petitioner will be binding on him as *res judicata*, though wholly *ex parte*, and much more if some of the defenders entitled to appear have contested and tried the question. On this ground, alone, the Lord Ordinary thinks that the objector cannot set aside Lord Wood's judgment of 1746.

"The result is, that the Lord Ordinary holds it to be finally fixed in the parish of Cameron that the teinds in the hands of the Crown as titular are bishop's teinds, and as such can only be localled upon after the teinds held on heritable rights are exhausted. He has therefore sustained the plea of *res judicata* stated for the Crown. There are other questions as to the college teinds, but they do not appear to arise under the present record—see minutes, Nos. 67 and 68 of process."

Mr Bonar reclaimed.

HALL and WATSON, for him, argued—(1) That the privileges of bishop's teinds only extended to teinds which were bishop's teinds at the Reformation, or at least prior to 1628. (2) That the question now raised was not raised in the former locality. (3) The judgment of 1846 was *res inter alios acta, quoad* the Crown.

Cases referred to—*Blantyre* v. *Wemyss*, 22d May 1838, 16 S. 1009, and 3 Bell Ap. 34; and *Hopetoun*, 5 Bell Ap. 59.

The SOLICITOR-GENERAL and KINNEAR in answer

At advising—

LORD JUSTICE-CLERK—The matter here presented for decision lies in a narrow compass. This is a locality of the parish of Cameron, and one of the heritors, Mr Bonar, maintains that the scheme of locality is defective, in respect that the teinds of the lands of certain other heritors are not localled

on, under the pretence that they are bishop's teinds. Mr Bonar maintains that these teinds are not bishop's teinds. The Crown answers that it is *res judicata* in a previous locality in 1817 that they are bishop's teinds. The heritor replies—(1) That that decree only affects the locality in which it was pronounced; (2) that the question now sought to be raised was not there decided. The Crown replies that these pleas were repelled by Lord Wood's judgment in 1846. I cannot say that I have any hesitation in agreeing with the Lord Ordinary's interlocutor. We are not deciding whether the decree of 1817 forms "*res judicata*," but that it was settled by final decree of 1846 that the decree of 1817 did constitute "*res judicata*." Some confusion has been introduced by the fact that there was an action of reduction in 1846. The plea of "*res judicata*" was raised in the locality, and subsequently the action of reduction was brought, and Lord Wood's judgment was pronounced on the conjoined process. A locality is partly a temporary process, but general questions may be raised in such a process, and, if decided, will regulate future localities. Had Lord Wood's judgment not stood in the way, I could not for my own part have distinguished this case from that of the *Duke of Buccleuch* (7 Macph. 95). But it is not necessary for us to proceed upon that ground.

Lord Cowan had no difficulty; whenever in one locality it was judicially determined what were the character of teinds in the hands of a certain heritor, then all future localties were to be regulated by that decision.

Lords Benholme and Neaves concurred.

Agent for Reclaimer—James Dalgleish, W.S.
Agent for Respondent—W. H. Sands, W.S.

Friday, November 4.

FIRST DIVISION.

WALLACE *v.* FISHER & WATT.

(*Ante*, v, 42.)

Agent and Client—Responsibility of Agent for Neglect. Circumstances in which agents were held not liable to their client for the expenses incurred in an action, which he had lost through an alleged omission on their part in carrying out a business transaction between him and two other parties, in consequence of which one of the latter was held free of the engagement.

This was an action brought by Mr Wallace of Auchinvole against his law agents, Messrs Fisher & Watt, writers in Glasgow, in order to recover a sum of £616, with interest, being the expenses incurred and paid by Mr Wallace in a previous unsuccessful action against Mr George Cadell Bruce, civil engineer (see 5 Scot. Law Rep. 42). This action Mr Wallace alleged was lost by him, and these expenses incurred, through the unskilfulness or neglect of the defenders in the conduct of his business, and particularly through their having made an unauthorised alteration on a certain document, and having failed to get it validly executed by the said Mr Bruce.

The pursuer had let the coal in his lands of Shirva to a Mr Wingate for the space of fifteen years from 1860. Wingate, in 1862, become desirous of getting out of the concern, but was not allowed to do so by Mr Wallace. Wingate then tried to obtain a partner in the adventure, and first proposed a Mr Dennistoun, who was objected to by Mr Wallace; he then brought forward the foresaid Mr Bruce, who was approved of by the pursuer. In order to carry out their arrangement, and have Mr Bruce assumed as a joint-tenant, Messrs Wingate and Bruce employed the present defenders Fisher & Watt, who then acted as agents for the pursuer, to prepare a minute of agreement between them, whereby Wingate was to acknowledge and declare that the lease he held from Mr Wallace stood in his person in trust only, for the joint use and behoof of himself and Bruce. The defenders accordingly prepared such a draft minute, and handed it to Wingate for revisal by him and Bruce. The draft was revised and adjusted by them, or their agents for them, then superscribed by Wingate and Bruce, and returned to the defenders, to be extended for signature. The only alteration made by Wingate and Bruce (or their agents was the insertion, on the margin, of a clause intended to be expressive of the pursuer's approval, in these terms—"by whom these presents are also signed in testimony of his approval thereof." On extending the draft, Messrs Fisher & Watt, or one or other of them, caused to be added to this marginal addition the words "but without prejudice to his legal rights." This they did without informing Messrs Wingate and Bruce, or their agents, and getting their approval, nor did they bring the alteration under the notice of the pursuer. According to special instructions, the minute of agreement, after being extended, was forwarded to the pursuer, on the understanding that he was to get it executed. It was signed by him and Wingate before the same witnesses, and the pursuer then forwarded it by Wingate to Bruce for his signature. The deed never returned into the custody of either the pursuer or the defenders. Matters remained in this state for two years, with the exception that the pursuer was, during the early part of that time, in communication with Bruce as to his taking out a new lease in different terms from the former one; and that in November 1862 the pursuer requested the defenders to recover the minute of agreement out of the hands of Messrs Wingate and Bruce. The defenders accordingly at the pursuer's request wrote twice, in November and December 1862, requiring Wingate to return the minute duly signed, but this they had reason to believe was only intended by the pursuer to bring his new negotiations with Mr Bruce to a head. In 1864, in consequence of Wingate having left the country and deserted the colliery, the pursuer raised an action against Wingate and Bruce, concluding for payment of arrears of rent, lordship, &c., due to him. On the said action being called in Court, the pursuer obtained decree in absence against Wingate, and a record was made up and closed between the pursuer and Bruce. After a proof, the Lord Ordinary (Jerviswoode), on 17th July 1866, pronounced an interlocutor assoilzieing Bruce from the whole conclusions of the summons, and finding him entitled to expenses. In the note annexed to this interlocutor the Lord Ordinary states the grounds of his judgment to be that the defender had never executed the extended deed, and "never approved of, and is not shown to be a party to, the alteration of the minute of agreement which, as candidly stated by Mr Fisher, who was agent for the pursuer, the defender never saw and never approved;" and his Lordship held that he was not