COURT OF SESSION.

Tuesday, July 14.

SECOND DIVISION.

M'FADYEN AND OTHERS *v.* RAMSAY AND OTHERS.

Teind—Decree of Valuation—High Commission—Stipendiary—Mensal Kirks. In an action of reduction of a decreet of the High Commission valuing the teinds of the island, brought by the Ministers of Islay, *held*, that at the date of the valuation under reduction, the pursuers' predecessor in the kirks of Islay, being ministers of patrimonial kirks of the Bishop of the Isles, had only a personal claim against the bishop for their stipend, and therefore had not the right of ministers of erected kirks to plead the principle of the *Dunbarney* case—that a decreet of valuation of teinds is null which is made in absence of the minister.

This was an action of reduction brought by the Ministers of the island of Islay against the Heritors, for the purpose of setting aside a decree of valuation dated in 1636, whereby the teinds of the island were valued at 2000 merks Scots. There were various grounds of reduction stated, but the main ground, and that upon which the case ultimately turned, was, that the ministers of the parishes of which the island of Islay was composed at the date of the valuation were not cited to the process of valuation, and did not appear. It was said that this was fatal, in respect of the decisions in the *Dunbarney* case two years ago, and the recent decision of the First Division in the case of *Old Machar*.

The defence (apart from certain preliminary pleas which were repelled at the outset) was founded upon an argument to the effect—(1) That the decision in the *Dunbarney* case was unsound; (2) that, if sound, yet the principle of that case did not apply where, as here, the ministers were stipendiaries, and where the bishop, who was titular and represented the benefice, was a party to the valuation; (3) that in any event the principle in question did not apply where, as here, the ministers were not only stipendiaries but were stipendiaries who were incumbents of mensal or patrimonial churches, and had no claim to stipend except a personal claim against the bishop of the diocese.

The Lord Ordinary (BARCAPLE) sustained the reason of reduction founded on the absence of the minister, and reduced accordingly. The following is his Lordship's interlocutor:—

"*Edinburgh, 2d July* 1867.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—repels the pleas stated for the defenders against the title and interest of the pursuers to sue this action; sustains the reason of reduction rested on the ground that the valuation sought to be reduced proceeded in the absence and without citation of the ministers of the parishes within which the lands therein comprehended were situated; reduces decerns, and declares, in terms of the conclusion of the libel; finds the defenders liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report.

"*Note.*—For the reasons formerly stated in the Note to his interlocutor of 3d March 1866 repelling the preliminary defences, the Lord Ordinary is of opinion that the pleas stated by the defenders against the title and interest to sue, being their three first pleas in law, are not well founded, and must be again repelled.

"The Lord Ordinary does not think that any of the grounds of reduction libelled, except that founded on the absence and want of citation of the ministers, can be sustained, at all events without further investigation of the facts of the case.

"The pursuers maintain that the valuation is reducible, as having been led without a proof of the value of the stock or teinds, and without any competent process. It proceeded at the instance of the Bishop of the Isles, as tituler, against the Heritors, who appeared by their procurator. The titular desired to have the heritors held as confessed upon a rental of the teinds produced by him, amounting to 2,100 merks. The heritors asked to have the rental reduced to 1,900 merks, in respect of alleged 'defalcations,' of which they offered a proof. The Commissioners having refused to allow a proof of the defalcations, the parties referred the reasons and defalcations to them, and they by their decree fixed the value of the teinds at 2,000 merks. The Lord Ordinary does not think there was anything unusual or irregular in the mode of valuation proposed by the titular. Sir John Connell, (i., 210) says, 'The most common mode of valuation in former times was by a rental of lands or *teinds* produced in process, and consented to by the parties.' In absence of all evidence to the contrary, it is to be assumed that the situation of the teinds was such as to make a separate valuation of them practicable and proper; and if the heritors had not objected to the rental, and had thereupon been held as confessed, the Lord Ordinary does not see that any plausible objection could have been taken to the proceedings on that ground. Nor does he suppose that an objection can be grounded upon the refusal of the Commissioners to allow a proof of the defalcations. If the rental was not to be admitted as the ground of the valuation, the regular course was to allow a proof of the value of the teinds to proceed in usual course. But both parties concurred in wishing to make the rental the ground of the valuation, subject to a reference to the Commissioners of the effect which should be given to the heritors' claim to have it reduced in respect of the defalcations. The precise nature of the question between the parties does not appear. But the High Commissioners having disposed of it, and decerned in the valuation, the Lord Ordinary does not think it can now be assumed that, in doing so, they acted in a manner incompatible with their powers.

"The pursuers also object to the valuation that it does not specifically set forth the lands, and that it does not contain the value of the whole lands in the pursuers' parishes. The Lord Ordinary does not think that the former objection, if stated separately, would be of any importance. The valuation of an heritor's whole lands in a parish, if it does not specify the lands, may leave room for a question as to what lands were actually valued. But it is a competent and ordinary form of valuation. It is just such a question, whether this valuation comprehends the whole lands in Islay? Upon the face of the decree, the Lord Ordinary thinks it must be held that it does so, and that, at all events, it must lie upon the pursuers to prove that there were other lands in the island which were omitted.

"The pursuers further plead that the Bishop was not titular. The Lord Ordinary thinks there

is at least strong *prima facie* evidence that he was so; and the point was not pressed.

"In this state of the case, the important point immediately for decision is the objection taken to the valuation on the ground that the ministers of the parishes of which Islay was then composed were not cited, and did not appear. Looking to the judgment of the Court in the recent case of *Dunbarney, Kirkwood* v. *Grant*, 4 M·P. 4, the Lord Ordinary does not think that he can entertain this as, in any aspect of it, an open question. The extract decree there founded on did not import more strongly than the one now in question that the minister was not cited and did not appear. The minister was there admittedly a stipendiary—a circumstance alleged and founded on by the defenders in the present case, but which is denied by the pursuers. In either view of the fact, the Lord Ordinary must hold the case of *Dunbarney* to be an authority for holding the objection to the valuation to be good.

"The defenders found upon the speciality that the titular was the bishop, who may be held to have represented the ecclesiastical interest of the benefices. The Lord Ordinary is not insensible to the force of this argument. There is no statutory enactment requiring that ministers shall be called to a valuation, and many passages in the statutes might lead to the inference that the titular and the heritor were alone contemplated as proper parties to the proceedings. Indeed, it seems to be indubitable that in many of the earlier valuations led before the High Commissioners the minister was not called. If the practice of calling the minister was introduced from the propriety and justice of having the ecclesiastical interest of the benefice represented, the necessity for that might not be so apparent where the benefice was in the hands of the bishop. An extract from the proceedings in the Union of Tiree and Coll, given by Sir John Connell in his work on the Law of Parishes (pp. 23–24), shows that where the benefice was held by a dean, the position of the parish minister, if any existed, was subordinate, and such as might not unnaturally be held to dispense with the necessity for calling him in a valuation. But the Lord Ordinary thinks that he is precluded from going into any such question by the terms of the recent judgment, if not also by the previous decisions.

"The defenders found upon homologation rested on the agreements and proceedings in relation to the erection of the new parish of Kilarrow and Kilmeny. The Lord Ordinary does not think that effect can be given to this plea. Right to challenge the valuation was expressly reserved to all parties in the decree of erection, and it does not appear that any of the parties to these proceedings could compromise the permanent and public interest of the benefices. He is also of opinion that the plea of *res judicata*, founded upon the proceedings in the augmentation and locality of 1745, cannot be sustained. No objection was taken to the validity of the valuation, and the parties had no opportunity of joining issue on the point. Prescription is also pleaded against the reduction, but this plea is negatived by all the decisions setting aside valuations on the ground that the minister was not called."

The defenders reclaimed.

YOUNG, GIFFORD, and BALFOUR for them.

CLARK and LEE in answer.

At advising—

LORD JUSTICE-CLERK—This is a reduction of a decree of the High Commissioners valuing the teinds of the Island of Islay, on 2d March 1636. It is brought by the three ministers of the island, and is directed against all the heritors of the lands of these parishes.

A preliminary objection taken by the defenders, founded upon alleged absence of identity of interest in the pursuers, was repelled by the Lord Ordinary, and, in my opinion, properly repelled. The decree founded on affects the interest of the three pursuers; it extended to the whole island. The reduction rests on the same ground, and, if successful, would remove the source of what is said to be an unjust prejudice to all their benefices. One action was infinitely more convenient. By the bringing of separate processes, and adopting this course, the ministers have saved great and unnecessary expense to both parties.

The defenders further pleaded that the decree having subsisted unchallenged for 230 years—having received effect in processes of locality in which it was sustained—and having formed the basis of ecclesiastical arrangements between heritor, the church, and the Crown, leading to an assignation of the amount of the valued teind as ascertained by the decree—the erection of a new church, and the founding of an additional cure within the island, could not now be opened up. The Lord Ordinary has disregarded this plea, and I agree with him. I do not think that the proceedings in the locality form a *res judicata*, and that no such effect can be given to the proceedings as to the formation of the third charge, especially seeing that there was an express reservation in the decree of the Synod of the interests of the two ministers of the original parishes, and that the right therefore of the beneficiaries was not even *ex facie* surrendered. Moreover, if the decree labours, as it is said to do, under a fundamental nullity, it would seem competent to set it aside, even though, under the assumption of its validity, many important transactions may have taken place.

The pursuers contend, in the first place, that the decree is open to reduction, in respect that the proceedings before the High Commissioners were irregular, the valuation not having proceeded on evidence duly taken. The pursuer, the bishop, desired to have the heritors held as confessed upon a rental of 2100 merks. The heritors objected, alleging "defalcations" which would have reduced the valuation to 1900 merks. A proof of defalcation was refused, and the case would have been followed to a conclusion by proof of the value of the teinds. Both parties referred the matter to the Commissioners. They fixed the sum at 2000 merks. I agree with the Lord Ordinary in holding that the decree was not so irregularly framed as that any fatal objection to the decree can be stated on that ground.

An objection is also taken as a ground of reduction to the non-specification of the lands, which has been disallowed by the Lord Ordinary. In that finding also I agree with the Lord Ordinary.

I now come to the material question. The leading and important finding of the Lord Ordinary is one by which he sustains the objections of the pursuers, that the then ministers were not called as parties to the valuation, which was a proceeding before the High Commission, and he has reduced the decree accordingly. He has followed what he considers to be the precedent in the case of *Dunbarney* in this Division of the Court; and his view

is said to be confirmed by a decision which has followed since the date of the judgment, as to the valuation of the lands in the parish of Old Machar.

The question which it appears to me we have to determine is, whether these cases apply in the circumstances which are disclosed in the present? These cases are binding upon us as authoritative judgments of this Court, and in the like circumstances we must give effect to them, whatever our opinion might have been had the questions determined by them been open.

From these cases we deduce, I think, two propositions. The first is, that in the absence, on the face of the decree of valuation, of anything directly showing that the minister was a party, we must hold that he was not in point of fact called, the presumption that after such a lapse of time without challenge of everything having been done *rite et solemniter* not being applicable. It is further ruled that the objection holds good although the minister had or had not a benefice.

We must, I think, hold that in this case the ministers were not called. The question is, whether they stood in the same position as the ministers did as to whom it was found that they required to be made parties?

The objection was given effect to in the absence of any express direction or provision in the commission itself, or in the statute which sanctions it, because these ministers had a right to a modification and augmentation of stipend out of the fund which was to result from the valuation. Having thus an interest in its amount, it was held that they should be made parties to the process of valuation. The amount of the fund available for stipend was liable to be affected. Such is the *dictum* of Mr Erskine when speaking as to the necessity of calling ministers, and such the principle of law sustained in these cases. If the charges of Islay were at the time proper benefices, parsonages or vicarages, with regular endowments, or if the ministers then serving the cure at the parish churches had a right to have their stipends modified out of the teinds of the several parishes in which they were then serving (with a prospective right to increased stipends out of these teinds), we have direct precedents for a judgment favourable to the pursuers.

If otherwise these cases are inapplicable and the *ratio decidendi* does not come into play, the case of the defenders is, that the ministers did not hold at the time the position of having any claim against the teinds of the parishes in which they served, either for modified or augmented stipend. The bishop of the Isles, it is said, was at that time titular of the two parishes of which Islay then consisted, and had the teinds as a part of his benefice; that the position of the ministers was that of parties serving the cure as parishes belonging to the bishop, and consequently having a claim,—not against the teinds of any particular parish, or indeed necessarily against teinds at all as the fund from which their stipends were payable,—but depending on the bishop, and having no legal claim but against him, as recipient of the revenue of temporal lands and teinds belonging to his benefice, for the sum which should be paid for their services.

I hold this, if true in point of fact, to be relevant in law to meet the objection arising from the absence of the minister in the process of valuation. I cannot hold that the decisions in *Kirkwood* and *Old Machar* apply to such a case as that of ministers whose claim for stipend does not fall to be made good against the teinds of his parish. It was simply because in these cases the ministers were directly affected by the valuation in the ascertaining of the fund appropriable in payment of their present stipend, and in augmentation of their stipend for the future, that they were held to have such an interest as that they required on principles of justice to be called.

The valuation of the teinds was brought at the instance of the bishop as titular of the teinds of the island of Islay. The fact of his being titular is disputed upon record. The Lord Ordinary has assumed the fact, and has disposed of the case in favour of the pursuers on that assumption. His view seems to have been limited rather to the consideration of the position of the pursuer as giving rise to doubt the application of the case than to that of the position of the minister. He says that an ecclesiastical titular may be assumed to have such an interest in the benefice as to distinguish his position from that of a lay titular; although that distinction is insufficient in his estimation to lead to the result that a rule should be applied in the one case different from the rule applicable in the other. I should have been disposed to concur with his Lordship in holding that the mere fact of a titular being a churchman would make no substantial difference. But the question does not turn upon the position of the pursuer of the valuation as an ecclesiastic, but, as it appears to me, upon the position of the minister of a bishop's parish as to the teinds. The question is as to whether a minister serving the cure in a bishop's parish at that time had any right to have an augmentation allotted to him out of the teinds of the parish actually or prospectively, and if he had not, how he can be held a necessary party.

The first question is, Whether these parishes were bishops' parishes at the time of the valuation?

Is it or is it not true, that at the date of the valuation the bishop of the Isles was titular of the whole teinds of the island of Islay? If he was not, independent altogether of the point under consideration, the valuation would be null as led by a party falsely assuming a position as pursuer to which he had no right, and the valuation would be *funditus* null and void.

I regard it as a very startling proposition to be advanced for the first time, 230 years after the date of the decree, that the bishop who brought into the field all the heritors of Islay in the valuation, and followed it out without an objection, and in fact with their consent, should have falsely assumed a character to which he had no real pretension. The acts done during this long period on the faith of the decree seem in this question important. Moreover, I think the defenders satisfy any *onus* which can be conceived to attach to them on such a question by the evidence which we have before us. They have proved by the lease dated in November 1634 that there was let to the then proprietor of Islay, Campbell of Calder, by the bishop, "All and sundrie the teinds, as well parsonage as vicarage, teynd sheaves, teynd boilles, brockes, great and small teynds, teynd fishes, and other teinds whatsomever, as well by sea as land, of All and haill the lands and Isle of Ila, with parts, pendicles, and pertinents of the same whatsoever, and of the haill sea coasts, lochs, creeks, bays, and waters thereof, as well fresh as salt (excepting the haill teinds of the five merk land of Ballenabe, Arressett, How, and Saligo, lying in the said Ile of Ila, pertaining heritably to ane noble Lord Archibald Lord

Lorne), all lying within our diocie of the Iles, and of old within the Sheriffdom of Tarbert, and now within the Sheriffdom of Argyle;" and this lease proceeds upon a narrative of the same condition of matters as having existed previously. We have the history of the right to the entire valued teind-duty subsequently to the abolition of bishops. The defenders have traced it from the Crown into the Synod of Argyle, and from the Synod, with the Crown's assent, to Campbell of Islay, under arrangements with the Synod in 1765 as to its payment to the minister of a new parish. These successive parties drew the 2000 merks of valued teind-duty. We have no trace of any other than the bishop, or those taking through him, except to the extent of one five merk land which was said to belong to the Lord Lorn, having received tack-duty for teind, or the valued teind-duty which came in place of the teind after the process of valuation. The actual condition of the teinds in 1636, and the whole subsequent history of them, show that the bishop had an exclusive right to them at that period.

It is true that evidence is adduced by the pursuers to show that the charges of the ministers of Islay prior to the Reformation were parsonages, and presentations from the Crown down to 1543 to the livings are referred to, which directly or indirectly show that the presentations were made to benefices. It is equally true that no grant from the Crown, or from any donee of the Crown, has been adduced to an alteration of this condition of matters in point of fact.

On the other hand, no presentation subsequent to 1543 has been found, and the state of matters as they stood in 1638 shows that the teinds did then truly belong to the bishop, because it is very clear there is presumptive evidence of the existence of such grants. Taking into view the wish of the then monarch to uphold the estate of the bishops, we have every reason to think it natural that such grants should have been made. They were frequently made by patrons on vacancies before the Reformation to bishops and religious houses. Speaking of such annexations, Mr Erskine says—(B. ii, 10, 11)—"In appropriating to a cathedral church, the patron made the grant sometimes to the bishop himself, and, when that happened, the church annexed became part of the bishop's own benefice, and was called mensal." The evidence seems to show that the parishes in Islay were in 1636 mensal churches of the Bishop of the Isles.

It is certainly somewhat startling to find that, in the reconstitution of the chapter of the bishopric of the Isles, there is inserted in the list of ministers who are to constitute the chapter the name of "the parson of Killenew, in Isla." If a parson, he would have right as entitled to the great teinds of his parish; if, as appears from the documents founded on by the defenders, these teinds really belonged to the bishop, the designation must have been inaccurate, and have meant the minister who might be serving the cure, and paid by the bishop a sufficient stipend under the conditions to which he was subjected by his gift of the temporalities of the office as well as the obligation incumbent on a bishop to whom the *spiritualia* of all his proper parishes belonged. While it is impossible to dispute that there is a conflict to some extent between the proof referred to by the pursuer and that adduced by the defenders, I come to the conclusion that the bishop was titular. It does not conflict with this view that the ministers serving the cure at Kildalton and Killarow should, the year after the General Assembly of 1638, take their place as members of the Synod. As ministers serving the cure in these parishes, though named by the bishop to these cures, the body of their brethern, then in opposition to Episcopacy, would not hesitate to recognise their status. They certainly had no right as parsons or vicars to teinds which were then let by the bishop and producing to him what was then a considerable annual revenue.

If the bishop was titular, and so in right to the spirituality of the island, as well as the temporality of his benefice, the ministers officiating in the parish churches had no claim against the teinds for stipend—no right to have an allocation on the special teind of their parishes which had been attached to and formed part of the bishop's patrimony.

The original fund provided to the clergy after the Reformation was the third of the rentals of the benefices, which were, to the extent of this third, to be uplifted by the Queen. Stipends were to be modified out of this fund by a commission called the Commission of Plat.

By the Act 1581, c. 100, special ministers were to be placed and resident in every parish, and stipends were to be paid to them out of the thirds, teinds, and other rates arising out of their parishes.

This Act provides, *inter alia*, "that all kirks annexed to prelaces be provided of sufficient ministers with competent livinges, asweil laitlie disponed sen his Heines acceptation of the government in his awin persone, as that sall vaik and be provided hereafter, quhill his Heines perfite age. And befoir the title of any prelacie be conferred to any person hereafter, that the saidis livings and stipends be reserved in the provision, and always compted in the thrid, to the effect that ministers may be provided thereto *ad vitam*. And in case any gift or provision of prelacie sall pass utherwise, declaires the same to be null and of nane avail, force, nor effect."

The stipends of ministers annexed to prelacies, such as these were, were not made payable out of the teinds, but from the resources of the benefice to which they were annexed.

By 1606, c. 2, which restored bishops, the thirds which had been separated from the remaining two-thirds were reunited "to the body titill and twa part of the same," and restored to that order. In the Act restoring them they are declared to have benefices of cure, and none were to be appointed unless discharging the duty of a cure. They are restored (see Act 1606, c. 100) as if "the Acts of Annexation and remanent Acts made in any wyse to their prejudice in the premisses, and averie ane of them, and all that followed thereupon, had never bene made nor done. They alwyse entertening the ministers serving at the cure of the kirks of their saids bishopricks upon the readiest of their saids thriddes, according to the ordinar assignations made or reasonablie to be made thereanent."

The position of the ministers of bishops' kirks, as effected by the restoration of bishops, was contemplated and provided for by the Statute of 1606, c. 3, which, *inter alia*, provides, that to the effect that the ministers of the saidis kirks may be "the mair certainly provided, and the rentall of the bishopricks may be made (whilk shall not be altered as said is), ordains all archbishops and bishops wha are already provided, or shall be provyded in tyme to come, to make ane sufficient rentall of the patri-

mony of ilk bishoprick, and to give in the same to the Clerk of Register and his deputes, to remain in his Register *ad futuram rei memoriam.*"

The ministers of Islay, from and after the restoration of Episcopacy, which restored the bishops' churches, necessarily fell, if their parishes were truly bishops' parishes, to claim not teinds, or an allocation out of them, but reasonable allowances.

In the Commission 1641, which passed when the bishops were abolished, we find that the commission "appoint, modifie, and set down a constat and locall stipend t maintenance to ilk minister (his present stipend being allowed in the first end yrof) to be payit out of the teindis yroff, and to grant augmentaouns to ilk mirs of wther kirks nor bps. kirkes who got not ye benefite of the former commissioune." We also find these teinds specially devoted to "ye use and benefite of the ministers serving ye cure of ye saidis kirks, and to ye maintenance t supplie of universities, colledges, and schooles."

At the period when this valuation was led these churches were bishops' churches. The teinds were part of the patrimony of the bishopric. The bishop was liable to make provision for the clergy who might serve in their parishes. These clergy had no right to stipends out of teinds which belonged to the bishop. The grant to this bishopric by King James VI in 1605 proceeds upon a narrative of some importance. The appointment, it is said, can "give no right except to the spirituality of the saidis benefices qlkis ar not able to beir out the chargis and estait, and is debarit from bruiking onie of the temporalite yrof, receaving or entering the tenantis and vassallis of the samyn be ressoun of the annexatioun of the said temporal landis to ye Croun, nor yit can be provyd his kirks of sufficient ministeris, except the thriddes of the saidis benefices be disponit to him to that effect."

There follows a grant of the temporalities of the benefice generally, as existing before the Act of Annexation 1587, "and siclyk gevand, grantand, and disponand to the said Mr Andro during his lifetime, with consent foirsaid, for entertenment of sufficient and qualifiet ministers at his kirks of the said bishoprick, abbacie, and priories, the haill thriddes of all the rentis, baith temporalitie and spiritualitie, of the saidis beneficeis of the crop and zeir of God Jajvic. and four zeiris, and all vytheris yeiris and croppis nixt yairefter following (he pleaceand and sustenand ministers at all his kirkis of the samyn during that ilk space, according to his awin modificatioun), with power to him, his factoris, servitors, and vtheris in his name, to intromet with, vplift, and resaue all and sundrie teyndis, fruitis, rentis, proffeitis, emolumentis, and dewties and vtheris respectively aboue mentionat, pertening and belanging to the saidis benefices, als weill tua pairt as thrid pairt yrof, temporalitie as spiritualitie of ye samen, and thairupoun to vse and dispone at his pleasour during all the dayis of his lyftyme."

The grant concludes with a prohibition discharging "the Lordis of the plat and chequer, modifieris of ye ministeris' stipendis, of all modifieing of any stipendis furth of ye fruitis of ye saidis benefices, tua pairt or thrid yrof, bot suffer the said Mr Andro plant and plaice thame in his kirks yairof, and furneiss yame in sufficient stipendis of ye reddiest of ye thrid yrof."

The grant to Bishop Thomas Knox in February 1619 gives to the bishop all the rights of temporality or spirituality, with churches, teinds, &c., as possessed by his predecessors, but contains no special provision as to the support of his clergy. The grant to Neill Campbell in 1634 is more precise, and gives the benefices under a proviso that the bishop shall provide for the sustentation of the ministers of the churches, as I read it, of the bishopric, the priory of Oronsay, and the nunnery of Icolmkill.

In the lease to Mr Campbell of Calder of the teinds of the island, except those of one five-merk land belonging to Lord Lorne, the bishop takes himself bound to relieve his tacksman of all stipends and augmentations, as well assigned as to be assigned, to the ministers present and to come "serving the cure in the said Ile of Isla," the tacksman taking upon himself to relieve the lessor of all other burdens affecting or to affect the teinds during the currency of the lease. It is said that "our predecessors, bishopes of the Isles, receavers of the tack-deutie of the teyndes befoirwrettin, ware in tyme bygane payeris to the ministeris serving the coore in the said Ile of Ila of their haill stipendis, and did releive the said Johne Campbell, fiar of Calder, and his predecessoures, takismen of the saidis teyndes, of the samen: Thairfore, in lykemanner but derogatione of the provisione foirsaid, and in corroboratione yairof we, the said Neill, Bishop of the Iles, with advyse and consent aboue-specifiet be thir presentis binds and obleigis us and our successouris foresaides to sufficentlie warrand, disburden, freith, and relieve the said Johne Campbell, fiar of Calder, his aires-male, successouris, and assignayes, off all payment making to the ministeris present and to come, serving the coore in the said Ile of Ila, of all stipendis and augmentationes yairof quhatsumevir, alsweill alreddie assigneit and appoynttit as heireftir to be assigneit and appoynttit."

The pursuers referred us to notes by Bishop Knox, in which he says, "Yla belongeth to Sr Johne Campbell of Calder, is 24 myles of lenth, als mouche neir in breid, peyes 1000 merkis yeirlie to the bishop defraying the ministeris stipendis servit be Mr Patrik M'Lachland and Duncane M'Ewen, and equallie distribuittit amongst yame." The payment of the teinds by the bishop to the ministers of the 1000 merks is quite consistent with the bishop receiving the tack-duty and providing the ministers with the tack-duty or a portion of it.

We have been referred to an Act of the Commission, from which it appears that in December 1635 the then minister at Killarow and Kilchoman raised an action, not directed against the bishop, or calling any one as titular, for having the teinds valued, the parishes divided, and a stipend allocated. The proceedings seem to have gone no farther than a single appearance before the Commission. To any other effect than that there was a local minister actually serving the cure at these places in 1635, I do not think that any inference can be drawn favourable to the pursuers, and that condition of matters was conformable to the provisions of the Act 1606. The failure of pursuing this process admits of being very well accounted for by the consciousness that the pursuer was not in a condition to follow it out to any effect.

The result is, according to my view, that at the date of the valuation the ministers of Isla had no legal right to allocations on the teinds for their stipend. It apears that they were in a position to have made good reasonable stipends from the

bishop's general revenues, and especially from the thirds, although there may have been practical difficulties in establishing their claims. They were, though not in the position of mere chaplains, in no position to affect the teinds of the parish for their stipends; they had no special interest in the teinds of their respective parishes; they were not in the position of erected clergy, or of beneficed clergy, or of all parochial clergy, after the final abolition of Episcopacy in Scotland. The bishop held the whole teinds for the sustaining of his state and condition as a bishop. The ministers had a claim against him as the recipient of the proceeds of the temporality and spirituality of the benefices. They had no distinct special interest in the teinds, and consequently no such right in or to these teinds as to come within the principle of the decisions to which I have referred. The circumstances of these cases differ in this vital particular,—and, so differing, can form no precedent for our judgment here. As they had no such interest, the failure to call them cannot invalidate the decree.

Lord Benholme—This is an action of reduction raised at the instance of the pursuers, who are ministers of the parishes of the Island of Islay, to set aside a valuation of teinds in that island, dated 2d March 1636.

The Lord Ordinary has sustained "the reason of reduction rested on the ground that the valuation sought to be reduced proceeded in the absence and without citation of the ministers of the parishes within which the lands therein comprehended were situated."

In submitting this interlocutor to the review of the Court, the defenders do not seriously dispute the ordinary rule now established in this Court, that the non-citation and absence of a minister as a party to a valuation of the High Commission, is fatal to its validity. For, whatever may be thought of that point of law in the Court of Appeal, it seems to be now a closed point in the Court of Session.

But the defenders allege a specialty in this case, by which the *ratio decidendi* in the case of ordinary parish ministers is overthrown. They say that in the early part of the seventeenth century, the ministers of the bishops' patrimonial churches stood in a very different position from that of the ordinary stipendiary clergy. They allege that the Bishop of the Isles, who appears as the pursuer of the valuation in question, was, as is set forth in the valuation itself, the titular of the tithes of the several kirks of Islay, and duly represented the interest of the benefice in the proceedings before the High Commission.

Assuming, in the meantime, that the defenders are right as to the matter of fact, that the bishop was the titular, or in other words that these were patrimonial kirks attached to the diocese of the Isles—it may be well to examine the grounds upon which the general point of law has been established in our practice with a view to estimate the importance of the defender's specialty.

It is admitted that in the statutes and commissions relative to valuations there is no indication of any positive rule that the minister of a parish must be cited as a defender to a process of valuation. Farther, it is alleged, on the authority of an old MS., that the High Commission of 1633 pronounced in 1634 an act, decrete, or ordinance in the following or similar terms:—"The Lords find no necessity to summon any minister to approbation or valuation, but by the titular or tacksman."

The true ground, therefore, upon which in later times (notwithstanding great difference of judicial opinion) the rule has been established, is the deep interest which a parish minister, for himself and his successors, has in the teinds of his own individual parish, as being the only fund out of which his stipend is payable, and out of which his augmentations may be expected.

In the last case which has been decided on this point—*Smith and Others* v. *Forbes and Others*, 28th February 1868—the Lord President made the following clear and authentic statement as to the ground of decision. Adverting to the use of the word *stipendiary* as applied in general to ministers of the Church of Scotland, his Lordship said, "I think a good deal of misapprehension is introduced into the discussion of this question by calling the minister a stipendiary. I do not 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 shows, I think, as plainly as anything can possibly do, that in the amount of that fund, out of which alone he can draw any augmentation of his stipend, he has as deep an interest as any one possibly can have."

In the present case the general point has not been disputed in argument. It has been admitted that in this Court the point is not open. The defence has been founded on the specialty that the valuation under reduction was a valuation of bishops' tithes, that is of the tithes of *patrimonial* or mensal kirks of the Bishop of the Isles, which stood in a totally different situation from what have been called the *erected* churches in regard to the interest of the ministers in the tithes.

In order to estimate the extent of this difference, it is necessary to attend to some historical facts connected with the Reformation in this country.

At the date of the Reformation a large proportion of the tithes of Scotland belonged either to the archbishops and bishops, who were the secular prelates, or to the religious houses whose members were presided over by abbots, priors, &c., known as the regular clergy.

The benefices of both the secular and regular popish clergy fell to the Crown at the Reformation.

The reformed clergy had no recognised right of succession to the revenues or possessions of their popish predecessors. But at an early period a fund was established by Parliament out of which stipends should be assigned to them. This fund was a third part of the revenues of all the benefices, extending to the temporality as well as the spirituality of these benefices.

This continued to be the only fund for providing the minsters till the year 1617. A great change took place at that time, the cause and the nature of which can be understood only by attending to an event of great importance which took place some years before, in the year 1606.

It had all along been the policy of the King to preserve the estate of bishops and archbishops; and it would rather appear that they had been allowed, notwithstanding the Reformation, to remain in possession of the main portion of their revenues. However that may be, in 1606 they were restored to their benefices, both as to spirituality and temporality—the Act of Annexation of 1587 being repealed in so far as regarded their temporalities. The thirds of their benefices were also conveyed to them, under the burden or condition of their maintaining the clergy of their own kirks—that is, of their mensal or patrimonial kirks. From henceforth the ministers of these kirks had a fund of provision which, whilst it extended to the third part of the land rents and teinds of the benefice, was preserved from dilapidation by severe statutes enacted for their special benefit.

So early as 1581, by the Act 1581, c. 100, which treats of ministers' provisions, it is enacted, "That all kirks annexed to prelacies be provided of sufficient ministers, with competent livings, &c., and before the title of any prelacy be conferred to any person hereafter, that the said livings and stipends be reserved in the provision, and always counted in the third, to the effect that ministers may be provided thereto *ad vitam*."

When, in 1606, bishops were restored, and all statutes to their prejudice repealed, they got right to the *thirds* of their benefices, which were no longer to be levied separately, but drawn with the rest of their revenues by the bishops, "they always entertaining the ministers serving the cure of the kirks of their said bishopricks upon the readiest of their thirds, according to the ordinary assignations made or reasonably to be made thereanent." By another statute passed the same year it was provided, "That it shall nowise be leasome for any person provided or to be provided to ane bishoprick within this realm, to dispone or give in pension any part of the patrimony of the said bishoprick, which shall endure or last longer space nor the giver of the said pension shall bruike the said bishoprick."

The bishops are allowed to set tacks of the fruits and duties of their benefices. "And by reason that the duties of the said tacks, to be set by the persons provided to the bishopricks, are to be applied and converted for satisfaction and entertaining of the ministers serving the cure of the kirks of the said bishopricks, and for supply of ane part of their stipends to be given to them; therefore the estates ordains the said bishops to have an careful regard that the said tacks be set for ane competent duty, which may in some reasonable proportion, answering to that which is set in tack, be mair meet to supply ane part of the said ministers' stipends; which duties of the said tacks, and also the stipends which shall be provided to the ministers serving at the cure of every bishoprick shall be in all time coming repute as ane part of the rental of the said bishoprick, which rental shall nowise be hurt, viciate, or diminished by the titular of the said bishoprick." And the Act goes on to provide that the bishops shall give in to the clerk-register a rental of the patrimony of the diocese, "to the effect the ministers of the said kirks may be more certainly provided." The Act commends the provision of their ministers to the bishops, "to whose care and travels our Sovereign Lord and estates has recommended and commits to give over, in the certain provision of the ministry serving at the kirks of their bishopricks, with competent and reasonable stipends, answering and agreeable for their travels and sustentation."

Nothing is more certain than that the ministers of the bishops' mensal or patrimonial kirks had for their stipends a claim upon the temporality, the lands and land-rents of the benefice, as well as on the spirituality; and that claim was rendered permanent and effectual by stringent statutory provisions to prevent dilapidation or concealment of these temporalities.

Their claim upon the spirituality of the benefice was characterised by this quality, that to each minister was made available as a fund for augmentation the tithes of the whole diocese to the extent of one-third. This claim was not confined to the tithes of his own parish, but extended to those of all the patrimonial kirks of his bishop.

This catholic quality of the churchman's claim came into practical effect when, in 1641, upon the suppression of bishops, a Parliamentary commission was established, whose jurisdiction as to modification was extended to the bishops' kirks. This commission contains the following provision—"It is hereby declared that the ministers provided by the former commission shall be supplied to the full quantity foresaid: Lykeas hereby it is declared that all bishops' kirks, whether or not provided at all or provided by the former commission, but beneath the quantity foresaid, shall be supplied to the full quantity of eight chalders victual or 800 merks out of the teinds of their own parish: And where the same cannot be had, then out of the tythes of the other kirks of that bishoprick; and that all kirks that had greater quantity of stipend before the restitution of bishops than they now have, (except they have been diminished by just valuation) shall be supplied and brought to the same quantity whereof they were in possession before the said restitution, to be paid out of their own parish, and where it is inlaking, to be paid out of the tithes of the bishops' other kirks, &c.; Lykeas it is hereby declared that all teinds and teind-duties which belonged to chapters, deans, sub-deans, and other dignitaries of the chapters, shall be liable to the like provision of the kirks which were annexed thereto, according to the proportion of eight chalders victual, or 800 merks, furth of the teinds of their own parochin allenarly, according to the Act of Parliament."

There is here a remarkable difference in the statutory provision between bishops' kirks and the kirks of chapters. With regard to the latter, the arrangement introduced in the Act of Parliament of 1617, here alluded to, as to erected kirks and proper parsonages, was adopted, by which the teinds of each minister's own parish, and these alone, were appropriated as the fund of his stipend and augmentations; whereas the ministers of bishops' kirks retained that interest in the whole spirituality of the suppressed benefice which they enjoyed during its subsistence.

Having thus considered the history of bishop's kirks during the early period of valuations, it is proper to revert to that of the other parishes of Scotland. For very different was the history of the thirds of what were called the *erected* benefices and the kirks connected with them. These benefices were bestowed by the King upon the Lords of Erection by permanent grants; it never having been his intention to restore or revive religious houses. The thirds of these benefices very soon became an unavailable fund for the provision of the clergy. The erected benefices no longer re-

mained in their integrity—the temporalities being separated from the spirituality—and the spirituality being subjected to a process of rapid disintegration by the purchase competent to each heritor of his own tythes.

It would appear that in the hands of the lay donees the Church lands were virtually withdrawn from the ecclesiastical fund consisting of the thirds. In many of the erections the thirds were discharged by the King; and in regard to all, the separate action of the clergy, either individually or as a body, was no match for the evasions of the holders of church lands. To this result, it no doubt contributed that the church lands were never considered to be subject peculiarly to the claims of the particular clergyman in whose parish they happened to lie; for that to which many in general and no one in particular has a claim is easily withdrawn from the pretensions of all.

Even before the restoration of the bishops the difficulty of providing the clergy out of the thirds appears from the preamble to the Commission of 1592, which is as follows:—

"Commission to confer and treat with the Ministry anent the provision of sufficient and local stipend to the ministers.

"Our Sovereign Lord and estates of this present Parliament being all resolved and of deliberate mind and purpose, that in all time cumming there shall be ane special minister appointed to make residence at ilk particular kirk within this realm, for teaching and preaching of the evangel of Jesus Christ, and manifestation of the sacraments thereat; and siklike that there be a local stipend designed and appointed to ilk minister, to be taken up yearlie of the thirds, teinds, and other duties lyand within ilk parochin whereout the ministers' stipends were in use to be taken and payed of before. And seeing the greatest part of the same thirds, teinds, and others rents assigned yearly of before, in the said ministers' stipends are now exhausted and taken away by the annexation, erections, and other dispositions maid thereof, to diverse persons, sa that without the goodwill of the present possessors of the teinds, temporal lands, and other kirk-rents, it will be hard and difficult to modify and appoint the said local stipends at ilk parish kirk, and that the shortness of time will nawyse permit such ane weighty matter to be entreated in this present Parliament."

A commission, therefore, was appointed to confer with the holders of teinds and to report.

Immediately after the restoration of the bishops, a commission was appointed by Parliament, entitled, "Commission anent the Erections."—

"Our Sovereign Lord and estates of Parlt., considering that there is sundrie benefices pertaining of old to abbots, priors, and nuns, erected to sundrie persons, in this present Parlt., by his Highness, with advice of the said estates in lordships and baronies, and also that the patronages of the kirks pertaining to the said abbacies, priories, and nunneries are given and annexed to the same lordships and baronies, to the foresaid persons, &c." Two commissions are accordingly appointed, one to ascertain the king's annuity to be paid out of the erections; and another 'to modify, decern, and declare to every minister serving, or that shall hereafter serve at every kirk the cure, three yearly stipends in all times cumming, by their manse and glebe, of all their kirks whereof the patronages are disponed by our said Sovrn. Lord in this present Parlt. in the erection of temporal lordships and baronies, or otherwise whatsomever, to the effect that the whole kirks, both already planted and as yet unplanted, may be provided to sufficient stipend in all time coming."

These commissions proved nearly ineffectual, in consequence of the dilapidation, or rather disintegration, of the erected benefices, and still more from the restoration of the bishops.

It is certain that at the period of the bishops' restoration the thirds of all the benefices except those of the episcopal benefices, had become utterly unavailable for the maintenance of the clergy. And when the latter were, by that restoration, taken out of the common fund and bestowed upon the bishops, under the burden of supporting merely the ministers of their own kirks, the condition of the rest of the ministry became truly deplorable, and must have remained so till, by the noted Statute of 1617, a great and beneficial change was wrought upon the rights and provisions of the clergy of Scotland.

Sir George Mackenzie, in speaking of this Statute, observes: "After the archbishops and bishops were restored, the thirds of benefices out of which ministers were provided formerly came to be an unfit and unproportional stock for providing the whole ministry of the kingdom; and therefore, by this Act there is a commission granted for planting and providing of churches; and this is the first of the many commissions which were granted by Parliament afterwards to this effect, and their decreets are to this day, called decreets of plat in our practice."

Forbes (p. 126) observes, "that the allowance of thirds was to continue till they were provided out of the teinds. But the thirds happening to be extinguished, partly by restitution of bishops, who got right to their own thirds, and partly by the erection of abbacies and priories, &c., into temporal lordships—in which the thirds were discharged in favour of the lords of erection, they planting the churches;—that fund could no longer serve for a provision for ministers. Therefore commissions of teinds were appointed to plant churches and modify stipends out of the teinds; which turned the books of assumption into desuetude, though they still continue useful for clearing the old rental of benefices."

By the Statute 1617 the Commissioners were authorised to assign to each minister a competent stipend out of the teinds of his own parish, and where that was necessary, to assign to him the whole teinds of the parish, and that notwithstanding of any right or title pretended by the said tackmen or others in whose favour teinds have been erected. The statute concludes with a clause confirming the rights of the holders of erected kirks, except in so far as the decreets to be pronounced by the Commissioners may affect them.

This statute, whilst it made no change on the bishops' tithes or the condition of their ministers, produced a great change on the other tithes and clergy.

The maxim *decimæ debentur parocho*, for which the clergy had so long striven, was substantially recognised and acted upon. The claim of the clergy in general to the thirds of the church lands was virtually abandoned, for the Commissioners were directed to provide the clergy entirely out of the teinds. But their claim upon the teinds was now enlarged, so as to extend to the whole teinds of each clergyman's own parish, which were constituted a fund for his own exclusive benefit.

It will now be seen that at the era of the introduction of valuations the claims and provision of the ministers of the bishops' kirks stood upon a totally different footing from those of all the other ministers of Scotland. The modification of the stipends of the latter was intrusted to the Commissioners. The fund out of which the modification took place was confined to the teinds of each minister's own parish. He could never hope to have an augmentation beyond the amount of these.

The bishops' ministers were dependent on their bishop for the modification of their stipends. It does not appear that the Commissioners ever interfered with them; although, no doubt, the influence of the statutes respecting the reasonable amount of the stipends due to the clergy serving the cure, must have had an indirect effect in increasing their allowances. Forbes appears to be correct in what he says (p. 385) as to these ministers: "Ministers in mensal churches under episcopacy had no decreets of locality, nor the benefit of the high stipend provided by the Parliament 1633. They behoved to hold themselves content with what the bishop pleased to settle upon them for a means of subsistence. But these, by the 30th Act 1641, were ordered to have the full quantity," &c. But the main difference consisted in the footing on which these allowances were paid, and the funds out of which they were due. For these allowances the bishops were personally liable, by acceptance of their benefices, and they were due out of their whole revenues, both temporality and spirituality, to the extent of one-third. If it could be supposed that the interest of any such minister gave him a right to be called as a defender to the valuation of the teinds of his own parish—that interest was shared by all his brethren of his diocesan's patrimonial kirks. All would require to be summoned to the valuation of every parish the teinds of which formed part of the spirituality of the diocese.

But was this the case in practice? So far as can be gathered from recent investigation, no case can be pointed out in which the minister of a bishop's patrimonial kirk was called as a defender to a valuation of teinds.

Sir John Connel has mentioned a number of valuations to which the minister was called as a defender, and a few in which he was not. By the direction of the Court, the records of these valuations have been examined by the agents, and a joint statement has been put into process, from which the following results are deducible. In nine of these cases—*Beith, Selkirk, Inchinan, Carnbee, Kinkell, Borthwick, Stobo, Kirkbean, Balfron, Fossaway, South Leith*—the minister is called as a defender. But none of these were valuations of patrimonial kirks, or kirks in which the bishop had any property in the teinds. In two of them the minister was not called, and in one of these the Bishop of Dunkeld was titular of one-fourth of the teinds. The valuation was founded upon an agreement between the titulars and the heritors. The minister was a party neither to the agreement nor the valuation. The bishop appears to have been the sole representative of the church.

It is proper to apply to the present case the general observations which I have made as to bishops' kirks.

The valuation under reduction was led at the instance of the bishop of the Isles as titular. And that he was so at and previous to the date of the valuation seems clearly established. A series of tacks of the teinds of the island of Islay, granted by the bishop, have been produced, the earliest of which is in 1634. This tack proceeds on the narrative that the tacksman in whose favour it was granted was kindly tacksman and possessor of the teinds; which seems to imply an antecedent relation between him and the bishop as tacksman and titular.

At what time the kirks of Islay were annexed to the bishoprick it seems impossible now to determine. It is proved by gifts of presentation preserved in the Register of the Privy Seal that these kirks, in Popish times, till near the era of the Reformation, were proper parsonages, of which the Sovereign was patron. It is well known that patrons assumed the right, on occasion of vacancies, of annexing such parsonages to bishopricks; the effect of which was to constitute the bishop *pro tempore* the parson of the parish, with the titularity, and the right of appointing a person to do the duty, with such allowance as he thought fit. These mensal or patrimonial kirks (for Lord Stair treats them as convertible terms), were unquestionably gifted by our sovereigns after as well as before the Reformation. Of this a noted instance occurred in 1633, as appears from the letter of Charles the First to the Commissioners of Valuations, contained in Connel's Appendix, No. Cix., which is as follows:—

"Whereas we have erected a bishopric of new, to be called the bishoprick of Edinburgh, having for maintenance thereof appropriated thairto certain kirks, tithes, and other benefices, as by patent of erection may appear, to the end the tithes, parsonage and vicarage, of the said bishoprick, which is our own Royal work, may be in the same case and as free as the tythes of any other bishoprick whatever within that our kingdom: Our pleasure is that you proceed no otherwise therein than in the said tithes, parsonage and vicarage of other bishopricks, and that you remit the provisions of the patrimonial churches of the bishoprick, to the modification of the said bishop and his successors," &c.

It appears from this letter that the patrimonial kirks therein referred to as having been annexed to the bishoprick of Edinburgh were to be dealt with in the same way as other bishop's kirks, and that the provision of the clergy serving the cure was to be left to the bishop himself.

There has been produced from the Register of the Privy Seal the letter of gift, bearing date 2d April 1605, in favour of Andrew Knox, one of the earliest bishops of the Isles after the restoration of the bishops. This gift preceded the general Act of 1606, by which the Act of Annexation was repealed in so far as the bishops were concerned. It states that Knox had been debarred from enjoying any other part of the benefice than the spirituality "by reason of the annexation of the said temporal lands to the Crown, nor yet can he provide his kirks of sufficient ministers, except the thirds of the said benefices (of the Isles, the abbacy of Icolmkill, and priories of Ardchatten and Ornsay, annexed to the said bishoprick) be disponed to him."

There is then mentioned, *inter alia*, a gift during his life, "for entertainment of sufficient and qualified ministers, at his kirks of the said bishoprick, abbacy, and priories, the hail thirds of all the rents both temporality and spirituality, of the said benefices, &c., he placing and sustaining ministers at all his kirks of the same during that space according to his own modification."

His factors are accordingly authorised to draw the whole revenues of the benefices, "as well twa pairt as third part thereof, temporality and spirituality of the same." The sovereign undertakes to ratify this gift in parliament; and the letter concludes with "discharging the Lords of the plat and chequer modifiers of the ministers' stipends, of all modifying of any stipends furth of the fruits of the said benefices, twa part or third part thereof, but suffer the said Mr Andrew plant and place them in his said kirks thereof, and furnish them in sufficient stipends of the reddiest of the thirds thereof."

The appointments of the bishops who succeeded Knox are all in general terms, and are therefore to be understood as similar in their special effect as that which has now been quoted.

It is not foreign to the subject of the present discussion to observe, that for a century past the ministers of the island of Islay have derived part of their stipend from the temporality of the old bishoprick of the Isles. There has been produced in process a decree of the Court of Teinds, dated 22d February 1769, sanctioning an arrangement whereby the Crown and its donees, the Synod of Argyle, appropriated to the support of these ministers the feu-duties of the lands within the island which formerly belonged to the bishop of the Isles.

At the final suppression of bishops, the spirituality and temporality of this as well as the other bishops fell to the Crown. By Queen Anne's Act these revenues were bestowed during pleasure on the Synod of Argyle, for ecclesiastical and educational purposes. And by the arrangement above mentioned the claim of the ministers of the bishops' patrimonial kirks in Islay was finally recognised, both over the temporality and spirituality of the benefice. The whole valued teind of the island (as ascertained by the decree now under reduction), together with the whole temporality within the island, were combined into one fund, which was amplified by the liberality of Mr Campbell of Islay, and made into a provision for which he became answerable, which was to be equally divided amongst the three ministers of the Island.

I conclude that at the date of the valuation now under reduction, the pursuers' predecessors in the kirks of Islay, being ministers of patrimonial kirks of the bishops of the Isles, stood in relation to the teinds of their individual parishes in a totally different situation from that of the ministers of erected kirks. Because, *first*, they were dependent on the pleasure of the bishop for the amount of their stipends; and *secondly*, and more especially,—for these stipends the bishop was personally liable to them; whilst the fund out of which they were payable, instead of being confined to the teinds of each minister's individual parish, extended to one-third of the whole revenues of the benefice, including both temporality and spirituality.

It follows that the peculiar interest which, in regard to other ministers, made it necessary that they should be called as defenders in valuations, is entirely wanting in regard to them. Accordingly, there is no example of any such minister having ever been cited in valuations,—the interest of the benefice, and through it the interest of the church, having been fully represented by the appearance of the bishop.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the defenders assoilzied.

Lord Cowan—The opinion just delivered by Lord Benholme will make my observations much shorter than they would otherwise have been. That opinion I have had an opportunity of carefully considering; and in its general reasoning and statement of the statutory enactments, and in the result at which his Lordship has arrived, I entirely concur.

The question is one of great historical interest, as well as of interest patrimonially to the parties. The valuation was carried through in 1636; it has stood unchallenged for 230 years; and it was not until the decision of the Lord Ordinary in the *Dumbarney* case that the present action was thought of being instituted. During that long period of 230 years the decreet which is now brought in question has been recognised and acted on as undoubted and valid. The titles of the several heritors have been completed upon the faith of its being unchallengeable. The present proprietors of estates in Islay have acquired their lands upon the faith of that valuation. It requires therefore careful consideration of the grounds upon which it is now impugned, before we can give effect to them, and hold the valuation ineffective and inoperative in law.

Moreover, in 1705, when a gift was made by the Crown to the Synod of Argyle of the whole of the emoluments attached to the bishopric of the Isles, it was, as I gather from the other documents relative thereto, recognised that the teinds were then valued; and in 1765, when the Crown gave effect to the arrangement made between the Synod of Argyle and Campbell of Shawfield, the teinds are set forth expressly as valued teinds,—recognising the completeness and sufficiency of the decree of valuation now in question. Further, in 1769, when the arrangements were made by which Campbell of Shawfield undertook to provide for a third minister in the island of Islay,—it being thought that the two ministers then existing did not sufficiently serve the cure,—the teinds are there also set forth as being valued teinds, and on the faith of the payments to be made by the heritors being fixed by the valuation, that onerous contract was come under by Campbell of Shawfield; and this was done with the sanction of the Court, because there was a judgment on the point after consideration, all parties being called. Not only so, but I find in the intermediate locality, in 1744, this decreet of valuation was specially founded on and given effect to. Now, I don't say that all these proceedings are sufficient to exclude an objection that may lie to the decreet of valuation as *ex facie* irregular and void; but I desiderate the same kind of objection to it that existed in the case of *Dumbarney*, or in any of the other cases that have been before the Court.

The peculiarity attending this valuation, which Mr Balfour so well illustrated, essentially distinguishes the present case from those other cases. In the present case we have a valuation brought by the Bishop of the Isles as titular; and while it is true that upon the face of the decreet there is no evidence that ministers serving the cure were called, any more than in the case of *Dumbarney*, the important inquiry is, Whether there were parties serving the cure, having at that time an interest in the teinds, whom the bishop was bound to have called in the valuation? The case of *Dumbarney* was that of a valuation brought by heritors against a lay titular and all parties interested in the teinds proposed to be valued; and it being an established rule that ministers ought to be called in such pro-

cesses of valuation, and it appearing on the face of that decreet, as clearly as could well be, that the ministers had not been called,—there was consequently on the face of the decreet an objection to its validity, which the parties were entitled to state. But if the argument of Mr Balfour be well founded, this decreet of valuation is not objectionable upon the face of it; because, being a valuation instituted and carried through by the bishop of the Isles as titular of the teinds,—if it be true that all the kirks in the island were at that date truly mensal churches,—there can be stated no *ex facie* objection to the decreet on the ground of its having been obtained in the absence of parties interested in the teinds, for ministers serving the cure of such charges had no such interest. The whole argument, in this view of it, resolves into the inquiry, Whether or not, in 1636, there were ministers serving the cure in the island of Islay who held an independent position, and had an independent interest in the teinds, entitling them to be called as having that interest in the process of valuation instituted by the titular?

I take it as undoubted that the Bishop who pursued this valuation was truly titular of these teinds. The pursuer's counsel said he was willing that this fact should be taken for granted; and I presume parties have renounced probation as to that matter. The evidence in process is to my mind quite satisfactory that the bishop of the Isles was truly titular of the teinds at the time he brought this valuation in 1636; and that being the state of matters, What was the condition of the ministers serving the cure? Reference has been made to what is stated by Forbes at p. 385 of his Treatise on Teinds; and also to what is stated by Erskine in reference to the state of the clergy at an early period during Episcopal times. An additional authority will be found in an author, Sir Thomas Hope, who flourished at the very period we are now investigating. In his Minor Practicks, title 2, Sir Thomas explains the distinction between the ministers being beneficed persons acquiring right by the presentation of the patron, and those ministers who held charges or filled cures under bishops in proper mensal churches. And in section 2 he explains that this last class held no right to the "fruits of the hail (benefice), because the minister is not titular thereof, but allenarly has right to such a portion or yearly duty out of the kirk as the bishop appoints him for his maintenance; and he is the bishop's vicar allenarly, for the bishop himself is parson." This distinguished lawyer, writing in the very heart of the times with which we have to deal, thus emphatically states the peculiar position of the clergy under the bishops. The bishops had certain rights of patronage, but they had also patrimonial churches given over to them by those gifts to which Lord Benholme has alluded; and the ministers serving the cure of these patrimonial or mensal churches had no independent right or individual interest in the teinds, which belonged exclusively to their bishop, and were bound to be contented with whatever sum for their maintenance the bishop thought fit in his generosity or in his niggardliness to assign to them.

The Act 1606 restored Episcopacy, and secured the bishops in their several emoluments, including kirks, teinds, thirds, patronages, and rights whatsoever with bishoprics, with power freely to dispose of the same, "they always entertaining the ministers serving at the cure of the kirks of their said bishopric upon the readiest of their said thirds, according to the ordinary assignations made, or reasonably to be made thereanent."

By the letter of James VI, dated 2d April 1605, His Majesty James VI provided to Andrew Knox, the Bishop of the Isles, the whole emoluments of the bishopric which belonged to it preceding the Act of Annexation 1587, and granted to him for his lifetime, and with a view to the entertainment of sufficient and qualified ministers at his kirks of the bishopric, the haill thirds of all the rights, both the temporality and spirituality of the said benefice, "he placing and sustaining ministers at all his kirkes of the same during that ilk space, *according to his own modification.*" And again, at the close of the letter, discharging the Lords of the Parliament from modifying any stipend furth of the fruits of the said benefices, "but to suffer the said Mr Andrew to plant and place them in his kirks, and furnish them with sufficient stipends."

In 1619 the bishopric is provided to Thomas Knox, and in 1628 it is provided to John Leslie, with all the same rights and privileges. Then, in 1634 the bishopric and its emoluments was provided by Charles I to Neil Campbell, by whom the valuation in question was insisted in and obtained in 1636. For two years prior thereto there is a tack by the said bishop, dated 7th November 1634, of the whole teinds, parsonage and vicarage, of the island for nineteen years, the tacksman thereof paying 1000 merks yearly, it being provided that the bishop should warrant the tacksman from all stipends and augmentations thereof, as well assigned as to be assigned to the ministers present and to come, serving the cure in the said isle of Islay.

It does not appear to me to be of any relevancy to refer to documents affecting the position of the ministers of this island prior to the restoration of the order of bishops in 1606, or to documents having reference to their position as ministers, and their recognition as members of church courts subsequent to 1638. We know that by an Act of the General Assemby in 1638 "all episcopacy different from that of a pastor of a particular flock" was declared to have been abjured, and all persons were prohibited, under ecclesiastical censure, from usurping, accepting, or obeying the pretended authority thereof in time coming. And, by a subsequent Act of the same Assembly various bishops, including the bishop of the Isles, were deposed, and ordained to be excommunicated in case of their disobedience to the ordinances of the Assembly. These acts, however, could not touch the right to the teinds, which stood on those documents to which I have generally referred.

On the whole, I am of opinion that the ministers serving the cure in this island were the bishop's nominees or *vicars allenarly*, as Sir Thomas Hope designates them, and enjoyed such stipends only out of the teinds as he thought fit to provide for them; and therefore, that the bishop as titular, in adopting the requisite procedure to have the teinds valued, did not require to call these ministers in the process.

Lord Neaves—In considering this case I adopt fully the general rule, recognised in former decisions and lately confirmed in the case of *Old Machar*, that in valuations of teinds before the High Commission it is necessary to make the minister of the parish a party, though he be not a parson or rector, but drawing an ordinary stipend, and that the omission to make him a party will be

fatal to the valuation. The question now is, whether that general rule governs the present case, or whether there is not here a specialty that excludes its application?

It is important to know the ground on which the rule rests. There is no statutory enactment establishing it, but it is founded on clear principles of law and right rules of procedure. The reason of the rule is well stated by Mr Erskine (ii, 10, 35), and forcibly illustrated by the Lord President in his opinion in the case of *Old Machar*.

The question then comes to be, whether the reason of the rule exists here, for if it does not it will not be easy to enforce a rule in such a case when the reason for it ceases.

The decree of valuation here sought to be reduced was pronounced in the year 1636. This was indisputably in the times of Episcopacy, and it was obtained under a summons raised at the instance of the Bishop of the Isles against the heritors of Islay, in which it is set forth that the bishop is titular. Upon that summons there ensued the decree in dispute, valuing both the parsonage and vicarage teinds at the sum there mentioned, without prejudice to the tack of the teinds during its currency, the tack referred to being apparently the one granted by the bishop to Campbell of Calder, on 7th November 1634, for nineteen years, printed among the papers now before us, the tacksman being one of the defenders called in the process.

The ministers of the several parishes of Islay were not made parties to the valuation, and their absence has been stated and sustained as a good objection to the valuation.

In this question the titularity of the bishop must of course be assumed. If the bishop was not the titular or owner of the teinds valued, the valuation may be challenged on other grounds. The Lord Ordinary notices the fact that the pursuers plead that the bishop was not titular, but he adds that he thinks there is at least strong *prima facie* evidence that he was so, and that the point was not pressed. I certainly concur with the Lord Ordinary, and understand that that plea is not now insisted in.

The only plea sustained, and the only one we have to consider, is the objection arising from the absence and non-citation of the ministers, and we are thus led to consider what was the legal position of those ministers at the date of this valuation, and whether they had any, and what, interest in the teinds thereby valued. That matter cannot be understood without looking narrowly into the way in which tithes were sometimes dealt with both in Catholic times and at the Reformation.

The theoretical destination of tithes by the Canon law was expressed in the maxim "*Decimæ debentur parocho*,"—a maxim which, of course, could only have come into force after the formation of regular parishes. But the actual state of things was very different. A large proportion of the tithes in Scotland had, before the Reformation, been alienated to other tithe owners, sometimes to monastic or other similar institutions, and sometimes to bishops, an abuse which came ultimately to be a means both of hastening and of facilitating the Reformation. It estranged and degraded the secular clergy; it corrupted the regular clergy, and in connection with the gift of church lands, it accumulated with monastic or collegiate institutions an amount of spoil which, while it strongly tempted the cupidity of designing men, formed an easier prey than would have been presented by the same revenue fairly distributed among the laborious parish priests. The spoliation thus begun continued during the progress, and even after the accomplishment, of the Reformation, and in this way, and otherwise, the fund for payment of the reformed ministers was so greatly encroached upon that they were left without any decent support.

In the arrangements that became necessary for obviating this great evil and injustice a marked distinction was recognised between tithes and temporalities, and also between tithes themselves, according as they were in the hands of bishops or of monastic or collegiate institutions.

Apart from their manses and glebes, the parish clergy were not considered to have any right to lands as part of the natural patrimony of the church, but the tithes were held to be the spirituality of benefices, and at and after the Reformation the restitution of these to the parochial pastors was contemplated, or as least held out as a result to be aimed at and desired.

Monasteries being considered as superstitious institutions, the right to their revenues came on the Reformation to be vested in the Crown, by whom they were gifted, sometimes on a temporary title to commendators, and sometimes permanently to lords of erection. The bishops and their property were differently dealt with. The office, though shorn of some of its emoluments, was not abolished, and indeed, it would not be easy to say that it legally ceased to exist till the year 1640. Certain it is that it remained in greater or less force for the greater part of the period from 1560 till that year. It may sometimes be convenient to forget that John Knox died a member and minister of an Episcopal church. One of the last documents under his hand is his signature after that of Douglas, Archbishop of St Andrews, who signs "John, Sanct Androis," and concurs with Knox and some other ministers, acting under a remit from the General Assembly, in giving their approval and recommendation of the eloquent and admirable sermon preached by David Ferguson in 1572 on the sacriligious spoliation of church property. It is to be feared that Douglas was himself tainted with the very stain that he commended Ferguson for denouncing, and that he was little better than a trustee for enabling Morton to draw the greater part of the revenues of St Andrews. If it be true that Knox denounced the appointment from the pulpit, it is probable that his true reason for doing so was his knowledge or suspicion of the simoniacal character of the appointment. The extreme views of Bancroft and of Beza as to the divine or demoniacal character of Episcopacy had not been promulgated, and were no part of Knox's creed.

The church lands of all classes of the clergy, with certain exceptions, were annexed to the Crown in 1587, but the teinds were not annexed, and in 1606 the benefices of the bishops were restored to them. By that Act the kirks and teinds belonging to bishops, including their thirds, were fully confirmed to them, and this provision was added, "They always entertaining the ministers serving at the cure of the kirks of their said bishopricks upon the readiest of their saids thirds, according to the ordinar assignations made, or reasonable to be made, thereanent." It is probable that about or shortly after this time the patrimony of the kirks in question were made over to the Bishop of the Isles, to whom also the abbacy of Icolmkill and priory of Ardchattan were also gifted. These falling under the Act of Annexation, required to be disjoined by Act of Parliament, but the teinds of

the kirks could be given by Royal grant alone, as they had never been annexed.

On the accession of Charles I in 1625, matters were matured for the consummation of those remarkable measures for the valuation of tithes and the modification of ministers' stipends, which ought to secure for that monarch, whatever his faults may have been, the lasting gratitude both of the Church and the country. By the one measure, the agricultural improvement of Scotland, by a commutation of the tithe to a fixed payment, was promoted, and by the other the members of the Church of Scotland were virtually admitted to the benefit of the old maxim, "*Decimæ debentur parocho*," and were prevented from falling into that state of poverty from which so many efforts have been made in England to rescue the small vicarages.

In the first instance, however, the arrangements adopted proceeded on a recognition of the distinction already referred to as to the temporal or spiritual character of the grantees by whom the tithes were held. I do not know whether our Scotch writers have adopted the distinction so well known in England between the appropriation and the impropriation of tithes. But the things so distinguished were fully understood. The temporal or lay impropriator, not being a church officer, was incapable himself of serving the cure of a parish, and was taken bound to furnish a minister, whose rate of remuneration should be fixed by public authority, and paid out of the tithes of the parish, as its natural source. This system, under some modifications, is that which still prevails, and which gives our parochial clergy a direct interest in the valuation of the teinds as the fund, and the only fund, available to them for the augmentation of their stipends. The bishops and their kirks stood on a totally different footing. The bishop was a spiritual person. He was a kirk-officer or minister of religion, who was qualified in his own person to discharge all the duties of the ministerial office by preaching and administering the sacriments to a flock. In truth, it is rather a misnomer to call the bishop, as was here done, the titular of these teinds. A titular is properly a person who possesses a benefice without holding the office which should accompany it. A bishop had both. In his own kirks he was, in truth, the parson or vicar, as the case might be. He was all that a presbyter is, though something more might be added, and indeed, in the primitive and in the Saxon and other mediæval churches the bishop belonged not to a different order, but to the same order as the presbyter, though on a higher degree. The bishop's kirks within his own diocese were thus not so much separate benefices as one complete benefice *partes ejusdem beneficii:* and the state of matters was not very different from what it may have been before proper parishes were formed, and when the diocese was the only ecclesiastical division.

It follows from these views that the minister whom the bishop might appoint to serve any of his kirks was more his own servant or chaplain than a proper incumbent or parish minister, and his remuneration was left to depend upon arrangement with the bishop, his principal. Accordingly, it is certain that under the Commission of 1633 the ministers serving the bishop's kirks had no claim to the benefit of the high stipend or locality thus contemplated. The concurrent authority of Forbes and Erskine on this matter is conclusive.

Now, compare this statement of the position of the bishop's substitute with the description which Mr Erskine gives of the interest which makes it necessary to call an ordinary minister. The bishop's minister having no special interest in the tithes in the particular parish had no *status* to appear in the valuation.

Even under the Act 1640, after the abolition of Episcopacy, it is doubtful if the minister had such an interest, because the fund of his payment was not solely the tithes of his own parish. But before that Act I think it clear that he had not.

On these grounds, I am for altering the interlotor, and repelling the plea that has been sustained.

The case will go back to hear parties on any further pleas.

Agents for the Pursuers—W. & J. Cook, W.S.

Agents for the Defenders—Crawford & Simson, W.S.

HOUSE OF LORDS.

Thursday, July 23.

BARSTOW *v.* BLACK AND OTHERS. PATTISON *v.* HENDERSON AND OTHERS.

(3 Macph. 779; 4 Macph, 1104.)

Succession—Substitution—Title to Sue—Deathbed—Consolidation—Superiority—Dominium utile. W. D. disponed his whole estates to his brother A. D. "and his heirs and assigns whomsoever," declaring, without prejudice to the powers of A. D., that if A. D. died intestate and without heirs of his body, and without otherwise disposing of the estates, the same should devolve upon certain parties named. To one of those parties, A. D. P., there was destined the superiority of B. After the date of this disposition, W. D. purchased and was infeft in the *dominium utile* of B., but did not consolidate. A. D. survived his brother, and made up titles to his estates as heir-at-law, and consolidated the superiority and property of B. by resignation *ad remanentiam*. He died without issue, leaving a trust-disposition executed on deathbed. *Held* (1) that the heir-at-law of A. D. had no title to sue a reduction of the deed of A. D., so far as regards the lands acquired by A. D. by succession from his brother, —except in so far as the deed conveyed the *plenum dominium* of B., but only to the effect of vindicating a claim to the *dominium utile*,— in respect that W. D.'s deed contained a valid substitution whereby the heir-at-law of A. D. was excluded. (2) That A. D. P. had a title to sue a reduction of the deathbed deed of A. D., as a conveyance of the *plenum dominium* of B., to the effect of enabling him to vindicate his claim as an heir of provision to the superiority of B. under the settlement of W. D.

In one of the actions included in this appeal, the *curator bonis* of William Park, heir-at-law of Alexander Dunn of Duntocher, sought to reduce *ex capite lecti* a disposition by Alexander Dunn of certain heritable property, part of which he himself purchased, and to part of which he succeeded from his brother William. The Court of Session, on 27th March 1865, sustained the title to reduce so far as regarded the lands which had belonged to Alexander Dunn, but, in so far as regarded the