strong surmise that the defender's father received by way of loan a portion of the pursuer's money, particularly the £200 received from Mr Black in November 1851, and if that money had been fixed on the father as a loan, the amount might have been held a valid asset of communion goods, the father not being said to be insolvent or unable to repay the advance. But the Lord Ordinary cannot hold the conflicting evidence judicially to establish the fact. The pursuer has also failed to prove by sufficiently conclusive evidence that at the dissolution of the marriage the defender carried off, and has never returned, the gold watch belonging to her. The Lord Ordinary has found no expenses due, because the circumstances disclosed in the proof are such as raised a justifiable belief on the pursuer's part that money was due to her; and, in the Lord Ordinary's apprehension, the defender by no means goes out of process with his hands entirely clean."

The pursuer reclaimed.

CAMPBELL SMITH was heard for her on the import of the proof.

RHIND, for the defender, was not called on.

The Court unanimously adhered, but without expenses.

Agents for Pursuer—Ferguson & Junner, W.S.

Agents for Defender — Jardine, Stodart, & Frasers, W.S.

Tuesday, Feb. 12.

SECOND DIVISION.

KINLOCH AND OTHERS *v.* BELL.

Teinds—Titular—Heritor—Decree of Valuation—Locality—Reduction—Title to Sue—Negative Prescription. An heritor of a parish who had in two processes of augmentation paid upon his lands as unvalued, discovered a decree of valuation dated 1811, and brought an action of reduction of the decrees of locality. The titular, heritors, patron, and minister of the parish then brought an action of reduction of the decree of valuation, against which the defender pleaded that none of the parties had a title to sue and that the right of action was cut off by the negative prescription. Held—(1) that the titular had no right to sue, his right being extinguished as the heritor held all the teinds of the parish as heritable rights; (2) that the heritors had no right to sue a reduction, because they are not entitled to state objections which require a reduction to give effect to them, and any objection to the effect of getting rid of an over burden may be pleaded *ope exceptionis* in the process of reduction of the decrees of locality; (3) that the patron and minister had a title to sue; (4) that the negative prescription cut off grounds of reduction on the head of incompetency that did not appear *ex facie* of the decree.

This is an action concluding for reduction of a valuation of teinds obtained by the defender's author in 1811, and is brought by the patron, the titular, the minister, and several of the heritors of the parish of Athelstaneford, in the county of Haddington.

By a final decree of locality pronounced in 1825 in a process of augmentation and locality, brought in 1822, the teinds of the defender's lands, then belonging to Sir Francis Walker Drummond, were locallled upon as unvalued. Another process of augmentation was brought in 1859, after the defender had acquired right to the lands, and the teinds were again locallled upon as unvalued. Sir F. Walker Drummond and the defender paid the stipend so locallled until 1862 without objection. But in 1862 he discovered the decree of valuation which is now sought to be reduced, and in 1863 he brought an action of reduction of the decrees of locality in the two previous processes of augmentation. The minister, the Presbytery, and all the heritors of the parish were called as defenders in that action, and in support of the defences then prepared the present action has been brought to reduce the valuation.

The defender objected that none of the parties had a title to sue; and further, that the title to sue was cut off by the negative prescription.

The Lord Ordinary (Barcaple) repelled the pleas stated for the defender against the title to sue the action, but found that the right to sue the action is cut off by prescription. His Lordship accordingly assoilzied the defender.

Both parties reclaimed.

WEBSTER and BALFOUR, for pursuers.

SOLICITOR-GENERAL and DUNCAN, for defender.

At advising,

LORD JUSTICE-CLERK—The Lord Ordinary has repelled the pleas stated by the defender against the title to sue this action, and against this part of the interlocutor the defender has reclaimed. But his Lordship has also found that the right to sue the present action is cut off by the negative prescription, and on that ground has assoilzied the defender. Against this part of the interlocutor the pursuers have reclaimed.

It is necessary, in the first place, to dispose of the reclaiming note for the defender, and in doing so I am disposed to think that we cannot safely affirm, as a general proposition, the title of all the pursuers to sue this action of reduction for decree of valuation.

The title of Mr Dalrymple of Hailes, as libelled, is an unexceptionable title to sue, for in the summons he is expressly described as titular of the teinds of the parish. But it turns out, in point of fact, that the whole teinds of this parish are held by the heritors on heritable rights; or, in other words, the whole teinds originally belonging to the titular have been transferred in property to the heritors, and he who was titular has no longer any estate in the teinds. In a parish so circumstanced there is no titular, and therefore Mr Dalrymple does not possess the title libelled.

The right of titularity being thus extinguished, it follows that the only parties who have any right or interest in the teinds adverse to that of the heritors are the patron and minister as representing the benefice. The teinds belong to the heritors as part of their estates, except in so far as they are required for stipend. But as the whole teind may come to be required for stipend, and may, in progress of time, be found insufficient to provide an adequate stipend, the patron and minister have a clear and direct interest to resist any proceeding having for its object the limitation of the amount of teind. Hence their title to sue a reduction of a decree of valuation, or to resist or defend a process of valuation or of approbation, is clear and well established.

The remaining pursuers are the heritors of the parish other than the defender, all having heritable rights to the teinds of their own lands respectively. Their title to sue is attended with much more difficulty.

It has been settled in a series of cases beginning with Abercromby *v.* Erskine in 1800, and ending

with the Duke of Buccleuch *v.* the Common Agent in the Locality of Selkirk in 1865, that (apart from the heritors being in the position of having acquired heritable rights) neither an individual heritor nor the common agent, as representing the general body of the heritors, has a title to challenge a valuation produced and founded on in a locality, and *a fortiori* that neither of them has a title to sue a reduction of such valuation. This rule proceeds on a very obvious and just principle; for an heritor who has no heritable right to his teinds is bound to pay the full amount of these teinds either to the titular or to the minister, or partly to the one and partly to the other; but he has under no circumstances right to retain any portion of these teinds for his own behoof; and he can never be made to pay more than the true amount of his teind. Further, his teind being free teind in the hands of the titular, is liable to be localled on *primo loco* for the minister's stipend. It is thus that a limitation or extension of the liability on other heritors in respect of their teinds can have no effect on his position or liability; and so neither one heritor without an heritable right, nor the general body in the same position, can have any interest or title to object to the valuation of any heritor in the parish.

But when heritors in a parish have acquired heritable rights to their teinds, the case is quite altered. They have then a manifest and direct interest to limit as much as possible the amount of stipend that shall be allocated on the teinds of their lands, because all the teind that is not carried off for stipend belongs absolutely to themselves. In a parish where some of the heritors have acquired heritable rights to their teinds, and some have not, if one of the latter class produces in a locality of decree of valuation of the teinds of his lands, valuing them at greatly less than a tenth of the produce or a fifth of the rent, the effect of sustaining that valuation will be to limit in a corresponding degree the amount of free teind in the hands of the titular, which is *primo loco* liable for stipend, and on the exhaustion of which only any part of the stipend can be localled on teinds held by the heritors under heritable rights. In a parish, again, like the parish of Athelstaneford, where all have heritable rights to their teinds, a valuation possessed by one heritor limiting the amount of his teind greatly within the true value of one-tenth of the produce of the land or one-fifth of the rent, entails a loss on all the others who have no valuations, or who have more modern and less favourable valuations, and even, though in a less degree, on those who have equally favourable valuations well established and unchallengeable, because the effect of sustaining the valuation for the first time produced and founded on will necessarily be to increase the amount of stipend localled on the other heritors as compared with what they would have to bear if the teinds of their neighbour were not valued so low.

It seems to me that this clear and direct interest must be held to give to heritors who have acquired the teinds of their own lands in property a right to scrutinise everything that is produced in a locality as a decree of valuation, and on certain limited grounds to object to its being received and given effect to as a valued decree.

I don't think that such an heritor is entitled to challenge his neighbour's valuation on the ground of inequity, or to open up the decree upon its merits, however recent it may be; for an heritor in pursuing a valuation is not bound to call any defenders except the titular and the minister, nor could the other heritors of the parish have even atitle to compear as defenders in the process of valuation; and it would be most anomolous, and against all principle, that any person should be allowed to challenge on its merits a decree pronounced in a process to which he did not require to be made a party.

But what an heritor calls a decree of valuation of his teinds, and desires to have received and given effect to as such, may appear on the face of it not to be what he represents it to be; and I cannot doubt that any other heritor having a clear and direct interest such as I have above described, may in a locality object to a valuation which is *ex facie* invalid. If, for example, it appear on the face of the extract produced that the decree was not pronounced by a competent court, or that the necessary parties were not called as defenders to the process, or that the lands of the heritor founding on it are not embraced in the decree, all these and similar objections, I apprehend, may be stated in a locality by any one having an interest.

It does not by any means follow, however, that those who have thus an interest and title to state such objections in a locality against the validity of a decree of valuation will also have a title to sue a reduction of that decree. On the contrary, I think heritors even with heritable rights have no title to sue such an action, because they have no title to state any objections which require a reduction to give effect to them. All objections of incompetency or nullity appearing *ex facie* of the decree itself are pleadable *ope exceptionis*, and heritors have no interest, and therefore no title, to object to a valuation for any other purpose, or to any other effect, than to prevent an overburden of stipend being laid on the teinds belonging to themselves. As, therefore, they can obtain in the locality all the benefit to which they are entitled, by urging there the only objections which are competent to them, any separate process of reduction or declarator for the same purpose is entirely superfluous, and they cannot qualify or instruct any legitimate interest to resort to such proceedings.

In the case before us the defender, Mr Bell, whose decree of valuation is in question, failed to produce it in the localities of the parish, and his share of the stipend was ascertained and localled on the footing of his teinds being unvalued. But having, as he says, discovered that his teinds have been valued by a decree of the High Commission in 1811, he has brought a reduction of the final schemes and decrees of locality for the purpose of having them rectified in conformity with the valuation of his teinds. Now, I can entertain no doubt that in that process of reduction of the decree of locality it is competent to the heritors who have the property of their own teinds to propone as a defence every objection which they could have stated in the localities against the decree of valuation, and I can give no countenance to the notion that such objections which were pleadable by them *ope exceptionis* in the localities are not equally receivable as relevant exceptions or defences against Mr Bell's action of reduction of the decrees of locality.

My opinion is that the heritors who appear as pursuers of the present process of reduction have no title to sue.

I deal with this reduction, therefore, as a process insisted in only by the patron and minister.

Upon the question raised by the reclaiming note for the pursuers I am disposed to think that the Lord Ordinary's interlocutor is not sufficiently

discriminating as regards the reasons of reduction proponed by the pursuers. He has held that all the reasons of reduction are, as grounds of challenge of the decree of valuation, cut off by the negative prescription. It may in the end be found to be so; but it seems to me that the interlocutor is in this respect somewhat premature and illogical.

The reasons of reduction are summarised, though not completely expounded, in the 3d, 4th, 5th, 6th, and 10th pleas. But these pleas, taken in connection with the allegations in fact, show distinctly what the true character of the different reasons of reduction is. The 8th plea, I think, is irrelevant as a reason of reduction, and all the other pleas are of the nature of replies to the defences. Now, of the reasons of reduction, those represented by the 3d and 10th pleas are in my opinion extended by the negative prescription, because they impugn the merits of the decree of valuation sought to be reduced, and are not founded on any intrinsic nullities or objections of incompetency arising on the face of that decree. But as regards the 4th, 5th, and 6th pleas, taken in connection with the allegations in fact on which they are rested, they appear to me as stated to raise objections to the decree of a different kind—objections of incompetency appearing *ex facie* of the decree itself. I have formed no opinion whatever as to the merits of these objections. They may turn out to be utterly untenable as objections of incompetency appearing *ex facie*. And if this shall be so, they will of course be repelled in respect of their own inherent weakness. But I cannot hold that these reasons of reduction as stated are cut off by the negative prescription. I think the negative prescription affords no answer to them as stated. The defender seems to contend that they ought to have been stated otherwise, looking to the grounds of fact and evidence on which they are based; and that, if so stated, they would have opened the way to a plea of negative prescription. But until these reasons of reduction are advised on their own merits, we can only take them as they are stated; and, as stated, they appear to me to be objections of radical incompetency appearing *ex facie* of the decree of valuation sought to be reduced.

The result of my opinion is—(1) That the objection to the title of Mr Dalrymple of Hailes as titular ought to be sustained; (2) That the objection to the title of the Earl of Wemyss, the Earl of Hopetoun, and Sir David Kinloch, as heritors, ought to be sustained; (3) That the objection to the title of Sir D. Kinloch as patron, and the Rev. J. M. Whitelaw as minister of the parish, ought to be repelled; (4) That we should find that all objections to the decree of valuation under reduction other than those founded on incompetency or nullity appearing *ex facie* of the decree are cut off by the negative prescription, and sustain the plea of negative prescription in so far as regards the reasons of reduction embraced in the 3d and 10th pleas in law for the pursuer; and as regards the other reasons of reduction, remit to the Lord Ordinary to hear parties on these reasons of reduction which are embraced in the 4th, 5th, and 6th pleas for the pursuers, and to proceed otherwise in the cause as shall be just.

The other Judges concurred.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Defender—John T. Mowbray, W.S.

SCEALES AND OTHERS *v.* SCEALES.

Husband and Wife—Declarator of Marriage—Habite and Repute. Circumstances in which held that a marriage grounded on habite and repute had not been proved.

This is an action of declarator of marriage at the instance of Helen Darsie or Sceales, residing in London, widow of the deceased Stewart Sceales, formerly of the Customs, Leith, latterly residing in Aberdeen; and Helen Fleming or Darsie, widow of the late Walter Darsie, Sibbald Place, Edinburgh; and is directed against the representatives of the said Stewart Sceales and others. The pursuers make the following statements:—

"The said Stewart Sceales became acquainted with the pursuer in or about the end of 1852, or beginning of 1853, while she was in service in the house of his sister, Mrs Ritchie, near Newhaven, where he resided. He then commenced and carried on a courtship of the pursuer, with a view to marriage. The said courtship was well known to the mother and other relatives of the pursuer, and the purpose thereof was frequently mentioned by the said Stewart Sceales to the said relatives, and to his acquaintances.

"While this courtship was proceeding, and in or about the end of 1852, or beginning of 1853 aforesaid, the said Stewart Sceales repeatedly promised and engaged to marry the pursuer, and he persuaded her to leave her situation in Mrs Ritchie's, in order that they might get married. The pursuer accordingly left her situation at the request of the said Stewart Sceales, and for the said purpose, and thereafter, on the faith of said promises, the said Stewart Sceales induced the pursuer to permit him to have carnal connection with her.

"The said Stewart Sceales, however, delayed the celebration of his marriage with the pursuer *in facie ecclesiæ*, for fear, as he alleged, of giving offence to his relatives, and of losing money which he expected to come to him by succession. Within a few weeks after the pursuer had left her situation, he took up house with her, and he and the pursuer continued from in or about the end of 1852, or beginning of 1853, to in or about the years 1859 or 1860, to live and cohabit together as man and wife in various places, in Edinburgh, and also in the shire of Fife; and during that time they were habite and repute, and treated and considered as man and wife by their friends, neighbours, and acquaintances. Amongst other places they lived as man and wife, and were habit and repute as such during said period, in Cumberland Street, Bedford Street, Horne Lane, Park Gate, Amphion Place, and Middle Arthur Place, all in Edinburgh, and Markinch, in Fifeshire."

The pursuers then state that on numerous occasions the said Stewart Sceales acknowledged her as his wife, and addressed her as such in the presence of various persons, and that children were born of the intercourse which were recognised as legitimate.

The discussion before the Lord Ordinary turned mainly on the evidence, partly oral and partly written, which was very voluminous, as to cohabitation and habite and repute as married persons. The case as rested on promise *subsequente copula* was not insisted in, nor as based or separate acknowledgment. The Lord Ordinary (Ormidale) found that facts and circumstances were not proved from which it could be inferred that the parties were married.