were secured. It appears to me that these policies having been secured *coute qui coute*, the principle of *jus habentis* comes in, and they must go in accordance with the true meaning and effect of the trust. And the case cited by Sir Roundell Palmer from Younge and Collyer appeared to me to corroborate the assertion of that very plain, very equitable, and very well understood principle.

As to the £10,000 and the £30,000 policies, I entirely concur with my noble and learned friends that those policies were to be maintained out of the rents and profits of the estate, and that they ought to go in exoneration of the estate. I therefore entirely concur in the judgment which is proposed to be pronounced.

SIR ROUNDELL PALMER—Before the question is put, perhaps your Lordships will allow me to say one word on behalf of all parties. I wish just to call your Lordships' attention to the position of the matter of expenses. By the trust-deed there is a provision for the payment of the expenses "of this agreement and of the transaction under the same," "and all other proceedings and arrangements that may be necessary for carrying this agreement into effect." I will not enter into the question of the interpretation of that provision. All these proceedings are in an action of multiplepoinding by the trustees for in substance executing the trusts of the deed. All the parties have claimed something more than your Lordships have given them a right to, one of those parties being the infant children of Lord Glamis, who have no funds whatever. The Court below has reserved in both interlocutors all the expenses with which they had to deal; and I venture to submit to your Lordships whether, under these circumstances, it would not be consistent with your Lordships' view either to treat the expenses of the appeal as a matter to be dealt with by the Court of Session like the other expenses, or to allow them out of the estate which is under administration.

LORD CHANCELLOR—We had some difficulty in coming to a conclusion about the expenses; but as the Court below has reserved the question of expenses, I think it would be better for us to reserve the costs of the appeal in the same manner, to be dealt with by the Court below.

Interlocutor of the First Division of the Court of Session varied.

Agents for the Earl of Strathmore—Gibson-Craig, Dalziel, & Brodies, W.S., and Grahames & Wardlaw, London.

Agents for the Strathmore Trustees—Dundas & Wilson, C.S., and Loch & Maclaurin, London.

Agents for James Haldane — George Wilson, S.S.C., and Connell & Hope, London.

Agents for Lord Glamis and Others—Alexander Horn, W.S., and Martin & Leslie, London.

Tuesday, July 26.

MINISTERS OF OLD MACHAR *v.* HERITORS.

(*Ante*, vol. v, p. 335.)

Teinds — Valuation—Minister—Stipendiary. Held (reversing judgment of the Court of Session) that it was not a valid objection to a decree of valuation by the Commissioners of Teinds under the statute of 1663, that the minister of the parish, being a stipendiary, and not having a direct beneficial interest in the teinds, had not been called.

These were appeals from a judgment of the First Division of the Court of Session. The respondents, Dr Robert Smith and the Rev. George Jamieson, ministers of the parish of Old Machar, in the county of Aberdeen, in 1861 raised a summons of augmentation, modification, and locality before the Commissioners of Teinds, to grant augmentation of ministers' stipends. The whole of the heritors of Old Machar were called as defenders in the action. In 1862 the Lords, by interlocutor granted an augmentation of stipend, and remitted to the Lord Ordinary to prepare localities. Thereafter, a report on the state of the teinds of Old Machar was lodged in process by the common agent appointed by the heritors. This report, *inter alia*, bore that decrees of valuation of the teinds had been produced by the heritors, to which the common agent had given effect, and that as the valued teind was exhausted by the old stipends paid to the minister, there was, in the opinion of the common agent, no free teind in the parish out of which the proposed augmentation could be provided. The respondents gave in answers or objections to this report, and averred that the decrees of valuation relied upon by the appellants, who were heritors, were not effectual and binding on the respondents. The decree referred to was a decree of valuation of the teinds of the lands of Balgownie and others, dated 1697, the tenor of which was proved by decree of 1727. The respondents contended that the alleged decree of 1697 was ineffectual—1st, Because neither the minister of Old Machar, nor any person representing the cure of the parish, was cited as a party; 2d, because the decree was not a decree of valuation by the Teind Commissioners, but a ratification of an extra-judicial arrangement as to the teinds of the appellants' lands, to which the minister was no party.

The objections to the other decrees were of the same nature.

The Lord Ordinary held that the decree of valuation was ineffectual, and decided in favour of the respondents. The First Division, consisting of Lord President Inglis, Lords Deas and Ardmillan, agreed with the Lord Ordinary, Lord Currichill dissenting. The present appeals were then brought.

The cases were argued in May last, when the judgment was postponed.

The LORD ADVOCATE, Sir R. PALMER, Q.C., Mr ANDERSON, Q.C., Mr J. T. ANDERSON, SOLICITOR-GENERAL (COLERIDGE), Mr ASHER, Mr H. SMITH, and Mr SHIRESS WILL were heard for the various parties.

At advising—

LORD CHANCELLOR—My Lords, the three cases now under your Lordships' consideration relate to a matter which has occasioned a good deal of discussion of late, namely the question of how far the teinds of certain property can be said to have been effectually valued by proceedings before a body of Commissioners appointed under certain Acts of Parliament, which originated in the reign of Charles the First; and whether or not a decree which those Commissioners were authorised to pronounce can be considered to be valid and effectual in the absence of the stipendiary minister, as a party before the tribunal at the time of the decree being so pronounced?

There is, no doubt, a preliminary question in these cases, arising from the great lapse of time which has occurred, now nearly 200 years in each of the cases; and arising also from accidents which affected the custody of the records. It is narrated in an Act of Parliament which was passed on the subject in Scotland, that many of them had been destroyed by fire, and that some others had been destroyed at sea; and the Act I refer to authorises certain copies of extracts to be rendered as effectual as if the instruments themselves were still to be found. Under these circumstances it has been made a question whether or not we ought to assume in the present case that the stipendiary in reality was not cited, or whether the maxim of *omnia præsumitur rite esse acta* should prevail; and that therefore, although we find no mention of the stipendiary minister being present, it must be assumed that he was there; and therefore, in truth, no such question would arise as I have indicated. Probably your Lordships would not consider it necessary upon the present occasion, at all events I think it is not necessary, but I think it might possibly be hazardous to proceed upon such a presumption. I say no more however upon that point, wishing carefully to avoid expressing any opinion upon it in case the question should arise hereafter. The cases in each of the three appeals which are now before us for our decision are very similar. I shall assume in each of those cases that the stipendiary minister was not cited.

In addition to the main point which has been argued before us, there is also a certain subsidiary point affecting each case, of course somewhat differently, or at all events as to which the circumstances are somewhat different, namely, whether or not the decree can be sustained with regard to its having been founded, as is urged by the respondents, upon an approbation or a confirmation of certain decreets-arbitral, or arrangements out of Court as I may term them, without the tribunal itself entering into a proper investigation to ascertain the value of the teinds. That is a subordinate question, which affects somewhat differently in its precise details the several cases.

Now, my Lords, as regards the main and great point we have to consider, we have had not only the advantage of the most able counsel arguing it before us, but we have really had so very full and able an argument on each side, if I may so express it, in the judgment of the Lord President, who took the one view, and of Lord Curriehill who took the other, that I find the case exhausted by those two arguments; and it would be in a great degree mere repetition if I went into any lengthened detail upon the subject.

I think the first thing which it is important to consider is this—What was the exact position of all the parties interested in the question of the valuation of the teinds which was desired to be effected by the Acts of Parliament passed in the time of Charles the First? As far as the King was concerned, he had a certain direct interest in the question, inasmuch as the Crown had an annuity arising from the teinds, and he was very desirous to have the teinds valued immediately, once for all, as between the heritors who had to pay them, and the titulars who had to receive them. He was anxious that that valuation should be brought to a complete and final close, and he seems to have pressed, in various ways, upon the several persons upon whom the duty was cast by the Acts of Parliament that were passed, to bring this matter to a conclusion. The mode he took was this:—He established a body of Commissioners by a special Act of Parliament passed in the year 1633, consisting of men of high position in the state, and many of them eminent also for their legal knowledge, as a body which should have the power of proceeding in the fullest manner to investigate the matter, and having authority of a very high character to carry out the valuation.

I will read from page 52 of the case, where it is concisely stated. He appointed the commission by the statute of 1633, chapter 19, "with power to the Commissioners to value and sell tithes, and to appoint Sub-Commissioners for valuing them all over the kingdom. The commission was granted to nine of the clergy, nine of the nobility, nine of the small barons, and nine of the burgesses, together with my Lord Chancellor and eight officers of state whose names are given in the Act, or any fifteen of them." They were "to meet and convene at Holyrood House, or Edinburgh, at such times and places" as they thought fit, and they were to prosecute the valuation "of whatsoever teinds, parsonage or vicarage, within the kingdom which are as yet unvalued." And then it is enacted "for the better expeding and advancing of the saids valuations that the Commissioners shall have power to appoint committees or sub-committees of their own number, to receive the reports of the said valuations made or to be made, and to receive, admit and examine witnesses, and to take parties' oaths, with their depositions, when the same is referred to oath, and to give such further power to the said committees or sub-committees of their own number as they shall think fit for the good of the work and speedy finishing of the same; and sicklike, with power to them, if need be, to appoint Sub-Commissioners not being of their own number within any parochin or presbytery of the country, for leading and deducing of the saids valuations." And then they had ample authority given to them to do that, "with power to them to set down whatsoever other order or course which shall be thought fit and expedient for despatch of the said valuations, rectifying thereof, or final closing of the same." Their decrees were to have an effect of a very high character, for His Majesty "declares and ordains the acts, decreets and ordinances of the Commissioners foresaid, and of the other persons who shall be surrogate in their places by His Majesty in manner foresaid in the whole particulars above specified, and every one of them to have the strength, force and authority of a decreet sentence and Act of Parliament." This was extremely high authority.

Now, we have to consider who were the several persons interested in this valuation. First no doubt there was the Crown which had its annuity; but in the highest point of view, as to the extent of interest, there was the titular, who was to receive the teinds; and there was the heritor who was to pay them. The stipendiary clergy, who had an interest in the matter, undoubtedly were in a different position as to interest altogether from the titulars. The titulars were those who had the right to the tithe, and the drawing of the tithe, and the first right in fact to receive that provision. But the stipendiary's position was this—I need not now consider the possibility of his being a beneficed minister, in which case he had an actual title, and was in the position of a *quasi* titular in respect of that, with regard to the tithes to which he was so entitled. Unless he were

in that position he stood thus,—he was entitled to be paid his stipend out of the whole teinds of the parish. He was entitled, moreover, upon certain grounds, which might be established from time to time for all time after, to have an augmentation of that stipend if circumstances justified it. He was entitled further, and that usually took place when the augmentation was asked for, to proceed by an action of locality, as I think it is called, by which he could have the tithes specially apportioned and assessed upon the different heritors, and he could have it ascertained how much each was to bear of the burden of providing the stipend, especially if it was an augmented stipend. At the time the Act of Parliament passed of course he had a fixed stipend, but subject to the possibility of having it augmented.

There was another possible position in which the stipendiary might be placed, which I mention in reference to two cases which were cited in the course of the argument. He might be in a position where a certain part of the teinds had been assigned to him, in which case he would be to that extent a sort of *quasi* titular. Again, if an augmentation of his stipend took place, it was decided that he might have an interest as the result of that augmentation. This augmentation might come up so nearly to the value of the whole teinds of the parish, that if any person were to proceed to obtain a valuation after his stipend had been so raised, he might have a very direct interest in the investigation; because, in case a valuation should be made as between the heritor and titular which should considerably reduce the teind which had been actually paid by the heritor up to the time of his obtaining the valuation, it might so happen that the teind would be so much reduced (this applies to another of the cases cited before us) as to be insufficient for the whole of that augmented stipend. But with that exception the stipendiary had no direct interest at the time of this valuation being made in the teinds. He only had a certain charge upon the whole amount, and if the whole amount was equal or more than equal, as I apprehend it was in most cases at the time, for the payment of the charge, he would not be affected specially by anything that might take place with regard to the valuation.

And so I think the matter seems to have been regarded at a very early stage of the proceedings, because we are indebted to Lord Curriehill for giving us a most detailed historical account of how it was that these Acts of Parliament were passed, and who were the persons then supposed to be specially interested in the matter. He says this, at page 120, "These valuations were authoritatively commenced under the Commission of Surrenders of 1627, already mentioned, and under the arbitrations of King Charles the First, which were part of the proceedings under that Commission. These decrees-arbitral were pronounced upon four submissions" (this is an important thing to observe) "by the different classes of persons to whom the teinds of Scotland then belonged, namely, one by the Lords of Erection (certain persons who benefitted by the dissolution of the abbeys) and other titulars who, at the commencement of the Reformation, had acquired rights to a large proportion of the teinds of the country, in the manner already mentioned; a second by the bishops and other beneficed clergy; a third by the commissioners of the royal burghs; and a fourth by tacksmen of teinds and others. But the merely stipendiary ministers were not parties to any of these proceedings. Nor were they referred to in any of the decrees-arbitral other ways than as parties whose interests were protected by the titulars to whom the teinds then belonged."

The Commissioners proceeded to carry into effect the Acts of Parliament; and in doing so they appointed Sub-Commissioners. It has now been decided by your Lordships' House that those Sub-Commissioners were undoubtedly able to proceed in the absence of the stipendiary, and that effect might be given to their decisions by the Commissioners themselves (who had to approve of their decision), although when the Sub-Commissioners made the inquiry the stipendiary was not before them. That has been settled by a decision of your Lordships' House in the case of *M'Neill* v. *The Minister of Campbelton.* The Commissioners laid down rules for the proceedings of the Sub-Commissioners, who were directed (I am reading again from Lord Curriehill's Historical Account, at page 121) "to call all parties having interest in the valuation before them." They were directed to proceed in the valuations "if both parties be present." The expression "both parties" is a strong indication that it was considered that all parties having an interest consisted of two. But that appears somewhat plainer a line lower down, between letters A and B, where it is said that "if neither titular nor heritor will compear" a procurator-fiscal was to be appointed to lead the proof of the value. Therefore what the Sub-Commissioners are instructed to do is this:—They are instructed to proceed to a valuation, having all parties interested before them,—those parties being described to be the titular and the heritor. If either of those two parties fail to appear, then a certain other course is to be taken.

These reports of the Sub-Commissioners no doubt have all to be approved by the higher body of the Commissioners themselves, and those higher Commissioners are "directed to prosecute the valuation of the teinds" (that is, by a subsequent statute of 1633, the very one that I have already mentioned) "and to receive the reports from the Sub-Commissioners" of the valuation of the teinds which had been deduced before them, "according to the tenor of the Sub-Commissioners' direct to that effect, and to allow or disallow the same according as the same shall be found agreeable or disagreeable from the tenor of their Sub-Commissioners." That was accordingly done from time to time.

My Lords, we have taken a remarkable step in this inquiry, when we find that the Sub-Commissioners themselves did not think it necessary for the purposes of justice that the stipendiary should be summoned before them, and that they, being directed to have both the parties present, considered it sufficient to have the titular or his tacksman (who is the same thing in effect, as we shall afterwards find) and the heritor, and that they did not consider it necessary to have the stipendiary. As I said before, that was ultimately determined in this House to be a correct view, and it was held that a report of the Sub-Commissioners was not invalid on that account.

But then observe what that leads to. It is true that their report must be approved by the higher body, and therefore as regards the valuations which, as in the cases now before us, have been made by the higher body, this does not prove distinctly that it was not necessary to have the

stipendiary there when they were approved, or that it was necessary to have him there when the valuations were conducted directly by the higher body, as in the instances before us. But this is settled, that these reports which the Sub-Commissioners made at this very remote period without the stipendiary having been present, may be confirmed now at any time. There seems to be no definite time whatever to which the confirmation of these reports is confined. It is true that the new body which has been constituted since the year 1707 as the higher tribunal has laid down definately for its rule that the stipendiary shall be present at all their proceedings, and there present he must be now. But in the year 1780 or 1790 they might have been called together by the heritor to affirm decisions made in 1600 and odd, 150 or 160 years before, at which the stipendiary was not present. And it does seem a very singular thing to say that, that being so, and it being regular on the part of the higher tribunal to affirm a document drawn up in the absence of the stipendiary, it can have been of importance at the remote period of which I am speaking, that the stipendiary should have been present if the matter was carried on in the higher court, but not necessary if the matter was carried on in the lower court. Because what position could the stipendiary stand in if the decision was proposed to be approved 160 years afterwards? All that he could possibly do would be to prove that it ought not to be affirmed, because the valuation was improper or unfair. He could not object to it as being irregular, but the burden of proof would lie upon him to show that it was improper or unfair. I would ask any one to consider how far, such a burden of proof being thrown upon him, it could have been of any use to say that he was to be present at those proceedings, though it was not necessary that he should be present at the proceedings which led to the report of the Sub-Commissioners.

Further, it does seem most strange that the Sub-Commissioners sent into the country to make a complete valuation on the spot should not have considered it necessary that they should have before them a person who was considered to be all essential and all important to the question when the matter was brought up to Edinburgh, at some distance from the place in question; and that the King, being desirous of having all these valuations conducted as speedily and as cheaply as possible, and having therefore arranged that they should all be conducted through the medium of these higher Commissioners, and having directed them to give the Sub-Commissioners rules for their guidance, those higher Commissioners should have thought it consistent with the general principles of justice to excuse the Sub-Commissioners from the necessity of having the stipendiary present, and yet should have thought it inconsistent with the general principles of justice to affirm their decision without the stipendiary being present when the whole case was brought up, after it had been in a sense disposed of by the Sub-Commissioners, in order to have their affirmation.

But the question as to whether or not it was necessary that the stipendiary should be present does not, I think, rest there, because I now come to a document which is certainly of very vast importance in the case, and which would seem almost, or I may say quite, to conclude the whole case, but which is unfortunately in this position, that there is a difference between the learned Judges who have taken different views of this case, the Lord President and Lord Curriehill, as to its authenticity or legal validity. It appears that there has been found, and there has been acted upon (though there is some doubt in the Lord President's mind on the latter point), an order, which if made by the higher class of Commissioners would seem to settle the whole question. It was made, or purports to have been made, in 1634, and if so made, it, according to the Act of 1633, would have the effect of an Act of Parliament. Your Lordships will find the document quoted at page 122. It purports to bear the date of the 25th of July 1634, and it purports also to be an Act in these terms: —"The Lords find no necessity to summon the minister to a valuation or approbation except he be titular or tacksman." Therefore the whole point is in truth decided if that document be what it purports to be. This is said to be "betwixt the minister of Benethie, and heritors thereof."

The question arises between the two learned Judges as to whether or not this is a document to which faith and credit ought to be given. But it occurs to be a document which has found its way to a public library at Edinburgh—the Advocates' Library I think. It seems to have been regarded by Sir John Connell as a document to which faith was to be attributed. He cites it, and cites it without disapprobation; and Lord Curriehill asserts that it has been acted upon. It is exceedingly difficult to conceive how or why a forgery of such an instrument as this should have been perpetrated; and it does not appear that anybody has taken upon himself to say as much in distinct terms, although the Lord President argues against its probable genuineness, apparently founding upon the word "Lenethe," having been written instead of Benethie, and upon some other reasons which he assigns for believing that it is not genuine. But Lord Curriehill says—"As most of the records of the Commissioners were destroyed by shipwreck in 1661, and by fire in 1700, the public have had to rely upon such copies of them as have been preserved; and fortunately the Faculty of Advocates have preserved three copies of a volume containing the ordinances of the commissions for a considerable time after their first appointment. The handwriting of two of these copies appears to be of the period from the middle to the end of the 17th century, and the third copy is somewhat later. Sir John Connell, in the appendix (No. 41) to his treatise, has printed about 100 of these ordinances transcribed from one of these copies; and much of his Treatise on Teinds is founded upon them. The ordinance of 1634 is one of these; and I have quoted its terms from the most distinctly written of the two older copies. No doubt has ever been stated, until very recently, of the authenticity of these copies of the lost records: and at this distance of time the Court is surely not warranted to reject these documents, which have been so long relied and acted upon, without at least a careful inquiry on the subject." I must confess I concur in that reasoning. The learned Judge points out that it is not only this particular ordinance, but other ordinances quoted out of the same book which are considered to be authoritative. Then, if that ordinance be genuine, the whole matter as to the necessary presence of the minister is at an end.

But I ought to notice (though I am not going to do it at great length, because it would take a great deal of time to do so, and because it would

be improper for me to enter into detail upon it after having stated as I have that it appears to me that the arguments on the one side and the other are really exhausted by the two learned Judges) the authorities which are most relied upon by the Lord President in support of his view that the presence of the stipendiary minister is necessary. He begins with an early case, namely, the case of *Kirkbean.* Now, in that case it appears that the minister himself made a statement that the valuation, if made in the manner there proposed, and if supported, though having been made in his absence, would bring the whole amount of the teinds below the modification of his stipend to which he was entitled, and therefore in effect he had a complete and direct interest in being present, in order to save a part of his property which would be otherwise destroyed, inasmuch as the rest of the teinds would not be sufficient to pay the modification. That of itself, I think, makes a very clear distinction between that case and an ordinary case in which the stipendiary simply has that species of lien or charge which I have described.

The other case which was very much relied upon was the case of *Lady Purvishaugh.* In that case it appeared that the minister averred that he had an assignment of the teinds. Therefore that again is a case in which the stipendiary had a direct and complete interest in the matter in question.

Several of the text books seem to speak strongly upon the point of the minister being a necessary party. But here again this observation arises, that by the Act of 1633 the power given to the Court to direct its own proceedings was, as I have said, very great, for the effect of their orders and ordinances was to be that of an Act of Parliament. Setting aside therefore the effect of the alleged ordinance of 1634, if it could be set aside properly, still it appears to me that, even then, the dicta of the learned authors, and they are authors of great authority undoubtedly, with reference to this point are very much weakened by this circumstance, that in 1707 the whole system was changed, and the Commissioners appointed under the Act of Charles the First, with these extensive powers and high authorities, were no longer to exercise the high functions which had been assigned to them, but the Court of Session was in effect converted into the Teind Court. It was not for that purpose to sit under the name of the Court of Session, but the same body was to sit under the appellation of the Lords Commissioners of Teinds; and the matters which were to be performed under the Act of Charles the First by the higher Commissioners of Teinds are now performed by that body, which is in fact the Court of Session.

We can easily understand how a body circumstanced as they were, and directed by the Act of Parliament to carry on their proceedings according to the usual course of business of the Court, not having therefore any of that large and wide authority given by the former act to their predecessors, might, on mature deliberation, think that necessary to be done which the Commissioners appointed under the Act of Charles the First did not think necessary to be done, namely, to call before them all the persons who by any possibility whatever might have an interest in the matter in question. No doubt the stipendiary may ultimately have an interest in the valuation of each particular property; but I can easily conceive, on the other hand, that the former Commissioners, without violating any of the fixed principles of justice, which require that persons interested should be brought before the Court, might still decide that the stipendiaries had not that amount of interest which would make it necessary that they should be called. We have instances of the kind even in our own Courts. I remember the time when the question was much discussed with reference to the parties to our suits in equity (who are very numerous, because it is wished to bind all parties by the result of the proceedings), as to whether parties having an interest in the nature of charge for an annuity, and the like, should be brought before the Court; and a great and legitimate difference of opinion existed upon that point, where the interest was comparatively very much less than the interests of all the other parties who were concerned in the litigation.

It appears to me that, supposing of course the case to be honest, the titulars had so much larger an interest at the time of the inquiry, they being the persons to receive the whole body of the teinds, than the stipendiaries had at that time, that they might well be regarded, in the absence of the stipendiaries, as persons qualified to undertake the support of the interests of the stipendiary ministers. And this appears the more probable from that portion of these Acts of Charles the First, which is referred to by Lord Curriehill, where special remedies are given to the King on the one hand, who does not seem to have appeared by his officers with reference to his interest, which was a much more direct one, for it was a per centage charge upon the teinds, and on the other hand, the stipendiary by a "process of rectification," in case of any misfrasance by which he had been prejudiced. There was a clear and distinct remedy provided, which would have been fully adequate.

It was said in the course of the argument that the interest of the stipendiary was very great, and at last it was pushed in argument to this extent, that it exceeded the interest of the titular. It is possible that in consequence of some recent augmentations, and some other causes of that kind, it may have become great, but in the present instance before us it appears that matters had gone on for nearly 200 years before the interest of the stipendiary emerged. That being the case, I think it is not too much to say that the character of the stipendiary's interest was one which could reasonably and without any disregard of the first principles of justice, be considered as sufficiently and adequately represented by the titular.

My Lords, I have mentioned these two early cases, as they were a good deal relied upon by the Lord President in his decision. After them we come to a series of modern cases, beginning about the year 1830, or within the last thirty or thirty-five years, in which there have been no doubt several decisions, none of which, however, have been brought up to your Lordships' House, in favour of the view contended for by the present respondents. We have now, my Lords, to consider how far your Lordships ought now to affirm those decisions which have never been brought up to this House, and at this distance of time to say that that was not rightly done which was done by high officers, who must be supposed to have been acting in the discharge of their duty, and who did not think it necessary, in the discharge of that duty, to give to their Sub-Commissioners any directions for the attendance of the stipendiary, and who were held by your Lord-

ships' House to be justified in that conclusion in the case of *M'Neill* v. *The Minister of Campbelton*, who, irrespective of all weight which might be given to the Act of 1634, were ready at all times to affirm the decisions of those Sub-Commissioners, although this stipendiary had not been served with notice to attend. Nay, though we find that long afterwards—even since the matter has come into the hands of the present Lords Commissioners of Teinds—since 1707 a stipendiary being only summoned to the proceedings for confirming a decision of the Sub-Commissioners made more than an hundred years before, has not been held competent to object to the absence of the former stipendiary when the Sub-Commissioners made their report. My Lords, when we look at all these circumstances, I think we are justified in saying that the weight of reason and probability would stand very high, wholly irrespective of the Act of 1634, for the course, and the regular course of proceedings, before the Commissioners having been such as that ordinance would indicate it to be.

My Lords, the case is undoubtedly one of extreme length, and one might dilate upon it at large; but I prefer with the most unfeigned humility (which indeed I ought to feel in all such cases, but which I do feel most strongly in the present case) to rest upon the reasons which were brought forward by Lord Curriehill, and which I have carefully read through, as indeed I have also read those brought forward by the Lord President. I have carefully endeavoured to weigh the arguments on both sides; and I say, even if the case was not fortified by that ordinance of 1634, I should have come to the same conclusion; but I say also that I think the balance is strongly in favour of the genuineness of that document, and if so, the case would be decided by that document alone.

As regards the particular cases before us, I do not wish to address your Lordships again upon them. The second and third cases, namely, the cases of *Skene* and *Paton*, seem to me to rest upon exactly the same point as the first case as regards the summoning of the stipendiary; but what relates to their different points is this—Lord Curriehill was adverse to one of the cases, thinking that it fell within the principle of the decision in your Lordships' House, in which it was held that the mere approval of a decreet-arbitral in itself would not bind any persons but the parties to the submission to arbitration. Of course that would be so according to the general principles of law. If these persons being private parties submit the matter to arbitration, the result of that arbitration can bind nobody but those who were parties to the submission. That has been decided by your Lordships' House in a case which was brought up to this House on this very subject-matter. But, on the other hand, these principles are stated and agreed to by the learned Judges, who took different views in other respects. If it be shown that this Court of Commissioners, to whom the matter was referred, did really enter upon the valuation, I apprehend that it is no objection to the valuation that there was brought before them, not for their approbation as giving confirmation to the instrument, but as part of the evidence in the cause, a decision upon the parties being willing to have the matter so investigated, or an admission (I refer to the case of an admission, because we had the case of an admission brought before your Lordships' House not long since as between a titular and a heritor) between the one party and the other, as to what the real value of the tithe was, they both being parties before the Court—they both being parties who might insist that that evidence was not worthy of confidence, or that it might be displaced by other evidence, or the like; or perhaps in consequence of being unwilling to have the expense of a double and further inquiry submitting to that evidence. *Forbes'* case seems more free than the others from any question of that sort, though even there I think Sir James Scougall was called in to arbitrate; but then he was only called in by the Court itself, that being one of their modes of proceeding which I apprehend they were entitled to use.

As regards the teinds in *Skene's* case, I think what we have got there is in the "extract decreet of valuation of teinds; *George Earl of Panmure* against *The Principal of King's College, Aberdeen, and Others*," at page 69 of *Skene's* case. The whole matter seems to be recited there at some length. The documents, including the consents, were all produced before the Court. As to what is asked to be done in the proceeding, it is a process of valuation. After all the preliminaries have been gone through, at page 73, the Lords Commissioners "interpone their authority in and to the foresaid consent contained in the foresaid tack"—that is to say, a certain tack by which it had been agreed that the value was to be a certain amount. It is not that they approve of it, but they interpose their authority "and hereby find and declare the foresaid quantity to be the value," "and that because at the time of the calling of the said matter, the said pursuer's procurator produced the foresaid two seisins and tack above mentioned, bearing the saids defenders to have consented to the foresaid valuation in manner foresaid, after that the saids defenders and all others having or pretending to have interest in the said matter were lawfully summoned to have compeared before the Lords Commissioners to have heard and seen the foresaid lands valued." Then it says, thereafter the Earl of Panmure gave in a supplication mentioning that the petitioner having intended process for valuation of the teinds against the members of King's College, Aberdeen, as titulars of the teinds, and they mention certain other difficulties which had arisen, but nevertheless there had now been a farther consent in the matter, and ultimately the Court seem to give their opinion upon this consent. I apprehend that it was perfectly competent to them to do so if they thought that it was fair and right and just that that should be done; but it rests upon the valuation, and it does not rest on anything in the shape of a consent, or a decision, upon a submission to arbitration.

In *Paton's* case there is something very similar to that. There is there a document in which the college seem to have consented in a somewhat similar way; and then there is a decree of valuation of the following tenor set forth at page 59 of *Paton's* case,—"At Edinburgh, the 31st day of December 1690, anent the summons of valuation raised and pursued before the Lords and others of the commission appointed by their Majesties, and the estates of Parliament, for plantation of kirks and valuation of teinds, at the instance of George Paton of Grandholm, heritor of the lands undermentioned, against Dr George Middleton, Principal of the King's College of Aberdeen," and so on; "which summons having lain over and slept was thereafter wakened at the said pursuer's instance against the said defenders," and so on "which

summons of valuation makes mention that when power was given to the Commissioners to value the teinds, great and small, true it was that the teinds of the pursuer's lands undermentioned, namely, the towns and lands of Grandholm," and so forth, "with the tofts, crofts, parts, pendicles, and pertinents," were yet unvalued; then they were summoned to compear before the Lords Commissioners on a certain day, "to have heard and seen a just and true valuation of the said pursuerss' lands above mentioned, lying as is lawfully led and deduced, and all lawful manner of probation made use of for that effect, or else to have shown a reasonable cause to the contrary why the same should not have been done;" and then in that process, which seems to be in the regular form to produce a consent, the consent is produced just as in the other case, and that is gone through at some length; and then, on page 62, we come to a passage to this effect,—"the foresaid summons, and summons of wakening, being all at full length heard, seen, and considered by the Commissioners, and they being well and ripely advised, the said Commissioners find and declare the just worth and constant yearly avail of the pursuer's lands to be" so and so, and that "that shall stand, continue, and endure, and be repute and holden as the just and true worth and constant yearly avail of the said pursuer's lands."

My Lords, I apprehend it will follow in each case that the objection falls to the ground when the principle has been laid down that the Commissioners did not meet merely to approve the consents, but that they met to have such evidence produced before them as they should deem to be just and meet. They did not disregard consents as being a very good mode of ascertaining the real value of the teinds, but having examined them, and looked into the circumstances, they came to the conclusion that the value was such as the consents showed.

I apprehend therefore, my Lords, that there is really no objection to the proceedings on these grounds, and that we ought accordingly to reverse the interlocutors complained of; and probably the proper course would be to direct that there should be an absolvitor.

Lord Colonsay—I think there should not be an absolvitor. The question arises on a process of augmentation, modification, and locality; and therefore the reversal of the judgment here would mean that it was to go back, in order that the process may be disposed of in the Court below. That will be the course of proceeding if the judgment of this House be in conformity with what has now been suggested.

In my opinion the conclusion at which my noble and learned friend has arrived is a correct conclusion. I think that prior to about 1837 there is scarcely any decided case at all, I should say no decided case, which goes directly to sustain the contention of the respondents in these cases. The early case of *Purvishaugh* is not, I think, a case in point; for it appears that in that case the minister of the parish was not merely a stipendiary, but that he had another interest in the teinds; and accordingly, I observe that, in giving judgment in this very case, the Lord President throws out of view the case of *Purvishaugh*, as not being a case upon which he can rely in support of the judgment he is going to pronounce. Then, coming to the more recent cases, the next in date is the case of *Kirkbean* in 1708, in which also it appears that the minister had obtained a decree of augmentation and modification of his stipend; and the attempt at a valuation then made was an attempt which would deprive him of the judgment he had already obtained, and that was held to be an interference with a substantial interest. The next case, I think, is the case of *Ferguson* v. *Gillespie;* and in that case it appears that the minister was the titular, and therefore it is not a case in point, for we are dealing with a case where the minister is a stipendiary.

The next case is the case of *M'Neill* v. *The Minister of Campbelton*. That was a case of a sub-valuation, the approval of which was opposed. It was decided in the Court below that in that case, and affirmed by this House, that the absence of the minister, whether he was not called or whether he had not appeared after being called did not invalidate the proceedings, that it was not necessary that he should be a party to the sub-valuation; and that the Sub-Commissioners were quite entitled to go on without the presence or knowledge, as far as judicial knowledge went, of the stipendiary. That is a very important step; and I must say I have great difficulty in seeing any principle by which such a distinction could be drawn as that of not requiring the minister to be a party to a sub-valuation before the Sub-Commissioners, and requiring him to be present at a valuation conducted by the Commissioners.

I see that in the case of *Brown* v. *Stewart*, in 1851, which was not however the next case that occurred, but was a case of the absence of a minister at a valuation by the Commissioners, the Lord Justice-Clerk (Hope), who was one of the majority in that case, in very strong terms and with very great confidence, assailed the judgment of the Court below in the case of *M'Neill* v. *The Minister of Campbelton*, and also the judgment of this House. He contended very strongly and very forcibly that there was no distinction in principle between the case of a valuation by the Sub-Commissioners and the case of a valuation by the Commissioners; and while he was sustaining the objection founded upon the absence of the minister at a valuation before the Commissioners, he contended that the judgment which decided that a valuation proceeding before the Sub-Commissioners could go on without the presence of the minister was necessarily wrong in principle. But it was only wrong in principle if the view of Lord Justice-Clerk (Hope) in regard to the necessity of the minister being present before the Commissioners was a right conclusion. Then we have to set the principle on which Lord Justice-Clerk (Hope) worked out his judgment in the case of *Brown* v. *Stewart* against the principle assumed by this House in the case of *M'Neill* v. *The Minister of Campbelton*. I venture to lean to the judgment of this House in the case of *M'Neill* v. *The Minister of Campbelton;* and if that is to be the fixed point which we are to start from, I hold that the judgment delivered by Lord Justice-Clerk (Hope), who led the majority in the case of *Brown* v. *Stewart*, is, in principle, in favour of the judgment we are now going to pronounce; because his opinion is that there is no distinction as to the necessity for the presence of the minister, whether the valuation be before the Sub-Commissioners or before the Commissioners. I think he is right in that view; but I think the conclusion it leads to is that he was wrong in the judgment he pronounced in the case of *Brown* v. *Stewart*. And

Lord Medwyn was of opinion, in the case of *Brown* v. *Stewart*, that the presence of the minister before the Commissioners was not necessary.

Therefore down to 1851 there was no unanimous opinion of the Court—it was a disputed point among the Judges, and it was in that unsatisfactory state of the question that the judgment in the case of *Brown* v. *Stewart* was arrived at—the Lord Justice-Clerk contending that he must maintain that in principle the judgment of this House in the case of *M'Neill* v. *The Minister of Campbelton* was wrong. There had been a case shortly before that (the case of *Simpson* in 1837), in which there had been a divided judgment too. In that case Lord M'Kenzie was of opinion that the presence of the minister was not necessary. Therefore, since the decision in the case of *M'Neill* v. *The Minister of Campbelton*, there have been judgments in which the Court was divided, and in the latter of the two, the reasoning I have noticed, of the Lord Justice-Clerk, leads, I think, to the opposite conclusion to that which the judgment in that case decided. Then comes the case of *Kirkwood*, in which the Court of Session held that the point was settled according to the view contended for by the respondents as far as that Court was concerned, because there had been two or three successive judgments resting upon it. But it is now a settled point, not only by the case of *M'Neill* v. *The Minister of Campbelton*, but by a subsequent case to all these, the case of *Jamieson*, that the presence of the minister, or his being made a party in the case of a valuation before the Sub-Commissioners was not necessary.

I think, therefore, my Lords, that there is no authority that can be held as at all final, or bearing the character of a series of judgments as the Lord President held in this case.

Then what is the principle that is to be applied? The proceedings before the Commissioners or the Sub-Commissioners were not proceedings before a regular Court. They were proceedings before a Commission appointed for the attainment of a public object, namely, the valuation of the teinds with a view to various results that were to follow from it—one of them being the right of purchasing tithes. They were to go on and execute their commission, taking such evidence as they thought necessary, or as appeared reasonable in the circumstances. They required to have before them the heritor who wanted his lands valued; and the titular who was the party who had the direct and immediate interest in the teinds was to be cited. No other parties are named. If the minister was a beneficiary, then he was in the same position as the titular. But there is no indication or mention whatever of stipendiary ministers as persons who require to be called. And there is no direct authority for saying that they were required to be called. Forbes, who writes at the very close of the last century, and who has never been considered a very accurate writer on either the general law of Scotland in his two volumes of Institutes, or in his treatise on Teinds, though it was useful as being almost the only one at the time it was written. Forbes says that the minister must be called, but he does not say what minister must be called, and he refers as his authority to the case of *Purvishaugh*. That case is given up now as an authority for a stipendiary minister being called; and therefore there is no written authority for a stipendiary minister being called.

And the practice was very various. We have evidence of that practice, and Lord Medwyn founds upon that practice, in the case of *Brown* v. *Stewart*. The practice both before the Commissioners and the Sub-Commissioners has been various. The ministers who were stipendiaries in many cases even were not called before the High Commissioners. In that condition of a divided practice, how can we say that there is either authority or practice for its being a fatal objection to a valuation that the minister was not called? No doubt more recently the practice has been getting more general, and it is, I believe, now universal to call the minister whether he be a stipendiary or a beneficiary. It is very reasonable to do that *ex majore cautela*, but the practice that has made it so universal is the practice before the Court of Session since it has become the Commission of Teinds. And Erskine refers to the necessity of calling him before the Court of Session, and only the Court of Session. Now the Court of Session was required to proceed as they did in their ordinary course, and their ordinary course was to call all parties who might be supposed to have an interest in the question. But at the early period when these three valuations with which we are dealing took place—in 1683, 1690, and 1697—there was no uniformity of practice at all, and indeed if there had been, it is not likely that these three different valuations in three different years, at the instance of different parties, would have all proceeded upon the principle that it was unnecessary to call the stipendiary minister if the practice had been uniform of calling him.

Now what was the interest of the stipendiary minister? It was a very remote interest indeed. The titular was the party who had the real and true interest in the teinds. The stipendiary was a sort of creditor of the titular—that was all—and his interest was of a very remote kind, and might never emerge. It was remote in this case; for it is only now that it has come into existence. The valuation has been recognised and acted on for a very long time, and the defence of the minister for having allowed that to take place is,—I had no interest till now. No interest till now! Why! he says he had an interest 200 years ago. But the interest he had was so remote that it has only emerged now. So also in the case of *M'Neill*, the valuation took place 180 years before the interest emerged. The Commissioners required to bring into the field the party who was interested. The titular, whose interest was immediate, was the proper party to bring into the field, and that was done.

I therefore think that there is neither principle nor authority in the proceedings prior to 1837 for holding this valuation to be a nullity. As regards the judgments since 1837,—with respect to two of them there was a difference of opinion in the Court,—one of them proceeded upon feeling it necessary to impeach the judgment of this House in the case of *M'Neill* v. *Campbelton* in order to arrive at the conclusion which was arrived at; and the third case was one in which it was held, very properly, that the matter had been decided twice in the Court of Session, and that in that Court at all events those previous decisions ought to be followed. But now that the case has come here, I think that the reasons assigned by Lord Curriehill and by my noble and learned friend on the Woolsack are quite sufficient to require us to alter the decision of the Court of Session.

There is another objection raised, especially in

the case of *Skene*. There is some ambiguity about the decree; but I think, looking at the whole character of it, that it is a proceeding in a process of valuation, and if you regard it as a proceeding in a process of valuation, then I think it was evidence of a kind that the Commissioner was entitled to take into account and to rely upon, and that there is not such a broad distinction between that and the other decrees as would entitle us to give a different interpretation to it.

LORD CAIRNS—My Lords, I had prepared some detailed observations to lay before your Lordships upon these cases, but after what has been said by my noble and learned friends who have preceded me, I do not think I should be justified in occupying any space of your Lordships' time, and shall content myself, therefore, with making one or two very general observations upon the cases before us.

The object of these proceedings in the Court of Session in Scotland was to set aside valuations made as long ago as the years 1682, 1690, and 1697. These valuations have stood since that time, and have been acted upon, and in one case at least they have been used as a defence to a proceeding which was at variance with such valuations being in existence. Therefore your Lordships would be very unwilling to set aside instruments of this kind unless you are satisfied that there was some reason or some authority which required you to do so.

There are two or three general observations which occur at the very outset of a case of this kind. In the first place, I must say that the character of the objection to these valuations appears to me to be entirely technical. There is no suggestion whatever here that there was any collusion or undervaluing at the time of the valuation being made. It is simply a suggestion that there was the absence of a person who was not called, without any suggestion that there was some collusion or some undervaluing which, if that person had been called, would have been prevented. In the next place, the interest of the person who is said not to have been called appears to me to have been identical with the interest of the titular who was called, and who was a party to the proceedings. Or if there is a difference between the two interests, the interest of the titular appears to me to be the higher interest of the two, because the titular was interested in what I will call the *residuum* of the teinds after satisfying the stipendiary, and therefore he would be the person who would be naturally most anxious to make the teinds as large as possible.

In the next place, it is conceded that on a valuation made by the Sub-Commissioners the stipendiary would not have been a necessary party, and the argument therefore has been obliged to be, that though his presence was not necessary before the Sub-Commissioners, where I should have *thought* there was more reason that he should be present, he ought to be present before the Commissioners. Further than that, my Lords, it is admitted, and indeed it could not be controverted, that the Sovereign, who had at least as much interest as the stipendiary, and I might add the co-heritor, never has been cited, and his interest at least has been allowed by statute to be protected by those who were cited.

In addition to these considerations there is one other which presses very much upon my mind. Beyond all doubt it was the object of the Legislature in Scotland at the time when the Act of 1633 was passed to have a valuation made of the teinds of the whole of Scotland, and to have that valuation made as soon as possible. And the phrase which has been mentioned occurs in one of these Acts of Parliament,—that the object of Parliament was to "accomplish and finish the great and glorious work of the valuation of the teinds." I must say it does seem to me *a priori* the most unlikely thing in the world that the intention of Parliament at that time would have been to have required all the stipendiaries all over Scotland to leave their more proper and holy work in which they were engaged, and to embark in that which was a species of litigation, either before the Sub-Commissioners or before the Commissioners, for the purpose of maintaining their remote rights, because it was nothing but remote, to an augmentation of stipend, when, as I have shown, I think the whole of their interest was substantially protected by those who must have been called to that valuation.

These considerations would make me very unwilling indeed, unless I were compelled by absolute authority to do so, to come to the conclusion that the stipendiaries were necessary parties to be called upon the occasion of any of these valuations.

Now, my Lords, with regard to the authorities, I do not intend to go over them. I will only say this of them, that as to the practice of the seventeenth century, we have nothing to guide us which can be called authority except three documents, if I may term them documents, namely, the Commission of 1629, the Act of 1633, and that decree of 1634, a copy of which is in the Advocates' Library at Edinburgh, and to which my noble and learned friend has referred. Beyond all doubt every one of these documents, existing and having their origin in the seventeenth century, is favourable to the case of the appellants, and unfavourable in my judgment to the case of the respondents. I attach very much less weight to the authorities dating from the year 1700 (I refer to those in the eighteenth century), because at that time the jurisdiction had been transferred, as has been said, from the Teind Commissioners to the Court of Session; and under that transfer the business was to be conducted in the Court of Session as a regular civil suit. When that was the law, it was the most important thing in the world that the Court of Session should require every person who had the same sort of interest which is represented in a civil suit to be called in any proceeding before the Court of Session sitting as the Commissioners of Teinds. But, my Lords, even with regard to all those authorities, running down from the year 1700, putting aside one or two very recent cases which have been referred to, and which may be said to be now under review as well as the particular cases upon which we are engaged, it appears to me that several of them have been founded upon the *Purvishaugh* case, which clearly must be given up as a binding authority for the purpose we are discussing; and as to the others of them it appears to me that they do not at all establish the purpose for which they are cited, of showing that the stipendiary must have been called in proceedings of this kind.

I am very glad my noble and learned friends have arrived at the conclusion to which they have come. I entirely concur with them in that conclusion. I think that there is nothing special in these particular cases to exempt them from the ge-

neral conclusion; and I am quite prepared to concur in the motion made by my noble and learned friend.

SIR ROUNDELL PALMER—Will your Lordships allow me to remind you that by the interlocutors below the appellants have been ordered to pay, and have paid, expenses. Of course that will be set right in your Lordships' judgment.

LORD CHANCELLOR—I apprehend this will be the proper course:—Turning to *Skene's* case, at page 38, where we find the interlocutor of the Lord Ordinary, it will be sufficient to reverse that interlocutor, so far as it finds that the appellants in the cause, "Henry David Forbes, John Gordon Cuming Skene, James Gordon Hay, and Major Paton, have not produced valuations of their respective teinds which can be sustained as effectual against the ministers of the parish, and decerns: Finds them respectively liable to the objectors in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor, to tax and report." That will be reversed, and this House will probably direct to be substituted for it a finding that the teinds of the appellants' lands have been valued under the decree in each case, and are not liable for additional stipend.

LORD COLONSAY—The interlocutors of the Inner House will also be reversed, I suppose.

LORD CHANCELLOR—Yes. This will be put in proper form. The question I shall have to put to your Lordships will be—That the interlocutors of the Lord Ordinary and of the Inner-House be reversed so far as they affect the several cases of the appellants, and that the words I have read be struck out, and that in lieu thereof we find that they have established these valuations, and that they are not liable to be located upon for teinds. Your Lordships will also further direct that the expenses paid by the several appellants be repaid to them by the respondents.

MR ANDERSON—And that the appellants should have their costs below.

LORD CHANCELLOR—No. There are several other parties who are not before us now who have proved their valuations; and as regards them they neither pay nor receive expenses. The interlocutor "Finds that the valuations founded on by the said Charles B. Fisher and Luke Netterville Barron are not now objected to; finds that no expenses are due to only these respondents."

Interlocutors reversed, with finding and directions as to repayment of expenses in the Court below.

Agents for the Ministers—H. & A. Inglis, W.S., and Martin & Leslie, Westminster.

Agents for Mr Forbes—Henry & Shiress, S.S.C.

Agent for Major Paton—W. Duthie, W.S., and Loch and MacLaurin, Westminster.

Agents for Mr Skene—John Auld, W.S., and Messrs Burchells, Westminster.

END OF VOLUME VII.