Wednesday, August 4.

OUTER HOUSE.

(COURT OF TEINDS.)

[Lord Guthrie.

IRVINE'S TRUSTEES *v.* EWAN.

Teinds — Surrender—Competency—Valuation of Teinds — Validity of Decree—Minister not Formally Called nor Formally Sisted in Process of Valuation—Decree Proceeding on Questionable Principle of Valuation—Prescription.

The proprietors of certain lands presented a minute by which they proposed to surrender certain teinds which had been valued conform to decree of valuation obtained in 1805 and subsequently acted upon. The minister objected to the surrender as incompetent, on the ground that the valuation founded on was invalid, in respect that it appeared *ex facie* of it (1) that the then minister of the parish had not been called or formally sisted in the process, and (2) that the principle proceeded on in arriving at the valuation was erroneous. It appeared that during the proceedings for the valuation the then minister had appeared and had cross-examined two witnesses. The valuation was based on a lease which had expired six months previously, and there were witnesses who stated that the lands which had remained in the proprietor's hands would bring a much higher rent.

Held (*per* Lord Guthrie) that the validity of the decree of valuation of 1805 was not now to be set aside on either of the grounds urged by the minister, and the surrender of the teinds *sustained.*

This was a minute of surrender of teinds, and condescendence, presented to the Court by the trustees of the late Walter Irvine of Dunino and Grangemuir, in which they, *inter alia*, averred that by a decree of valuation of 4th December 1805, produced in process, the teinds of the lands of Balkaithlie and others were declared to be £35, 8s. 6d. sterling, which sum of teind they now proposed to surrender to the minister.

It was contended for the minister that these teinds were unvalued, and that therefore the proposed surrender was incompetent. He, *inter alia*, averred that the decree of valuation of 1805 was *ex facie* invalid, in respect (1) that it was pronounced in the absence of the minister, who was not made a party to the process, and (2) that it proceeded on a rent of £153, 2s. 6d. payable under a former expired lease, in face of proof that the lands were at the date of the valuation in the possession of the proprietor, and would if then let for a period of nineteen years have yielded a rent of £250.

In answer, the minuters, *inter alia*, averred that at the time when the process of valuation was raised in 1805 there was a vacancy in the parish of Dunino, but that the Moderator of the Presbytery of St Andrews and the titulars were called as defenders; that the vacancy in the parish was filled while the process of valuation was pending before the Court, and the new minister, as the decree showed, took part in the proceedings therein, and must *post tantum temporis* be held to have been properly made a party to the process, and that the said valuation then made had been acted upon in subsequent processes of augmentation and locality. They further averred that the constant rent of the lands of Balkaithly in stock and teind, parsonage and vicarage, and the true and just rate of teinds, was in 1805 as declared by said decree.

The minuters maintained that the minute of surrender should be sustained and the objections thereto repelled, in respect "(1) That the objector's statements are (*a*) irrelevant and insufficient to support the crave of the objections, and (*b*) so far as material, unfounded in fact. (2) That the validity of the decree of 1805 is *res judicata*. (3) That the present process is an incompetent or at least inappropriate and inconvenient process to have the question of the validity or invalidity of the decree of valuation of 1805 determined; especially in the absence of all parties interested in the decree. (4) That after the lapse of so long a period of time, since 1805, everything in connection with the decree then pronounced must be presumed to have been regularly and properly carried out; and (5) that in any event all the questions raised by the present objector regarding the validity of said decree are excluded (*a*) by prescription, (*b*) by mora, and (*c*) by acquiescence and homologation on the part of the present objector, and of all parties interested in the decree."

The following authorities were referred to—Erskine's Institutes, ii, 10, 35; Juridical Styles (2nd ed.) iii (part i), 467 and 471; *Stewart* v. *Brown*, January 31, 1851, 13 D. 556; *Heritors of Old Machar* v. *The Ministers*, July 26, 1870, 8 Macph. [H.L.] 168, 7 S.L.R. 726; *Hay* v. *Minister of Peebles*, February 19, 1886, 13 R. 585; *Kinloch* v. *Bell*, February 12, 1867, 5 Macph. 360; Connel on Teinds, i, 183-185.

LORD GUTHRIE—"The late Walter Irvine's trustees, proprietors of Dunino in Fife, state in a minute of condescendence and surrender that the teind of the lands of Dunino and others belonging to them was surrendered by the then proprietor in 1813. This is not disputed by the minister of the parish of Dunino, the other party to this process.

"In regard to the lands of Balkaithly and others the trustees allege that the teinds of these lands were duly valued in 1805 at £35, 8s. 6d., which sum of teinds they propose to surrender to the minister. He replies that these teinds are unvalued; that the proposed surrender is therefore incompetent; and that the minute of surrender ought not to be sustained.

"Contrary to the trustees' contention, I think the question may satisfactorily be decided in the present process.

"The minister admits that the trustees plea of prescription is sound, unless it appears that the valuation of 1805 is *ex facie* invalid—*Kinloch* v. *Bell*, 5 Macph. 360. No minute of admissions has been adjusted, and neither party asked for proof. It is not denied that the valuation of 1805 has been regularly acted on.

"The question depends on the decreet of valuation, dated December 4, 1805, obtained in an action raised at the instance of the Reverend Dr Alexander Duncan of Balkaithly, the first calling of which was upon June 5, 1805. That decreet contains the valuation of £35, 8s. 6d., on which Walter Irvine's trustees now found. The minister objects that the valuation is *ex facie* void, because, first, no valuation of that date can be valid unless the minister has been duly made a party to the cause, and in the process of 1805 the minister was not originally called and was not subsequently sisted.

"Nowadays unless the charge is vacant the minister is always called, and if the charge is vacant the Moderator of the Presbytery is called and the minister will be sisted on appointment—Erskine's Institutes ii, 10, 35; *Shaw Stewart* v. *Brown*, January 31, 1851, 13 D. 556; Juridical Styles of 1828, vol. iii, pp. 467, 471. In older practice it has been held sufficient if the minister's interests were represented by the titulars or others—*Heritors of Old Machar*, 1870, 8 Macph. (H.L.) 168; *Hay*, 113 R. 585.

"In this case it appears from the decreet that when the process was raised the charge was vacant; that the Moderator of the Presbytery was called; and that on the charge being filled up the minister appeared at the examination of witnesses examined before a Commissioner appointed by the Court, and cross-examined the witnesses Robert Edmond and John Duncan, examined for Dr Duncan of Balkaithly, the pursuer of the action. But the minister points out in this action that it is not stated that his predecessor who thus took an active part in the valuation proceedings of 1805 was ever formally sisted as a party. It appears to me that the legal presumption *rite et solemniter actum* applies—*Heritors of Old Machar*, February 28, 1868, 6 Macph. 504, *per* Lord Curriehill, 534. The minister would not have been entitled to cross-examine unless as a party to the cause. The valuation has been regularly acted on since 1805. In a process of augmentation, modification, and locality raised in 1812 the Lord Ordinary adjusted a scheme in which the teind of the lands of Balkaithly was stated at £35, 8s. 6d., the amount of the 1805 valuation, and in the subsequent locality this finding was given effect to. I may add that Lord Barcaple, in *Kinloch* v. *Bell*, 5 Macph. 360, called Lord Robertson, the Lord Ordinary in the 1805 valuation, 'a great authority on such questions.'

"The minister also questions the validity of the 1805 valuation on the ground that it appears *ex facie* that the valuation was made on a wrong principle. When the valuation was made the lands had been out of lease from the previous Martinmas—that is, November 1804—and the two witnesses already mentioned, John Duncan and Robert Edmond, deponed in answer to the minister that, although the rent under the lease had only been £150, the land would then let for £250. The minister says that the Court obviously went wrong in preferring the rent under an expired lease to the rent which on the evidence under cross-examination of the proprietor's own witnesses could then have been got—Ersk. ii, 10, 32; Connell, i, 183 to 185.

"This objection is no answer to the plea of prescription. Suppose the Court erred in fact or in law, or in both, the decree might be voidable but it would not be void. But it does not follow that any mistake was made. The Court might well prefer the actual rent charged and paid up till six months before the action was raised to a rent involving a rise of £100, about which two witnesses speaking in a period of Napoleonic fluctuations, and of whose capacity to judge the Court may have had a poor opinion, chose to give a speculative opinion for which no reasons are given."

The Lord Ordinary repelled the objections for the minister and sustained the surrender for the trustees.

Counsel for the Minuters—G. C. Steuart. Agents—J. C. & A. Steuart, W.S.

Counsel for the Minister—Chree. Agents—Wishart & Sanderson, W.S.

Friday, October 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MATHIESON'S TUTOR *v.* AIKMAN'S TRUSTEES AND OTHERS.

Reparation—Landlord and Tenant—Negligence — Duty to Public — Invitation — Owner's Liability to Public where Premises Let to Various Tenants—Averments —Relevancy.

A message boy was sent to collect parcels from certain tenants in a tenement let out as offices to a number of business men and traders. The gate of a lift in the tenement was open, and thinking the lift was there the boy stepped into the well and was injured. His father, as his administrator-in-law, raised an action against the landlords of the tenement.

The pursuer averred—"For a considerable time before the said accident this said lift and safety gate were not working properly, the gate frequently failing to shut when the lift left the platform at the ground floor. This was due to the mechanism by which the said gate was operated having been allowed to go out of repair. The condition of the said lift apparatus and