Friday, November 6.

LOCALITY OF FORGAN.

Teind—Decree of Valuation—Surrender—Locality. *Held* that a surrender of teinds by a heritor in a former locality does not exclude challenge by the minister of the validity of a decree of valuation, the said decree having been obtained in his absence.

The question in this case was one between the minister and the Earl of Zetland in the locality of the parish of Forgan, and it was in substance this:—Whether, when a heritor has in a former locality surrendered his teinds and had the surrender sustained, it is open to the minister in a subsequent locality to challenge the valuation upon which the surrender proceeded.

It was pleaded, for the Earl of Zetland that certain objections stated by the minister in this parish to a decree of valuation produced by his Lordship, dated in 1629, were excluded by a surrender sustained in the previous locality, proceeding upon the decree of valuation objected to, and were so excluded upon the principle of *res judicata*, or at "least that of *competent and omitted.*"

The Lord Ordinary (BARCAPLE) repelled this plea, adding the following interlocutor:—"The respondent's plea of *res judicata* is founded on an interlocutor in the last process of locality sustaining a surrender by the respondent's father of the teinds in question. But no question appears to have been raised in regard to the decree of valuation, and the parties did not in any way join issue on the point. In these circumstances the Lord Ordinary is of opinion that the plea cannot be sustained. There are no averments to support the plea of homologation and acquiescence.

"The ground on which the Lord Ordinary thinks that the decree founded on cannot be recognised as an effectual valuation in a question with the present incumbent is, that it appears on the face of the document that the minister was not called, and did not appear in the valuation. In this respect the case appears to him to be identical with that of *Kirkwood* v. *Grant*, 4 Macph. 4. He thinks that the judgment in that case established, in accordance with views expressed in *Stewart* v. *Brown*, 13 D. 556, that from the earliest period it was essential in a valuation before the High Commission that the minister should be called, in order to make it an effectual valuation against his successors in the cure.

"In the view which the Lord Ordinary takes of the case, it is unnecessary to dispose of the objections stated to the competency of the Court and to the form of the decree. The document is certainly of an unusual tenor, in so far as it refers to the appointment by the High Commission of a committee of their own number. But the Lord Ordinary is disposed to read it as setting forth a valuation by the High Commission itself, not by a committee. The objector also maintains that at its date, 16th December 1629, the High Commission could not itself carry through valuations, and that they could only be led before the sub-commissioners. The Lord Ordinary thinks that from the time when, after the submissions to the King, he authorised proper valuations of teinds to be led, that duty was committed both to the High Commission and the sub-commissioners. It appears to him that this objection is founded upon an erroneous view of the results of the investigation into the early proceedings of the commissioners, which took place in the case of *Dunlop and Allan* v. *Commissioners of Woods and Forests*, 20 D. 1012. Neither does the Lord Ordinary think it a good objection to the valuation that no proof was led, the heritor being held as confessed."

The Earl of Zetland reclaimed.

FRASER and LANCASTER for him.

MONRO and BALFOUR for minister.

At advising—

LORD COWAN—The only question is the effect of the surrender by the Earl or Zetland in a former locality—that is to say, the effect of the surrender upon the decree of valuation. I am prepared to hold the decree ineffectual as a decree of valuation, because, *ex facie* of the proceedings, it appears that the minister was not called, and I hold that to be a fatal objection. But, apart from that, it is said that the minister here is barred from taking this objection to the decree of valuation by force of the plea of *res judicata*, or of "competent and omitted," or of homologation and acquiescence. On that matter I say, as regards the surrender, that that is a matter of personal right, and not of contract. An heritor is entitled to say, I surrender all my teinds, and that surrender will be final to this effect, that no objection can afterwards be taken to it in terms of the decree of valuation. But that does not touch the question—How far the decree of valuation is thereby fortified against all objection? The surrender may be good in terms of the decree of valuation, but that does not debar the minister from challenging the decree itself. There is no such doctrine as the reclaimer contends for, and the subject has been very deliberately considered. I hold that unless there has been a contest in regard to the decree of valuation there is no room for the plea of *res judicata*. *Ex facie* of the valuation, it appears that the minister was not called, and therefore it is liable to challenge at his instance. Cases of *Eddleston* and *Crail* referred to.

The other Judges concurred.

Agents for Objector—Dundas & Wilson, C.S.

Agents for Respondent—H. G. & S. Dickson, W.S.

Tuesday, November 10.

FIRST DIVISION.

PEGGIE *v.* CLARK.

Reparation—Wrongous Search and Apprehension—Police Constable—County Police Act. Circumstances in which *held* that a search of a person's house and apprehension of the person himself by a Superintendent of Police were not illegal or oppressive, the Superintendent having reasonable ground for believing that the person had been guilty of a criminal offence. *Observations* on the duties and powers of police constables at common law and under the County Police Act 20 and 21 Vict., c. 72.

Peggie, sometime a carrier in Kinross, sued Clark, Superintendent of Police for the county of Kinross, for damages on account of alleged wrongous search of the pursuer's house, and wrongous apprehension of the pursuer. The facts of the case are stated in the subjoined opinions of the Court. The Sheriff-substitute (SYME) decerned against the defender, assessing the damages at £6. The Sheriff (MONRO) reversed and assoilzied the defender. The pursuer Peggie advocated. The Lord