residue destined by Mrs Wilson's trust-deed to Mrs Elizabeth Moffat or Purves in liferent, for her liferent use allenarly, and to her children in fee?"

Agents for Mrs Ann Moffat or Roper, &c.,—Duncan, Dewar, & Black, W.S.

Agent for Mrs Purves' Representatives—John Rutherfurd, W.S.

Agents for John White, &c. (Mrs Wilson's next of kin)—H. W. Cornillon, S.S.C.

Thursday, July 13.

SECOND DIVISION.

PITTS *v.* WATSON.

Obligation—Agent. A business was carried on by deputy, who was paid by a weekly salary, and had the full control both of ordering the goods and selling them—*held* that the deputy, after the principal's bankruptcy, was personally liable for goods ordered by him for the business, whether he ordered them in the name of the principal or his own.

This was an action at the instance of Edward Kemble Pitts, glaziers' patent diamond manufacturer, London, against Robert Boyle Watson, of No. 165 New City Road, Glasgow, for payment of £29, 10s., being the amount of an account for diamonds furnished by the pursuer to the defender. The defender admitted that he had ordered and received the goods in question, but pleaded that they had been supplied solely on the credit of the Nailsea Glass Company, now bankrupt, but formerly carrying on business at Bristol, for whom the defender acted as agent in Glasgow.

A proof having been led, the Lord Ordinary (ORMIDALE) decerned against the defender, on the ground that the diamonds had been furnished to him on his individual account and credit, and not as agent for the Nailsea Glass Company. From the proof it appeared that the defender had, when in London at the beginning of 1868, ordered the diamonds, partly for his son and partly for himself. At this time he had charge of the Glasgow warehouse of the Nailsea Glass Company; was paid by salary; and rendered to the Company weekly or monthly accounts of the sales. It appeared, however, that while the defender had full power to buy diamonds and other articles in the line of the Company's business, the Company had no means of ascertaining the purchases made on their account, except from the receipts sent in by the defender of the accounts settled by him. There was no proof, beyond the defender's own statement, that the diamonds in question had been sold on the Company's account.

The defender reclaimed.

R. V. CAMPBELL for him.

BLACK and BEGG for the respondent.

The Court unanimously adhered, on the ground that the defender had not acted *factorio nomine*, and indicated opinions that, even if the goods had in the pursuer's knowledge been ordered on the Company's account, the exceptional character of the defender's agency would have rendered him personally liable. He was clearly the *dominus* of the business, as he ordered the goods and sold them on his own responsibility. This was not an ordinary case of agency. The goods were no doubt sent with an invoice to the defender, and it was his duty to show that they were not sent to him on his own account, and he had failed to do so.

Agents for the Pursuer—Morton, Whitehead, & Greig, W.S.

Agent for the Defender—J. Knox Crawford, S.S.C.

Friday, July 14.

FIRST DIVISION.

COUNTESS OF CROMERTIE, AND MACKENZIE OF KILCOY *v.* THE LORD ADVOCATE.

Teinds—Titular—Bishops' Teinds — Crown—Error—Condictio Indebiti — *Repetition — Interest.* Teinds had been erroneously regarded as bishops' teinds, and on that belief had been paid to the Crown for a series of years. In an action of declarator and repetition at the instance of the true titular and of the heritor jointly, the Crown allowed decree to pass in terms of the declaratory conclusions, and agreed to repay to the heritor the principal sum erroneously paid by him. *Held* (altering judgment of Lord Gifford, and *diss.* Lord Deas) that the pursuers were not entitled to interest on the said sums, except after the date of formal demand for repayment.

Till recently, it was believed that the teinds of the lands of Drumderfit and Wester Kessoch, in the parish of Kilmuir Wester, and county of Ross, belonging to Charles Mackenzie, Esq. of Kilcoy, were bishops' teinds, and consequently that the surplus teinds belonged to the Crown. In 1854 the Crown demanded payment of the surplus teinds of these lands from Mr Mackenzie, and threatened legal proceedings. In consequence, arrears from 1839 were paid. Mr Mackenzie continued to pay the surplus teinds to the Crown down to 1864.

In 1864 the Duchess of Sutherland and Countess of Cromertie discovered that the teinds in question were not bishops' teinds, and that the Crown had no right whatever to them; but, on the contrary, that they belonged to her (the Countess), as patron of the parish of Wester Kilmuir. It appeared that by charter of erection and donation, dated 3d February 1588, which narrates that the teinds of the church of Kilmuir belonged to the Dean of the diocese of Ross, James VI. gifted the patronage of the church of Kilmuir Wester to Sir William Keith. The teinds were by this charter reserved to the then Dean of Ross for his life, and provided to the minister of the parish after his death. The patronage ultimately came into the Cromertie family, who acquired right to the teinds by the Act 1690, c. 23. In the early part of this century a dispute arose between the Crown and the Laird of Cromertie in regard to the patronage of the church of Kilmuir Wester. After a lengthened litigation the right of the Cromertie family to the patronage was sustained by judgment of the House of Lords, dated 27th July 1814. Although these proceedings disclosed the true state of the titularity, for some inexplicable reason it seemed to be taken for granted by all parties that the teinds belonged to the Crown.

On discovering her rights the Countess of Cromertie intimated them to Mr Mackenzie of Kilcoy, who, in consequence, refused to pay any more surplus teinds to the Crown. A formal demand was made upon the Crown on 12th March 1868, and on 26th April 1870 the present action

was raised in the joint names of the Duchess of Sutherland and Countess of Cromertie, with consent of her husband, and of Charles Mackenzie, Esq. of Kilcoy, and G. A. Jamieson, C.A., his *curator bonis*, against the Lord Advocate on behalf of the Crown.

The conclusions of the summons were:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that we and our royal successors have no right or title of property to the teinds of the lands of Drumderfit and Wester Kessoch, in the county of Ross, belonging to the said Charles Mackenzie, and that the said teinds do not form part of the patrimony or property of the Crown, or of the hereditary revenues thereof; and it ought and should be found and declared, by decree foresaid, that the teinds of the said lands belong to the pursuer, the said Countess of Cromertie, and that she has a good and undoubted right and title to the property of the said teinds, with and under the burdens specified in the Act 1690, c. 23; and further, the defender ought and should be decerned and ordained, by decree foresaid, to pay to the pursuers, the said Charles Mackenzie and George Auldjo Jamieson, as his *curator bonis*, the sum of £694, 4s. 10d. sterling of principal, and £357, 19s. 9d. sterling of periodical interest to 12th March 1868, conform to state to be produced at the calling hereof, with interest at the rate of 5 per centum per annum on the said sum of £694, 4s. 10d. from the said 12th day of March 1868 till payment."

The Crown, finding the claim of the Countess to the titularity was irresistible, agreed to repay to Mr Mackenzie the sums paid by him to the Crown as surplus teinds of the lands, and allowed, without dispute, decree to pass in terms of the declaratory conclusions of the summons. The only question that remained was that of interest. The Crown submitted that interest was due only from the date of the formal demand for repayment, and bank interest only since tender of payment of the principal sum.

The pursuers pleaded—"(3) The pursuer Charles Mackenzie, having paid the surplus teinds of the said lands to the Crown for the period specified under error, is, in the circumstances, entitled to repayment of the sums so paid by him, with interest and expenses as concluded for."

The defender pleaded—"(1) The claim for the surplus teinds in question having been made in *bona fide* on behalf of the Crown, and in the reasonable belief that it was well founded, and no objection having been made to it by or on behalf of the pursuers and their predecessors for many years, though they had the same means of knowing the true state of the case as the Crown, the claim for interest, in the circumstances of the case, is not in accordance with equity, and should therefore be disallowed. (2) The pursuers, Mr Mackenzie of Kilcoy and his *curator bonis*, not being liable to pay interest on the said erroneous payments to the pursuer, the Duchess of Sutherland and Countess of Cromertie, as the right to recover interest in cases similar to the present is derived entirely from the right to receive reparation for loss actually sustained, the claim for interest here is untenable, and should be disallowed."

The Lord Ordinary pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Further, and in reference to the petitory conclusion, finds that the defender and the Commissioners of Her Majesty's Woods and Forests and Land Revenues are bound to pay to the pursuers, Charles Mackenzie, Esquire of Kilcoy, and George Auldjo Jamieson, chartered accountant, as his *curator bonis*, the various sums paid by the said Charles Mackenzie, or by his predecessor William Mackenzie of Kilcoy, whom he represents, to the Crown as the surplus teinds of the lands of Drumderfit and Wester Kessoch, said payments being made during the years 1855 to 1864 inclusive, all as the same are set forth in the state, No. 5 of process; finds that the defender and the said Commissioners of Her Majesty's Woods and Forests and Land Revenues are also bound to pay to the said pursuers interest on the said sums, at the rate of 3 per cent. per annum, from the respective dates when the several sums of teind above mentioned were actually paid to the Crown, or to its officers on its behalf, down to the date of citation in the present action, and at the rate of 5 per cent. per annum thereafter; and appoints the pursuers to lodge in process a state of said principal sums and interest, made up in conformity with the preceding findings; reserves meantime the question of expenses.

"*Note.*—The Lord Ordinary has found the question of interest, being the only disputed question in this case, to be attended with a great deal of nicety, especially as both parties having renounced probation, some of the elements affecting the decision of the question do not appear on record, but were assumed in argument as matters of general notoriety.

"If the question regarding the repayment of the surplus teinds of Drumderfit and Kessoch had arisen between the subjects, there would undoubtedly have been room for the plea of *bona fide* perception and consumption. There seems to be no doubt whatever that the Crown, from 1855 to 1864 inclusive, demanded and uplifted the surplus teind in question in *bona fide*—the officers of the Crown, as well as all others interested, really believing that the teinds belonged to the Crown. Indeed this belief seems to have existed and been acted on from time immemorial. At least so far as appears from the papers before the Lord Ordinary, it seems to have been always assumed or taken for granted that the teinds in question were bishops' teinds, and were consequently the property of the Crown.

"The error under which the teinds were paid to the Crown was an error in point of fact, and the matter was one of a somewhat recondite nature, depending upon an inquiry whether the teinds of Drumderfit and Wester Kessoch were or were not bishops' teinds. If, under an error of this kind, a private titular had uplifted and expended the surplus teinds, there seems little doubt that the plea of *bona fide* perception and consumption would be available to him as a defence, not only against payment of interest, but against payment of the teinds themselves so uplifted. See *Stirling* v. *Denny Feuars*, as decided in the House of Lords, 25th June 1731, Mor. 1717.

"Whether such plea would be competent to the Crown it is unnecessary to inquire, for the Crown has declined to state any such plea, in conformity, as is believed, with its usual practice. There is an obvious distinction between the Crown and its officers holding and administrating the public revenues of the kingdom, and a private individual uplifting rents, teinds, or revenues as his own property, and whether the plea of *bona fide* perception

and consumption would be competent to the Crown or not, it seems quite proper and reasonable that the Crown should decline to state, or should waive, such a plea.

"The pleas stated for the Crown are different. It is admitted on behalf of the Crown that the principal sums must be repaid, as having been truly and all along not the property of the Crown at all, but the property of the pursuer, the Duchess of Sutherland and Countess of Cromertie. But it is maintained, that because both parties were under a common and reasonable error, the claim for interest is 'not in accordance with equity. It is further pleaded that the teinds would not have borne interest to the Countess of Cromertie had they remained undemanded and unlevied in the hands of Mr Mackenzie, and that neither she nor Mr Mackenzie can be said to have suffered loss, and it is urged that the Crown is not bound to do more than repay the principal sums, but without interest.

"The very special question thus raised does not seem to be ruled by any previous decision. Very little assistance can be derived from the cases regarding interest generally. It is plain that in the present case interest is not due *ex lege*, *ex contractu*, or *ex mora*. The cases of undemanded and unconstituted debts, unlevied rents, or feu-duties, &c., scarcely touch the present case.

"The Lord Ordinary thinks that the true principle applicable to the present case is the equitable principle of restitution. Laying aside the plea of *bona fide* perception and consumption as inapplicable to the case, or as waived by the Crown, then the rule is, that he who has become possessed of the property of another, however innocently, is bound to restore it, or hand it over to the true owner *cum omni causa*, that is, with all profit or advantage which has accresced or accrued to it in his hands. If it be a moveable subject, which has increased in value by change of market, by age, or otherwise, the true owner is entitled to the benefit of such increase. So, if the subject, without expense or labour on the part of the *bona fide* possessor, has produced fruits or increment, such fruits, as an accessory to the subject itself, must be restored along with it. Of course in all these cases there might be the plea of *bona fide* consumption, but if once that is out of the way, the obligation of restitution applies equally to the fruits as to the subject itself.

"On the other hand, it is plain that the Crown, as *bona fide* uplifter of the teinds in question, ought not to be subjected to any loss or detriment whatever on account of the innocent mistake which has occurred. The Crown cannot be asked to pay back more interest than has actually accrued upon the money in its hands. To exact from the Crown interest which it has not actually received, would be to subject the Crown, without fault, to a loss. This is inadmissible. The Crown, by abstaining from pleading *bona fide* perception and consumption, has virtually, and it may be generously, stated that it desires no gain; but no ground can be suggested why it should be subjected in loss.

"Here the difficulty arises in determining what is the actual gain which the Crown has made by having these monies of the Countess of Cromertie's in its hands since 1855 and downwards. In other words, what interest has actually accrued in the Crown's hands on the sums so paid?

"In old times, when the revenues of the country were kept in treasure-chests, of course no interest accrued, and nothing but principal sums could have been demanded in such a case as this. But now the practice is different, and monies paid to the Crown are either invested, or, what is the same thing, they go to diminish the debts due by the Crown or by the country, which bear interest. But the interest which the Crown or the country pays on its debts very slightly exceeds 3 per cent. The Crown can borrow, and does borrow, at very little over 3 per cent.—Three per Cent. Consols selling at 92 to 93 per cent. In the circumstances, therefore, the Lord Ordinary thinks the rate of interest ought to be fixed at only 3 per cent. This will keep the Crown *indemnis*, which the Lord Ordinary thinks just and equitable in the circumstances.

"A puzzle was made as to who would get the interest,—whether the Countess of Cromertie or Mr Mackenzie,—and this was used as an argument why no interest should be paid at all. The difficulty, however, is entirely avoided in the present case by both the Countess of Cromertie and Mr Mackenzie concurring in asking that the teinds and interest shall be repaid to Mr Mackenzie. The two pursuers have made some bargain between themselves, and as they both concur in the action, and as the right is in one or other of them, it is needless to inquire what the result would have been if they had been at variance.

"The Lord Ordinary has found it necessary that a state should be prepared in accordance with the principles above explained, and he has reserved the question of expenses.

"The correspondence preceding the action was founded on at the debate. The Lord Ordinary has perused that correspondence, but he thinks that it did not result in any conclusive or binding agreement, and that it does not affect the judgment now pronounced. No plea is founded upon the correspondence."

The Lord Advocate reclaimed.

SOLICITOR-GENERAL and IVORY, for the reclaimer —Mr Mackenzie is not entitled to demand interest. He was bound to pay his teinds to some one, and therefore he has suffered no loss. The Countess cannot demand interest from him (*Scott Moncreiff* v. *Lord Dundas*, 24th November 1835, 14 S. 61; *Advocate-General* v. *Sinclair's Trustees*, 15th January 1855, 17 D. 290; *Fraser* v. *Morrice*, 28th June 1826, 4 S. 762; *Wallace*, 13th June 1821, 1 Shaw's Appeals, 42; *Monypenny*, 9th May 1624; M. 1748); and consequently, if he recovered interest from the Crown, he would be *lucratus* by the proceeding. The Countess has no right to interest either from the Crown or in a question with Mr Mackenzie. She has been negligent of her rights. Neither of the pursuers, then, has any right to interest, and two non-existent rights cannot, by being combined, form a good right.

SHAND and KEIR, for the pursuers—Mr Mackenzie is liable to the Countess in interest, though the Countess may, if she pleases, make him a present of the interest. There is no rule that interest is not due on arrears of teinds. Mr Mackenzie has therefore an interest to recover it from the Crown to pay the Countess.

At advising—

LORD PRESIDENT—This action is raised by the Duchess of Sutherland, as Countess of Cromertie, with consent of her husband, and by Mr Mackenzie of Kilcoy and his *curator bonis*. The one is the titular of the teinds of the parish of Kilmuir Wester, and the other is one of the heritors of that parish. The defender is the Lord Advocate,

representing the Commissioners of Woods and Forests. First, we have the declaratory conclusions (*reads declaratory conclusions of summons*); then there is a conclusion for payment to the pursuer Mackenzie and his curator "the sum of £694, 4s. 10d. sterling of principal, and £357, 19s. 9d. sterling of periodical interest to 12th March 1868, conform to state to be produced at the calling hereof, with interest at the rate of 5 per centum per annum on the said sum of £694, 4s. 10d. from the said 12th day of March 1868 till payment"—being (though this is not expressed in the summons) the sum representing the teinds which have been paid by Mackenzie to the Crown on the false belief and assumption that the Crown was titular of the teinds. The defence of the Crown does not touch the question of declarator. It does not even resist payment of the principal sums, erroneously paid as teinds. The defence is entirely directed to the question of interest. It must be kept in view that the petitory conclusion of the summons is at the instance of Mr Mackenzie. The character of the Countess of Cromertie as pursuer is limited to the declaratory conclusions. About those there is no dispute. The Crown has admitted her character, and so far the action may be said to have been unnecessary. At the same time, the Countess was entitled to have her title judicially ascertained. The question at issue is between the heritor and the Crown. It is a *condictio indebiti*. Mr Mackenzie is seeking repetition of a sum paid on an erroneous assumption. The question is, Whether he—the sole pursuer of the petitory conclusion—is entitled to interest? Now, the sum which the heritor paid as surplus teinds was a sum which he was bound to pay to some one. He has no title to the teinds, and therefore he had just as little right to that part of the fruits which form the teinds as the titular to the rest of the fruits. The rights of the titular and of the proprietor are equally strong in law. The heritor was thus owing the teinds to the titular, whoever he was. What he did was to pay to a person who was not the true creditor. If he is to receive back the sum, it must be for the purpose of discharging his debt to the true creditor, *i.e.*, the true titular. Will £694, 4s. 10d. enable him to discharge the debt, or will the creditor be entitled to interest? That is the true question. The heritor is not entitled to be *lucratus* by this proceeding. He is not to be allowed to pocket the interest because he has paid to a wrong creditor. Will he then be bound to pay to the Countess the interest on the sums erroneously paid to the Crown? I can scarcely conceive a case more clear against the creditor being entitled to interest. It was entirely her own fault that she did not get the teinds paid to her. I never saw a creditor guilty of such extreme negligence and laches. She was bound to know that she had right to the teinds. The fact was impressed on her mind, or at least on the minds of her agents, by a series of legal proceedings, the significance of which it is impossible to dispute. There was a long litigation in the beginning of this century as to the patronage of the parish, and the right was found to be in the ancestor of the Countess. In that litigation the whole titles were investigated. Among other deeds, a certain charter of erection and donation of the patronage of the church of Kilmuir in 1588, in favour of Sir William Keith, was subjected to a great deal of examination. On the face of that charter it appears that the teinds belonged to the Dean of the diocese of Ross. The subsequent course of titles, taken in connection with the Acts 1690, c. 23, and 10 Queen Anne, c. 12, show beyond a doubt that the teinds belong to the person in right of the charter of 1588, viz., the Countess of Cromertie. It is the most extraordinary case of negligence that I ever heard of. In these circumstances, it cannot be doubted that, in a question between the titular and the heritor, all that the heritor is now bound to do is to pay the principal sums due as teinds, without interest.

Reference has been made in the argument to an arrangement between the heritor and the titular. The use of their names jointly as pursuers is intended to make this question assume a different shape, as if they were both going against the Crown for repetition. They have not done it in the summons, for the heritor is the sole pursuer of the conclusion for repetition. Even supposing that the practical question was between the Crown and the Countess, I should come to the same conclusion. The carelessness and negligence of the true titular caused her loss. No doubt it may be said that the Crown had as good an opportunity of ascertaining the true state of facts as the Countess. But there was no negligence on the part of the Crown. What, then, is charged against the Crown? That it was willing to take payment of teinds which the Countess did not think it worth while to take! After all that, is the Countess entitled to interest, as if she had been very ill used in being kept out of her teinds? In whatever point of view the case is regarded, clearly no interest is due.

Lord Deas—It is admitted that the Countess of Cromertie is the true titular of the teinds, and that the Crown has no right to them whatever. For a considerable period no one demanded the teinds, and it is not surprising that the heritor did not pay them. In 1854 the Crown made a demand for arrears of surplus teinds, enforced by a threat of litigation, representing that the teinds were bishops' teinds. In that state of matters the heritor made payment. It was latterly discovered that the Crown was not the titular. This action is brought to have it found that the Countess of Cromertie, and not the Crown, is the titular, and for repayment of the sums erroneously paid, with interest. The first thing to be attended to is the nature and form of the action. The action is at the instance of the Countess of Cromertie, and of Mr Mackenzie of Kilcoy, the heritor. They are both pursuers in the action. There is no room to doubt that, when two parties concur in an action, they may conclude for payment to be made to either. This is quite settled. I can have no doubt that although the conclusion is for payment to Mr Mackenzie, it is a conclusion by both pursuers. If the sum claimed is due to either, they are entitled to decree in terms of that conclusion. The whole question comes to be, whether the Crown is due these sums to either of the pursuers. It is not much matter whether the money be repaid directly to the Countess, or through Mr Mackenzie. That the Countess is entitled to be repaid the fruits of her estate of titularity (for that is what the Crown took) is conceded. It is conceded that the Crown cannot retain the principal sums on the ground of *bona fide* perception. It is not pleaded, and I do not think it would be a good plea. In a question between the Countess and the heritor, I am disposed to think that interest could not have been demanded. The right to a portion of the

annual fruits is one which ought in fairness to be enforced from year to year. It is not the same case as feu-duties. But much the same principle applies, that where yearly payments are not uplifted, the presumption is that the creditor does not mean to insist on interest. However, be this as it may, this is not a question between the titular and the heritor. It is a question between the titular and a person who pretended to be the titular, who had no more right to the teinds than I have. The question is, whether a person who has uplifted the money of another, however much in *bona fide*, is entitled to make a profit thereon. The Lord Ordinary says that he is not, and I think that is a sound principle. It is very true that if the titles had been looked into it would have been seen that the Countess was the titular. The opportunities of knowledge were equally open to the Crown and the Countess. The Crown was equally negligent with the Countess in not looking into the titles. In uplifting the teinds they were no more negligent than a pickpocket who puts his hand into a man's pocket. That is not what is charged against them. On the contrary, they showed too much vigilance, looking out for any annual sum that might be going a-begging. I daresay there was *bona fides* on their part, in this sense, that they thought, as no one else was asking for these teinds, that they must belong to them. Assuming then equal *bona fides* in the parties, and equal negligence in not looking into their rights, the question is,—whether a party who interferes in such circumstances with another's property is entitled to make profit by having done so. I agree with the Lord Ordinary that if the interest is not to be paid, the Crown will make a profit by their own unwarrantable act. I think the Lord Ordinary goes far enough in their favour when he restricts the interest to 3 per cent. The principle is sound, that a party is not entitled to make a profit by such actings.

Lord Ardmillan concurred with the Lord President.

Lord Kinloch—The question before us is, Whether the Crown, who received for some years by mistake, but in good faith, from Mr Mackenzie of Kilcoy, teinds due to the Duchess of Sutherland, as Countess of Cromertie, and who at once agreed to repay the teinds on discovery of the mistake, is liable in interest on the yearly sums so received, struck by the Lord Ordinary at the rate of 3 per cent. per annum?

I am not satisfied with the grounds on which the Lord Ordinary has awarded interest against the Crown. He admits that interest is not due in this case *ex lege*, *ex contractu*, or *ex mora*. But he awards interest on the ground of thus making restitution of the money, together with the gain which the Crown may be assumed to have made of it, which he estimates at 3 per cent. per annum. If this principle be sound, I think it simply amounts to establishing a charge of interest in every case whatever in which money owing to another remains unpaid; for in every such case it may be equally assumed that gain was made by its retention. I can draw no sound distinction between the case of money of another's, drawn and kept by mistake, and money owing to another on an ordinary debt, not paid when due. The latter rather appears to me the more fitting case of the two for the exaction of interest. The assumption of gain being made by a holder of money in every case whatever is a somewhat violent one, and often very contrary to the fact. I perceive no ground for considering it necessarily presumable that on each of these yearly receipts 3 per cent. per annum was made by or on behalf of the Crown. It seems to me just as likely that they were spent or employed without creating any pecuniary profit. As regards the alleged debtor, therefore, I think the ground of the Lord Ordinary fails.

But as regards the alleged creditor in this claim of interest, I think that, still more clearly if possible, there is no reason for the demand. The summons concludes for payment of the teinds received by the Crown, not to the Countess of Cromertie, but to Mr Mackenzie of Kilcoy and his *curator bonis*. Clearly Mr Mackenzie is not entitled to interest on the sums in question; for although he paid to the wrong party, he was only paying a true debt, and he cannot say that, in consequence of this payment, any interest was unjustly lost by him. The object of the payment sought to be enforced must be to pay the interest over to the Countess of Cromertie, who can alone set up any pretext to demand it. But I think that the Countess of Cromertie is not in a position to demand interest. She cannot ask it directly from the Crown, towards whom she stands in no relation of creditor and debtor. But further, she cannot ask it from Mr Mackenzie, who paid his debt when due, though, it appears, to the wrong party, all concerned being under the *bona fide* belief that the Crown was the true claimant. She ought to have known her title; and it was her own fault that she did not get her money from Mr Mackenzie, who was as ready to pay to her as to the Crown. Any demand of interest at the Countess' instance against Mr Mackenzie I hold to be untenable and extravagant. The device of making the Countess and Mr Mackenzie joint pursuers cannot authorise judgment for this interest against the Crown. Neither one nor other of them has, as I think, any claim for interest. Mr Mackenzie has himself no claim for interest; and it cannot be drawn by him, or in his name, in order to be paid over by him to the Countess of Cromertie; because, as between her and Mr Mackenzie, I think no claim of interest lies at her instance.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, to the effect of denying interest on the sums of surplus teind to be decerned for, with its own full consent, against the Crown.

In regard to expenses, the Court were of opinion that as no formal acknowledgment seems to have been made by the Crown previous to the raising of the action, the Countess was entitled to a declarator of her right at the expense of the Court, but that, as regards the rest of the expenses, the pursuers, who had been unsuccessful in the only disputed point, must be found liable.

The following interlocutor was pronounced:—"Recal the interlocutor of the Lord Ordinary; find, decern, and declare in terms of the declaratory conclusions of the summons; also decern in favour of Charles Mackenzie and his *curator bonis*, pursuers, for payment of the sum of £694, 4s. 10d. sterling, of principal, with interest from 12th March 1868, but as regards the conclusion for interest on the said sum prior to the said 12th March 1868, sustain the defences, assoilzie, and decern; find the defender liable in expenses of the summons; *quoad ultra* find the defender entitled to expenses."

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

Agent for Defender — Donald Beith, W.S., Solicitor H. M. Woods, &c.

Tuesday, July 11.

SECOND DIVISION.

EDMISTON, PETITIONER.

Trust-Settlement—Pupil's Maintenance and Education—Administrator-in-Law. In a petition at the instance of a father of three pupil children, an advance from the interest of money belonging to them authorised to be made to him as an individual for their maintenance and education, he, although in embarrassed circumstances, being stated by the trustees in charge of the money as the most proper person to have charge of the children.

Observed (*per* Lord Neaves), that, as administrator-in-law, he was a creditor, and could not apply to the equitable jurisdiction of the Court by petition, but must proceed by ordinary action.

Mr Edmiston's three pupil children were entitled under the trust-deed of their maternal grandfather to a sum of about £22,000, yielding a free income of £880, subject to a deduction of £150, paid to Mr Edmiston under his marriage-contract. During Mrs Edmiston's lifetime this money was liferented by her, and the whole income was paid to her by her father's trustees. For some time after her death they paid to Mr Edmiston £500 a-year for his children, but latterly refused to do so without judicial authority. The children had all along resided with him. He accordingly presented this petition "for himself, and as administrator-in-law" for the children, stating that some years ago he met with reverses in business, and that the income of the children's means was necessary to enable him to maintain and educate them in the manner in which they had lived during their mother's lifetime. He therefore prayed the Court to ordain Mr Miller's trustees to make payment to him, "as administrator-in-law for his children, and for their behoof," of the free annual income, or otherwise to ordain them to make payment to him of such portion of the free income as to the Court should seem proper for the suitable maintenance and education of the children.

The trustees lodged answers, in which they stated that they were advised that the petitioner might be held to be domiciled in England, and that, if so, they were not authorised to continue the payment without the authority of the Court. They stated at the bar that they considered the petitioner the most proper person to have the charge of his children, and to disburse any money that might be advanced for their maintenance and education.

Lancaster for petitioner.

Balfour for respondents.

At advising—

Lord Benholme—I have considerable doubts as to the rights of this father as administrator-in-law. We have no sufficient evidence as to his guardianship in England, and in respect of his domicile, and that of the children, we cannot look on him as a Scotch guardian. But in our position as protectors of all minors we can surely authorise the trustees to draw on this fund for what is necessary for the children, and pay the money to him, as a proper person to have charge of the children, and a trustworthy dispenser of the money.

Lord Neaves—I am of the same opinion. I could not countenance this petition as at the instance of this father as administrator in-law. As administrator-in-law he is a creditor, and ought to have brought an ordinary action. But he applies, not only in that capacity, but for himself, and he applies to us as a court of equity, and says, my circumstances are embarrassed, and my children cannot be supported in a manner becoming their position and prospects unless you allow them an allowance out of their money. There is no objection to him,—so far from that the trustees state that he is the proper person to educate and bring up his children, and I can see no objection to giving him an allowance for their maintenance and education, as suggested.

Lord Justice-Clerk and Lord Cowan concurred.

Agents for Petitioner—Webster & Will, S.S.C.

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

Saturday, July 15.

FIRST DIVISION.

PAGAN *v.* PAGANS & FORDS.

Process—Expenses—New Trial. Circumstances in which the defenders were found entitled to the expenses of the first trial, though the pursuer had been successful in it, the pursuer having abandoned the action after the verdict in the first trial had been set aside, and a new trial granted.

In this case, which was brought for reduction of the trust-deed and settlement of the late Mr Pagan of Clayton, writer and banker in Cupar-Fife, an issue was sent to a jury, on which they returned a verdict in favour of the pursuer, who was the deceased's eldest son. The defenders (Fords) moved for a rule to show cause why a new trial should not be granted. After a hearing upon the rule, which was granted, their Lordships came to be of opinion that the rule should be made absolute and a new trial granted. When the case came up on the defenders' motion to fix the day for the new trial, the pursuer appeared, and put in a minute, stating that in the first trial he had effected the only object he had in view, and cleared his own reputation as a man of business from certain imputations which he had considered put upon it, and he did not intend to prosecute the action farther, but would consent to absolvitor going out.

The case thereafter came up on a motion for absolvitor, with expenses, on the part of the defenders.

Solicitor-General (Clark), with him Lee and Watson, for the defenders, contended that the expenses of the first trial, which had been reserved by their Lordships upon granting a new trial, in accordance with the general usage of the Court in such cases, should now be given him. They urged that where the first trial failed through the miscarriage of the jury, the practice was to give no expenses to either party. But here the pursuer, taught by the experience of the first trial, did not think proper to go to a second, but consented to absolvitor going out, on the verdict in the first being set aside. Referring to the pursuer's minute, he endeavoured to show that the pursuer had not brought the action so much to get his father's deed set aside as to free himself personally from what he considered a