tioner had obtained the concurrence of George Whyte, one of the trustees, to the petition. The truster died in 1869. The petitioner averred that the trustees, who were three in number, Mrs Whyte, George Whyte, the truster's son (both of whom were trustees nominated by the truster), and Rev. J. Stewart, were at variance among themselves, and that the management of the estate (which was almost entirely heritable and was heavily burdened) was brought to a dead-lock thereby. On this point it was admitted that there had been variance between George Whyte and the other trustees, but denied that the management was brought to a dead-lock thereby.

The petitioner also averred that no accounts had ever been produced by the respondents, though they were ordered to produce them in a previous action which they had brought against her, and the conclusions of which involved the question of her election between her testamentary provisions and those in the testator's marriage-contract, which action had been dismissed as premature. The trustees stated that full accounts could be produced, and produced in the present process accounts showing that the estate was in a very embarrassed position, and that though the estate at the time of Mr Whyte's death produced a considerable revenue, there was now almost no available revenue.

It was further averred and admitted that the agents of the trustees held an adjudication over the trust-estate for a sum of £319 or thereby, which consisted of cash advances and law charges, the history of which was that the debt had been incurred to them during their agency, that they had resigned the agency, and afterwards led the adjudication for the debt, and had two years after its date again been appointed agents.

Mrs Whyte, one of the trustees, was seventy-eight years of age. The Rev. Mr Stewart had no intromissions with the trust funds.

The answers lodged bore to be on behalf of the majority of the trustees (Mrs Whyte and Rev. Mr Stewart) and all beneficially interested except the petitioner.

George Whyte (who was alleged by the respondents not to have any beneficial interest in the trust, since he had been bankrupt, and his whole interest had been sold by his trustee) made a separate appearance at the bar and lodged a minute craving that the desired appointment should be made, and setting forth that the accounts which had been produced showed that the estate was being rapidly dilapidated, and further that he was excluded from all share in the management.

The Court, without delivering opinions, sequestrated the estate and appointed a judicial factor.

Counsel for Petitioner—Sym. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Comrie Thomson—Dickson.

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*Friday, July 17.*

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## LORD ADVOCATE *v.* LADY WILLOUGHBY DE ERESBY.

*Teinds—Valuation—Rescissory Act* 1662, *cap.* 1 *—Act* 1662, *c.* 9*—Act* 1663, *c.* 28.

A valuation of teinds by the High Commission in 1647 *held* not to be struck at by the Rescissory Act 1662, c. 1, depriving of all force acts, gifts, tacks, or deeds passed after 1637 to the prejudice of the rights of the several bishoprics.

In the locality of the parish of Cargill a question arose between the Lord Advocate as representing the Crown and Lady Willoughby de Eresby, heiress of entail in possession of the entailed estates of Drummond, as to whether the teinds of the lands of Kirklands of Cargill, and Nether Campsie, the property of Lady Willoughby de Eresby, were or were not valued, the Crown as titular of the teinds of Cargill in right of the Bishop of Dunkeld contending that the teinds in question were unvalued. The Lord Advocate accordingly lodged objections in the locality, alleging that the teinds in question had not been, as they ought to be, included in the state of teinds, and Lady Willoughby de Eresby lodged answers. She maintained (1) that the lands in question were valued by a decree of the High Commission dated December 1647, and which had gone amissing for a long period (during which a valuation of 1629 was assumed to be the ruling valuation), but which she now produced. (2) She maintained, alternatively, that the lands in question were included in a decree of valuation by the Sub-Commissioners of the Presbytery of Dunkeld in 1629, approved by decree of the High Commission dated 24th July 1771 and 3d February 1773.

The former of these contentions was alone the subject of decision in the Inner House in this process, and it is fully explained in the opinion of the Lord President.

The Lord Ordinary repelled the objections for the Lord Advocate.

"*Opinion.*—In this case it is contended on behalf of the Crown that the teinds of certain lands pertaining to the respondent, known as the Kirklands of Cargill, and the lands of Nether Campsie, are unvalued.

"There is a valuation of the respondent's estate, made by the Sub-Commissioners for the Presbytery of Dunkeld in 1629, and approved by the Commissioners of Teinds, by decree of approbation and valuation, dated 24th July 1771 and 3d February 1773. But in the valuation thus approved the lands of Nether Campsie are not referred to by name, and in it the Kirklands of Cargill are named without being valued, because it is there stated that they are 'alleged to be feued *cum decimis inclusis*, but no charter or confirmation produced for verifying thereof.'

"One of the answers made by the respondent is, that the lands in question are valued by a decree of the High Commission dated December 1647, an extract of which is produced and founded on. It is not disputed that the last-mentioned decree has reference to the lands of

Nether Campsie and Kirklands of Cargill. But it is maintained for the Crown that the document in question is not a valuation; that it is primarily a decree of modification of stipend, and that the valuation therein contained is a valuation for the purposes of that particular grant of stipend, and that it was not intended to have any prospective operation.

"The case was argued with ability and learning, and I have carefully considered the arguments presented to me. My opinion is that the decree in question is a valid and effectual decree of valuation by the High Commission. It is not necessary to consider whether this decree or that of the Sub-Commissioners ought to prevail with respect to the teinds which are included in both, because no question is raised regarding these teinds. But as regards the teinds of the Kirklands of Cargill and the teinds of Nether Campsie there is no competition as to the effect of the decrees, and I think that these teinds must now be taken as of the value found by the decree of the High Commission.

"With reference to the argument founded on the circumstance that the extract decree sets out with a modification of the minister's stipend, I may observe that at the date when this decree was pronounced the distinction which now prevails between actions of modification and actions of valuation did not exist. The High Commission was not a Court of lawyers, but an administrative body; and there is nothing in its constitution which could have the effect of preventing such a body from embodying in one public act the results of its adjudication upon the various matters which came before it at any sitting. The decree does in fact fix the value of the particular teinds, and fixes it in perpetuity. As the valuation of teinds was one of the duties of the High Commission, I think it is to be presumed that the valuation which is set forth in this decree was a valuation made in the exercise of the instructions given to the Commissioners to value all the tithes of the country, It is no objection to the valuation that it proceeds on an agreement, nor is it necessary that the valuation should contain a formal decerniture.

"On this general ground I am prepared to repel the objections for the Lord Advocate to this scheme of locality. There are no technical difficulties, because it is quite settled that a process of augmentation and valuation is a competent proceeding, and that such a composite action may proceed at the instance of the minister of the parish.

"Nor is there any reason to doubt the authority of the extract decree considering the source from which it has come. Decrees similar to this in all respects have been ordered by the Court to be officially recorded in the exercise of the statutory powers to that effect.

"A separate argument was maintained on the part of Lady Willoughby to the effect that on a sound construction of the Sub-Commissioners' decree the Kirklands of Craigill are included in it. It is unnecessary that I should give an opinion on this question, because if my opinion on the first branch of the case is well founded the teinds of these Kirklands are valued by the decree of the High Commission, and in either way the Crown's objection to the scheme will fail."

The Lord Advocate reclaimed.

The argument maintained for him fully appears from the opinion of the Lord President *infra*.

Authorities cited—*Deans of Chapel Royal* v. *Johnston*, 5 Macph. 414; Ersk. ii, 10, 36; Stair ii, 8, 35; Act 1662, cap. 1; 1662, c. 9; 1663, c. 28.

At advising—

Lord President—The question raised by the objections lodged on the part of the Crown is, whether the teinds of certain lands belonging to Lady Willoughby de Eresby, in the parish of Cargill, namely, the Kirklands of Cargill and the lands of Nether Campsie, are valued or unvalued? The teinds of this parish were made the subject of a valuation by the Sub-Commissioners of the Presbytery of Dunkeld in the year 1629, and that subvaluation was approved by the High Commission in 1771 and 1773. It has been suggested that it was approved of at an earlier period, and very soon after the sub-valuation was made, but for reasons which I shall advert to immediately I do not think that can be held to be the fact. The approbation is not earlier than 1771. Now, if that is the regulating valuation of the teinds in this parish, the Crown contend that these lands are not valued at all, but are mentioned in the report of the Sub-Commissioners only for the purpose of showing that they are not valued, because they were supposed to be held on a *decimæ inclusæ* right; and that was the contention originally between the parties when the objections were made on the part of the Crown. But since that time another decree of valuation of the teinds of this parish has been discovered, made by the High Commission in 1647, and that having been produced in process, Lady Willoughby de Eresby contends that that is the only proper valuation of the parish, but, at all events, whether that be so or not, the teinds of her lands of Kirklands of Cargill and Nether Campsie are undoubtedly valued by that decree of 1647. Now, there were a good many heads of the argument before us originally insisted in which were in the end abandoned by the Solicitor-General, and the only question really remaining for decision is, whether that decree of valuation of 1647 by the High Commission is valid and effectual. It is contended that its effect was entirely destroyed and taken away by the Rescissory Act passed in the beginning of the year of Charles II. immediately after the Restoration. But there are some points connected with the decree itself which it is necessary to notice before proceeding to consider the effect of these statutes. It is contended, in the first place, that this was not a proper valuation at all—that it was a process of augmentation brought by the minister of the parish for the purpose of having his stipend augmented, and that the conclusions for valuation which were given effect to by the decree were really for a temporary purpose, viz., to ascertain and fix what teind there was to furnish an augmentation of his stipend. That is plainly an objection that has no weight, because we are quite familiar with decrees of augmentation and valuation pronounced about this time by the High Court for the double purpose of augmenting the minister's stipend and also of valuing the teinds, and there never has been any doubt entertained that a decree of valuation pronounced in such a process

is a valuation of the teinds for a permanent purpose, and not for the mere temporary purpose of fixing the augmentation. It was said also that this decree could not be rendered effectual because there was nobody then in the proper position of titular of the parish. Now, if by that is meant that there was no bishop, that is very true. There certainly was no bishop in 1647 who could appear or be heard in any Court in this kingdom. But if the absence of a bishop created any invalidity in the decree of valuation, I am afraid there are a number of judgments standing upon our books that ought to be altogether expunged or reversed; and no further back than the case of *The Deans of the Chapel Royal* v. *Johnston*, *supra cit.*, we have a valuation of bishop's teinds, or what is the same thing, of the teinds of beneficed clergy, then in the hands of the Crown which were valued in 1647 by a decree of the High Court made in the very same year in which the present decree was pronounced, and in that case there was no bishop and could not be, and the person who represented the titular there being the Duke of Buccleuch, was so far as it would appear from the historical evidence nothing better than a tacksman of teinds, but still he was for the time in right of the titularity. So that all these objections to the decree of 1647 are quite untenable, and indeed were abandoned by the Solicitor-General in his reply. But then he insists that this decree being to the prejudice of the bishop, is struck at by the statutes passed in the years 1662 and 1663; and there are three Acts which it is necessary to examine in order to see precisely what is the effect of that rescissory legislation. The first Act is 1662, chapter 1, which is an "Act for the restitution and re-establishment of the ancient government of the Church by archbishops and bishops," and the part of the statute founded on by the Crown is this—it is statute and ordained "that no act, gift, tack, or deed passed by whatsoever authority since the interruption of the government by archbishops and bishops in the year 1637, to the prejudice of their rights, patronages, admiralities, superiorities, rents, possessions, and jurisdictions pertaining to the several bishoprics, stand valid or be in force. But that the said archbishops and bishops may have their claim, right, and possession for the year 1661, and all years following, to whatsoever was possessed by, or by the laws of the kingdom was due to, their predecessors *in anno* 1637; and that notwithstanding of any donation or rights made to colleges, churches, corporations, ministers, or any persons since the year 1637, by whatsoever order, deed, or warrant." Now, if it were necessary to determine whether this statute taken by itself cuts down all valuations of teinds which are made during the period of the Cromwell usurpation I should be quite of opinion that the Act does not affect such valuations at all. It is not said that a decree pronounced in the ordinary course of the exercise of jurisdiction by the existing Court of the kingdom, whether it be a court of law, or a commission of teinds, or anything else, is to become null and void because pronounced by persons who were the representatives of a usurping Government. There is nothing of that kind to be found in the statutes. What is cut down is "acts, gifts, tacks, or deeds," and certainly a decree of valuation does not come within that description. But this matter is made a good deal clearer when we come to consider the other statutes which are founded on by the Crown. Chapter 9 of the same year is an "Act anent the Teinds belonging to Bishops and other beneficed persons," and it sets out that "forasmuch as by the King's decreet-arbitral in the month of September 1629, His Majesty found, upon the submission made by the bishops and other clergy, that the *quota* or rate of all teinds pertaining to the bishoprics and other benefices which falleth under the submission should be the fifth part of the constant rent of stock and teind; in which submission there is an express clause that the bishops and others of the clergy should enjoy the fruits and rents of their several benefices as they were possessed by them the time of the said submission; by which provision it appears that whatsoever teinds, parsonage or vicarage, they were in possession of by leading and drawing the same, or by rental bolls, they were not at all to be valued by the heritors thereafter: Likeas, till the year 1641, none of the said teinds possessed by the bishops and other beneficed persons were valued and approven by any commission, unless by consent or collusion, none making opposition thereto: And it being reasonable that the rights and privileges belonging to the Churchmen in the year 1633 should be restored to them: Therefore, the King's Majesty, with advice and consent of his Estates of Parliament, statutes and ordains all valuations of the teinds whereof the bishops and other beneficed persons were in possession, as said is, led by any pretended commission for valuation of teinds since the year 1637, to be void and null in time coming; and that the said bishops and other beneficed persons shall enter to the said possession of rental bolls and leading of the said teinds, parsonage and vicarage, this crop and year of God 1662 years, and in time coming: Providing always, that the heritors of such lands whereof the tithes belong to the archbishops, bishops, and other beneficed persons, being ministers, and were set in tack the time of their submission to His Majesty's father of blessed memory, shall be in that same place and condition they were in by the decreet-arbitral pronounced thereupon and by the 19th Act of Parliament held 1633." Now, here is a very plain distinction between the two classes of valuations. In the submission by the beneficed clergy to the Crown in 1629 they expressly protested against there being any valuation made of the teinds which they received either in the shape of drawn teind or of rental boll. And His Majesty, as arbiter, gave effect to that protest, and fixed the rate of valuation in the case of beneficed clergy to be one-fifth part where the teinds were not actually possessed by the beneficed clergy, but were set on tack, and as regarded all the teinds which were actually in the enjoyment of the benefice in the shape of drawn teind or rental boll he declined to give any award whatever. And that award of His Majesty was made effectual and became law by the operation of the Statute 1633, chapter 19. Now, as regards the teinds which were drawn or in the shape of rental bolls enjoyed by the beneficed clergy, all valuations made during the usurpation which affected to value these teinds are declared by this statute to be absolutely null and void; but, on the other hand, all valuations which are made of teinds belonging to beneficed clergy which were

set in tack at the time of the submission to His Majesty are to stand in the same position as if this statute had not been passed at all. It is plain therefore that that Statute, chapter 9, of 1662 gives no countenance whatever to the notion that a valuation which is led by the High Commission strictly in terms of the Statute 1633 shall be cut down merely because it happens to be a valuation of teinds held by beneficed clergy, but held under tack. There is one further statute which deserves notice—the Act 1663, chapter 28. Now, that is an Act creating of new the Commission for plantation of kirks and valuation of teinds, and there is this clause in it, "And albeit all the Acts of the pretended Parliaments in the years 1640, 1641, and thereafter, are declared by an Act of this Parliament null and of no avail in all time coming; yet it is hereby declared that all and whatsoever valuations, acts, sentences, and decreets, done and past by any commissions granted by the said pretended Parliaments, with all executions used or to be used thereupon, are and shall be as valid in all time coming as if the said valuations, acts, sentences, and decreets had been given and pronounced by persons legally empowered to that effect, anything in the foresaid rescissory Act to the contrary notwithstanding: Excepting such decreets of valuation, modification of stipends, or augmentations thereof, past and granted since the year 1637, whereby the said archbishops or bishops are prejudged of any part of their rents whereof they were in possession in the said year thirty-seven." Now, here again we have it pretty clearly expressed, I think, that the only ground upon which any decree of the High Commission during the usurpation can be set aside or held to be invalid is that thereby the beneficed clergy have been prejudged of any part of the rents whereof they were in possession in the said year 1637. Now, I do not think it at all necessary to say—although it might perhaps be contended—that in speaking of the rents whereof they were in possession the statute intends merely to describe those teinds that they enjoyed in the shape of drawn teind or rental boll, for I think the more probable interpretation of the statute is, that wherever the beneficed clergy are directly prejudged by any decree of the High Court in favour of anybody else to their prejudice they shall be restored against that. Now, we have got to apply these statutes to the case before us, and particularly to the decree of 1647. And here again it is quite necessary to observe that we are dealing with teinds which were never at any time within the memory of man drawn by the bishop or enjoyed from rental boll. That is made perfectly apparent by the tack of 1633, which, being granted in the very same year in which the Act of Parliament establishing the valuation and settling the law upon that subject was passed, is a document of very considerable importance. But it gives rise to some observations which are not altogether out of the case even now that the objections of the Crown are limited to the objections founded upon the statutes to which I have referred; because, in the first place, it proceeds upon a statement that there has been a valuation of the teinds of this parish by the Sub-Commissioners of the Presbytery of Dunkeld, and that that valuation or sub-valuation had been approved by the Lords of the High Commission. I think it is quite plain that the parties to this tack really knew nothing about that sub-valuation except the fact that there was such a thing in existence; because, in the first place, it is obvious that they were utterly wrong in supposing that it had been approved by the High Commission. It was not reported until the year 1635, and therefore could not possibly be approved in the year 1633. But, in the second place, this tack mistakes the terms of the sub-valuation altogether. The teinds are valued in that sub-commission at so many bolls of victual, partly meal and partly bere, whereas this tack represents them as being all valued in meal only. And again, the tack represents that the aggregate of the valuation is 13 chalders. Now, it is quite plain from the face of the sub-valuation itself that it does not amount to 13 chalders. And therefore it appears to me very plain that in granting this tack parties really were guessing at what the sub-valuation was, and had it not before them. But a much more important observation in regard to this tack is, that it sets out distinctly under the hand of the bishop, not only that he hereby—by this present tack—gives a grant of the teinds for a limited period to the heritor in tack, but also that the heritor, the Earl of Perth, to whom the tack is granted—he and his predecessors—have been "kindly and native tenants to us and our predecessors of the said teind sheaves of the said lands and barony of Cargill in time bygone past memory of man," which clearly bears out the statement with which I started, that the teinds of these lands had never past the memory of man in 1633 been drawn by the bishop or enjoyed in the form of rental boll. And therefore the teinds that we have to deal with are teinds which must be held to have been always set in tack, and therefore subject to valuation. Now, the way in which the tack deals with the teinds, assuming them to amount according to the valuation to 13 chalders, is this—There are 3 chalders and 8 bolls given to the minister, and there are 4 chalders given to the Governor of the Castle of Edinburgh, and then the balance, being 5 chalders and 8 bolls, is payable by the tacksman to the bishop according to a certain valuation—40 shillings a boll. So that the right of the bishop under this tack was to receive 5 chalders and 8 bolls of victual, converted at 40 shillings per boll. That was his interest in the teind under this tack. Now, the tack seems to have been renewed from time to time, but I need not dwell upon that. We proceed to deal now with the substance and effect of the decree of valuation of 1647. The summons is at the instance of the minister, and the parties who are called are the titular and the heritors, and when I say the titular is called, it is perhaps necessary to explain who it was that then stood in the position of the titular. It appears from a contract that was afterwards executed for giving effect to some of the provisions in this decree between the Earl of Crawford and Lindsay and the Earl of Perth that after the abolition of Episcopacy His Majesty King Charles the First made a gift, under the Privy Seal 1641, in favour of Mr James Livingstone, then one of His Majesty's bedchamber, and what he got, among other things, was a tack for a certain period of the titularity of this parish, along with a number of other grants of a similar kind affecting lands and teinds in other parishes. It was originally for a period of nineteen years, but it was extended to the life-

time of Livingstone and three nineteen years thereafter; and he had full power to subset and even to sell the teinds to the heritors. Whether that would have been effectual if it had been done is a different affair, because these bishops' teinds although they are liable to be valued are not liable to be sold. But, however, the powers of Livingstone were very great, and in exercise of the powers which he had he assigned to the Earl of Crawford the teinds of this parish, and so the Earl of Crawford came to be practically in the situation of the titular of these teinds. No doubt it was upon a right which was of a temporary character, but a right of very long endurance, because it was not only for the lifetime of Livingstone but for three nineteen years afterwards. And therefore it appears to me that the titular represented in 1647, when the High Commission made this decree, was really in all practical effects the titular of this parish for the time. There could be no better titular. That is quite clear; and we have it under the authority of the statutes to which I have referred that the processes of valuation were effectually led during the usurpation and in this year 1647, and that could not have been done without somebody to represent the titular of the parish. Now, this titularity was derived from the King himself, into whose hands the bishop's teinds had fallen on the abolition of Episcopacy. And therefore there could be no better right to the titularity, and if there was to be a titular at all the Earl of Crawford was clearly the titular to call in that process. Then there is a considerable part of the decree which I need not trouble your Lordships by reading at any length by which a stipend is modified to the minister, and what he gets there is 5 chalders and 300 merks of money. Now, that is undoubtedly in excess of what he was entitled to when the bishop was in possession of the teinds, because his stipend appears from the tack of 1633 to have been 3 chalders and 8 bolls, and not 5 chalders as here settled. Then the decree goes on to deal with the conclusions of the summons for valuation, and that is quite distinctly set out—The teind is valued at 11 chalders, and the distribution of that is made among the minister, and the Keeper of the Castle of Edinburgh, and the titular, just in this proportion, that the Castle gets its 4 chalders, the minister gets 5 chalders instead of 3½, and the titular gets the balance. Now, there are two effects of this decree which must be carefully distinguished. The one is the part of it that augments the minister's stipend, and to the extent of that augmentation prejudges the right of the titular. The other is the part of it which permanently valued the amount of the teinds, and fixes it at 11 chalders. Now, it appears to me that the one of these things is perfectly valid, and the other is not. The augmentation of the minister's stipend is invalid under the statute, because that was clearly in prejudice of the right of the titular, and consequently in prejudice of the right of the bishop when he came to be restored in 1662, because it was a diminution of the amount of his income from these teinds as it stood in the year 1637 under the tack of 1633. And what is the after history of the case—after the restoration of the bishop? Simply this, that the bishop was restored against the augmentation of the minister's stipend, and the minister's stipend was held to be 3½ chalders and not 5 chalders. But the valuation stands good. This is made pretty clear, I think, because there is a discharge by the Bishop of Dunkeld to the Earl of Perth of his tack-duty for the crop and year 1667, dated the 24th of June 1668, and he acknowledges to have received as the amount of his tack-duty £176 Scots, which is ascertained to be 5½ chalders converted at 40s. a boll. Now, that is exactly the amount to which the bishop was entitled under the tack of 1633. If the augmentation of the minister's stipend had been given effect to the titular would not have been entitled to £176 or to the equivalent of 5½ chalders, but only to the equivalent of 3½ chalders. So that the bishop was here clearly restored against any prejudice that he would have suffered by the operation of that part of the decree of 1647 which augmented the minister's stipend. Then we have a tack of teinds granted by the bishop in like manner in 1684, and there again the payment by the heritor, the Earl of Perth, is said to be—Paying yearly, for the space of nineteen years above-written, to the present minister of the said kirk of Cargill, and to his successors serving the cure, for their stipend and all other augmentation that can be craved furth of the said teind-sheaves of the said noble Earl, his said lands of the baronies of Stobhall and Cargill, all and haill the number of 3 chalders 8 bolls meal in part payment of 13 chalders of victual contained in the valuation, then to the Castle of Edinburgh 4 chalders, "and to us and our successors, Bishops of Dunkeld" 20s. 3d. "Scots money for ilk boll of 5 chalders and 8 bolls victual as the remainder due to us of the said haill number of 13 chalders victual." So that after the restoration of Episcopacy and the restitution of the Bishop of Dunkeld to his rights as they stood in 1637, it will be observed that he enjoys exactly the same income from these teinds that he did under the tack of 1633, which unquestionably was in operation in the year 1637, which is the date taken by the statutes to which I have referred as being the date for fixing what the amount of the bishop's interest is. It seems to me therefore, upon an examination of the history of this case in connection with the statutes to which I have referred, that this valuation of 1647 is good notwithstanding of the Act 1662, chapter 1, which does not touch valuations at all—that it is good under chapter 9 of the same year in consequence of the express declaration of that statute establishing the difference between the Crown teind of the bishops and the teind possessed by them under tacks, and a declaration that the valuation of the teinds which are drawn on tack shall be good and effectual notwithstanding that they are led and pronounced during the usurpation, and that the statute of 1663, chapter 28, recognises the same distinction. The bishop therefore under these statutes was entitled to be restored against any decree that prejudged his rights by conferring upon any hospital or college or charity of any kind, or upon any minister, anything that previously belonged to the bishop; but he was not entitled to be restored against the effect of a decree of valuation formally and competently led before the High Commission although led during the usurpation. For these reasons I am for adhering to the interlocutor of the Lord Ordinary and holding that the valuation of the teinds of this parish must be taken to be the valuation of the High Court in 1647, and there-

fore that the teinds of Lady Willoughby de Eresby's lands of Kirklands of Cargill and Nether Campsie are valued. There was a question behind as to whether even if the only valuation of the teinds of this parish must be taken to be the sub-valuation of 1629, whether the teinds were not still valued. I do not understand upon what that argument was founded, but it is needless to consider it, because Lady Willoughby succeeds upon the other ground, which is much more distinct and satisfactory.

LORD MURE—There are various questions raised in this case, but the only one which was distinctly brought before us for decision was whether the decree of 1647 was calculated to operate to the prejudice of the bishops so as to be struck at by the Acts of Parliament referred to. It was very clearly and distinctly put by the Solicitor-General, and after fully considering the whole matter I have come to be of the same opinion as that which your Lordship has now so very fully and clearly expressed.

LORD SHAND and LORD ADAM concurred.

The Court adhered.

Counsel for Crown—Sol.-Gen. Robertson—Keir. Agent—Donald Beith, W.S.

Counsel for Lady D'Eresby—Mackintosh—Dundas. Agents—Dundas & Wilson, C.S.

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*Thursday July*, 17.

## SECOND DIVISION.

[Lord Fraser, Ordinary.

### MACDONALD *v.* MACDONALD.

*Husband and Wife—Divorce for Adultery—Condonation — Action of Damages by Husband against Wife's Seducer.*

*Held* (*rev.* judgment of Lord Fraser) that a husband is not barred by having condoned his wife's adultery from an action of damages against her seducer.

In April 1884 Murdo Macdonald raised an action of divorce against his wife, Mary H. Macdonald, founding on an act of adultery which she had confessed to him to have committed with Kenneth Macdonald. The action was defended by Mrs Macdonald, but Murdo Macdonald failed to proceed with it, and decree of absolvitor by default was pronounced. He subsequently resumed cohabitation with his wife.

In January 1885 Murdo Macdonald raised the present action against Kenneth Macdonald for £1500 in name of damages and *solatium* for the seduction of his wife. The defender denied the adultery, alleging that the pursuer's wife was of immoral character, that the confession was false, and that the action was the result of a conspiracy to injure him and gratify the pursuer's ill-will against him and extort money.

He pleaded—"(3) The pursuer having resumed cohabitation with his wife after having raised an action of divorce against her, on the ground of her alleged adultery with the defender, and being still living and cohabiting with her, he is barred from claiming damages from the defender."

The Lord Ordinary sustained this plea and assoilzied the defender, holding in law "that an action for damages against the seducer of a married woman cannot be maintained where the husband has condoned the offence and taken back his wife to cohabitation and is living with her when the action is brought."

The pursuer reclaimed, and argued—In deciding this case the Lord Ordinary had considered himself bound by the case of *Aitken* v. *M'Cree*, February 6, 1810, F.C., while in the previous case of *Collins* v. *Collins* (December 1, 1882, 10 R. 250) he had expressed an opinion (p. 257) "that it is quite compatible with forgiving a repentant wife to demand reparation from the man who has brought dishonour both upon her and her husband, and has diminished the happiness of both." The report in *Aitken* v. *M'Cree* was too short and unsatisfactory to be regarded as a fixed precedent on so important a point. Though noted by institutional writers since (*e.g.* Bell's Prin. 2033), it was not approved as an authority settling the point, but was merely cited as a decision which had occurred. There was no ground in principle for holding that forgiveness of the wife involved the waiving of the husband's claim for compensation for the wrong done him by the seducer; for there might be reasons inducing the husband to take back his wife, applying only to her, and which might make the wrong done him by the seducer all the greater. It was extravagant to say that a wronged husband was to have no recourse against the author of that wrong except on condition of divorcing or trying to divorce the wife. The policy of the Roman law in excluding such actions was its fear of *lenocinium* on grounds of public policy. But the argument from public policy was at least as strong on the other side. The prospect of immunity to the seducer by forbidding recourse against him would be productive of as much evil as the possible encouragement to collusion between an immoral couple to extort money by way of damages from victims. It was the office of the Court on public grounds as much to encourage reconciliation between a husband and an erring wife as to discourage collusion and *lenocinium*.

Other authorities cited—*Maxwell* v. *Montgomery*, 1787, M. 13,919; *Paterson* v. *Bane*, 1803, M. 13,920; *Glover* v. *Samson*, Feb. 15, 1856, 18 D. 609; *Wilton* v. *Webster*, 7 Carington and Payne, 198; Fraser, H. and W. 1205; Sedgwick on Damages, ii. 517.

Replied for pursuer—No doubt the Lord Ordinary had held differently in the case of *Collins;* but in the present case he was following a precedent, viz., *Aitken* v. *M'Cree*, which decided the point. The report was full enough to state the point, and that was enough, and it was uniformly cited by institutional writers since, and certainly never disapproved, while it was approved by two of Erskine's editors—Ivory's Ersk. note to i. 3, 13, and Macallan's Ersk. *ib.*; also by More, Lect. p. 65. The only intelligible doctrine of condonation on grounds of principle was that it wiped out the act of adultery as if it had never been committed, so that no legal proceedings of any kind could ever afterwards be founded on it against any person. [LORD RUTHERFURD CLARK—Could