

think, that those who are imposing assessments of this kind and collecting them are entitled to treat him as the occupier of the whole, and if it be contended, as in a question between tenants of particular flats and the landlord, that they ought to bear a proportion of the inhabited-house-duty, that must be made matter of arrangement or stipulation between them in order to secure that object, but in a question between the Crown and the landlord of such a house, I think the landlord is the occupier of the house as a whole.

The Court affirmed the judgment of the Commissioners.

Counsel for Appellant—Kinnear. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Inland Revenue—Solicitor-General (Macdonald)—Rutherford. Agent—D. Crole, Solicitor of Inland Revenue.

COURT OF TEINDS.

Monday, February 23.

(Before the Lord President (Inglis), Lord Mure, Lord Gifford, Lord Shand, and Lord Rutherford Clark.)

THE DUKE OF ATHOLE v. THE LORD ADVOCATE AND OTHERS.

Teinds—Valuation—Approbation of Report of Sub-commission—Where the Sub-commissioners Found that the Teinds were to be Valued along with the Stock, but Added a Valuation of the Teinds Separately.

The Sub-commissioners of 1629–35 found that the teinds of a certain parish were to be valued together with the stock, “because the samyn teinds are possess be the heretors of longtyme bygane for payment of a silver dewtie.” The bishop as titular protested against this finding, and appealed to the Great Commission, alleging that the teinds should be valued according to a rental which he produced, and he offered to prove by the oaths *de calumnia* of the heritors “that the samen rental was the treu rentalit bolis yat yair lands payit of auld.” The separate findings of the report of the sub-commission with reference to the particular lands of the parish in many instances contained, in addition to the value of the lands, stock and teinds together, a statement of the annual value of the teinds as “led,” “rentallit,” or “payit of auld.” In an action of approbation and ratification of the report of the sub-commission as regarded these lands, and valuation of the teinds in terms thereof, by a heritor against the Crown, as coming in place of the bishop—*held* that the lands were to be valued stock and teind together in terms of the report, and that the valuation should be ascertained by taking one-fifth of the reported rent of stock and teind without deduction of feu-duty or such like.

Observations (per Lord Gifford) on the interpretation of old judicial or quasi-judicial records.

This was an action of valuation and approbation at the instance of the Duke of Athole against the Lord Advocate as representing the Crown, the titular, as in place of the Bishop of Dunkeld, of the teinds of the united parishes of Little Dunkeld and Logieallochie, and of the parish of Caputh, and of the united parishes of Auchtergaven and Logiebride, and against the ministers of these parishes. The object of the action was to obtain decree of ratification and approval of a report by the Sub-commissioners appointed to value the teinds of the lands within the Presbytery of Dunkeld, and of valuation of the teinds in conformity with the report in so far as it related to the teinds of certain lands in the above parishes now belonging to the Duke of Athole. The Lord Advocate and the minister of the united parishes of Little Dunkeld and Logieallochie appeared to defend the action.

The valuation of the parish of Little Dunkeld, as contained in the report of the Sub-commissioners, was as follows:—

“The kirk of Litill Dunkeld, being ane kirk of the patrimonie of the Bischoprik of Dunkeld, hes anexit yairto ye kirkis of Logyaloquhie and Dowallie. And Mr Williame Glass, thesaurare of Dunkeld, is actual minister, and hes ane locall stipend payit to him be the heretors and intro-meters with the teyndis at comand and direction of the Bishop of Dunkeld, titular.

“It is fundin that the rent of the lands, stok and teind, is sufficiently prowine, as is gevin in be the heretors in maner following—As also the Bischope of Dunkeld compeirand be Wm. Fyff, hes pror., productit the rental of the teinds of the saids lands lyand wthin the said parochine of Litill Dukeld and Dowallie, alledgit payit of auld. And ane sumonds. dewlie execute and endorsat againe the heretors and takisme. for pruving of the samen, and to gif yair aithes *de calumnia* gif yei. knew that the samen rental was the treu rentalit bolis yat yair lands payit of auld; and in respect of no cpeirance, the said Wm. Fyff, pr. forsaid, desyrit they sould be haldine *pro confesso* on the auld rentalis. And because the samyn teinds are possess be the heretors of long tyme bygane for payment of ane silver dewtie, the Sub-commissioneris. fand be yr. interloqr. that they wald proceed in the valuaoun. for stok and teind joyntlie togidder according to the probatioun usit be the saids heretors. And the said Wm. Fyff, pr. forsaid for the said Reverend, appeillit to the Great Commission. and protestit for remead *prout de jure*.”

Then followed a number of findings with reference to particular lands in the parish, and among others the following belonging to the pursuer, and of which he sought approbation:—

“Finds ye lands of Ladywell, by ye comoditie of ye myln yairrof, pertennig to Mr James Stewart of Ladywell, and his pairt of the landis of Litill Dunkeld, to be worth in yeirlie rent of stok and teind of silver dewtie yeirlie vc mkis mol. Burdenit wt. ye feu meilles and teind silver.

“And the teind schewis of the half landis of Litill Dunkeld, led be the minister, qlk. ar rentalit to iij bolis teind, and four merkis payet to him for the uther half of the saids lands.

“Findsis the aikers of land in Litill Dunkeld, pertennig to Johne M’Keandlay yair, ar worth,

and may pay in yearlie rent of stok and teind of silver dewtie yeirlie the sowme of xxij^{lb} xij s iij^d, burdenit wt. the feu meills and ground annualls. And the teind scheavis led be ye minister, qlk. is estimat to 1 boll vicle.

“Findis ye landis of Tomnavalie, Wallace Croft, and the rig of auld callit Malcolme Reid’s Rig, pertenig to James Grymmen in Litill Dunkeld, to be worth in yeirle rent of stok and teind of victual . . . v bolls.

And the teind scheavis of Malcolme Reid’s Rig, led be the airis of umqle. Mr Thomas Abercrombie of Craigieogekie, is estimat to . . . ij flottis vicl.

And the rest of ye teinds yrof, led be Mr Williame Glass, thesaurer of Dukeld, minister, qlk. is estimat of vicl. to iij flirttis teind. And the vicarage tane up *ipsa corpora* be ye ministr.

“Findis the tenementis in Litill Dunkeld being brew Seittis with the aickers of land adjacent yrto., pertenig to James M’Duff of Fandowi, to be worth of yeirle rent of stok and teind of silver dewtie ye sowme of . . . L merkis mol., burdenit wt. the feu meills and ground annualls. And the teind scheavis led be ye thesaurer of Dunkeld, qlk. is estimat to be worth yeirle of victual . . . v flirttis. And the vicarage teind tane up be the thesaurer *ipsa corpora*, qlk is estimat to

“Findis the landis of Wester, Middill, and Over Kinnairds, pertenig to Williame Stewart of Kinnaird, to be worthe of yeirle rent in stok and teind, baith personage and vicarage, of silver dewtie yeirle the soume of . . . iij^c mks. mol. burdenit wt. the feu meillis and teind silver dewties.

And was rentalit of auld for ye teinds, coforme. to the bischopis rental to

xxij bs. aittis and iij bs. beir. but the watter of Tay hes tane away the half of the haugh lands yrof. and hes maid unprofitabell.

“Findis the lands of Ballelochein, pertenig equallie betwix David Borrie elder and David Borrie younger, estimat to be worth of yeirle rent of stok and teind of vicl. tua part meall and third part bear . . . xii bolls. Burdenit wt. the feu dewtie for personage and vicarage.

And was rentalit of auld coforme to ye bischoppis rental for ye teinds to

vi bs. aittes and 1 boll beir.

“Findis the landis of Tok, pertenig to Patrik M’Stane, to be worth of yeirle rent in stok and teind of silver dewtie yeirle, . . . Lv. mkis. mol. Burdenit with the feu-dewtie and tak dewties for the teinds, personage and vicarage. And payit of auld for the teinds coforme. to the deposun. of witness, . . . iij bl. aittis.

“Findis the lands of Port, pertenig to John Gyloch, to be worth of yeirle rent of stok and teind of silver dewtie, . . . liij^{lbs}. viss. viiij^d. Burdenit wt. ye feu meills and teind bolls to the takisman, coforme to the probatioune payit of auld for ye teinds, . . . ix bolls aittis.”

The report of the valuation of the parish of Caputh was in these terms:—“The parochin of Caputh being ane kirk of the patrimonie of the bishoprik of Dunkeld, and Mr Thomas Glass be-

ing actual minister yrat., and hes ane local stipend payit to him be the heretors and intrors. wt. ye. teinds in the costant. plat. It is fundin that ye rent of ye landis, stok and teind, is sufficientlie provine, and is given in be the heretors in manner following—As also the Bischope of Dunkeld compeirand be Williame Fyff, his pr., and product the rental of the teinds as the said parochin payit of auld, and ane sumonds. dewlie execute and indorsat againis the heretoris and takismen for prouiffing of the same, and to gif thair aithis *de calumnia* gif they knew that the same rental was the trew rentalit bollis yat thair landis payit of auld, and in respek of na comperance in the contrair, the Sub-comissioners decernit yame. *pro confesso* on the auld rental: And becaus the saids teinds ar possessit be the heritors for payt. of ane silver dewtie. The Sub-comissioners. fand be thair interloquitur, that they wald proceed in the valuatioun of the lands for stok and teind. And the said Williame Fyff, pr. for the said reverend fayr., appellit to the High Commissioun and protestit *prout de jure*.”

Then again there came findings with reference to individual lands, and, *inter alia*, of the following belonging to the pursuer:—

“Findis the landis of Eister Haltoun, pertenig. to Thomas Wallandie of Drumbowie, to be worth of yearlie rent of stok and teind of vicl. twa part meill and third beir . . . x bolls, burdenit with the feu maillis, teind silver, and augmentatioun to the minister, and payet of auld for the teinds to the Bischope of Dukeld. . . .

“Findis the landis of Richip, Eister and Wester Rimoirs, pertenig. to Johne Erle of Atholl, and the Laird of Drunkello pretending right yrto., ar valuit as followis, viz., Richip of teind and stok of silver dewtie yearlie

liii libs. vi^s viiij^d

and the vicarage teindis yrof., estimat yeirle to be worth of silver . . . xx^s

The landis of Easter and Wester Rimoiris of stok and teind of silver dewtie yeirle, . . . xl lbs. moe, and the vicarage yof. estimat to xx^s yeirle, and the saidis landis wer rentalit of auld for the teind payit to the Bischope of Dukeld., coform. to his rental, to . . . xiii bolls aittis burdenit wt. the tak silver and augmentation to the minist. . . .

“Findis the lands of Birkenburne, perteng. to the said Thomas Wallandie of Drumbowi, to be worth in yeirle rent in stok and teind of victuall, twa part meill and third part beir . . . 10 bolls. allegit haldine *decimis inclusis*.”

Lastly, the pursuer concluded for approbation of the valuation of the lands of Bleock, in the parish of Logiebride, and with reference to these lands he made the following averment:—“The teinds of the lands of Over Bleock, in the parish of Logiebride, which were drawn by the parson of Logiebride in rental bolls, are in a different position from those above mentioned. The Sub-commissioners found by the declaration, upgiving, and oath of verity of Mr George Graham of Inchbraikie, that these lands had paid, then paid, and might ‘pay in constant rent of stok and teind, baith personage and vicarage, of victuall twa part meall, third part bear, zearlie, . . . liij bolls. Qrof the rentalit teindis bollis extendis to . . . xxij bolls. qlk. is far abone the just valour of the stok.’ It

was competent for the parties interested to depart from and to change or convert these rental bolls, which were so far above the just value of the stock, and the pursuer has ascertained that almost immediately after the valuation by the Sub-commissioners these rental bolls were changed or converted by a deed or writing into 100 merks Scots, and have never since been demanded or paid. This being so, the pursuer seeks an approbation of the sub-valuation, but without prejudice to the rented teind bolls in so far as the same may be exigible, so as to leave it open for him hereafter to show, if he is able, that these bolls are not exigible." The pursuer, however, ultimately abandoned this claim.

The pursuer concluded for valuation of the teinds at one-fifth of the yearly value of the stock and teind together, as set forth in the above findings of the Sub-commission. The defenders objected to such a decree in the case of all the lands of which the Commissioners, after finding the yearly value of the lands, stock and teind together, specified the value of the teinds "led" or "rentallit" or "payit of auld." The defenders in consequence did not object to the decree concluded for as regards the lands of Ladylands in the parish of Little Dunkeld, or of Easter Haltoun and Birkenburne in the parish of Caputh, with reference to which no such alternative statement was made.

Pleaded, *inter alia*, for the pursuer—" (1) The teinds having been let to and possessed by the heritors jointly with the stock, the only competent mode of valuing the lands for stock and teind was that adopted by the Sub-commissioners. (2) The bishop not having been in possession of rental bolls at the time, the Sub-commissioners were entitled to disregard as they did the rental bolls which had been paid 'of auld.'"

Pleaded, *inter alia*, for the defenders—" (1) The pursuer is not entitled to decree as concluded for as regards the lands as to which it is specified in the report that the teinds were 'led,' 'rentallit,' or were 'payit of auld.' (2) The teinds so stated to be 'led,' 'rentallit,' or 'payit of auld' in conformity with the submission and Act of Parliament referred to, should be declared the teind of the lands to which they respectively apply."

The arguments fully appear from the opinion of Lord Gifford *infra*.

Authorities—Stair, ii., 8, 35; Buchanan on Teinds, 261; *Stewart of Invernytie*, July 19, 1665, 2 Connel 166; *Chalmers*, Nov. 22, 1820, F.C.; *Stewart v. Strathurd*, Jan. 22, 1669, 2 Connel 180; *Thomson v. Lord Lynedoch*, June 18, 1834, 12 S. 747; *Smythe v. Liston*, Feb. 5, 1833, 15 S. 216; *Ainslie v. Officers of State*, June 6, 1869, 11 Macph. 260.

The opinion of the Court was delivered by

LORD GIFFORD—This is an action of approbation and valuation at the instance of the Duke of Athole against the Lord Advocate as representing the Commissioners of Woods and Forests, titulars of the teinds of the united parishes of Little Dunkeld and Logieallochie, and of the parish of Caputh, and the united parishes of Auchtergaven and Logiebride, and against the ministers of these several parishes; and the purpose of the action is to obtain a decree of this Court as the High Commission of Teinds ratifying and approving a

report of the Sub-commissioners appointed for valuing the teinds of the lands within the Presbytery of Dunkeld, and valuing the teinds in conformity with the report of the said Sub-commission in so far as it relates to the teinds of various lands now belonging to the pursuer, His Grace the Duke of Athole.

The report of Sub-commissioners appointed for ascertaining the value of the teinds of the lands within the Presbytery of Dunkeld is said in the summons to be dated on or about 29th July 1635, but the precise date does not appear from the report of the Sub-commissioners itself. It is plain, however, that as the whole proceedings of the Sub-commissioners were carried on and completed between the year 1629 and the year 1635, the date of their report now in question cannot be later than the date mentioned in the summons, and it may be taken as having been made and issued in the year 1635. It further appears, that although this report of the Sub-commissioners has never been approved and allowed by the High Commission so far as relates to the teinds of the pursuer's lands now in question, it has been acted upon in a series of successive localities during the last two centuries, and effect has been given thereto in these localities, the teinds of the various lands having been held as valued thereby. This same report of the Sub-commissioners for the Presbytery of Dunkeld has also been approved of by the High Commission, and decrees of valuation have been pronounced in conformity therewith, in regard to the teinds of other lands contained therein not belonging to the present pursuer, and accordingly there is no doubt or dispute whatever as to the genuineness and authenticity of the report of the Sub-commissioners now founded upon by the pursuer. The document is undoubtedly genuine and authentic, and is admittedly the report of the Sub-commissioners by whom it bears to have been made.

Nor is there any objection stated to the present action on the ground of the time which has elapsed since the report of the Sub-commissioners was issued. It is perfectly competent for this Court sitting in 1880 to approve of a report of Sub-commissioners issued in 1635, and to pronounce decree of valuation in conformity therewith, unless it could be averred and shown that the report had been derelinqushed or abandoned, and there is no averment of derelinqishment in the present case. No doubt it was intended that the reports of Sub-commissioners should without delay be laid before the High Commission, and be immediately allowed or disallowed, but none of the statutes contain any limitation in point of time. The leading statute is that of 1633, cap. 19, which appoints the High Commissioners "to meet and conveine at Holyrudhous or Edinburgh at such tymes and places as they sall think fitt, and thair to prosecute and fallow furth the valuatione of quhatsumever teinds, parsonage or viccarage, within the Kingdome which ar as zett unvalued, and also to receaue the reports frome the Sub-commissioners appointit within ilk presbyterie of the valuationes of quhatsumever teinds led and deducit before thame according to the tenour of the sub-commissiones direct to that effect, and to allow or disallow the same according as the same sall be fund agriable or disagriable frome the tenour of thair sub-commissiones." The powers of this and of the other statutes are now transferred to and

vested in this Court as the permanent Lords Commissioners of Teinds, and the Court as such has always been in use to approve and allow reports of sub-commissions, no matter how long they have lain over unapproved, where no good objection can be stated thereto. See *M'Neill v. The Minister of Campbeltown*, affirmed in the House of Lords, 5 Paton 244; *Richmond v. Officers of State*, July 19, 1871, 9 Macph. 1020, and many other cases.

There being no question, therefore, as to the genuineness and authenticity of the report of the Sub-commissioners now before us, and no question as to the competency of now approving or disapproving thereof in whole or in part, the only controversy between the parties arises upon the terms of the report of the Sub-commissioners itself—as to what is its true meaning and import, and also as to whether it was within the power and competency of the Sub-commissioners to value as they have done the teinds of the pursuer's lands now in question.

The action is resisted by the Lord Advocate as for the Commissioners of Woods and Forests, who, as representing the Crown, are titulars of what were formerly the bishop's teinds of Dunkeld, and also by the minister of the united parishes of Little Dunkeld and Logieallochie, and their objections to the conclusions of the action and to the decree of approbation and valuation demanded by the pursuer I think resolve into two questions, although these two questions are not very distinctly brought out in the pleas stated for the defenders upon record.

The first objection seems to be, that whereas the teinds reported upon by the Sub-commissioners were bishop's teinds in the possession of the bishop, and led by him or his treasurers, they are not subject to valuation at all, and it is contended that at all events whenever these teinds are said in the Sub-commissioners' report to have been "led" or "rentalit" or "rentalit of auld" or to have been "payit of auld," then such teinds under the statutes could not have been legally valued at all, and therefore no decree of approbation or valuation can now be pronounced regarding them.

The other question raises an alternative plea—that even supposing that the teinds of the pursuer's lands are to be valued, then the valuation must be, not one-fifth of the stock and teind reported on by the Sub-commissioners, but shall be the amount separately reported on by the Sub-commissioners as the value of the teinds taken separately according to the bishop's rental, and said to have been "led or rentalit or payit of auld." In this last view, the report of the Sub-commissioners is represented as an alternative report giving the materials for two separate methods of valuation of the teinds, it being left to the High Commission to determine in point of law which is the right method or the right principle on which the valuation should proceed.

Both of these objections or defences relied on by the defenders are supported mainly, if not exclusively, by a reference to the terms of the report of sub-valuation itself, and by a critical construction of the document. Indeed, the whole questions now before your Lordships turned, I think I may say, almost entirely upon the construction of the sub-valuation itself, and very little, if any, light is really obtained from any other documents in process. A general reference was made at the

debate to some of the old documents, excerpts from which are printed in the three prints before the Court, but hardly any definite argument was founded upon any of these by the defenders, the reason of which seemed to me to be that many, perhaps most, of these old documents, so far as relevant at all in the present questions, seemed to indicate that from a very early period the bishop's teinds of Dunkeld, at least so far as regards the parishes and lands now in question, were not drawn or led by the bishop or by anybody, whether treasurer or parson, appointed by him, but were let in tack to the heritors or tenants of the land, and commuted for fixed quantities either of victual or of money, which the heritors, tenants, or intrmitters with the teinds paid as in lieu of the teinds to the bishop or to those appointed or authorised by him. Thus, for example, in the very first documents printed for the defenders, being extracts from alleged rentals of the Bishopric of Dunkeld, I think it appears that the teinds of Little Dunkeld and of Caputh, two of the parishes in question, were at a date long previous to this report no longer drawn or led by the bishop, but were under tack for payment of fixed quantities of meal, bere, or corn. It is said that the kirk of Little Dunkeld is in the parishioners' hands; this must mean that the teinds are in the hands of the heritors and their tenants, and let to them by the bishop or titular, and that the rental thereof is so many chalders and bolls meal, so many chalders and bolls bere, and so many chalders and bolls horse corn. There is a similar statement regarding the kirk or teinds of Caputh. There is a separate statement of certain particular "teinds set for silver, as follows," and among others teinds of the Kirk of Caputh extending to £30, teinds of the Kirk of Little Dunkeld extending to £22, 17s. Again, there is "the true rental of the kirks as follows that pays victual and horse corn upon 'baith the sydis of Forth,'" and among others are enumerated the kirk of Little Dunkeld and the kirks of Caputh and Dowallie, both of which pay specified quantities of bere, meal, and aitts. All of this appears to have been the state of matters as at the date of 1561.

I am unwilling to refer further to documents not specially founded on in the argument at the bar, and especially not founded on in the argument for the defenders, but, so far as I can follow the documents printed, I think there is nothing in any of them apart from the report of the sub-valuation itself to show or to indicate that at the date of the sub-valuation the teinds of any of the lands now in question were actually led or drawn by the Bishop of Dunkeld or by his treasurer, or by any party appointed by him or by any minister to whom he had assigned or, as it was then called, "localled" the teinds of these lands. On the contrary, so far as I am able to read the printed documents, their tendency is in the opposite direction—that is, they indicate or leave to be inferred that the whole teinds of the bishopric, including those of the lands now in question, had at the date of the sub-valuation, and probably long before, been let or set in tack to the heritors or other tacksmen, and were thus possessed jointly with the stock or other nine-tenths of the reaped crops, and that for payment of fixed quantities of victual or money, or both, which constituted the proper rent of the teinds.

At all events, the argument for the defenders at your Lordships' bar was exclusively rested on the terms of the sub-valuation itself, which is far more favourable for the defenders' argument than anything contained in any of the documents, from which documents I do not think the defenders' argument derives any material aid, and therefore I proceed to the question, What does this document, the report of the Sub-commissioners, really state, and what is its true meaning and effect?

And here I observe that in reading an old judicial or quasi-judicial record or decree the Court are to apply, wherever it is possible, a favourable interpretation, favourable in this sense, that the report or decree must be held, if possible, to say and to do what the Court—that is, the Sub-commissioners—must have intended in the discharge of their duty to say and to do. Of course the Sub-commissioners, who were appointed for the express and for the sole purpose of valuing the teinds, and of reporting the value, must be held, if their words will reasonably bear the construction, to have actually done so, or at least to have reported all the materials from which the value can be deduced. In short, they must be held to have done their duty, unless it can be very clearly shown that they have failed to do so. In such cases *omnia presumuntur rite et solemniter acta*, and not only so, but the written report or decree must be so construed, if at all possible, as to be an intelligible and effective report, and not an abortion or an unintelligible failure. If there are contradictions or apparent contradictions in the report itself, they are, if reasonably possible, to be reconciled, and not to be so read as to destroy one another, or to destroy the report itself. I think this is plain from the nature of the case, and this canon of construction was recognised in the strongest manner in reference to documents of this nature by the judgments of the House of Lords in two recent cases—*The Deans of the Chapel Royal v. Johnstone*, 18th March 1869, 7 Macph. (H. of L. Rep.) 19, and *Heritors of Old Machar v. The Ministers*, 26th July 1870, 8 Macph. (H. of L. Rep.) 168. These cases related severally to alleged decrees of valuation in 1647 and 1707, and in both cases very important observations were made as to the rules of interpretation which should be applied to such documents. The effort of the Court in all such cases should be to give effect to the real intention and meaning of the old tribunal or quasi-tribunal, wherever its meaning and intention can be clearly gathered, and care should be taken not to defeat that intention by reason of imperfection or even of apparent contradiction in the mode of expression made use of in the ancient record. The makers of a decree or report like this knew the whole circumstances and the whole position of parties far better than we can possibly do after the elapse of two centuries and a-half, and it is easily conceivable that if we had their information what seems to us confused or contradictory would become clear and consistent. Keeping these principles in view, I proceed to read the report of the Sub-commissioners.

It begins by an explanatory statement of fact which has an important bearing on the whole question. The words are—"The kirk of Litill Dunkeld being ane kirk of the patrimonie of the bischoprik of Dunkeld hes anexit yairto ye kirks of Logyaloquhie and Dowallie. And Mr Williame

Glass, thesaurare of Dunkeld, is actual minister, and hes ane locall stipend payit to him be the heretors and intrometers with the teyns at comand and directioun of the Bishop of Dunkeld, titular." This preamble establishes several very important facts:—*First*, The kirks mentioned (and of course this includes the teinds of the parishes) are bishop's teinds, "part of the patrimonie of the bishopric of Dunkeld;" *Second*, Mr William Glass, who was then the bishop's treasurer, was actual minister of the united parishes of Little Dunkeld, Logieallochie, and Dowallie; *Third*, As such—that is, as "actual minister"—he had a "locall stipend payit to him;" that is, as the word "locall" means in such a connection, his stipend was assigned or localled to him by the bishop, and of certain specified parts of the revenue of the bishopric; *Fourth*—And this is very important—The stipend so localled was apparently a pecuniary stipend "payit to him be the heretors and intrometers with the teyns;" and *Fifth*, All this was at the command and direction of the bishop, who was titular.

Now, I need only dwell for a moment upon the fourth of these facts, all of which of course must be taken *pro veritate*, for not only is there no contradiction or contrary evidence anywhere, but there is abundance of corroboratory proof. It was then the fact that at the date of the sub-valuation Mr William Glass, the stipendiary minister of the united parishes, had his localled—that is, his assigned—stipend paid to him by the heritors and intrometers with the teinds. This is conclusive. I think that Mr Glass, the stipendiary, did not then lead or draw the teinds which formed the source of part of his stipend. If he led or drew the teinds, then they could not be paid to him by heritors or intrometers, for drawn teinds are only introritted with by the parson or titular who draws them, and who draws them—that is, takes them—off the field as the separate estate possessed by himself. If, then, the stipendiary was paid by the heritors or intrometers, these heritors or intrometers must necessarily have been in possession of the teinds as tacksmen under the titular. They could have had no other title of possession, and as the eight parcels of land first mentioned in the summons are all in the parish of Little Dunkeld, this preamble of the sub-valuation seems conclusive that the teinds of these lands were then in the hands of the heritors or their sub-tenants in virtue of tacks from the titular, at least so far as the stipendiary was concerned. I think there is no alternative but to hold this.

The report next proceeds—"It is fundin that the rent of the lands, stok and teind, is sufficiently prowine, as is geven in be the heretors in maner following." A proof then had been led before the Sub-commissioners—a proof by famous witnesses, as it is expressed in another of their reports,—and the result was that the rental of the stock and teind was sufficiently proven to their satisfaction. Now, this implies nearly conclusively that the stock and teind were possessed jointly. The rental of stock and teind had been given up by the heritors, as the words I have just read bear, and this implies that the heritors were in possession of their teinds. If the teinds had been drawn by the bishop, or by his treasurer, or by the minister to whom the bishop localled them, the rental could not well have been given up by the

heritors at all. They were not in the heritors' possession, and even if let to a third party as tacksman, the heritors, as such, could know nothing about their rental, which fell to be given up by the titular or those in his right to whom the rent was paid; and here, therefore, in the very first sentence of the report, we have the strongest confirmation of what is implied in the preamble, that the teinds were in the possession of the heritors or their tenants as intromitters, in virtue of tacks from the titular. At all events, the fact is that the rent of the lands, both stock and teind, was proven before the Sub-commissioners.

At this stage the report of the sub-valuation bears that the Bishop of Dunkeld compeared by his procurator Mr William Fyff, and "producit the rental of the teinds of the saids lands lyand wthin the said parochiune of Little Dunkeld and Dowallie, alledgit payit of auld. And ane sumonds dewlie execut and endorsat againe the heretors and takisme for pruing of the samen, and to give yair aithes *de calumnia* gif yei knew that the samen rental was the trew rentalit bolis yat yair lands payit of auld;" and in respect of no compearance, the said William Fyff, procurator foresaid, desired they should be held *pro confesso* on the old rentals.

Now, I am of opinion that the fair reading of, and the fair inference from, this narrative is that the "auld" rental of teinds produced for the bishop was not the then existing rental either of the lands or of the teinds separately or jointly, but an old rental of the teinds which had been in force at some former time more or less distant, and which is vaguely described as being what the lands "payit of auld," but which at the date of the valuation was paid no longer, and accordingly the mode in which the bishop's procurator sought to prove this superseded old rental was not by his treasurer or tacksman, who drew the teinds or levied the rental bolis, or by the tenants who paid them, but by the oath *de calumnia* of the heritors or tacksmen—that is, by the oath of what their opinion or belief was—for that is the nature of the old oath of calumny, and it appears it was only to be taken "gif yei (that is, the heritors) knew" what was the true rental "yat yair lands payit of auld."

It does not appear that any oath of calumny was taken, or that the heritors and tacksmen were held as confessed, but the Sub-commissioners proceeded to give judgment upon the question whether an old rental no longer in force and no longer observed or paid could be the measure for a valuation under the statute. The extract decree records their judgment, which is preceded by the reason in point of fact upon which the judgment is founded. The reason is thus expressed—"And becaus the samyn teinds are possess be the heretors of long tyme bygaue for payment of ane silver dewtie;" and the finding is—"The Sub-commissioneris fand by yr. interloqr. that they wald proceed in the valuaoun., for stok and teind joyntlie togidder, according to the probatioun usit be the saids heretors." Against this judgment the bishop by his procurator "appeillit to the Great Commission, and protestit for remead *prout de jure*."

This appeal was quite competently taken, and as it has never been disposed of, it still subsists, and as this Court is now the permanent High Commission of Teinds, we seem now called upon,

in the present process of approbation and valuation, to adjudicate upon this appeal taken by the bishop 250 years ago. The appeal is now insisted in by the Lord Advocate as representing the Commissioners of Her Majesty's Woods and Forests, who are now in right and place of the Bishops of Dunkeld. It seems absolutely necessary to dispose of the appeal, and to affirm or to reverse the judgment of the Sub-commissioners of the Presbytery of Dunkeld. In deciding the question, however, I think it must be conceded—and it was not seriously contested at the bar—that this Court must take as true in point of fact what was found in point of fact in or about 1635 by the Sub-commissioners. The Lord Advocate or the minister did not tender any proof to the contrary. In the nature of things he could not do so. No parole proof now led could establish what was the state of possession in 1635, and although light might be thrown on this matter by old documents, the Lord Advocate did not cite a single document to show that the teinds in question in 1635, or for long previous to that date, had been possessed separately from the stock, either according to the "auld" rentals on which the bishop founded, or according to any other rental whatever. Indeed, as I have already said, the only documents recovered in the present process point in an opposite direction, and tend to show that long before 1635 the teinds by tacks or otherwise had come into the hands of the heritors, and were possessed by them or by their agricultural tenants jointly along with the stock. I think therefore the statement in fact made by the Sub-commissioners in the decree in question must be taken to be true in point of fact—that "the samyn teinds are possess be the heretors of long tyme bygaue for payment of ane silver dewtie"—that is, a money rent.

If this, then, be the state of the fact—and this cannot now be gainsaid—then the judgment of the Sub-commissioners against the bishop's contention was clearly right. The statute of 1633, cap. 19, granting a commission for valuation of teinds, and the previous statutes in this respect, are in the same terms, and all are conform to the decreets-arbitral pronounced by King Charles I. and ratified by Parliament. The general rule laid down by the decreets and Acts is—"The rate and quantity of all teinds of the Kingdom is and shall be the fifth part of the constant rent which each land payeth in stock and teind where the same are valued joyntly; and where the teinds are valued apart and severally, findeth that the rate and quantity thereof is and shall be such as the same shall be valued and esteemed by the saids Commissioners or Sub-commissioners, deducing always the fifth part thereof, which we out of our fatherly and royal care for the well of our said Kingdom ordaine to be deduced off the saids teinds severally valued as said is." The practice following upon the decrees-arbitral and the relative statutes was perfectly uniform. Wherever, under whatever arrangement, the teind was possessed by a heritor along with his stock, and was jointly let out and jointly reaped, then the teind was held to be one-fifth part of the annual rent of stock and teind together, which fifth of the total rent was held to be a reasonable surrogatum in place of one-tenth of the reaped corn crops. It was only when the teind was possessed separately from the stock, and thus admitted of a separate valuation, that the Commissioners are directed to

take proof of its amount and ascertain its value *communibus annis*, and from this value one-fifth was to be deducted under the name of the King's ease. Plainly, if the facts stated by the Sub-commissioners are true, the present was a case, not for separate valuation of the teinds, far less for valuation by obsolete, superseded, and, it may be, long forgotten rentals, but for proof according to existing possession, ascertaining the fair rental of stock and teind jointly, whereof one fifth would be "constant rent" of teinds. This was the proof which the Sub-commissioners had actually taken, and they were right in refusing to admit any other.

The question in law being thus settled, and the proof in the valuation completed, we would naturally expect the decree to go on to find what was the proven valuation of stock and teind together of each parcel of lands, one-fifth of which would be the valued teind. Accordingly the decree before us does contain such finding of the valuation of stock and teind together of each of the parcels of land now in question, and from this the valued teind can easily be deducted. But a difficulty is created by the circumstance that the decree does not stop here, but in reference to each of the lands goes on to make certain findings or statements regarding the teinds of said lands as if they were paid separately or drawn by the minister or rented by him, and in many cases a result is brought out which would be quite different in amount from the fifth of the value of stock and teind jointly.

The decree or report does not bear in express terms any explanation of this procedure. It gives no reason for its double findings—first, its finding of the proven valuation of stock and teind jointly; and second, its separate statements as to the teinds—their condition and value. This is left to inference, and I think I am entitled to infer from the whole document that the reason why these separate statements are inserted in the decree was that the bishop's procurator had requested it to be done with a view to his appeal to the High Commission, and for giving materials, or part of the materials, which might be necessary in order to rectify the valuation in case the bishop's appeal should be sustained. I think this is the only conclusion which can be come to reading the extract-decree as a whole. But if this be so, and if I am right in holding that the present valuation could only be made by taking one-fifth of the value of stock and teind jointly, it follows that all these additional statements about teinds, or of the old state thereof, or of the old rentals thereof, go for nothing, and fall to be disregarded altogether. If the bishop had succeeded in his appeal, they might have been of some use, though, as I shall show immediately, even in that view they are imperfect; but if the bishop is to lose his appeal and have it dismissed, which I think is inevitable, then all these separate statements are utterly useless and have no application whatever to the case in hand. I am therefore of opinion that in reference to all the lands now in question the decree of the Sub-commissioners should be approved of, and the valuation of the teinds fixed at one-fifth of the valuation of stock and teind jointly proved before the Sub-commissioners and found by their report.

But there are additional reasons why I think this is the only course which this Court can adopt

in dealing fairly with this old document of undoubted authenticity, the report of the Sub-commissioners of the Presbytery of Dunkeld, made 250 years ago. Regarding some of the lands there is no question. The Lord Advocate for the Crown, and the minister, state on record that they have no objection to the Court ratifying and approving of the report as a valuation of certain of the lands libelled—that is, of such lands regarding which there is no separate statement as to teinds led or as to "auld" rentals—and their objections are confined to eight parcels of land in the parish of Little Dunkeld, to one parcel of lands in the parish of Caputh, and to one parcel in the parish of Logiebride. This last parcel, being the lands of Over Bleloch, has been withdrawn by the pursuer, and no decree of approbation is asked concerning them, so that there remain in all nine parcels of land as to which the defenders dispute the pursuer's right to obtain decree of approbation and valuation. Now, besides the general grounds above explained, on which I think the defenders' objections to the valuation of all the lands should be repelled, excepting the lands of Over Bleloch, which the pursuer has withdrawn from the case, there are additional answers to the pursuer's objections. Thus, in reference to the first lands objected to—the lands of Ladywell—these lands are reported as worth in yearly rent of stock and teind 500 merks, but the additional statement made, as I suppose, at the request of the bishop, does not refer to the same lands as those reported on in the first finding. Thus, the lands reported on are "the lands of Ladywell pertaining to Mr James Stewart," and his part of the lands of Little Dunkeld is reported as worth in stock and teind 500 merks. But the addition to this finding refers to different lands altogether, namely, the half lands of Little Dunkeld, the teinds of which, led by the minister, "are rented to three bolls teind, and four merks paid to him for the other half of the said lands." It is impossible to apply this to the first finding—that is, to the valuation of the stock and teind. It is unintelligible. We cannot tell what part of the lands of Little Dunkeld belonged to Mr James Stewart.

A similar objection applies to many of the other parcels of lands. Thus, while Tomnavally, Wallace Croft, and Malcolm Reid's Rig are valued, stock and teind, at 5 bolls, the separate statement relates only to Malcolm Reid's Rig, and not to Tomnavally or Wallace Croft at all, and the teinds of Malcolm Reid's Rig are described as having been led partly by a tacksman and partly by Mr Glass, the treasurer of Dunkeld, and these teinds alone are estimated as of greater amount than the fifth of the stock and teinds of the whole three lands.

In other cases there are blanks in the separate statements. In the case of Wester, Middle, and Over Kinnairds, the separate statement, after giving the "auld" rental, adds that "the water of Tay has tane away the half of the haugh lands prof. and has maid unprofitabell."

It is needless to go over the particulars in detail. In most of them I do not see how it would be possible to give effect to the defenders' view even if the alleged "auld" rental or old state of possession were to be sustained.

In two or three of the cases it is said that the teinds or the teind sheaves were led by the minister, or that vicarage teind "was taen up *ipsa cor-*

pora" by the minister, but it is not said when this was done, and if the finding of the Sub-commissioners is to stand, that the whole teinds were possessed by the heritors of long time "bygane for payment of a silver dewtie," it is plain that the statement about drawn teinds or teind sheaves led must relate to an old state of matters which had then long ceased to exist.

This conclusion is very strongly confirmed by the effect which has been given to this report of the sub-valuation of the teinds in question. Although never approved by the High Commission in regard to the pursuer's lands, it has received effect for 250 years as equivalent to a valuation, and the teinds of the pursuer's lands have been stated in successive localities as valued teinds, and the pursuer and his authors have paid accordingly. The valued teind has always been taken as one-fifth of the reported rental of stock and teind jointly. It has never been attempted to give to the sub-valuation the meaning now ascribed to it by the defenders. I cannot help ascribing very great weight to what may be called the contemporaneous interpretation of the document in question—an interpretation which it has uninter-ruptedly received for 250 years.

I am therefore humbly of opinion that the defences should be repelled, and decree of approbation and valuation should be pronounced as to all the lands libelled except Over Bleloch, and that in terms of the report of the sub-valuation, striking the teinds at one-fifth of the reported value of the stock and teind jointly. Taking the facts as stated in the report, there are no grounds for holding either that the teinds of the lands in question were not subject to valuation at all, or that the valuation should proceed in any other way than by taking one-fifth of the reported and proved value of the stock and teind jointly.

I may observe that in reference to all the lands, or to most of them, the report of the sub-valuation bears that the value of the stock and teind is so and so, burdened with the feu-mails and teind silver, or some similar expression. I think that no effect can be given to these words, but that the value of the teind must be struck at one-fifth of the reported rental, without any deduction whatever. I think it quite clear on principle, that in striking teind at one-fifth of the whole of the stock and teind jointly, no deduction can be allowed either of the feu-duty paid for the lands or of the tack-duty paid for the teinds, and so it seems to have been decided by the High Commission on 28th January 1632—*Parish of Abdie*, Connell, i. 202 (2d ed.) I think therefore the summons in the present case quite rightly concludes for valuation of the teinds at one-fifth of the rent of stock and teind without asking any deduction for feu-duty or ground-annual.

LORD MURE, LORD SHAND, LORD RUTHERFURD CLARK, and the LORD PRESIDENT concurred.

The Court therefore repelled the defences and pronounced decree of approbation and valuation as to all the lands libelled, with the exception of Over Bleloch, in terms of the report of the sub-valuation, and struck the teinds at one-fifth of the reported value of the stock and teind jointly.

Counsel for Pursuer — Balfour — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders—Lord Advocate (Watson) —Solicitor-General (Macdonald)—Keir. Agents —Donald Beith, W.S.—Murray, Beith, & Murray, W.S.

HOUSE OF LORDS.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord O'Hagan, and Lord Blackburn.)

RANKIN AND OTHERS (RANKIN'S TRUSTEES) v. LAMONT.

(*Ante*, Feb. 26, 1879, 16 Scot. Law Rep. 387, 6 R. 739.)

Superior and Vassal — Entry by Trustees — Whether Casualty Payable as Singular Successor — Conveyancing Act 1874 (37 and 38 Vict. cap. 94, secs. 4 and 5).

Where trustees became infest in certain heritable property in terms of a trust-disposition and settlement in their favour under which they were to entail the property upon the truster's heirs, held (*affirming* the Court of Session) that under the Conveyancing (Scotland) Act 1874 the superior was entitled to the composition payable by a singular successor, and that the heir of the last entered vassal could not now be tendered for an entry.

The 4th sub-section of section 2 of the Conveyancing (Scotland) Act 1874 provides that the implied entry with the superior which is provided for by that Act in all cases where a party becomes infest, "shall not entitle any superior to demand any casualty sooner than he could by the law prior to this new Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

Question per Lord Blackburn—Whether the effect of that provision is to postpone the right of the superior to bring an action for payment of casualties till after the death of the last entered vassal?

This was an action of declarator and for payment of casualty by John Henry Lamont of Lamont against Patrick Rankin and others, trustees of Patrick Rankin of Auchingray, Cleddans, and Otter.

The Second Division of the Court of Session (*diss. Lord Young*) affirmed the judgment of the Lord Ordinary (*CURRIEHILL*), finding the casualty due — Feb. 26, 1879, 16 Scot. Law Rep. 387, 6 R. 739.

The defenders appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case the appellants are the trust-disponees of Patrick Rankin, who died on the 5th of March 1873. Patrick Rankin held certain land at Achagoyle of the respondent as his immediate lawful superior, and in this land the appellants were duly infest