offence of "keeping open house" could not be committed. What I base my opinion upon is the entire want of anything that could supply proof of the commission of the offence.

The Court sustained the appeal, quashed the conviction, and allowed £7, 7s. of expenses to the appellant.

Counsel for Procurator-Fiscal — Mackintosh. Agent—
Counsel for Respondent (Appellant)—R. V. Campbell. Agent—

COURT OF SESSION.

Friday, March 15.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CAPLEDRAE CANNEL COAL COMPANY *v.* THE COMMON AGENT.

Teinds—Patron's Title to Teinds—Heritable Right—Acts 1690, *c.* 23, *and* 1692, *c.* 25.

The title which a patron has to teinds in virtue of the Acts 1690, c. 23, and 1693, c. 25, is perfected *vi statuti*, and cannot be derogated from by any attempted feudalization of the teinds.

Observations per Lord President on the history of parsonages.

The Lochore and Capledrae Coal Company (Limited) had their lands of Ladath, &c., localled upon in the locality of the parish of Ballingry on the footing that they had no heritable right to the teinds of the said lands. They accordingly objected to the interim scheme, upon the ground that being infeft in the patronage of the parish, and having by virtue of the Acts 1690 and 1693 right to the teinds of the whole parish, they were thus proprietors of the teinds of their own lands, and as such entitled to be ranked *pari passu* with the heritors holding their teinds on heritable rights. The common agent replied that the predecessors of the objectors having right to the teinds had feudalised them; that teinds once feudalised could only be transmitted according to feudal rules, and that the teinds had not been so transmitted to the objectors.

The description of the lands in the older titles (before 1691) was as follows:—"The lands of Navitie and Quonthill, the hills called Bannertie Hills, with the advocatioun donatioun and right of patronage of the personage and vicarage of the paroch kirk of Ballingry, the quarter lands of Blaircrumbeth," &c. In the year 1690 the lands described as above were in the possession of John Malcolm of Balbedie, who in 1691 disponed them with the same description to Sir John Malcolm of Innerteil and Michael Malcolm. Soon after this, however, the lands seem to have fallen to the Crown in virtue of the casualty of recognition, as the next title is a Crown charter of recognition in favour of Alexander Colvill, of date 1698. This charter contains a description of the lands in the same terms as the older titles, but finishes with a clause of novodamus, as follows:—"De novo dedimus concessimus et disposuimus proque nobis et successoribus nostris pro perpetuo confirmavimus et hac presenti Carta nostra de novo damus concedimus et disposuimus proque nobis et successoribus nostris pro perpetuo confirmamus prefato Alexandro Colvill hæredibus suis et assignatis antedict. hereditarie et irredeemabiliter Totas et Integras predict. Terras et Baroniam de Lochoreshyre Comprehenden. omnes et singulas particulares villas terras Burgum Baroniæ Molendina Lacus Piscationes Jura Patronatus Decimas aliaque respective suprascript. Cum omnibus suis pertinen. jacen. designat. unat. et incorporat. modo rexive. suprascript." Upon this Colvill was infeft. The two Malcolms and Colvill having had various interests over each other's lands, entered into a submission by which their interests were to be determined. Accordingly, on 10th November 1698 a decreet-arbitral was pronounced, the executive part of which was as follows:—"In the first we decern and ordain the within designed Alexander Colvill to make and grant ane ample and formall disposition and assignation to and in ffavours of the also within designed Sir John and Michael Malcolm yr. aires and assigns either in ane or two distinct papers conform to yr. rexive interests in the Lands and Barrony of Lochore as they shall aggree bet. ymselves of the haill lands and barrony tynds milns superiorityes and oyrs mentd. in and disponed to the sd. Alexander Colvill by his gift of recognition of the sds. lands and barrony past his matties hands with warrandice from his oune fact and deeds containing ane prorie of resignation and all oyr clauss requesite and necesyr for denuding him effectually of the said gift and the haill lands and oyrs yrin contd." In implement of the said decree-arbitral and of a contract of division which had been entered into between the two Malcolms, Colvill in 1699, with consent of Michael Malcolm, disponed to Sir John Malcolm the hills called Binertie Hills "(reserving to ye sd. Michael Malcolm his airs and successors qtsomever the liberty and priviledge of grazing and pasturing upon ye sds. hills in manner ment. in the said Contract of Division) with advocation donation, and right of patronage parsonage and vicarage teinds of the parish kirk of Ballingry the quarter of ye lands of Blaircrumbeth," &c. Sir John Malcolm thereafter, in 1708, disponed the said lands in precisely the same terms to himself in liferent and to his son Robert Malcolm in fee. Thereafter, on 5th March 1708, he got a Crown charter of resignation, of which the dispositive clause was as follows:—"Montes lie Bannertie Hills nuncupat reservan Michaeli Malcolm de Balbedie, hæredibus ejus et assignatis super dict montes graminis pasturæ libertatem et privilegium cum advocatione donatione et jure patronatus rectorearum et vicariarum decimarum ecclesiæ parochialis de Ballingrie, quartam partum terrarum de Blaircumbell." The quæquidem was as follows:—"Quæquidem Terrae decimæ jura patronatus burgum baroniæ aliaq: suprarecitat cum omnibus partibus pendiculis et pertineni earund. perprius ad demortuum Joanem Malcolme de Balbedie hæreditarie pertinuerunt." The precept of sasine warranted infeftment in teinds, and sasine was taken in the teinds. In the subsequent titles the description continued as above

till the next Crown charter, which was of date 1734, when the description reverted to the terms of the very oldest titles, viz. :—"Cum advocatione donatione et jure patronatus Rectorie et Vicariæ Ecclesiæ parochialis de Ballingrie"—and so continued in all the dispositions down to the present time.

The Lord Ordinary pronounced an interlocutor repelling the objections for the Lochore and Capledrae Cannel Company (Limited), of date 17th July 1877. He added this note :—

"*Note.*—The objectors are patrons of the parish of Ballingry. They maintain that in that character they are titulars of the teinds of their own lands, and claim the same preference in the locality as is possessed by an heritor who has an heritable right to the teinds of his own lands.

"In the older titles to the lands belonging to the objectors the teinds are not conveyed; but the titles between 1698 and 1734 include the teinds. It is not necessary to detail them. It is sufficient to say that under at least one Crown charter, viz., the charter of 3d March 1708, the predecessors of the objectors were infeft in the teinds. The conveyance in the charter is undoubtedly peculiar; but it seems to include the teinds which are comprehended in the quæquidem clause. Sasine is given in the teinds.

"The teinds thus feudalised were not afterwards conveyed, and in particular were not conveyed to the objectors. Hence the Lord Ordinary is of opinion that the objectors have no right to their teinds. They urge that the teinds belonged to their predecessors *qua* patrons; that they were included in the titles by mistake; and that the mistake was rectified in the subsequent titles. But if their predecessors were proprietors of the teinds, there seems to have been no incompetency in their feudalising them, and after that was done they would not, it is thought, be conveyed by a mere conveyance of the patronage."

The objectors reclaimed and argued—The word "teinds" after the patronage are mere words of style. Patronage grammatically governs teinds, *i.e.*, it is the patronage of the teinds. The charter of recognition gave no teinds, the words of the novodamus being limited by the words "supra respective recitat." The putting in of the word teinds was a mere blunder, and was at once rectified by the Crown charter of 1734. In any view, the patron cannot be deprived of his statutory right by any conveyance.

The common agent argued—The first appearance of teinds is in the charter of recognition, and they were then feudalised. At any rate the Malcolms had right by the statutes to the teinds, and might feudalise the teinds if they chose. It was possible that the forfeiture by recognition occurred between 1691 and 1693, which would account for the Crown having the teinds, as Ballingry was a parsonage, and so the patron did not get right to the teinds till 1693. After 1734 the words import a mere conveyance of the patronage, and the teinds are consequently left in *hæreditate jacente* of some of the Malcolms, and do not belong to the objectors, who are singular successors. The cases show that the word "teinds" imports a conveyance of the titularity, whereas "parsonage and vicarage" alone are mere words of style.

Authorities quoted—Connell, ii. 77; Buchanan, 140; *Ogilvie* v. *Scott*, 1792, M. 15,695; *Spalding* v. *Heritors of Kirkmichael*, 1753, M. 15,670, and Elchies' App. 2, *voce* Teinds, No. 37, also vol. ii. 480; *Stewarts* v. *Scott*, 1797, M. 15,703; *Feuars of Kerseland* v. *Blair*, 5 Br. Supp. 626; *Sands* v. *Earl of Wemyss*, November 15, 1842, 5 D. 74 (Lord Medwyn's opinion, 82); Erskine, ii. 10 40; Statute 1690, c. 23; 1693, c. 25.

At advising—

Lord President—In this locality of Ballingry the respondents object to the interim scheme, on the ground that the teinds of their lands in the parish have been localled upon along with those of heritors who have not heritable rights, whereas being vested with the right of patronage and titularity the teinds of their lands are entitled to the privilege of postponement in the order of the allocation for stipend. The Lord Ordinary has not given effect to that contention, and has in his interlocutor repelled the objection of the respondents. It is not disputed that in the ordinary case the patron of a parish who has the right of the teinds in virtue of the Acts 1690 and 1693, and has lands in the parish, is by those statutes in the position of one having a heritable right to his teinds, and in respect of that right is entitled to have his teinds postponed in order of allocation, just as any other heritor who has a heritable right to his teinds. The Lord Ordinary has, however, not given effect to that rule, on special grounds founded on the titles in this case. He says that—"In the older titles to the lands belonging to the objectors the teinds are not conveyed, but the titles between 1698 and 1734 include the teinds." Then he says—"The teinds thus feudalised were not afterwards conveyed, and in particular were not conveyed to the objectors. Hence the Lord Ordinary is of opinion that the objectors have no right to their teinds. They urge that the teinds belonged to their predecessors *qua* patrons, that they were included in the titles by mistake, and that the mistake was rectified in the subsequent titles. But if their predecessors were proprietors of the teinds, there seems to have been no incompetency in their feudalising them, and after that was done they would not, it is thought, be conveyed by a mere conveyance of the patronage."

In point of fact, the Lord Ordinary holds in law that these teinds having been once feudalised, and thereafter not specially transmitted, they either remained in the possession of some one who had sold the lands without the teinds, or in the *hereditas jacens* of some proprietor, out of which *hereditas* they had not been taken by his successor. This view, I think, rests on a mistake, which has arisen from not fully considering the nature of the benefice and the history of teinds of this description. It was admitted by the common agent that Ballingry was a parsonage, and continued to be one subsequent to the Reformation. I should, however, hesitate to take an admission made in debate as evidence of such a point in the inquiry. I am glad therefore to find that there is no doubt of the fact, for I find in the list of parishes given by Dr Keith, whose work is generally acknowledged to be accurate, that Ballingry appears as one of the parsonages not appropriated to a prelate or religious house before the Reformation, and therefore it continued after that time to be enjoyed as a proper parsonage by the parson who served the cure. This was the

case through the whole of the seventeenth century. For though the Statute of 1617 gave the minister of a parish the right to provision from the teinds of that parish, parsonages were excepted from the statute, and the parson serving the cure continued in the full enjoyment of the teinds. No doubt in 1649, when patronage was done away with, an arrangement was made to compensate the patrons by giving them the right to the teinds of benefices which had not been specially conveyed. Whether that was carried out to any real result in any given parish it is almost impossible to find at the present day. But if such was the case, the effect would have been to make the parson of a proper parsonage a mere stipendiary minister dependent on the patron. But that point is not of importance, for any effect made by the Act 1649 was undone by the Act of 1669, as matters were by that restored to the position they were in prior to 1649. This lasted till 1690, or perhaps 1693, for it is doubtful whether the Act 1690 included parsonages. To make that certain the Act 1693, cap. 25, was passed. At that later date, then, the parsons who from the Restoration had been again enjoying the full fruits of the benefice were reduced as in 1649 to the position of stipendiaries, and the fruits of the benefices were transferred to the patrons. That is the history of Ballingry parish, and the first question for consideration is—What is the nature of the patron's right to the teinds as created in 1693? The Lord Ordinary holds that it is a right inferior to that of a titular—a right which may be sopited if the patron acquires a better one—for it is only on such a theory that he holds the patron to have lost what was given him by an Act of Parliament. But it is impossible that any better rights could be acquired than are given by an Act. There could be no titularity in such a parish, for the titular is the successor of the lord of erection, and if there had been a lord of erection of this parish, it could not have been a parsonage after the Reformation. Therefore no title to the teinds in Ballingry could exist different to that created by the Acts of 1690 and 1693, and none could be better. The teinds were vested in the parson till they were passed on to the patron. It is not averred that after the Reformation the parson could alienate the teinds of his benefice. It therefore appears to me that the patron after 1693 had a good title to them *qua* patron, and that the supposed feudal title which was set up between 1708 and 1734 was a mere imagination and impossibility. But supposing that there was any force in the suggestion that the title to the teinds might be feudalised, would it sopite that title that the feudal title which had been created was again allowed to fall into abeyance? I think not, for a statutory title is the best of all titles, and no other title can sopite it. This is very accurately stated in the 40th section of Mr Erskine's title on teinds—[*his Lordship here quoted the section*]. That is, I think, a perfectly accurate description of the position of the patron after 1690. He had a right to the tithes. But no seisin was required to perfect that title or to vest it in him. It was in him in virtue of his office as patron, just as it would have been had he been a beneficed churchman. The temporary feudalisation of the teinds cannot derogate from his right *qua* patron to the teinds. Nor can the subsequent omission of teinds from the titles. The patron has the right *vi statuti*, and it cannot be sopited by any such circumstance. That right being *vi statuti*, is to a certain extent matter of fact, but I think I have shown satisfactorily that the right to the teinds of this parish must have been acquired in that title, and in the absence of any contrary evidence of transmission by the patron of the teinds to someone else, they must be held still to belong to that title. But I am anxious to find out the state of the heritable rights to the teinds of this parish, as I thought the position of these might throw some light on the present question. The common agent has sent me an example, and I find that it is in direct illustration of the account I have given. It is a grant of the teinds of the lands in favour of the laird of Navity, in virtue of which heritable right the teinds of the said lands are now postponed. The grant was in 1736, at which date Sir J. Malcolm was liferenter and his son fiar of the barony with the patronage. This was after the words "Teinds, parsonage, and vicarage, &c.," had been dropped out of the titles after being two or three times previously inserted.

In this case there is a plain and unmistakeable sale of teinds by the titular *vi statuti* to a heritor at the statutory price, and that shows quite plainly that the title under which the teinds were held was that of patronage. To maintain that title it is of no consequence that there is nothing in the original grant or in the subsequent transmissions of the patronage, except the mention of the patronage, for the patronage carries with it all its accessories, namely, the right to vacant stipend, a right to a preferable seat in the parish church, &c. Those need not be specified, and no more need the statutory right to teinds. You could not by so specifying them make the right higher than it is, nor can the omission to do so injure it in any way. I am therefore of opinion that the patron has here a right to the teinds of such lands as have not been conveyed to the heritors, and amongst others those of his own lands, and that he is therefore entitled to the postponement he claims. I am therefore for altering the Lord Ordinary's interlocutor, and a remit must be made to him to rectify the locality.

The other Judges concurred.

Counsel for Objectors — Lee — Rutherfurd. Agents—Drummond & Reid, W.S.

Counsel for Common Agent—Gloag—Murray. Agent—George Burn, W.S.