of a year that is allowed. I think it is only right that that fact should be noticed before your Lordships proceed further.

LORD ADVOCATE—It does not make any difference.

LORD WESTBURY—It is a mere substitution of six months for twelve months. The principle of the law remains the same.

LORD ADVOCATE—Exactly, my Lord.

LORD WESTBURY—My Lords, I have very little to add to what has been said. The Succession Duty Act attaches upon interests in possession and interests in expectancy, but the duty payable on the value of an interest in expectancy is not payable until that interest becomes an interest in possession, with this exception, that if the interest in expectancy be in the successor a continuing interest, and capable of being transmitted by will (which definition is used for the purpose of denoting interests of which the successor in expectancy has the absolute ownership) then such continuing interest becomes in reality a new succession, and makes the duty attaching upon the interest in expectancy a debt of the successor who has that continuing interest.

The question here is, whether Williamina had a continuing interest capable of being transmitted by her as her absolute property? The facts are, that she held upon an apparency; that the beneficial interest would not arise until the expiration of six months after the death of her sister Janet; that she died before those six months expired; and that she did nothing either to incur representation or to make up the title to the estate. I think it is clear, therefore, that she had no continuing interest, either in the sense of those words in the Scotch law, or in the meaning to be attached to those words under the Succession Duty Act.

Well, now, had she a beneficial interest in possession? My Lords, I think it abundantly clear, if you look at the 21st section, and take the words about the time when the duty shall arise and become payable, for the purpose of applying them by way of test or criterion as to what is the meaning of the words "beneficial interest" in the section, you must come to the conclusion that what is meant is a beneficial interest in actual enjoyment and possession. If that be so, it is clear that the apparency of Williamina never came within that category, and never was an interest of a nature to which the words "beneficial interest in possession" can be properly applied.

Upon these grounds, my Lords, which I believe are the grounds which were taken by the Court below, I entirely concur with my noble and learned friend on the Woolsack in advising your Lordships to affirm these interlocutors. Undoubtedly we felt some anxiety at first, because the learned Lord Advocate stated that this case would probably be an authority for many others. I can hardly imagine that that will be so; because the present case depends upon the combination of a set of circumstances which are very singular and very peculiar, namely, an apparency which determined within the six months during which the right to the estate of the deceased sister's property extended without anything having been done to constitute an act of ownership on the part of the apparent heir. I think, therefore, my Lords, this is a case which cannot often occur; it is governed by its own peculiar circumstances, and it will add nothing to the law as it has been already ascertained. The decision which has been come to in this case is a mere consequence of the meaning which has been attached to the words of the Succession Duty Act; therefore I have no apprehension of this being a precedent for other cases, which must be dissimilar on account of the peculiar circumstances of the present case.

LORD COLONSAY—My Lords, I have arrived at the same conclusion in this case, and I do not think it necessary to go over the grounds which have been already stated. I particularly concur in the views which have been last delivered. It appears to me that the two sections of the Act which have been referred to must be read together. It must be made clear that the interest contemplated by the statute exists, and that it exists under the circumstances in which the provisions of the statute levying the duty will apply. My Lords, it appears to me, in the first place, that the interest which the statute contemplates did not exist in this case The interest here is too limited to have applied to it the provisions of the 21st section, as to the levying of the duty. Therefore, the conclusion which the Court below arrived at, is, in my opinion, the one suitable to the circumstances of this case.

LORD CAIRNS—My Lords, I concur in the opinions which my noble and learned friends have expressed.

Interlocutors complained of affirmed, and Appeal dismissed, with costs.

Agents for Appellant—Solicitor of Inland Revenue, and W. H. Melvill.

Agents for Respondent—Grant & Wallace, W.S., and Holmes & Co., Westminster.

Thursday, March 18.

LEE AND OTHERS *v.* JOHNSTONE AND OTHERS.

Teinds—Valuation—Titular and Tacksman—Agreement. Circumstances in which a valuation *sustained*, against objections that it had been obtained in absence of the titular, and without proof of the value of the stock or teind.

The defender, Mr Johnstone, is proprietor of a portion of the lands of Over and Nether Ballialies, in the parish of Kirkhope; and the other defenders, Mr Brown's Trustees, are also proprietors of a portion of these lands, and of the lands of Helmburne, in the same parish. The teinds of all these lands were valued by a decreet of valuation of the High Court of Commission of Teinds, dated 28th July 1647, and the present action was brought to reduce that decree, and to have it declared that the pursuers are entitled to exact the teind at a fifth of the actual rental of the lands.

The Lord Ordinary (BARCAPLE) having assoilzied the defenders from the whole conclusions of the summons, the pursuers reclaimed, and, after a full argument at the bar, the Court ordered cases on the whole cause. The parish of Kirkhope, in which the defenders' lands are situated, was, along with the parish of Yarrow, and a portion of the parish of Ettrick, originally included in the ancient parish of St Marykirk of the Lowes, the teinds of which were, with various other endowments, annexed to the Deanery of the Chapel Royal, originally founded and erected by James IV. in the year 1501, under

the authority of a papal bull. It is unnecessary at present to trace the history of the deanery or its endowments, farther than to observe that, shortly after its erection, it was annexed to the bishopric of Galloway, but was, with its endowments, afterwards, by royal charter of mortification, dated in 1621, dissolved from the Crown and from the bishopric of Galloway, and erected into a separate benefice. By the same charter Adam Bishop of Dunblane received a life appointment to the deanery and its emoluments. This charter was ratified by Act of Parliament 1621, cap. 57. On the translation of this bishop to the see of Aberdeen, he was succeeded in the bishopric of Dunblane, in 1635, by Dr James Wedderburn, who at this time also received from the Crown a life appointment from the deanery, with a gift of its emoluments. This prelate being, in 1638, excommunicated by the General Assembly, went to England, where he died in exile the same year. No successor was appointed to Bishop Wedderburn until after the Restoration in 1662. In 1647, when the deanery was vacant, the action of valuation, in which the decree under reduction was obtained, was raised before the High Commission of Teinds, at the instance of the heritor of the lands, against Francis Earl of Buccleuch and the minister of the parish. The decree of valuation proceeded upon an agreement between the Earl, who was therein designed tacksman and titular, and having right to the teinds of the parish, on the one part, and the heritor, Mr William Elliot of Stobs, on the other part, whereby they agreed that the value of the lands should be in all time coming £210 Scots, without deduction of his Majesty's ease. The agreement was ratified by the High Commission, and their authority and decreet interponed to it in the usual way. At the date of the action and decree, the Earl of Buccleuch was in possession of the teinds of the parish, and his predecessors had been so for many years before. The teinds continued to be levied by the Buccleuch family down to the year 1848, and after that date by the Deans of the Chapel Royal. Since its date, the decree of valuation has been the title under which the heritors have possessed the teinds, and been the measure of the teind valuation exigible by and paid to the titular, or the party in right of the titular, down to the year 1859. It has been given effect to in all the processes of augmentation and locality since its date, and was, in 1852, recognised and given effect to in the action of disjunction and erection of the parish of Kirkhope, in which the lands are situated. It is in these circumstances that the present action was brought to reduce the decree of valuation.

The grounds of reduction were summed up thus:—(1) That the decree of valuation was obtained in absence, and without citation of the proper parties to a process of valuation, and particularly of the titular; (2) that it was procured without legal proof of the value of the stock or teind of the lands; (3) that the agreement upon which the decree proceeded was *ultra vires* of the parties, and could not form a legal basis for a permanent valuation of the teinds; (4) that the decree is null under the statutes 1661, cap. 15, and 1663, cap. 28.

The grounds of defence chiefly relied on were substantially these:—(1) that the decree was regularly and legally obtained; (2) that the titular, or the party who acted and was recognised at the time as titular, was a party to the action and agreement upon which the decree proceeded, and a consenter to the decree itself; (3) that, on the assumption that the Dean of the Chapel Royal was the true titular, the benefice at the time was vacant, and the titular could not be called; (4) that although the titular could not be called, the heritor was nevertheless entitled, under the statutes, to lead a valuation of his teinds, which should be valid if the tacksman or other party in possession of the teinds was called, as representing the interests of the titular. And that, in any view, it is sufficient to call the tacksman, or other party in possession of the teinds in place of the titular; (5) that the decree is *ex facie* regular and complete, and cannot be set aside *post tantum temporis*, except on the ground of fraud and collusion, or of unjust and inadequate valuation of the teinds; (6) that not only is the decree protected by the negative prescription, but the heritors of the lands have, by possession under the decree, acquired a prescriptive right to draw and possess the *ipsa corpora* of the teinds; (7) that the decree has been validated by homologation, acquiescence, and adoption by all parties interested to challenge.

The Lord Ordinary (BARCAPLE) assoilzied the defenders, and, on 20th February 1867, a majority of the whole Court adhered.

The pursuers appealed.

Lord Advocate (MONCREIFF) and H. J. MONCREIFF for appellants.

SIR ROUNDELL PALMER, Q.C. and NEVAY for respondents.

At advising—

LORD CHANCELLOR—My Lords, in this appeal three interlocutors are complained of, the first being that of the Lord Ordinary of the 7th March 1865, and the other two being interlocutors of the Lords of Session acting as Lords Commissioners of Teinds, and dated respectively 8th February 1867 and 16th March 1867. The action raised in this case is an action on the part of the pursuers of declarator and reduction, and the object is to establish the right of the pursuers to certain teinds in kind, as against which right the defenders assert the existence of a valuation confirmed by a decreet of the commissioners in the year 1647 as approving and ratifying a valuation then made, fixing, as they allege, for all time the value of the teinds.

The objections made on the part of the pursuers to this decreet are twofold—the first of them, however, should perhaps not be stated as an objection to the decreet, because they insist that, according to the true construction of the decreet, it in no way affects them; that the decreet is one that was made as between the heritor and the tacksman of the teinds, and that it in no way affected the titular under whom they claim, and that therefore *ex facie* the decreet does not assert or declare any right that interferes with the right which they insist upon in the present action. But they say, should the Court be of a contrary opinion, and should it be thought that the decreet *ex facie* bears to declare a perpetual right to the valuation at a settled sum, then the decreet itself is erroneous, having been made in the absence of the titular, and therefore being a decreet which can have no effect whatever upon the rights of the titular who claims a title paramount. In that case, therefore, they say they are entitled to proceed by the process of reduction to set aside this decreet so far as it in any way affects or purports to diminish the claim which they now assert.

The Lord Ordinary, in the first interlocutor complained of, has decided in favour of the defenders, and has declared the validity of the decreet. The

decision of the 20th February 1867 is an affirmation by the Lords Commissioners of Teinds of that judgment or interlocutor of the Lord Ordinary. The other interlocutor which is appealed from, of the 16th of March 1867, is simply an interlocutor concerning costs, which interlocutor follows as a matter of course from the conclusion come to in the previous interlocutor.

The first and main question in this case (which has been most fully and ably discussed before us) is, what is the true construction of the decreet? And subordinate to that arises the question whether or not the titular must be taken to have been summoned, and to have appeared on the occasion of that decreet being pronounced, or whether, on the contrary, the pursuers are now entitled to say that the titular was not so summoned, and that the decreet was therefore irregular.

Now, as regards the construction of the decreet, before entering into the history of the case, upon which it may be necessary to say a word presently, I would rather consider the effect of the decreet itself *ex facie*, and how, under any ordinary circumstances, that instrument ought to be construed, regard being had to the terms of the document itself, as we now find it preserved in the registry, and of which we have unfortunately not a full and complete extract, because certain parts of the process appear to have been lost, which, however, contain, as it appears to me, all that is material for arriving at a just conclusion as to what is the scope and object of the decreet.

The decreet appears to have been pronounced by certain Commissioners appointed in the time of Charles I. for the very purpose of effectuating a valuation of teinds throughout the kingdom, in order that proceedings might be taken subsequently for the purchase of those teinds, and for settlements to be made with the heritors in respect of them. The Commissioners were appointed expressly for this purpose, and there were Sub-Commissioners also appointed, who should, in the various districts assigned to them by the principal Commissioners, proceed in effecting the valuation, which, of course, could not be effected throughout the kingdom by the Commissioners alone. But every proceeding of the Sub-Commissioners had to be laid before the Commissioners themselves; was subject to review by them; and required or might receive their approbation.

In the present case we find the decreet itself, or rather an extract from it, in the Appendix, at page 57. It is dated the 28th July 1647, and it purports to be in the matter of a "summons raised at the instance of William Elliot of Stobs, heritor of the lands underwritten, against Francis Earl of Buccleuch, and Mr William Elliot, minister of St Marykirk, for his interest."

Now, it appears to be scarcely contended on the part of the defenders that it was otherwise than necessary that there should appear in proceedings of this character to have been present as parties summoned or actually attending three persons, namely, the heritor in respect of his interest in the lands, the minister in respect of the interest which he might have in the teinds, either stipendiary or otherwise, and the titular, in whom would be vested the ownership of the titles. Here we have the summons mentioned in the first part of the decreet as bringing before the Commissioners the Earl of Buccleuch, Mr William Elliot the minister, and Mr William Elliot of Stobs, the heritor. It is not stated, in that early part of the decreet, in what character the Earl of Buccleuch appeared, but that appears more manifestly as we proceed in reading the terms of the decreet itself. It recites that "the teinds, parsonage, and vicarage of these lands in question, which are within the parish of St Marykirk, are not yet valued, nor the true worth and avail thereof dignosied" (which, I suppose, means ascertained), "wherefore the pursuer" (that is, Mr Elliot of Stobs, the heritor) "is content that ane lawfull and formall valuation be made thereof be the said Commissioners; and for that effect is willing and ready to lead and adduce ane lawfull probation of the worth of the said lands in stock and teinds parsonage and vicarage, and, in the meantime, necessar it is that the said pursuer have warrand granted to him to lead the teinds of his said lands, this instant cropt and year of God 1647 years, finding caution for payment," and so on. Then it proceeds, at page 59, in this way, that the procurator of the pursuer produced an agreement underwritten passed between the Earl of Buccleuch and the pursuer, "subscribed with their hands, whereby they have agreed" (that means fixed, I suppose) "upon the constant worth of the teinds of the lands underwritten, and desired the said Commissioners to ratify and approve the same." "And the same Earl of Buccleuch, appearing by his procurator, and consenting thereto, and the said Mr William Elliot, minister, being oftentimes called and not appearing, the Commissioners having heard and seen and considered the agreement produced, and therewith being well advised, they have ratified, allowed, and approved, and, by their presents, the said Commissioners ratifies, allows, and approves the said agreement produced, whereof the tenor follows."

Then the agreement itself is set out, dated 26th July 1647, whereby "It is agreed between the Earl of Buccleuch, on the one part, and William Elliot of Stobs, on the other part, that the teinds in question shall be in all time coming two hundred and ten pounds Scots, with a certain deduction of His Majesty's case, whereunto the said Earl of Buccleuch, as tacksman, and the said William Elliot of Stobs, as heritor, of the said lands, have agreed by their presents, written by so and so advocate, subscribed the day and year afternamed." Then, the rest of it, I think, is merely formal. We have, in fact, the approval of the Commissioners of this agreement so set forth. And the question is, first, what is the true construction of that agreement, independently of the question afterwards raised as to whether or not the titular was in fact a party to the proceeding?

Now, as regards the construction of the decreet itself, I confess it appears to me, having carefully perused the several opinions given by the learned Judges in Scotland, between whom there appears to have been in many respects considerable difference of opinion, and the reasons assigned for those opinions, that it is so impossible to construe this instrument as bearing *ex facie* any other meaning than this, that this is an arrangement come to between the heritor and the Earl of Buccleuch—we shall see presently in what capacity. As far as words go, it is an arrangement that there shall be between the heritor and the Earl of Buccleuch what is called a constant or fixed valuation of the teinds, and that that valuation shall be for all time coming—that is to say, a fixed valuation to have perpetual effect, and not to be limited in any way in its extent, as far as the words go, unless we find something else on the face of the document which

would induce the Court to say that a limitation ought to be placed upon these otherwise apparently clear and explicit words. And the learned Judges who pronounced their opinions on this matter have in one or two instances pointed out (Lord Deas particularly has done so) that there is a marked distinction in the frame of this decreet as compared with other decreets, which did affect to limit the period for which the valuation should be made, and which are expressed to be a valuation only during the time of that limited interest, where a limited interest occurred as in the case of a "tack" which would endure only during the tacksman's interest. That where that has been intended the intention has been expressed, and certain regulations have been made in some cases with reference to payment of interest on the valuation for a limited period. The whole object and scope of these valuations in themselves being that a sale should take place, as pursuant on the valuation, the *prima facie* view of any decreet of this description would appear to be this, that the object of the valuation was to obtain an entire and complete valuation upon which sales could be made, though in certain cases such valuation for some reason or other could not be effected. And in such cases exception was made, and, exception being made, it was expressed on the face of the instrument, namely, that only a limited and not a complete interest for all time coming was that which was within the purview of the Commissioners in making the decreet. I think in only one instance has anything apparently to the contrary been pointed out. I mean in the case of *Easter Glens*, upon which I must say a word or two presently.

The next point is, Upon the face of the decreet, who appear to have been the parties it it? There can be no doubt about this. We have not the summons, and are not able therefore to say precisely who were summoned beyond those who appear on the face of the instrument, but we do find undoubtedly upon the face of the instrument an agreement set out as between the parties who were brought before the Commissioners, those parties being Mr Elliot of Stobs and the Earl of Buccleuch, and we have to look to the agreement which the Commissioners affirm to see in what character the parties who asked them to affirm the agreement appeared before them. Those who appeared before them produced an agreement, and they must be taken to have come before the Commissioners in the character in which they describe themselves in that agreement. Mr Elliot describes himself as heritor, and the Earl of Buccleuch is described as being "tacksman and titular," and having a right to the teinds of the parish. There is no controversy therefore whatsoever that, rightly or wrongly, on the face of the instrument he describes himself as being both tacksman and titular, and as having a right to the teinds of the parish. And we are asked to do one of two things, either to say that that is altogether an erroneous assumption on the part of the Earl in assuming and claiming the right of titular, when in effect he was only tacksman, or what is a much more reasonable proposition, arising on the face of the decreet itself, to assume in reading this decreet that this description of the Earl in the agreement means no more than that he was tacksman, and *qua* tacksman was also titular. I call that the more reasonable view to suggest, because I observe that the Lord-Ordinary in the first instance, although on the whole taking the views which the defenders have taken in this controversy, does favour in some degree the interpretation which the pursuers in the agreement before us have based upon those words, namely, that the description of "titular" in the agreement means simply titular *qua* tacksman.

Now, in the first place, one is struck with this observation at once which arises upon such an argument, namely, that a double description is adopted, although it seems utterly unnecessary and superfluous in every way, if the single description was all that was intended to be effectual. The Earl of Buccleuch is described as tacksman, which would be perfectly sufficient if the pursuers were well warranted in their construction of this instrument, namely, that it was intended to be only a valuation during the period of the tack as between the heritor and the tacksman. In that case there was no necessity for any further description, and the introduction of the two terms "tacksman" and "titular" would simply amount to a description which would be in itself superfluous, the one description of "tacksman" alone being adequate to all that would be necessary for the purpose of settling the arrangement as between the heritor and the tacksman, and the introduction of the term "titular" having no effect but to introduce confusion into the agreement.

But there is another reason for holding that in this description the Earl of Buccleuch intended to describe himself as titular, and it is this. It has been strongly pressed upon us that for these decreets it was absolutely necessary that the titular should be present, and I think indeed that has scarcely been controverted by the defenders in their argument. A suggestion was made which prevailed to a certain extent in the minds of some of the Judges in the Court below, especially in the mind of Lord Curriehill, that although it might be necessary, or at all events proper and expedient, to have the titular present at the time of settling the valuation which was to affect his rights, yet the Commissioners did not act necessarily with all the formalities of a Court until subsequently when their constitution was changed by the Statute of 1707, and that therefore, although it might be right and proper to have the titular present, it was by no means so essential as that his non-presence would vitiate a decree which might be made by the Commissioners in pursuance of their powers, regard being had to the circumstance that they would not necessarily be called upon to act with all the formalities of a regular tribunal dispensing justice.

I confess, though I say it with all humility, after reading the able judgment of Lord Curriehill, I should, in my own judgment, strongly incline to the argument of the pursuers, that a decreet of this description could not prevail unless the persons to be affected by it were present.

It is so fundamental a principle in the administration of justice that all parties to be affected by a decree or decision come by a tribunal should have an opportunity of appearing before it, being summoned, or should actually appear before it, that I can scarcely think that it can be contended successfully that the decreet could be upheld unless the parties interested were present.

Now, construing the instrument as it appears before us, and looking at the terms of the decreet, without looking further into the history of the case, a strong argument surely arises upon that very circumstance that it is necessary to have the titular present, for holding that the Earl of Buc-

cleuch was that which he described himself as being, namely, as being a person entitled to appear before the Commissioners, and whose appearance justified them in coming to the conclusion that they might make a full and complete and permanent valuation. Because I proceed thus in my construction of the instrument—I say, first, taking the words of the instrument, they import a perpetual valuation for all time coming.

Secondly, I say that the Lords Commissioners must have been held to have been aware of the duties imposed upon them, and the mode in which those duties ought to be carried into effect, and I must suppose them to have been fully and perfectly conscious that they could not bend the rights of an absent party, and make a perpetual valuation as between persons who did not represent a continuing interest, and that we must therefore come to the conclusion that they must have satisfied themselves that they had before them the proper parties unless it should appear manifestly and clearly upon the face of the instrument that those parties were not present.

Now, I agree with the suggestion of the Lord Advocate, in his reply, that where you have an instrument before you purporting to be a formal and solemn instrument, as to which, from its date, you would be bound to hold all to be rightly done that was necessary to be done, the proposition of your so presuming in respect of the instrument on account of its ancient date will not include any formalities which appeared distinctly and plainly upon the face of the instrument to have been omitted. For instance, had we had the summons here containing the names of the persons who were summoned, being only two, we could not have concluded that the third person, who ought to have been present in order to give the decreet validity, was present, however remote might have been the date of the instrument, and whatever time might have elapsed since the decreet was pronounced. You must take a formal omission in the summons, if you find that there is such an omission, as conclusive evidence that none but the persons who appear on the face of the instrument to have been summoned were there; but we have not that instrument, we have only the decreet as it stands before us, and on that decreet we find the Earl of Buccleuch appearing before those Commissioners in the two capacities which I have described, namely, as tacksman and titular. Thereupon, it appears to me that we are justified in holding (as Lord Deas appears to have held) that having here an extract which is in itself imperfect, as not supplying us with the summons and some other particulars, and finding upon what we have here that which describes the persons who ought to have been summoned, finding them described as being present before the Commissioners under descriptions which, if rightly used, would indicate their character and position, and finding the Earl described as titular in that instrument before us, we cannot infer that if we had had the summons itself here we should have found any defect in it, whilst we find upon the face of this extract that which ought to convince us that no such defect existed, and that the person who appeared before the Commissioners in the capacity of titular was summoned before them in that capacity, and that all that proceeded before them, in respect of the Earl's interest, either for or against the Earl (whichever way it was), proceeded upon the footing of his appearing before them in the capacity in which he is described in the instrument which has come down to us, namely, that instrument of agreement which was ratified and confirmed by the Commissioners.

Under these circumstances, it appears to me impossible to hold that this description of "tacksman and titular" can be read as "tacksman" exclusive of the additional description of "titular," but that it must be taken to describe him as being titular as well as tacksman, unless indeed we could find some authority for that purpose in the other instruments of about the same or a somewhat later period which were produced before us, and which are to be found in the appendix. The case principally relied upon on this subject was the case of *Easter Glens*, in which certain points appear which afford no doubt a ground of argument,—though, I think, not a conclusive or satisfactory argument,—for the pursuers upon this particular head, namely, that a man may be described as a titular who is only a tacksman, and that a decree may purport to be made in perpetuity with regard to the interest of a person so described as "tacksman and titular," when it appears from other parts of the decree that he was not titular in any other respect than as tacksman, and that the decree, though so worded, was a decree which ought only to affect substantially the interest as between the heritor and tacksman in that particular capacity. But, on carefully examining that particular decree, I think any one will see that it was a case in which a vast amount of controversy existed as to who was and who was not the owner of the teinds. It appears to have been a case in which a person described as "John Lennox the younger, titular and tacksman," had been setting up a variety of distinct claims in respect of these teinds, which claims had been opposed—and very vigorously opposed—by Lord Strathallan; and, accordingly, in consequence apparently of this opposition of Lord Strathallan, who claimed to be titular of the teinds, but whose claim to be such titular was disputed, as appears upon the face of the decreet, although the decreet purports to be a valuation by agreement (and it is by agreement in this case), and although that agreement does speak of it as being an agreement for "the true valuation and constant rental of stock, parsonage, and vicarage teinds of the said Adam, his £10 lands of Easter Glens," and speaks of it as a valuation made of a certain worth yearly, "in all time coming;" yet, when that valuation is affirmed, we find in the decreet itself a reservation which is most important, because, after having said that there is this valuation for all time coming, there is this conclusion in the decreet, "reserving the Viscount Strathallan's right after the expiry of the tack and prorogation, and to quarrel the agreement before the Judge Ordinary, as accords of the law." Then we find that Viscount Strathallan has also asserted that there was no title whatever in John Lennox in any capacity whatever to the teinds. The answer to that was, well, he had a title, because if he had no other title, at least he had title as tacksman, the tack having been prorogated in the year 1618, as stated at the bottom of page 107 of the joint appendix.

The result of all that controversy was this, that here was John Lennox setting up rights vigorously which were as vigorously controverted by his opponent Lord Strathallan, who succeeded to this extent, that the decreet, which purported to be a decreet as between the heritor and John Lennox,

was nevertheless made expressly subject to all his rights to the end of the tack, and also all his rights to quarrel with or dispute the question with regard to the title of John Lennox in any way to any interest in those teinds which were the subject of that particular controversy.

That being so, a precedent of that peculiar and singular nature being the only one which is produced in which anybody is called "tacksman and titular" when he was tacksman only, I think, looking to the difference between that decree and this—the one reserving the rights of the third person the titular intact, the other being without any reservation—the one showing a controversy between the parties as to who was and who was not titular, the other (being the one which we are now considering) giving no indication whatever of any such controversy,—that precedent tends rather to confirm than otherwise the conclusion which one would be inclined to draw upon the face of this instrument, namely, that it was that which it purported to be, a continued valuation for all time coming between the parties that it purported to deal with, namely, between the heritor on the one hand, and him who was tacksman and titular on the other.

Now, if there had been any doubt that by the law of Scotland a person could be both tacksman and titular, the case would have been wholly different, but it has scarcely been contended before us on the part of the pursuers, and there seems to be no doubt whatever that by the law of Scotland a person might fill both those positions—that a man might hold under his charter a complete title to the teinds, and yet at the same time, in case of that grant being in any way defective or insufficient, he might fall back upon the minor right which he might hold as tacksman; and Lord Deas, in the reasons for his judgment, mentions a case of *Lord Fife* in which that state of circumstances actually existed, in which he claimed and was held to be entitled to claim in the double character of tacksman and titular.

That being so on the face of the instrument, we are then invited to consider the extraneous circumstances of the time, and we are told in effect that it was impossible that the Earl could be titular at this time, regard being had to the circumstances which existed, and it is contended that the expression "titular" is ambiguous on the face of the decree, and that it is at least open to the pursuer to explain that description of "tacksman and titular," by showing what the Earl's position really was.

Now, I apprehend that extraneous circumstances cannot get rid of the description which we find in the instrument, unless we can find in those extraneous circumstances something which would induce the Earl to describe himself as that which he was not. It is not enough to show that there may be difficulties or doubts as to whether or not this title existed, regard being had to all the historical circumstances of the case, but there ought to be shown something at least so clearly and completely conclusive upon the subject as to induce one to say that it is impossible to put any other construction upon that instrument than that of his being titular solely and entirely in his character of tacksman. Now, it does not appear to me that the circumstances in this case can be regarded as amounting to anything like certainty in that respect.

The circumstances are very singular. I have taken a full note of them all, but I shall run through them extremely briefly, all that I mean to say being capable of being compressed in a very short compass. The circumstances alleged in the pleadings are extremely singular, inasmuch as they by no means set out a clear title in anybody whatever at this date of 1647, and the condescendence on the part of the pursuers asserts a variety of facts which are certainly of very remarkable character during that disturbed period. It begins by stating the foundation of the collegiate body of the Chapel Royal of Stirling, which seems to have been founded originally by James the Fourth of Scotland. It then proceeds to state the confirmation of the foundation of that chapel by an Act of Parliament in 1606, which declares the title of the Crown to the whole of the possessions which were annexed to the Chapel Royal, but which also refers to the donation which had been made to the collegiate body by the Crown of the tithes of this parish and numerous other parishes, and it then proceeds further to say that the Crown nevertheless (which is rather a singular circumstance, after having apparently made a grant of the teinds in question to the Chapel Royal), made a grant of the teinds to one Gib for a certain period, and then afterwards they were again more immediately connected with the Deanery of the Chapel Royal, and afterwards they became vested, first, in the Bishop of Galloway (during his life I think), and afterwards by several instruments they became vested, first in the Bishop of Dunblane, and then, upon his being transferred to another district, and another bishop coming into his place, in the succeeding Bishop of Dunblane, and ultimately they became vested either in the Bishop of Dunblane as the Dean of the Chapel Royal, or in the collegiate body. But whichever view of the case may be taken, both the bishop and the collegiate body were deprived of their title, and of their existence, as far as they could be deprived of it, by the proceedings which took place anterior to this valuation, during the troubles which occurred in Scotland. All these proceedings afterwards were swept completely away, and therefore during this period, although those bodies were not recognised bodies, they were in the eye of the law, I presume, to be taken as existing bodies, holding all the rights which had been vested in them anterior to their irregular deprivation of those rights; but the pleadings are very imperfect and uncertain in the statement of these matters. And, finally, after bringing the matter down to the Restoration, when, as they say, the bishop being restored, and Episcopacy being restored, and the collegiate body being restored in Scotland, one would suppose that the former rights would be asserted to be revived; but afterwards comes this singular statement—"at the Revolution in 1688, the teinds and the old patrimony of the Chapel Royal reverted to the Crown as *bona vacantia*," a very odd kind of expression, the previous condescendence having stated that "no successor to Dr Wedderburn in the Deanery was appointed until the Restoration of the Stuart dynasty after the usurpation.

From the Restoration, however, until the Revolution in 1688, and final establishment of Presbytery in Scotland, the office and emoluments of Dean of the Chapel Royal were held by the successive Bishops of Dunblane during that period. After the appointment of the Bishop of Galloway in 1615 as aforesaid, and while the Deanery was held by him and his successor the Bishop of Dunblane,

the Establishment, as originally founded, was in a great measure restored, and in particular prebendaries and other inferior members of the College were regularly appointed by royal presentations, and maintained out of the emoluments of the benefice.

Those two articles, although I have read them through several times, I confess convey no clear or definite or precise idea to my mind, but only seem to me to represent that everything was in a state of confusion during that period.

The object of the representation, I take to be this, to show that everything being confused it was not supposed that during that period the right, whatever it was, was in the Crown rather than in any one else, though that itself is rather thrown into doubt by the ninth condescendence, which I have read, in which it is stated that at the Revolution in 1688, the whole reverted to the Crown as *bona vacantia.* In other words, there certainly is no distinct and definite title asserted in these pleadings as between the period (which was 1638, I think) when Episcopacy was abolished, and this collegiate body in a sense dissolved.

Between that period of 1647, when this decree was made, and 1688, we have nothing clear or distinct whatsoever to show us in whom the pursuers assert the title to be, whether in the suspended and semi-animate College, or whether in the bishop, in the state of suspense which then existed with reference to the bishopric (though I believe the last bishop who held this grant is said to have died anterior to the decree of 1647), or whether in the Crown, there is nothing precise or definite alleged.

In that state of circumstances, why are we to hold that it is so clear and manifest that the titular was not the Earl of Buccleuch? What is there that should induce us to say that that description may be treated as being a doubtful description, and as having been inserted merely as describing him *qua* tacksman, and that we ought to look to the title by which alone, it is said, that he was known and recognised, namely, as a tacksman in respect of his interest under the tacks which had been granted to his predecessors in the title, and to himself?

Now, his actual title as tacksman is set out thus, that since 1606 his predecessors had had the tack of those teinds, and at the time in question, no doubt, the Earl of Buccleuch had a tack which had only some sixteen or seventeen, or possibly twenty, years to run. In that state of things the valuation is made. I need hardly pause for a moment to say, in addition to what I have before observed, that the terms of it, being "for all time coming," that expression, now that we are looking to the extraneous circumstances, would be still more inconsistent with the extraneous circumstances than the construction I have given, namely, that it means what the words imply, because we should have to hold that those Commissioners, who must be supposed to have known what duties they had to perform, and what the interests were with which they were dealing, used that expression in respect of an interest of a very few years' duration subsequent to the decreet.

But then, further, the Earl being there described as titular, what is there which ought to prevent us, with reference to a decree now upwards of two hundred years old, and with reference to circumstances so confused, according to the statement of the pursuers themselves, that they cannot clearly enunciate the exact title upon which the teinds were held; what is there, I say, to prevent us from applying that doctrine which is invariably applied to instruments of long date, more especially where the enjoyment appears to have been in no way inconsistent with the instrument, namely, the presumption that all was rightly done—that all that could be in anyway according to law achieved in support of the decree should be presumed to have been achieved, and that, whether you look to the parties to the suit, or whether you look at the conclusion that was come to, the parties should be presumed to be the parties which they are described to be, and the conclusion that was come to should be adjudged to be founded upon anything which can be presumed in reasonable intendment of the law to have existed as the foundation of that conclusion which was come to?

Now, as regards the position of the Earl of Buccleuch, that he could be both tacksman and titular is not disputed. Then why are we not justified in saying that in the state of confusion which existed at this time with reference to the title, the title might, for very many good reasons which might be suggested, have been vested in him at this particular conjuncture? It might well be assumed that those persons whose titles were in abeyance during that period, and who might have hopes of their being again revived and recognised, might make over their title to the Earl, if it were only for the purpose of having this valuation, which was for the benefit of all parties at that time, carried into effect, that they might make over to the Earl all such interest as would be necessary to constitute him perfect titular for that particular purpose.

There is nothing at all unreasonable in such a suggestion.

Again, if it were vested in the Crown, as seems to be rather hinted or suggested than averred, there is nothing to prevent us from presuming a grant from the Crown, either for that or for any other purpose which might have existed at the time, but which, owing to the remoteness of the time we can only now presume. We cannot fathom the depths and obscurities in which the whole matter of title is involved, but we are fairly justified in presuming that the title was given to the Earl of Buccleuch, if only for the purpose of having this complete valuation made.

It appears to me, therefore, that upon the face of the decreet you have that which purports to be a complete valuation for all time; upon the face of the decreet you have all the parties to that decreet. You have the minister summoned, though he does not appear. You have the heritor, and you have the person who is both tacksman and titular; and, having all those parties, the valuation is made.

I do not pause for a moment to notice the question, whether or not the valuation was properly made in respect of its being an agreement, and not an actual valuation? Both authority in other cases which have been cited and reason would induce one to say that there is no reason at all why, when a valuation is being made, the parties who are parties to the valuation, and the only persons interested, should not settle their own rights by determining the valuation otherwise than by formal proof. Nor is it any objection to such an arrangement that one of the parties who may be supposed to have had some interest in such a valuation, the minister, was not present at the time. He was summoned. It was competent to him to appear in the Court and to know all that was

done, but it is not competent to him to object to the evidence with which the Court are satisfied. He must take as the valuation that which everybody concerned says is the true and proper valuation. As regards the valuation, I may further observe, what is not unimportant with regard to the whole effect and meaning of the decreet, that neither was it asserted by any one at that period, nor is it now asserted by the pursuers (though there are certain pleadings to that effect which are not supported by any evidence whatever), that at the time when this valuation was made it was an imperfect and improper or insufficient valuation. There is nothing at all, as it appears to me, to lead us to any such conclusion. Therefore, assuming, as I do, that the Commissioners must be taken to have known what duty they had to discharge, and to have known who were the proper parties to have before them, when we find that the persons before them are described in terms which indicate that they are the persons in question, namely, the tacksman, the heritor, and the titular—that all those appear upon the face of the decree—and that during the long period which has elapsed since the decree was made, in 1647, the enjoyment has never in any way been contrary to the decree (something more than that indeed might be said in its favour), I apprehend that we are bound to come to the conclusion that the decree was valid in every respect, and was made between the proper parties, and therefore should be binding upon those who raise the present controversy.

Then there arose another question, and that is the only other question to which I shall advert, as to how far the present pursuers, claiming under a title which is not the title of the person in respect of whom the decree was made—that is, not the title of the Earl of Buccleuch—are to be bound by negative prescription in respect of this decreet. I apprehend that, taking them to have in any way knowledge of the decree, it is not necessary with respect to negative prescription, as it would be with reference to homologation or confirmation, that they should have done any act with intent to confirm, or any act from which that intent must be presumed; but it is quite sufficient that they must be taken to have had notice of the existence of the decree; and if they had notice of the existence of the decree then, from that time at all events, whatever other question might arise in the case, the forty years would commence running, and the negative prescription would arise.

Then had they or not notice of this decree? It appears to me that the reasons upon which Lord Deas rests his conclusion of their having had notice of decree are unanswerable. The decree itself has so far been acted upon that, as far as regards the Earl of Buccleuch, those who succeeded him as tacksman continued from that time down to the time when the tacks which were renewed from period to period were finally put an end to, and during that period several proceedings took place in what is called process of augmentation and locality with reference to the teinds. Now, I apprehend it is not necessary to be shown that those under whom the pursuers claimed had any special interest in the matter, provided they had so much interest as to be summoned to and to be present at those various processes. Then, beginning from the year 1733, we find at page 22 of the revised statement of the defenders a distinct averment, which appears to be in no way in controversy, but is taken as established in the judgment I have referred to, that "in the subsequent process of augmentation and locality which depended in the year 1733, and previously, the said decrees of valuation, including the decree under reduction, were produced and founded on by the heritors in right thereof, and were judicially recognised and given effect to, the teinds of the lands therein contained being dealt with and localled upon as lawfully valued by the said decrees, while those heritors who had no decrees of valuation were held as confest on proven rentals." The Deans of the Chapel Royal, as donatories of the Crown, were called and appeared as parties in said process, and took an active part in the proceedings and discussions which took place with regard to the state of the teind valuations.

Whether they took an active part or not we do not know. We probably cannot now know much as to what the precise amount of activity on their part was in 1733. But the part of that statement upon which I rely is, that they appear to have been summoned, and to have appeared as parties in the process. Therefore, on various occasions,—on all occasions indeed when those processes took place,—the decree (which, as I ought to have observed before had been registered), was produced and was acted upon.

But further than that, I think the reasoning of Lord Deas, founded upon the subsequent renewals of the tacks, is worthy of very great consideration. When a tack of this kind is renewed, with an increasing rent, and with an increasing grassum or charge in respect of the renewal, are we to suppose, —is anybody justified in calling upon the Court to suppose—that these renewals of interest are made without any inquiry into the circumstances of the property with which the titular is about to deal? It would stand in this position,—Supposing that by reason of some question or another upon which there might be a dispute, an interest is claimed in certain land, as being held under a particular lease, at a fixed value for a certain time, and that afterwards upon the renewals of that lease the value is to be set upon it for so many years to come, and that the landlord renews that lease from time to time, having such an agreement in respect of part of his land, and having no such agreement in respect of the rest of his land. The renewal is made, the value is ascertained, and the fine or charge is fixed. Could the landlord afterwards say, "During all that time I knew nothing about the rent at which you were holding, I had not the slightest notion what the amount of the rent was at which those several tenancies which existed in the land were calculated. I took my fine, and I increased my rent just at hazard, as I might think best, or most expedient for myself, without taking into consideration the question what rent any particular portion of that land might bear." I apprehend that that is a presumption which no landlord would be allowed to make. I apprehend that that would not be a presumption which the Court would allow him to make in his own favour, and to say, "Though true it is, that for all this period of time I have allowed certain lands to be held at a particular fixed rental, less than its real value has become in subsequent years, though I have made all those renewals, I never knew anything about it. I did not at all know that that portion of land, though it is just as valuable as all the land around it, was held during so many years at a lower rental than the rest of the land around it."

Therefore I apprehend it must be presumed that

persons like these titulars in dealing with their property must have known the fact that there was a part of it which did not bear the same proportionate value as the adjoining part of it—that is to say, as the part of it which was not subject to the valuation, and did not bear a fixed value. The Lord Advocate, in his reply, entered into reasonings to show that they did get the whole value as if no part of it had been held at the valuation, but the whole had been held as unvalued teind—and his contention was, that they having got the full value, we have no right to suppose that they were aware that any part was held at a less rent. Now, from what I find in the judgments of some of the Lords of Session there appears to have been at one period a gap of some eight or ten years in which there was no tack at all existing, during which time it must have come to their knowledge whether they received the full value or not. But without founding myself upon that point, which I confess I have not been able to make out very clearly from the instruments before me, still I do find that at various periods when the land was relet at an increasing value, they relet these teinds at a fixed fine. I hold that those persons who let their land from time to time at increased fines must have it presumed against them that they ascertained what the value of their property was, because upon no other principle can one understand why any increase should have been demanded, or why any difference should have been made in the grassum as well as in the rent itself.

Under those circumstances, it seems to me that we have clear proof here of the knowledge of the existence of this valuation; and if there be clear proof of the knowledge of the existence of this valuation, of course the negative prescription would run, and it would be impossible to contend against the terms of this decreet, the terms of which appear to me, as I have said, to be conclusive of the controversy between the parties.

I have not given any mind to the question of confirmation or homologation, which may be a more difficult question, because the law of Scotland appears to be in that respect the same as the law of England. I apprehend that it cannot be disputed that not only must homologation be with full knowledge of the right, but the act done must either be an act done with the intent and view to confirm the right, or an act so necessarily in its tendency evincing an intention to confirm that, that intention is inferred from the character of the act which is performed. I do not think it necessary to enter into that somewhat difficult question. It appears to me that the decreet was effective, and that that decreet, made at that distance of time, has now completely bound the rights of the parties, and prevents their questioning or disputing it.

Therefore I shall move your Lordships to affirm these several interlocutors.

Lord Westbury—My Lords, this is a proceeding of great interest and great importance for the owners of land in Scotland. Your Lordships are called upon to rescind or to refuse to give effect to a quasi-judicial proceeding that took place 220 years ago. You are called upon to refuse to give it that interpretation and that validity which it has been acknowledged to have as giving a title to the enjoyment of land, and under which, in fact, lands have been held, disposed of, transmitted, and enjoyed, without interruption, for more than two centuries. Now, I know no greater obligation that lies upon a Court of Justice than that of supporting long continued enjoyment by every legal means, and by every reasonable kind of presumption. And I dwell more particularly upon this obligation to presume everything that can be reasonably supposed to have existed in favour of long possession, because I do not find that principle quite so prominent in the judgments in the Courts below as I could have desired to have found it.

My Lords, the judgments in the Court below, when they refer to this head of judicial decision, rather run off into the conclusion that the action is barred by negative prescription. The difference is very great. Negative prescription proceeds upon the foundation of the illegality, and the imperfect obligation created by the thing that is challenged; but the doctrine of presumption goes on the footing of validity, and upholds the validity that ought to be assumed by supposing that everything was present which that validity required. The great principle *omnia præsumuntur a judice rite acta* is the principle that ought to be observed, and not the ground that the thing itself is challengeable, but that the challenge is cut off and negatived by prescription.

The proceeding in question was a quasi-judicial decree in the year 1647. The original registers of these proceedings were destroyed by fire in the year 1700, but a remedial statute was passed in 1707, which created a special register for the extracts of the decreets that had perished, and gave to these extracts, when registered, the same validity as the original warrants would have had.

First, therefore, with regard to this decreet, the extract of which only we have, we are not to impute to it the absence of any necessary formality. We may well assume that that formality would have been found to have existed if the original decreet had been preserved, and that the absence of the formality may well be accounted for by the fact that we have nothing more than an imperfect extract of that original decreet.

My Lords, the first objection which is made to this decreet is, that the owner of the teinds, "the titular" as he is called in Scotland, does not appear to have been called in the proceeding.

My Lords, I cannot for one moment admit that this decreet is to be judged of by the same rules which may be applied to the records of judicial proceedings; neither can I admit that it is at all to be inferred that the true titular was not called in this proceeding. I mention that particularly, because although, as I shall presently endeavour to show, these observations are not necessary for the determination of this case, yet I desire to have it understood that I for one should by no means be willing to accept, as a conclusive objection to the validity of a decreet, the fact that the charging of the titular does not appear clearly on the records of the proceedings. It by no means follows that they may not be assumed to have been done, although the fact that it was done is not entered upon the record of the proceedings.

But in the present case the objections that are made on this head are made upon two grounds,—First, upon the construction of the decreet; and secondly, upon the objections to the agreement extrinsic to the decreet itself.

Now, first, with regard to the construction of the decreet, it is said that it is manifest that the Earl of Buccleuch, who was the acknowledged tacksman of the teinds, was not there present in the character of titular; and that the words which occur in

the agreement which is embodied in the decreet, and to which the authority of the Commissioners is interposed, must be read as stating that the Earl of Buccleuch was a party to the agreement as tacksman, and *ex eo* nominee as titular.

My Lords, I can by no means accept any such interpretation; the words must have their simple meaning ascribed to them. Tacksman is one character and titular is another character, and the superaddition of titular to tacksman must, in conformity with every rule of construction, be held to denote that the Earl was there present, and acting in the agreement, not merely in the character of tacksman, but also in the additional character of titular. And that might well be—for it by no means follows as a proposition of Scotch law, that if a man be tacksman he cannot also be titular—that is a notion, founded probably upon the notion of English lawyers that the tack or lease would merge in the reversion, but that is by no means the rule of the Scotch law, the two legal characters and positions of ownership of tacksman and titular may well coexist in one and the same person, and the identity of the legal effect of each be preserved without their being injured by being brought into contact with one another.

It is then said that it is quite plain that the agreement ought to be construed as an agreement of a temporary character. It is impossible so to construe it consistently with the language of the agreement. The agreement purports to be an agreement to last for all time coming. That is the character which it ascribes to itself; that is the character in which it was received by the Commissioners; that is the character and effect of the agreement to which the authority of the Commissioners and their decreet are interposed. We have, therefore, a proceeding in which this agreement was taken as an agreement to last for ever, and in that capacity it was received by the persons exercising the duty of examining it, and the duty of giving it a quasi-judicial character, and with that view, and as having that force and effect, they do decree that it shall have, in truth, that effect in all time to come.

Then we are told that it was impossible that the Earl of Buccleuch could have been titular. And it is upon the supposed proof of that impossibility that we are called upon to reduce the agreement, and if we do not utterly rescind it, to give it the limited construction of being an agreement of a temporary kind.

My Lords, that is an undertaking on the part of the pursuers which it is impossible for any man to discharge. It is impossible for the pursuers, or for any man, to prove that the Earl of Buccleuch had not obtained, even if it was only *pro hac vice*, a grant of the titularity, or a delegation from the titular to represent the titular in this proceeding. And in conformity with the principle and rule of legal construction to which I have already referred, I should have no hesitation in declaring myself under an obligation to assume that there had been a grant of titularity validly made to the Earl of Buccleuch, even if I were also obliged to assume that the Earl afterwards made a surrender of that grant in order to lay a foundation for the subsequent grant which appears to have been made by the Crown. A presumption of that kind would be much less violent than other presumptions which have been made both in the law of England and in the law of Scotland, and it is a presumption which is required by the reason of the thing, and by the circumstances of the case, because, if you find a proceeding which has been accepted and fully recognised as having entire legal validity for a period of two centuries, you are compelled by that fact to arrive at the conclusion that the proceeding was unchallengeable; and then, if you are asked to show how it became unchallengeable, there is no difficulty in pointing out a legal mode of proceeding that would have given it that character, and which ought to be presumed as a thing that was possible. My Lords, these are the objections that are made with regard to the construction of the decree.

Then it is said, in addition to this, that the decree is not only bad on the ground I have mentioned, but that it is bad also upon another ground, namely, that it did not proceed in the legal and required mode of taking evidence of the value of the teinds, —in other words, that an agreement between the parties ought not to have been substituted for evidence of the value. Now, this is an objection which (independently of everything else) is incapable of being made by those who do not even aver or attempt to prove that the valuation given to the teinds by the agreement in the year 1647 was less than the actual value. The £210 per annum Scots, which is the valuation given by the agreement, is not attempted by the pursuers to be challenged on the ground that it was less than the actual value of the teinds. It is impossible, however, to hold that there is any validity in this objection, because the industry of the parties has collected together a great number of instances of valuations of this description, proceeding not upon testimony, but upon that which supersedes testimony, namely, the agreement and confession of the parties. And it would be impossible therefore to hold that a valuation founded upon agreement was not a valuation upon legitimate testimony,—a resting upon that legitimate confession which is superior to the necessity of testimony.

It is unnecessary, therefore, if we take this view of the subject, namely, that the thing had validity, and must be deemed to be complete in all legal requirements, to advert to the minor ground, which would exclude it from being challenged even if it were supposed to be objectionable, but that minor ground would be quite sufficient for our determination. And undoubtedly it stands forth in a manner most intelligible. My Lords, this decreet, as I have mentioned, was recorded under the remedial statute of 1707, in the year 1733. That appears to have been done at the time with reference to a proceeding of locality and augmentation of stipend which took place in the year 1733. It is quite clear that either the Crown itself, or at all events the donators of the Crown, were parties to that proceeding. It is abundantly clear that the valuation itself must have been used or adverted to in that proceeding. The donatories therefore, that is the grantees of the titular, had, in 1733, abundant proof that this decreet of 1647 was relied upon as a living and valid thing—not as a thing that was defunct or expired, but a thing which fixed the existing valuation of the teinds, and was treated by the heritors as the title-deed of the heritors, by which the teinds had been conveyed to the heritors in consideration of the estate being charged with a commuted money charge instead of the teinds themselves.

There are several other proceedings of subsequent dates all pregnant with the same conclusion. They are all occasions on which the decreet of 1647

was appealed to as a thing of force, and upon which the heritors could rely. It was therefore on these occasions brought home to the knowledge of the donatories that there was this instrument set up against their title. And if they did not acquiesce in the meaning attributed to it, it was their bounden duty at once to challenge it and attempt to set it aside. That thay have not done (I advert to this, not so much for the sake of getting up the negative prescripion as for the purpose of using this conduct, and these acts, and this acquiescence, as a confirmation of the justice and reasonableness of the great presumption which I draw), that the proceeding of 1647 had everything that was required to give it legal validity, and that therefore it ought not for one moment at this period to be attempted to be challenged or set aside.

My Lords, I hope that your Lordships will, and it is most material for the interests of Scotch landowners that you should, affirm these interlocutors, and dismiss the appeal with costs.

Lord Colonsay—My Lords, I had occasion to consider this case carefully in the Court below, and I have listened with great interest to the arguments at the bar of this House. The judgment which I gave in the Court below I endeavoured to condense as much as I could, and to embrace in it more as propositions than as matter of argument the views which I entertained. I have great satisfaction in finding that those views have now been confirmed by my noble and learned friends who have addressed the House; and, looking at the position of matters, and at the business we have to go through, I think it unnecessary to say more than that I now hold my former judgment as repeated here.

Interlocutors complained of affirmed, and appeal dismissed with costs.

Agents for Appellants—James Allan, S.S.C. and Connell & Hope, Westminster.

Agents for Respondents—Mackenzie & Kermack, W.S. and Loch & Maclaurin, Westminster.