to any questions of the liability or non-liability to rates and taxes of the lands and heritages contained in it, refused the appeal, whereupon the appellants declared that they were dissatisfied with the determination of the commissioners, and considered the same contrary to the true intent of the Valuation Acts; and therefore they craved a case for the opinion of Her Majesty's Judges, which is here stated accordingly."

GORDON, D.-F., and BALFOUR, for the University.

SHAND and TRAYNER for the burgh of Partick, the parish of Govan, and others.

Mr BALFOUR, in accordance with a suggestion from the Court, argued on the assumption that the University was not liable to any public or parochial assessment. In face of the case of *M'Laren*, 4 Macph. 58, and of the 41st section of the Act, he could not maintain that it was a taxing act; but he held it to be an act to ascertain the value of taxable property with a view to taxation, and not for speculative purposes. The effect of entering the University property in the roll would be to create *prima facie* liability to assessment, and thus to subject the University to continual discussion and expense. The general words of the enacting clause must be construed by reference to the preamble, which showed that it was not intended to include non-assessable property. Sections 5, 9, 10, 11, 13, and 18 confirm this view. This was the only case in which the question had arisen, whether property admittedly non-assessable should be entered in the roll.

LORD ORMIDALE—We are prepared to decide this case without further argument. Many parties interested are not represented here, no notice of this appeal being required. I think that that shows that it was not intended by the act that any question of liability should be decided by the mere entry of property in the valuation roll. In regard to the argument from the preamble, I adopt entirely the statement of Sir Fortunatus Dwarris, that in doubtful cases recourse may be had to the preamble, but not where the enacting clause is, as in the present case, clear and positive. I think the purpose of the act was to ascertain the value of all the landed property in the kingdom. Such a valuation might be useful for many purposes, including future purposes. This view is borne out by section 35; and the whole machinery of the act shows that it has reference only to the question of value. Even the words of the preamble, "leviable, or that may be levied," are consistent with the view that all landed property is to be valued, since subjects now exempt from taxation may be assessed under future Acts of Parliament imposing taxes. If anything more were required, it would be found in section 41, which plainly shows that the act contemplates only valuation.

LORD MURE—I concur generally in the grounds on which your Lordship's opinion rests.

The Court accordingly affirmed the determination of the commissioners, and dismissed the appeal.

Agents for Appellants—Machonochie & Hare, W.S.

Agents for the Respondents—D. Crawford and J. Y. Guthrie, S.S.C.

COURT OF SESSION.

Wednesday, January 11, 1871.

SECOND DIVISION.

CHEAPE *v.* LORD ADVOCATE.

Teinds—Res judicata—*Action of Spuilzie—Locality.* In an action of spuilzie brought by the Solicitor of Tithes in 1773, it was decided that the teinds of certain lands belonged to the Crown as coming in place of the Archbishop of St Andrews. Thereafter, in 1798, the proprietor of said lands obtained from the Crown a tact of the teinds thereof, and a subsequent locality of the parish on which the lands were situated proceeded upon the footing that the teinds in question belonged to the Crown. In an action of declarator, concluding for decree that the teinds in reality belonged to the pursuer, and had never belonged to the Crown, and for reduction of the decree in the action of spuilzie—*held* that the decree in the said action did not constitute *res judicata*; and decree granted in terms of the conclusions of the summons.

This was an action in which G. C. Cheape, Esq., of Strathtyrum, in the county of Fife, concluded against the Lord-Advocate, as representing the Crown, and the Commissioners of Her Majesty's Woods and Forests and Land Revenues, for, *first*, decree of declarator to the effect that the teinds, parsonage, and vicarage, of his, the pursuer's, lands of Park (Pusk) and Seggiehill, and others, in the parish of Leuchars, Fifeshire, pertain and belong to him, "and that he has the only good and undoubted right and title to the said teinds, and to the full enjoyment of the same as his own absolute property, without any claim against him in relation to the said teinds, either on the part of the defender or any other person in our right and behalf, or any other person;" and *secondly*, for decree of reduction of certain interlocutors or decrees of this Court pronounced in 1775 and 1776, in an action which the pursuer calls an action of spuilzie, whereby it was, in the words of the pursuer's summons in the present case, "found that the teinds of the lands then belonging to the governor and company of the York Buildings Company in the parish of Leuchars, which included the pursuer's said lands, but excepting the company's lands known by the name of Broadlands, belonged to the Crown and not to the said governor and company.

The following narrative of the facts of the case is taken from the opinion of Lord Benholme:—"The present is an action of declarator and reduction, at the instance of Mr Cheape, of Strathtyrum, against the Lord Advocate and the Commissioners of Woods and Forests, as representing the Crown, in order to vindicate his alleged right to the teinds of certain lands belonging to him, in the parish of Leuchars, and county of Fife; which lands are thus specified in the summons—'viz.: All and whole, the towns lands, and farms of Pusk and Seggiehill, and whole parts and pertinents thereof, including in the said lands of Pusk that part of the same, formerly belonging to Sir Robert Henderson, of Fordell, Baronet, and now allocated to the other parts of the said lands of Pusk, in compensation of part of the lands of

Broadlands, allocated to the said Sir Robert Henderson; as also the shares of the commonty or Muir of Seggie and commonty of Lucklawhill, allocated to the lands before-mentioned, and whole other pertinents of the same, all lying within the parish of Leuchars and Sheriffdom of Fife.' The reductive conclusions of the summons seek to set aside certain interlocutors pronounced in the years 1775 and 1776, in an action of spuilzie, in which the Solicitor of Tithes on the part of the Crown was pursuer, and the York Buildings Company were defenders.

"The contention of the parties in the present case, as to the property of these teinds, has turned, not upon a comparison of the respective titles of the parties, as now fully produced, and standing on authentic documents; but upon certain special defences, upon which the advisers of the Crown rely, as excluding the pleas of the pursuer, founded upon what he considers as his authentic and paramount progress of feudal titles. These special defences are founded upon more than one *res judicata*, and also on the plea of the positive prescription. But in order to estimate the force and effect of these defences, it is necessary to give a sketch of the early history of these teinds.

"Previous to the Reformation, the kirk of Leuchars, together with the titularity of the teinds of this parish, belonged to the Priory of St Andrews. In consequence of that event, the whole possessions of the Priory, both temporality and spirituality, fell to the Crown, whose right to the former was affected by the Act of Annexation of 1587, and whose right to the latter appears to have been fortified by the demission of the prior and his convent. In 1606, the whole possessions of this religious house were erected, by Statute 1606 c. 95, into a temporal lordship in favour of Ludovick, Duke of Lennox; which, in 1611, was followed by crown charter and infeftment in the Duke's favour. In 1629 James Duke of Lennox, the nephew of Ludovick, disponed to David, Lord Carnegie, (who afterwards was created Earl of Southesk) the teinds of certain lands belonging to Lord Carnegie, in the parish of Leuchars; to which teinds the Duke had right, as the Lord of Erection of the Priory. This disposition, which is all-important in the present case, proceeds upon this narrative, 'For sameikle his sacred Majesty his declarit his royal will and pleasour, that every Heritor within the Kingdome of Scotland, suld have and possess the teynds of his awin proper lands, heritablie, and for ever, upon sic conditions, and for sic prices as his Majestie sall determine,' &c.; 'and likeways, for sameikle as the said David Lord Carnegie, hes pertaining to him, heritablie all and haill the lands after specifiet, lyand within the parochin of Leuchairs and Lordship of St Androus, whereof the teynds pertains to me, as ane part of my said Lordship of St Androus.' Then follows a specification of the lands belonging to Lord Carnegie in this parish, the teinds of which he had purchased from the Duke. The disposition afterwards proceeds as follows: 'Witt ye me, with advice and consent of his sacred Matie, for his Hyness' richt and interest, as said is, and of my said mother and curators under subscryvand for their interest; to be bundin and obleisit, and be thir presentis bind and obleiss me and my airis and successors, to dewlie and lawfullie infeft and sease *titulo oneroso*, the said David Lord Carnegie, his aires male and assigneis whatsumever heritablie; in all and sundrie the teynd sheaves and teynd bollis of the foresaids lands of Craigie, Rind, Balconzie, Kinstar, Segie, and of the third part of the foresaid lands of the Broadlands of Leuchars, comprehending therein the foresaids lands, callit of auld Moncurris lands, the Milntoun of Leuchars, with the meadow thairof, Pusk, Nethermuirs, Auldmures, Kinchaldies, and Wester Fotteris, and of the foresaid fourt part lands of Mortoun, with the parts, pendicles, and pertinents thereof, lyand as said is, be double infeftments,' &c.

"Amongst the teinds included in this clause of conveyance are contained the teinds of the pursuers' lands now in question. This disposition was superscribed by King Charles the First, in token of his consent. It contained procuratory of resignation, and was followed by crown precept and infeftment in favour of Lord Carnegie. It was afterwards, in 1634, followed by a ratification granted by the Duke of Lennox, on his attaining majority, in favour of the grantee, who, by that time had been created Earl of Southesk. The right to these teinds thus feudalised was transmitted *verbatim* by several special services in the Southesk family, down to 1700, when it was vested in James the Fifth Earl, who some years afterwards was attainted for his participation in the Rebellion of 1715.

"In 1635, King Charles, having obtained from the Duke of Lennox a redisposition and surrender of the Priory possessions, bestowed them upon the Archbishop of St Andrews, and his successors. The surrender was made in the form of a contract between the King and the Duke, which contained a special exception of the teinds which had been previously sold by the Duke to Lord Southesk. The signature in favour of the Archbishop (of which the subsequent Crown charter is an exact Latin translation) contains the following important exception from the mortification; 'Exceptand allways furth and fra the foirsaid dispositioun and foundatioun, all the landis and teindis exceptit in the contract maid and past betwixt his Matie and the said James Duik of Lennox, on the one and uther pairtis, contening the surrender of the said Lordschip of Sanct Androis, viz.':—Then follows a *verbatim* transcript of the teinds which had been conveyed in 1629, and which are said to have been 'disponit by the said James Duik of Lennox, to David Earle of Southesk, his aires maill and assignais, heritablie and irredeemablie, conforme to the richt and securities grantit be him to thame thairupon, to be haldin of his Matie and his successouris, for payment of the dewties and upon the conditiouns mentionat in the saidis richtis granted be the said James Duik of Lennox, to the said David Earle of Southesk, and his foirsaidis thairupoun, daitit in the monthis of Februar and Maii, sixteen hundred and twentie nyne yeares, and third day of Marche, sixteen hundred and threttie four yeares.' Thus, it will be observed that Lord Carnegie's teinds were specially excepted from the Duke's surrender to the Crown, as well as from the Crown's gift to the Archbishop. Before completing my narrative of the earlier history of these teinds, I take occasion to remark that this important deed of mortification, by which the rights of the Archbishop, and subsequently those of the Crown, as coming in place of the Archbishop, must be measured and defined, never appears to have been produced in judgment in any of the litigations in which during the last century the Crown were engaged as proprietors of Bishops' teinds. It

seems to have been produced for the first time in the action raised against the Crown by Lindsay of Balcarras, in 1851. The teinds originally conveyed to Lord Carnegie in 1629, having ultimately come to be divided between him and the predecessors of the present pursuer—the question raised by Lindsay's recent action was on the merits precisely identical with that which your Lordships have to determine in the present case.

"I am free to confess that the production of this deed, bearing on its face an exception so hostile to, or rather destructive of, the pretensions of the Crown, made a deep impression on my mind when, as Lord Ordinary, the action at Lindsay's instance came before me for judgment. The interlocutor which, on 27th February 1857, I pronounced in favour of the pursuer Lindsay, was the result of that impression—an impression which appears to have been shared in by the then advisers of the Crown; since that interlocutor—disposing as it did of by far the largest portion of the Southesk teinds—was not taken to review, but at once acquiesced in. I now resume my sketch of the history of the teinds in question.

"The first litigation in which the Crown were engaged in reference to these teinds was the process of locality following upon an augmentation of stipend obtained by the minister of Leuchars in 1708. A detailed account of the procedure in this locality was given by the Officers of State in the subsequent locality of 1794. They state that Lord Southesk appeared and produced his heritable right of teinds. That right, standing as it did upon feudal titles for nearly a century, was not disputed by the advisers of the Crown, who, however, objected to the Earl's claim to a total exemption from allocation. They contended that the rest of the teinds of the parish, which the Crown held as coming in place of the Archbishop, ought not to be encroached upon by allocation, even in competition with the heritor's heritable right to his own teinds. In that contention the Crown appears to have prevailed.

"It is important, however, to observe the real question between the parties; since, as will be afterwards shown, the very same question was that on which the parties were at issue in the ultimate phases of the process of locality in 1794. The Court distinctly defined the point upon which the question depended by ordering 'Her Majesty's Advocate and the procurator for the Earl of Southesk to be ready to debate said day whether the tithes belonging to the said Earl by virtue of an heritable right, or the teinds belonging to Her Majesty in manner foresaid, were to be first allocated; and the same order was renewed of this date peremptorie.' Before a final decision was given on the question thus debated, the Earl of Southesk was attainted. On 15th December 1717 the Lord Ordinary reported his opinion that the teinds belonging to the Crown should be relieved of allocation, 'and that for making up the stipend modified there should be allocated upon the teinds of the lands pertaining to the said late Earl of Southesk, one chalder of bear and £77, 15s. Scots. The Court having advised the locality, approved thereof, and decerned accordingly.' In consequence of his accession to the Rebellion of 1715, James, fifth Earl of Southesk was attainted, and his estates forfeited; and in 1720 they were purchased by the York Buildings Company. The company bought the estates upon a rental, at a certain number of years' purchase. That rental, in reference to the barony of Leuchars, was calculated without deduction on account of teinds, and the company naturally insisted either that in the titles to be granted to them there should be contained a conveyance of the teinds, or else a deduction given of one-fifth of the calculated price. In their ignorance as to the extent of the forfeited Earl's rights, they insisted that the Crown was the proprietor of the teinds, and that as the Crown was to receive the full price, the Barons of Exchequer, as coming in place of the commissioners of forfeited estates, should grant them a disposition containing a right to the teinds. A reference having been made to the Lord Advocate of the day, Duncan Forbes, his Lordship gave his opinion in favour of the company, although not upon the grounds alleged by them. His Lordship remarks upon the suggestion that it was a possible case these tithes might belong to the Crown, that upon a most careful inquiry no such thing could be discovered when that matter had lately been canvassed before the Barons. But as the company had paid a full price, comprehending the price of the teinds as well as the stock, his Lordship was of opinion that the charters to be granted in pursuance of the sales made by the Commissioners ought to comprehend the teinds.

"It was more than twenty years before this matter was finally adjusted. The exception of the Leuchars teinds contained in the Crown's rights, as derived from the Archbishop, at first suggested that some subject must be proprietor of these teinds from which the Crown were thus excluded. Ultimately it was discovered, probably from a reference to the retour of the forfeited Earl, that he had been himself the proprietor of his own teinds. Accordingly, in the year 1744 the barons granted in favour of the company a disposition in which was contained a clause conveying the teinds exactly in the same terms as were contained in the original conveyance to Lord Carnegie.

"By this time the affairs of the York Building Company had got into confusion. In 1727 they had been obliged to execute a disposition of their whole estates in Scotland in favour of their creditors, certain life annuitants, for whom George Andrie, Esq., acted as trustee.

"In 1773 an action was raised, nominally against the company, but really against the creditors, the annuitants, and their trustee, by the Solicitor of Tithes, to which it is necessary particularly to attend.

"The summons is entitled a summons of spuilzie, proceeding upon an inhibition of teinds. Yet it cannot be considered as involving a mere possessory question, since it contains petitory conclusions, craving decree against the company 'to make payment to the pursuer, for our behoof, of the sum of £160 sterling, as the value of the tithes of the barony of Leuchars and Leuchars Forbes, and of the tithes of the lands of Auldmyres Fordell, Pusk, Whitecroft, then part of Broadlands, and other lands belonging to them lying in the said parish of Leuchars, diocese of St Andrews and shire of Fife, excepting the tithes of such parts of the said lands and barony to which the said company have heritable rights; and the said sum for crop and year 1772, and the like sum yearly in time coming.' The ultimate result of the action was an interlocutor of the Lord Ordinary (adhered to by the Court), by which his Lordship 'Finds that the teinds of the defender's whole lands libelled, excepting of the farm of Broadlands, to which it is acknowledged they have an heritable

right, did belong to the Archbishop of St Andrews, and now to the Crown, as come in place of the Archbishop; and therefore, with the exception of the lands of Broadlands, decerns, conform to the conclusions of the libel.'

"Before considering the effect of this decree as a *res judicata* in the present action, it is necessary to attend to the pleadings of the parties by which it was brought about.

"In the first place, the summons subsumes—'That where by the laws and Acts of Parliament abolishing Episcopacy in Scotland, we have undoubted right to the tithes, parsonage and vicarage, which belonged to the late archbishops, bishops, and other beneficed clergy in Scotland, and amongst others to the tithes after mentioned lying in the parish of Leuchars.'

"The ultimate decision proceeds upon this ground, that the defender's teinds 'did belong to the Archbishop of St Andrews, and now to the Crown, as come in place of the Archbishop.'

"We know now, from the production of the Archbishop's charter, lately made by Lindsay of Balcarras, that this statement of the Solicitor of Tithes was altogether incorrect, and that the judgment of the Court proceeded upon an important, indeed an all-important, error as to a matter of fact. It was not merely that the Archbishop's grant did not contain these teinds, but that it specially excepted and excluded them. The pursuer, the Solicitor of Tithes, was careful not to produce the deed that would at once have put him out of Court, although upon that deed his alleged title depended; and the defenders were thus in no condition to dispute his confident assertion of the right of the Crown to these teinds.

"But if, in regard to the Crown's right, the Solicitor seems chargeable with want of candour, his statements in his pleadings as to the defender's titles involve him in important misrepresentation. The pursuer observed that the defender had not produced the disposition granted by the Barons of Exchequer, thirty years before, in favour of the company, or any copy of it; and this was true. The creditors of the company and their trustee appear to have been altogether in ignorance of the contents of this disposition, of which they had no full or correct copy. But the Solicitor seems to have been in possession of a copy of it, since he mentions in his pleadings the exact date of the disposition, 25th January 1744. Instead, however, of producing the disposition, he undertook to lay before the Court a full statement of its whole contents. We now know that this disposition contained the clause, derived from the Southesk retours, conveying expressly the Leuchars teinds in favour of the company; and hence it is startling to observe the bold and decisive terms in which the Solicitor denies that it contained any grant of the teinds to which his action related. In his answers to the defender's condescendence he states:—'When the late Earl of Southesk was forfeited upon his accession to the Rebellion in 1715, he only forfeited to the Crown his lands. He neither did nor could forfeit tithes or patronages which *ab ante* belonged to the Crown *qua* successor to the Archbishop of St Andrews, and the Barons of Exchequer, as they had no power under the forfeiting Acts to sell any estates but those that were forfeited, so they neither meant to sell, nor did they sell and dispone, the tithes of the estate of Leuchars or the patronage of the kirk of Leuchars, which never belonged to the family of Southesk, but to the Archbishop. Had the company produced the disposition itself, or a full copy of it, this would have appeared to your Lordship. Meantime, it will not be denied that it stands thus.'

"He then proceeds to detail the various particulars contained in the barons' disposition, the last of which is, 'The farms or rents of tenants of the barony of Leuchars and Leuchars Forbes, lying in the shire of Fife.' The answers then proceed thus:—'This is the list of the particulars of the estate of Southesk, certified by the Commissioners to have been purchased by the York Buildings Company,' upon which the disposition proceeds, and your Lordship will observe that, except in the second and third articles, viz., Kinnell and Fearn, no teinds are enumerated; the others consist only of farms and rents of tenants, and in this last predicament stands the barony of Leuchars, which, for the reasons above assigned, could not be otherwise.

"The defenders seem to be sensible of this, and therefore they do not found upon any direct disposition to the tithes, but upon this, that the disposition contains the advocation, donation, and rights of patronage of the parish of Leuchars.

"What is here stated as to the defender's pleadings is perfectly true. In their utter ignorance of the contents of the Baron's disposition, they abandon all pretension to a direct conveyance of the teinds, and resort to the alternative plea, which was at once inconsistent with the contents of the disposition, and fatal to, because exclusive of, their own true rights. They set forth in their condescendence as the only ground of their defence, that 'by the disposition granted by the Barons of Exchequer in favour of the said company, the advocation, donation, and right of patronage of the parish of Leuchars, in which the lands lie, is conveyed, together with the lands to the company, in virtue of which right they have good and undoubted title to the tithes of all their lands in the said parish.'

"This defence was met by the pursuer by the allegation that the patronage of Leuchars was not conveyed by the Baron's disposition. In this state of the pleadings—no titles of either party or authentic copy of them having been produced in process, the interlocutor of the Lord Ordinary was pronounced.

"The defenders now saw the necessity of making some efforts to recover the titles on which the rights of their authors, the company, depended. They therefore presented a representation in which they craved a deligence. In this paper, after setting forth the judgment against them, they say 'Of these interlocutors the representers must again crave your Lordship's review. They were hopeful before this time they would have been able to satisfy your Lordship that the teinds of their lands, which were claimed by the Solicitor of Tithes, were conveyed to them along with the stock. For this purpose they have been making a search after some papers, which it is believed will throw some light upon the subject. To recover some of these a diligence will be necessary, and it is believed the pursuer will have no objection to the delay which this will occasion.

"'The representers being unwilling to lay their cause again before you until they have obtained every possible information, are persuaded your Lordship will have no difficulty in allowing them a proper time to make every necessary inquiry, that the cause may be fully before your Lordship, and

they are hopeful that the writings they will recover will be sufficient evidence that the teinds of the lands libelled were conveyed to them along with the stock.

"'May it therefore please your Lordship to grant letters of incident diligence, at the representers' instance against havers, for recovering such papers as may tend to show their rights to the teinds in question; to be reported the first sederunt day of January next, and in the meantime to stop extract.'

"This does seem to have been only a reasonable request, considering the circumstances in which the annuitants and their trustee stood; but strange to say, it was of this date (23rd Jan. 1776) refused. And consequently, in their appeal to the Court, the Defenders could do no more than repeat the mistaken arguments, upon which in their ignorance of the truth they had been led to rely. On the other hand, the pursuer persisted in his system of misrepresentation. In the very last pleading in the case, being answers to the reclaiming petition for the defenders—the Solicitor, after stating that 'the defenders have reclaimed to your Lordships, and the sum of their defence is that their disposition in 1744 mentions teinds, and gives them right to teinds,' proceeds to say—'The substance of the answer to this defence is, that though their disposition of 1744 includes the teinds of other estates lying in other parishes, purchased in the same lot, yet it does not contain the teinds of the estate of Leuchars, lying in the parish of Leuchars, which teinds neither were sold to them nor could be sold to them, as they were no part of the forfeiture.'

"He then proceeds to repeat his erroneous and defective description of the barons' disposition of 1744, which he concludes in the same words as he had made use of in his former pleadings, as follows:—'This is the list of the particulars of the estate of Southesk, certified by the commissioners to have been purchased by the York Buildings Company, upon which the disposition proceeds, and your Lordships will observe that, except in the second and third articles, viz., Kinnell and Fearn, no teinds are enumerated. The others consist only of farms and rents of tenants, and in this last predicament stands the barony of Leuchars, which for the reasons above assigned, could not be otherwise.' Thus the Court were kept in the same ignorance of the titles and true rights of the parties as the Lord Ordinary had laboured under.

"Having got his decree for £160 sterling, as the true value of the teinds, the Solicitor was pleased to abandon it, and to accept a comparatively inconsiderable victual tack duty. The defenders were constrained to accept from the Crown a tack of the teinds of the barony of Leuchars. It was granted to George Andree, as trustee for the annuitants; but it is important to observe that he insisted on the tack containing a clause 'saving and reserving to the said George Andree, and his foresaids, and to the said company, all heritable rights to the said teinds, if any be, which shall be hereafter discovered.'"

The pursuer's predecessor and author James Cheape, and his successors, possessed the said teinds under this lease of date 5th July 1798 until 1851, when he became aware of his heritable right to the teinds in question under the deed of 1629 in favour of Lord Carnegie, and also of the disposition of 1744, in favour of the York Buildings Company, and he accordingly raised the present action for declarator and reduction as above set forth.

The Lord Ordinary (ORMIDALE), finding "That any right the pursuer alleges he has to the lands referred to, and the teinds thereof, has, on his own showing, come to him and his authors and predecessors, and been derived by them from the said York Buildings Company: Finds that the said company were parties litigants, as defenders, in the foresaid action, called by the pursuer an action of spuilzie, and that it was in said action adjudicated and determined by the interlocutors and decrees now sought to be reduced; that they had no heritable right to the teinds in question, but that the same belonged to the Crown: Finds that no competent or sufficient grounds have been established by the pursuer in the present action for setting aside or reducing the said interlocutors or decrees now challenged: Finds also that in a process of locality of the parish of Leuchars, in which Mr James Cheape, then the proprietor of the pursuer's lands, and a predecessor and author of the pursuer, was a party litigant, it was adjudicated and determined by interlocutors or decrees pronounced in 1794 and 1795 that he had no heritable right to the teinds in question, but that the same were bishops' teinds, and belonged to the Crown as in place of the Archbishops of St Andrews: Finds that the last-mentioned decrees or interlocutors pronounced in said process of locality have not been challenged or sought to be reduced by the pursuer in the present action: Finds that in 1798 the pursuer's author and predecessor, James Cheape, applied for and obtained from the Crown a tack, dated 5th July 1798, of the teinds in question, which tack expressly bears that said teinds 'formerly belonged to the Archbishops of St Andrews as part of their patrimony, and are now in our (the Crown's) hands, and in our gift in virtue of the Acts of Parliament abolishing Episcopacy in Scotland,' and whereby the said James Cheape undertook and obliged himself and his heirs succeeding him in the foresaid lands, to pay a yearly tack-duty of 14 bolls, 3 firlots, 2 pecks and 2 lippies of victual: Finds that under and in terms of said tack the pursuer or his authors and predecessors held and possessed for the nineteen years thereof the teinds in question, and paid therefor to the Crown the stipulated tack-duty, and that on the expiry of the said nineteen years the pursuer or his authors and predecessors continued, by tacit relocation, in like manner to possess, down till 1851, the teinds in question, and to pay yearly therefor to the Crown the same duty: Finds, in these circumstances, that as regards the pursuer's conclusion for declarator, the defender's plea of *res judicata* is well founded, and sustains the same accordingly; and that, as regards the pursuer's conclusion for decree of reduction, no competent or sufficient grounds in support thereof have been established, and repels the reasons of reduction accordingly; and generally assoilzies the defender from the whole conclusions of the summons, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report."

In his Note his Lordship observes—"Whether the teinds in dispute were in the seventeenth century disponed by the Crown to the Duke of Lennox, from whom they have been transmitted through various parties, and in particular through the family of Southesk and the York Buildings Company, to the pursuer and his predecessors and authors, as

proprietors of the lands of Park (Pusk) and Seggiehill, as maintained by the pursuer, or whether no such disposition and transmission of these teinds ever were or could competently have been made by the Crown, are questions which, according to the views adopted by the Lord Ordinary, as now to be explained, need not be inquired into, and indeed must, agreeably to these views, be held to be excluded from inquiry. He holds that the question whether the teinds in dispute are now to be dealt with as belonging to the pursuer or to the Crown must be determined in favour of the Crown, in respect that it is *res judicata* that they belong to the Crown, and in respect also, and separately, that any right the pursuer or his authors and predecessors may ever have had to the teinds in dispute, has, on the one hand, been lost to them, and, on the other hand, been established in the Crown by the operation of the long negative and positive prescriptions.

"The Lord Ordinary must own that he has been unable to understand how, having regard to the narrative now given, it can be maintained that the question, whether the teinds in dispute belonged to the Crown or to the authors and predecessors of the pursuer, was not raised and determined in the process referred to, and if so, how the judgment by which the question was determined should not now have the effect of *res judicata*. The parties to that process of spuilzie were the Crown and the York Buildings Company, from and through whom the pursuer admittedly derives any right he can possibly have to the disputed teinds, and, as has been shown, the very question of right to these teinds, and no other question, whether they belonged to the Crown or the York Buildings Company, was discussed and determined. It seems, therefore, irrelevant and of no importance to argue, as the pursuer did at the debate, that an action of spuilzie is essentially a possessory one, and that a question of possession might be determined on considerations irrespective altogether of the matter of right. To such an argument it is enough to remark that the question of right was raised and *in terminis* decided by the Court, and this being so, it cannot avail the pursuer to say that the essential and immediate object of an action of spuilzie is to clear and determine the possession merely, for it may very well be, and is shown to have been in the instance referred to, that for and in the determination of such a question the matter of right was brought into contention and made to form the sole bases of the judgment. Nor can it be maintained in law that a judgment which has been pronounced on a question of right, relevantly and fairly raised and determined in an action, although only incidental to the more immediate object of that action, may not constitute *res judicata* in a subsequent action between the same parties or their representatives, instituted for a somewhat different object, but raising and depending on the same question of right; see the cases of *Anderson* v. *Gill*, 22d December 1860, 23 D. 250, and the recent case of *M'Alister* v. *Stevenson, M'Kellar & Co.*, 18th October 1870, 8 Scot. Law Rep., p. 5.

"The defender, besides relying, in support of his plea of *res judicata*, on the interlocutors or decrees in the spuilzie process, also appealed to and relied on certain interlocutors or judgments in a subsequent process of locality of the parish of Leuchars, which depended in 1794 and 1795. Although Mr Lindsay, to whom belongs a portion of the lands acquired from the York Buildings Company, at the judicial sale of their estates seems to have taken the leading part in the discussion in the locality process now referred to, Mr James Cheape, the present pursuer's author and predecessor, also appeared in the process and made himself a party to the discussion which took place and the interlocutors and judgments which were pronounced in such a way as to render these interlocutors and judgments *res judicata* against him. Mr Lindsay, indeed, stood precisely in the same position in the process as the pursuer's author and predecessor, Mr James Cheape, and whatever pleas were available to the one were equally available to the other.

"It thus very clearly appears that in the process of locality referred to, in which the Crown and Mr James Cheape, the pursuer's author and predecessor, were litigating parties, a scheme of locality was, after a full discussion and controversy, settled by the Court on the footing that the teinds now in dispute belonged to the Crown, and that Mr Cheape held no heritable right to them; and that such a judgment in one process of locality must be held to be *res judicata* in a subsequent process of locality where the same question is sought to be brought into controversy, was so recently as the beginning of the present month (November 1870) decided by the Second Division of the Court, affirming an interlocutor to that effect of Lord Gifford in the case of *Bonar* v. *The Crown*. A report of this decision has not as yet been published, so far as the Lord Ordinary is aware, but the interlocutor of Lord Gifford, which was affirmed by the Court, and the nature of the proceedings and judgment to the effect now stated, were brought under his notice and commented on at the debate. The principle, indeed, had been recognised and given effect to in previous cases. In the case of the *Duke of Buccleuch* in locality of Inveresk, 10th November 1868 (7 Macph., 950), an admission by a common agent in a locality as to the exemption of certain lands on a *decimæ inclusæ* right was held binding on all the heritors in a subsequent locality, thereby giving effect to the principle recognised in the *Earl of Hopetoun* v. *Ramsay*, as decided in the House of Lords 22d March 1846 (5 Bell's Appeals, 69), where a consent by a common agent was held binding on the general body of heritors, although no express authority had been given; and it had been previously settled in *Blantyre* v. *the Earl of Wemyss*, 22d May 1838, that a judgment in one process of locality is binding, not merely in that locality, but formed *res judicata* in subsequent localities of the same parish.

"The Lord Ordinary is therefore of opinion, as well on principle as authority, that the plea of *res judicata* stated in the present litigation on the part of the Crown is well founded. The circumstances which here occur are indeed peculiarly favourable for giving effect to the plea, for not only was the question which has been raised in the present process raised and determined in the process of spuilzie which has been referred to, but again in the subsequent process of locality, which has been also referred to; and it is not unimportant to remark that the judgment in the spuilzie process was referred to and founded on as forming *res judicata* in the locality process.

"If the Lord Ordinary be right so far, there is an end to the pursuer's contention. But there is, besides, the separate and independent defence to the pursuer's action, founded on the simultaneous

running of the long positive prescription in favour of the Crown, and of the long negative prescription against the pursuer. That the pursuer's author and predecessor, Mr James Cheape, took from the Crown, in 1798, the tack, No. 19 of process, of the teinds in question, and paid therefor the stipulated duty from that year to 1851, a period of upwards of fifty years, is not only not disputed, but is matter of express admission in the joint-minute by the parties, No. 28 of process. And the tack so taken and acted on by the pursuer and his authors and predecessors expressly bears that the teinds in question 'formerly belonged to the Archbishops of St Andrews, as part of their patrimony, and are now in our (the Crown's) hands and in our gift, in virtue of the Acts of Parliament abolishing Episcopacy in Scotland.' That possession, therefore, was held by the Crown for greatly more than the prescriptive period, and that there was no possession by the pursuer or his authors and predecessors, except as tenants of the Crown, for the same period, is beyond all question. It was said, no doubt, for the pursuer, that he and his predecessors possessed in virtue of charters they had obtained from the Crown, and that, in the face of these charters, and in respect of the divestiture thereby effected, the Crown could not plead prescriptive possession as against the pursuer, and, indeed had not a habile title to which their possession could be ascribed. But the Lord Ordinary could not give effect to this reasoning, which he considers to be plainly fallacious. There is no evidence whatever of possession by the pursuer and his predecessors during the prescriptive period referred to, in virtue of charters from the Crown, for any Crown charters which have been granted subsequently to the commencement of the prescriptive period were merely charters by progress. But it is a well-established principle of law that superiors cannot be prejudiced or their rights affected by the granting of charters by progress, *Forbes*, 28th November 1673, M. 6517; and *Aytoun* v. *Magistrates of Kirkcaldy*, 4th June 1833, 11 Sh., p. 676. And it is an equally well-established principle of law that a superiority title *jure coronæ*, even where there is no other, is of itself sufficient for the operation of the positive prescription—*Magistrates of Peebles* v. *Officers of State*, 25th November 1800, Hume's Decisions, p. 457; and so in regard to the title of a subject superior—*Robertson* v. *Duke of Atholl*, 16th February 1808, Hume's Decisions, p. 463.

"It only remains to be noticed that the judgment of Lord Benholme in an action similar to the present, which depended before his Lordship a few years ago, at the instance of Mr Lindsay, who, it has been mentioned, has right to other lands in the parish of Leuchars, acquired as the pursuer's were from the York Buildings Company, was very much founded on by the pursuer at the debate. It appears that Lord Benholme decided in that action a similar question to the present in favour of Mr Lindsay, but it does not appear that the plea of *res judicata*, although stated for the Crown in the record in that case, was pressed in argument as here, and most certainly no mention is made of such a plea by Lord Benholme either in his interlocutor or relative note. Besides, in that case, although there was, as here, a tack obtained from the Crown by Mr Lindsay, and payment by him of the tack-duty for the prescriptive period, the tack in that case—differing most essentially from the tack in the present case—contained a clause 'saving and reserving to the said Robert Lindsay and his foresaids all heritable rights to the said teinds, if any be, which shall hereafter be discovered.' It was with reference to, and in respect of this saving clause that Lord Benholme disregarded the pleas of the Crown founded on prescription. But as the pursuer has no such saving clause in his tack to found on, Lord Benholme's *ratio decidendi* has no application to the present case."

Mr Cheape reclaimed.

FRASER and ADAM, for him, argued, *inter alia*, that no question affecting heritable rights could be so finally decided in a possessory action, such as an action of spuilzie, so as to become *res judicata*; and relied upon the following authorities, *Leven* v. *Cartwright*, 23 D. 1061; and *Gray* v. *M'Hardie*, 24 D. 1047; Digest B. 44, L. 14, § 3; Stair, App. 797, More's Edition.

The SOLICITOR-GENERAL and IVORY in answer.

At advising—

LORD BENHOLME, after giving the narrative above quoted, proceeded:—The effect of this important reservation in the tack of 1798 was plainly this—to render the previous judgment a mere conditional decision, liable to be opened up by a discovery of the titles hitherto beyond the reach of the defenders. The judgment took no higher effect than attaches to a interlocutor in a multiplepoinding, preferring one of the claimants *for aught yet seen.*

It only remains to observe that the production by Lindsay of Ballcarras of the disposition of the Barons of Exchequer in the locality of 1794, with its clause of teinds in favour of the company—and his subsequent production of the conveyance to Lord Carnegie, and the several retours of the Southesk family, by which the Baron's disposition was fully and finally justified—put an end to the legal effect of the supposed *res judicata* of 1776. The condition upon which the defeasance of that judgment depended was thus purified; and the rights of the York Buildings Company in the teinds in question finally ascertained.

Even if the alleged *res judicata* had been pronounced in a proper action of declarator, and had not been made defeasible upon the discovery and production of emergent titles, I should have thought, in the peculiar circumstances of this case, it would have been reducible upon the general principles of the doctrine of *res judicata*. Mr Erskine (iv. 3, 3) observes "In the opinion of Stair, B. 4 t. 1, sec. 44, and of Mackenzie, the Session may also reduce their own decrees upon the emergence of any new fact or voucher in writing not pleaded formerly by the party, if it shall appear that it was not known to him before decree, or that he did not omit it willfully, with a view to protract the cause. Nor is this opinion in any degree inconsistent with the above quoted act of regulations 1672; for a defence of which a party is ignorant, and which therefore it is not in his power to plead, cannot be called competent and omitted."

Lord Stair's work contains several passages which justify Mr Erskine's statement of his Lordship's opinion. In book 4, t. 1, sec. 44, he observes "The Lords suspend sometimes, and more frequently reduce their own decreets, upon compearance, by proponing new matter of facts, either emergent since the decreet, or truly come to the proponer's knowledge thereafter, although it was competent to have been proponed in the decreet; if evidence be given that it was not *dolosè* omitted, to protract the plea."

And in the Appendix to his work, (App. 8, 2), in treating of suspensions, he observes: "When the charger answers, that *res est judicata*, the same point being proponed in the principal cause and repelled, or in another decreet produced; against this it may be objected, that the reason of suspension is upon the matter emergent or new come to knowledge after the decreet, which therefore cannot be excluded thereby."

The case of *Graham* v. *Maxwell*, 20th May 1814 (Brown's Synopsis, p. 1805), is reported under the following rubric, "To render the matter of a judgment a *res judicata*, so as to make this a valid plea, it is necessary not only that the subject and parties, but that the grounds of judgment or *media concludendi*, should be the same."

Lord Elchies reports the case of the *Creditors of Winram*, 6 Jan. 1735, under this rubric—"Interlocutor founded upon an error in fact is not binding as a *res judicata*, but may be altered, and was altered after several years.' Lastly, Lord Kames, in his Elucidations, expresses the same doctrine in these words:—"The other branch of unjust decrees is where they are founded upon an error in fact. All controversies that can be brought before a court of justice arise from facts; and if judgment be given upon an error in fact, it is set aside as not being a judgment upon the case in controversy." In the present case the decree in 1774 was founded upon an essential error in fact. The decreet itself embodies the erroneous statement that the teinds in question "did belong to the Archbishop of St Andrews, and now to the Crown as come in place of the Archbishop;" whereas the clause of exclusion in the title of the Archbishop demonstrated that the Crown, as coming in place of the Archbishop, had no right to these teinds.

Again, the discovery of the new titles of the defender, and their production in process, were sufficient of itself to render the *res judicata* ineffectual. On the pursuer's record in this case it is expressly averred, in article 8 of the condescendence, that at the time of the decree of 1774 "the origin and true state of the title to the teinds of the said lands was not known to the company, nor pleaded in the action of spuilzie above mentioned." To this the Officers of the Crown answer,—"Denied that the true state of the title was unknown at the time mentioned to the said company. *Quoad ultra* admitted."

But from what has been already said it is evident that the company and their creditors, or those acting for them, were altogether ignorant of these important documents, in regard both to the titles of the Crown and their own. And it is equally clear that their ignorance of both was caused at once by the reticence and by the misrepresentations of the Solicitor of Tithes. I am therefore of opinion that the decree of 1774 is not *res judicata*.

In the year 1782 the York Buildings Company's estate of Leuchars was brought to judicial sale. Part of it was purchased by the author of Lindsay of Balcarras; and another part by the predecessor of the present pursuer. Each of these lots contained a portion of the lands, the teinds of which were conveyed to Lord Carnegie in 1629. Feudal titles had been made up by the pursuer and his predecessor to his portion of the lands and teinds. These teinds form the subject of the present action.

In 1794 a decree of locality was pronounced, which is alleged by the defenders to be *res judicata* in the present case.

This allegation seems to be unfounded. In that locality no interlocutor was pronounced touching the right of property of the teinds in question. The only matter decided was that Lindsay of Balcarras and Mr Cheape of Strathtyrum were not entitled to be exempted from allocation in regard to the teinds which they held by heritable right in competition with the other teinds of the parish held by the Crown as bishop's teinds.

In the course of this process Lindsay had produced the disposition of 1774, by the Barons of Exchequer. He quoted the special clause as to teinds, and he afterwards recovered and produced in process the disposition to Lord Carnegie of 1729, and the Southesk retours connected therewith. The Crown still made a show of defending their position; for they still kept in the background the fatal clause of exemption contained in the Crown's rights, derived from the Archbishop, corresponding with, and as it were fitting into, the clause of teinds in favour of Lord Carnegie. But now they were content to rest their plea in the matter of allocation on the same grounds on which they had been successful in the locality of 1711. They referred to the decree in that locality as embracing the very point which they had now to maintain. They even repeated the very argument which they had employed on the former occasion, and referred to the cases of *Arngask* and *Lochnell* as decisive of the question. I may here refer to one or two passages in the pleadings of the Crown which fully ascertain the argument upon which they relied, and upon which the Court proceeded. In a representation dated 3d July 1793 the following passage occurs:—"The representers do not mean at present to answer the objections for Mr Lindsay founded upon the supposition that the family of Southesk had an heritable right to the tithes of their lands in this parish prior to the forfeiture of that family, or the after title which the York Buildings Company are said to have acquired to these tithes from the Barons of Exchequer in the year 1744; it is sufficient here to observe that if such heritable right should be established, then, agreeable to the established law as fixed by repeated judgments of the Court, the tithes thus heritably acquired must be localled upon, in the first place, before the Archbishop's tithes now belonging to His Majesty, as come in his place, can be touched." And in the very last pleading given in for the Crown, being answers dated 9th August 1775 to a petition for Lindsay, the following passage occurs:—"The decisions in the cases of *Arngask* and *Lochnell* ought certainly to have the effect of settling the law, if the law is ever to be fixed by the judgments of this Court. Both these cases were argued by the ablest counsel at the Bar, and submitted to the consideration of the Court in every way by which information could be obtained; they were first stated to the Court on informations, and argued in presence, and next stated in petitions and answers; and the judgments were not made to rest upon particular facts and circumstances, but on the general abstract question, evidently formed on purpose to settle the law, and regulate the practice in time coming. The respondents therefore conclude that your Lordships will not be inclined, without very strong and pregnant reasons, to alter judgments pronounced with so much solemnity and deliberation, and sanctioned by uniform practice since the

period of these decisions. Mr Erskine (b. ii, t. 10, § 53) considers these decisions as fixing the law in a competition betwixt tithes belonging to the Crown, as coming in place of the bishops, and tithes held by the heritors in virtue of an heritable right,—'Where part of the tithes of a parish belong to the bishop, and part to the landholders by virtue of heritable rights from lay titulars, the tithes belonging to the landholders must be exhausted before any part of the stipend can be localled upon the bishops' tithes; because bishops are considered a superior order of ministers; *Minister of Arngask* v. *The Heritors*, 13 July 1715; *Officers of State* v. *Campbell of Lochnell*, 7 March." It is very plain, therefore, that the decision in this locality is not *res judicata* in the present case.

The last special defence is a plea of positive prescription. The possession of the teinds alleged by the Crown is by certain tacks granted in 1797 to Lindsay of Balcarras and Cheape of Strathtyrum of their respective teinds. Which teinds above mentioned the tacks declare "pertained of before to the late Archbishops of the diocese of St Andrews, and are now fallen, and come into our hands, and at our gift and disposal, as come in place of the said Archbishop of the said diocese, by virtue of several Acts of Parliament abolishing Episcopacy."

This narrative, at the time it was framed, was plausible, and might remain so whilst the Archbishop's deed of mortification was withheld. But in the late litigation at the instance of Lindsay of Balcarras, that disposition was produced and laid before the Court. Now, in reference to the Crown's plea of positive prescription, that disposition is absolutely exclusive of the teinds which the Crown seeks to prescribe.

In positive prescription a habile title is absolutely necessary—a title which not only quadrates with the nature and evidence of the possession, but is, in its own terms, capable of comprehending the subject possessed. A bounding charter has frequently been held to be no title for prescription beyond the bounds set forth. But this is, perhaps, the first case in which a party has attempted to plead prescription upon a title which absolutely and specially excludes him from the very subjects sought to be acquired.

At the last debate the advisers of the Crown seemed willing to abandon the title of the Crown as derived from the Archbishop; and the suggestion was made that perhaps the Crown might fall back upon the *jus coronæ* as a title of prescription.

This certainly appeared at the time to be, in regard to teinds, a novel idea, countenanced, so far as I know, by no authority.

The theory of our feudal constitution, no doubt, ascribes to the Sovereign a primary property in all lands within the kingdom, and in many rights connected with lands, the right of every subject being in these, secondary and derived.

Hence the *jus coronæ* vests in the Crown an unwritten and universal title to these subjects. The Crown is the supreme superior of all lands in Scotland; and, as the overlord or *dominus directus*, the Sovereign is enabled to plead on this unwritten title in questions of positive prescription. But no author, so far as I know, has said that the *jus coronæ*—the Sovereign's unwritten and universal title—applies to teinds; and, in my opinion, all principle, as well as theory, is against the idea.

"The King's right, *jure coronæ*," says Lord Stair, "is a sufficient title to lands either in superiority or property without seizin." The same author observes—"Teinds are acknowledged with us to be the patrimony of the kirk;" and his Lordship refers to the Act 1567, c. 10, as containing an authoritative statement of this doctrine. The *jus coronæ* probably applies to all the temporalities of the Church, but these his Lordship distinguishes from "the teinds, the spirituality as flowing from a spiritual ground of Divine right." The Church did not derive the teinds, their spiritual patrimony, from the Sovereign. That patrimony was founded, if not on Divine right, as some authors contend, at least upon the acknowledged constitutional law of most Christian countries.

Whatever teinds are possessed by the Crown are held by singular and secondary title—a title derived mediately or immediately from the Church.

The Crown acquires teinds by contract or demission, by the annihilation of ecclesiastical establishments under the maxim *Quod nullis est, fit domini regis*, or by the attainder of individual titulars, in which case the law of escheat operates in favour of the Sovereign. But in every case the Crown's right is limited, circumscribed, and qualified by the titles of its author.

It is perhaps unnecessary to pursue this speculation any farther, for, after all, even although such universal and unwritten title in the teinds could be ascribed to the Sovereign, it is difficult to see how that could be of any avail in the present case. It is difficult to understand how such title could be conjoined so as to form a prescriptive right with the possession constituted by tacks, which *in gremio* profess to be granted by virtue of another—a special—and, as it now appears, an insufficient and inhabile title.

Upon the best consideration, therefore, which I have been able to give to this part of the case, I am unable to sustain the Crown's defence of positive prescription.

I have therefore to propose to your Lordships that the Lord Ordinary's interlocutor should be altered, the defences repelled, and judgment pronounced in favour of the pursuer.

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

Agent for Defender—Donald Beith, W.S.

Friday, January 13.

(Before seven Judges.)

SIBBALD'S TRUSTEES *v.* GREIG AND OTHERS.

Trust — Testament—Residue Clause — Revocation—Necessary Implication. Terms of a deed which *held* (before seven Judges, dissenting Lord Cowan) to operate a revocation by necessary implication of nineteen testamentary bequests of a previous date, found in the repositories of the truster.

Expenses. A number of claimants who appeared and successfully maintained the same case, *held* entitled among them to the expense which would have been incurred had only one of them argued the case.

This was an action of multiplepoinding and exoneration at the instance of the trustees and executors of the late Dr John Robertson Sibbald, against the several beneficiaries under Dr Sibbald's testamentary bequests. Twenty-one writings of a testamentary nature were found in Dr Sibbald's