Friday, February 28.

FIRST DIVISION.

MINISTERS OF OLD MACHAR *v.* HERITORS.

Teinds—Valuation—Minister—Stipendiary. Objection to decrees of valuation produced by heritors in a locality, that, in the processes in which these decrees were pronounced by the High Commission, the ministers of the parishes had not been called as parties, *sustained* (Lord Curriehill *diss*). *Opinion*, by majority, that the law was well settled to that effect, both as to decrees of valuation and decrees of approbation. *Opinion, per* Lord Curriehill, that where the minister was merely a stipendiary, it was not necessary to cite him to any process of valuation previous to the year 1707.

This was a question arising between the ministers and the heritors in the locality of Old Machar, in the county of Aberdeen. In 1862 the ministers obtained an augmentation. The common agent who was appointed to conduct the locality gave in a report giving effect to certain decrees of valuation produced by heritors, and stating that there was no free teind in the parish of Old Machar out of which the augmentation awarded by the Court could be provided. The ministers objected to this report. With regard to the valuations founded on by Mr Forbes of Balgownie, Mr Cumming Skene of Mindurno, Mr Gordon Hay of Seaton, and Major Paton of Grandholm, they objected that the valuations were invalid in respect that the minister had not been a party thereto. They further contended that the teinds of the lands of Mr Fisher of Murcar and Mr Barron of Denmore were unvalued. Mr Fisher and Mr Barron, in their answers to the objections for the ministers, produced valuations, and alleged that their teinds were surrendered and exhausted, and accordingly the ministers did not further object as regarded these heritors. The Lord Ordinary (Barcaple) found that Mr Forbes, Mr Skene, Mr Hay, and Major Paton had not produced any valuations which could be sustained as effectual against the ministers, and found them liable in expenses. With regard to Mr Fisher and Mr Barron, who produced valuations which were not now objected to, he found these respondents neither entitled to nor liable in expenses; and remitted to the clerk to correct the locality. The heritors reclaimed.

Young and Fraser for Mr Forbes.
Adam for Major Paton.
Clark and Keir for Mr Skene.
Clark and H. Smith for Mr Hay.
Gifford and Asher for respondents.

Lord President—In this case the two ministers of the parish of Old Machar obtained an augmentation upon the 15th of January 1862, and a remit was made to prepare a locality in the common form. The first step in the locality was the preparation of a report by the common agent on the state of the teinds, and the result of that was, that in the view of the common agent there was no free teind in the parish out of which the augmentation awarded to the ministers could be provided. This result, however, was brought out by giving effect to certain decrees of valuation; and the ministers objected to the report of the common agent upon the ground that certain of these decrees of valuation were invalid, and ought not to be given effect to. Upon the objections of the minister a record was made up, and the Lord Ordinary, in the interlocutor now under review, finds that certain heritors—Harry David Forbes, John Gordon Cumming Skene, James Gordon Hay, and Major Paton—have not produced valuations of their respective teinds which can be sustained as effectual against the ministers of the parish. These four heritors have reclaimed against the judgment, and the question is, whether the Lord Ordinary's interlocutor ought to be adhered to or altered? The ground of the Lord Ordinary's judgment in regard to all of these four heritors, each of whom founds upon a separate decree of valuation, is, that in the processes in which these decrees were pronounced by the High Commission, the minister of the parish was not called as a party. Before proceeding to consider the effect of this objection, it is necessary to say a word or two as to the nature of the decrees of valuation. There are three of them—viz., those of Mr Gordon Skene, Mr Gordon Hay, and Major Paton,—that appear to me to stand very much in the same position. Mr Gordon Skene is proprietor of certain lands called Mindurno—at least that is the leading name—and he founds on a decree of valuation by the High Court in 1683. Now this decree, although called a decree of valuation, is in truth a decree of approbation, and the thing which is approved of by that decree is not a valuation by the sub-commission, but a consent of the titulars and the heritors that the teinds shall be taken as at a certain value. That consent is contained in a tack of teinds by the titulars to the heritors, dated in 1681, just two years before the decree of approbation. Mr Gordon Hay is proprietor of the lands of Bridgefields and Seaton, and he founds upon a decree of the High Court in 1684, which also proceeds upon a consent, and is in truth a mere approbation by the Court of that which parties had extrajudicially agreed to, the consent being contained in a tack of the teinds by the titulars to the heritor, dated in 1681—that is to say, three years before the decree. Major Paton is the proprietor of the lands of Grandholm, and he founds upon a decree of the High Court, dated in 1690, which proceeds partly—that is to say, as regards a certain portion of the lands—on a deed of consent by the titular in 1688, consenting that the teinds of the heritor's lands shall be valued at a certain rate. This deed of consent is produced by the heritor in the process, and is given effect to without inquiry by the decree. As regards the rest of his lands, the decree proceeds upon a consent contained in a tack of the teinds of these lands, granted by the titulars to the heritor, and containing a consent by the titulars that the teinds shall be valued at a certain rate. In the case of Mr Forbes, the leading reclaimer, the decree stands in a somewhat different position. He is proprietor of the lands of Balgownie, and the teinds of these lands are said to be valued by a decree of the High Court in 1697. There is no doubt that in the process in which that decree was pronounced there were but two parties present—the heritor on the one hand, who was pursuer of the actions, and the King's College of Aberdeen, who were the titulars of the teinds and defenders of the action. After the action came into Court, but it does not precisely appear at what stage of the process, these two parties came under an arrangement to submit the value of the teinds to arbitration; and they made choice of Sir James Scougall, then one of the senators of the College of Justice, as arbiter. There was an inquiry accordingly before Sir James Scou-

gall as arbiter, and he pronounced a decree-arbitral valuing the teinds, and the decree of the High Commission proceeds upon that decree-arbitral. I do not think it very clearly appears whether it proceeds upon anything else; whether there were any witnesses examined in Court before the submission was made to Sir James Scougall, or whether the evidence which was taken was taken before the arbiter exclusively. But to me it appears of little consequence what is the state of the fact as regards that. I take the fact to be that, either in whole or in part, the decree-arbitral of Sir James Scougall was the foundation of the decree of the High Court. Now, although there are these differences between the cases of the four different reclaimers who are before us, they are not, I think, very material in the consideration of the general question which we are about to decide. But it is right to keep them in view, because unquestionably, as regards three of the reclaimers, the decree of the High Court gave effect only to the private compact of parties. In the other case the decree may have proceeded to a certain extent upon evidence led before the Court itself; and it may also be said that the decree-arbitral of Sir James Scougall partakes of the nature of the decree of a judicial referee. There are certain other specialities regarding some of these decrees, which it would have been quite necessary to enter into and dispose of if I were not of opinion that the only objection which has been sustained by the Lord Ordinary is a good objection to all of them. It is to be observed, however, undoubtedly, looking to the reason and nature of the objection, that it does apply with greater force to those cases in which the High Commission did not apply their own mind to the valuation of the teinds, but accepted of extrajudicial compacts between the titular and the heritors, to which they give effect without inquiry. But, while premising these observations as to the distinctions between the different decrees that are founded on here, I now proceed to consider the objection that the minister was not called in these processes of valuation, as an objection apart from specialities altogether; and it appears to me that it is settled by a very long and a very strong *series rerum judicatarum* that that is a good objection to a decree of the High Commission, whether it be a decree of valuation or a decree of approbation; and I do not think that, in the whole history of the valuation of teinds in this country, there is the slightest appearance of any departure from the doctrine thus established. It is perhaps unnecessary to say anything about the earliest decision which we have recorded—the case of *Lady Purvishaugh* in 1671—because it has been represented that in that case the minister was a parson; and from the slender information that we have about the case it is impossible to say whether he was or no. But there are the cotemporary authorities, which I think they may be fairly called, of Sir George Mackenzie and Mr Forbes, about which there is no mistake, and which show that the understanding in their time—that is to say, in the end of the seventeenth and beginning of the eighteenth century—was, that it was necessary to the validity of a proceeding before the High Commission that the minister should be called as a party, Immediately after the publication of Mr Forbes' work there is a judgment of the Court of very great weight, and directly applicable upon this question—I mean in the case of the *Minister of Kirkbean*, on the 4th February 1708, of which we have an account in the first volume of Connell. The teinds there had been valued by decree of valuation of the High Commission in 1699; a reduction of that decree was brought by the minister, and the decree was set aside expressly on the ground that the minster was not called as a party in the valuation. Now, here there can be no question raised as to whether the minister was a parson or a stipendiary, because it appears on the face of the proceeding that the interest which he alleged he had in maintaining a reduction of the valuation was that the valuation, if sustained, would reduce his stipend below the last decree of modification, clearly showing that he was a stipendiary. After this date of 1708, the understanding and the practice remained quite undisturbed, so far as I can see, for a century, and nothing can better illustrate the perfect coincidence of opinion everywhere upon this subject than the statement of Mr Erskine, writing shortly after the middle of the eighteenth century, who gives us both the rule itself and the reason for the rule, in language which is quite worthy of himself, as regards its distinctness and perspicuity. He says, "In actions of valuation brought before the session, as the Commission Court, the titular or his tacksman, and the minister of the parish, must be made parties to the suit, for both have an interest in it: the titular that the tithes be not valued too low, because all the tithes belong to him after payment of the minister's stipend; and the minister, because the more tithes there are in a parish, he is the better secured in his stipend, and in a fund for future augmentation."—(ii. 10, 35.)

Now, it is not immaterial to notice in passing, that among the commentators upon Mr Erskine, there is not one that throws the slightest doubt upon this statement in the text. The earliest commentator states, in a note, that the Court do not require the same regularity to appear in the reports from subcommissioners, and no author has ever said that they do. But he states that, not as derogating from the authoritiy of the text, but, on the contrary, supporting it, by stating that in another class of cases, not embraced within the statement in the text, the rule of procedure is understood to be different. I think a good deal of misapprehension is sometimes introduced in the discussion of this question by calling the minister a stipendiary. I don't mean to say that he is not a stipendiary in a certainly perfectly proper sense of that term, because he is the recipient of a stipend. That is very true; but the word stipendiary is apt to convey an inaccurate impression, as if he were a stipendiary in this sense, that he has a certain fixed salary assured to him, and nothing more. Now, in that sense he is not a stipendiary. On the contrary, while he has a present stipend in enjoyment, he has a larger stipend in expectancy. He is entitled to have his stipend augmented from time to time, and he has a fund out of which, but out of which alone, he is entitled to draw these augmentations. That shews, I think, as plainly as anything can possibly do, that in the amount of that fund, out of which alone he can draw any augmentations of his stipend, he has as deep an interest as any one possibly can have. Now, this concludes all that one has to say about the history of the matter during the last century. There is really no more authority, no more light, to be had about it; and if the matter rested there, I should have supposed that he would be a very bold man indeed who would attack Mr Erskine's law on this subject, and say that it was unsound. And accordingly, I think it has

been reserved for very late times to do that, for, most certainly, no attack was made upon that law in the case so much founded on by the reclaimers —I mean *Macneil* v. *The Ministers of Campbeltown*. It is quite necessary to examine that case somewhat in detail, partly for this reason, that the grounds of the judgment, both in this Court and in the Court of Appeal, are not given in the reports, and therefore we are driven to an examination of the proceedings, and of the pleadings of parties, to see what was really the question submitted for decision. There was a sub-valuation of Mr Macneil's teinds by the Sub-Commissioners in 1630, and the action which he raised and brought into this Court about the beginning of the present century was a summons of approbation of that sub-valuation. The ministers appeared and opposed this approbation upon various grounds, but one of the grounds was, that in the proceedings before the Sub-Commissioners the minister of the parish for the time had not been called. The Court held that to be a bad objection, and the House of Lords adhered to that judgment; and if I were considering that question as an open question now, I should be of the same opinion, that that is a bad objection, and I think it would be found that most of the learned Judges who have had to consider the question that is now before us indicate pretty clearly that they hold the same doctrine as the Court of Session and the House of Lords in the case of *Macneil* v. *The Ministers of Campbeltown*. But then one of the proceedings before the Sub-Commissioners was necessarily of a different kind from those before the High Commission. It has been suggested, and very properly, that the Sub-Commissioners were not persons to whom the exercise of any precise judicial functions could have been very well committed. They were not lawyers; they were either country gentlemen or members of the presbytery of the bounds; they were not persons acquainted with the forms of process, and could not be expected to conform themselves thereto in all respects, and the duty which was committed to them was to pronounce any judgment, but to inquire and report to the High Commission. It is also to be kept in view, that in all proceedings before the Sub-Commissioners there was a public officer charged with attention to the interest of all parties—the procurator-fiscal; and if any parties were absent from the inquiry, the presence of the procurator-fiscal afforded some assurance at least that no great injustice would be done. Now, I have said that the grounds of judgment are not to be found in the Reports, but I think in this case, more than in almost any other in such a position, we gain light from the pleadings of the parties, which leads us with almost perfect certainty to what the grounds of judgment must have been. Both parties founded upon the Statutes 1633 and 1661. The ministers argued that these statutes recognised his interest as being an important interest, and gave him a title to be present in the High Court for the purpose of objecting, at least upon certain grounds, to the valuation which had been led before the Sub-Commissioner: and he argued from that, that having such a right it was certainly but reasonable, and followed also almost by parity of reasoning, that he was a necessary party in that court in which the primary inquiry was made. But the heritor replied to this that that only shewed that he had a right to be present in the High Court, and not before the Sub-Commissioners, and that it was quite a sufficient recognition and defence of his right and interest that he should have an opportunity of appearing in the High Court. I find in the pleadings for the parties in this Court, that the matter is thus alleged upon the one side and on the other. The petition of the minister sets out thus:—"As the titular therefore and the stipendary minister have each of them an interest in every valuation, so each of them ought to be made a party: and as their interest is in some cases diametrically opposite, so it is impossible that the citation or the appearance of the one can make up for the want of the citation or appearance of the other. This matter is clearly ascertained in practice in all valuations before the High Commission of Teinds, as it is well known that it is necessary in every case to cite not only the titular but also the stipendiary minister serving the cure of the parish, and in case of a vacancy it is necessary to cite the moderator of the presbytery in order that the interest of the minister may be properly attended to. But if this is necessary in a process before the High Commission, it must have been equally necessary in all the proceedings before the Sub-Commissioners, for the interest of the minister is the same in both, and it is absurd to suppose that it is necessary to call him in all the proceedings before the High Commission, and yet that the proceedings before the Sub-Commissioners, by which his interests may be equally affected, were perfectly regular and valid, though he was not made a party to it." That is the statement of the law and practice by the minister. Now let us see what is said on the part of the heritor. He says—"It is further argued in the petition, that as ministers are made parties in valuations led before the High Commission of Teinds, so it must also have been thought necessary to have made them parties in valuations led before Sub-Commissions; but it surely cannot be presumed that all the forms which are required in this Court were observed by the Sub-Commissioners. The nature of their court, and the description of the persons of whom it was composed, authorises no such inference. It will be attended to also, that from the great proportion of teinds now valued in the country, the ministers have a much more direct interest to be present at valuations than in the days of Sub-Commissioners, when valuations were but in their infancy, and there was little or no risk of the minister being prejudiced by them." That is the only answer he makes to the statement which I have read from the petition by the minister. In another part of the answer, he says, "The Sub-Commissioners were not lawyers, nor probably in any degree versant in law. They were generally country gentlemen, or the members of the presbytery in which the lands lay. From such men a rigid attention to forms could not be expected nor required. Substantial justice only could be looked for, or a following out of the measures most likely to attain the purpose of the appointment." Now, if the petitioner's counsel (the minister's counsel), had entertained the smallest doubt of the proposition which he was here asserting as to the absolute necessity of the minister being called in a process before the High Commission, do you imagine that he would not have cited the authorities in support of that proposition, and that he would have left it upon his own statement? But he finds it quite unnecessary even to cite such high authority as Mr Erskine, and for a very plain and obvious reason, because his opponent did not for one moment question it. The only passage of the answer to that petition which refers to the matter at

all I have read to your Lordships, and it does not even venture to suggest the possibility that a process could go on before the High Commission without the presence of the minister. Now, so stood the matter in the pleadings in this Court. But how did the case fare in the House of Lords? We gather that from the appeal case. The appellant, the minister, says this in his appeal case: "This matter is clearly ascertained in practice in all valuations before the High Commission of Teinds, and it is well known that it is necessary in every case to cite not only the titular but also the stipendiary minister serving the cure of the parish, and in case of a vacancy it is necessary to cite the moderator of the presbytery, in order that the interest of the minister may be properly attended to. But if this is necessary in a process before the High Commission, it must have been equally necessary in all the proceedings before the Sub-Commissioners," and so he goes on to argue that the interest of the minister in both is the same. On the other hand, the respondent, the heritor, says in his case, objection 3d—"It has been further objected that the minister must be made a party in every process of approbation before the High Commission, and therefore it must have been equally necessary to call him as a party to the original proceedings before the Sub-Commissioners. Answer—The obvious answer to this objection is that the interest of ministers at present in valuations is much more direct and important than it was at the period the Sub-Commissioners made their inquiry. Besides, in the valuations made by country gentlemen as Sub-Commissioners, who had no authority to pronounce decrees, but merely to report their proceedings to the High Commission, the same formalities could not reasonably have been required, as in proper processes before the High Commission or Court of Tithes. Accordingly, in processes of approbation, it has ever been understood that these sub-valuations are to be held as good evidence, if liable to no objection in regard to substantial justice, which is the case here, where the presence of the titular was the best possible security that a fair value should be put on the tithes." This is the only answer given to the objection. Now, is it not a most remarkable thing that in the pleadings, both in the Court of Session and in the House of Lords, the one party should have asserted, in the broadest terms, the constant understanding and practice that in every process before the High Commission the minister must be a party; and that the other party, the heritor, never once ventured to question that proposition? Do your Lordships believe that the Court, in this state of the pleadings, would for the first time, and against all the authorities as they then stood, have pronounced this judgment upon the ground that it was unnecessary that the minister should be made a party in any process of valuation and approbation? and, much more, is it to be expected that the House of Lords, who themselves could have no possible knowledge of the state of the law and practice, finding these pleadings before them, should have invented a ground of judgment for themselves that was not suggested to them by the parties? But these observations are made still more weighty, in my humble apprehension, when it is considered who were the counsel that gave utterance to these pleadings. The counsel for the minister in the Court of Session was Mr Wm. Robertson, who afterwards, as Lord Robertson, was distinguished for a greater knowledge of teind law and ecclesiastical law than almost any man on the Bench; and the counsel for the heritor was Sir John Connell, of whose knowledge of teind law I need say nothing. The counsel for the appellants in the House of Lords was the late Lord Justice-General Boyle, a lawyer also particularly distinguished in that department of law. It appears to me, therefore, that upon these grounds, and after that investigation, it is very difficult indeed to say that this case of *Macneil* v. *The Ministers of Campbelton* could have disturbed in the slightest degree the already settled and known practice in regard to the necessity of calling ministers as parties before the High Commission. But there is another part of the argument of the parties which I cannot pass over without notice. The counsel for the heritors said that it would be most unreasonable to hold that the absence of the minister before the Sub-Commissioner should constitute a valid objection to the approbation of the Sub-Commissioners' report, when it had been found, in more cases than one, that the absence of the titular was not a good objection; and for this purpose he cited, among other cases, the case of *Thomson* v. *The Officers of State*, reported in Morrison, 10,687. The answer which was given to the objection in that case is thus recorded in the report:—the titular was the Crown—the Officers of State had not been called before the Sub-commissioners, and when the objection was pleaded, the pursuer of the approbation answered—"As the Sub-commissioners were authorized to execute the business committed to them in the manner which should be most agreeable to justice, without being limited to the nice forms of ordinary courts, so there are many instances of valuations having been proceeded without calling the titular, or at least without its appearing from the face of the decree that he had been made a party; and though in the process of approbation at the instance of *Sir John Clerk and Sir David Forbes* v. *Moir of Stormywood*, in the year 1713, the like objection was made, the Court approved of the valuation." The judgment is not given in this report to which I am now referring, but only the pleadings. The judgment there given is upon a different point, the point of dereliction. But in the fourth volume of the Folio Dictionary p. 358, the result of the discussion upon this subject is given in these terms:—"The Lords found it was no sufficient objection to the approbation of the valuation of the Sub-commissioners that the Crown being titular, the Crown Officers had not been called as defenders in the process before the Sub-Commission." To that doctrine also I am quite prepared to subscribe. But I don't think that that case of *Thomson* v. *The Officers of State* proves that a decree of valuation or approbation in the High Court will be good if the titular has not been called in the process; and just as little do I think that the case of *Macneil* v. *The Ministers of Campbelton* proves that such a process will be good if the minister is not called. The one follows just as much as the other. If *Macneil* v. *The Ministers of Campbelton* is an authority for saying that you may get a good decree of valuation in the High Court without calling the minister, then *Thomson* v. *The Officers of State* is an authority for saying that you may get a good decree of valuation in the High Court without calling a titular. And so I conclude the observations which I have to make upon the import and effect of this much discussed case of *Macneil* v. *The Ministers of Campbelton*. It appears to me that it not only does not disturb the current of decisions and practice, but that, when

properly examined, it falls most harmoniously into its place as one of the *series rerum judicatarum* which establishes the proposition I am stating. Now the judgment of the House of Lords in the case of *Macneil* v. *The Ministers of Campbelton* was pronounced in the year 1809, and it was not long before questions of this kind came to be mooted again. One looks, therefore, with great curiosity and interest for the purpose of seeing what was the effect of this judgment of the House of Lords upon the practice of the Court and upon the understanding of the profession. There were two cases of very great importance, and deserving to be very thoroughly studied by every one who desires to understand teind law and practice, which occurred in 1823. The one is *The Minister of Kinnoull* v. *M'Donald*, and the other is *Gillon* v. *The Duke of Gordon*. They are both reported in Shaw's *Teind Cases*, and one of them was appealed to the House of Lords, and a judgment pronounced there, the value of which I shall state immediately. In the case of the *Minister of Kinnoull* v. *M'Donald of St. Martin's*, the question was whether a decree of the High Commission in absence of the minister, although he had been cited, could be opened up like any other decree in absence. There was a very great deal of difference of opinion on the Bench upon that subject, but that which ultimately prevailed was that such a decree might be opened up any time within forty years by the minister, just like a decree of the Court of Session. The summons (the report states) was executed personally both against the titular and the minister, but no appearance was made for either, and after the summons had been seen and returned by the Officers of State, decree of approbation was pronounced in absence on the 8th of March 1815. This was an approbation of a sub-valuation. I need not trouble your Lordships by a reference to the opinions in that case which are given to a certain extent in Mr Shaw's report, but are given at greater length in the report of the judgment in the House of Lords in the case of *Gillon* v. *The Duke of Gordon*, to which I shall refer immediately. I only pause here for a moment for the purpose of saying that it is very difficult to understand how anybody could be allowed to reduce a decree in absence who was not a necessary party to the suit in which the plea had been pronounced. And therefore this first case which occurred after the judgment of the House of Lords in *Macneil* v. *The Ministers of Campbelton* seems very far away from the doctrine that has been founded upon. The minister said, "I was personally cited, but I did not appear, but I have a right like every other litigant to open up this decree any time within forty years," and that plea was sustained. *Gillon* v. *The Duke of Gordon*, which is reported in the same volume of Shaw's *Teind Cases*, p. 64, involved the same question as *The Minister of Kinnoull* v. *M'Donald*, but it had another point in it. The minister not only proposed to reduce the decree merely upon the ground that it was pronounced in absence, but he objected also that the benefice had not been properly represented, for although he, Mr Gillon, the very man who was in Court, had been cited as a party to the action, he had not at that time been inducted as minister of the parish, but had only been presented, and he said he was not the proper party to cite, and that the moderator of the presbytery ought to have been cited. This would have been a very unpromising-looking plea certainly if *Macneil* v. *The Ministers of Campbelton* bore the construction that is now put upon it, and it was not a very promising plea in any aspect of it, but it certainly indicated the professional feeling as to what was the effect of *Macneil* v. *The Ministers of Campbelton*. And what was the fate of that plea? It was this: The Court anxiously considered it, and they repelled the objection, because Mr Gillon was in law the minister of the parish when he was cited, although not inducted by the presbytery, and was therefore the proper party to cite as defender, and not the moderator of the presbytery. That is the *ratio decidendi*. Now, I have said that this case was carried to the House of Lords, and that judgment of the House of Lords was not brought under our notice in the argument, so far as I recollect; but it appears to me to be one of the most important authorities on this question. The rubric of the case in the first volume of Wilson and Shaw, p. 295, is this—"Found, affirming the judgment of the Court of Session,—1*st*, That a decree of approbation of a sub-valuation, pronounced in absence, of the minister of the parish, may be competently challenged by reduction; 2*d*, That the feudal proprietor is the proper pursuer of an action of approbation; and 3*d*, That the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the Moderator of the Presbytery, is the proper defender" in an approbation of a sub-valuation. Now, this case was dealt with very carefully, and most elaborately, in the House of Lords; and notes of the opinions of the Judges in the case of *The Minister of Kinnoull* v. *M'Donald*, much more full than Mr Shaw gives, were laid before the House, and are given in a note to the report. The facts are stated exactly as I have stated them already, and I need not waste time in repeating them. The judgment of the House of Lords was a simple affirmance; but observe what was the state of the argument here. The heritor was the appellant in the chief or original appeal against that part of the judgment which held that the minister could open up the decree as being a decree in absence; but the minister presented a cross-appeal upon that question as to whether he or the moderator was the proper defender in the process of approbation. And what the minister said in his cross-appeal was this—"The respondent has to object (1st) That when the summons of approbation was executed, the Duke of Gordon was the true proprietor, and he neither concurred as a pursuer, nor was called as a defender; and (2d) That it was directed against the wrong party; when executed, the parish of Speymouth was vacant; the respondent was not inducted: and therefore the moderator of the presbytery ought to have been called, and not the respondent." And what says the heritor? Does he say, Oh, all this is founded upon a pure delusion; the minister is not a necessary party in such cases at all, and it does not matter a straw whether he was called, or appeared, or anything else? Look at the judgment of this House in the case of *Macneil* v. *The Ministers of Campbelton*. Not a word of that. The case of *Macneil* v. *The Ministers of Campbelton*, is not once mentioned as having any possible authority in the question. But the answer which the heritor makes is this: As to the minor pleas of the respondent in his cross-appeal, it is quite clear that the Earl of Fife, as the undivested feudal proprietor, had a sufficient title to sue, and that the respondent, although not inducted at the time, yet his presentation having been sustained, was pro-

perly called as defender. And such, accordingly, is the ground of judgment both in this Court and in the House of Lords. Now, in chronological order, which really is the most instructive one can take in a question of this kind, the next case we come to is *Gordon* v. *Dunn*, which is not a direct authority, but which is certainly most valuable as indicating the state of opinion on this question both in the profession and upon the Bench, and, let me add, in the House of Lords. In the case of *Gordon and Dunn*, there was a submission to value the teinds, and a decree-arbitral following upon it in 1759. There was a process of approbation brought in the year 1830 by the heritor, to which the minister objected that this submission and decree-arbitral were *res inter alios* as far as he was concerned, and he objected to that valuation being approved of. Now, Lord Moncreiff pronounced an interlocutor in that case, which contains a statement of what he considers to be six settled points in the law of tiends, and I am going to ask your Lordships' attention to three of them. He gives plenty of authority for each one in succession, with which I don't trouble you, but his first, second, and fourth propositions are these—"1*st*, That in a process of valuation before the High Commission, the minister of a parish must be called in order to make a decree binding on his successors; 2*d*, That in a process of approbation of a sub-valuation, the rule is the same; 4*th*, That where the minister was a stipendiary, and the titular was duly called, the sub-valuation may be approved of though it does not appear that the minister was either called or present before the Sub-Commission." Now, if these are sound propositions, *cadit quæstio?* and Lord Moncreiff was a man who knew something about teind law. He was by this time on the Bench, and acting as Lord Ordinary in the cause. It was in the year 1832 that he pronounced that judgment. I don't suppose he was ignorant of the case of *Macneil* v. *The Ministers of Campbelton*, and I don't suppose he could very well be ignorant, having been counsel in the cases of *The Minister of Kinnoull* v. *M'Donald*, and *Gillon* v. *The Duke of Gordon;* and yet these he holds to be settled points in the law of teinds. The case was carried to the Inner House, and his judgment was affirmed, and no one there throws the slightest doubt on any one of his six points. There is not a whisper or a suspicion of any of them being wrong. Well, the case is carried to the House of Lords, and the judgment is affirmed after a most able and learned argument on the part of the appellant, which did not require an answer from the respondent, for the House did not call on the respondent's counsel; but Lord Brougham, as Chancellor, reviewing the whole matter, and founding very much on the detailed judgment of Lord Moncreiff, characterises the note in which these six propositions occur as a model of a judicial statement, and as a careful and judicious and learned examination of the authorities. As regards the case of *Gordon* v. *Dunn*, I said that it is not a direct authority upon the general proposition, that the minister of the parish requires to be called in all processes in the High Court, whether of valuation or of approbation; but it is a direct authority against the reclaimers here, or most of them, because that was an approbation which was sought of a valuation made by a submission, and in that way the Court here and the House of Lords both held that in such a process the minister must be called. That is the judgment. The opinions go a great deal farther; but that is the judgment, and therefore that is a judgment of the House of Lords which appears to me to be directly in point against Mr Gordon Skene, Mr Gordon Hay, and Major Paton. In my opinion, it also involves the case of Mr Forbes, but I do not say it is so directly in point against Mr Forbes as the other authorities that I have appealed to. But the great value of that case is not so much for the direct authority it gives as to particular parties before us in the present case, as for the general doctrine that it clearly establishes, in conformity, I think, with every other authority from the beginning of the last century down to the present time. But will it be said, or can it be reasonably suggested, that during the whole of this time the world had forgot *Macneil* v. *The Ministers of Campbelton*,—that somehow or other it had sunk into oblivion, and that people had got somehow into the notion that there was no such case in existence? That cannet be true, because in 1833, just a year after the judgment of this Court in *Gordon* v. *Dunn*, the case came before Lord Moncreiff as Ordinary, which was an approbation of a sub-valuation; and the objection was that the minister was not called in the proceedings before the Sub-Commissioners. Lord Moncreiff repelled that objection without the slightest hesitation—he who had laid down his six propositions the year before, held that the minister's presence before the Sub-Commissioners was not required at all, in conformity with *Macneil* v. *The Ministers of Campbelton*. No man could be stronger about the necessity of the minister being called before the High Commission, and yet, without the slightest hesitation, he repelled, in 1833, the objection that he had not been called before the Sub-Commissioners. That was in *Smythe* v. *The Minister of Redgorton*, 3d February 1833, but reported out of its order in 15 Shaw, 216. Now, after the long detail with which I have troubled your Lordships, I am not going to say more than a single word upon the three last cases which have occurred; but it is necessary to the completeness of the statement which I have thought it right to make that I should say a word about them before concluding. In the case of *Simpson* v. *Skene*, in 1837, there was a reduction brought by the minister of the parish of a decree of valuation by the High Court in 1697, on the ground that his predecessor was not called as a defender, and the decree was reduced. In *Brown* v. *Shaw Stewart*, in 1851, there was a proposal in a locality by the heritor to surrender the teinds as valued by the High Commission in 1648. It was objected that the decree was null, because the minister was not called, and the objection was sustained. In 1865 occurred the case of *Kirkwood and Grant*, in the locality of Dumbarnie. That was the case of a valuation by the High Court in 1635; and although there were other difficulties in the case, the Court selected as the ground of their judgment the objection that the minister had not been called, and they held that objection fatal, and refused to give effect to the valuation. Now, I think I have exhausted the whole authorities on the subject, so far as I know. It appears to me that they are consistent and coherent throughout, and that there never is, except by individual judges, in one or two of these last-mentioned modern cases, the least difficulty raised as to the law and practice regarding the calling of the minister in processes before the High Commission. In the case of *Kirkwood and Grant*, there was brought before the Court an authority, if it may be so called, which I have not adverted to, and which I don't know that it is necessary I should advert to at present, but I do

it for the purpose of avoiding any misconception. In the Appendix to Sir John Connell's work on Teinds, there are a number of entries printed which are said to be deliverances by the High Commission in the 17th century. These are taken from a manuscript in the Advocates' Library, and there is an entry in one of these to the effect that it is not necessary to call the minister in a valuation or approbation, but only the titular and his tacksman, or his tacksmen—I forget which. But I took the liberty of saying in that case that I could not, with any satisfaction to my own mind, proceed upon that as an authority, because I knew no sufficient reason for dealing with that manuscript as authentic. I am still in the same situation. It may be an authentic manuscript; it may be hereafter shown to be so. I shall be very well pleased if it is, because it seems to contain a great deal of matter that, if it is authentic, would be very important and very valuable, but judicially I cannot so regard it at present. And therefore I retain the position which I occupied in regard to it in the case of *Kirkwood and Grant.* We have been told in the course of this discussion that I fell into a mistake there in saying that the name which was given in that manuscript in connection with this entry was not the name of any known parish in Scotland, and we were told that Bennathie is the old name for Cupar-Angus. Be it so; but the entry in the manuscript, as your Lordships will find in the note to the case, 4 Macpherson, 7, does not contain the name of Bennathie. It is, no doubt, so printed in Sir John Connell; but Sir John Connell is in many respects very inaccurate, and the precise copy from that manuscript which we had laid before us in the case of *Kirkwood and Grant* gives the case thus:—"Betwixt the minister of Lennothy and heritors thereof;" and I am still of opinion, until further corrected, that there is no such parish in Scotland as Lennothy. I am extremely sorry to have detained your Lordships so long upon a point of this kind, which in one view may be considered to be a point of form, but which is unquestionably one of very great general interest. Even that would not have induced me to enter into so elaborate an examination of the authorities if I had not been aware that our judgment is not to be unanimous; but I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord Curriehill—In this process of locality four ancient decrees of valuation of teinds are objected to as being null and void, on the ground that in the processes in which they were pronounced the minister of the parish neither appeared nor was called as a party. Those valuations are also objected to on special grounds, to which I shall afterwards advert. But there is no allegation that any of the valuations was erroneous or is objectionable on any other than merely *technical* grounds. I shall begin by stating fully my opinion on the important question raised by the general objection—that the minister was not one of the parties called to the valuation.

In the consideration of that question it is of importance to keep in view that when the Reformation took place, the parish ministers of Scotland consisted of two different classes. One of these consisted of ministers, who were the owners or titulars of the teinds. These again consisted, in the first place, of the parish ministers, who had still continued to be *parsons;* and who, according to Keith's list of them, were 262 in number; and secondly, of *some vicars,* in whose favour rights to vicarage-teinds had been made *separate benefices.* The remaining class consisted of ministers who had no right to the teinds, but were merely *stipendiaries* of other parties who had become owners or titulars of the teinds, in the following manner:—"Patrons," as stated by Erskine (2, 10, 11), "who considered themselves, upon the merging of every vacancy, as the absolute proprietors of the benefice, assumed frequently a power of appropriating or annexing the whole endowments of it to a cathedral church or monastery, both that part which was given by themselves and even the tithes. By this annexation the patron conveyed from himself to the donees not only the right of presenting an incumbent, *but all the fruits of the benefice,* so that the donees became in effect the perpetual beneficiaries of the church annexed, and of consequence *the titulars of all the tithes belonging to it.*"

After the Reformation, the legal right to those tithes, which had been so acquired by bishops, or by religious houses, was held by the donees of the Crown, and never was restored to the ministers of the parishes from which they were drawn; and hence the ministers of these parishes continued to be merely *stipendiaries.* Indeed, during a period of about half a century after the era of the Reformation these ministers received their stipends—not out of the trinds of the parishes in which they officiated—but indiscriminately out of the general fund, which was denominated the thirds of benefices. And although, by the Statute 1617, cap. 3, a stipend of 500 merks, or of 5 chalders of victual, was appointed to be paid to each of these stipendiaries, by the titulars of the tithes of the respective parishes in which they officiated; yet they had merely a personal claim on these titulars, and no right to draw the tithes themselves. That Statute itself distinguished the right so conferred upon them from that which belonged to the other class of ministers, who were beneficiaries, by enacting, "where the fruits of any benefice *are in the possession of a minister,* that the same shall be continued in the estate wherein it is at the present, *and not to be meddled with by virtue of the said commission.*"

So stood matters when the system of valuing the tithes of the lands in Scotland commenced under the Commission of Surrenders issued by King Charles I. on 27th January 1627. I have examined the commissions and statutes under which these valuations were made during all the seventeenth century in order to ascertain whether or not such stipendiaries were thereby required to be called as parties to these valuations, either, first, by any rule of common law; or, secondly, by any express direction in these commissions or statutes; or, thirdly, by the *practice* of the commissioners; or, fourthly, by judicial decisions. I shall state the result of these inquiries as briefly as possible.

I. It has been suggested that this was required by the common law, in respect that the minister had an *interest* in the proceeding, inasmuch as if the teinds should be estimated at an under value, his privilege of afterwards obtaining an augmentation of his stipend might have been detrimentally affected. And it is true that he had such an interest; and also that it is a general rule in proper judicial proceedings that all parties directly interested should be called as parties to them. But what was the nature and extent of the interest of a stipendiary minister in such valuations of teinds? He was not the *owner* of the teinds which formed the subject of the valuations. He was not entitled to draw the *ipsa corpora* of them, or to interfere with them in any way. The titular was exclusively

their owner. The position of the stipendiary ministers was that of *creditors of these owners.* Even the *amount* of such a minister's claim on the titular did not depend on the amount of the valuation of the teinds—as if the former had consisted of some definite percentage or proportion of the latter. Moreover, unless the contingency should happen of the stipendiary's stipend being enlarged at some future time to an amount greater than that of the *teinds of all the lands in the parish*, he could not be affected by such a valuation. It might not have been very wonderful, therefore, if the Legislature, in its arrangements for valuing the teinds of the titulars, had made no special provision for protecting an interest so remote and contingent. Certainly other parties, whose interests in such valuations were more direct and immediate, were not required to be called as parties to them. For example, the Crown for its annuity was in that position—his Majesty's claim on the titulars having depended for its amount on the amount of the valued teinds, having been a certain percentage thereof; and yet it was not necessary to call the Crown as a party to the valuations. So also it was not necessary, in the valuation of the teinds of any one property, to call as parties to the process the owners of the teinds of all the other lands in the parish, although all of them would be affected more immediately than the minister by an under-valuation of the teinds; inasmuch as the minister could not be affected by an under-valuation of any one property *until* the teinds of all the lands in the parish should be exhausted. But it is not necessary to inquire whether or not, by common law itself, an interest so remote and contingent would have made it requisite to call stipendiaries in such processes of valuation. For, in the first place, the functions of these commissioners were parliamentary rather than judicial. They consisted of a large number of members of Parliament selected from the different estates, and they acted under not judicial but parliamentary powers. And, in the next place, and what is far more important, the Legislature, in every one of the statutory commissions which were appointed during the seventeenth century, while it made the decrees of valuation to be final and conclusive against all titulars, including of course beneficed ministers, did specially provide for stipendiary ministers means for obtaining redress in the event of the teinds being under-estimated in their absence by decrees of valuation. I shall afterwards state what that remedy was.

II. The next inquiry is, whether in the commissions and statutes, under which these valuations were made, there was any provision which required stipendiary ministers to be called as parties to the proceedings?

1. These valuations were authoritatively commenced under the Commission of Surrenders of 1627 already mentioned, and under the arbitrations of King Charles I., which were part of the proceedings under that commission. These decrees-arbitral were pronounced upon four submissions by the different classes of persons to whom the teinds of Scotland then belonged—viz., one by the Lords of Erection and other titulars who, at the commencement of the Reformation, had acquired rights to a large proportion of the teinds of the country, in the manner already mentioned: a second by the Bishops and other beneficed clergy already mentioned; a third by the commissioners of the royal burghs; and a fourth by tacksmen of teinds and others. But the merely stipendiary ministers were not parties to any of these proceedings. Nor were they referred to in the decrees-arbitral, otherways than as parties whose interests were protected by the titulars to whom the teinds then belonged. On the other hand, in these decrees-arbitral the interests of all *beneficed* clergymen were carefully provided for, by their being exempted from any obligation to sell their teinds to the heritors, although these were to be valued as well as the other teinds.

2. While that arbitration was in dependence, sub-commissioners were appointed by each of the Presbyteries of Scotland to value the teinds of the lands within these different localities; and on 2d February 1629, commissions by his Majesty, in concurrence with the High Commission, were issued to these Sub-Commissioners, containing instructions as to the mode of procedure to be followed by them. The terms of these commissions show that the parties to be called to the processes of valuation were only the titulars and heritors, and not ministers who were not also titulars. While these Sub-Commissioners were thereby directed "to call all parties *having interest* in the valuation before them," the sequel shows that only *two* parties were held to fall under that description—viz., titulars and the heritors. These Sub-Commissioners were directed to proceed in the valuations "*if both parties* be present;" and "if neither *titular nor heritor* will compear," a procurator-fiscal was to be appointed to lead the proof of the value. That these were the only parties who were required to be called as parties appears farther from the directions given as to the mode of leading the proof of the value. When the stock and teind had been possessed jointly, the parties who were to lead the proof were "the *titular* or *heritor, or either or both of them;*" and when the stock and teind had been possessed separately, the *titular alone* was to prove the value of the teinds; the heritor in that case being allowed to prove the stock. In no case was the minister (unless he was also titular) required by the tenor of these sub-commissions to be a party to the proceeding. Nor was a procurator-fiscal to be appointed if both the titular and the heritor appeared.

3. The first of the series of statutory commissions was appointed by the Statute 1663, cap. 19. That commission, which consisted of 45 members, who were not professional lawyers, but chiefly members of Parliament, selected from the different estates—prelates and noblemen, freeholders, and commissioners of burghs. These commissioners were directed both to prosecute the valuations of such teinds as were still unvalued, and likewise "to receive the reports from the Sub-Commissioners appointed within ilk Presbytery, of the valuation of whatsoever teinds led and deduced before them, *according to the tenor of the sub-commissions direct to that effect; and to allow or disallow the same, according as the same shall be found agreeable or disagreeable from the tenor of their sub-commissions.*" And as, according to the tenor of these sub-commissions, mere stipendiary ministers were not required to be parties to the proceedings; and as Parliament made it imperative upon its own High Commission to approve of the valuations so to be made, this enactment was, in effect, a Parliamentary enactment that ministers, who were not also titulars, were not required to be parties to such valuations.

Nor was there in that Statute any direction that, in the valuations before the High Commission itself, these stipendiary ministers should be called as parties to the proceedings. On the contrary, the Statute was framed on the footing that they would

not be parties to them, because it established in their favour the different remedy I have already referred to, for enabling them to obtain redress against such decrees of valuation in processes between the titulars and heritors, if by these decrees the teinds should be undervalued. That remedy consisted of what was denominated a process of rectification. The Commissioners were directed "to *rectify* whatsoever valuations led, or to be led, to the enorm prejudice of *the titulars, and to the hurt and detriment of the Kirk, and prejudice of the ministers' maintenance and provisions, or of his Majesty's annuity.*" That remedy of rectification was to be available, not in the processes of valuation themselves, but only in a separate and subsequent process, and in cases where the valuations were alleged to have been detrimental to these parties. And it was further enacted that remedy was not to be available "at the instance of the minister *not being titular*, or at the instance of his Majesty's Advocate for and in respect of his Majesty's annuity, except it be proved that collusion was used *betwixt titular and heritor*, or betwixt the procurator-fiscal and the *titulars and heritors*, which collusion is declared to be where the valuation is led with diminution of the third of the just rent presently paid, and which diminution shall be proved by the parties' oaths." The effect of that remedy, in cases in which it should be found to be applicable, was, not to annul the valuations, but to have them rectified—that is to say, to have the valuation corrected in so far as rectification should be proved to be necessary.

That such ministers as were not titulars were not required to be parties to processes, either of valuation or of approbations of valuations led before Sub-Commissioners, was placed beyond question by the High Commissioners themselves. On 25th July 1634, they passed an Act in these terms:—"The Lords finds no necessitie to summond the *minister* to ane valuation, or approbation, *except he be titular* or taxman. Betwixt the minister of Benethie and hers. yr. of." To appreciate the full effect of that ordinance, it is proper to observe that the Statute 1633, c. 19, ordained (as indeed all the Parliamentary Commissions of the seventeenth century did) the acts, decreets, and ordinances of these Parliamentary Commissioners "*to have the strength, force, and authority of a decrete, sentence, and Act of Parliament.*" Hence the rule established by this Act, 1634, had the same effect as if it had been in the Statute itself. And thus, from the very outside of the valuation of tithes, it was established by Parliamentary authority, on the one hand, that it was not requisite that ministers, who were not also titulars, should be called as parties to valuations; but that, on the other hand, when the valuations were made greatly to their prejudice, they might obtain redress by this separate remedy of rectification.

As most of the records of the Commissioners were destroyed by shipwreck in 1661, and by fire in 1700, the public have had to rely upon such copies of them as have been preserved; and fortunately, the Faculty of Advocates have preserved three copies of a volume containing the ordinances of the commissions for a considerable time after their first appointment. The handwriting of two of these copies appears to be of the period from the middle to the end of the seventeenth century, and the third copy is somewhat later. Sir John Connell, in the appendix (No. 41) to his treatise, has printed about 100 of these ordinances, transcribed from one of these copies, and much of his treatise on teinds is founded upon them. The ordinance of 1634 is one of these; and I have quoted its terms from the most distinctly written of the two older copies. No doubt has ever been stated, until very recently, of the authenticity of these copies of the lost records; and at this distance of time the Court is surely not warranted to reject these documents, which have been so long relied and acted upon, without at least a careful inquiry on the subject. In the absence of such an inquiry, I have for my own satisfaction made such investigation as has been in my power regarding these manuscripts; and from collating them with each other, and from comparing them with two principal sederunt-books which have fortunately been preserved, and are in the Teind Office and the General Register House, with several Acts of Parliaments confirming some of these ordinances, and with numerous references to them by writers on teinds, I am satisfied that the public has no ground for withdrawing or abating the reliance which has hitherto been placed on their authenticity. We have to rely upon similar evidence for the authenticity of the copies, printed in the Statute-book, of the lost originals of the Statutes of the reign of Queen Mary, and of some of her predecessors, and even of the latter part of the reign of Charles I., as appears from Mr Thomson's prefaces to vols. ii, v, and vi, of the Statutes.

4. The next Parliamentary Commission was appointed by the Statute 1641, c. 56. Its functions, *quoad* the valuation of teinds, were the same as those of the Commission of 1633. One of its proceedings contains further evidence that it was not held to be requisite to call as parties to valuations such ministers as were not also titulars of the teinds. In the exercise of *the statutory powers* conferred upon them, these Commissioners, on 12th January 1642, issued new Sub-Commissions for valuing the teinds in the different presbyteries. And as this Statute, like the former one, had made it *imperative* upon the High Commissioners to allow the valuations of the Sub-Commissioners, *if these valuations should be made agreeably to the tenor of these Sub-Commissions*, it would have been necessary, in framing the terms of these Sub-Commissions, to have expressly required even stipendiary ministers to be called as parties to the valuations, if this had been deemed an indispensable requisite by the Commissioners; for otherwise the sub-valuations could not have been allowed. But they did not do so. The directions as to the parties who were to be called, and who were to prove the value of the teinds, and as to what each of the parties was to prove, were the same, and only the same, as those which were in the former Sub-Commissions of 1629. According to the tenor of both of these Sub-Commissions, no ministers, unless they were also titulars, were required to be called as parties. And the High Commission, by framing the tenor of these Sub-Commissions in these terms, in the knowledge that it would be imperative upon them to confirm the valuations made agreeably to the tenor thereof, gave thus additional proof that no such thing was requisite. It is proper to mention that, although this Commission (with two renewals thereof in 1644 and 1647) was rescinded after the Restoration, yet by the Statute 1661, c. 61, *all valuations made by these Commissioners were declared to stand valid.*

5. Other six Parliamentary Commissions were appointed between the dates of the Restoration and of the Union, by the Statutes 1661, c. 61; 1663, c. 28; 1672, c. 28; 1685, c. 28; 1686, c. 22; and 1690, c. 30, continued by 1693, c. 23. I need not advert to the enactment in these Statutes

farther than to repeat, that the functions of the Commissioners in all of them were, in effect, the same as those prescribed in the Act of 1633, in so far as these related to the valuation of teinds. Hence, throughout the whole of the seventeenth century, stipendiary ministers, on the one hand, were not required by any statute, commission, or other authority, to be called as parties in processes of valuation; but, on the other hand, the remedy of a process of rectification was made in their favour, to enable them to obtain redress against these valuations, if in their absence the teinds should be materially undervalued to their prejudice.

III. The next inquiry is, whether or not, *in practice*, the Commissioners did always require stipendiary ministers to be called as parties to valuations? The destruction of the records of the commissions renders it impracticable to ascertain, to the full extent, what their practice was. But some *gleanings* of information on that subject have come down to us. And it is true that these, on the one hand, do shew that parish ministers were called as parties in numerous valuations. They were, of course, so called in all cases where they were titulars of the teinds as well as ministers. And they were in that position not only in the 262 parishes in which they were parsons, but likewise in many other parishes, in which vicarage teinds had been constituted *separate benefices*. In all the Parliamentary Commissions, express instruction is given to the Commissioners to value that inferior class of benefices. That instruction, as expressed in the first of the series—viz. the Statute 1633—is, "that the vicarage of each kirk, *being a several benefice and title* from the parsonage, shall be severally valued to the effect the *titulars or ministers* serving the cure, *who have right to the said vicarages*, be not frustrate of the worth of the said vicarages." Thus in both of these cases, ministers, *qua titulars, behoved to be called*. They were also called in many cases although they were only stipendiaries; because, as even that class of ministers had the statutory privilege of sueing processes of rectification, in certain circumstances, of valuations made in their absence, it was a prudent *precaution*, in order to save valuations from the risk of being so disturbed, to call even such ministers as parties to the original processes of valuation. But, on the other hand, that precaution, however recommended by its prudence, was far from being universally adopted. Examples of this—which appear from investigations which were made in some decided cases, of which the reports have been preserved—suffice to shew how frequently parties had abstained from adopting that precaution. Thus, in the report of the decision in the case of *Campbelton* (to be afterwards more particularly adverted to), it appears that of forty-three parishes in one county (Argyll) there were twenty-three where the ministers were *beneficiaries*, and behoved to be called; and accordingly, all of these ministers either had entered appearance or had been cited in the valuations before the Sub-Commissioners, while *the remaining twenty, who were not beneficiaries, but merely stipendiaries, had not been cited*. Another glimpse of the practice, after the Restoration, is obtained by a report which was made by the teind-clerk in the case of *Simpson* v. *Skene*—to which also I am afterwards to advert. It thence appears that of sixty-two decrees of valuation between the years 1666 and 1696, the ministers in thirteen, *or somewhat more than one-fifth part of the whole*, had not been called as parties. Connell (i, p. 276) states, that "it appears from the record that in a number of the valuations adduced in the High Commission in the reign of Charles I., the *minister was not called as a party*." We are informed also by Lord Corehouse, in the report of that case of *Simpson*, that while, in his opinion, the omission to call the minister in valuations was an error, that "error *had prevailed to a very considerable extent*." Indeed, the very fact that in this one parish of Old Machar with which we are dealing, there occurred four valuations between the years 1683 and 1697, shews that that practice continued to a considerable extent until the end of the 17th century.

It is thus certain that a considerable proportion of the valuations of the teinds of the territory of Scotland, during that century, was made without the ministers, when they were not also titulars, having been called as parties to them. What has been the consequence? Relying upon all the produce which all their lands might yield beyond the fixed amount of teind-duty specified in these valuations, being their own, the owners of lands expended large amounts of capital in improvements of their estates. Many of these estates have also been the subjects of repeated sales—the prices having been, of course, regulated by the rentals of the lands, on the assumption that the teind-duties to be deducted were only those specified in the subsisting decrees of valuation. Farther, in the successive processes of locality of the stipends of the ministers of the parishes in which these lands are situated, the apportionment of the stipends upon the different heritors has always been regulated by these decrees of valuation. That course of procedure has continued for more than two centuries since the system of valuations commenced, and (as I shall presently shew) the landowners during that period were assured of their safety in trusting to these valuations by a unanimous judgment of this Court, and by an affirmance of that judgment by the House of Lords. And were the valuations of the teinds of the estates of these landowners to be henceforth dealt with as nullities, what would be the consequence? They would be deprived of the produce of much of the capital which they expended in these improvements during the last two centuries, inasmuch as one-fifth part of their rents (*minus* the comparatively small sums at which the teinds were estimated in these ancient valuations) would henceforth be exigible from them in all future time by the titulars or clergymen. Or if the owners who made the improvements have sold the lands, the purchasers who have bought them, trusting to these valuations as limiting the deductions to be made from the rentals as the teinds of the lands, would be deprived of the rents thereof to a corresponding extent in all future time. And farther, the *data* according to which the stipends of the clergymen of all these parishes have been apportioned by decrees of locality would henceforth require to be altered. The changes, therefore, which would thus take place on the rights of parties, as these have been regulated for so long a period by these valuations of the seventeenth century, would inflict very grievous hardships indeed upon the owners of a considerable proportion of the territory of Scotland. In my opinion, there is neither principle nor practice for subjecting them to such forfeitures.

IV. Do, then, the *dicta* of our institutional writers, and the decided cases, require us to do so? I have carefully examined these authorities; and the result of my inquiries leads me to the conclusion that until the year 1837—more than two centuries after the valuations commenced—it had never

been held to be necessary to call a stipendiary minister to a valuation of teinds; and that, nearly thirty years before that date, the very reverse had been settled by a unanimous judgment of this Court, affirmed by the House of Lords.

Let us first see how the institutional writers deal with this matter. Forbes, Mackenzie, and Erskine did state, generally, that the minister of a parish requires to be cited as a party to a process of valuation. And that statement was correct as to valuations in cases in which the ministers were titulars of the teinds which formed the subject of the valuations. But the statement would have been altogether erroneous, if it had been applied to valuations in parishes where the ministers were not also titulars. Unfortunately, none of these authors state which of these two classes they refer to. But we get insight into this matter by examining the only authority upon which they found in support of their *dicta*. That authority is the decision in the case of *Lady Purveshaugh*, 1st February 1671. The only report we have of that case, of which I am aware, is that quoted in the appendix to Connell, ii, p. 196. It thence appears that the minister was directed to be cited as a party to the valuation. But why? For two reasons, the second of which was that "*the teinds craved to be valued are assigned to the minister.*" He having been the owner of the teinds which were the subject of the valuation, or the titular thereof, behoved, of course, to be called as a party. Hence that case is no authority for holding that *stipendiary* ministers were required to be parties to valuations. And the same remark applies to Forbes and Erskine, as their equivocal statements are founded only on that case.

Another case founded upon by the objectors is that of *Kirkbean*, 4th February 1708, Connell ii, 280. In that case a decree of valuation obtained by an heritor had the effect of depriving the minister of a part of the stipend which had been *previously modified to him* by a decree of augmentation. And it was found that a decree of valuation pronounced in his absence was not binding on him in respect that it in effect *rescinded the vested right*, which he held in virtue of a prior decree of the Court That case therefore fell under quite a different category.

The objectors also founded on the case of *Fergusson* v. *Gillespie*, 4th February 1795 (affirmed on appeal). But in that case also, as stated in the report of the case in the House of Lords, the minister "had the most important interest in the proceedings, being both *titular of the teinds* and parish minister."—Paton's App. iii, p. 540.

Thus, down to the beginning of the present century, there was no authority for the doctrine that a decree of valuation was essentially null, unless the minister of the parish, although not also titular of the teinds, had been called as a party. But the question was then raised and settled. This took place in the case of *M'Neil* v. *The Minister of Campbelton*. In that case, by a unanimous judgment of this Court on 3d June 1801 (M. "Teinds," App., No. 12), and an affirmance of that judgment in the House of Lords on 20th February 1809 (Paton, v, 244), it was settled that the validity of a valuation, which had been made in the year 1630, was not affected by the minister, who was only a stipendiary, not having been called as a party to the proceeding. And thus the doctrine, besides being clear on principle — on statute—and on practice—was established by the highest judicial authority,

Attempts have recently been made to evade the authority of that decision, by alleging that the ground upon which it proceeded was, not that the minister of the parish was only a stipendiary, but that the valuation was made by the Sub-Commissioners. There appears to be no warrant for so evading the force of that decision. There is no indication in the terms of the judgment, of either of the tribunals, that it proceeded on any ground other than what I have stated. The Faculty Report of the case in this Court sets forth the ground upon which the heritor (whose counsel was Mr Connell, the author of the treatise on Tithes) supported the valuation; and that that ground, as there summarised, was—"The statutes *prove that the presence of the stipendiary clergy was not required.*" The circumstance that it was by the Sub-Commissioners the valuation was made is never mentioned or alluded to in the Faculty report of the case. It is said that that appears in some printed pleading. If that was the case, the fact of its being left altogether unnoticed in the report of the grounds of the judgment, would only make it clear that such a plea had been held by the Court to be unworthy of notice. And again, the argument pleaded by the heritor in his appeal case in support of the judgment, is likewise, as stated in Paton's summary of it, that "the valuation was made in presence of the proper parties—viz., the landlord, whose tithes were valued, and the titular who had right to these tithes, and of course had the primary and material interest to see them valued as high as possible." In that report also the incident of the valuation having taken place before the Sub-Commissioners is not even alluded to as having been an element in the grounds of the judgment.

Nor is there any ground in reason why stipendiary ministers should have been called as parties to such valuations when they were made by the one set of Commissioners, more than when they were made by the other. To use the words of Lord Brougham in the case of *Gordon* v. *Dunn*, 28th August 1833, all valuations which were made by the Commissioners had statutory effect, "*the Sub-Commissioners being as much public functionaries and officers authorised by public appointment, and statutably authorised, as the Commissioners themselves.*" And in what a strange state the tithes of Scotland would now be, if, while the valuations of them, in a large portion of the territory, were valid, although wanting a requisite, which, *ex hypothesi*, is legally essential; the valuations of them in another large proportion of the territory would be nullities in respect of their wanting that requisite. That the valuations stand on the same footing in this respect when made by the Sub-Commissioners as they are when made by the High Commissioners, is further indicated by the judgments of this Court and of the House of Lords, in *Fergusson* v. *Gillespie* already noticed; for in that case it was held, that in the cases where ministers are beneficed, and consequently are required to be called as parties, the omission to call them is equally fatal, whether the valuation be made by the Sub-Commissioners, or by the High Commissioners.

Thus, then, down to the year 1809 the objection we are now dealing with was not recognised in our law. If the question had then occurred, this objection must have been repelled. Has, then, the law, as it was then established, been reversed since that time? The objectors say that by three cases, decided in the years 1837, 1851, and 1865, it has now been settled, in contradiction of the judgment of the House of Lords, that valuations are nullities,

unless the ministers, although they were merely stipendiaries, were called as parties. Before adverting to these cases, it may be mentioned that since the last of them was pronounced, *the whole Court*, in the case of *Jamieson*, 19th June 1867, have unanimously decided again that a valuation of Sub-Commissioners is not objectionable on that ground.

Let us then see whether the decisions in the three intervening cases require us, or even warrant us, now to disregard these judgments of the House of Lords, and of this Court, and the principles and authorities upon which they were founded.

The first is the case of *Simpson*, 20th June 1837. In that case the opinion of one of the Judges (Lord Mackenzie) was in conformity with the law as formerly settled, that the valuation was valid although the minister was not called to the proceeding, in respect that he was only a stipendiary. The other three Judges were of a contrary opinion. I have examined the report of their opinions with some curiosity, to see on what ground they disregarded the judgment of the House of Lords in 1809, in the case of *Campbelton;* and to my surprise I find that although the judgment of this Court in that case in 1801 was referred to in the argument at the Bar, the judgment of the House of Lords in 1809 is not mentioned, nor alluded to, in the report of the opinion of any one of the Judges. Even Lord Mackenzie does not mention it in support of his opinion. Nor is it referred to in the pleadings of counsel, as these are reported. The inference from all this is, that in 1837, that judgment of the House of Lords, nearly thirty years before, was then unknown to both the Bar and the Bench—an inference which is supported by the fact that at that time no regular reports of the decisions of the House of Lords in Scotch cases had been published, and that many of their decisions about that period had become unknown to the succeeding generation until they were subsequently reported by Mr Paton. And accordingly, what the three Judges in the majority *did found their opinion upon*, was only the decision of the case of *Purveshaugh* in 1671, and the opinions which Forbes, followed by Erskine, founded on that case; although, as I have shewn, that case warranted such opinions only in cases where ministers were also titulars. Hence that judgment (which was not appealed) did not destroy the authority of the judgment of the House of Lords.

The next case is *Stewart* v. *Brown*, 31st January 1851. By that time the judgment of the House of Lords in 1809 had become known by the publication of Mr Paton's Reports. And how was it then dealt with by the Court? There were only three Judges on the bench when that case of *Stewart* was decided. One of them, Lord Medwyn, was clearly of opinion that the judgment of the House of Lords in 1809, besides being binding on the Court, was well founded on those very grounds in law which I have stated. The other two Judges were of an opposite opinion. But on what ground? As I read the report of their opinions, they dealt with the judgment of the House of Lords only as having been utterly erroneous—in so much that, although it might be necessary to follow it in any other case in which all the circumstances were precisely the same, it ought not to be followed in any case in which there was even an incidental difference. According to the printed report, the opinion of the Lord Justice-Clerk (Hope) was this:—"I do not intend to depart from the rule in the case of *Campbelton*, which must be repeated, I presume, having been affirmed in the House of Lords, *in exactly the same precise circumstances*. I may think the rule against principle and against justice. I may think that the very fact that the minister has, at a subsequent period, an undoubted interest to oppose an approbation of a valuation is a sufficient proof of the false principle adopted in assuming, that when the minister was a stipendiary, his interest was sufficiently protected by calling the titular, and that it was unnecessary to make the minister a party to the valuation. And I may think that that case itself shews the hazard of injustice by acting on the fiction—that a distinct and really separate interest, arising out of a different right from that of the titular, was sufficiently protected by calling the titular—and that therefore the minister need not be called. But whatever my opinion of that case may be, while I must hold it as a final decision for *the exact case*, I cannot extend the doctrine—in itself false and unsound, and full of hazard—to any other class of cases." I quote the terms in which the Judges, who formed the majority in that case, thus denounced the decision of the House of Lords, as shewing that their opinion did not proceed on the ground that the valuation had been made by the Sub-Commissioners—for these epithets would then have been spared. They avowedly rejected that decision as a precedent, solely because they thought it was *erroneous;* and they availed themselves of the incident of the valuation having been made by Sub-Commissioners, only *to evade* the authority of that decision. Notwithstanding my sincere respect for their Lordships, I concur, not with them, but with their colleague, Lord Medwyn, in holding the judgment of the House of Lords, besides being well founded in principle and on authority, to be binding as a precedent upon this Court.

The remaining case is that of *Kirkwood*, 7th November 1865. In the report of that case, the judgment of the House of Lords in the case of *Campbelton* is never alluded to by any of the judges. According to that report, they dealt with the question as having been settled by *authority*, although the only authorities referred to by their Lordships were again the case of *Purveshaugh*, with the *dicta* of writers founded upon it, and the cases of *Simpson* and of *Kirkwood*. It is thus remarkable that the decision of the House of Lords, in the case of *Campbelton*, does not appear to have ever been noticed by the Judges in this Court in any of these three cases, except in the case of *Stewart*, where it was dealt with in the manner I have mentioned.

Two cases mentioned in Shaw's Teind Cases—*Earl of Kinnoull*, 21st May 1823, and *Duke of Gordon*, 2d December 1823—have been referred to as supporting the contention of the objectors. But I cannot see what reference they have to the question as to the alleged necessity of stipendiary ministers being called as parties to valuations of teinds. These cases related to two valuations by Sub-Commissioners, one of which had been made in 1635 in the parish of Kinnoull, and the other in 1629 in the parish of Urquhart. But in both of these cases the minister had been called as a party; and the valuation, as originally made, was not alleged to have been objectionable on any ground whatever. The objection stated against them was that, however valid they might have originally been, they had subsequently become ineffectual by having been *delinquished*. Both of them had been approved of in processes of approbation by the High Commission—the one in 1814, the other in 1784. The

action in which the judgments founded upon as precedents in the present case were pronounced, were actions of *reduction of these decrees of approbation* at the instance of the minister. Even in these processes of approbation also, the ministers had been called as parties, although they had allowed the decrees of approbation to be pronounced in absence. The ground of reduction in both cases of these decrees of approbation was that the valuations had, long before the dates of approbation, become extinct by dereliction. And what had at last led to the institution of these reductions by the ministers was, that in both cases they had obtained augmentations of their stipends, and that the heritors were attempting to affect the stipends which had been so obtained by them, by founding upon the decrees of approbation obtained in absence. The judgments finding such reductions to be *competent actions* have no bearing whatever on the present question.

I am thus of opinion that, on principle, on practice, and on authority, the *general* objection which has been stated to the valuations in question ought to be repelled. I must explain, however, that this opinion applies only to valuations which were made during the seventeenth century; and that I reserve my opinion as to what might be the effect of this objection as to valuations subsequently made by this Court in virtue of the jurisdiction conferred upon it by the Statute 1707. Its functions are in some respects different from those of the former Parliamentary Commissions. It is directed to exercise these functions "in all respects as "the said Lords do, or may do, in other civil causes." And, accordingly, its judgments are appealable to the House of Lords. Moreover, during the last century and a-half, the prudent precaution of calling the stipendiary minister has been more generally adopted than it formerly was. I am far from saying that the law itself has undergone such a change; but I reserve my opinion upon that question, should it occur. The opinion I have expressed applies only to such valuations as were made during the preceding eighty years by the Parliamentary Commissioners; and all the four valuations we are now dealing with were made during that period.

Another answer made to this objection is, that if it should be held that it was requisite that stipendiary ministers should have been called as parties to the valuations, there would be a *presumption* that that requisite was complied with. It is maintained that the legal presumption, *rite et solemniter actum*, would apply. And it appears to me that that plea also would be well founded. For, in the first place, it is presumable that the Commissioners would not have proceeded to perform their functions without all parties being called whom the law required to be called. And although the evidence of that requisite having been complied with cannot now be produced, this may have arisen from the destruction of the records and other proceedings of the teind office. And, in the next place, the acquiescence by all parties concerned in the efficacy of the alienations; and, in particular, the facts that the heritors never until now have been called upon to pay more than the sums in the decrees of valuations as teind-duties to either titulars or the ministers,—and that the localities of stipends among the heritors have been made in comformity with these valuations,—warrant a presumption that whatever requisites the law required to be observed, had actually been observed. There are several decisions to that effect.

It remains to notice the special objections which are stated to these valuations. They are alleged to have been pronounced without any other evidence of the value of the teinds having been adduced before the Commissioners than voluntary agreements between the titulars and heritors that the teinds should be valued at certain sums. With regard to that objection my opinion is this.—On the one hand, when such agreements were altogether extrajudicial, and processes were instituted before the Commissioners of Teinds merely to have such prior extrajudicial agreement approved of, without any other evidence being brought as to the value of the teinds,—such decrees of approbation are not effectual. I think that such proceedings are not of *the kind* which the Commissioners were empowered to carry into effect. Their functions were to value teinds; and such approbations of prior *extrajudicial* agreements do not appear to have been within their functions. And, according to the judgment of the House of Lords in the case already referred to, of *Gordon* v. *Dunn*, 28th August 1833, such decrees by the Commissioners of Teinds were held to be ineffectual. On the other hand, when proper actions of valuations were brought before the Commissioners, and a proof was allowed to the parties of the value of the teinds, *a judicial agreement* of all the parties in presence of the Commissioners was legal evidence. The Commissioners had an opportunity of judging whether or not such a judicial transaction was fair, and of sustaining or rejecting it as they might see cause. There are, accordingly, many cases in which such a proof has been held to be legal and sufficient. Keeping this distinction in view, I think that two of the decrees in question ought to be sustained.

One of these is the decree of 16th June 1697, at the instance of James Gray of Balgownie. The proceedings in that process had been lost with the other teind records, and no extract of it had been preserved. But its tenor was proved by a decree of proving the tenor, dated 8th February 1727, in conformity with the Statute 1707. It thence appears that an action of valuation having been instituted before the Commissioners, a proof had been allowed, writings for proving the tenor of the decree had been produced, and witnesses had been examined; that in the course of discussing some questions as to deductions claimed by the heritor, a judicial submission was made to settle these matters; and that thereafter the Commissioners pronounced the decree of valuation. I think that that decree was valid and effectual.

The other decree, which, as I think, should be sustained, is that dated 31st December 1690, at the instance of George Paton of Grandholm. It also bears to have proceeded upon a written consent by the titulars, of a prior date; and consequently, if nothing more had been produced, I think that that extrajudicial consent, *per see*, would not have been sufficient. But the decree bears that, after a remit had been made to two of the Commissioners, they reported to the Court of Commissions that a new consent by the titulars was offered to be produced judicially; and such new consent was produced as to the value of the teinds, I think that this was truly a judicial valuation, and was effectual.

But as to the other two valuations, no evidence of the value was produced in either of them, excepting certain written documents, dated some years before, in which the parties had then agreed that, if afterwards processes of valuation should be instituted, the teind should be valued at the sums

therein set forth. And what were founded upon as valuations in these cases, were merely decrees of approbation of these prior extrajudicial arrangements. For the reason already stated, I think that these proceedings ought not to be sustained, and that this special objection to each of these two decrees ought to receive effect.

Lord Deas—I have listended attentively to the opinion delivered by your Lordship in the chair, and I have followed the whole of it to my own satisfaction, with the single exception of a remark which your Lordship made upon the case of *Thomson* v. *The Officers of State*, and in consequence of not being sure that I quite apprehend what your Lordship said upon that case, I wish to explain that I do not hold that, in the general case, a valuation before the Sub-Commissioners would be good without calling a titular, and I do not think that that case of *Thomson*, when it is properly attended to, sanctions any such notion. I think I had occasion to allude to that matter in the late case of the *Deans of the Chapel Royal*, and I adhere to the view that I there stated in regard to it. With that single explanation, I adopt not merely the conclusions at which your Lordship has arrived, but the whole grounds upon which that conclusion is arrived at. I so entirely concur in all the observations which your Lordship has made that it would only be a waste of judicial time to endeavour to state my own views in different language from that in which they have been stated so clearly and so distinctly by your Lordship. And therefore, with the explanation I have made, I entirely concur in your Lordship's opinion.

Lord Ardmillan—If the question whether the valuations by the High Commission are liable to fatal objection in consequence of the minister not having been called as a party were now open, and if we were dealing with the case where the decree of valuation was pronounced on proof before the Commission, I should be disposed to think that many of the very important and instructive observations of Lord Curriehill in regard to cases where the minister was a stipendiary, and not titular, are entitled to great weight. But I agree with your Lordship in the chair that the question cannot now be considered as open to us in this Court. If there is a *series rerum judicatarum* on the point we must adhere to it. We cannot in this Court permit the result of research, however careful, and speculation, however ingenious, to re-open a point resting on clear, consistent, and continued authority; and I am, with your Lordship, of opinion that the authority upon the matter, both of decisions and of institutional writers, is in favour of this objection. Where the objection is taken to the valuation by Sub-Commissioners the authority is that it is not a good objection, and I think upon the obvious reason that the minister has the opportunity for afterwards appearing and enforcing his right, and correcting anything that may be wrong; and it appears to me that that is mainly urged as the reason in argument why the objection should be repelled in the case of the sub-valuation. In the case of the valuation in the High Court, it seems to me that the case is now past our dealing with as an open question, and the authority of Sir George Mackenzie, and Forbes, and of Erskine, I think, goes to support the same conclusion; and your Lordship's most interesting and careful analysis of the decision in the case of *Campbelton* quite satisfies me that that case of *Campbelton* was decided on the distinction between the two valuations—the valuation by a Sub-Commission, and the valuation by the High Court—and that had the law been as it is maintained to be by those who now resist this objection, that judgment would not have been pronounced in the manner and with the observations by which it was accompanied. I have only to add that I think, in this particular case, and with reference to all the cases now before us, the additional circumstance must be borne in mind that, with one exception, they are all of them cases where the judgment of the High Commission was not upon a proof, but was the mere ratification of the private consent of parties: and the consent of parties cannot bind those who were not consenting, and the ratification of the consent can bind nobody who was not bound by the consent. Therefore, in all cases where the High Commission does no more than ratify a consent, it cannot go beyond the measure of that consent. On these grounds I agree with your Lordship that the objection should be sustained in this action.

Lord President—Then we adhere to the Lord Ordinary's interlocutor.

Mr Asher—With expenses?

Lord President—With expenses.

Agents for Ministers—H. and A. Inglis, W.S.
Agents for Mr Forbes—Henry & Shiress, S.S.C.
Agent for Major Paton—W. Duthie, W.S.
Agents for Mr Skene—Auld & Chambers, W.S.
Agent for Mr Hay—James Webster, S.S.C.

Saturday, February 29.

WATT *v.* SMITH.

Title to sue—Property—Possession—Lease—Squatter—Reduction—Erection of building by tenant on ground beyond the limits of the subject let. Circumstances in which *held* that a party had no title to sue a reduction of certain decrees in the Court of Session and Sheriff-court, the effect of which had been to remove him from certain premises.

This was an action of reduction and declarator at the instance of James Watt, tanner, Aberdeen, against George Smith, wool merchant and skinner, there.

It appeared that the pursuer in 1862 took a seven years' lease of a house and piece of ground in Aberdeen, belonging to Robert Smith, and possessed the same until July 1864. He then, by agreement with the defender, who was by that time in right of the property, renounced his lease. He now alleged in this action that while in the occupation of these premises, he erected at his own expense, beyond the walls and boundaries of the subjects leased to him, and on the pathway of the public street, a small building of one storey in height, with entrance from the said pavement; that in the end of July 1864 the defender presented a petition to the Sheriff of Aberdeenshire, setting forth that this building was part of the subjects embraced in the pursuer's lease, and craving warrant of removal therefrom against the pursuer, and interdict against his taking away certain fixtures from the house, which process, interim interdict being first granted, was sisted by the Sheriff, until the question of heritable right should be determined. The pursuer farther alleged:—(Cond. 8) "On the 27th November 1866, the defender instituted in the Court of Session