I do not think that the law as to the nature of these exceptional circumstances is doubtful. I have always been of opinion that to that end two things must concur. First, there must of course be averments by the defender, which if proved show bad faith on the part of the holder; and second, there must be in the statements of the holder, or in the real evidence of facts and circumstances, or in some relative writing, something which tends to throw suspicion on him. Here I think there is a combination of these elements. There is, in the first place, no reasonable doubt that Stevenson, for whose accommodation the bill was accepted by Jolly, had no right to retain it after negotiation, for the purchase of the house by Jolly fell through. The question is, whether the endorsees knew that this was so? The trustee distinctly avers that they did. And along with this averment we have the endorsees' letter of 28th May, which plainly shows that the reason they assign in the record for taking the endorsation is an untrue reason. That may possibly be explained on the proof, but so it stands at present. That this case therefore comes up to an exception entitling the appellants to proof *prout de jure* I do not doubt; but if either of these two things had been absent—*i.e.*, an averment of bad faith and something suspicious on the part of the holders—I could not have arrived at this conclusion.

Lord President—My brother Lord Mure has stated, I think with great precision and accuracy, the rule of law applicable to this class of cases, and he has also stated the exception to that rule. I entirely concur in that exposition of the law.

As I understand Lord Shand, he does not differ in his opinion as to what the law is, and therefore his views are to be taken as an exposition as to what his Lordship thinks the law ought to be rather than expression of doubt as to what it is. If there had been any doubt as to the law, I think it would have been found in the report of the Mercantile Law Commission, referred to in argument, before whom the points of difference in the laws of England and Scotland were brought by the examination of the most distinguished lawyers of both countries, and the perfect accuracy of the report is not disputed. Now, this report came under the notice of Parliament in 1856, and received very deliberate and anxious consideration, and the outcome was the Mercantile Law Amendment Act for Scotland and the Mercantile Law Amendment Act for England. Now, in the Act applicable to Scotland there are various important alterations made in the law, but the rule which we are at present considering is left unaltered. While, therefore, as a Judge I decline to enter into any question as to the expediency of the law, I have only to observe that Parliament did not think it right to alter it.

I have only to add that in the special circumstances of the case I concur in the judgment which is to be pronounced.

The Court therefore recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

Counsel for the Trustee (Appellant)—Balfour—Lorimer. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Respondents—Lord Advocate (Watson)—Graham Murray. Agent—James Somerville, S.S.C.

Friday, January 30.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF MANSFIELD AND OTHERS *v.* SIR A. D. STEWART—LOCALITY OF AUCHTERGAVEN.

Teinds—Sub-valuation by the Sub-commissioners of 1629—*Construction of Report.*

A report by the sub-commissioners of teinds dated 1629–35 contained these words—"Findis be the declaratioun and vpgiving of Sir Williame Stewart of Grantullie, Knight, that his landis of Obneyes, lyand within the barronie of Murthlie and parochin of Auchtergavine foirsaid, with the viccarage teindis of the saidis landis, hes payit, presentlie payes, and may pay, in constant rent, stok and viccarage teindis, comunibus annis in tyme cuming, and no moir, of siluer dewtie zeirlie, iiiᶜ-xxxiiiˡⁱᵇ vis. viiiᵈ. And hes been in vse of pay of rentallit bollis for the personage teind, to the titular and takisman, of wictuall zerlie . xl bollis burdenit with the few-dewteis and teind-dewteis. And siclyk, findis the landis of Nether Obney, Over Obney, and Wester Burnebane, perteining to the said Sir Williame Stewart, to be fewit of auld by vmqahil Alexander Erskine, Sub-dean of Dunkeld, wᵗ consent of Mr James Hepburne, Dean of Dunkeld, and viccar-generall *sede vacante* and channonis of the chapter thairof, to vmquhil Alexander Abercrombie of Murthlie and Elizabeth Dischintoun, his spous, and the said vmqˡˡ Alexʳˢ airis, &c., wᵗ the teindis of the saidis landis, als weill personage as wiccarage, quhilk wer never in vse to be separat fra the stok, conforme to ane chairtour producit yʳanent, of the dait the tent day of Junii Jajvᶜ. and fyftie zeiris, but na cofirmaᵒn. of the same is as zit producit."

Held, on a construction of the report and of the title-deeds to the lands, in a question between Sir W. Stewart's successor and certain other heritors in the parish (*diss.* Lord Shand), that notwithstanding a long usage in which the contrary had been assumed, the lands of Over and Nether Obney had not been valued, and fell to be localled on accordingly.

Teinds—Res judicata—*Admission by Lord Advocate*—Res inter alios acta.

Held that a judgment proceeding on an admission by the Lord Advocate in a question between him and a heritor in a process of locality was not *res judicata* as against the minister and two other heritors in the locality.

Observations per Lord Deas on *Officers of State* v. *Stewart*, July 20, 1858, 20 D. 1331.

In a locality of the united parishes of Auchtergaven and Logiebride objections were raised for the Earl of Mansfield and General R. R. Robertson, heritable proprietors of certain teinds in the parish of Auchtergaven, and for the Rev. D. Winter, minister of the united parishes, against Sir A. D. Stewart of Grandtully, as heritable proprietor of the teinds of the lands of Nether Obney and Over Obney in the parish of Auchtergaven. The common agent in his rectified state had

omitted to local upon these teinds, and the objectors averred that they never had been valued, and should therefore be localled on *pari passu* with their own.

The respondent averred that these teinds had been valued, and produced as evidence of the fact a report by Sub-commissioners of the presbytery of Dunkeld in 1629-35, which was afterwards approved of by the High Commission on 3d February 1796, and which contained the following paragraphs:—"Findis be the declaratioun and vpgiving of Sir Williame Stewart of Grantullie, Knight, that his landis of Obneyes, lyand within the barronie of Murthlie and parochin of Auchtergavine foirsaid, with the viccarage teindis of the saidis landis, hes payit, presentlie payes, and may pay, in constant rent, stok and viccarage teindis, comunibus annis in tyme cuming, and no moir, of siluer dewtie zeirlie iiic xxxiiilib vis. viiid. And hes been in vse of pay of rentallit bollis for the personage teind, to the titular and takisman, of wictuall zerlie . xl bollis burdenit with the few-dewteis and teind-dewteis.

"And siclyk findis the landis of Nether Obney, Over Obney, and Wester Burnebane, perteining to the said Sir Williame Stewart, to be fewit of auld by vmqahil Alexander Erskine, Sub-dean of Dunkeld, wt consent of Mr James Hepburne, Dean of Dunkeld and viccar-generall *sede vacante* and channonis of the chapter thairof, to vmquhil Alexander Abercrombie of Murthlie and Elizabeth Dischintoun, his spous, and the said vmqll Alexrs airis, &c., wt the teindis of the saidis landis, als weill personage as wiccarage, quhilk wer never in vse to be separat fra the stok, conforme to ane chairtour producit yranent. of dait the tent day of Junii Jajvc. and fyftie zeiris, but na cofirmacn. of the same is as zit producit."

The respondent founded on the former paragraph as containing a valuation of all lands of Obney belonging to him in the parish of Auchtergaven—including Over and Nether Obney—at forty rental bolls; while the objectors maintained that the following paragraph showed that Over and Nether Obneys had never previously been valued, being held on a *decimæ inclusæ* title, and were not valued by that report.

The history of the titles so far as throwing light on the present question, was as follows:—A charter dated 10th June 1550 was granted by Alexander Erskine, then Sub-dean of the Cathedral Kirk of Dunkeld, "cum consensu et assensu venerabilis et egregii viri mgri. Jacobi Hepburne dicte cathedralis ecclesie decani ac eiusdem Sede vacante vicarii generalis et canonicorum capituli dunkelden.," the words of conveyance being "dare concedere arrendare locare et ad feudifirma. seu emphiteosim dimittere honorabili viro Alexandro Abircrumy. de Murthlie et Elizabet Dischingtoun eius sponse in coiuncta. infeodatione et heredibus masculis inter eosdem legitime procreatis seu procreandis quibus deficientibus heredibus masculis dicti Alexandri quibuscunq. Omes. et singulas terras meas de nethir Obeny vuir Obeny et vest. Burnbane cum jure piscande super aquam de Taya et cum mollendinis constructis seu construendis vnacum vniusis. et singulis decimis tam Rectorie qua. vicarie earundem terrarum cum pertinen. que temporibus preteritis ab eisdem terris et fructibus earundem principalibus seu trunco mie. separari solebant vnacum aliis necessariis que predecessores mei et ego nostriq. tenentes de dictis terris habuimus habemus seu habere poterimus aut saltem habere pretendebamus intra baroniam dunkelden. et vicecomitatu. de Perth jacen. vnacum aliis et singulis suis partibus pendiculis et pertinen. quibuscuq." The reddendo ran thus—"Reddendo inde anuatim. dicti Alexander Abircrumy. et Elezabet Dischingtoun eius sponsa heredesq. sui predicti mihi et successoribus meis dukelden. subdecanis qui pro tempore fuerint Sumam. viginti sex libraru. quatuor solidoru. et quatuor denarioru. monete currentis Scotie tanquam pro antiqua firma dictarum terrarum de nether Obeny vu. Obeny et vest. Burnbane cum piscatura molendinis constructis seu construendis decimis tam rectorie quam vicarie et aliis pertinen. predictis vnacum suma Tredecim solidoru. et quatuor denarioru. consimilis monete nuc per dictum Alexandrum augmentat Extenden in integro ad sumam. viginti sex libraru. septemdecim solidoru. et octo denarioru. ad duas anni terminos." The lands so conveyed were subsequently obtained from the Abercromby family by Sir William Stewart of Grandtully, and by Crown charter of date July 1615, after the Act of Annexation, King James VI. disponed to him and his heirs and assignees whomsoever, *inter alia*, the lands and barony of Murthly, and the lands of Nether Obney, Over Obney, and Wester Burnbane, with the teinds, parsonage and vicarage, as never having been separated from the stock, lying in the barony of Dunkeld. The quæquidem narrated the former tenure from the Sub-dean of Dunkeld, and subsequently from the Crown by virtue of the Act of Annexation. This charter annexed Over and Nether Obney to the re-erected barony of Murthly. In a sasine of 1620, in favour of Sir W. Stewart, four Obneys—Nether, Over, Meikle, and Easter *alias* Muirheadstone—were mentioned as separate lands. In a Crown charter of 1623 in favour of Sir W. Stewart, of the baronies of Grandtully and Murthly, no mention *nominatim* occurred of the lands of Over and Nether Obney. In 1635, the rights of chapters having been restored by the Act of 1617, Over and Nether Obney were, *inter alia*, again given out by the then Sub-dean of Dunkeld to Sir Thomas Stewart, then of Grandtully, in the same terms as the charter of 1550, and were described as lying in the barony of Dunkeld.

The objectors maintained that the lands in question had not been valued by the Sub-commissioners in 1629-35, being then believed to be held on a *decimæ inclusæ* title. The first-quoted paragraph of the report showed that the lands of Obney had been in use to pay 40 bolls of parsonage teind to the titular, who was the Bishop of Dunkeld. Now, it was impossible that any teind could be paid to him by Over and Nether Obney, (1) because the sub-dean, who had feued these lands, was proprietor of both land and teind; and (2) because the *decimæ inclusæ* right, though not good to infer immunity from stipend, was good to protect the Stewarts from paying teind to the titular.

The sasine of 1620 showed that at that date four distinct parcels of land were known as "Obney," and the presumption was that Over and Nether Obney and Wester Burnbane, *alias* Meikle Obney, were intentionally distinguished in the report from the Obney in the barony of Murthly, mentioned in the first-quoted paragraph.

The latter could not include Over and Nether Obney, for these were originally in the barony of Dunkeld, and though the charter of 1615 annexed them to the barony of Murthly, they reverted to that of Dunkeld after the restoration of chapters in 1617. The original reddendo of £26, 17s. 8d. of the chapter of 1550 was repeated in the titles subsequent to 1617.

The respondent contended that the lands in question had been valued by the Sub-commissioners; the presumption must be that they did their duty, which was to value, as no confirmation of the charter was produced to them. The Obneys mentioned in the two paragraphs of the report quoted were in fact the same lands, and there were no Obneys at the date of the report except these in the barony of Murthly—Over and Nether Obney and Wester Burnbane having been by charter of 1615 expressly added to that barony. The decision in *Officers of State* v. *Stewart*, 20 D. 1331, though scarcely amounting to a *res judicata*, proceeded to some extent on the assumption that the lands in question were valued by the report in 1629-35.

The respondent also pleaded *res judicata* in respect of various judgments in the years 1811, 1858, and 1876. The most important of these pleas was founded on an interlocutor pronounced by Lord Curriehill, Ordinary, on 9th November 1876, in a process between Sir A. D. Stewart and the Lord Advocate, which held that the teinds of Over and Nether Obney had been included in the old valuation of 40 bolls victual. This interlocutor proceeded on an admission to that effect by the Lord Advocate.

The respondent argued that when a question had been raised between two parties in a locality, the decision was binding upon all parties concerned. The objectors replied that the Court would be slow to sustain *res judicata* in a matter of compromise and concession (*Jenkins* v. *Robertson and Others*, 5 Macph., H. of L., 27); that the Lord Advocate's admission could in no case be binding as against the minister and heritors; and that the locality in which the judgment was pronounced had not yet become final.

The pleas-in-law for the objectors were, *inter alia*—"(1) The Lands of Obneys in the barony of Murthly, consisting of Meikle Obney and Easter Obney or Muirheadstone, and the lands of Nether Obney and Over Obney in the barony of Dunkeld, being separate and distinct lands, ought to have been separately specified, and the teinds thereof separately stated by the common agent in his rectified state of teinds. (2) The lands and teinds of Obneys in the barony of Murthly having been valued by the sub-valuation in 1629-35, and approbation of that sub-valuation in 1796, the exact amount of the teinds, parsonage and vicarage, as thereby valued, ought to have been stated by the common agent in his rectified state of teinds. (4) The interlocutor of the Lord Ordinary of 9th November 1876 being, at least so far as inconsistent with the prior interlocutors of the Lord Ordinary and of the Court in 1857 and 1858, ineffectual and inoperative, the common agent ought to have given effect to these interlocutors, and to have stated the teinds of Over and Nether Obney in his rectified state of teinds irrespective of it. (5) *Separatim*—The said interlocutor of 9th November 1876 being, as regards the objectors, *res inter alios acta*, cannot be allowed to prejudice them."

The respondent pleaded—(1) *Res judicata*, in respect of the judgments of 1811, 1858, and 1876. "(2) The teinds of Over and Nether Obney being contained in the sub-valuation of 1629-35, and in the approbation thereof in 1796, the present objections fall to be repelled."

The Lord Ordinary (RUTHERFURD CLARK) pronounced an interlocutor finding that the teinds of the lands of Nether Obney and Over Obney were not valued. He added this note:—

"*Note.*—The question in this case is, whether the teinds of the lands of Nether Obney and Over Obney have been valued by a sub-valuation in 1629-35, which was afterwards approved of by the High Commission, conform to decree dated 3d February 1796? The sub-report values the teinds of the lands of Obneys 'lyand within the barony of Murthlie,' and further finds that the lands of Nether Obney, Over Obney, and Wester Burnebane, 'to be fewit of auld by the Sub-dean of Dunkeld . . . with the teindis . . . alsweill personage as viccarage, quhilk wer never in use to be separat fra the stock, conforme to' charter, dated 10th June 1550, 'but na confirmatioun of the same as zit producit.' The contention of the objectors is that the lands of Obneys, the teinds of which are valued, are the lands of Meikle Obney and Easter Obney or Muirheadstone. These, they say, are in the barony of Murthlie, while the lands of Over and Nether Obneys are in the barony of Dunkeld.

"(1) The respondent pleads that the question is *res judicata*. The judgment founded on is that pronounced by Lord Curriehill on 9th November 1876, in a record made up between the present respondent and the Lord Advocate. The allegation in that record was that the lands of Obneys included the lands of Over and Nether Obney. This was admitted by the Lord Advocate, and the judgment of Lord Curriehill proceeded on that admission. If the allegation was true in fact, there could be no question; and though in the earlier form of the record the Lord Advocate had averred that 'Over and Nether Obney are separate lands and are unvalued,' he withdrew that averment and made the admission already mentioned.

"The Lord Ordinary would be disposed to hold that a judgment pronounced in a locality is binding on the heritors who are not formally parties to the record, provided that it is pronounced in a fairly contested suit. But the respondent does not contend that this was the case. At the utmost, he represents the judgment as proceeding on the admission of the Lord Advocate, and maintains that a judgment founded on such an admission is as binding as any other. This would be so if the party making the admission possessed any representative character, as, for example, if he had been the common agent. But the Lord Advocate possessed no such character. He merely acted for the Crown as titular of certain teinds, and neither the admission nor the judgment which follows on the admission can, it is thought, be *res judicata* against the heritors.

"(2) On the merits, the case for the respondent is that the lands of Obneys, lying in the barony of Murthly, include, or are identical with the lands of Nether and Over Obneys.

"The earliest title to the lands of Nether and Over Obney is a charter in 1550, by which the

Sub-dean of Dunkeld feued these lands to Alexander Abercromby of Murthlie. They are described as lying in the barony of Dunkeld. The teinds are conveyed and are described as being 'never in use to be separat from the stock.' In 1615, after the Act of Annexation, there is a Crown charter in favour of Sir W. Stewart of Grandtully, conveying to him, 1st, the barony of Murthly, and 2d, the lands of Nether and Upper Obney, with the teinds thereof. The description of the latter subjects is the same as in the charter of 1550, and the quæquidem deduces the tenure as originally from the Sub-dean of Dunkeld, and now from the Crown, by virtue of the Act of Annexation. But the barony of Murthly is of new erected, and the lands of Nether and Over Obney and others are annexed to it.

"In this charter the lands which are comprehended in the barony of Murthly are not described in detail, nor are any mentioned under the name Obney. But in a sasine of 1620 Nether Obney and Over Obney, Meikle Obney, and Easter Obney or Muirheadstone are mentioned as separate lands.

"Chapters were restored by the Act 1617, c. 2 (Thomson, iv. 529), and in 1635 the lands and teinds of Nether and Over Obney were again given out in the same terms as before by the Sub-dean of Dunkeld; but they are described as lying in the barony of Dunkeld. Accordingly, the objectors maintain that they were disunited from the barony of Murthly in 1617, when they were restored to the Sub-dean, and that they lay in the barony of Dunkeld at the date of the subreport.

"There are now existing three processes of locality, the earliest of which began in 1793. There has been much litigation in connection with the teinds in question. It is not necessary to state all the details. But there are some parts of it to which it seems proper to refer.

"So far back as 26th January 1807 it was decided by Lord Woodhouselee that 'the teinds of the lands of Obnies and Muirheadstone must be stated at 40 bolls, conform to old valuation.' It will be observed that there was a double valuation, the one by the rent of stock and teind, and the other by the rental bolls, and by this judgment the latter was found to prevail. The Court adhered in December 1811.

"In 1851, in answer to a minute which was lodged for the Lord Advocate, the respondent's predecessor Sir W. Stewart stated that the whole of his lands within the parish were comprehended in the description of Nether Obney, Over Obney, and Wester Burnbane. A record was made up between the Lord Advocate and Sir William Stewart, which contained a similar averment. But in 1854 Sir William was allowed to amend his record, and his 'second amended revised statement' stood thus—That the lands of Obneys lying in the respondent's barony of Murthly consist of Meikle Obney and of Easter Obney, otherwise called Muirheadstone. That these are the lands referred to in the sub-valuation of 1629 as the lands of Obneys lying in the barony of Murthly, and the teinds of which were thereby valued; and that the lands of Nether Obney, Over Obney, and Burnebane are 'held under a complete *decimæ inclusæ* right.' This is a very distinct statement. The teinds of the lands last mentioned were not said to be valued, but a claim for exemption was set up.

"Much litigation followed on this plea of exemption. But it was ultimately decided that it was not well founded—1st, by the Lord Ordinary on 27th May 1857, and 2d, by the Court on 10th July 1858.

"After that judgment Sir William Stewart on 8th June 1864 lodged a condescendence, in which he stated that the teinds of the lands of Over Obney and Nether Obney were unvalued, and an *interim* locality was made up on that footing. But another change in the pleadings occurred. On 20th July 1876, the respondent, who had been sisted in place of Sir William Stewart, was allowed to amend his record. He did so by alleging in substance that the lands of Obneys mentioned in the sub-valuation comprehended, or were identical with, the lands of Nether and Over Obney. This averment was admitted by the Lord Advocate, and the judgment of Lord Curriehill followed.

"It is in these circumstances that the Lord Ordinary is called on to decide this question. He cannot help saying that the respondent and his predecessor have been allowed a strange license in altering their statement of facts, and it is singular that a party who asked for and obtained the judgment of the Court on one statement of facts should be allowed in the same process to obtain the judgment of the Court on another statement diametrically opposite.

"The Lord Ordinary conceives that the subvaluation is of itself conclusive of the question. The lands the teinds of which are valued are therein stated to have been in use to pay 40 rental bolls to the titular and tacksman yearly—that is to say, to the bishop and his tacksman. To the Lord Ordinary it appears that this fact is wholly inconsistent with the theory that they are identical with the lands of Nether and Over Obney, which in the same report are described as being part of the benefice of the sub-dean, and with the statement that the teinds thereof were never in use to be separated from the stock. It is said, no doubt, that the lands of Nether Obney and Over Obney are included in the lands of which the constant rent is fixed, and that the finding regarding the use of paying rental bolls is applicable only to that part of the lands from which the rental bolls were paid; or, in other words, that the rental bolls were paid from a part and not from the whole lands. But this does not appear to the Lord Ordinary to be the legitimate construction of the report, and it could only be adopted on proof of the fact on which it depends. But no such proof is offered. Indeed, the evidence is all the other way. Further, it would lead to the result that if the valuation by rental bolls was adopted, as was the case, there would be no valuation of the teinds of the other lands, for there are no means of apportioning the constant rent.

"But if the titles be examined, the case seems all the clearer. Nether Obneys and Over Obneys were acquired from the sub-dean. The charter of 1550 is granted by the sub-dean with the consent of the dean and chapter, the see being then vacant. Again, in 1635 they are given out by the sub-dean with the consent of the bishop and dean and chapter. It was urged that they were bishop's lands, and that the rental bolls were pay-

able to him therefrom. But it appears to the Lord Ordinary that neither plea can avail. It is the sub-dean who dispones as proprietor. In 1550 the assent of the bishop to the alienation of a part of the benefice of the sub-dean could not be given, as the see was vacant. But in 1635 the bishop appears as a consenter only, while it is the sub-dean who dispones and confirms. Further, it seems to the Lord Ordinary impossible to hold that the rental bolls had been in use to be paid to the bishop from teinds which in both charters of 1550 and 1635 are described as never having been separated from the stock.

"So far back as 1620 it appears that there were four Obneys, and the same distinction obtains in the later titles.

"The objectors founded on the fact that the lands of which the teinds are valued are described as lying in the barony of Murthly, while Nether and Over Obneys are in the barony of Dunkeld. The Lord Ordinary has not attached importance to that argument, considering that the latter lands were annexed to the barony of Murthly erected in 1615, and that a mere error in description would not affect the valuation.

"The Lord Ordinary was referred to the opinions of Lord Curriehill and Lord Deas in the case of the *Officers of State* v. *Stewart*, 20 D. 1331, in which the *decimæ inclusæ* right claimed for Nether and Over Obneys was negatived. He need not say that for these opinions he feels the utmost deference and respect, and that if he thought that these Judges had decided the present question he would bow to their authority. But it could not be decided by them. In fact the averments of Sir William Stewart were such that if it had been raised, it must have been decided against him. For his case was, that while the teinds of Meikle and Easter Obney had been valued, the teinds of Nether and Over Obney had not been valued, but were held on a *decimæ inclusæ* right. The Court had, as already mentioned, decided that the valuation of the teinds of Obneys and Muirheadstone was to be taken at 40 bolls, and not at a fifth of the constant rent, or, in other words, they dealt with them as bishop's teinds. Sir William Stewart was of course making no attempt to impeach that judgment or to deny that he was not liable for teind to the amount of 40 rental bolls. He was contending that he was not liable for the teinds of lands other than those which were valued in respect of his alleged *decimæ inclusæ* right.

"There are some expressions which fall from the Judges to whom the Lord Ordinary has referred which seem to imply that the valuation included all the Obneys. But if that be their just meaning, the *dicta* are *obiter* merely. As has been seen, Sir William Stewart, on his record as it then stood, could not have maintained any such plea, and if he thought that he could, he would have had no interest to plead his *decimæ inclusæ* right. The Lord Ordinary has therefore held himself bound to give his decision in this case according to his own judgment."

The respondent reclaimed.

Authorities—on *Res judicata*—*Lord Hopetoun* v. *Ramsay*, March 2, 1841, 3 D. 685—H. of L., March 27, 1846, 5 Bell's App. 69; *Duke of Buccleuch* v. *Common Agent in Locality of Inveresk*, Nov. 10, 1868, 7 Macph. 95; *Bonar* v. *Lord Advocate*, Nov. 3, 1870, 9 Macph. 58; *Thomson* v. *Lord Advocate*, June 21, 1872, 10 Macph. 849; *Jenkins* v. *Robertson and Others*, June 9, 1864, 2 Macph. 1162—April 5, 1867, 5 Macph. (H. of L.) 27. On merits—*Officers of State* v. *Stewart*, July 20, 1858, 20 D. 1331; *Earl of Dalhousie* v. *Somers*, July 15, 1864, 2 Macph. 1349.

At advising—

Lord President—The question to be determined in this case is, whether the teinds of certain lands belonging to Sir A. D. Stewart, called Nether Obney and Over Obney, were valued by the Sub-commissioners of the Presbytery of Dunkeld within the years 1629–1635?

Another question was argued before the Lord Ordinary, and also before your Lordships, viz., whether this question was not *res judicata?* I have no intention, however, of entering upon a detailed consideration of the grounds on which the reclaimer maintained that plea, for I have come to be of opinion that there is no good foundation for it.

The question which remains is, whether the teinds of these lands were actually valued or not, and it depends, in the first place, if not wholly, on the construction to be put on the Sub-commissioners' report, which bears date 1629–1635, and which contains a valuation of the teinds within the parish of Auchtergaven, one of the parishes in the Presbytery of Dunkeld.

The only lands which are valued in express terms at all resembling the description of the lands we are dealing with are valued in these words—"Findis be the declaratioun and vpgiving of Sir Williame Stewart of Grantullie, Knight, that his landis of Obneyes, lyand within the baronie of Murthlie and parochin of Auchtergavine foirsaid, with the viccarage teindis of the saidis landis, hes payit, presentlie payes, and may pay, in constant rent, stok and viccarage teindis, comunibus annis in tyme cuming, and no moir, of siluer dewtie zeirlie, iiiᶜxxxiiiˡⁱᵇ vis. viiid. And hes been in vse of pay of rentallit bollis for the personage teind, to the titular and takisman, of wictuall zerlie . . xl bollis burdenit with the few-dewteis and teind-dewteis." Now, it is contended for Sir A. D. Stewart that this comprehends all the lands belonging to him in the parish of Auchtergaven known by the name of Obney, and consequently that his teind of any lands called Obney can be no more than the 40 bolls here declared to be the customary rental bolls then paid for these teinds. On the other hand, the objectors maintain that the lands with which we are here dealing, of Nether Obney and Over Obney, are not comprehended in these lands of Obneys in the barony of Murthly, which alone are valued in this report, and in confirmation of this view they found on the immediately following paragraph of the report—"And siclyk, findis the landis of Nether Obney, Over Obney, and Wester Burnebane, perteining to the said Sir Williame Stewart, to be fewit of auld by vmqahil Alexander Erskine, Sub-dean of Dunkeld, wt consent of Mr James Hepburne, Dean of Dunkeld, and viccar-generall *sede vacante* and channonis of the chapter thairof, to vmquhil Alexander Abercrombie of Murthlie and Elizabeth Dischintoun, his spous, and the said vmqll Alexrs airis, &c., wt the teindis of the saidis landis, als weill personage as wiccarage, quhilk wer never in vse to

be separat fra the stok, conforme to ane chairtour producit yranent of the dait the tent day of Junii Javc. and fyftie zeiris, but na cofirmon. of the same is as zit producit." Now, here the objectors say there is an express declaration as to Nether Obney and Over Obney (the only Obneys we are here dealing with), to the effect that they were not valued, for they were contained in a charter from a beneficed clergyman, who disponed his lands and teinds together on the statement that the stock and teind had never been separated. No doubt one of the instructions given to the Sub-commissioners was that where lands were held *cum decimis inclusis* there should be no valuation, and if therefore they were satisfied that a heritor had, and had produced, a title to his lands *cum decimis inclusis*, their duty was clearly to omit these lands and teinds from their valuation. But it is argued, on the other hand, that although in the former paragraph of the report, which does value the lands of Obneys, the subject is described as "lying within the barony of Murthly," and in the other paragraph, which contains the statement as to the *decimæ inclusæ* right, the lands mentioned are called "Nether Obney, Over Obney, and Wester Burnbane," yet in fact these are the same lands, because there were no lands except the Obneys lying in the barony of Murthly which were known by the name of Obney at all. If that were established as matter of fact, it would go a long way to settle the construction of the report, for it is quite intelligible that as the confirmation of the ecclesiastical charter by the Crown had not been produced, the reporters might go on to value provisionally the lands said to be held *cum decimis inclusis;* but, on the other hand, if it cannot be established, then that argument fails, and it is hard to see how, looking at the terms of this report, it can be said that Nether Obney and Over Obney were valued by it.

But how does the evidence stand as to the question whether Over and Nether Obney are the same lands as the lands lying in the barony of Murthly called Obneys. The first point is, that there is no doubt the lands of Obneys are known, or were known, by other names than the collective name of Obneys, for it is undoubtedly proved by a title of date 1620 that there were four parcels of land bearing the name of Obney. In a sasine dated 13th December 1620 these lands are described as "Nether Obney and Over Obney, Meikle Obney, and Easter Obney *alias* Muirheadstone." Now, it is not immaterial to observe that this is not only a description of four Obneys, but that they are coupled together, two and two—Nether and Over Obney, Meikle and Easter Obney—so that at that time there were certainly more Obneys than Nether Obney and Over Obney. This seems to me to create a strong presumption that when in the same report the Sub-commissioners find (1) that the Obneys "lying within the barony of Murthly" have paid and may pay so much, and (2) that Nether Obney and Over Obney fall to be dealt with in a different way, the Obneys in the barony of Murthly are truly Meikle and Easter Obneys, and are therefore distinct from and other than Nether and Over Obneys. There is a great amount of confusion no doubt in the subsequent titles and in the subsequent teind processes, but I do not attach much importance to those in the construction of the report with which we are mainly concerned. Evidence contemporaneous, or nearly so, is the only evidence which is of much value with regard to the names of these lands, and from the report itself and the sasine of 1620 I should be inclined to draw the conclusion—if there were no more evidence—that the lands which are mentioned in the valuing part of the report were one set, and those in the other paragraph, Nether and Over Obney, were different lands, which latter were therefore not valued by the report.

But on examining the matter more carefully the same result comes out quite clearly—the Sub-dean of Dunkeld was the owner as beneficiary of the lands of Nether and Over Obney, and he held the teinds along with them. Whether he was in a position to give out a good right *cum decimis inclusis* is immaterial to the present question. He professed to do so. He did so in form, and so did his successor. But in his own person there is no doubt the sub-dean was in the enjoyment of the teinds of these lands, and so as regards these teinds the only possible titular. That the teinds could not belong to the titular of the parish, the Bishop of Dunkeld, is proved by abundant evidence. The valuation of the parsonage teinds of Obneys was as follows—of rental bolls, to the titular and tacksman, forty bolls. The rental bolls were of course a matter of custom, and must have been in use for some time, otherwise they would not have been adopted by the Sub-commissioners as the rule for the future. It is said there was use to pay these bolls to the titular and his tacksman—that is, the Bishop of Dunkeld and his tacksman—but it is certain the sub-dean never paid forty bolls to the bishop, for the teinds belonged to him, and he was titular of them. Yet the reclaimer's contention results in this, that there was use to pay to the bishop these forty bolls.

To make the matter clear, let us look at the titles. The charter founded on in the report, and produced by Sir William Stewart, is dated 10th June 1550, and bears to be granted by the Sub-dean of the Cathedral Kirk of Dunkeld, with consent of James Hepburn, Dean of Dunkeld, as representing the bishop, *sede vacante*. If there had been a Bishop of Dunkeld then holding the see, he would have been the party to consent, and in a subsequent charter of the same lands the bishop is the consenting party. But the consent of the bishop is coupled with consent of the chapter. The consent is given because of the interest the consentors had in the Cathedral Kirk and its revenues. If the bishop had been the titular of those teinds, he would have conveyed them, as having sole title thereto, but as it is, we find the bishop consenting to the sub-dean alienating the lands and teinds together on the footing that the teinds as well as the lands belong to the sub-deanery of the Kirk. What the sub-dean conveys is just Nether Obney, Over Obney, and Wester Burnbane. The reddendo is to him and his successors, the Sub-dean of Dunkeld for the time being, the sum of £26, 17s. 8d., and this sum continues in the subsequent title-deeds to be attached to these particular lands of Nether and Over Obney.

Matters thus stood on a clear footing in 1550. The superior of both lands and teinds was the sub-dean, and the vassal was Alexander Abercromby and his successors, and if the charter was confirmed by the Crown before the Act of Annexa-

tion, no doubt the Sub-commissioners were right, so far as they could see, in refusing to value the teinds of Over and Nether Obneys. They say, however, that no confirmation of the same is as yet produced, and they seem on that account to pause before determining whether they will or will not value the teinds of Over and Nether Obneys. But they seem to have come to no further conclusion, for there is no valuation of these teinds in this report.

The history of these lands down to the time of this report is very material. In consequence of the church being deprived of the benefices, the lands and teinds belonging to the Sub-dean of Dunkeld (like others of the same class) came to vest in the Crown by the Act of Annexation in 1587, and consequently the lands of Over and Nether Obneys, with their teinds, must after that date have been held of the Crown. Accordingly, Sir William Stewart of Grandtully took a charter from the Crown in 1615, in which were comprehended the lands and barony of Murthly, the lands of Sloginhoill, Nether Obney, Over Obney, and Wester Burnbane; and the lands of Over and Nether Obneys and Wester Burnbane are declared to have been previously held of the Sub-dean of Dunkeld referring to the charter of 1550. But by this charter of 1615 these lands are added to and incorporated in the barony of Murthly, and if this charter had been the subsisting title to the lands at the date of the Sub-commissioners' report, it might have given some colour to the notion that the lands of Obneys in the barony of Murthly, which are the only Obneys valued by it, comprehended these Obneys which had been added to the barony of Murthly by this charter of 1615. They are distinctly described in the charter of 1615 as lying in the barony, not of Murthly but of Dunkeld, but by that charter they were incorporated into the barony of Murthly. But it so happened that the charter very soon lost its force, for only two years later, by Act of Parliament, chapters were restored to their ancient rights, and the Crown was no longer the superior, but the superiority of Over and Nether Obneys and their teinds reverted to the Sub-dean of Dunkeld, and that was the state of matters when the Sub-commissioners set to work.

The next title which Stewart of Grandtully obtained from the Crown was in 1623. This deed comprehends the barony of Murthly, but nothing is said as to the Over and Nether Obneys. One explanation of this which is suggested is, that these lands having been already incorporated in the barony, did not require to be specifically described, but it was perfectly well known both to the Crown and the vassal that Over and Nether Obneys could no longer be held of the Crown, and so the charter of 1623 could not possibly comprehend lands which did not belong to the Crown but to the sub-dean. Therefore that charter, which was the existing charter at the date of the report, could not contain the lands of Over and Nether Obneys or their teinds.

But the whole matter was put straight almost immediately afterwards by Stewart of Grandtully obtaining a new charter in 1635 from the Sub-dean of Dunkeld. Thus, all parties no doubt recognised the fact that by the Act of 1617 the superiority had reverted to the restored ecclesiastics, and accordingly the sub-dean for the time (whose name was Glass) grants a charter in the same terms as his predecessors had done nearly 100 years before.

Thus, from 1635 onwards the Stewarts of Grandtully hold, as before, Over and Nether Obneys and Western Burnbane direct from the Sub-dean of Dunkeld *cum decimis inclusis*, and the reddendo is repeated, as fixed by the charter of 1550, at £26, 17s. 8d. Now, it is impossible to suppose that there could have been any payment of 40 rental bolls to the Bishop of Dunkeld as titular of the parish by the sub-dean or by anyone holding under him. The sub-dean was himself titular, and anyone deriving right from him could not have so paid, as he must have obtained the lands and teinds together absolutely from the sub-dean.

Therefore the construction of the Sub-commissioners' report is in all respects consistent with itself, and to hold that they meant to describe precisely the same lands in the two paragraphs is a construction entirely excluded by the terms of the report itself and the other considerations to which I have referred.

One other observation on this report is of great importance, as bearing out the meaning of the two paragraphs. There are other cases in which the Sub-commissioners mention lands without valuing them, and others in which, while mentioning an allegation of a *decimæ inclusæ* right, they still proceed to value them. Thus, the finding with regard to the lands of Little Tullybelton is expressed in this way—"Findis the lands of Littill Tullybetane, pertenig. to Andro Burt, citiner in Dunkeld, heritor thairof, to be set in few, with the teindis includit, be vmqll. James Hepburne, Dean of Dunkeld, to vmqll. Thomas Lindsay and Janet Douglas, his spous, in coiunct. fie, etc., conforme to ane charter producit thairanent, of the dait the penult day of Julii Jajvc. and fiftie zeris." Here is a case of a charter from the dean (not the Sub-dean of Dunkeld), and it happens to be dated in the same year. These lands of "Tullybetane" are not valued in this report at all, and this shows that where a charter was produced containing the lands and teinds together, from the holder of an ecclesiastical benefice, the Sub-commissioners, in obedience to the instructions of the High Commission, refrained from valuing. In the next paragraph of the report we read—"Findis be the declaratioun and vpgiving of James Ratray of Rannagullan, that his landis of Monydie Rodger hes payit of auld, pntlie. payes, and may pay, in constant rent of stok and teind, baith personage and viccarage, in tyme cuing., and no moir, of wiell., tua pt. meall and third pairt bear, ... xx bollis zerlie. And of siluer dewtie zerlie . . . xx lib. Quhilkis landis are allegit to be haldin decimis incluses of the rector of St Leonard's Colledge in St Androis, bot na charter producit to verefie ye same." Therefore they value them; there is a suggestion, but no evidence, of a *decimæ inclusæ* right. This contrasts very well with the entry immediately preceding, when the charter is produced, and they do not value. Here the charter is produced, and they do value, and the form is quite distinct. First, there is a valuation of the teinds, and then they say—"Which lands are alleged to be held *cum decimis inclusis*." Contrast that with the case of the lands we are dealing with. They value Obneys in the barony of Murthly, but they

do not go on to say, "which lands are alleged to be held *cum decimis inclusis*," but, on the contrary, the report proceeds—"And siclyke, finds the lands of Nether Obney," and so on, the inference being that they refuse *in hoc statu* to value those lands till confirmation of the ecclesiastical charter be produced.

Upon the whole matter, I agree entirely with the conclusions arrived at by the Lord Ordinary, and I think it is quite unnecessary to go through the mass of proceedings in the various teind processes referred to. I think they throw much darkness upon the matter and no light.

Lord Deas—When I read the judgment of the Lord Ordinary in this case, and listened to the argument from the bar, I confess I was quite satisfied with the observations and reasoning of his Lordship, and I have seen no reason to change that opinion. On the contrary, the observations which have been made so clearly by your Lordship in the chair tend to confirm it, if confirmation were necessary. I should not have said anything more had it not been for some allusions made to the opinions of the late Lord Curriehill and myself in the case of *The Officers of State* v. *Stewart*, July 20, 1858, 20 D. 1331, the then proprietor of this property, now some twenty-two years ago. A Judge who has been long on the bench may expect an occasional comparison to be made between his opinion in one case and his opinion in another. But what seems to be suggested here is, that Lord Curriehill and myself had indicated certain views in the case referred to upon a question not before us, or at least made some pregnant observations upon it. I have read the report carefully, and I cannot discover any grounds for either observation. The question then was, Whether Sir William D. Stewart had a *decimæ inclusæ* right to the teinds of these lands?—a dark enough question in itself without plunging into matters totally distinct from it, and I do not find that we did so. Observations may have been made on the footing of dealing with the case according to the averments of Sir William, although that would be very difficult, for I may say I never knew a case in which the averments of a party were not only so different, but so entirely contradictory, at one period of the litigation to what they were at another. I see nothing in the opinions in the former case to affect the present, and having made these so far personal observations, I am, as already indicated, for affirming the judgment of the Lord Ordinary on the grounds stated by him, and more fully developed by your Lordship.

Lord Mure—I have come to the same conclusion upon both questions. I concur in the views your Lordship has expressed as to the proper construction of the Sub-commissioners' report, and of the various title-deeds referred to.

On the question of *res judicata* I agree with the Lord Ordinary. The only decision which could be referred to as *res judicata* was the interlocutor of 1876, professing to proceed upon an admission by the Lord Advocate, but I do not think that this admission is sufficient in the circumstances to bind parties who were not represented by him.

Lord Shand—I am unable to concur in the judgment of your Lordships. I think the objections ought to be repelled, and it should be found that the teinds of the lands of Nether Obney were valued by the sub-valuation of 1629–35, approved of by the High Commission by decree dated February 3, 1796.

Reading the account of the litigations regarding the teinds of the different lands of Obneys contained in the record, with the reports of the decisions and the voluminous pleadings, of which extracts have been given in the prints in this case, which I agree with your Lordship show in many instances the great darkness and confusion in which the parties were groping, I confess I would have thought it scarcely possible that a fresh litigation should have originated in 1879 as to the effect of the valuation of 1724–35. I may be permitted to express the hope that the final determination of the question now raised, as it will apparently exhaust every question which it is possible to raise about the teinds of any part of the respondent's lands of Obneys, will be the last step in so prolonged a series of litigations.

In the view which I take of the case, I think it of much consequence to bear in mind that, as a matter of fact, in the allocation of stipend from 1770, when a final decree of locality of the stipend of the parish of Auchtergaven was pronounced, down to the present time, the lands of Over and Nether Obney have been treated as included in the old valuation. Although it was notorious that the respondent's predecessors were possessed of the lands of Over and Nether Obney, and of Easter and Meikle Obney, lying in the parish of Auchtergaven, the whole of these lands have been treated as included in the valuation, not only in the final decree of locality of 1770, but in all of the interim decrees of locality which have formed the rule of payment of the minister's stipend in the three still depending and conjoined processes of locality of 1793, 1811, and 1863. In 1879, for the first time, certain heritors and the minister of the parish have objected to the decree of valuation having the effect hitherto given to it, maintaining that the teinds of the lands of Over Obney and Nether Obney are unvalued. The effect of the objection stated, after so great a lapse of time, during which a practice entirely contrary to the objectors' view has prevailed, will apparently be to impose on the respondent's lands a burden of about £86 a-year, with, it may be, claims for bygone years within the period of prescription, during which it may be maintained that immunity from the payment of teind to that amount should not have been enjoyed. It seems to me that in such circumstances the objectors, seeking to disturb the course followed in the various localities for upwards of a century, are bound to make it clear that the decree of valuation, on any fair construction of its terms, cannot be held to include the teinds of the lands in question. If the objectors' argument even leaves the question doubtful, and the decision of the Court is to rest on probabilities, or the result of considerations on either side of almost equal weight, the practice which has hitherto prevailed ought not in my opinion to be disturbed. This appears to me to be the view on which the Court has acted in more recent cases, and which has been strongly approved of in the Court of last resort. The application of any other rule or principle only tends to cause

litigation on questions which are necessarily involved in great difficulty, obscurity, and uncertainty, because the inquiry relates, as in the present case, to proceedings which took place centuries ago, the records of which are in many instances not easily understood, and involves the interpretation of writings and titles obscure in themselves, and which are all the more so at the present day when so little light can be got as to the contemporaneous surrounding facts and circumstances.

I am of opinion, after an anxious consideration of the case, that the objectors have failed to show that the terms of the decree of valuation do not warrant the practice that has hitherto obtained, and cannot on a reasonable construction include the teinds of the lands in question. On the contrary, construing the decree subject to the great disadvantages resulting from the long lapse of time, I am of opinion that according to its true construction it embraces the lands of Over and Nether Obneys. The considerations that lead me to this result I shall state shortly.

(1) It is to be presumed that the Commissioners would include the teinds of all the lands of the heritor Sir William Stewart within the parish in their valuation, and not a part only, and equally that the heritor would have the teinds of the whole lands included in the valuation. It is clear from the concluding words of the entries recording the absence of any confirmation of the subdean's charter of 1550, that the Commissioners were aware that it was only the teinds of lands held *decimis inclusis* "and confirmed before 1587" (see minute of Commission of 28th January 1629, Connell II., App. No. 41, p. 82) that were not to be valued.

(2) The decree, in terms, professes to value Sir William Stewart's lands "of Obneyes." The objectors must give a limited meaning to these words. They require in order to succeed to have the words read as if they were not really Sir William Stewart's lands of Obneys, but only "his lands of Easter and Meikle Obneyes," thus restricting the natural meaning of the general term Obneys so as to include two possessions only out of four belonging to the heritor, and all of which had the name of Obneys. The respondent's reading of the term is the natural one. The word used is broad enough to include Over and Nether Obneys, and if it had been intended to refer to Meikle and Easter Obneys, and to these lands only, these specific names would I think have been used. I shall immediately consider the effect of the words "lying within the barony of Murthly." In the meantime I observe

(3) That the words "burdenit with the feu-duties and teind-duties," with which the first of the two paragraphs in the report concludes, are in my opinion of great importance in this question. What is desired is to identify if possible, and in so far as possible, the lands "of Obneyes" with which the entry deals, and I think this is done by these concluding words. It is clear, I think, that these words refer to the lands just named. The lands and teinds are mentioned as "burdenit with the feu-duties and teind-duties." If this be so, it appears to me to be quite decisively shown that the term Obneys must have been used as including Over and Nether Obneys, for these lands were "burdenit with feu-duties and teind-duties," while Meikle and Easter Obneys were not held in feu at all, and were therefore not burdened with any feu-duty. This was not disputed in the argument, and it is clear from the charter of 1615 and subsequent deeds. In that charter the old lands and barony of Murthly, which included Meikle and Easter Obneys, are declared to have a ward-holding—while the lands and teinds of Nether and Over Obney, incorporated in the barony by that deed, are stated to be held for the feu and teind duties specified in the charter by the Sub-dean of Dunkeld of 1550.

The objectors have, I think, been unable to displace the force of this argument. They cannot suggest any other application of the words "burdenit with the feu-duties and teind-duties" than their natural application—that is, to the lands of Obneys—and if so applied they can only refer to Nether Obney and Over Obney, which must therefore of necessity be included under the general term Obneys. They maintain, however, that the words have no operative effect, and say the object of the Commissioners in adding them is unintelligible. This argument just affords an illustration of the great disadvantage to all parties in being now called on to interpret such a document at this distance of time in necessary ignorance of many circumstances which might have cleared away what is now obscure, and the danger of going back on the immemorial practice, because the object of such a statement in the report is not now apparent. Supposing, however, the Commissioners' object to be now unintelligible, the respondent's argument still remains, and, as it appears to me, not seriously affected; for the words serve to identify the lands, and that is all that is wanted for the settlement of the present question. It appears from Connell on Tithes, vol. i., 202–3, that the practice of sub-commissioners as to deducting feu-duties in making valuations of the stock or rent was various. On 26th January 1632 there was a decision by the Court that nothing should be deducted from the constant rent on account of feu-duties, and it may be that the Commissioners in this case though it right to record that no such deduction had been made in their valuation. And it is worthy of observation that a great number of entries in other reports by the same Commissioners contain the same words, as appears from the printed papers in the case between the *Lord Advocate and Duke of Athole* now before the Court of Teinds. Against the points now adverted to in support of the valuation as applying to the lands in question the objectors say that the limited meaning of the word Obneys contended for is to be inferred (1) from the words "by and within the barony of Murthly," occurring after the mention of the lands, and (2) because of the second paragraph of the report, which refers to the claim to a *decimæ inclusæ* right.

In regard to the first of these points, I agree with the Lord Ordinary in thinking that it is not of much weight. His Lordship says—"The objectors founded on the fact that the lands of which the teinds are valued are described as lying in the barony of Murthly, while Nether and Over Obneys are in the barony of Dunkeld. The Lord Ordinary has not attached importance to that argument, considering that the latter lands were annexed to the barony of Murthlie erected in 1615, and that a mere error in description would not affect the valuation."

The lands of Over and Nether Obneys had been

incorporated in the barony of Murthly by the charter of 1615, the right of superiority having been in the Crown from 1580 by virtue of the Act of Annexation till that time. It is true that in 1617 the Act of Restoration was passed, and that in 1623 a Crown charter in favour of Sir William Stewart had been obtained which omitted Over and Nether Obney from the lands described as held under the barony title. But it is equally true that at the time of the valuation between 1629 and 1635 these lands were still held by Sir William Stewart under the charter of 1615, which described them as lying in the barony. It was only in 1635 that another title was taken from the Sub-dean of Dunkeld. It is not, I think, at all remarkable therefore that the lands should be described as lying within the barony of Murthly. They were so described in the last title to Over and Nether Obneys which had been obtained, and though, strictly speaking, the effect of this had been undone by the Act of Restoration, this does not, in my opinion, make the statement so obviously inaccurate as to lead to the limitation of the word Obneyes to Meikle and Easter Obneyes only.

As to the clause referring to the claim to a *decimæ inclusæ* right, as I have already observed, the Commissioners treated this as a claim only. They were quite aware that it did not exempt the lands from valuation. The fair reading of this part of the report is, I think, merely as a note that such a claim was put forward, leaving it to the heritor to take what benefit he could before the High Commissioner, if any, when the report came before them for approval. From other reports of Sub-commissioners, and indeed from other parts of the general report of these very Sub-commissioners, the Court has repeatedly had occasion to notice alternative views, suggested or stated evidently with the view of leaving questions open for the High Commissioner, and cases have previously occurred of reports in which a note is given of claims put forward in regard to lands the teinds of which were nevertheless valued.

This view of the second paragraph of the report appears to me also to afford an answer to the Lord Ordinary's reasoning, founded on the narrative of the charter of 1550, by the Sub-dean of Dunkeld, to which charter it appears to me the Sub-commissioners gave no effect.

On the whole, on the question of construction of the Sub-commissioner's report, I think the lands of Over and Nether Obneys are included under the general term of Obneys used by the Commissioners. At the best for the objectors, the case made out appears to me only to throw doubt on that construction, and I think such doubts, even though much stronger than they are, are quite insufficient to disturb and overturn the immemorial usage which has existed.

I do not think the question is *res judicata* against the objectors. But it is an important element in the case that in former teind processes Nether and Over Obneys were, as it appears to me, admitted to be included in the valuation, and an express admission to that effect was made by the titular. I am also disposed to attach much weight to the case of the *Officers of State* v. *Stewart*, 20 D. 1331. Sir W. Stewart in that case maintained, in order to support his claim to a *decimæ inclusæ* right, that the only lands valued were Meikle and Easter Obneys, but that contention was negatived, for this reason among others, that the lands of Nether and Over Obneys were valued by this valuation. I may refer to the opinion of the Lord President on page 1343 of the report, and to that of Lord Curriehill on page 1347. It is evident that one of the grounds on which Sir W. Stewart lost his case was that the Court were of opinion that the Commissioners had disregarded the charter and valued the lands. The point is not *res judicata*. But I know nothing to which I would attach more weight on the construction of this decree than the opinion of those Judges, and by their concurrence in the construction which I have put upon it I am much fortified in my opinion.

The Court adhered.

Counsel for Objectors (Respondents)—Asher—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Keir. Agents—Dundas & Wilson, W.S.

Wednesday, February 4.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DENT AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

*Process—Proof—Jury Trial—*6 *Geo. IV. cap.* 120 (*Judicature Act* 1825), *sec.* 28—29 *and* 30 *Vict. cap.* 112 (*Evidence (Scotland) Act* 1866), *sec.* 4—*Mode of Trial of Case of Collision at Sea.*

In an action for damages for collision at sea both parties desired trial by proof before a judge, and not by jury. The Lord Ordinary having ordered issues to be adjusted, parties reclaimed. *Held* that under sec. 4 of the Evidence (Scotland) Act 1866 the question of the mode of trial must be left entirely to the discretion of the Lord Ordinary.

John Dent junior, shipbroker, Blyth, and others, owners of the steam-tug or trawler "Integrity," sued the North British Railway Company for £1000 damages, on the ground that on 7th October 1879 the "Integrity" had been run down and sunk in the Firth of Forth by the steamship "John Stirling" belonging to the Railway Company.

Both parties desired to have the case tried by proof before the Lord Ordinary, and not by jury.

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112) enacted (section 4) that—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof, in any cause which may be in dependence before him, notwithstanding of the provisions contained in the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, section twenty-eight, and the pro-