us, but it stands here upon record, and it may require some observation. I see it mentioned in one of the latest books that we have upon tithes—a very valuable book in many respects, I mean Mr Buchanan's—that it is not considered to be a decided question that the Crown domains are exempted from teinds. It may be that they are exempted from teind. Even as such, I confess I can discover no good authority and no good principle for such an opinion. I imagine that, looking both at the origin of the thing, so far as we can find the origin, obscure as these subjects are, and the principle of it, the reverse is the general rule, and that all lands are, as a general rule, liable in teind. Whether the teinds were introduced under the Christian system from some idea of divine obligation, or whether they were introduced by the pious concurrence of all parties to contribute a certain portion of the fruits of their lands to religious services—in either way, it does not appear to me that it can be supposed that the extensive domains of the monarchs were meant to be exempted from that burden. If we go to the Old Testament, and take the example of Abraham and Melchisedec, I rather think that Abraham was a prince in his own territory, and paid teind upon all that he had to Melchisedec, who was an ecclesiastical person. If we take the other view, that the monarchs of modern Europe, and the peoples of modern Europe, thought it their duty to contribute thus to religious services, it would be equally out of the question to suppose that the extensive domains of the Crown, as such, were universally exempted. The kings and queens were treated in those times as nursing fathers and nursing mothers of the church: but they would have been very dry nurses if they had withheld the teinds of the extensive possessions they then had; they would have been stepfathers and stepmothers rather, and very unjust governors, if they had left their subjects alone to pay tithes, while they themselves did not do so. I consider it to be the obvious import of all that we know of the history of this obscure subject that all lands paid teind. Exemptions may arise, but I have great doubts whether there was ever any very good exemption that did arise, unless an exemption in favour of or through the medium of an ecclesiastical body or corporation. That is certainly the explanation that is given of the best exemptions we know of, I mean the exemption *decimis inclusis*, which is not an exemption enjoyed by everybody, nor by any length of possession of exemption, but must be traced back to the privilege of an ecclesiastical body. How the monarch comes in certain circumstances to have the exemption it is very difficult to explain or see. That he has it in some cases and to some extent I am prepared to admit. The case of *Haddington* is conclusive on that subject; at least till it is farther considered in some more solemn way. In some countries the monarch is an ecclesiastical person. I don't think that has been much the case in Scotland; certainly while Popery prevailed he was scarcely so, and as far as pure Presbytery is concerned he is no ecclesiastical personage at all; he has no jurisdiction except to call Councils and call on the clergy to do their duty. But so it is, that he has in certain circumstances enjoyed an exemption which may arise from this, that the Crown in its own right requires no title; that the diadem which the monarch wears is his title to all the lands he possesses; and that whatever he has possessed may, if it can be possibly reconciled with anything like law, be held to be in that position. That is the case with the Crown, different from subjects. But to that extent only I think it is so, where the Crown rights have never been granted out in fee to others, and where, not for forty or any number of years, but for immemorial time, there has been a constant custom in favour of not paying teinds. I think, therefore, the second plea cannot be sustained. As to the third plea, I think it is proved that this has not been always a royal domain; and, at any rate, it is not proved that it has always been exempted from tithes. I am inclined to think that for a certain period it did pay tithes. Either of these elements, wanting in favour of Lord Moray, is fatal to his case. If this, although it has never paid tithes, was at one time feued out to subjects and came back to the Crown by forfeiture or annexation, that is fatal to his case, because it is not the original domain of the Crown, but an alienated subject forfeited from one in whose hands it was teindable. On the other ground, also, I think he must fail.

Agents for Objector—Melville & Lindesay, W.S.
Agents for Minister—Marshall & Stewart, S.S.C.

Wednesday, February 16.

FIRST DIVISION.

ORR'S TRUSTEES *v.* ORRS.

Trustees—Partnership—Power of Nomination. By contract of partnership it was stipulated that the death of either partner should not dissolve the firm; that the trustees of a deceasing partner should have the option of letting the truster's capital remain in the business, and themselves becoming partners, or of withdrawing; and that either partner, or the trustees of one, might nominate a deceasing partner's son to become a partner. The trustees of one of the partners appointed the managers of two of the distilleries partners with a small interest in the firms. *Held* their doing so was not in excess of their powers.

John Kerr Orr and his brother Daniel Orr carried on business in partnership as distillers in Campbeltown and Jura, and as merchants in Glasgow. The business at Campbeltown was carried on under the name of "The Glenside Distillery Company;" that in Jura under the firm of "J. K. and D. Orr;" and that in Glasgow under the firm of "John K. and Daniel Orr." For many years the partnerships were carried on without any written contract. But on 24th September 1866 a contract was entered into in regard to the Glenside Distillery. By article six it was thus provided,—"In the event of the death of either of the partners during the currency of this contract, the trustees or representatives of such deceaser shall have the power and option of either allowing the capital of such deceaser to remain in the concern, and to become partners therein, subject to all the rights and liabilities of their author, or to withdraw from the concern. Either of the partners, or their trustees under their respective settlements, shall have the like power and option of nominating one of their sons to succeed him, or sons in succession, as a partner in the said concern, along with the survivor, and in that case the surviving partner shall be bound to receive such trustees or nominee as a partner, and the copartnery shall thereafter continue and endure

under, and be regulated by, these presents for the remainder of the contract, and for such farther period as the partners may agree upon; said nominee being bound in that case to allow the share and interest of his predecessor to remain in the concern." By article seven it was provided that the company should not be dissolved by the death of either of the partners; and by article eleven a power of alteration was reserved.

John Kerr Orr died on 4th October 1866, survived by a widow and two children. He left a trust-deed and settlement dated 21st September 1866, by which he conveyed to his wife, his brother Daniel Orr, and his son John Mackintosh Orr, his whole estates, heritable and moveable. By the third purpose he made the following declaration, "and in regard to the Glenside Distillery Company, in which I am a partner to the extent of two-third parts or shares, and the Jura distillery in which I am a partner to the extent of one-half, it is my wish that, on the death or second marriage of my said spouse, my son John Mackintosh Orr, whom failing, my son William Orr, shall have the option of succeeding me as a partner in said distilleries, and with that view I authorise my said trustees to sell my said shares and interests in the said distilleries to my said son John, whom failing to my said son William;" "and until the death or second marriage of my said spouse I authorise my said trustees, if they should deem it expedient, to allow my capital to remain in the said Glenside Distillery Company and Jura Distillery, and to carry on the said business of distilling as at present, and to apply the profits, or such portion thereof as they may deem necessary, for the support of my said spouse, and the upbringing of my said children."

Thomas Orr was manager of the Jura business at a salary of £80, and a creditor of it to the extent of £433, 7s. 9d.; and Dugald Campbell Macintyre was manager of the Glenside business at a salary of £100. By agreement dated 19th and 30th October 1867, entered into by John Kerr, Orr's trustees, Daniel Orr, D. C. Macintyre and Thomas Orr, it was agreed that Macintyre should become a partner of the Glenside and Jura firms, and Thomas Orr of the Jura firm. Each was to receive two-tenths of the profits, and to contribute to the capital of the firms, Macintyre £1500, and Thomas Orr the sum in which he was creditor of the firm. They were also to receive certain small commissions on the sales, according to the rates heretofore received by them. Mrs Orr and her son, with the concurrence of Macintyre, now sought to reduce this agreement. There were also various other conclusions not at present persisted in.

SOLICITOR-GENERAL and M'LAREN, for them, argued—The agreement of 1867 is *ultra vires* of all the parties thereto, and is reducible in so far as it supersedes or alters the contract of co-partnery of 1866, and substitutes for the two companies of the Glenside Distillery Company and J. K. and D. Orr, two new and different companies, composed of different partners, alters the risks of trade in respect of both concerns, defeats the right conferred by the trust-deed on John Mackintosh Orr and William Orr, the truster's sons, to acquire by purchase in succession the truster's share and interest in the stock and profits of both the Glenside Distillery Company and J. K. and D. Orr, and disposes of a part of the truster's shares and interests in the stock and profits of the Glenside Distillery Company, and in the stock and profits of J. K. and D. Orr respectively, by giving a part thereof to the assumed partners, all in contravention of the truster's deed of settlement, and in violation of the contract of co-partnery of 1866. The agreement is also reducible in so far as it authorises the payment of commission, or of an allowance for time and trouble to Messrs John K. and Daniel Orr of Glasgow, in respect that Daniel Orr, a partner of that firm, being a trustee, was personally disqualified from entering into a remunerative contract with the trust.

WATSON and BLACK, for Daniel and Thomas Orr, replied—The pursuers are barred *personali exceptione* from insisting in the action. The agreement was entered into with the knowledge and consent of the whole beneficiaries under the trust-deed. It has been homologated by the pursuers. The acting of the trustees was not *ultra vires*. Under the powers given to them it was quite competent to assume new partners with small shares as here. It is often prudent to give a manager a small share in the business.

LORD MURE reported the case.

The Court assoilzied the defenders. The arrangement entered into by the trustees was only voidable, not void; and if set aside it must be at the instance of parties interested. There was, however, no ground for setting aside what they had done. Their right to assume a new partner was a question of circumstances; and under the powers given to them by the truster they were quite entitled to do so. Had he been alive no one could have disputed his title to do as they had done, and they had just come in his place. It was a most prudent step on the part of the trustees to give the managers some interest in the business; and the allowing commission on sale was only fixing a right which they as managers had already possessed.

Agents for Pursuers—J. A. Campbell & Lamond, C.S.

Agent for Defenders—P. S. Malloch, S.S.C.

HOUSE OF LORDS.

Thursday, February 17.

STEWART *v.* M'CALLUM.

(*Ante*, v, 256.)

Sale — Condition — Consignation — Relief. On the sale of certain lands a sum of £1500 was consigned by the purchaser, on the stipulation that the seller should "take all necessary proceedings for effectuating a claim of relief" of certain burdens granted in the warrandice clause of the original titles; and that the seller should receive payment of this sum in proportion to the amount of relief effected. *Held* (*affirming* Court of Session) that he was entitled to uplift the whole sum on fixing the liability for relief on the superior *qua* superior, and was not bound to try to fix the liability on the superior personally.

By a feu-contract in 1705, between James Marquis of Montrose and David Graham, the Marquis conveyed the lands of Braco, and the teinds thereof, to Mr Graham in liferent, and his son James Graham, and his heirs therein set forth. The