husband's dissipated habits was not to her discredit; in any view it could neither excuse nor palliate the violence which he used towards her. With justifiable apprehensions as to her personal safety, I cannot think we have any alternative but to decern in the separation.

The other judges concurred.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—James Young, S.S.C.

Friday, May 22.

UNIVERSITY OF GLASGOW *v.* POLLOK.

Teind—Titular—Valuation—Cumulo *Lands*—Cumulo *Teind-duty—Heritor—Intromitter—Interest. Held* that where a heritor has intromitted with the fruits of a portion of lands valued *in cumulo* to an amount equal to the value of the whole, he is bound, before the valuation is divided, to pay the titular the full amount of the *cumulo* teind-duty.

Interest on a claim by the titular for arrears of *cumulo* teind-duty *disallowed*, in respect it was not brought *tempestivè*, and the heritor was thereby exposed to the danger of not operating his relief.

This is an advocation from the Sheriff-Court of Lanarkshire of an action at the instance of the University of Glasgow against Mr Pollok of Rhindmuir, in the parish of Old Monkland. The summons concludes that the defender should be decerned to pay to the pursuers "the sums of teind or teind-duties after-mentioned, due and payable to the said University and College of Glasgow, as titulars of the teinds, parsonage and vicarage, of the said parish of Old Monkland, out of the lands of Rhindmuir and lands of Hole and Atkinson, all lying in the said parish of Old Monkland, of which, or of parts and portions of which lands, the said defender is proprietor, and has been since the year 1846 and previously proprietor, and, as such, has intromitted with and uplifted the stock and teind, or the rents both for stock and teind, of the said lands for the several crops and years after mentioned, viz., the sum of £10 sterling of teind-duty, being the valued teind of the said lands of Hole and Atkinson for crop and year 1847, and £1 sterling of teind duty, being the balance remaining due and unpaid by the defender of the sum of £6, 12s. sterling, being the valued teind of the said lands of Rhindmuir for the same crop and year," There are conclusions of the same nature applicable to the subsequent years. The whole sum amounts to £198, and there is a conclusion for interest on the several sums from the term of Candlemas in each year respectively following the reaping of the corn for which said teind-duty is payable.

The pursuers make the following statements:—"(1) The pursuers are titulars of the teinds of the subdeanery of Glasgow, which includes the parishes of Old and New Monkland, with the teinds, parsonage, and vicarage, thereof; and particularly, they are titulars of the teinds of the lands of Rhindmuir and Hole and Atkinson, lying within the barony of Glasgow, and shire of Lanark; and they have been in the immemorial possession of the teinds of the said lands, in virtue of their rights and titles thereto. (2) By decree of valuation of this date, obtained at the instance of Mr Matthew Morthland, then proprietor of the whole lands of Rhindmuir, Hole, and Atkinson, the teinds of these lands were valued at the sum of £16, 12s. sterling, of which, as appears from the proven rental, on which the decree proceeded, the teind of Rhindmuir amounted to £6, 12., and the teind of Hole and Atkinson amounted to £10. (3) The lands of Rhindmuir, Hole, and Atkinson were thereafter acquired by Mr Andrew Stirling of Drumpellier; and Mr Stirling subsequently sold to Mr James Mylne, Professor of Moral Philosophy in the University of Glasgow, *inter alia*, 'All and Haill these parts of the fifteen shilling land of Rhindmuir, lying on the north side of the parish road passing Swinton and Rhinds;' item, 'All and Haill these parts of the fifteen shilling lands of Rhinds and Rhindmuir of Hallhill, now called Rhinds.' Mr Mylne having thus acquired only a portion of Rhindmuir, it appears to have been arranged between him and Mr Stirling that Mr Mylne should pay £5, 12s. of the valued teind applicable to Rhindmuir, and that Mr Stirling should pay the balance of £1 in addition to the sum of £10 payable for the lands of Hole and Atkinson; and this was, accordingly, the mode of payment down to the year 1846. The pursuers, however, were not parties to this arrangement, and they never entered into any agreement limiting their right to levy the whole teind-duty from the fruits of any portion of the lands, or intromitters therewith. Neither has any judicial division of the *cumulo* valued teind ever been obtained. (4) The defender is now, and has been ever since the year 1846, proprietor of the whole lands of Rhindmuir, valued by the foresaid decree, or of the greater part thereof. He is, and has been since 1846, also proprietor of a portion of the lands of Hole and Atkinson. As proprietor, he uplifts and intromits with the whole fruits, both stock and teind, of the lands so belonging to him, or at least the rents and profits of the same, and has done so yearly since 1846. The fruits or rents and profits of the same which the defender has so uplifted annually since 1846 far exceed in value or amount the yearly teind-duties sued for in this action. (5) The defender has paid to the pursuers and their predecessors the sum of £5, 12s. sterling annually since 1846, to account of the teind-duty payable for the lands of Rhindmuir; but he has not paid, and refuses to pay, the balance of £1 sterling per annum of teind-duty payable for these lands; and he has not paid, and refuses to pay, the teind-duty of £10 sterling per annum, payable for the lands of Hole and Atkinson; and Mr Stirling of Drumpellier having ever since 1846 declined to pay these sums, or any portion thereof, on the ground that, at and prior to that date, he had feued the whole lands which formerly belonged to him, and thereby entirely divested himself of the *dominium utile* thereof, both the said yearly sums remain unpaid and owing to the pursuers from and since crop and year 1847 inclusive, until the present time."

The pursuers further state that before raising the present action they called upon the defender to obtain a judicial division of the *cumulo* valued teind of the said lands of Rhindmuir and Hole and Atkinson between himself and the other proprietors, and intimated their willingness to defer exacting teind-duties till the result of the division, but that the defender refused to do so.

The defenders maintained the following pleas:—"Acquiescences. The pursuers having since 1846 accepted from the defender £5, 12s. sterling per annum as his share of teind-duty for his lands of Rhindmuir, and granted receipts therefore, are not

now entitled to insist against him for the additional sum of £1 per annum sued for. Teinds being *debita fructuum*, not *fundi*, the action competent to the titular for recovery of the arrears of tithe-duties is only personal against those who have intermeddled with them. The defender having intromitted with only the teinds of his own lands, he is only liable in payment of the teinds of these lands; and he having offered, and being willing to pay the same, the action ought to be dismissed. In no view can the complainer be called upon to pay the teind of lands belonging to other proprietors, even supposing these lands to have originally belonged to the person who was also proprietor of the defender's lands, and supposing the whole to be included in a *cumulo* valuation.

At the debate in the inferior Court it was stated for the pursuers that, so far as the pursuers conclude for the several sums of £1, and a balance remaining due each year since the year 1846 of the valued teinds of the lands of Rhindmuir, in payment of which valued teind, the pursuers had accepted for each year of said years the sum of £5, 12s., they agreed to depart from that conclusion.

The Sheriff-substitute) GLASSFORD BELL) pronounced the following interlocutor:—

"Repels the defences in as far as the summons concludes for the gross amount of the arrears of teind-duty payable for the lands of Hole and Atkinson from the year 1846 to the year 1864 inclusive, amounting to the sum of £180, reserving to the defender his relief *pro rata* against the other proprietors of the other portions of said lands: Finds, as regards the conclusion for interest, that in respect the pursuers do not appear to have given the defender any notice till recently that they intended to hold him liable for the whole of said arrears, and that, if they had presented their account or made their demand sooner, the defender might have taken steps to obtain a scheme of division, or have otherwise liberated himself, the said defender is liable in interest on said principal sum only from the date of the constitution of this action, and finds him liable accordingly: Finds, as regards the question of expenses, no expenses due to or by either party, in respect, first, of the pursuers having abandoned a part of their claim; and, second, of the nicety and novelty of the matter at issue; and decerns."

His Lordship added the following note:—

"There seems no reason to doubt that, though this action is of an unusual character, it is within the jurisdiction of this Court; for, in the words of Mr Connell (vol. ii, p. 84, 2d ed.), 'petitory claims for teinds may be brought either before the Court of Session or the Judge Ordinary.' But, whilst entertaining the case, the Sheriff-substitute has had great difficulty in making up his mind regarding it. There is no decision in the books which can be referred to as a direct precedent, and the validity of the claim put forth by the pursuers must therefore be tested by general principles. It may be admitted so far for the defender that he is justified in contending that teinds being *debita fructuum*, not *fundi*, the titular has only a personal action for recovery of arrears of tithe-duties against those who have intromitted with them, and it is such personal action that has here been raised. At the same time, it is not to be overlooked that, as long as the fruits exist, the titular has an hypothec upon them (Ersk. Princ., 2, 10, 20), or, as Connell calls it, 'a real lien;' 'and this lien,' he adds, 'subsists as to teinds which have been valued, as well as those which have not' (vol. ii, p. 81, 2d ed.); in which doctrine he differs from Erskine, who thinks that after valuation there can be no hypothec (Ersk. Inst., 2, 10, 44). Be this, however, as it may, all writers are agreed that an action lies at the instance of the titular for arrears of tithe-duties against those who have intermeddled with them. The important and vital question is, whether the intermeddler with teinds valued *in cumulo* is liable only in payment of that portion of the duty which he admits to effeir to the portion of the land he has acquired, or *in solidum* if the fruits he has reaped exceed in value the whole duty, reserving his relief against his co-heritors? At the outset of his title on teinds, Stair says—'teinds do affect all intromitters with the stock and teind jointly, or with the teind severally.' Erskine says (b. 2, 10, 42), 'Tithes, even after valuation, continue to be *debita fructuum;* for the valuation does no more than ascertain the value of the tithes, without altering its nature.' 'In virtue of his lien,' says Connell (vol. ii, p. 442), 'the claim of a titular extends against all persons who have reaped the fruits.' The same writers point out 'that the hypothecation competent to teind-masters was extended to ministers for their benefices or stipends, whereby they may have access to any intromitter with the teinds out of which the stipend is modified, not only for the intromitter's proportion of his lands, but *in solidum* for his whole teind, according to the value of his intromissions' (Stair, b. 1, 13, 16). See also Connell, who says (vol. i, p. 208), 'An intromitter with teinds was found liable to pay the minister his modified stipend *in solidum* for the whole quantity of his intromission if it extended to so much as would pay the minister's stipend, notwithstanding that the rest of the parish had intromitted also; and the suspender could get no relief but from the granter of his tack, who was bankrupt.' The rule is, no doubt, different as soon as a decree of locality has followed on a decree of modification. When the stipend has been proportioned among the heritors by a decree of locality, the minister can make his claim effectual against each heritor only to the extent of the proportion localled upon him. Under a valuation of teinds, the titular is in the same position as the minister whose stipend has only been modified. When lands which have been valued as a whole are split into different parcels among different heritors, there is no splitting of the *cumulo* teind-duty, which remains a debt against any heritor intromitting with the fruits to the amount of the duty until a decree of division, analogous in character to a decree of locality, has been obtained. Accordingly, we find in *Campbell and Others* (Mor., p. 15,762), where lands which had been valued jointly to fix the amount of teind payable from them came to be split, the different heritors brought an action, in which the Court was moved to divide 'the *cumulo* valuation,' and the Court pronounced a decree of division as craved. Until such division takes place, it seems correct to hold that every part and portion of the fruits of the land is burdened with the whole valuation, in the same way as a feu-duty affects each portion of the subject. The defender took away fruits which would have more than paid the teind-duty; and if he is not liable to the pursuers in consequence, then none of his co-heritors are liable either; and how are the pursuers to recover their valuation? It is no duty of theirs to ascertain how much they are entitled to from each proprietor. They are en-

titled to receive it as an *unum quid*. The defender may, no doubt, have some difficulty in operating his relief; but, in the meantime, he has the pursuers' teinds in his pocket, and he has a remedy in his hands by forcing on a division."

The Sheriff (the late SIR A. ALISON) altered, and pronounced the following interlocutor:—

"*Glasgow, 25th May* 1866.—Having heard parties' procurators at great length under their mutual appeals upon the interlocutor appealed against, and made avizandum, and considered the record and whole process, adheres to the interlocutor in so far as its holds the conclusion for the sum of £1 a-year, as a balance remaining due each year since 1846 of the valued teind of the lands of Rhindmuir, as departed from, and assoilzies the defender from said claim: And, as regards the conclusion for payment of £10 for each year since 1846 as the valued teind of the lands of Hole and Atkinson, finds that the share of the *cumulo* valued teind of £10 for the whole lands of Hole and Atkinson, extending to seventy acres or thereby, effeiring to the defender's portion of said lands, being fourteen acres or thereby, is admitted by the defender to amount to £2, which he professes his willingness to pay for each year since 1846—he denying only his liability for the remaining portion of the said *cumulo* valued teind-duty: In respect of said admission, decerns against the defender for payment of the sum of £2 sterling a-year as his admitted share of the teind-duty payable for his portion of the said lands of Hole and Atkinson from the year 1846 to 1864 inclusive, amounting to the sum of £36 in all, with bank interest at the rate of 2½ per centum per annum on each year's teind-duty, as concluded for in the libel; but, *quoad ultra*, finds, for the reasons stated in the following note, that the pursuers are not entitled to any farther decree against the defender in this action, and assoilzies the defender accordingly; reserving to the pursuers all competent action against any party or parties legally liable for any balance of the *cumulo* valued teind of £10 for the whole lands referred to not found due to them in this action: And, on the question of expenses, in respect of the difficulty of the case, and of there being no decision precisely applicable to the present question: Finds only half costs due to the defender, of which allows an account to be given in, and remits to the auditor to tax the same, and to report: And alters the interlocutor complained of accordingly, and decerns."

"*Note.*—This is a very difficult and nice case, and the more so as there is no direct decision by the Court of Session bearing on the point, and the Court is left to decide it on the comparatively uncertain light to be derived from analogy or principle. These, however, seem to concur in the view which the Sheriff, after much consideration, has taken of the case, and which points to a different decision from that of the Sheriff-substitute.

"The view which the Sheriff takes of the case, and which may be stated in a few sentences, is as follows. Erskine says expressly in his chapter on teinds or tithes that teinds are *debita fructuum, non fundi*. 'The tithe,' he says, 'is a proportion only of the *fruits*, and is therefore *debita fructuum, non fundi*. Hence the arrears of tithe create no real burden or charge on the lands, and so have no operation to the prejudice of singular successors. Nor could churchmen suffer by this doctrine, for they had the same right to draw the tenth sheaf, which was their proportion of the fruits, from the several crops of which they were the product, that the owner of the lands had to the property of the residue of the stock, and so might make their right effectual without the aid of any real security; and tithes, *even after valuation*, continue to be *debitum fructuum*, for the valuation does no more than ascertain the *value* of the tithe, without altering its nature.'—Ersk., b. 2, tit. 10, sec. 42.

"This authority appears to the Sheriff to be decisive of the whole question here at issue. As tithes are a burden on the *fruits*, not on the soil, it follows, as a necessary consequence, that, previous to a valuation of the teind, when tithes were drawn in kind, the titular, though he might draw every tenth sheaf, he could draw that tenth sheaf *only from the land of which it was the tithe*. He could not, for instance, go into the field of A and draw every tenth sheaf, on the ground that there was an arrear of sheaves due by the adjoining proprietor B, of whose tithes he also was the titular. Each separate property must bear its own ecclesiastical burden, and cannot be saddled with any part of the burden of the neighbouring property. This is the well-known distinction between a *debitum fundi* and a *debitum fructuum* which is carried out in practice, and can lead to no other result. Erskine expressly says that this distinction between *debitum fundi* and *debitum fructuum* remains unimpaired and unaltered *after* the teinds have been valued; and therefore the titular must be restrained by the same rules in seeking his money payment of the teind after valuation, as he was in taking his tenth sheaf before valuation. He must take the valued teind from each heritor bound for it separately, without pretending to a solid obligation against a number of heritors taken together.

"The plea on the part of the pursuers, in support of their demand against the defender for the whole valued teind, rests upon the assumption that separate heritors who have got their lands included in one decree of valuation have put themselves in a situation in which the *nexus* of a superior for his feu-duties, or a bondholder for the interest of his money, attached to the whole property included in the decree of valuation, or any portion of it. The obtaining a decree of valuation of teinds is a step *for the benefit of the landowner;* and it often proves a very great one by fixing the burden at an annual money payment not liable to be increased by any change in the value of agricultural produce. There is no room for presuming that one or more landlords, taking advantage of their right to have their teinds valued, intended to subject themselves to an obligation for their right in doing so *singuli in solidum*, instead of a *separate* obligation. Unquestionably they mean nothing of the kind. The law expressly lays it down that the teind is a burden on the *fruits*, not the soil; and that holds *after* valuation as well as before. Erskine says expressly, that the action competent to the titular for recovering the arrears of tithes is only personal against *those who have intermeddled with them*, whether it be the owner of the lands himself, or tenants under him.—Ersk. 2, 10, 42.

"There is a well-known process in law for ascertaining in a just and equitable way the amount of the money payment of valued teind which is payable from each separate parcel of land included in a *cumulo* valuation, and that is, by a process of modification and locality, or division of the valued teind, which is of everyday occurrence in the Teind Court. If such a process is brought, the proportion of the valued teind payable by each heritor can at once be ascertained, and, *quoad ultra*, each heritor

will be for ever free from further burden. Then, it may be asked, who is bound to bring such an action if the matter cannot be arranged extrajudicially? The Sheriff can see no reason why in such a case, more than any other, the pursuers demanding the teind should be relieved from the necessity of ascertaining and defining the extent of their claim against each heritor by the proper legal method, *actori incumbet probatio.* To decide otherwise, and to hold that the titulars of teinds are entitled to bring an action against any one of the heritors whose lands are included in a decree of valuation of teinds, not only for the payment of the teind effeiring to his own lands, but for the whole *cumulo* teind payable for the *whole* lands—no matter how numerous soever the heritors may be, or however large the amount of teind—leaving that heritor to adjust the matter as he best could, would be to invert altogether the legal rights of parties, and put the holder of a right which is *debitum fructuum* only in the same category with those who hold a right that is *debitum fundi*, or obligation *in solidum* of any kind. The distinction is quite clear where the obligation is solid: the parties subject to it are liable to be sued *singuli in solidum*, and they must exercise their *pro rata* relief among each other. Where the obligation is several only, it lies upon the pursuer to specify and prove the aliquot portion of the burden or obligation falling upon each obligant separately."

The pursuers advocated.

Clark and Gifford for them.

Solicitor-General and Skelton in answer.

The Court ordered written argument.

At advising—

Lord Justice-Clerk—The material facts in this case on which the solution of the present question depends are few, and, with one material exception, admitted. The pursuers, the University of Glasgow, are titulars of the teinds of Hole and Aitkinson, which then belonged to one proprietor, and were valued *in cumulo* by the Teind Court in 1792. Mr Pollok, the defender, is proprietor of a part of these lands only, the property having been subdivided since the date of the valuation. The valuation has not as yet been apportioned among the different proprietors. The teind of Hole and Atkinson, as ascertained by the valuation, was £10, the rental at the date of the valuation having been ascertained to be £50. The fruits of the portion of the subject which does belong to Mr Pollok exceed in yearly value the £10 of teind which was found applicable to the whole lands of Hole and Atkinson. It is matter of dispute what, if the matter were to be inquired into, the tenth of the fruits would be. But the pursuers dispute the relevancy of such inquiry, maintaining that, they having intromitted with the fruits to an amount equal or in excess of the valued teind, they are entitled to recover from him for each year the entire sum of *cumulo* duty, with interest, from the expiry of each year when they say the interest was payable.

The defence is, that the demand is ill laid, because no previous process of division has been brought to ascertain the proportion being leviable from the defender's land; so that the action should be altogether dismissed; or otherwise that the matter should be adjusted in this process, and decree given only for the amount that should appear to be the proper proportional amount of the special portion of the land held by the defender. The question was brought before the Sheriff-Court of Lanarkshire. The Sheriff-substitute decerned for the principal sums concluded for, with interest from the date of citation in the action. The late Sheriff—Sir A. Alison—altered this finding, and proceeding upon an admission on the part of the defender, that the teind of the lands his property might be taken at £2 per annum, a fifth of the valuation decerned for, that sum for each year, with bank interest on the amount.

It is very difficulty to see how the precise result of a payment to the amount of £2 only was arrived at by the Sheriff; because, although the defender stated that the amount of the teind of his lands was £2 a year, it was not admitted by the pursuer. As to that amount, even if the proportion were calculated upon the footing of a fair division, it would seem necessary that some inquiry should have been directed to be instituted with a view to ascertain the condition of the fact. By adopting the course of getting at a precise sum, one important objection to depart from the *cumulo* valuation was certainly rendered less palpable, but it does not appear to me that there was any proper ground on which the amount decerned for could be fixed. But as I concur in the result to which the Sheriff-substitute came, there is no occasion to say more on that point.

Previous to valuation, the right of the titular was to have gone into each field where corn was cut, and to take his tenth sheaf. The heritor could not ingather his corn till the titular had drawn his tiend—a rule which was found to be extremely oppressive, and was partially corrected by limiting the time for the exercise of the titular's right, but the titular's right was to draw his tenth part of the crop. He went into the field at harvest, and took his tenth part. When the lands were not under crop, if there was no vicarage, he had nothing. The heritor was entitled to have his land in grass; and where there was grass, parsonage teind was not leviable, and vicarage only if custom had established the vicar with the right. By the process of valuation all this condition of matters was altered. A sum was fixed as the annual value of the teind, and was leviable in all time to come, under all circumstances affecting the use of the ground or purposes to which it might be applied. The titular was debarred from drawing his teinds, and the heritor was bound to pay according to valuation, though not a single stalk of corn should be grown upon any part of his property.

At first, it would appear to have been contemplated that the heritor should give real security for payment of the valued teind, but this does not appear to have been at any time enforced, and the power as to this was latterly found not to be capable of enforcement. The titular never had a *debitum fundi*, but under his decree of valuation he had a claim against intromitters with the fruits. The intromitter, as liferenter or fiar, with the fruits, was certainly liable to him as to one who had a *debitum fructum.* The extent of the heritor's liability in the case of lands *separately* valued was to the amount of the valued teind of these lands. The valuation being that of the teind of all the land, and being a *debitum fructum*, naturally extended to the fruits of the whole subject valued.

I have come to the clear conclusion that the defender, as intromitter with the fruits of a portion of the lands valued *in cumulo* to an amount equal to the value of the whole, must be held bound, before the valuation is apportioned by regular process; to pay the titular the full amount of the *cumulo* teind-duty, having his relief against the other parties, although

he may thereby be paying a duty for teinds held by other heritors.

I think that any other principle would lead to consequences most anomalous and most unjust; and would go to nullify the valuation process altogether. The heritor, in virtue of a decree which alone empowers him to draw the teinds of any part of a combined subject, would seem, so long as the valuation remained undivided, bound to see to the fulfilment of the counter obligation, in respect of which he alone receives right to touch the corns. The counter obligation of a heritor, under decree fixing the teind of *cumulo* lands, is to pay what is fixed by that decree. It cannot be held to be less than payment of the entire amount until division and apportionment, the condition of the decree made, be fulfilled. It certainly never could be the meaning of the Legislature that the heritor could proceed to draw his teind without liability to pay anything, and as it would be impossible to say, in any case of divided property, what is payable, the titular would be helpless. He could not hope to recover anything in such a case without a costly and lengthened litigation. If the power of enforcing his decree were to depend upon his fixing, in a separate process, what proportion of *cumulo* teind-duty he had to get, the decreet in his favour would be practically worthless. The sum is unalterably fixed by the decree against him, and by it he is excluded from touching the growing crops. Can it be held to be open to the heritor to draw his own teind, and to say, in every case of a division of property held and valued together, that as there has been no sum ascertained at all which can be exacted by the titular for a particular part of the subject, but that in every such case the titular must just set about proving the amount of the teind, as if nothing had been fixed, except that he was to abstain from realising his teinds by drawing them?

Subsequent to a valuation, the whole amount is due, though the whole subject is converted to uses which would have prevented the drawing of any teind if there had been no valuation. Rich agricultural fields are thrown permanently into lawn, or orchards, or covered with houses. The valued teind-duty is payable notwithstanding. It is of no consequence to the titular what the mode of occupation may be. If a proprietor has only a fragment of his estate under crop, and the great proportion of it permanently under grass, he must pay the whole valuation. It is of no matter how the property is dealt with. If there is any intromission by receipt of rent, or by appropriation of the fruits of a single acre, the proprietor is liable, irrespective of any use to which the rest of the estate may be applied, though the application is permanent, and the use such as would before the valuation have excluded any claim by the titular. If he retains the proprietorship of a single field of a *cumulo* property, others having come into the right of the rest, and intromits with the fruits of that field, shall he not be liable to at least the extent of that intromission? A single proprietor, with a single acre under crop, and the remaining property in the decree converted into unteindable subjects, would be undoubtedly liable; shall he be free by showing that others are in possession of those fields, which, if they had remained in his possession in a state in which no teind could be drawn, would assuredly make him liable?

This view might lead to the result that the liability would attach even although less was intromitted with than the amount of the whole valuation. But if there be security over the fruits, to the extent of intromission with these fruits *fructuum* must be decreed. The titular is said to have security over the fruits; it is admitted by the defender that teinds are *debita fructuum*, but the argument is that this is not over the whole fruits, but over a tenth only. It seems to be suggested that the titular could, failing the payment of the valued amount, only pay himself by entering and taking the tenth, but this is clearly not wrong. The right after valuation cannot be measured by the right as it existed before it. There may be no teind to draw, and, if there were, the drawing is done away with. The titular would, in that view, be in the unfortunate condition of being limited as before the valuation to the precise amount of his teinds. A security over *fruits* is not a security reaching only to the part of the fruits which constitute teind. If that were so, the titular would not have a security for his teinds over the fruits, but only a right to take a tenth by drawing them after a valuation, which was to put an end for ever to his right to them. In short, the proposition is that he would be permitted to revive his original right of tithing, and that he should have that right and no more. In the case of a *cumulo* valuation it seems to me that it is enough for a titular to justify his demand against any proprietor that he has intromitted with the fruits to the amount of the sum demanded. I have already pointed out that to sustain the defender's plea would practically defeat the valuation, and render recovery of the valued teind really impracticable in numerous cases of division of property by sale or subinfeudation. Large tracts of lands are frequently valued *in cumulo*, and cases may be conceived of a sub-division involving, it may be, the introduction of innumerable parties having rights of property, liferenters, feuars, &c. If the action against one for *cumulo* duty could be met by a plea of his liability being restricted to his own property, the extent of litigation to which titulars would be reduced would be enormous. To exact from the titular the trouble, inconvenience, and expense of a new action at his instance on any change of property by others whom he could not control, would be to impose a burden for which there is no warrant. Accordingly, it does not appear that any such process was ever brought by a titular, a fact conclusive as to what was the general understanding as to the law. There is no form in the books applicable to a case of an action instituted by any other than an heritor for division of *cumulo* teind-duty, and no example of such a process has been cited. The heritor who acquires a portion of ground, or the heritor who parts with a portion and retains a portion, may bring an action of division if he pleases, and may remedy the position of matters brought about by these transactions.

I am therefore of opinion that, so long as no division is brought, the remedy of the titular is to recover his *cumulo*, finding against any one who has intromitted with the fruits to the amount sued for, and I come to the same conclusion as the Sheriff-substitute, though not precisely adopting the views expressed in his note.

There remains the question of interest. On that subject I agree with the Sheriff-substitute. Where a primary liability exists, but with rights of relief which may be lost by non-enforcement, is is incumbent on a party to make a demand which may put his debtor upon his guard *tempestivè*. A demand for long arrears is not favourable. Here I

think that justice is done by making interest run from the date of citation only.

Lord Cowan concurred—His Lordship explained the nature of teinds as follows:—

Teinds are not *debita fundi;* and, did the argument of the pursuer lead to that result, it must be rejected. They are *debita fructuum;* and Mr Erskine's express authority is that, even after valuation, tithes continue *debita fructuum,* "for the valuation," he adds, "does no more than ascertain the value of the tithe, without altering its nature." The situation of the titular, however, is materially affected by the valuation. He can no longer draw his teind sheaves, but must enforce the money payment to what he is entitled under the decree of valuation. And, in like manner, the heritor has right, on making payment of the value, to intromit at his pleasure with his crop, without distinction of stock and teind. Now, on failure by the heritor to pay, the titular's remedy is not confined to mere personal action against the heritor; he may take proceedings against all intromitters with the subject of the security he has for his payment over the fruits. It would be a very idle characteristic of his claim to call it *debitum fructuum,* and yet to hold that he might be disappointed of payment by the fruits being carried off and his liability for the debt with which they are burdened be incurred by the intromitter. I cannot doubt that every intromitter with the fruits, to the extent to which he has intromitted, must be accountable for the valued teind to the titular (Stat. 1637).

Taking this general view, it cannot affect the liability that, subsequent to the valuation, there has been a division of the property by the heritor, unless there has been a division of the *cumulo* teind-duty. The inherent burden on the fruits of the estate valued remains; and the titular's residues are not affected by sales of his property, and subdivisions of it by heritors to which he was no party. And this is no hardship to the heritor for the time, because he has his remedy in the process of division of the *cumulo* duty for which the law has provided. See form in Juridical Styles; and observe the alternative principle of division there suggested.

The other judges concurred.

Agents for Advocator—Maconochie & Hare, W.S.

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

COURT OF JUSTICIARY.

GLASGOW CIRCUIT.

Thursday, April 23.

(Lord Jerviswoode presiding).

WOTHERSPOON *v.* LANG.

Police Conviction—Appeal—Glasgow Markets and Slaughter Houses Act, 28 *Vict., c.* 6—*Glasgow Police Act* 1866—29 *&* 30 *Vict., c.* 273—*Jurisdiction—Proof.* An appeal having been taken against a conviction by a police magistrate on the ground mainly of defect of jurisdiction, and a proof having been allowed of the *locus* where an alleged sale of fish took place, the proof was led and reported to the next Circuit Court, and from the proof it appeared that said sale occurred within the private premises of a railway company, but which were accessible to the police. *Held,* that the police magistrate had jurisdiction, and appeal dismissed with expenses, as these should be taxed.

This was an appeal against the sentence and conviction of a magistrate sitting in the Police Court, Glasgow. On 12th July 1867, the appellant was cited, in terms of the Glasgow Police Act 1866, to compear before the sitting magistrate, in the Central District Police Court, Glasgow, on the 16th of that month, to answer to a complaint at the instance of the respondent, Procurator-Fiscal of Court, charging him with having contravened "'The Glasgow Markets and Slaughter Houses Act 1865,' particularly § 55 thereof, and 'The Glasgow Police Act 1866,' particularly § 414 thereof, actor or art and part, in so far as on Wednesday the 10th of July current, the respondent did, in or near North Queen Street, Glasgow, the same being a public place within the meaning of the said Acts, sell or expose to sale, otherwise than by retail, a quantity of fish, namely, salmon trout, conform to citation," etc.

The appellant appeared and pleaded not guilty, and averred as a special defence that the sale or exposure for sale of fish made by him on the date libelled, was by private bargain, and on the private property and premises of the North British Railway Company, which is not, according to the intent and meaning of the Acts libelled on, a public place.

The appellant was convicted and fined £2, 2s. and expenses, and failing payment, was sentenced to fourteen days' imprisonment.

Against this conviction he appealed to the Glasgow Autumn Circuit of 1867, under sections 132 and 414 of The Glasgow Police Act 1866, and the case was heard before the Lord Justice-Clerk and Lord Cowan.

Gloag, for the appellant, argued (1) that the appeal was competently taken, as it rested on defect of jurisdiction, one of the statutory grounds; (2) that the libel was irrelevant in respect of an insufficient specification of *locus.* Under the description of "in or near North Queen Street, Glasgow," the sale might have been made in a private shop or other place belonging exclusively to a private person; (3) that the sale was in point of fact made within the private premises of the North British Railway Company, and therefore not in a public place in the sense of the Act of Parliament.

Brand, for the respondent, argued—(1) That the libel was relevant, and if it had been proved under it that the alleged offence had been committed in North Queen Street, or near that street, and in a public place, the appellant had been relevantly charged and proved guilty and duly convicted. The question was in truth not one of jurisdiction at all. That question could only arise in the event of a conviction for an offence outwith the Parliamentary limit; (2) that it was incompetent for a court of review to inquire where the offence was committed, as that was the merits of the case, which the court could not investigate; (3) that, whether the sale took place within or without the railway company's premises, it was made on a spot paved and lighted, and in all respects treated as a part of North Queen Street, and which the railway company had in no way appropriated or enclosed; and (4) it was denied that the sale took place within the private premises of the railway company.

The Court held the appeal competent, and, in re-