are laid down as the grounds of decision, the endless variety of opinions that are formed upon the subject, no two seeming to agree, we shall leave the law of Scotland in a state of uncertainty, dreadful to every body in the situation of a parent, and mischievous to every one. Upon these grounds I agree with the noble and learned Lord, that the judgment ought to be reversed, and the defender assoilzied. It is a case between father and son, and therefore no costs should be given. June 1. 1825.

Appellant's Authorities.—3. Ersk. 9. 16, 17.; Kaimes' Pr. Eq. p. 80.; 25. Voet, 3, 4.; Maidment, May 27. 1818; 6. Dow, 259.; Mack. Ob. p. 101.; Moncreiff, Jan. 27. 1736; 3. Stair, 5. 3.

Respondent's Authorities.—Dig. 25. 3.; 1. Stair, 5. 7.; 1. Ersk. 6. 56.; 1. Bank. 6. 13.; 4. Bank. 45. 17.; Dick, Jan. 13. 1666, (409.); Aytoun, July 25. 1705, (390.); Ramsay, July 1. 1687, (391.); Adam, March 1662, (398.); De Courcy, July 3. 1806, (No. 8. Ap. Aliment); 2. Craig, 17. 20.; 25. Voet, 3. 3.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

Duke of GORDON, Appellant and Respondent. No. 32.
Adam—Abercrombie.

Reverend JAMES GILLAN, Respondent and Appellant.
Keay—Wilson.

Teinds—Title to Pursue—Process.—Found, (affirming the judgment of the Court of Session), 1. That a decree of approbation of a sub-valuation, pronounced in absence of the minister of the parish, may be competently challenged by reduction. 2. That the feudal proprietor is the proper pursuer of an action of approbation. And, 3. That the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the moderator of the Presbytery, is the proper defender.

IN 1629 the whole teinds of the parishes in the presbytery of Elgin, including specially the parishes of Dipple and Essil, were valued by the sub-commissioners. These two parishes were afterwards united, under the name of Speymouth, to which the lands of Garmouth, lying in the parish of Urquhart, were subsequently annexed, quoad sacra. The property of these united parishes belonged to the Earl of Fife; but, in 1779, his Lordship excambed them with the Duke of Gordon, who entered into possession at Whitsunday in that year. Lord Fife, still remaining feudally invested on his infeftments, June 7. 1825.

TEINDS.
Lord Meadowbank.

June 7. 1825. brought, in August 1784, a process of approbation of the sub-valuation. At this time Mr Gillan was minister of Kinloss; but had received a presentation to Speymouth in December of the same year, which was laid before the Presbytery, and sustained on the 6th of January 1785. The summons of approbation was executed against him in July 1785; but he was not inducted until October following. It was also directed against the other clergymen within the Presbytery of Elgin. The summons was blank, and the copy of citation short. When called, Counsel (who was solicitor of tithes at the time) took the process to see. No debate ensued, but, on the 21st November 1792, decree was pronounced in absence of the minister.

Subsequently, Mr Gillan having obtained an augmentation, the Duke of Gordon, who had now completed his titles, proposed to surrender his teinds, in terms of the decree of valuation. This was opposed by Mr Gillan, who also raised an action of reduction of the decree of approbation, on the grounds, 1. That it was in absence; 2. That the action had been pursued by Lord Fife, whereas the Duke of Gordon ought to have been pursuer; 3. That as the parish was vacant at the time it was executed, it ought to have been directed against the moderator of the Presbytery; and, 4. That the sub-valuation had previously been derelinquished by over-payments. The Lord Ordinary found, inter alia, 'that there are no relevant grounds stated for 'setting aside the decree of approbation sought to be reduced, 'and that the action of reduction ought, therefore, to be dis-'missed;' and made avizandum to the Inner-House.

In the meanwhile, a case, involving the same question, was in dependence between Mr M'Donald of St Martin's and the Minister of Kinnoul, in which the Lord Ordinary (Cringletie) had sustained the action of reduction at the instance of the minister, and Mr M'Donald had brought his interlocutor under review. In the present case, the minister reclaimed; and, when his petition came to be advised, the Court, on the 7th February 1821, in respect of 'the coincidence of this case with another depend-'ing before the Court between the Minister of Kinnoul and 'Mr M'Donald of St Martin's, now ready for advising, they 'supersede advising this case farther till the other is consi-'dered.' Thereafter, in Mr M'Donald's case, their Lordships, 'in respect all parties concerned were regularly cited 'in the action of approbation and valuation brought by the de-'fender, Mr M'Donald's author, found, that the decreet that

'followed thereupon in his favour, although obtained in absence, 'cannot now be opened up; therefore recalled the interlocutor of 'the Lord Ordinary complained of; repelled the reasons of re- 'duction; assoilzied the defender from the whole conclusions of 'the libel, and decerned.' And, upon the same day, the Court pronounced the following interlocutor in this case: 'The Lords 'having again advised this petition, the answers thereto and 'whole proceedings, and having considered and determined in 'the case of Mr M'Donald of St Martin's above referred to, 'they refuse the desire of this petition, adhere to the interlocutor 'of the Lord Ordinary complained of, and decern.' Reclaiming petitions were then lodged in both cases by the respective ministers; and, on the 22d May 1822, the case of Mr M'Donald having come to be advised, the Court 'so far altered the in- 'terlocutor reclaimed against, as to repel the respondent's objec- 'tions to the competency of the action of reduction, and remit 'to Lord Kinneder, Ordinary, to prepare the cause, as upon the 'merits, for the consideration of the Court.' Against this judgment Mr M'Donald reclaimed; but the Court, on the 21st May 1823, adhered,* and, on the same day, pronounced this interlo- June 7. 1825.

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* The following opinions of the Judges in that case were laid before the House of Lords:—

Lord Hermand.—It is stated, that there is a difference between a process of valuation and a process of approbation of a sub-valuation; but I don't see that difference. In the question before us there is a point of great importance: It is insisted, that a decree of approbation, where every thing has been regularly done, and all parties called, shall be set aside, because the minister, though called, did not choose to attend. The evils arising from this not being done may sometimes occur; but Mr M'Donald, when he purchased the lands, saw a decree of approbation ex facie regular; and the minister says—an extraordinary thing—that he paid no attention to the process when it was going on. I will not take such a statement off his hand. I would not believe any person who says that he did not attend to his own interest; and the plea has been rejected in cases of valuation where the same objection has been made.

As to the principle, I never heard it disputed, that in such a case, where all parties are cited, it was of no consequence whether one of them appeared or not. A pursuer cannot force a party to come into Court. We don't employ the Roman method, and bring them into Court obtorto collo. There is a compulsitor to tell him to appear, but none to make him appear. The evils arising from the plea by the minister would be more fatal in an approbation than in a sub-valuation.

As that is my opinion on the preliminary point, it is the less necessary to go into the plea of dereliction; but I may only say, that dereliction not being presumed in law, it must be made out in a clear manner, especially where the valuation is in victual. The over-payments here depend on calculations for a century or more, and it is very difficult to make out that there has been an over-payment. There is a great deal stated to shew, that in the localities no excess was laid on the lands, but even something under. It is not in the power of this Court to set aside the decree of approbation.

June 7. 1825. cutor in the case: 'The Lords having resumed consideration 'of this petition, and having advised the same with the answers, 'they, in respect of the judgment pronounced this day in the

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Lord Cringletie.—I was Ordinary in this case; and it appears to me to be a question of great importance, not whether Mr M'Donald shall be considered as having derelinquished, but whether the decree of approbation shall be held as final and not to be traversed. Your Lordships will look at the terms of the Act of Parliament, on the thirty-eighth page of the minister's memorial: 'Where valuations are lawfully led 'against all parties having interest, and allowed by the former commissioners accord-'ing to the order observed by them, that the same shall not be drawn in question, nor 'rectified upon pretence of enorm lesion at the instance of the minister, &c. except it 'be proved that collusion was used betwixt the titular and heritor,' &c.

If we were entering into the question, whether this sub-valuation was duly led or not, it would be met by the Act of Parliament. How can he shew that there was enorm lesion without the decree being open to challenge? If the minister could lay upon your table a decree of the High Commission, rejecting the sub-valuations, would your Lordships persist in supporting this approbation? I cannot enter into that. Or suppose that he was to lay before you a discharge by the heritor departing from the decree, would the decree nevertheless stand in time coming? It is true that the nature of the question here is not quarrelling the decree on enorm lesion. It is that the sub-valuation had been derelinquished, and more than derelinquished. Dereliction and prescription are two different things. A sub-valuation may be lost by dereliction, even of a few years, but that is not prescription. It may be also lost by prescription, though, by merely lying by, it will not be lost by the negative prescription. The bottom of the matter is, that in that case the minister has acquired right to the over-payments, not under the valuation, but by the positive prescription. This is not a question of dereliction, but the objection is, that the sub-valuation had been lost three times over by the positive prescription, and that there had been over-payments even by the fiars. Here is a valuation lost and annihilated the same as if it had been rejected by the heritor; and yet, in that situation, it is brought forward, and decree of approbation passes in absence. It is said this would endanger land rights. But what happens in reductions improbations? We pronounce decreet of certification contra non producta. It is only after various acts that you reduce when the writings are not produced. And even after all that, the decree may be opened up, though not as a matter of course. Now, in the present case, when a citation is given on a blank summons, and a decree is pronounced restoring a deed cut off and lost, I must adhere to the opinion I gave in the Outer-House, that it is competent to open it up. And here the objection is not, that the sub-valuation is wrong, but that it is a piece of waste paper. (His Lordship then went into the question of dereliction; but as that point was not decided, it is unnecessary to give the rest of his Lordship's opinion).

Lord Robertson.—This is a case of great importance, and my opinion has varied at different times. The heritor here has obtained a decree of approbation of the sub-valuation. This decree was regular in all respects. The summons was executed against the proper parties, and all the regular forms were observed. The minister was cited personally, but did not appear; and he now insists on setting the decree aside, and contends, that although he was personally cited, it was a decree in absence, and that he ought now to be heard on any grounds on which he could have opposed the decree. It is maintained on the other hand, that this decree is now unchallengeable. I should hesitate very long before I could find a decree in absence to have the same effect as a decree in foro. A decree in foro is held pro veritate, and nobody is allowed to chal-

'case of William M'Donald, Esq. of St Martin's, so far alter June 7. 1825.
'their interlocutor in this case, as to sustain the competency of
'the action of reduction; and, before answer, allow the pursuer

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lenge it; and for what reason? Because it proceeds on having knowledge of all circumstances; and therefore it is of consequence, after all the circumstances have been considered, that it should not be lightly opened up. Now, what is the decree here? It is entirely in absence. When the Court had no opportunity nor power to examine all the circumstances, in such a situation the pursuer takes the decree at his own risk, and I cannot agree to hold that a decree so obtained is to be held as effectual as a decree in foro. If the Act of Parliament puts the decrees of the Commissioners of Teinds on a different footing from those of other Courts, and if decrees in absence by the Commissioners are as unchallengeable as decrees in foro, then no doubt a reduction of a decreet of locality in absence could not be allowed; but we have an instance to the contrary in this day's roll, and no doubt was entertained of the right of reduction. But it is maintained, that there is something different in processes of approbation or valuation from other processes, and a great deal has been founded on the Act 1633. But although this Act has been founded on by the heritor, it appears to me to operate the other way, and proves that there is a right of reducing such decrees; for it is not a prohibition of review, but only a limitation of the right. It is a complaint that the teinds were undervalued; and in order to remedy that, and to stop numberless litigations, there was a limitation by the Act which applies only to reduction of decrees upon the head of enorm lesion, which were not to be allowed but in the manner appointed by the Act; that is, when the decree is challenged on enorm lesion, the minister must prove that there was collusion, and that by the oath of party. But there is no prohibition against reducing the decree on other grounds, such as not calling the proper parties. There is nothing to prevent such reductions. It is better not to say any thing as to the dereliction till this preliminary point is settled.

Lord Succoth.—I own I have formed an opposite opinion. It is unnecessary, in my view of the question, to go into the point of dereliction, because I think that it is not competent to open up this decreet of approbation, which is bottomed on a process regularly brought, and all parties called, though they did not appear. At first, a report of a sub-valuation was made to the High Commission at once without any process, and it was approved of. Afterwards a more regular mode of proceeding was adopted by a summons of approbation, and that seems to have been adopted prior to the Act 1633. It seems not to have been held as necessary that the defenders should appear in valuations, if they had been regularly called, of which a variety of instances are given on the eighth page of Mr M'Donald's memorial. Then as to approbations of the proceedings of the sub-commissioners, a variety of instances are given on page tenth of that memorial, to shew that it was not necessary that the defenders should appear. Then as to the Act 1633, on which this question mainly depends, the terms of it are, 'Attour for clearing all doubts and difficulties which may arise anent the rectifying of 'valuations, or other particular heads following, his Majesty and Estates have declared 'and declare, that where valuations are lawfully led against all parties having interest, 'and allowed by the former commissioners according to the order observed by 'them.' (This appears to relate to the proceedings of the sub-commissioners from the words themselves, and from the context, and therefore this statute was meant to apply, not only to the High Commission, but to the sub-commissioners, and that is a material point in the discussion). The statute then goes on, 'That the same shall not 'be drawn in question or rectified upon pretence of enorm lesion at the instance of the 'minister not being titular, or at the instance of his Majesty's Advocate, for and in

June 7. 1825.

'to give in a condescendence of his grounds of reduction, found-
'ed on the objections to the sub-valuation, and the derelict ion
'thereof by over-payments: quoad ultra refuse the desire of the

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'respect of his Majesty's annuity, except it be proved that collusion was used betwixt
'the titular and heritor, or betwixt the procurator-fiscal and the titular and heritors,
'which collusion is declared to be where the valuation is led with diminution of the
'third of the just rent presently paid, and which diminution shall be proved by the
'party's oath.'

Some of your Lordships have gone on the latter part of the statute as if it applied only to the case of enorm lesion. Now there are two different things here. These decrees are not to be drawn into question,—that is one thing; 'nor to be rectified 'for enorm lesion,'—that is another thing. From the last part of the clause it is plain, that if collusion can be alleged, it is competent to open up the sub-valuation or approbation, and it is sufficient collusion where the enorm lesion is one-third. But unless upon the question of collusion, if the valuation has been led against the proper parties, and approved of, it is not to be opened up at all.

It is said that this Act does not apply to the case in hand, of there not being an appearance for the minister, though regularly cited. I am at a loss how to construe the statute, unless it applies to this case. The enactment would have been useless if it only applied to cases where all parties had not only been cited, but appeared; therefore I don't see the use of it unless it was to go the length of the case in hand, where every thing was regular, so far as citing them, though they did not appear. In point of expediency there is great room for the construction put on the Act by Mr M'Donald, because no heritor has it in his power to compel parties to appear, and it would be hard if the situation of his teinds were to depend on their making appearance at any time within the forty years. I admit, that if it could be made out that the parties were not cited, that would do, because that would not fall under the statute; as it is only where the valuations are lawfully led against all parties having interest, which means that all parties are called having interest. In the same way, if there are any intrinsic nullities in the procedure, the Act would not apply, and that appears to me to be the real ground of the opinion given by Connell, (vol. i. p. 438. quoted in the case before us to-day of the Duke of Gordon). 'According to the practice of the present Court, 'it is not considered to be essential that the defenders cited should enter appearance. 'If the proceedings have been correct and formal, a decree of valuation, as well as a 'decree of approbation in absence, will be attended with all the effects which usually 'attach to a decree in foro of the Court of Session.'

Therefore, upon the whole, though it is a nice question, and though it is with hesitation, still I am of opinion that it is not competent for this pursuer to open up this decree of approbation.

Lord President.—I am in the same situation with Lord Robertson, as my opinion has varied at different times. I was for some time of the same opinion with him, and if I viewed this decree as a judicial procedure merely, I would continue of that opinion; but a process of valuation is not, strictly speaking, a judicial proceeding. It is a privilege given to me to get my property valued on going through certain forms. It is not from any obligation come under to me, or any obligation by me. I am not asking any thing out of the pockets of the persons called, I am only seeking to acquire certain privileges, which is to depend on my going through certain forms, one of which is, that I shall cite those having interest. The Legislature might have adopted any other mode, but this is what they have prescribed. Accordingly I take all these steps; and I call the summons at the head burgh, and stick it up on the church door, or I call the

'petition.' To this judgment their Lordships (3d December 1823) adhered.* June 7. 1825.

* Shaw's Teind Cases, Nos. 20. and 23.

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minister and the titular,—I go through all the forms, and then the valuation is lawfully made. It is something like another statutory privilege—that conferred upon proprietors of entailed estates as to improvements. It is not precisely the same, but it is very analogous; provided I do certain things I am entitled to make the expense of the improvements a burden on the entailed estate. I must call the heir of entail next after those of my own body, or his nearest male relation. If I have done all this, and called the next heir, though the decree should pass in absence, the heir would not be allowed to challenge the expediency of the improvements. The analogy of judicial procedure does not hold in such a case. Judicial procedure goes on a supposed quasi contract; and if this quasi contract is entered into before the judicial procedure, I say the law does authorize you to bring the defender obtorto collo. But if there is no quasi contract, and he does not appear, he acquires a right to open up the decree. But then it is not a privilege I am acquiring to myself,—I am asking decree against another; but in the present case I acquire a Parliamentary privilege if I go through the order of law. If the parties do not appear, the presumption is, that their interests have been taken care of, and I have secured my privilege. It would be most dangerous to land rights to hold any other doctrine. I once thought there was no more danger than in opening up adjudications, which often pass in absence. If I purchase an adjudication, it is always sub periculo of being opened up. But then an adjudication is a judicial act. The adjudger asks for my money, or takes my land; and I have not only to appear for my interest, but my property is at stake. The decree here is not a judicial act. It is res voluntariæ jurisdictionis; but where I have done every thing the law requires, it cannot be challenged; and this still leaves open the question as to the law of prescription in favour of the minister.

Lord Justice-Clerk.—I am afraid I must also differ from Lord Robertson; and I have come to the same conclusion with your Lordship. It is quite clear that it is on the Act 1633 that the question depends; and in confirmation of what your Lordship has now said, it is material to attend to the words of another clause of the statute: 'And his Majestie, with consent of the estates foresaid, finds, declares, and ordaines 'the acts, decreets, and ordinances of the commissioners foresaid, and of the other 'persons who shall be surrogate in their places by his Majestie in manner aforesaid, '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:' Therefore the proceedings under this Act, when duly followed out, are to have the force of an Act of Parliament. It therefore places them on a different footing from common judicial proceedings. Now, when you consider the object of the Act, for clearing all doubts and difficulties that may arise, it comes to be a very narrow ground to say, that the only ground was confined to cases of enorm lesion alone. There is a great deal in considering what was the object of the Legislature. It is material in reference to the construction contended for, that the only ground is collusion, and a definition of collusion is given. The declaration of the Legislature is, that without any further proof than the diminution of one-third, they can bring it under review. It is material to see what occurs in Connell as evidence of the course of practice, (~~446~~.) 'In reference, no 'doubt, to this clause in the Act of Parliament, in an approbation of a sub-valuation of 'lands in the parish of Linlithgow,' the King's Advocate appeared, and protested, 'that he might have action to rectify the valuation, in case the samen were one-third 'within the worthe; and the commissioners approved of the sub-valuation, the minister

June 7. 1825. The Duke of Gordon appealed, and Mr Gillan, the minister, cross appealed, in so far as his objections to the form of the decree had been repelled.

'agreeing, and the heritor not objecting, "but prejudice to his Majestie's Advocate 'for his Highness's interest to rectify the valuation above-specified, in case the samen 'be one-third within the just worth and vail thereof. 1st July 1636.' A similar 'qualification was annexed to another decree of approbation pronounced on the same 'day respecting other lands in the same parish.' Here is complete evidence as to the practice, within three years of the Act, that those interested, who had doubts as to the sub-valuation, had a qualification introduced, that they should be at liberty to challenge it. That is a strong argument, that unless collusion could be shewn, the decree could not be reduced.

Lord Bannatyne.—I rather agree with the Lord Ordinary, that the decree may be challenged.

Lord Balgray.—I never could see the distinction between an ordinary valuation and a decree of approbation. In the first, the minister cannot open it up. The proceedings of the sub-commissioners were nothing more than taking a proof, as in other cases, to be reported to the High Commission. I have always looked on a decree of approbation as a modus acquirendi dominii; it is the legal title to the subject.

State of the Votes.

For Altering.—Lords Hermand, Succoth, President, Justice-Clerk, Balgray, Balmuto, Pitmilly, Meadowbank.

For Adhering.—Lords Cringletie, Robertson, Bannatyne, Craigie.

At the advising on the 21st May 1823, the following Opinions were delivered:—

Lord Balgray.—A difficult and important case. Interlocutor imports, that the proceedings in the valuation are the same as in a civil process, and that the same rules must be observed as to decrees in absence. Have great doubts of this; no distinction between decreets of valuation of, and decreets of approbation. I take it for granted, that proceedings had been lawfully conducted, and that omnia rite or solemniter acta. Interlocutor adverse to the views and intention of the Legislature, and will be attended with serious consequences to land-holders. The intention of valuations was, that there should be permanent establishments to clergy, to stop drawing tithes, and to crush the power of the lords of erection, viz. titulars and their tacksmen,—not a mere civil process. The measures of Charles I. produced great discontent. The machinery of proceedings quite adverse to the idea of a civil process. Intrusted Procurator-fiscal and King's Advocate, and rules laid down for proceedings in absence of the parties, and cannot be said that the proceedings must be voided if in absence. See First Minutes of Commissioners in Treatise on Tithes, p. 49. No doubt, a remedy of rectification —Act 1633—where there was enorm lesion, but no right to challenge valuations, even if fraudulent, if no lesion to this extent. In Act 1690, c. 30., the clause is more clearly expressed. Said meaning of word lawful is, that a decree must be liable to no legal exception; No. 38. App. Terms used shews 'lawful means,' if valuations led against all having interest. If no legal objection, the decree protects itself. Plea adverse to the right intended to be created; for the purpose of valuation, as it is somewhere expressed, was to create an heritable right. Consider the consequences in a ranking and sale, a proof of holding land and burdens, including teinds. Now, what is the proof of the teinds? Is it not the decree of the Court? Cases of warrandice, cases of entail, where clear rental is found, or in making provisions to the children, &c. As to the practice of the Court not moved. Both Judges and lawyers ignorant of the law till Sir John Connel's Treatise on Tithes was published; and question never fully brought before the Court till now. Would be very wrong to lay

June 7. 1825.

Appellant (*in Original Appeal.*) The decree of approbation cannot be regarded as pronounced in absence, and therefore cannot now be opened up. But even if in absence, decrees, in matters of this kind, stand in a very different situation from decrees in mere civil suits. This is evident from the instructions of Charles I. and the subsequent statutes. Indeed, it is by statute expressly declared, 'that the acts, decreets, and sentences 'of the Commission, shall have the strength, force, and authority 'of a decreet, sentence, and Act of Parliament.' No doubt, if

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hold of the forms of the Courts in common law to defeat the great system of valuation of tithes. The rule would be even against the clergy; for all parties have coexistent interest in tithes. Said, as challenge of valuations were formerly competent, must be so now. Parallel cases in civil form. Decree of expiry of legal questions about entails. Every party bound to give effect to the object of valuation, and not to lie by, and then object to decrees.

Hermand.—A very nice case; agreed formerly with Lord Balgray, but after full consideration, I am of a different opinion. Here his Lordship repeated the arguments for the minister, and cases here quoted.

Lord Justice-Clerk.—Undoubtedly a nice case, and have had different views, but still for interlocutor last pronounced. No doubt this is a case differing from that of a civil nature; and if we were to consider ourselves as acting under the authority of Parliament, this would relieve us from a great deal of trouble; but innumerable cases of reductions. But not so by Act 1633: by that Act, all matters of teinds, augmentations, and valuations, are put in pari casu;—always a power to rectify valuations. The clause in the Act merely provides for a case of enorm lesion, and leaves every other case untouched; refers to cases quoted.

Robertson.—Formerly gave a full opinion. Plea is the sub-valuation departed from for fifteen years, and decree of approbation pronounced in absence, whole in ignorance of the fact. In an approbation there is no proof led. Argument, on the other side, does not rest on law, but on the Act 1633. But this clause only applies to cases of collusion, and there are innumerable cases of reduction.

Lord President.—A very difficult case, but for adhering to last interlocutor. Had I been sitting as a Commissioner before the Union, would have rather gone into the other opinion. In original valuations, absolutely necessary to proceed in absence. Act 1707 does not say we were to be Commissioners, but to proceed as in other civil causes, and Court cannot act in the capacity of Commissioners, because, if it did, could not grant secure augmentations. As to our decrees having the force of an Act of Parliament, do the Court not, in many cases, prorogate tacks of teinds, disjoin and annex lands? and our decrees, in these instances, are subject to review: or suppose a forged valuation, or one completely void, had been approved of in absence, could it possibly be maintained that such decree was not subject to review?

Gillies.—Still against interlocutor. Words of 1633 clear. If they do not apply to this case, they can apply to none. Every proceeding declared to have the force of an Act of Parliament.

Craigie.—Even decrees of Parliament may be reduced on nullities.

Adhere.—Lords President, Justice-Clerk, Bannatyne, Craigie, Cringletie, Hermand, Robertson, Mackenzie.

Alter.—Lords Balgray, Alloway, Gillies, Pitmilly, Meadowbank.

Lord Glenlee did not vote. Lord Succoth, absent.

June 7. 1825. there has been lesion to the extent of one-third of the just rent, the valuation may 'be drawn in question,' but that was the only ground; and the rule plainly follows, that mere absence cannot ground a challenge.

The practical results which would arise from the opposite doctrine, would be most injurious. Besides, the decree, even if reduced, would not benefit the respondent, as the sub-valuation was lawfully led, and is exposed to no just grounds of challenge.

(*In Cross Appeal.*)—As to the minor pleas of the respondent, it is quite clear that the Earl of Fife, as the undivested feudal proprietor, had a sufficient title to pursue; and that the respondent, although not inducted at the time, yet, his presentation having been sustained, he was properly called as a defender.

Respondent (*Original Appeal.*)—The decree of approbation was clearly a decree in absence; but it is well known, that the actual appearance of a defender is necessary to secure the decrees of civil courts from challenge; and there is no ground for a distinction (either arising from their nature, or from statutory interference) in cases of teind. This is not the time or place to go into the question as to the invalidity of the sub-valuation—the objection of want of parties—or dereliction, or any other. The inquiry at present is merely, whether the decree of approbation can be reduced to admit the discussion of these objections; and all the authorities shew that a reduction, on ground of absence, is well founded. By statute a power is given to rectify (under a certain restriction) valuations, generally including decrees of approbation; and such a power being conferred on the Commissioners, they were entitled to review their own decrees, or to open up the judgments where the defender had not appeared; and the like power is open to the present Commissioners,

(*In Cross Appeal.*)—Besides, the respondent has to object, 1st, That, when the summons of approbation was executed, the Duke of Gordon was the true proprietor; and that he neither concurred as a pursuer, nor was called as a defender. 2d, That it was directed against a wrong party: when executed, the parish of Speymouth was vacant; the respondent was not inducted; and, therefore, the Moderator of the Presbytery ought to have been called, and not the respondent.

The House of Lords ordered and adjudged, 'that the original 'and cross appeals be dismissed, and the interlocutors, so far as 'complained of, affirmed.'

Lord Gifford.—My Lords, There is a case which stands for your Lordships' judgment, in which the Duke of Gordon is appellant, and

the Rev. James Gillan respondent; and there is also a cross appeal between the same parties. June 7. 1825.

The principal point in the case respected the validity of a decree of approbation, by the Lords of Council and Session, as Commissioners for Plantation of Kirks and the Valuation of Teinds; and the question raised was, whether that decree, being a decree in absence, as it is termed, could be opened on the part of Mr Gillan, on the grounds of objection which he had to that decree? It was contended, on the part of the Duke of Gordon, that though pronounced in absence, it was to be considered a decree absolutely binding upon the parties, and that Mr Gillan could not open that decree. My Lords, in this case, as well as in others, this subject has undergone very grave consideration in the Court below, and there has been a considerable difference of opinion on that question. After discussion in this case, the Judges were of opinion, that it was competent to Mr Gillan to open that decree, and a very elaborate judgment was pronounced by some of the Judges.

Since the appeal was heard, I have had an opportunity of reading the judgment which was pronounced in the case of Dunbar (minister of Kinnoul) against Macdonald, in which the same question arose, in a manuscript report of it, which is much more full than the printed report of it to which your Lordships were referred.

My Lords,—I have, as it was my duty, considered the judgment which has been pronounced by the Court below in the case, and the result of my opinion is, that the judgment of the majority of the Judges in the Court was well founded. It is, therefore, my intention to move your Lordships, that that interlocutor shall be affirmed; and that being my intention, it is unnecessary for me to do that which I should have done under other circumstances—state the reasons which have influenced my judgment. It is sufficient to say, that I am satisfied with the reasons which have been urged by the majority of the Judges in the Court below.

My Lords,—Mr Gillan has also appealed, complaining that, by the interlocutor which has been pronounced, he has been precluded from urging certain formal objections, which he says existed to the process of approbation, such as want of parties to that proceeding. I have also considered that part of the case. The Judges in the Court below were unanimous on that part of the case against the objections urged by Mr Gillan. That certainly is no reason why your Lordships should be called upon to affirm that judgment, if there are reasons for reversing it. It is the bounden duty of those who assist your Lordships in these matters to consider, whether or not the reasons, which influenced the learned Judges in coming to that decision, were well founded; and though this House is undoubtedly inclined to pay all that deference which is due to the opinion of those learned persons, it is, at the same time, the duty of this House to consider,—and especially of those who advise your Lordships,—to consider whether the opinion which was

June 7. 1825. thus formed was founded on right principles. My Lords, having given my best attention to this matter, I see no reason whatever, in this case, to find fault with those reasons which influenced the Court below to repel those objections on the part of Mr Gillan; and, therefore, on the cross appeal also, I should humbly move your Lordships that the judgment be affirmed;—that the interlocutors appealed shall be affirmed, and both appeals dismissed.

Appellant's Authorities.—(*In chief Appeal.*) Stat. 1633, c. 19.; 1690, c. 30.; 3. Connell, 107.; 1. id. 433.—(*Cross Appeal.*) 1. Con. 335. et seq.; Cochran, June 26. 1751, (9951.); Lanark, July 29. 1772, (9954.); House of Lords, March 2. 1753.

Respondent's Authorities.—(*In chief Appeal.*) Stat. 1633, c. 19.; 1707, c. 9.; Kinnoul, May 21. 1823, (Shaw's Teind Cases, No. 20.)—(*Cross Appeal.*) 2. Ersk. 6. 51.; Johnston, March 3. 1810, (F. C.); Campbell, March 2. 1808, (Ap. 5. Removing); 2. Ersk. 10. 25.; 2. id. 5. 20.; Thompson, Nov. 17. 1611, (3395.); Campbell, Feb. 26. 1741, (14,795.); College of Aberdeen, Jan. 10. 1679, (14,791.); Forbes's Treatise on Tithes, p. 401.; Magistrates of Kirkcudbright, Feb. 12. 1777, (15,765. & Ap. No. 1. Teinds.)

SPOTTISWOODE and ROBERTSON—CONNELL,—Solicitors.

No. 33.

MAJOR MACKAY, Appellant.

ERIC LORD REAY, Respondent.

Prescription.—A fee-simple proprietor having, in 1732, executed an entail of his estate to his son, and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to alter, except as to the heirs of the marriage, on which infeftment was not taken; and having, in 1741, with his son's consent, executed a disposition of the estate, without fetters, on which sasine was taken; and having cancelled the entail; and one of the heirs of the marriage having afterwards, by a decree of proving the tenor, revived the entail, on which infeftment was taken in 1768; and the heirs of the marriage having become extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, having in ignorance of the latter made up titles under the entail, and there having been a possession for a period exceeding forty years from the date of the infeftment in 1768;—Held, (affirming the judgment of the Court of Session), That, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription.

June 7. 1825.

1st DIVISION.
Lord Alloway.

IN the earlier part of the last century, George Lord Reay held the estate of Reay in fee-simple, under a charter from John Earl of Sutherland. He had three sons, Donald, Master of Reay, Hugh, and George. In August 1732, in contemplation of the marriage of his son Donald, Master of Reay, with Marion Dalrymple, a contract of marriage was executed, by which Lord