liability. Then the question arises, whether it is for the pursuer to allege, that there were no reasonable grounds, or whether it is for the defender to set forth, that there was a reasonable ground.

In judging of cases of this kind, we are accustomed to examine the whole record, consisting of the statements of the pursuer and defender, and the answers of the pursuer and the statements of the defenders may throw material light upon the relevancy of the pursuer's case, and still more, it may come in in explanation of any ambiguous part of the pursuer's case; and where there is ambiguity on the part of the pursuer which he declines to clear up, I apprehend that he is in error in pleading in such terms.

The view taken in the Court below appears to have been, that the pursuer had not set forth, in sufficiently explicit terms, all the elements that were necessary to make a case of liability in damages. The view taken by your Lordships is, that he has set forth enough to make it the duty of the defenders to set forth, that they had reasonable grounds for what they did. That is a very narrow question upon a matter of pleading. I have been of opinion, and I cannot say that I am entirely shaken in that opinion, that the statements of the pursuer were evasive, and avoided that which was the main point in the reasonableness or non-reasonableness of the conduct of the constable. However, as I have said, that is a very narrow question of pleading, and as it is held, that nothing that is done in this case interferes with the proposition which was contested in the Court below, that a constable, in executing a search warrant for certain articles, and finding other articles that tend to implicate the party, and taking those articles and the party himself also into custody, is only acting in the performance of what may be his duty, I think there is the less reason to regret, that there should be any difference of opinion in regard to this case. I therefore do not enter further into this case beyond expressing my opinion as I have shortly done.

Interlocutors reversed, and cause remitted.

Appellant's Agents, W. Miller, S.S.C.; Adam Burn, Doctors' Commons, London.—*Respondents' Agents*, Murray, Beith, and Murray, W.S.; Loch and Maclaurin, Westminster.

MAY 14, 1867.

JAMES DYCE NICOL, Esq. of Ballogie, and Others, *Appellants*, *v.* REV. W. PAUL, D.D., Minister of the Parish of Banchory-Devenick, *Respondent*.

Teinds—Old Decreets of Valuation—Subjects omitted—Augmentation of Stipend—*A minister of a parish, in seeking augmentation of stipend, alleged, that a valuation of the barony of F., dated* 1682, *omitted to value the teinds of parts of the lands of B., C., and D., in such barony; also, that a valuation of the barony of P., dated* 1709, *omitted certain lands therein.*

HELD (affirming judgment), *That as the decrees did not in terms purport to contain a valuation of all the lands in such baronies, it was open to the minister to lead a proof of his averments.*

The Commissioners of Teinds had no authority to declare lands prospectively not to be liable to teinds—per LORD CRANWORTH.[1]

This was an appeal against the interlocutor of the Second Division, which found, that, "according to the construction and effect of the decree of valuation of 1682, the teinds of those portions of the barony of Findone, if any, which are not embraced within the special subjects enumerated in the rental produced by the pursuer, and adopted as the basis and limits of the decree of valuation, are unvalued, and that the teinds of the lands of Barclayhill, Calsayend, and Meddens, mentioned in the said decree, are not valued by the said decree; that according to the true construction and effect of the decree of valuation of 1709, the teinds of those portions of the barony of Portlethen, if any, which are not embraced within the special subjects enumerated in the prepared state of the proof which forms the basis and limit of the decree of valuation, are unvalued," etc.

The defenders having appealed against this interlocutor, in their *printed case* gave the following reasons for reversing the interlocutor:—1. Because the teinds of the whole lands and barony of Findone, and of the whole other lands mentioned in and embraced by the decreet of valuation of

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[1] See previous report 1 Macph. 1014: 3 Macph. 482: 37 Sc. Jur. 228. S.C. L. R. 1 Sc. Ap. 127: 5 Macph. H. L. 62: 39 Sc. Jur. 417.

1682, and the teinds of the lands and barony of Portlethen and other lands set forth in and embraced by the decreet of valuation of 1709 were valued, and have, since the date of the said decreets, been regarded and dealt with by all parties interested as valued—Ersk. ii. 6, 18; *Lord Fife's Trustees* v. *Com. of Woods and Forests*, 11 D. 899; *Forbes* v. *Buchan*, 1 Connell on Teinds, 422; *Heritors of Calder*, M. 15,739; *Peterkin* v. *E. of Moray*, Mor. Ap. Teinds, No. 11. 2. Because the decrees of valuation in question pronounced, the one in 1682, and the other in 1709, having since been regarded and acted on by the heritors and minister and their predecessors as decrees of valuation of the whole lands belonging to the appellant in the parish, the respondent is barred by prescription from challenging the said decrees, or maintaining, that they and the actions in which they were pronounced do not embrace and value the teinds of the said whole lands. At all events, such decrees cannot be challenged except in competent processes of reduction at the instance of the parties seeking to challenge them, and upon relevant and sufficient grounds—*Macintyre* v. *Maclean*, 8th March 1828, F. C.; *Fife's Trustees*, 11 D. 899; *Maxwell* v. *Blair*, 3d July 1816, F. C.; *Smith* v. *D. of Argyll*, M. 12,215. 3. Because it is not a valid or relevant objection to the decrees of valuation in question, that no separate valuation was put upon portions of land then uncultivated belonging to the heritors by whom the decrees were obtained, but which, it is alleged, have never been brought under cultivation—*Maxwell* v. *Blair*, 3d July 1816, F.C.; *Cameron* v. *Macpherson*, 15 D. 657. 4. Because all parties having, since the date of the decrees in question of 1682 and 1709 respectively, acted and transacted on the footing, that the teinds of the whole lands in the parish were valued, and the teinds exhausted, and the respondent and his predecessors in office, ministers of the cure, having since 1812 drawn sums from Exchequer in aid of their stipends on this footing, the respondent is now barred from maintaining, that any portion of the lands belonging to the appellant is unvalued.

The respondent in his *printed case* gave the following reasons for affirming the interlocutor :— 1. That the decrees of valuation of 1682 and 1709 do not instruct, that the lands specified in articles 10, 11, and 14 of the respondent's revised condescendence were valued for teind under said decrees, and that it is competent to inquire whether said lands were or were not included in the subjects valued by said decrees. 2. That the teinds of the whole lands and barony of Findone, etc. were not valued by the decree of 1682; and that no lands were valued by said decree except the special subjects enumerated in the rental produced by the pursuer of the valuation, and adopted as the basis and limits of the decree. 3. That by the decree of 1682, the lands of Barclayhill, Calsayend, and Meddens, are expressly excepted from the valuation, and declared not to be teindable subjects, and therefore incapable, as at the date of the decree, of being made the subjects of a process of valuation. 4. That the teinds of the whole lands and barony of Portlethen were not valued by the decree of 1709, and that those portions only of the said lands and barony were thereby valued, which are enumerated in the prepared state of the proof referred to, and incorporated in the decree. 5. That the said lands of Barclayhill, Calsayend, and Meddens, being now teindable subjects, are liable to be localled on for stipend to the extent of one fifth of their rental. 6. That it is incumbent upon the appellants to instruct, that the other lands belonging to them, condescended on by the respondent as unvalued, are included in the subjects falling within the decrees of 1682 and 1709; and, in any view, it is competent for the respondent to instruct, that the lands condescended on by him are distinct and separate subjects from the lands or portions of land valued by the said decrees. 7. That inquiry into the extent of the lands embraced in the said decrees of valuation, and the existence of unvalued lands belonging to the appellants, is not barred by the proceedings in former localities, or by the circumstance of the minister of the parish of Banchory-Devenick having received aid from Exchequer. Authorities :—*Duke of Buccleuch* v. *Connell*, 4 D. 157; *Kirkland* v. *Cathcart*, 5 D. 122; *Scott* v. *Kerr*, 2 Sh. & M'L. 968; Ersk. ii. 10, 34; ii. 6, 18; *Cameron* v. *Macpherson*, 15 D. 657. As to prescription—Ersk. iii. 7, 2 : iii. 7, 8 : iii. 7, 13; Stair, ii. 12, 22; Forbes on Tithes, 331.

Lord Advocate (Gordon), *Sir R. Palmer* Q.C., and *Forbes*, for the appellants.
The Attorney General (Rolt), and *Hall*, for the respondent.

Cur. adv. vult.

LORD CRANWORTH.—My Lords, the case in which your Lordships are about to pronounce judgment, is an appeal against part of an interlocutor pronounced by the Second Division of the Court of Session in an action of modification and locality, which was brought before the Court by the Rev. William Paul, Doctor of Divinity, minister of the parish of Banchory-Devenick, in the county of Aberdeen.

That proceeding was instituted in order to have an increase to his salary as minister of the parish fixed upon certain lands in the parish of Banchory-Devenick of which he was minister, which he alleged to have never been valued for teind. That proceeding was commenced by a summons on the 25th March 1862, and the Court of Teinds (which is substantially the Court of Session) made a remit thereupon to the Lord Ordinary to examine, whether there were any free teinds. The minister of the parish, Dr. Paul, on that lodged a minute stating, that there were

unvalued lands in the parish, the rental of which he alleged to be £4960. And if that were so, then according to an old Statute the teinds would be capable of being augmented to the extent of one fifth of that amount, which would be about £1000. The Lord Ordinary made a remit to the Teind clerk to inquire whether there were any free teinds. And the Teind clerk, on the 10th December 1862, reported, that there was undoubtedly a certain amount of the free teinds, and that if the unvalued moss and grass lands were to be taken into account, there was a considerable amount of free teinds. Upon that, the Lord Ordinary, without expressing any opinion himself, or hearing any argument, remitted the case to the Inner House, and the Inner House shortly afterwards appointed the pursuer to condescend articulately upon the lands which he alleged were subject to teind. That was done, and after that, answers were put in by the heritors. And then before going into proof, an argument was had before the Inner House, which was very much in the nature of an argument upon relevancy, the question being, whether, supposing the statement of the condescendence to be true, that there were lands unvalued, the minister had made out to the satisfaction of the Court, that he was entitled to have, and ought to have, an augmentation of his stipend. Upon that, the Inner House, having heard the argument, modified, decerned, and ordained the constant stipend and provision of the kirk and parish of Banchory-Devenick to have been for the year 1862 of such an amount, to be paid in the manner and at the time there set forth. I need not go into the detail of that; it is immaterial; but the interlocutor concludes with these words, "declaring, that this modification and the settlement of any locality thereof shall depend upon its being shewn to the Lord Ordinary, that there exists a fund for the purpose."

The cause having been remitted to the Lord Ordinary, the parties then went into proof, and the Lord Ordinary made a report, whereby he found, that the question whether there are or are not free teinds depends on the question, whether the decreets of valuation relied on relate to the whole lands or only to parts of them. Substantially he may be taken to have found for the heritors, that is, the respondents, *in omnibus* against the claim of the minister.

It is necessary to call your Lordships' attention shortly to the statements of the condescendence and the answers to them. The condescendence on the part of the pursuer consisted of various statements, that particular lands in the parish which he sets forth in the different articles of the condescendence, never had been valued for teind, and therefore remained liable to his demand. The Inner House having decreed, that if he could establish that there were free teinds, he was entitled to an augmentation, the answer of the heritors was, that all the lands on which he so condescended had in substance already been valued for teind, and therefore none remained liable to the augmentation of his salary.

It is not necessary to trouble ourselves with many of these articles of condescendence, because the question is eventually narrowed to the point, whether, in respect of two particular portions of land, the barony of Findone, or some of the lands therein, and the barony of Portlethen, the heritors have or have not made out, that the whole of those lands had been valued for teind. The heritors relied, in respect of the barony of Findone, upon a decreet of valuation made under the Statute of Charles I. dated, I think, in the year 1682, which valuation, they contended, embraced the whole barony of Findone. With regard to the barony of Portlethen, they relied not upon that decreet, but on another decreet in the year 1709, which, they contended, exhausted the whole barony of Portlethen.

The statement of the minister on the subject of the lands of Findone is found in the 10th and 11th articles of the condescendence. The 10th is this:—"The foresaid lands of Barclayhill, (those are some lands which have been already mentioned as being in Findone,) which were occupied, at the date of the summons, by Alexander Leper, formed part of the barony of Findone. The said decreet of valuation does not value or fix the teind of the said lands of Barclayhill, Neither does the decreet value or fix the teind of that portion of the lands of Badentoy, possessed by James Mowat for a money rent, or the teind of any part of the lands of Calsayend and Meddens. These lands of Barclayhill, Calsayend, Meddens, and that part of the lands of Badentoy, occupied by James Mowat at the date of the decree at a money rent, which now belong to the defender, James Dyce Nicol, Esq., are all undervalued for teind. The present rental of these lands amounts to not less than £534, one fifth whereof, for teind, is £106 16*s*."

Then by the next condescendence they state, that a large extent of the lands and barony of Findone was, at the date of the said decree, uncultivated and partly in moss. These waste and moss lands were not included in the decree along with the arable lands, which alone were thereby valued, and in respect of which the tenants paid victual rent. The following subjects were waste or moss lands at the date of the decree, and are unvalued, but have now been improved and converted into teindable subjects. I need not trouble yonr Lordships with stating them in detail.

With regard to Portlethen, the 14th condescendence states, that the teinds of part of the lands and barony of Portlethen, and also part of the lands of Balquhairne, Clashfarquhar, Auquhorthies, and others, all lying within the parish of Banchory-Devenick, were valued by decree of the Lords Commissioners, dated 19th January 1709, following upon a certain summons, which

was mentioned. The only portions of the said lands and barony of Portlethen which were contained in the prepared state of the proof in the process of valuation, and which were valued and included in the said decree, were certain farms which he mentions, and which were contiguous, and are all embraced in the farm now called Mains of Portlethen, presently tenanted by Mr. Robert Walker. At the date of their valuation, the said lands comprehended nearly the whole of the barony of Portlethen that was then under tillage. Of the remaining lands of Portlethen, all of which are now unvalued, a small part is believed to have been arable at the date of the valuation, but by far the greater part was then uncultivated, and either in moss or grass, and has since been reclaimed. The rental of these unvalued lands, so far as they are teindable subjects, is not less than £530, whereof one fifth is £106. That is about the same as in the barony of Findone.

I have stated that the Lord Ordinary reported against the minister and in favour of the heritors. It is unnecessary to say more on this point than that in fact he reported in favour of the heritors as to almost everything, but certainly as to the lands of Findone and Portlethen.

The case was then brought by reclaiming note before the Inner House, and the Inner House then pronounced the interlocutor which forms the subject of the present appeal. That interlocutor was pronounced on the 5th of February 1865, and is as follows :—"Recall the interlocutor complained of, in so far as regards the objections stated by the minister in the 10th, 11th, and 14th articles of the revised condescendence." Those are the articles to which I have referred; "and find that, according to the true construction and effect of the decree of valuation of 1682, the teinds of those portions of the barony of Findone, if any, which are not embraced within the special subjects enumerated in the rental produced by the pursuer and adopted as the basis and limits of the decree of valuation, are unvalued: Find, that the teinds of the lands of Barclayhill, Calsayend, and Meddens, mentioned in the said decree, are not valued by the said decree: Find, that the terms of the said decree are not such as to exclude a proof or inquiry before answer, that the teinds of the parcels of lands mentioned in the 11th article of the condescendence, or any of them, are unvalued." So much as to Findone. Then the Court proceeds to find, that, "according to the true construction and effect of the decree of valuation of 1709, the teinds of those portions of the barony of Portlethen, if any, which are not embraced within the special subjects enumerated in the prepared state of the proof which forms the basis and limit of the decree of valuation, are unvalued; *Quoad ultra*, adhere to the Lord Ordinary's interlocutor; and remit to his Lordship to direct such inquiry as may be rendered necessary by this interlocutor, and to proceed further as shall be just; reserving in the mean time all question of expenses."

The ground on which the Inner House proceeded as to the lands comprised in the 11th and 14th articles of the condescendence, was, that it did not appear on the face of the decrees of 1682 and 1709, that the lands which were thereby valued for teinds must of necessity include all the lands referred to in those two articles.

Where a decree purports in terms to have valued all the lands of a parish, for the purpose of ascertaining the teind to which the heritors are liable, no question can afterwards be raised as to any of the lands which it embraces being teindable. The decree concludes everything. So, where it purports to have valued any part of a parish known by some general designation, as a barony, no question can be afterwards raised as to the lands included under that designation, except by shewing, that the lands now passing under that designation comprise subjects which did not form part of what was valued under that same name by the decree.

The Court below were of opinion, that though, possibly, the lands valued by the decree of 1682 as lands of Findone may comprehend the whole barony other than Barclayhill, which is mentioned in the 10th article, yet that is not the necessary construction of the decree; so as to the lands in Portlethen, referred to in the 14th article. The Court, therefore, by their interlocutor of the 5th February 1865, allowed the parties to go to proof on the point, whether the valuations did include the whole of the lands of these two baronies of Findone and Portlethen, excluding, however, the lands comprised in the 10th article.

The ground on which the appellants complain of this interlocutor is, that the decrees, fairly interpreted, do necessarily comprise all the lands which, at the respective dates of the decrees, constituted, and now constitute, the barony of Findone and the barony of Portlethen. Whether they are warranted in the contention depends entirely on the true construction of the decrees themselves.

And first, as to the decree of 1682, relating to Findone, it appears to have been made in a process of valuation prosecuted by one Alexander Bannerman, an heritor in the parish of Banchory, against Mr. James Gordon, parson of the parish, and the then bishop of Aberdeen. The decree, after referring to the statutable authority under which the Court was acting, proceeds thus :—"And true it is and of verity that the teinds, parsonage, and vicarage of the sds. persewars, their lands, baronie, and others underwritten—viz. the lands and baronie of Findone, the lands of Cookstoune, Calsayend, Meddens, Badentoy, with their pertinents, lying within the parochine of Banchory-Devenick, and sheriffdome of Kincardine, are yet unvalued." It then, after stating

that the then pursuer had produced his titles to the lands libelled, proceeds thus: "As also the sd. pursuer's procurator produced ane rentall of the haill lands lybelled, whereof the tenor follows:—*Imprimis*, Robert Hunter, in Findone, pays yearly 43 bolls of meill and beir; Richard Bannerman, in Findone, pays yearly 46 bolls of meill and beir for his occupation of the lands of Findone; Robert Anderson, at the milne of Findone, pays for his occupation of the Milne Pleugh and croft thereof yearly, 24 bolls of meill and beir; Alexander Leper, in Barclayhill, for his occupation of the lands of Barclayhill, 100 merks money yearly;" and then proceeds with the rental of other lands not described as of Findone.

The Commissioners then, after stating the proceedings taken for verifying the rental, go on thus to make their valuation;—"The sd. Commissioners have found and declared, and hereby find and declare the constant rent and true availl of the sd. lands in stock and teinds, both parsonage and vicarage, to be now and in all time coming, the particular soumes of money and quantities of victuals after specified, vizt. the sd. lands of Findone, formerly possesst by the sd. Robert Hunter, and now by Wm. Smith, to be worth in stock and teind, parsonage and vicarage, the number of 20 bolls meill and 20 bolls beir, the teind whereof extends to the number of 4 bolls meill and 4 bolls beir: *Item*, that part of the sd. lands of Findone, possesst by the sd. Richard Bannerman, the number of 20 bolls meill and 20 bolls beir, in stock and teind; the teind whereof extends to the number of 4 bolls meill and 4 bolls beir: *Item*, the milne of Findone and Milne Pleugh and croft thereof possesst by the sd. Robert Anderson, the number of 24 bolls victualls, meill, and beir, and £8 money in stock and teind; the teind whereof extends to the number of 4 bolls, 3 firlots, and one fifth part of one firlot of victuall, and £1 12*s.* money." I do not think it important to refer to the rest of the decree.

The appellants contend, that the valuation must necessarily be held to include the barony. They rest their argument on these grounds. The barony of Findone certainly formed part of the lands libelled; the rental put in by the heritor is stated to be a rental of the whole lands libelled, and though the rental does not in terms mention the barony, yet it enumerates three persons as being tenants in Findone, besides a fourth, who was tenant of Barclayhill, which, by the tenth article of the condescendence, is admitted to form part of the barony. The necessary inference, therefore, (the appellants say,) is, that these four subjects constituted the whole of the barony. It would otherwise be untrue to say, that the rental was a rental of the whole lands libelled.

But is this a legitimate inference from the language af the decree? I cannot think that it is. Suppose the fact to have been, that the barony at the time of the decree comprised not only the four subjects specifically mentioned, but also mosslands yielding no rent, but held by the heritor himself, it would not be inaccurate to say, that the rental, though silent as to these lands, was a rental of the whole lands libelled. It would state all the rent yielded by the lands libelled, and so might fairly be described as a rental of all the lands libelled. On this very short ground I have satisfied myself, that the interlocutor properly admitted the parties to proof.

The facts as to the barony of Portlethen are substantially the same. The question as to this barony arises on a decree of valuation dated the 19th of January 1709. In this case no rental was carried in by the heritors as in the decree of 1682, but the Commissioners found, that the teinds of, *inter alia*, all and whole the lands and barony of Portlethen, were yet unvalued; and the heritor, Alexander Thomson, having produced his titles to these lands and barony, the Commissioners found and declared the just worth and constant yearly avail of the lands of Portlethen, with its pertinents, to be £357 6*s.* 8*d.* The decree states various inquiries made shewing in detail how that sum was arrived at. It is possible, as in the case of the barony of Findone, that the lands, the rents of which are enumerated as making up the £357 6*s.* 8*d.*, might comprise the whole of the barony. But this certainly does not appear *ex facie* of the decree. On the contrary, the decree shews, that Alexander Thomson, the heritor, was seized of the whole lands and barony of Portlethen, whereas nothing appears to be valued but certain lands described as being lands of Portlethen. In these circumstances, I think the Court below were right in not treating the question as concluded by the decree, and in authorizing an inquiry to ascertain whether there were lands unvalued.

With respect to the lands of Barclay Hill, Calsayend, and Meddens, mentioned in the 10th article of the condescendence, the interlocutor was clearly right. The decree in terms excludes those lands from the valuation, and I agree with the argument at the bar, that the Commissioners had no authority to declare lands prospectively not to be liable to teinds. They must therefore be treated as lands not valued.

My opinion is, therefore, that the interlocutor complained of was in all respects right, and so that the appeal ought to be dismissed with costs, and I humbly move your Lordships accordingly.

LORD WESTBURY.—My Lords, this suit and the determination of it are matters of very great concern generally to the heritors in Scotland. No doubt the payments made by them and the value of their estates have for a long period of years been calculated upon the belief, that these decrees of valuation would not be lightly disturbed. And I think it very desirable, that the

principle should be established, that a very liberal interpretation should be given to the language of these decrees, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of persons who had an interest in disturbing such decrees if not well founded. Where, therefore, there are general words of designation found in a decree of valuation, which may fairly be considered as comprehending a whole district, such as a parish or barony, effect should, I think, be given to those general words. But the decree which has been made in the present case, and the confirmation which I trust your Lordships will give to it, will be found to rest upon a principle of construction which preserves entirely unaffected the general principle to which I have referred.

The argument of the appellants was founded almost entirely upon this, that inasmuch as the word "barony" is found in the libel, the barony, as an entire thing, must be considered as comprehended in the words "libelled," and so it might have been if the words "the lands libelled" had not been followed by a specific enumeration, which would have the effect of cutting down the generality of the expression "barony," and shewing, that the barony, as one comprehensive thing, was not included in the valuation. Now that appears to be the case with regard to the valuation of Findone. And the same observation is applicable to the decreet of valuation as to the barony of Portlethen.

The argument of the appellants was founded entirely on these words: "*Item*, the principal disposition of the haill lands lybelled." Those words, they said, referred to the libel, and in the libel you find the lands of the pursuers, the barony and others, respectively ascertained. But then those words "the haill lands libelled" are followed by other words running: "The pursuer's procurator produced one rental of "the haill lands libelled."" Now the signification and extent of the phrase "the haill lands libelled" in the one case must of course be the same as the extent of the same phrase "the haill lands libelled" in the other. But the recital of the "haill lands libelled" is there given *in extenso*, and it plainly appears from that recital, that certain lands only were intended to be comprehended in the words of reference "the haill lands libelled;" the enumeration and description are confined to those particular lands, and there are no words comprehensive of the general barony. Therefore this must be the conclusion, either that the lands specified included "the haill lands libelled," and therefore included the barony, that is, that the lands specified were co-terminous and co-extensive with the barony, an hypothesis which is contradicted by the result of the inquiry; or else the conclusion must be, that the specific enumeration following the words "the haill lands libelled" confined the generality of the phrase "the haill lands libelled" to the things enumerated. I think it is plain, that the last conclusion is the correct one. I think the words of the decreet plainly carry on the face of them sufficient evidence, that the valuation is confined to the lands which are specified, and that it was not intended to take into consideration the generality of the word "barony," or to include the other lands uncultivated which might be included within the precincts of the barony.

Notwithstanding, therefore, the general rule, which I trust will be adhered to, of giving in favour of long usage or acquiescence a liberal interpretation to the words of the decree, yet, as the decree carries on the face of it clear evidence, that none but certain specific lands were taken into account, I think it is impossible to give the decree a greater extent.

I concur in the observation of my noble and learned friend, and think it unnecessary to add anything to what he has said. I therefore concur in the motion he has made, that this interlocutor be affirmed.

LORD COLONSAY.—My Lords, I have felt considerable anxiety in regard to the course that should be taken in this case, and I have heard with very great satisfaction the observations which have now been made by my noble and learned friend who last addressed the House, as to the importance of supporting such decreets when they can fairly and properly be supported, and in particular of supporting decreets which are in the predicament in which this decreet is. For your Lordships may, perhaps, have observed, that this is one of those decreets the proceedings in regard to which were destroyed by a calamitous fire that took place, and which were attempted to be set up to the best ability of the country at the time, by ordering such extracts of those decreets as had been given out to be brought back into Court, and to form a record of those decreets. But the effect of that is, that materials which might otherwise have been referred to in order clearly to explain and support the decreet are no longer accessible and available for the purpose. But if it appears on the face of the decreet, that there are good objections to allowing it to be decided, that a part of the lands mentioned in the decreet had been valued; still more, if it appears absolutely on the face of the decreet that they were not valued, then I apprehend, that the Court has no other course than to hold, that these lands stand unvalued, and whether the reasons why they had not been valued were valid reasons or not, the fact remains, that they were unvalued, and the Court must deal with them accordingly.

Now, in the present case, the judgment of the Court has dealt with two classes of lands mentioned in this decreet. It was held, that with regard to one of them the decreet shews, that that class of lands was not valued at all. I perfectly concur in that finding of the Court. I think it is plain upon the face of the decreet, that these parcels of lands which are mentioned

at page 93 were not valued, but excluded from valuation. For the decreet says, that, "as to the rent of the said lands of Barclay Hill, Calsayend, and Meddens, and money rent of Badentoy, the said Commissioners find and declare, that the rent of the said lands is not liable in payment of tind dewtie, the samen being paid upon the accompt of mossmail allenarly."

Now it is quite true, that they had no power to pronounce any finding, that the lands were free from teinds, but the meaning of that finding is, that those lands being in their opinion free from teind they had not valued them. The reason why they were unvalued is assigned on the face of the decreet, and the Court will judge of the validity of that reason.

But in regard to another portion of the lands here, I mean the lands which are not so excepted from valuation, the general principle arises, whether, taking first the case of Findone, the valuation is to be read as comprehending the whole of the lands libelled. Now it appears from the libel, that the action was brought for the purpose of having the heritor's lands libelled, and it describes them in this way, "that the teinds, parsonage and vicarage, of the said pursuers, their lands, baronies, and others underwritten, viz. the lands of Meddens and Badentoy, with their pertinents lying within the parochine of Banchory-Devenick and sheriffdom of Kincardine, are yet unvalued." Therefore Calsayend, Meddens, and Badentoy are not stated as part of the barony of Findone, but the lands and barony of Findone are brought forth to be valued. Now, what does that mean? It is not uncommon to talk of all the lands in a barony and the whole barony as the lands and barony of so and so. That is the construction which my friend, the Lord Advocate, endeavoured to put upon this expression here. It might be or it might not be so. But I think it is clear, that it is not necessarily so, because there may be lands of Findone which are only part of the barony of Findone. And therefore "the lands and barony of Findone" are not necessarily an expression for one and the same thing as "the lands in the barony of Findone." I think it appears here, that there were lands in the barony of Findone which were not part of "the lands of Findone," because I think it is stated in the record and not contradicted, and it seems to be assumed by the parties, that the lands of Barclayhill formed part of the barony of Findone; and they are not part of the lands of Findone. Therefore it is clear, that in regard to the expression in this case "the lands and barony of Findone," they are not of equal extent with "the lands of Findone," because the barony of Findone comprehended at least Barclayhill, which was not part of the lands of Findone, and it may have comprehended other things which were not part of the lands of Findone, as well as Barclayhill.

Now, the minister, the defender in the present action, says, that there were a great many other things besides Barclayhill which were not part of "the lands of Findone," and if we see, that there was land which was parcel of the barony of Findone, which did not form part of the lands of Findone, and which was not valued here, it is not unreasonable to suppose, that inquiry may shew, that there were other parcels in the same condition. The minister says, that there were, and he has specified a number of such lands in article 3 of his condescendence.

Now, all that the Court has done is to say, that this decreet does not conclude inquiry, and that inquiry should be made; that is the whole extent of the judgment, and I think, that is a reasonable judgment to pronounce. The Court has not said how far the *onus* may rest, or how long the *onus* may rest, upon the pursuer or upon the defender. That is left open for investigation. It may shift in the course of the inquiry, and some things may be adduced which will throw the *onus* upon the one side, and other circumstances may be proved which may throw it upon the other. It is upon the balance of the whole evidence, that the Court has eventually to determine whether, upon the fair construction of this decreet, it did or did not comprehend any of those parcels of land which the minister describes in article 3 of the condescendence.

Then with regard to the barony of Portlethen, the same general observations apply, though there is not here the special difficulty, which I mentioned in the other case, of detecting upon the face of the proceedings the parcels of land which formed the barony, and were known by that name. But the same principle applies. I must say, however, that in making up this record I think it would have been better, that the minister should have been required to condescend upon the particular lands in the barony of Portlethen which he says were not valued for teinds. He has done so in regard to Findone, but he has not done so in regard to Portlethen. I should have liked, that that should have been required, because then it would have limited the inquiry to those particular lands, and not have left open a wide range as is here done. However, that is still open to correction. I think we cannot alter the decreet by reason of that not having been done, for it does not appear to have been objected to by the other party.

Upon these grounds, I am of opinion, that the judgment which has been suggested by your Lordships is the correct one. I observe in the condescendence, and in the opinions of the Court, that this decreet was based upon the rental produced by the heritors. I am not quite sure, that that was so, as I read the decreet, because the decreet of valuation states, that the minister produced another rental, and he referred that rental of his to the oath of the heritors, and the heritors deponed upon that rental. Now, it was upon the result of that oath, that the judgment proceeded, and we have not that before us; it is one of the things which has vanished, and that

is one reason why there is a difficulty in this inquiry, but I do not think it affects the merits of the judgment which has been pronounced, and, therefore, I will not go further into it.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Appellants' Agents, Hill, Reid, and Drummond, W.S.; W. Robertson, Westminster.—*Respondents' Agents*, Tods, Murray, and Jamieson, W.S.; Martin and Leslie, Westminster.

MAY 16, 1867.

MRS. ELEANOR JANE SOMERVILLE or DICKSON and HUSBAND, *Appellants*, *v.* Dr. SAMUEL PAGAN and Others, Trustees, *Respondents.*

Husband and Wife—Postnuptial Contract—Contingency of Wife Surviving—Construction—*By postnuptial contract between S. and Mrs. S., narrating, that it was made "in order to regulate the interests they are to have in their property," S. gave to Mrs. S., in case she survived him, a liferent allenarly in the property that might belong to S. at his death, such liferent to be subject to the maintenance of the children, and on Mrs. S.'s decease all the subjects so liferented by her to go to the children, and if no children, then to the heirs of S. On the other hand, Mrs. S. gave to S. and the children in fee all her goods, etc. Mrs. S. died before S., who afterwards made other dispositions of his property.*

HELD (affirming judgment), *That the deed was intended to provide only for the contingency of the wife surviving the husband, and as she had died before the husband, it had no effect on the succession of S.*[1]

This was an appeal from interlocutors of the Second Division as to the construction of the marriage contract of Colonel Somerville and his wife, Eleanor Dixon, dated 1818, which was as follows:—"The parties following, viz. Henry Erskine Somerville, captain in the service of the Honourable East India Company, on the one part, and Eleanor Dixon, daughter of the deceased John Dixon, at Knightswood, on the other part, considering, that they were married at Glasgow on the 18th day of June, in the year 1816, without entering into written articles as to the division of, or succession to, any property then belonging to them, or which they might acquire or succeed to, or interest which they or their children or heirs might have, in the event of a dissolution of the marriage by the death of one or other or both of them, which in part arose from the said Eleanor Dixon not being fully acquainted with the rights that belonged to her under the settlement executed by her father: Therefore, and in order to regulate the interests which the said Henry Erskine Somerville and Eleanor Dixon are to have in the property, means, and estate presently belonging to them, or that they may acquire or succeed to during their marriage, or that they may afterwards come to have right to, have resolved to execute these presents in manner and to the effect following, viz.:—The said Henry Erskine Somerville hereby dispones, assigns, conveys, and makes over to and in favour of the said Eleanor Dixon, his spouse, in case she survives him, the full liferent rightof every property, money, means, and effects of every denomination that may pertain and belong to him at his death, for the said Eleanor Dixon her liferent use allenarly, but reserving to the said Henry Erskine Somerville full power to burden his said effects or estate with an annual payment or payments, not exceeding in all £25 sterg., to such person or persons, as he shall bequeath the same to by any deed or writing under his hand; and it is hereby declared, that the said liferent, under the above reservation, shall be subject always to the maintenance, clothing, and education of the child or children that may be procreated of the marriage; and upon the decease of the said Eleanor Dixon the whole subjects, money, means, and effects liferented by her as aforesaid, are hereby conveyed to the child or children of the marriage, and if more than one, to be divided in such proportions as the said Henry Erskine Somerville, and failing him, the said Eleanor Dixon, shall see proper, by a writing under his or her hand, and failing such division, equally among them; and in case of no children existing of the present marriage, it is hereby understood and agreed, that the whole property, means, and estate to be liferented as aforesaid, shall belong and accresce to the heirs and executors of the said Henry Erskine Somerville or his assignees, upon which he reserves the power of bequeathing and disposing of as he may think proper; which provisions, under the condition after mentioned,

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[1] See previous report 3 Macph. 602: 38 Sc. Jur. 41. S. C. 5 Macph. H. L. 69: 39 Sc. Jur. 421.