

to kill game, anyone in the position of the complainer here is at the same time tenant in occupation of the lands, such a one has the fullest rights contemplated by the statute.

Such, then, being the complainer's true position under the Ground Game Act of 1880, the objection taken to his title by the appellant really comes to this, that having a good and sufficient title the complainer did not libel that title rightly.

I do not think it necessary for the disposal of the present case to determine whether the title libelled be a good title or not, because even if the title which the complainer has libelled be bad, yet in point of fact he has a good and sufficient title, and one that brings him within the provisions of the protecting clauses of the Day Trespass Act and the Summary Procedure Act of 1864.

This complaint was brought under the Summary Procedure Act of 1864, the 35th section of which provides that prosecutions against any person on account of anything done in any case instituted under the Act shall be commenced within two months after the cause of action has arisen; and the 17th section of the Day Trespass Act declares that such prosecutions are to be commenced within six months "after the fact committed." Now, it appears that the date of the appellant's incarceration was 14th November 1883, while the summons in the present action was not signeted until 20th October 1884. It may be necessary to say that a prosecution may be so extravagant that it may not be brought under any statute at all—it may in fact be more of the nature of a bad joke than anything else—in which case, of course, no benefit would be derived from the protecting clauses I have just referred to. Nothing, however, of that kind has occurred in the present case; this was a *bona fide* prosecution under 2 and 3 Will. IV., and under the protecting clauses I have referred to the present action must be held to be excluded.

LORD MURE—This is a prosecution instituted under the Summary Procedure Act of 1864, and it comes under the provisions of sec. 35, which section declares that such actions shall be commenced within two months after the cause of action has arisen. Now, it appears that the present complaint was not instituted until more than two months had elapsed, and the Lord Ordinary has held that if this 35th section is applicable the present action falls to be dismissed. One of the objections which the defender took was that the title of the complainer was bad, and that inasmuch as he only designed himself as tenant of the lands he was not entitled to sue the action. I agree with your Lordship in thinking that this objection cannot be sustained, because it has been shown that in addition to being tenant of the land the complainer is also tenant of the game, and such being his title he was warranted in bringing these proceedings under the Summary Procedure Act. He appears not to have set forth his whole title in the complaint, as he seems only to have designed himself as tenant of the lands, but seeing that he was in point of fact tenant of the game also, I agree with your Lordship in thinking that the present action is excluded under the protecting clauses of the statute.

LORD SHAND—It was conceded, and if it had not been it was made more than clear, that "the cause" of this action of damages arose more than two months before these proceedings were commenced. Now, the Summary Procedure Act of 1864 is imperative in its terms, and excludes all actions such as the present unless they be instituted within the time specified. It was the intention of this statute to make procedure uniform in character as well as expeditious. Thus the 4th section provides that proceedings under the Act are to be instituted by a complaint in the form given in Schedule A appended to the Act, and when we turn to that schedule we see that the mark by which it is to be recognised that the proceedings are being taken "under this Act" is, that at the head of the complaint there are the words "Under the Summary Procedure Act 1864." Now, on referring to the complaint in this case, I see that it bears these words, and it is therefore a complaint "under this Act," and the proceedings we are now dealing with are on account of something done in a case instituted under this Act. That being so, the provisions of sec. 35 are clearly applicable, which section declares that such action must be commenced within two months after the cause of action has arisen, and that has not been done in the present case. Upon the other matter which has been referred to, namely, the complainer's title, I think it is clear that being tenant both of the game and of the lands he had a good title to sue. The mistake he made lay in his libelling himself only as tenant of the lands, but seeing that he is also game tenant, and that his title to prosecute this complaint was good, I do not think that he should be deprived by this mistake of the benefit of the protecting clauses of the statute.

LORD ADAM—I think that this action is excluded both by the Ground Game Act of 1880 and also by the Summary Procedure Act of 1864, and have nothing further to add to what has been already said by your Lordships.

The Court adhered.

Counsel for Pursuer — M'Kechnie — Nicoll.
Agent—James M'Caul, S.S.C.

Counsel for Defender—Brand—Lang. Agent
—John Gill, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

MACLACHLAN v. STUART.

Teinds—Res Judicata.

In a process of augmentation, &c., raised by the minister of the united parishes of Ardchattan and Muckairn in 1816, the lands of Dalness, situated in the parish, were entered at £300 in the proven rental. None of the heritors stated any objection to the rental, and the heritors were held confessed thereon. Thereafter the Lords having advised the scheme of the rental and prepared state, modified a stipend to the minister.

This stipend was the whole amount of the teind as it appeared in a sub-valuation of the parish in 1629. Dalness was not included *nominatim* in this sub-valuation, and did not appear in the prepared state. A scheme of locality, which was a copy of the prepared state, was thereafter lodged in process, and approved final in 1817. In an action raised in 1884 by the minister of the parish to have it declared that the lands of Dalness were not valued, and were liable to be localled on for stipend, the proprietrix of Dalness founded on the facts stated above, and pleaded *res judicata*. Held that there was no evidence of any question having been raised or decided as to the liability of Dalness to pay stipend, and plea of *res judicata* repelled.

Teinds—Valuation—Presumption.

Circumstances in which held that the terms of a report of sub-commissioners of teinds in 1629, decree of approbation thereof in 1777, and the proceedings in certain processes of augmentation in 1799 and 1816, raised a presumption that the whole lands in the parish had been valued in 1629, but that this presumption had been rebutted by proof that certain lands were not included in the valuation.

In 1883 the Reverend Hugh Maclachlan, minister of the united parish of Archdattan and Muckairn, in the county of Argyll, raised in the Court of Teinds a summons of augmentation, modification, and locality. In that process Mrs Elizabeth Margaret Downing Macdonald or Stuart, heritable proprietrix of the lands of Dalness, situated in the united parish of Archdattan and Muckairn, stated that the lands of Dalness were included in the decree of valuation of the lands of Inverawe, also in the said united parish, and that there were no surplus teinds of these lands, as they had been exhausted in former schemes of locality of the parish.

This was an action at the instance of the minister against Mrs Stuart to have it declared that the teinds of the lands of Dalness were unvalued, and were not included in the valuation of the teinds of any other lands, and were liable to be localled on for the stipend of the minister of the united parish of Archdattan and Muckairn.

The earliest title to the lands of Dalness which was produced was an instrument of sasine in favour of Dugald Campbell, heir-apparent of Inveraw, and Agnes Campbell, his future spouse, dated 3d and 4th May 1633, proceeding upon a charter by Archibald Campbell of Inveraw, his father, dated 1st May 1633. The lands were therein described as “totis et integris tribus mercatis trarum de Achacharne” and “totis et integris quatuor mercatis trarum de Inneraw. . . totis et integris quatuor mercatis trarum de Drumnachois duabus mercatis trarum de Dallenessa cum custodia forreste ac silvarum de Glenetteiff fideliter ac cum effectu prout custos silvarum et forrestarum et cervorum in eisdem existentium custodire tenentur. . . totis et integris sex solidatis et octo denariatis trarum de Branry.”

There was also produced a copy of a tack, dated 3d May 1608, granted by Archibald Campbell of Inverawe to Agnes Macdonald of the lands of Dalness. This tack contained the following, viz.—

“The saids Angus being alwise bound to keep the forest of Buachillette and the foresaid Archibald Campbell of Inveraw gives hereby to the said Angus as much power as any Forrester in Scotland haye for preserving of the said forrest.”

In a charter of *novodamus*, dated 29th October 1650, granted by the Marquis of Argyll in favour of Dougall Campbell of Inveraw, and of Archibald Campbell, his son, the description of the lands was the same as in the sasine of 1633.

By feu-contract dated 23d May 1764 Mrs Campbell of Inveraw feued to John Macdonald the twenty shilling land of old extent of Dalness, with the teinds, parsonage and vicarage. The feuar was taken bound to pay eighteen merks for the lands and ten merks for the teinds, and there was this further obligation imposed upon him—“as also for the said office of forrestry to kill whatever number of deer shall be called for in the proper season yearly for the use of the said Mrs Janet Campbell and her successors, and to bring the said deer upon his own expences from the forrest to the lands of Inveraw, and being bound and obliged faithfully to keep the said forrest and deer therein conform to use and wont.”

The defender of this action was the successor of John Macdonald in the lands of Dalness.

The report of valuation of the lands in the parish of Ballevoden by the sub-commissioners of the Presbytery of Argyll in 1629 set forth that the sub-commissioners had been directed to try and inform themselves by all lawful means of the worth “of all landis of each parochie, of the said presbitrie, in stock and teynd,” and that therefore they had “faithfullie trowley and dilligentlie proceedit in trying and cleiring of the saides waluatiounes of the parochynes underwrettene lyand within the said presbitrie of Argyll.”

The report then went on to declare that the lands underwritten pertaining to Dougall Campbell, fiar of Inveraw, for himself, and taking burden on him for Archibald Campbell of Inveraw, his father, lying within the parish of Ballivaddin in Bandvaloch, “hes payet in time bygane, pays presentlie, and may pay as a constant rent in stock yearly in time coming the particular rent and duty underwryten,” viz., Their lands of Inneraw, of rent 29 bolls meall, 6 bols bear, of personage teind 6 bolls meall, and for ye vicarage yrof eight pundis Scots money. Their lands of Branrie, of rent twa bolls bear, 2 stanes cheyis, of personage teinds 2 firlots meall, and for ye vicarage yrof 40 shilling. Their lands of Achacharne, of rent 30 stanes cheyis nine merks money, of personage teind ane boll half boll meall, and for ye vicarage yrof eight pundis 13sh. 4d. money. And their lands of Drumnachois, of rent 60 stanes cheyis eight pundis money, of personage teind 2 bolls meall, and for ye vicarage yrof £9, 6s. 8d. money.”

From the decret of approbation dated 5th March 1777, produced by the defender, it appeared that the summons was raised at the instance of Lieutenant-Colonel Robert Campbell of Finab, the then proprietor of Inverawe, and other heritors, against the Officers of State and the ministers of the respective parishes in which their lands lay, and that it contained conclusions for the division of the *cumulo* valuations of the teinds of such lands as had been valued *in cumulo*, but which at the date of the approbation belonged

to different proprietors. The decret set forth that the Court of Session, as Commissioners for the Plantation of Kirks and Valuation of Teinds, ratified and approved of the report of the sub-commissioners of the Presbytery of Argyle, interposed their authority to the decret, and “herely find and declare the just worth and constant yearly avail of the stock and teind parsonage and vicarage of the said pursuer Colonel Robert Campbell of Finabs Lands lybelled to be now and in all time coming the particular quantities of victual and sums of money following, vizt., The lands after mentioned lying in the parish of Ballivaddin or Ardchattan belonging at the time of the valuation to Archibald Campbell of Inveraw and Dugald Campbell fiar thereof his son now to the said Lieutenant-Colonel Robert Campbell of Finab pursuer, vizt., The rent of his lands of Inveraw twenty-nine bolls meal and six bolls of bear, of parsonage teind six bolls meal and the vicarage thereof eight pound scots Item the rent of his lands of Branrie two bolls of bear and two stoness cheese, of parsonage teind two firlots of meal and the vicarage thereof forty shillings scots Item the rent of his lands of Drumahois three scores stoness cheese and eight pounds scots of parsonage teind two bolls meal and the vicarage thereof nine pound six shilling and eight pennies scots Item the rent of his lands of Innercharrachan or Innerchannan belonging at the time of the valuation to John Macdougall of Ragray and now to the said Lieutenant Col Robert Campbell pursuer lying in the said parish of Ballivaddin forty merks scots of parsonage teind one firlot of meal and the vicarage thereof three pound six shilling and eight pennies scots Item the rent of his lands of Inverellan or Innerlane belonging at the time foresaid to the said John McDougall and now to the said Lieutenant-Colonel Robert Campbell lying in the said parish of Ballivaddin forty merks scots of parsonage teind one firlot of meal and the vicarage thereof three pounds six shilling and eight pennies scots.”

A process of augmentation, modification, and locality was raised in 1764, and came to an end in February 1771. In this process neither the lands of Dalness nor the name of Mr John Macdonald, the then proprietor, appeared. From the interlocutors in that process it appeared that the lands of Inverawe were exempted from stipend because they were found to be part of the bishop's fourth.

The next process of augmentation, modification, and locality was raised in 1799. In that process Coll Macdonald of Dalness appeared in the proven rental for a rent of £300. In 1806 a scheme of locality was prepared and approved final, but neither Coll Macdonald nor the lands of Dalness were mentioned therein.

In another process of augmentation, &c., raised in 1816, the Court modified to the minister the whole teind of the parish as valued by the sub-commissioners in 1629. By the scheme of locality which was approved final on 5th March 1817 no part of the stipend was allocated on Dalness, but the whole of the teind of Inverawe as valued in 1629 was laid on Mr Campbell of Inverawe.

A proof was led with regard to the situation of the lands of Dalness, from which it appeared that they were about twenty miles distant from Inverawe.

The pursuer pleaded—“(1) The teinds of the

said lands of Dalness not being valued or included in the valuation of the teinds of any other lands, and being libelled to be local on for stipend, the pursuer is entitled to decret of declarator as concluded for.”

The defenders pleaded—“*Res judicata*, in respect that it was decided in the process of augmentation, modification, and locality raised in 1816 that the proprietor of Dalness was not liable in teind in respect thereof.”

The facts upon which this plea was based are very fully stated in the opinion of Lord Adam *infra*.

The defenders further pleaded—“(2) The lands of Dalness having been included in the valuation of the lands of Inverawe and others in 1629, approved of by the decret of approbation and valuation in 1777, are not liable to be re-valued or local on for teind separately from the said lands of Inverawe and others.”

The Lord Ordinary (M'LAREN) on 16th January 1885 pronounced this interlocutor—“Sustains the first plea-in-law for the defenders: Finds that the lands of Dalness belonging to the defenders are not liable to be local on for the stipend of the minister of the united parish of Ardchattan and Muckairn: Therefore assolvies the defenders from the conclusions of the action, and decerns, &c.

“*Opinion*.—In this action of declarator, the pursuer, who is the minister of the united parish of Ardchattan and Muckairn, seeks to have it found and declared that the teinds of the lands of Dalness in the united parish are unvalued. The defender pleads (1) *res judicata*, and (2) that the lands of Dalness are included in the valuation of the lands of Inverawe and others made by the sub-commissioners of the presbytery of Argyll in 1629, and approved by a decret of the Court of Teinds in 1777.

“Being of opinion that the plea of *res judicata* ought to be sustained, it is unnecessary that I should also express an opinion on the merits of the question whether the teinds are valued, but I must refer to the conditions of the question as part of the history of the case.

“The valuation founded on, or so much of it as relates to these lands, is printed in the appendix to the record. From that document it appears that Dougall Campbell of Inverawe was liable on the rental there specified in respect of the four subjects named—Inverawe, Branrie, Achacharne, and Drumachois. Now, it appears from a charter of *novodamus* in favour of Dougall Campbell, granted a few years later, that this gentleman was also proprietor of the two-merk lands of Dallenessa, with the keeping of the forest and woods of Glen Etive, and it is certain that this subject is not separately valued in the sub-commissioners' report. We do not know why the forest of Dalness was not separately valued—whether, for example, it was because the forest was not a rent-producing subject, or because exemption was claimed on some special ground, or whether the forest was included in the valuation under the general name of Inverawe, or whether it was simply omitted to be valued. The proof adduced before me was confined to the identification of the subjects on the map, and there is really nothing to show that Dalness forest is unvalued, except that its dis-

tance from Inverawe and the difference of name make it unlikely that it should be included in the valuation of Inverawe.

"In 1764 Mrs Janet Campbell of Inverawe granted a feu of the lands of Dalness to Mr John M'Donald, taking Mr M'Donald bound to pay 18 merks of feu-duty for the lands, 2 merks for the multures, and 10 merks for the teinds. This last provision rather indicates that Dalness was considered to be included in the valuation of the teinds of Inverawe, to which accordingly the feuar was to make his proper contribution. The defender is the successor of Mr John M'Donald.

"I now come to the circumstances constituting *res judicata*. There were three processes of augmentation, modification, and locality of dates subsequent to the feu to Mr M'Donald.

"(1) In the process which was commenced in 1764 (the year in which the feu was granted), and which became final in 1771, neither the name of the lands of Dalness, nor the name of Mr John M'Donald appears.

"(2) Another process of augmentation, modification, and locality was instituted in 1799, and the result of the narrative in the minute of admissions is, that while Mr Coll M'Donald, the proprietor then in possession, was not called as a defender, he was cited by a supplementary proceeding, and his name was inserted in the proven rental as confessed on a rental of £300. But this insertion was not carried out in the scheme of free teind, and again, in the scheme of locality, which became final on 10th December 1806, neither the name of Mr Coll M'Donald nor the lands of Dalness are inserted.

"(3) With reference to the third locality, that of 1806, we have similar admissions, and excerpts from the actual proceedings are printed. In this instance the entry of the value of Dalness appearing in the rental whereon the heritors were held confessed does not appear in the state of teinds or in the locality. There is no evidence that in any of these proceedings there had been contentious litigation between the proprietor of Dalness and the minister or the heritors. On the other hand, it may be inferred that in each of these cases the proprietor of Dalness objected to be localled on, and that the other parties to the process acquiesced in his being left out of the locality. The question of his liability was not simply overlooked, because, in the second of the three proceedings the minister went to the expense of citing Mr M'Donald of Dalness by a supplementary diligence for the purpose of bringing him into the proven rental. It is not easy to account for the omission of Mr M'Donald's name from the scheme of locality afterwards prepared, except on the supposition that the minister was satisfied that he had no case for a decree affecting Mr M'Donald, and therefore acquiesced in his exclusion from the locality. In the last of the three proceedings the minister had a very material interest to cause Dalness to be put into the locality, if he had legal grounds for doing so, because the locality bears that the teinds of the parish are exhausted; yet here also the inclusion of Mr Coll M'Donald's name in the proven rental is not followed up in the settlement of a locality.

"According to the judgment of the House of Lords in *Dundas v. Waddell*, it is not necessary

to the success of a plea of *res judicata* that it should be made to appear that the question had been argued and judicially considered. It suffices for this purpose that the lands are declared to be valued or are ordered to be struck out of the rental by the sentence of a Judge.

"In the present case on referring to the printed proceedings it appears that the Lord Ordinary, Lord Reston, in the first instance, by interlocutor dated 6th February 1816, approved of the proven rental which contained the name of Coll M'Donald, and it results from his Lordship's deliverance that Mr M'Donald would be required to make an interim payment of his share of the sum of £1805, 11s. 4d. which was then found to be the amount of the teind, parsonage and vicarage. The case on 7th February was reported to the Court, by whom a stipend was modified, and a remit made to the Lord Ordinary to prepare a locality and to report. The locality then passed the usual stages, and became final in the following year. Now, although there is no order here, as in the case of Mr Dundas of Arniston, for striking the name of the heritor out of the rental upon which interim payment was to be made, yet as a matter of fact Mr Coll M'Donald's name does not appear in the locality, which is the rule of final payment; and the non-inclusion of that gentleman's name must be taken to have had the approval of the Lord Ordinary, to whom the preparation of the locality was committed. I am not to assume that the point was brought under the Lord Ordinary's notice; but if the question of Mr M'Donald's liability for stipend was not considered by the Lord Ordinary, that could only be because all the parties were agreed that Mr M'Donald was not liable, and that his name which had been provisionally included in the rental, ought to be dropped out of the locality. No one had any right to leave Mr M'Donald's name out of the locality except the parties or the Judge, and there is a report by the Lord Ordinary recommending this locality to the Court for approval, and an interlocutor of the Court approving of it. Therefore, while the circumstances are not precisely the same as in the case of *Dundas v. Waddell*, there is in my view no solid distinction between the two cases.

"I am of opinion that the question in dispute has been adjudicated upon in two of the three previous processes of locality, and that it is *res judicata* that the defender as proprietor of Dalness is not liable in payment of stipend."

The pursuer reclaimed, and argued—*On the plea of res judicata*:—No issue had ever been raised in the previous proceedings of the nature now presented, and there had, therefore, been no *judicium*. A plea of *res judicata* had never been sustained in such circumstances. In *Dundas v. Waddell*, Dec. 19, 1878, 6 R. 345, rev. 7 R. (H. of L.) 19, the issue whether or not the lands were teind free had in the previous proceedings been distinctly presented. In *Graham Bonar v. Lord Advocate*, Nov. 3, 1870, 9 Macph. 58, papers had been lodged on each side raising the question at issue. *On the merits*:—The lands of Dalness were admittedly not valued by name. It was contended that they were included under the name of Inverawe, but Dalness was not near Inverawe. There was no evidence to show that the proprietor of Inverawe was the proprietor of Dalness at

the date of the valuation. According to the defender's theory great trouble had been taken to value the half merk lands of Branrie, while the two merk lands of Dalness had been left unvalued. The terms of the decree of approbation in 1777 made it clear that all concerned understood at that date that Dalness had not been included in the valuation of Inverawe, because, although the decree made an allocation of the teind payable by the lands which had come to be owned by separate proprietors, but which had been valued *in cumulo*, there was no allocation in the case of Dalness, which had, in any view, ceased by that time to belong to the proprietor of Inverawe. It was not incumbent on the pursuer to suggest a reason why the lands of Dalness were not given up for valuation, but it was probably because those lands being a royal forest were considered to be teind free—*Cameron v. Macpherson*, April 1, 1853, 15 D. 657; *Earl of Murray v. M'Diarmid*, Nov. 16, 1869, 8 Macph. 142. This case was distinguishable from *Paterson v. Macleod (Morven Case)*, March 9, 1869, 7 Macph. 614, *aff.* 11 Macph. (H. of L.) 62; *Thomson v. Earl of Zetland*, Nov. 10, 1868, 7 Macph. 99; *Elder v. Fotheringham*, Jan. 8, 1869, 7 Macph. 341; *Haldane v. Ogilvy*, Nov. 8, 1871, 15 Macph. 62.

The defender argued—*On the plea of res judicata*:—The minister had twice judicially tried to raise the stipend, and twice failed. That amounted to *res judicata*. It was not necessary that the mind of the Court should have been applied to the question, as the decree might have been of consent—*Duke of Buccleuch v. Common Agent of Inveresk*, Nov. 10, 1868, 7 Macph. 95; *Earl of Hopetoun v. Ramsay*, March 2, 1841, 3 D. 685, *aff.* 5 Bell's App. 69. It was not necessary that the ground of judgment should appear, or that the minister should have an interest to object—*Dundas v. Waddell*, *supra*. Nor that the ground of judgment should appear—*Willoughby D'Esbesy v. Speir*, Dec. 14, 1876, 14 Scot. Law Rep. 162. It was not necessary that the judgment should be expressed in so many words—*Graham Bonar v. Lord Advocate*, *supra*—because it must be assumed the Court knew why the lands were not included, although their reason may not appear. All the elements of *res judicata* were here which were in *Dundas v. Waddell*. *On the merits*:—A liberal interpretation was to be given to the report of the sub-commissioners. They then state that they have valued all the teinds of the parish, and such a statement must receive effect unless the contrary is proved. The cases of *Paterson v. Macleod (Morven case, sup. cit.)*, and of *Earl of Mansfield, &c. v. Stewart*, Jan. 30, 1880, 7 R. 552, were the only two cases in which lands were held not to have been valued in spite of the statement in the report. Both those cases were distinguishable from the present—*Simpson, &c. v. Ewing*, Dec. 8, 1882, 10 R. 313; *Minister of Banchory Devenick v. The Heritors*, July 1, 1863, 1 Macph. 1014; Feb. 3, 1865, 3 Macph. 482, *aff.* 5 Macph. (H. of L.) 62; July 2, 1869, 7 Macph. 967, *aff.* 9 Macph. 121.

At advising—

LORD ADAM—This is an action of declarator brought by the minister of Ardchattan against Mrs Stuart of Dalness, to have it found and declared that the teinds of Dalness are unvalued,

and are liable to be localled on for stipend.

The defender pleads that it is *res judicata* that Dalness is not liable to be localled on for stipend, and, further, that the teinds are valued and exhausted.

The Lord Ordinary has sustained the defender's plea of *res judicata*, but he has not decided—or expressed any opinion—as to whether the teinds are valued or not, and in the view he took of the case it was unnecessary that he should do so. We, however, have heard the whole case fully argued, and I am now to express my opinion upon both pleas, and it appears to me that it will be most convenient to deal with the merits of the case first.

By feu-contract, dated 23d May 1764, John Macdonald acquired from Mrs Campbell of Inveraw the twenty shilling land of old extent of Dalness, with the teinds, parsonage and vicarage. The feu-duty payable was eighteen merks for the lands and ten merks for the teinds. It may be observed that this contract contains no obligation on the part of the granter to relieve the proprietors of Dalness of stipend, and, further, that John Macdonald and his successors are thereby appointed heritable subforesters and keepers of the Forest of Buachilletive. I understand that the lands of Dalness formed the whole or part of this Forest of Buachilletive, which is also known as the Forest of Dalness. The defender is the successor of John Macdonald in the lands of Dalness.

When a heritor claims that the teinds of his lands are valued it lies upon him to prove by competent evidence that the fact is so. In this case, accordingly, the defender, in order to establish that fact, produces a valuation of the teinds of the parish in which the lands lie, made by the sub-commissioners of the presbytery of Argyle in 1629. The sub-valuation of 1629, however, does not value the lands of Dalness *eo nomine*. The defender, however, maintains that Dalness was valued as a part of the lands of Inveraw, which are thereby *nominatim* valued. The *onus* lies upon her to prove that fact. Apart from the sub-valuation there does not appear to be any evidence going to show that Inveraw and Dalness were either one subject or were known as one subject at the date of the sub-valuation, but the defender relies on the inferences and presumptions which she says ought to be drawn from the terms of that document, and particularly in respect that it professes to be a valuation of the whole teinds of the parish.

This document was the subject of much consideration both in this Court and in the House of Lords, in the case of *M'Leod v. Paterson* in the locality of the parish of Morven. With reference to the character of the document, as professing to value all the teinds in the parish, Lord Colonsay, who gave the leading opinion in the House of Lords, remarked—"In the report of 1629 the sub-commissioners set forth that they had been directed to try and inform themselves by all lawful means of the worth of all lands of each parish in the said presbytery, and that they had faithfully, truly, and diligently proceeded in trying and clearing of the said valuation of the parishes underwritten. The reasonable inferences (he says) from that statement would be that they had valued all the lands in each parish, subject, however, to be rebutted by

evidence that certain lands had been omitted." It appears to me, therefore, that while the sub-valuation furnishes a strong presumption that the whole of the teinds of the parish are valued, yet that that presumption may be met and rebutted by a stronger presumption arising from the terms of the document itself taken in connection with the titles of the parties and other evidence. I may add, with reference to suggestions made by the pursuer in this case as to why Dalness was omitted from the valuation, that in no case would the sub-commissioners value lands claimed to be held teind free, because the heritor would not in that case give them up for valuation.

The contention of the defender being that the lands of Dalness are valued as part of Inveraw, the first point to be determined would appear to be, whether Dalness was the property of Campbell of Inveraw at the date of the sub-valuation in 1629. The earliest title produced is a sasine in favour of Dugald Campbell, heir-apparent of Inveraw, and Agnes Campbell, his future spouse, dated 3d and 4th May 1633, proceeding upon a charter by Archibald Campbell of Inveraw, his father, dated 1st May 1633. The lands are therein described as the four merk land of Inveraw, the three merk land of Achacharne, the four merk land of Drumachois, the two merk land of Dalness, and the six shilling and eightpenny land of Branrie.

There is also produced a copy of a tack dated 3d May 1608, granted by Archibald Campbell of Inveraw to an Angus Macdonald, of the lands of Dalness, from all which it may be presumed, and indeed it was not disputed by the pursuers, that the lands of Dalness and Inveraw were both the property of Campbell of Inveraw at the date of the sub-valuation in 1629.

It appears from the report of the sub-commissioners that Dugald Campbell, fiar of Inveraw, for himself, and taking burden on him for Archibald Campbell of Inveraw, his father, appeared, and deponed that the lands underwritten, pertaining to them, lying within the parish, had paid, or might pay, as a constant rent in stock yearly in time coming, the particular rent and duty therein specified, and the sub-commissioners found and declared in terms thereof.

The lands underwritten are:—Their lands of Inveraw, Branrie, Achacharne, and Drumachois, the teind payable for Inveraw being, for parsonage teind 6 bolls meal, and for vicarage teind £8 Scots.

Now, it will be observed that the lands of Dalness are not mentioned, and the presumption is that they were not valued. It is suggested, however by the defenders that Dalness may then have been known as part of Inveraw, and may have been included in the valuation under that name, or as a pertinent of Inveraw. But the valuation does not bear to be a valuation of the lauds belonging to Campbell of Inveraw under that general name. It bears to be a valuation of distinct and separate subjects belonging to him, and there is no valuation of parts and pertinents. The valuation does not state that the lands valued are the whole lands belonging to Inveraw in the parish.

The titles, too, show that Dalness was at this time quite a distinct subject from Inveraw, just as much so as Achacharne, Branrie, or Drum-

achois, which are separately valued. In the sasine of 1633, to which I have already referred, the four merk land of Inveraw is specified as one subject, and the two merk land of Dalness as another and a separate subject. In the only other title produced by the defender, namely, a charter of *novodamus* of 29th October 1650 in favour of Dougall Campbell of Inveraw, the lands are described in exactly the same way as the four merk land of Inveraw, the four merk land of Drumachois, the three merk land of Achacharne, the six shilling and eightpenny land of Branrie, and the four merk land of Dalness. The tack of 1608, before referred to, also shows that Dalness had been let to tenants and possessed as a separate subject. The size, also, and the local situation of Dalness, make it highly improbable that it was a part or pertinent of Inveraw. While Inveraw is a four merk land, Dalness is described as a two merk land; and I observe that in the proven rental in the locality of 1816 the rent of Campbell of Inveraw's whole lands in the parish is stated to be £800, while that of Dalness alone is stated to be £300. Moreover, Dalness is not contiguous to Inveraw, but lies at a distance of about 20 miles from it, the lands of other proprietors intervening, while Branrie which is only a six shilling and eightpenny land, and lies, if not contiguous, much nearer to Inveraw, is separately valued.

Upon the construction, therefore, of the sub-valuation, read in the light of the titles, I have come to be of opinion that it must be presumed that the teinds of Dalness are not valued. That they were omitted from the valuation designedly is, I think, clear, because the proprietor himself gave up for valuation the lands which were valued, and he must have known all about them. What his reason may have been is not very apparent.

The pursuer suggests that Dalness was or had been a royal forest, and that at that time it was supposed that such lands were or might not be liable in teind. I can only say of that suggestion, as Lord Colonsay said of a similar one in the *Locality of Morven*—the suggestion is plausible, rather than altogether satisfactory. If, however, Dalness was omitted, it is not incumbent on the minister to find out the cause of omission. On the face of the report there is no trace of its having been valued *eo nomine*, and on the record the only suggestion by the defender is, that it was comprehended in Inveraw, a suggestion which for the reasons stated, I think, cannot be accepted.

The decree of approbation and valuation, also produced and founded on by the defender, is dated 5th March 1777. From it it appears that the summons was raised at the instance of Lieutenant-Colonel Robert Campbell of Finab, who was then proprietor of Inveraw, and other heritors, against the Officers of State, and the ministers of the respective parishes in which their lands lay. The summons also contained conclusions for the division of the *cumulo* valuations of the teinds of such lands as had been valued *in cumulo*, but which at the date of the approbation belonged to different proprietors. As regards the lands belonging to Campbell of Inveraw, the Court approved of the report of the sub-commissioners, and found and declared the teind, parsonage and vicarage, of the lands to be

exactly as in the sub-valuation, with this exception, that Achacharne is omitted, it having been previously sold by him.

The amount of teind of the lands of Inveraw is therein declared to be 6 bolls meal of parsonage teind, and £8 Scots of vicarage, being the amount stated in the sub-valuation as the teinds of the lands of Inveraw.

Dalness was at the date of the approbation no part of Inveraw—the teinds of which were thus valued—Dalness having been sold sixteen years before to the defender's predecessor, so that we have here a decree of the Teind Court declaring that the teind stated against Inveraw in the sub-valuation is the teind of the lands of Inveraw proper, and, consequently, that no part of it is the teind of Dalness. Moreover, Colonel Campbell had no title or interest to insist in an approbation of the subvaluation as regards the teinds of the lands of Dalness, which were not his. It is clear, therefore, that Colonel Campbell must have understood that the valuation of Inveraw in the subvaluation applied solely to his lands of Inveraw, and no part of it to the lands of Dalness. That this was so may further be inferred from the fact that the summons, as I have stated, contained conclusions for the division of *cumulo* valuations, and that Colonel Campbell obtained a division of the valuation of the teinds of the lands of Shuachan and Plantilands which had been valued *in cumulo*, but which then belonged in part to him, and in part to another proprietor. No doubt he would have followed a similar course as regards Inveraw and Dalness had he supposed that they had been valued *in cumulo*. It appears to me, therefore, that these judicial proceedings do not in any way support the view that Dalness was valued as a part of Inveraw, but that they are inconsistent with that view.

As regards the proceedings in the various localities which have since taken place, it appears that a process of augmentation, modification, and locality, was raised in the year 1764 and came to an end in February 1771. The lands of Dalness are not mentioned in the proceedings. As the lands of Dalness were feued in 1764, it might be suggested that the proprietor of Inveraw had here an opportunity, in a depending process, of having the *cumulo* valuation of Inveraw divided, of which he would have availed himself if it was a *cumulo* valuation. As it appears, however, from the interlocutor of 31st January 1771 allocating the stipend that the lands of Inveraw were exempted from stipend as being part of the bishop's fourth, he had perhaps no particular interest in having this done, and I do not think that the proceedings in this process throw much light on the matter, one way or another.

The same remark also applies to the next process of augmentation, modification, and locality, which was raised in 1799. In this process Coll Macdonald of Dalness appears in the proven rental for a rent of £300. A scheme of locality was approved final in December 1806, but no stipend was allocated either on Inveraw or Dalness.

Another process of augmentation, modification, and locality, was raised in 1816, in which the Court, on 7th February 1816, modified to the minister the whole teind of the parish, as valued by the sub-commissioners in 1629, and this no

doubt was understood to be the whole free teind of the parish.

By the scheme of locality which was approved final on 5th March 1817, no part of the stipend is allocated on Dalness, but the whole of the teind of Inveraw as valued in 1629 is laid on Mr Campbell of Inveraw. As he was not bound to relieve Dalness of stipend, he had both a right and an interest to have a proportion of the valuation laid upon Dalness, if Inveraw and Dalness had been valued *in cumulo*. But this was not done—and the proprietors of Inveraw have ever since paid the whole stipend thus allocated on Inveraw. It appears to me that the proceedings in the locality, and indeed the whole proceedings subsequent to the valuation, do not in any way support the view that Dalness was valued as part of Inveraw, but the contrary.

It further appears to me that the case of *Macleod v. Paterson* in the locality of Morven is an authority in the pursuers' favour. The question there was whether the lands of Knock were valued. No lands appeared in the sub-valuation as having been valued under that name, but Mrs Paterson, the heritor, maintained that they were valued as part of the lands of Cowlekelis, which were valued in the sub-valuation.

It clearly appeared, however, from the titles that the lands of Cowlekelis had belonged at the date of the sub-valuation to M'Laine of Lochbuy, while the lands of Knock had belonged to the parson of Morven, and therefore that Knock could not have been valued as part of M'Laine of Lochbuy's lands. But the parson of Morven was also the proprietor of other lands in the parish called Ulling; these lands were valued by the sub-commissioners, and it was maintained that the parson's whole lands in the parish must be presumed to have been valued under the general name of Ulling, as the valuation bore to be a valuation of the whole lands of the parish, and there was no apparent reason why he should have valued part only of his lands. That argument, however, did not prevail, because Knock and Ulling were mentioned as separate subjects in the parson's charter of 1620. So in this case Inveraw, Achacharne, Dalness, and Branrie are all mentioned as separate subjects in the titles of Inveraw at the time.

On the whole matter, therefore, I am of opinion that the defender has failed to prove that the teinds of Dalness are valued.

The defender, however, will not be liable for stipend if the Lord Ordinary is right in sustaining the first plea-in-law stated for her, to which I will now advert.

The plea is in the following terms:—*Res judicata*, in respect that it was decided in the process of augmentation, modification, and locality raised in 1816 that the proprietor of Dalness was not liable in teind in respect thereof.

We must therefore see what the proceedings were in that process.

It would appear that the minister had, in terms of the Act of Sederunt of 1809, produced with his summons a rental of the parish, distinguishing the rent of each heritor. In this rental the rent, stock, and teind of the lands belonging to Coll Macdonald of Dalness were entered at £300. None of the heritors appear to have stated any objection to the rental, and the Lord Ordinary,

by interlocutor dated 6th February 1816, held the heritors confessed thereon.

Next day, by interlocutor dated 7th February 1816, the Lords having advised the scheme of the rental and prepared state, modified a stipend to the minister. This stipend, as I have had occasion to state, was the whole amount of teind appearing in the subvaluation of 1629. The prepared state referred to in the interlocutor enumerates the heritors of the lands appearing in that subvaluation, with the respective amounts at which the teinds of their lands appear therein to have been valued set opposite their names. As we know that the teinds of Dalness were not therein *nominatim* valued, the name of the proprietor of Dalness does not appear therein.

A scheme of locality was thereafter lodged in process, which was approved final on the 5th March 1817. This scheme is just a copy of the prepared state, and makes no change therein.

These appear to have been the whole proceedings in the process, and I see no trace of any question having been raised or decided as to the liability of Dalness to pay stipend. Mr Coll Macdonald no doubt would be cited as a party to the process, but there is no evidence in the documents before us to show that he ever appeared as a party in the process or objected to anything that was proposed to be done.

It is clear, indeed, that he had no occasion to do so, because it is obvious from the proceedings that no one proposed to insert his lands in the locality, or to lay any burden upon them. It is quite true, as the Lord Ordinary said, that no one had any right to leave Mr Macdonald's name out of the locality except the parties or the Judge. But if the parties chose to do so, raising no question about the matter, I fail to see how that can constitute *res judicata*.

The case of *Dundas v. Waddell* referred to by the Lord Ordinary does not appear to me to rule this case. In that case Mr Dundas raised a very distinct issue. He claimed that the lands about which the question arose were teind free, and craved that they should be struck out of the rental, and that was followed by an interlocutor ordering them to be struck out accordingly. In that case there was an issue raised and an interlocutor of a Judge disposing of it. But in this case, so far as I can see, there was neither question raised nor the decision of a Judge. It appears to me that if we were to adopt the Lord Ordinary's views we should be affirming the proposition that wherever an heritor is held as confessed in the proven rental, and his lands are not afterwards localised on in the final locality, it is to be held that the lands are in all future time to be exempt from stipend, and that although it may not appear whether they were omitted merely because they were postponed in the order of liability, or for any other reason. I know no authority for such a proposition.

From the mode in which the stipend was modified I have no doubt that the parties understood that the minister was getting the whole admitted free teind. I do not know whether the minister was satisfied or not that the teinds of Dalness were not liable for stipend, or whether he was merely satisfied to take the augmentation which was awarded, which I understand was considerable, amounting to between six and seven chalders. It appears to me to be quite imma-

terial what the minister may have understood. Until the question of liability or non-liability is fairly raised between the minister and heritor, and adjudicated upon, there can be no *res judicata*. Although arrangements may have been made and judgments pronounced in a locality on the footing that the whole teinds of a parish had been valued, that will not preclude inquiry into the actual fact, and of that the *Morven* case affords a strong example. On the whole matter I have no doubt that the plea of *res judicata* is not well founded.

I am therefore of opinion that the pursuer is entitled to decree in terms of the conclusions of the summons.

LORD MURE—I agree in the opinion expressed by Lord Adam, and as the reasons for that opinion have been so fully and distinctly explained, I scarcely think it is necessary for me to say much in addition. I may, however, state generally the grounds upon which I concur.

In the valuation of 1629 the lands of Dalness are not mentioned *eo nomine*, although they appear to be lands of some importance, and from the evidence seemed to have formed a royal forest. But while Dalness is not mentioned there are four separate portions of Inverawe, which are mentioned by name, viz., Inverawe, Branrie, Achacharne, and Drumachois. There are thus four parts of the estate of Inverawe mentioned, but Dalness is not one of them although it was well known to be part of Inverawe, and was held under a different description, as we see from the tack of 1608. Dalness is one of the subjects let under that tack by the proprietor of Inverawe, and the tenant is taken bound to keep the forest. So that in 1608, twenty years before the decree of valuation, Dalness was known by a separate name.

We have not seen any regular title prior to the date of the decree, but immediately after it there is the instrument of sasine in 1633, and there the four separate valued subjects are mentioned, and the lands of Dalness. Then in the charter of *novodamus* granted in 1650 the lands valued in 1629 are *nominatim* mentioned, and in addition the two merk lands of Dalness with the forest attached. Now, that being the nature of the titles we find in them five separate *nominatim* parcels of land, and in the decree of valuation we find only four, Dalness not being mentioned. It is therefore not expressly valued, and where is the evidence that it was valued as a pertinent? It is not a pertinent, because Dalness is as important a portion as any of the other four. There is no express valuation of Dalness, and I can find no ground for supposing that it must be held to have been valued under any of the other four names. It is situated in a remote part of the parish, and is not surrounded by the other lands. It may be that there was a notion that it was teind free because it was a royal forest. That idea existed up to a recent date, and was much discussed in the *Glenfinlas* case (*Earl of Moray v. M'Diarmid*, 8 Macph 142). But in the state of the facts in the present case there is no express valuation of Dalness by name, and I am of opinion that there is nothing to show that it was intended Dalness should be included under any other name.

On the question of whether this matter is *res*

judicata it is necessary to keep in mind what are the facts necessary to found such a plea. All that is here averred is that the lands have not been localled on. It is stated that the lands were originally entered in the proven rental, and that on an objection being taken they did not appear in the state of teinds upon which the final locality was adjusted. But in the cases of *Earl of Hopetoun v. Ramsay*, 3 D. 685, *aff.* 5 Bell's App. 69, and *Dundas v. Waddell*, 6 R. 345, *rev.* 7 R. (H. of L.) 19, the legal question which formed the merits of those cases, viz., whether the heritor had a *decimæ inclusæ* right, had been distinctly raised on the pleadings in former processes, and judgment had been pronounced upon that point. In the *Hopetoun* case it was argued that the judgment in the previous process had been of consent, and in the case of *Dundas* that the mind of the Court had not been applied to the point, and that therefore there had been no *judicium*. But still in both cases it was held that there was evidence from the proceedings to show that the point had been raised, and the plea of *res judicata* was therefore given effect to. It was considered that it did not need the application of the mind of the Court to the argument provided the point had been raised and decided. That is my reading of the cases of *Hopetoun* and *Dundas*, and I do not think that these cases lay down that rule for the first time, though they may lay it down for the first time in regard to teind cases.

The question here is whether the question as to the valuation of Dalness was raised in the previous proceedings or not. There is no averment that the lands of Dalness were valued, but only that the lands were entered in the proven rental as worth £300 a-year, and were struck out. It is not alleged that this was done because the teinds were valued, and accordingly I do not think there is any evidence, or indeed any relevant averment, that at the date of that locality the lands of Dalness were valued. I am therefore unable to concur with the Lord Ordinary.

LORD SHAND—I am of the same opinion as your Lordships.

The strength of the respondent's case seems to lie in the presumption that as the sub-commissioners professed to value the whole of the lands in the parish, therefore Dalness was included. This presumption is further strengthened by the fact that although there have been various localities, even in comparatively recent times, yet no stipend has ever been localled upon the lands of Dalness. I am very far from undervaluing these presumptions. They are strong, and unless rebutted they would probably be considered strong enough to induce the Court to hold that the lands were valued. But I think that in the present case they have been rebutted, and that on account of the important considerations which have been mentioned by Lord Adam.

Dalness has been known by a separate name from the earliest time, and yet we are asked to hold that in the decree of valuation it is included under the name Inverawe. Further, the lands of Dalness were important and valuable, and are situated at a considerable distance from Inverawe, the intervening lands being separately valued. These, in my opinion, are the considerations which lead to the conclusion that Dalness was not valued.

The absence of the lands from the decree of valuation might arise from various causes. No doubt if the objector could say that the only reason why they are not included is because they must have been included in the general name of Inverawe her case would be strong. But she has not been successful in excluding other explanations. The lands of Dalness may have been omitted from error, or probably because of the mistaken view that a royal forest is not subject to the payment of teind. That would be sufficient to account for the omission, but the law upon that point has now been cleared up, and if such was the view of the parties that was no reason why the lands should not now be localled upon for stipend.

With regard to the question of *res judicata*, if it had been pleaded that Dalness was a royal forest, and that plea had been given effect to, or if in the process of locality a question had been raised as to the liability of the lands for stipend, and after the point had been stated the lands had been struck out of the proven rental, or out of the state of teinds, then, on the authority of *Dundas v. Waddell*, I think the plea would have been good. But for some unknown reason the lands were not included in the proven rental or in the state of teinds, and I much fear that if we were to adhere to the interlocutor of the Lord Ordinary we would find it necessary to hold, whenever lands were not included in the proven rental or state of teind, that the question of their liability was *res judicata*.

I am therefore of opinion that this case is distinguishable from that of *Dundas v. Waddell*, and both upon the merits and also upon the question of *res judicata* I think that the pursuer is entitled to succeed.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found, declared, and decerned in terms of the conclusions of the libel.

Counsel for the Pursuer (Reclaimers)—Graham Murray — Liddall. Agent—J. B. McIntosh, S.S.C.

Counsel for Defenders (Respondents)—Gloag—Mackay. Agents—Mackenzie & Kermack, W.S.

Friday, June 12.

SECOND DIVISION.

LUCOVICH, PETITIONER.

Shipping Law—Bond of Bottomry—Petition to Arrest and Dismantle Vessel.

A creditor in a bottomry bond having petitioned the Court for warrant to arrest and, if necessary, to dismantle the ship over which it was granted, on the ground that it was about to proceed to sea without satisfying the bond, the Court, at the calling in the Single Bills, granted warrant to arrest *ad interim* pending the lodging of answers to the petition.

On 12th June 1885 Antone Treffone Lucovich,