vided that the disposition is itself not open to objection.

"Now the only objection taken to this disposition is the omission after the words 'hereby sell, alienate,' of the word 'dispone' from the dispositive clause; and had this been a disposition without a procuratory of resignation, that omission might have given rise to a serious objection to the title; although the Lord Ordinary, having regard to the fact that the conveyance was plainly intended to operate as a *de presenti* one, and that the words 'make over,' which are substantially equivalent in meaning to the word 'dispone,' is inserted after 'hereby sell, alienate,' is not prepared to say that the omission of that word would necessarily be fatal to the deed. But the disposition contains a valid procuratory of resignation, which is truly a disposition in its nature, being a conveyance of the lands to the superior for new infeftment; and, as the lands in question have under the procuratory been resigned into the hands of the superior, who has accepted the resignation, and granted a charter to the petitioner as his vassal in the subjects in room of the granters of the procuratory, it appears to the Lord Ordinary that, if the petitioner produces proper searches up to the present date, she will be entitled to an order to uplift the money, upon her delivering a disposition or assignation to the respondents, such as will enable them to make up a title with the superior by means of the charter of resignation of 1861, No. 9 of process.

"D. M."

The railway company reclaimed.

SOLICITOR-GENERAL and THOMS, for the railway company, argued—1. No disposition is good which wants the word "dispone." The petitioner's title is therefore bad. 2. The Lord Ordinary has awarded expenses which he had no power to do. Great Northern Railway Co., 8th June 1848, 5 Rail. Cases, 269; Graham *v.* Caledonian Railway Co., 27th Jan. 1848, 10 D. 495.

CLARK and M'LAREN, for the petitioner, admitted the general rule contended for, but argued that as the defect could be obviated either under the procuratory of resignation or by adjudication in implement of the obligation to infeft, an assignation by which the company could obtain a good title was all that the petitioner was bound to give. Renton *v.* Anstruther, 14th Dec. 1843, 6 D. 238, and 16 S. 184.

At advising,

Lord CURRIEHILL—The objection here is that the dispositive clause of a disposition has not the word "dispone." The words are "sell, alienate, and make over." There is an obligation to infeft, a procuratory of resignation, a conveyance to writs, a precept of sasine, and absolute warrandice. There was therefore a good contract of sale, giving a right which has been transferred to the petitioner, who now offers to assign it to the company. The same principle which I stated in the case of Miles is applicable here. Assuming the objection to be valid, the company has nothing to do but lead an adjudication in implement and so complete its title at its own expense. The expenses connected with this application fall under the expenses which the company must pay under section 81.

The LORD PRESIDENT and Lord ARDMILLAN concurred.

Lord DEAS declined.

The following interlocutor was pronounced:—

"*Edinburgh, 16th February* 1867.—The Lords having considered the reclaiming note for the North British Railway Company, No. 26 of process, and heard counsel for the parties, they, subject to the explanation that the words "under the Charter of Resignation No. 9 of process" are deleted, adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the desire of the reclaiming note: Find the respondents liable to the petitioner in additional expenses of process. Allow an account to be given in and remit to the auditor to tax the same and to report.

"DUN. M'NEILL, *I.P.D.*"

Agents for Petitioner—White-Millar & Robson, S.S.C.

Agents for Railway Company—Dalmahoy & Cowan, W.S.

Wednesday, Feb. 20.

SECOND DIVISION.

DEANS OF CHAPEL ROYAL *v.* JOHNSTONE AND OTHERS.

Teinds—Valuation—Reduction—Titular—Tacksman—Prescription—Homologation—Acquiescence. 1. Circumstances in which held that a decreet of valuation imported *ex facie* that the titular as well as the tacksman was a party thereto, and reasons of reduction maintained, on the ground that the titular was not called repelled. 2. Held that the action was excluded by the long negative prescription. Opinion by Lord Benholme that it was also excluded by the positive prescription. 3. Circumstances in which held that the action was excluded by homologation and acquiescence.

The defender Mr Johnstone is proprietor of a portion of the lands of Over and Nether Ballialies, in the parish of Kirkhope; and the other defenders, Mr Brown's trustees, are also proprietors of a portion of these lands and of the lands of Helmburne, in the same parish. The pursuers are the Deans of the Chapel Royal as donatories of the teinds and the Crown as titular.

The teinds of all these lands were valued by a decree of valuation of the High Court of Commission of Teinds, dated 28th July 1647, and the present action is brought to reduce that decree, and to have it declared that the pursuers are entitled to exact the teind at a fifth of the actual rental of the lands.

The Lord Ordinary (Barcaple) having assoilzied the defenders from the whole conclusions of the summons, the pursuers reclaimed, and, after a full argument at the bar, the Court ordered cases on the whole cause.

The parish of Kirkhope, in which the defenders' lands are situated, was, along with the parish of Yarrow and a portion of the parish of Ettrick, originally included in the ancient parish of St Marykirk of the Lowes, the teinds of which were, with various other endowments, annexed to the deanery of the Chapel Royal, originally founded and erected by James IV. in the year 1501, under the authority of a papal bull.

Shortly after the erection of the deanery, it was annexed to the bishopric of Galloway, but was, with its endowments, afterwards, by royal charter of mortification, dated in 1621, dissolved from the Crown and from the bishopric of Galloway, and erected into a separate benefice. By the same charter, Adam, bishop of Dunblane, received a life appointment to the deanery and its emoluments. This charter was ratified by Act of Parliament 1621, cap. 57. On the translation of this bishop

to the see of Aberdeen, he was succeeded in the bishopric of Dunblane, in 1635, by Dr James Wedderburn, who, at this time, also received from the Crown a life appointment to the deanery, with a gift of its emoluments. This prelate being, in 1638, excommunicated by the General Assembly, went to England, where he died in exile the same year. No successor was appointed to Bishop Wedderburn until after the Restoration in 1662.

In 1647, when the deanery was vacant, the action of valuation, in which the decree under reduction was obtained, was raised before the High Commission of Teinds, at the instance of the heritor of the lands, against Francis, Earl of Buccleuch, and the minister of the parish. The decree of valuation proceeded upon an agreement between the Earl, who was therein designed tacksman and titular, and having right to the teinds of the parish, on the one part, and the heritor, Mr William Elliot of Stobs, on the other part, whereby they agreed that the value of the lands should be, in all time coming, £210 Scots, without deduction of his Majesty's ease. The agreement was ratified by the High Commission, and their authority and decreet interponed to it in the usual way. At the date of the action and decree, the Earl of Buccleuch was in possession of the teinds of the parish, and his predecessors had been so for many years before. The teinds continued to be levied by the Buccleuch family down to the year 1848, and after that date by the deans of the Chapel Royal. Since its date the decree of valuation has been the title under which the heritors have possessed the teinds, and been the measure of the teind valuation exigible by and paid to the titular, or the party in right of the titular, down to the year 1859. It has been given effect to in all the processes of augmentation and locality since its date, and was, in 1852, recognised and given effect to in the action of disjunction and erection of the parish of Kirkhope, in which the lands are situated.

It is in these circumstances that the present action is brought to reduce the decree of valuation.

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

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

The Lord Ordinary (Barcaple) assoilzied the defenders.

The pursuers reclaimed.

Cook and H. J. Moncreiff for them.

Clark and Nevay for the defenders.

The written pleadings were laid before the whole Judges.

The following are the opinions returned by the Lord President and Lord Ormidale:—

Lord President—The object of this action is to reduce, or to declare ineffectual, a decree or pretended decree of valuation by the High Commission in 1747 of the teinds of certain lands in the parish of Kirkhope, obtained at the instance of the then heritor. The pursuers are the Deans of the Chapel-Royal, as donatories of the teinds, and the Crown as titular. The defenders are the present heritors of the lands in question. The grounds of reduction set forth are multifarious, and so also are the grounds of defence.

The document relied on by the defenders as an effectual decreet of valuation, and now assailed by the pursuers, is not the original of the proceedings in 1647. These, and their grounds and warrants, along with many other similar documents, were destroyed by a general calamity. But this document is the substitute for the originals specially provided by the Act of 1707; and the defenders are entitled to claim for it the benefit of the provisions of that Act. What, then, is the effect that should now be given to it?

I. As to the construction or purport of the document. I am of opinion—

1st, That it purports to be a final and completed decree of valuation of the teinds of the lands referred to. I attach no importance to the technical criticism of the pursuers as to the want of such words of decerniture as are to be found in the decreets of the Court of Session, and which are there the warrant for extract whereon execution may follow, without further application to any Court.

2d, That it purports to be a permanent valuation of the teinds, and not a mere temporary valuation during the currency of the then existing tack, which had only twenty-two years to run. The tenor of the summons, so far as can be discovered from the necessarily imperfect record that exists, had nothing in it to distinguish it from an ordinary proceeding for a valuation of the teinds out and out. The value ascertained is in express words stated to be the value "in all time coming," being the form of expression appropriate to a permanent valuation, but wholly inapplicable to the valuation of a mere temporary interest during the currency of a particular tack, and not, so far as I am aware, to be found in any of the cases (few and exceptional they are) in which nothing was intended to be valued but the temporary interest of a tacksman. My reading of the decree, as purporting to be a permanent valuation of the teinds, and not a mere temporary valuation which was to have effect only during the currency of the then existing tack, derives confirmation

from the manner in which that decree has been maintained, relied on, used, and dealt with during the period of nearly two hundred years that have elapsed since the tack expired in 1669; while, upon the opposite hypothesis, the decree must have then expired along with the tack. I allude more particularly to the recording of it under the provisions of the Act 1707, and the production of it in successive localities from 1733 downwards, as an effectual decreet of valuation still subsisting, and of which the benefit was claimed at these several dates, and never questioned or doubted till now.

3d, That it purports to be a decree pronounced in a proceeding in which the *titular* made appearance and took part. The defenders called were the Earl of Buccleuch and the minister. That part of the document which briefly narrates the summons does not show in what character or characters the Earl was called, and the original summons, which might have shown this, is not extant. But the document does bear that the Earl appeared, and that he took part in the proceedings, wherein he is described as tacksman and "*titular*," and that in these characters he entered into an agreement with the heritor as to the permanent value of the teinds "in all time coming;" and the Commissioners, recognising his character and power to make such an agreement, approved of and ratified it, and gave their decree of valuation accordingly. I am not now dealing with the question whether in 1647 the Earl was, in reality or of legal right, the titular. I am at present speaking only of what is set forth and represented on the face of the document, and I find that on the face of the proceedings there set forth the Earl is represented as being at that time the titular, and is so dealt with. It is suggested in argument that the two characters of tacksman and titular are incongruous and inconsistent, and could not be united in the same person; but that has been shown to be a mistake, and instances of it have been cited. It would, I apprehend, be no irregularity, but the reverse, that the tacksman and the titular should be represented in a valuation, whether these characters were held by different persons or by the same person.

II. As to the effect due to the document. If the views I have expressed as to the purport of the document are sound, I am of opinion that effect must be given to it as a good, out-and-out valuation of the teinds of the lands in question, unless and until it shall be cut down by an action of reduction, and that it cannot be deprived of such effect by a mere declarator. Nor, in my opinion, does the objection stated by the pursuers to the nature of the proof on which the decree proceeded furnish any valid ground for denying effect to it. I think that such an agreement or concurrence as to the value between parties having antagonistic interests, such as those of parties holding the respective characters ascribed to them in that decree, was such evidence of the value of the teinds as the Commissioners were entitled to proceed upon. The pursuers, however, have wisely not trusted to declarator, but have assailed the decree by reduction.

III. As to whether reduction, on the grounds alleged, is still available or is now excluded. The main, if not the only pleadable, reason of reduction is an allegation that the Earl of Buccleuch, though described and treated as titular, was not in reality titular at the time, and that the true titular was not called or made a party to the proceedings. Assuming the relevancy of that allegation—an assumption, the soundness of which, in the circumstances, is questionable—the *onus* of making out the alleged facts, if such an inquiry can now be gone into, must rest on the pursuers. I cannot say that the evidence they have referred to makes it clear to me that the Earl was not the titular or the acknowledged representative of the titularity at the time, or who was the titular at the time, if it was not the Earl. But if I have rightly interpreted the decree, I am of opinion that inquiry into the matter thus alleged against it is now excluded by the negative prescription. The applicability of the negative prescription to challenges of decreets of valuation of teinds cannot, I think, be disputed. And if I am right in the opinion I have expressed as to what this decree purports to be—if it sets forth and affirms the presence of all the elements essential to a valid decree, and no *ex facie* nullity—I see no ground for withholding from it the protection of the law of negative prescription, which applies to all decrees not challenged till after the prescriptive period, however relevant the ground of challenge alleged may be. I may further observe, that there is here no allegation of fraud or collusion. There is not even an allegation that the value put on the teinds was not a fair value to be put on them as a permanent valuation. There may be a question in this case as to the particular date at which the prescription began to run. But I do not doubt that it began to run from the date at which the decree must be held to have come to the knowledge of the party entitled to challenge it; and I agree with Lord Deas in thinking that there are several dates enumerated by him after any of which the pursuers cannot be allowed to plead ignorance of the decree, and each of which dates is sufficiently remote to support the plea of prescription.

IV. As to the defender's plea of homologation. I have come to be of opinion that this defence also is well founded. The grounds on which I have arrived at that conclusion are substantially those stated by Lord Curriehill and Lord Deas—I therefore consider it unnecessary to repeat them.

V. As to the plea of the pursuers, founded on the exception of the Act 1663, c. 28, I am of opinion that it is inapplicable and untenable in this case.

Upon the whole, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord ORMIDALE—The Lord Ordinary has in this case, in which the pursuers conclude for reduction of a decree of valuation of teinds so far as their interests are concerned, pronounced an interlocutor assoilzieing the defenders from the conclusions of the summons; and the question put to the consulted Judges is, Whether the interlocutor of the Lord Ordinary should be adhered to or altered?

While some of the points pressed in argument by the parties appear to me to be not unattended with difficulty, there are others which, as I view them, are of such a character as not to give rise to any embarrassment, or to require much consideration.

On the one hand, I think it clear that the argument of the pursuers, based on the assumption (1) that the valuation under challenge related to bishops' teinds, and therefore falls under the exception of the Act 1663, c. 28; (2) that the valuation is bad, in respect that it proceeded on an agreement of parties merely, and not upon proof regularly and formally adduced; and (3) that the decree is reducible on the ground that it does not contain a decerniture of valuation—is ill founded.

In regard to the first of these points, it is sufficient to remark that not only is there no evidence of the teinds referred to being bishops' teinds, in the correct sense of that expression, but that the whole evidence in the case bearing on the subject demonstrates the reverse. Besides, the pursuers do not in the record aver that they are bishops' teinds, or lay any other proper foundation for the maintenance of a plea founded on the assumption that they are. Accordingly, it is not surprising that the pursuers should ultimately have felt themselves constrained to acknowledge in their revised case that the teinds in question "cannot exactly be regarded as bishops' teinds." With respect, again, to the pursuers' argument, founded on the circumstance merely that the decree proceeds on an agreement of parties, and not upon actual proof regularly and formally adduced, I do not think that, having regard to the practice as well as the authorities bearing on the matter referred to in the note of the Lord Ordinary, effect can be given to it. Nor, on principle, can I see any ground for holding that an agreement, regular and complete in itself, and untainted by fraud or collusion, should not be held as equivalent to, and therefore sufficient to render unnecessary, the expense and delay of a formal proof, in so far, at least, as the interests of the parties to it are concerned. And just as little do I think that effect can be given to the pursuers' plea, founded on the assumption that the decree does not contain, in the precise technical language which seems to be desiderated by them, a decerniture for the amount of the valuation. It is enough, I think, that the agreement embodied in the decree distinctly specifies the valuation, and that the Court interponed its "decreet and authority thereto in all points."

On the other hand, the defenders' plea of *res judicata* is so clearly untenable as to be left by them without a word in support of it. Nor am I disposed to give any countenance to the argument of the defenders, founded on the assumption that a tacksman of teinds may always be held to represent the titular, so that it is unnecessary that the latter should be a party at all to a process of valuation. I have been unable to find any sufficient authority for such a doctrine; and I think it is irreconcilable with sound principle, to hold that a tacksman with, it might be, a temporary right of only a few years—in the present instance twenty-two years—should have the power, without any express or special authority, of binding the titular in perpetuity.

The remaining pleas of the parties resolve very much into the contention by the pursuers, that the decree is null and reducible, so far as their interests are concerned, in respect that the titulars of the teinds—or, in other words, the Crown or its donatories—were not parties to the agreement on which it proceeds, and had not been, in any shape, called or made parties to the process in which it was pronounced; and the contention, on the part of the defenders, that the titular, or the individual representing and entitled to represent the titular, was called in the process, and was a party to the agreement on which the decree proceeded, and that at any rate the validity of the decree against all concerned, including the titular, has been established by prescription, and that the pursuers are now, on that and other grounds, barred from challenging it.

As a general rule, it cannot, I think, be fairly questioned, that in order to render a decree of valuation complete and unobjectionable, the titular, as well as the heritor and minister, requires to be a party to the process. The authorities—if authority were necessary in support of a proposition so evidently reasonable in itself—cited by the pursuers in the very able and learned argument submitted for them, seem to me to be conclusive on this point. Nor do I think that the defenders, notwithstanding the zeal and ability displayed on their behalf, have succeeded in creating any serious doubt or difficulty on the subject. The only thing of the nature of authority they have referred to is the passage from Mr Erskine's "Institute," where it is stated that "in actions of valuation brought before the session as the Commission Court, the titular *or* his tacksman" must be made a party; but this, I think, must be held merely to mean that where a complete and permanent valuation against the proper titular is the object, he must be made a party to the process, while, where a limited and temporary one only is wished, it may be sufficient to cite the tacksman. Accordingly, in Mr Erskine's "Principles" (ii. 10, 10), which, unlike the "Institute," were revised and corrected for the press in his own lifetime by himself, the titular alone, without any reference to tacksmen, is mentioned as the proper and indispensable defender in an action for the valuation of teinds, a view which appears to be in accordance with the terms of the royal decreets-arbitral and relative instructions under the authority of which valuations of teinds were first introduced.

Whether, if the commissioners for valuing teinds had themselves proceeded, with reference to the teinds in dispute, to ascertain their value independently of the parties interested or of any arrangement or agreement by them, a reduction would now be maintainable on the grounds libelled, need not be inquired into; as it is clear that the commissioners did not themselves make up any valuation, or institute or prosecute any proceeding whatever, but, following a practice which seems to have prevailed to a considerable extent, approved of an agreement or arrangement as to value entered into by certain of the parties interested, and pronounced decree accordingly. It is essential therefore to ascertain, first, whether, in point of fact, the titular was, or was not, one of these parties, or a party in any way whatever to the decree of valuation in question; and, secondly, whether, supposing he was not, the decree has been otherwise validated, or the pursuers' right to challenge it excluded, as maintained by the defenders.

In regard to the first of these points, I feel myself unable to adopt the reasoning of the defenders. The process of valuation was at the instance of the heritor or proprietor of the lands, and the only parties called to it as defenders were the minister and Francis, Earl of Buccleuch. That the Earl was tacksman of the teinds is made clear enough by the authentic documents produced; and both pursuers and defenders are agreed that he was tacksman. But there is not a particle of evidence indicative in the slightest degree that he was titular of the teinds, or anything more than tacksman. All the evidence is the other way. Not only is there no specific grant, or other title to the teinds in favour of the Scotts of Buccleuch, but no allusion to any such grant or title is to be found in any of the numerous Crown charters, Acts of Parliament, and other writs relating to the subject founded on and referred to by either party. On the contrary, they all proceed on a footing, and are expressed in terms, inconsistent with the existence of any such grant or title. For example, the ratification by James

VI. in 1612, and that by the Bishop of Galloway, with consent of the Chapter of the Chapel Royal in 1617, demonstrate that the Earl was tacksman, and nothing more; and the tacks themselves, so far as can be discovered from those produced and from the ratifications and other writs founded on by both parties, extending over a period commencing long prior to the date of the decree under reduction, and coming down to 1848, are all to the same effect.

As might have been expected, therefore, the defenders do not venture distinctly to aver, that the titularity of the teinds in question was ever in the Buccleuch family. Their allegations, when closely examined, amount in substance to nothing more than that the Earl of Buccleuch was tacksman of the teinds, and at the time the decree of valuation in question was pronounced, in possession of them—as undoubtedly he was under his admitted and proved right of tack. The defenders, it is true, add that the Scotts of Buccleuch—the predecessors and ancestors of the present Duke—besides being in possession of the teinds as tacksmen, exercised the rights and privileges of titulars thereof; but what the defenders precisely mean by this statement they nowhere distinctly explain; nor is there in the record any statement or explanation whatever of how the Scotts of Buccleuch happened at one and the same time to hold the incongruous position of tacksmen and titulars of the teinds. They may, in virtue of their tacks, so long as they endured, have had possession of the teinds, and in that way, and in virtue of their rights of tack, been temporarily in the enjoyment of the teinds just as if they had been the titulars. But that they, in any other sense or in any other way, were the titulars, or exercised the proper rights of titulars of the teinds, nowhere appears.

Without, therefore, dwelling further on this point, I think it must be taken, in disposing of the present case, as being now indisputably established, that the Scotts of Buccleuch never were the titulars, but merely tacksmen of the teinds in question; and if so, it follows that the titulars were not in point of fact called as defenders in the process of valuation under consideration, nor were in any shape parties to the decree under reduction, or the agreement on which it proceeded.

The defenders, however, argue, on the assumption that the titulars were not in reality parties to the process of valuation, that the decree is nevertheless good against the pursuers, in respect that the right to the teinds was at the date of the process and decree in question merely in abeyance, in consequence of there being then no dean of the Chapel Royal. But I am unable to see how this view can avail the defenders. In the first place, it appears to me the right to the teinds was not merely in abeyance at the time referred to, but was in the Crown, having reverted to it on the abolition of Episcopacy; but, in the second place, and supposing that the teinds were merely in abeyance, and that the titular could not be called in the process of valuation in question, because there was no dean of the Chapel Royal then in office, I think the legitimate effect of such a state of things would be, not to render the process and decree competent and unobjectionable as against the titulars, but merely that no such process could be instituted, or decree pronounced, so as to affect the titulars or their interests.

At the same time, I am not to be understood as holding that it necessarily follows that the pursuers must prevail in setting the decree in question aside. It is at least conceivable that they may by the lapse of time and other circumstances, be now precluded from challenging the decree. The defenders maintain that they are, on the grounds of prescription, and of homologation, acquiescence, and adoption.

With reference to the defenders' pleas of prescription, it is necessary carefully to examine the terms of the decree of valuation, in order to see whether they are such as to make the decree *ex facie* regular and complete as against the titular; or whether, independently of any aid from extrinsic evidence, the decree, according to the fair and legitimate reading and construction of its terms, must be held to be one not directed against the titular at all.

It is only from the extract decree itself—the process not being now extant—that it can be seen whether the titular is to be held to be *ex facie* a party to it or not. Now, in so far as the extract decree narrates the summons of valuation, there seems to have been no express mention of the titular in that writ, which appears to have been at the instance of the heritor, and directed against the minister and "Francis Earl of Buccleuch," but without specifying in what character the latter was called—whether as titular or tacksman. The agreement, however, on which, in place of a formal proof, the decree proceeded, bears that it was entered into by the Earl of Buccleuch "as tacksman and titular, and having right to the teinds," on the one part, and Mr Elliot, the heritor, on the other part. The question thus arises, What must be held to be the true meaning and effect of the words, "as tacksman and titular, and having right to the teinds?" If they must be held to denote that the Earl of Buccleuch was truly and in fact the titular in the full and ordinary sense of that expression, then in that view I should be of opinion that the decree under challenge is in itself *ex facie* sufficiently regular and complete even as against the titular; but if the expressions referred to can only, according to their fair and legitimate construction, looking at the extract decree in all its particulars, be held to mean that the Earl of Buccleuch was a party to the agreement as tacksman, and as such and to that limited extent and effect only having right to the teinds, then I think the decree must be held to be *ex facie* irregular and incomplete, inasmuch as it does not bear that the true titular of the teinds was a party to it.

Although not without difficulty and hesitation, I am inclined to adopt the latter view. I consider it to be in the highest degree unnatural and unlikely that if the Earl of Buccleuch was truly the titular of the teinds, and that if it was intended that he should so appear as a party to the agreement and decree, he should not only be described as tacksman, but that that should be put forward as his principal and leading title and character. This, however, becomes quite natural and intelligible on the supposition that the Earl was in reality merely tacksman, and that it was only intended to represent him as titular and having right to the teinds to the limited extent and effect only of his temporary right as tacksman. In this view also the incongruity, if not the absolute inconsistency, of the same individual being at one and the same time titular and tacksman of the teinds disappears. There would certainly be no inconsistency in a party being first the tacksman of teinds, and thereafter, before the expiry of his tack, acquiring a full proprietary right to teinds, as exemplified in the case of the Earl of

Seafield, 16th July 1823; but neither that nor any other case that I know of, or that has been referred to, is an example of a titular designating himself as being at the same time tacksman and titular of the same teinds. In the present instance the defenders, neither in the record nor in their argument, have said that they ever held two such rights as collateral to and corroborative of each other. And although they have suggested, in speculative argument, various hypothetical and fanciful theories in reference to the possibility of a party being at once tacksman and titular of the same teinds, they have not in the record or anywhere else stated that Francis, Earl of Buccleuch, or any other member of the Buccleuch family, ever held the rights or occupied the positions in relation to which alone these theories could have even the air of plausibility.

For the reasons I have now stated, I feel myself unable to resist the conclusion that, according to the true and legitimate reading and construction of the decree of valuation in question, it must be held that the Earl of Buccleuch was a party to it as tacksman, or titular *qua* tacksman only, which in reality, as it now turns out, was the only right or title he ever possessed. And it is not unimportant, as confirmatory of this view, that limited processes and decrees of valuation against tacksmen of teinds, without being directed also against the proper titular, have, as already remarked, been not uncommon or without recognition in the practice of the Courts.

On the assumption, then, that the decree in question is, according to its fair and legitimate reading and construction, *ex facie* a decree against the tacksman only, and not the titular of the teinds, there can be no room for the operation of prescription to the effect of now precluding a challenge of the decree by the pursuers as the true titulars. Prescription, supposing it were otherwise applicable, could only validate the decree within the limits of its terms. It could not extend or convert it to one against the titular, if in its own terms, fairly and legitimately construed, it is a decree against, not the titular, but the tacksman of the teinds only. Such a decree may be good so far as it goes—that is to say, against the tacksman, but not against the titulars; and a decree against a tacksman only cannot by prescription be made a decree against the titular, any more than a decree of the valuation of the teinds of certain specified lands, situated within a particular parish, could be converted into a decree of valuation of the teinds of other entirely different lands, situated in another and different parish. The case of M'Intyre *v.* Cameron, which seems to be much relied on by the defenders, does not, in my judgment, affect this principle in the slightest. The decision in that case is merely to the effect that although a decree stated that a summons of valuation had been directed against the minister of a parish different from that in which the lands lay, yet as the minister of the right parish sisted himself as a party, the valuation was effectual—a decision which I rather think would have been arrived at equally well and with as little difficulty, although only four in place of the prescriptive period of forty years had elapsed before the challenge was made. Accordingly, although it appears from the report of the case that the Lord Ordinary rested his judgment on the ground that the challenge was, in consequence of the lapse of forty years, "excluded by the negative prescription," it also appears that the Court, while they came to the same result as the Lord Ordinary, disapproved of his *ratio decidendi*, and put their judgment on its true footing viz., "in respect that the Rev. Alex. Fraser sisted himself in the process of wakening and sale brought in 1795."

Independently, however, of the objection to the operation of prescription, arising as now explained on the *ex facie* reading and construction of the decree, the question suggests itself, whether the positive prescription can be held to apply at all, under any circumstances, to a mere decree of valuation of teinds. The terms of the statute 1617, cap. 12, do not, according to their ordinary meaning, extend to such a case; and no authority has been cited to the effect that the positive prescription has been held to apply to a mere decree of valuation of teinds, which confers no new or active title whatever on its holder. It is not in itself a title of property. It merely imposes—in favour, no doubt, of the holder of it—a limitation on the rights of others. In this respect, a decree of valuation is quite different from a decree of sale of teinds; and so also is it quite different from a disposition or other heritable right to teinds, although not feudalised by infeftment, as is well illustrated in the case of Budge, cited by the defenders themselves. If it were necessary, therefore, to determine whether the positive prescription is applicable at all to a mere decree of valuation of teinds, I should be disposed to hold that it is not; but, as previously explained, no period of time could, on the principle of prescription, even supposing it were applicable, convert the decree of valuation in question from being one as between the heritor and the tacksman of the teinds into one against the titular, who, according to my reading of the decree, cannot be held to be in any way, or to any effect, a party to it at all.

In regard, however, to the negative prescription, while I am of opinion that it might apply to a decree of valuation, I have been unable to satisfy myself that it has had any operation in the particular circumstances which occur in the present case. It could not, of course, have had any operation or effect, any more than the positive prescription, if I am right in holding that the decree of valuation in question never applied, in words or form any more than reality, to the titular of the teinds. But independently of this I think its operation would be excluded on the ground that the pursuers, or their authors and predecessors, as titulars, have not for the prescriptive period been so placed as to have had any interest to challenge the decree in question. Down to 1848 the whole beneficial interest in the teinds was in the Buccleuch family, in virtue of their tacks.

It was for the defenders to establish, if they could, the bar founded on prescription which they desire to interpose against the pursuers' demands, and to lay the necessary foundation for it—in averment as well as proof. I very much doubt whether they have done this. Their allegations are very vague and ambiguous; and as for evidence, I have been unable to discover any that is sufficient. There is no direct evidence whatever bearing reference to the period prior to 1848, to the effect that the pursuers, or their predecessors and others, ever acted or transacted on the footing of the decree in question being a good decree of valuation against them, or even that they knew of its existence. It is true renewals of tack in favour of the Buccleuch family were granted from time to time by the donatories of the Crown, the Deans of the Chapel-Royal; but in none of these renewals are the teinds referred to as having ever been valued;

and certainly the circumstance of large and increasing grassums having been demanded and received on each renewal of tack is difficult to be accounted for consistently with the assumption that the teinds were dealt with on these occasions as having been valued against the titulars as well as the tacksmen in 1647. There is, indeed, no proper or direct evidence—nothing but conjecture and inference—to support the allegation that the decree was for the prescriptive period, held to be binding and operative, even as betwixt the heritor and tacksman. The decree may quite possibly have been intended and dealt with by the parties as one operative only during the currency of the tack which existed at the time it was pronounced. The whole of this matter has been left in a most unsatisfactory state by the defenders, on whom, I think, the *onus* of clearing it up lay.

It appears to me, therefore, that the pursuers cannot, in the circumstances, be held to be affected by the negative prescription, in respect that it does not run against rights to which no adverse act has been opposed that could afford ground for the presumption of that dereliction or abandonment which forms the foundation of the negative prescription. In other words, there not having been—so far as has been shown or proved—for the requisite period any claim made or exigible, so far as the pursuers were concerned, to which the decree in question could be put forward or founded on as an answer or bar, there could as against them be no currency of the negative prescription. So long, in short, as there was no legal basis or call for the operation of the decree against the pursuers, there could be no room for the presumption which is implied in, and at the foundation of, the negative prescription that there was a forbearance on their part to assert a claim which, were it not for the decree, could and might have been enforced.

If, then, I am right in opinion that the decree in question, even supposing that by its terms it were to be read as being *ex facie* one against the titular of the teinds, is not fortified or protected by prescription, either positive or negative, it must follow that inquiry not being excluded on that principle, and as it has been clearly made out as matter of fact that the titular of the teinds, in whose right and place the pursuers now are, was not a party in any way whatever to the agreement upon which exclusively the decree proceeded—the pursuers have succeeded in establishing their grounds of action, and are entitled to decree accordingly.

But the defenders also maintain that the pursuers are precluded by homologation, adoption, and acquiescence from now challenging the decree of valuation and reduction. I do not think so. There is a want, in my apprehension, of facts to support these pleas. I can find nothing, indeed, of any materiality on the subject, except the acceptance by the Deans in 1859 of a certain sum as the balance due to them of the gross valued teind for crops 1848 to 1858 inclusive; but that act by itself, and of so recent a date before the institution of the present action, I consider to be wholly insufficient to establish, either directly or by inference, the knowledge or intention on the part of the pursuers, which would be indispensable towards the support of the pleas of homologation, adoption, or acquiescence, in any reasonable or legal view that can be taken of such pleas. And here I may repeat my former remark, that it nowhere appears so far as I can discover, or has been proved, that the pursuers or the titulars of the teinds in question at any time had, prior to 1848, when the tacks in favour of the Buccleuch family came to an end, been even aware of the existence of the decree in question; and assuredly there is no evidence of its validity having, prior to 1848, been recognised by them. The large and increasing grassums demanded and received from the Buccleuch family, as already noticed, go far, I think, to show either that the decree was never brought into view at all on any occasion when the interests of the titular had to be considered or dealt with, or at any rate was not on any such occasion held or allowed to affect these interests.

Finally, in regard to the defenders' plea, to the effect that whether the teinds in question are to be held as valued or not, the pursuers are not entitled to exact and levy a fifth part of the actual rent of the lands, I think it only necessary to say that the case of Learmonth *v.* the City of Edinburgh appears to me to afford a conclusive answer to it.

The result at which I have arrived is that in my opinion the interlocutor of the Lord Ordinary should be altered, to the effect of decree being pronounced in favour of the pursuers, in terms of the conclusions of their summons.

Lords Curriehill, Deas, Jerviswoode, Barcaple, and Mure arrived at the same result as the Lord President. Lords Ardmillan and Kinloch were of the same opinion as Lord Ormidale.

At advising,

Lord COWAN—The argument in this case was ably stated before us orally, and has since been resumed in very elaborate written cases, and we have now before us the opinions of the consulted Judges.

The leading question on which there are different views expressed by our brethren, and which has chiefly led to the conflicting results at which they have arrived, relates to the effect and meaning of the decreet of valuation of 1647, recorded in the register in terms of the Act 1707, of date 18th July 1733. From what appears *ex facie* of that decreet, can it be held, in the first place, that the titular was a party to the proceedings; and, in the second place, as depending on that primary point, that the valuation was intended to be, and is, in fact, applicable, not to any temporary interest held by the Earl of Buccleuch as tacksman of the teinds, but to his permanent interest as titular? As the one view or the other of the extract decreet under reduction is adopted, the course of reasoning, in relation to the defences pleaded by the heritors, will necessarily, in my apprehension, lead to the adoption of the conclusion on the one side or the other.

The defences stated to the action, which, from the outset of this discussion, have appeared to me to require careful consideration, are those, first, of the negative prescription; and second, of adoption or homologation. But the argument in support of these defences required the consideration, in the first place, of the true meaning and effect of the decreet as appearing on the register appointed by the Act 1707. On that primary question I adopt the views stated in the opinions of the majority of the consulted Judges. I have never been able to read the extract decreet otherwise than as setting forth (1) that the Earl of Buccleuch was a party to the original proceedings as much in his character and for his interest as alleged titular of the teinds, as in his character and for his interest as tacksman; and as flowing from that view, (2)

that the decreet must be held as intended to be, and as, in fact, being a valuation of the titular's interest in the teinds in all time coming. It would be to deny effect to the view taken of the decreet from its date, and especially to the effect of its having been recorded in 1733, to hold that the parties interested in it regarded it in any other light; and in a matter of this antiquity, I apprehend it to be a maxim of interpretation not to be easily set aside, that contemporaneous use and continuous understanding of the import of such a writing *optimus interpres est.* Yet until the institution of this action, upwards of two centuries after its date, it never was pleaded that this decreet had the limited effect and meaning now proposed to be attached to it.

As regards the two defences upon which, as it seems to me, the result of this litigation depends, I was prepared to have delivered a full opinion either formerly or now. But having before me the opinions of the majority of the consulted Judges, and especially those of the Lord President and of Lord Deas, I feel that it would be quite unjustifiable in me to do more than to say that I concur in those opinions, and in the result that the interlocutor of the Lord Ordinary should be adhered to.

Lord BENHOLME—This is an action of reduction and declarator, raised at the pursuers' instance, for the purpose of setting aside a valuation of the teinds of the defenders' lands, dated in the year 1647. Upon a consideration of the merits of the pursuers' grounds of reduction, without consideration of the defenders' pleas of prescription, the Lord Ordinary has decided the case in favour of the defenders. When the case came into the Inner House, it was suggested that questions of prescription of some importance required to be determined before the proper merits of the case, considered independently of prescription, could be regularly reached. An order for cases was therefore made, in which these questions have been fully discussed, as well as the merits of the grounds of reduction. After deliberate consideration of these cases, I have formed an opinion in favour of the defenders, not only on the proper merits of the case, but also upon the plea of homologation, fortified, as I think that plea is, by the plea of prescription both positive and negative.

The decree of valuation under reduction proceeded upon a summons of valuation before the High Commission, raised at the instance of William Eliot of Stobs, who was then proprietor of the present defenders' lands; against the Earl of Buccleuch and the minister of the parish.

In this action compearance was made for the pursuer, and the defender, the Earl of Buccleuch. The minister, although summoned and ofttimes called, did not appear. The parties compearers produced an agreement subscribed by them, "whereby they have agreed upon the constant worth of the teinds of the lands underwritten, and desired the said commissioners to ratify and approve the same." The extract sets forth that "the said commissioners having heard, read, seen, and considered the said agreement produced, and therewith being well advised, they have ratified, allowed, and approven, and by these presents the said commissioners ratify, allow, and approve the said agreement produced, whereof the tenor follows." The whole agreement is then engrossed verbatim, whereby it is agreed between the heritor and the Earl, "as tacksman and titular, and having right to the teinds of the said parish," that the teinds in question "shall be in all time coming twa hundred and ten pounds Scots, and that but deduction of his Majesty's ease." The extract then continues the deliverance of the commissioners (in which the tenor of the agreement had formed a parenthesis) as follows:—"In all and sundry heads, articles, and clauses of the samen, and have interponed, and hereby interpone, their decreet and authority thereto in all points; because," &c. Here follows a narrative of the procedure, which is closed by the words of style:—"Therefore the said commissioners ratified, allowed, and approved in manner foresaid, and sick lyke, ordains letters to be direct hereupon (if need bees) in form as effeirs."

It does not appear to me to be capable of reasonable doubt, that this was an *ex facie* regular decree of the statutory commission, fixing the value of these teinds, in all time coming, at the sum therein mentioned.

Previous to the date of this decree the teinds of these lands must have been drawn in kind by the tacksmen, which accounts for their being valued separately, without any valuation of the stock, and also for the notice of and settlement of the King's ease; all in terms of the alternative mode of valuation established by the decreets-arbitral and the subsequent statutes.

But subsequent to the date of the decree it is admitted that the heritor enjoyed the possession of his teinds upon payment of the valued amount, on the footing and statutory title of the decree, for more than 200 years down to the year 1858. And for the period from the expiry of the last tack in 1848 till 1858, the pursuers and their predecessors being in the personal right of the titularity, accepted the valued teind and settled with the heritor upon the footing of the valuation.

Such, then, has been the possession of the heritor. It may be proper to advert to the state of the titularity during this long period. The teinds of the parish in question formed part, and probably but a small part, of the Deanery of the Chapel Royal; the patronage of which benefice belonged to the Crown. These teinds were under a long tack to the Buccleuch family from 1603 till 1668; and subsequent to that last date they were from time to time let out by tacks of shorter endurance till 1848. The titularity itself was bestowed by liferent grants; some of the liferent beneficiaries being well known. No permanent grant of the titularity of the Deanery or of its constituent parts was or could be granted. After the liferent grant of the Deanery to Dr Wedderburn had expired, no certain information has been obtained as to the disposal of the titularity of the Chapel Royal. The pursuers' speculation that the Chapel Royal became extinct as a benefice, and fell to the Crown as *bona vacantia*, is inadmissible; since in after years, subsequent to the date of the valuation, the teinds in question were made the subject of liferent grants to various successive individuals upon the old footing of a subsisting benefice.

As to the titularity of the parish of St Mary's of the Lowis, within which the teinds in question fell, it was enjoyed in 1603, by three persons named William Scot, Thomas Gray, and James Castellorn—by whom the long tack was granted to the Buccleuch family. Similar liferent grants of the teinds of St Mary's Church were made in 1623 to Andrew Sinclair, to Robert Winrame in 1624, to Edward Kellie in 1628, to Edward Miller in 1634. But from that time till 1662, when a liferent appointment was made in favour of Mr James Hamilton, no certain information has been produced as to the enjoyment of the titularity. Who was titular in 1647 (the date of the valua-

tion) does not appear, except from the proceedings in the valuation, in which it was set forth that Buccleuch was tacksman and titular, and had right to the teinds. There is no incongruity in this statement, in reference to the peculiar circumstances of this parish. In the ordinary case it may be argued, that the acquisition of the titularity of teinds, by a tacksman, must cause an absorption of the inferior title by the superior. But a liferent grant of the titularity could not have that effect. where it was superadded to a long lease. For the latter title might subsist after the former was extinct. Thus, had Francis, Earl of Buccleuch, in 1647, been in the enjoyment of the titularity (as stated in the proceedings in the valuation), that title being but for his life, must have become extinct by his death in 1651; whilst the tack remained available to his heirs till 1668, the year when it expired.

In considering the question of prescription, I hold it to be clear that there is no *ex facie* defect or nullity in the decree of valuation; either in the statement of the permanent nature of the valuation, or the absence of the titular. The decree sets forth that the titular was a party to the agreement; and it ratifies in all its particulars the agreement for a valuation in all time coming. I am of opinion that this decree is fortified by prescription both positive and negative.

(1.) As to the positive prescription, I observe that the pursuers' only objection to its being applied to the case of a valuation of teinds is, that the property of the teinds is not here involved. They seem to deny that the positive prescription applies at all, in fortification of a title to the mere possession of heritable subjects. But the authorities are all against them. A long tack of lands or teinds is a title to which the positive prescription applies, as was held as to tacks of land in the noted case of Maule *v.* Maule, 4th March 1829. Lord Stair (II. 12, 23) applies the doctrine not only generally to tacks, but especially to tacks of teinds, observing—"Yea, this statute is extended to long tacks, which, if clad with forty years peaceable possession, either in the tacksman or his assignees or their heirs (who need no service) cannot be quarrelled, but stand valid not only for these forty years, but for all subsequent years unexpired; as was found in a tack of teinds though set without consent of the patron, and the bolls liquidated to ten shillings." The learned author refers to the cases of Preston in 1677 (M.D. 10761), and the College of Aberdeen, 1675 (M.D. 7230), which were both cases of positive prescription, applied to tacks of teinds. These authorities have been followed by many later ones. Thus in the case of Mair *v.* the Heritors of Dunlop (M.D. 10821) it was held that a sub-tack of teinds granted to the heritor though flowing *a non habente potestatem*, may be validated by the positive prescription. In this case the report of Lord Kames bear these remarkable words—"It was the opinion of the judges that the positive prescription is a favourable plea; and though the statute mentions infeftments only, yet that prescription has been introduced by practice, to take place with regard to many other subjects, particularly with regard to tacks."

Our later text writers all set forth the same doctrine: and thus the pursuers' doctrine is altogether inadmissible. But if the positive prescription validates a long tack of teinds, which is a mere temporary title of possession; shall it not be held applicable to a decree of valuation, which is a perpetual title of possession, a title of statutory authority. The statute 1633, c. 17, expressly declares "that each heritor and liferenter shall have the leading and drawing of their own teind, the same being first truly and lawfully valued." A decree of valuation is therefore a statutory title to the perpetual possession of the heritors' teinds, under condition of paying annually to the titular the amount of the valued teind, as fully as a tack is a temporary title under condition of paying the tack duty. The positive prescription is applicable to the former at least as properly as to the latter. And here I may expose a misapprehension by which I was myself at one time misled. An heritor who has an heritable right to his teinds (which must always be something in addition to the feudal title to his lands) acquires no additional *title* to his teinds by leading a valuation. He merely thereby impresses a limitation upon the burden under which he held the property of his teind. But an heritor who has no heritable right (and still more who cannot by purchase acquire such right) by leading a valuation, acquires a perpetual title of possession capable of being fortified by prescription. I confess I see no answer to the defenders' plea of positive prescription, considering the long-continued and admitted possession by which their title has been fortified.

It has been objected to the plea of the positive prescription as applicable to this case, that there has been no proper possession of the subject; that the heritor has always been paying the valued teind; and the argument seems to be, that such payment is inconsistent with the fact of possession. In this argument there is a plain fallacy. The subject possessed is the heritable subject—the *corpora* of the teinds—viz., the tenth part of the produce of the land—a subject which the heritor previous to the valuation had no right to draw or to possess, but which the statutes give him right to possess and enjoy in virtue of the valuation. That he may be bound, as a condition of that right, to pay an equivalent in money does not interfere with the fact of possession, any more than the payment of a full tack duty in the case of a tack. Thus it would appear that the principle of the positive prescription as extended by practice, is favourable to the argument of the defenders. I have now to observe that there is at least one decided case by which the principle for which I contend, has been applied in practice. This is the case of M'Intyre *v.* M'Lean of Ardgour, 7th March 1828, shortly reported by Shaw in his Teind Cases, No. 47, which is a distinct application of the defence of positive prescription to this class of cases. The pleadings are very instructive, and the manuscript notes of the judges' opinions made by the late Lord Justice-Clerk upon his copy of the papers (to be found in his collection, vol. 116) ascertain the views of the judges.

M'Lean's lands lay in the parish of Kilmailly, the teinds of which were bishop's teinds, the Crown being patron and titular. In 1783 the heritor obtained a decree of approbation of a report of the sub-commissioners in 1629; and upon that title of possession he had held his teinds without other right, for more than 40 years. In the course of a locality the minister of the parish, on 8th July 1826, raised a reduction of Ardgour's decree of approbation, founding upon various reasons of reduction, and *inter alia* upon this, that the approbation contained the teinds of lands not embraced by the report of the sub-commissioners. The defenders founded upon his prescriptive possession, and pleaded—"6. The defender by having possessed his teinds both before and since

the date of the approbation for a period long beyond the years of prescription, upon the footing of the sub-valuation, has acquired a prescriptive heritable title to his teinds, according to the sub-valuation and decreet of approbation."

Amongst the pursuers' pleas, the following is to be found:—"The decreet of approbation is sought to be reduced upon grounds arising from intrinsic nullities, Erskine III., 3, 9, and 12."

The Lord Ordinary (Newton) assoilzied the defender, and the Court adhered. Upon the plea of the positive prescription, the opinions of the Judges are ascertained by the following manuscript notes:—"Balgray—I have clear opinion. Both positive and negative prescription apply. Clear decree, which is good title. Can't inquire into matters unless you can show defects in decree." It being alleged that the prescription had been elided by the proceedings in the locality, that matter was made the subject of minutes and of debate. And it is of importance to remark that what the Court had to consider was whether the plea of the positive prescription was barred. Lord Craigie said, 'As to positive prescription, decree is clear title. Whether in case of negative prescription, proceedings might bar plea, I can't say, but here no legal interruption of prescription." Lord Gillies was clear for sustaining the plea of prescription; and the Lord President declined to vote from relationship to the parties.

(2.) The application of the negative prescription in favour of the defenders seems to me equally plain and decisive.

It is proper here to observe what were the rights of the titular in reference to this valuation, at the expiry of the tack in favour of the Buccleuch family, which at the date of the valuation had twenty years to run. Supposing that Buccleuch, at the date of the valuation, had no other right to the teinds than this tack, then on the expiry of the tack the titular, whoever he was, then in right of the teinds, before accepting the valued teinds as the measure of his right, was entitled, if he thought the valuation too low, to bring his action of reduction to get it rectified. If he could not allege any unfairness in the valuation, he would not have been entitled to challenge it on the technical objection that he had not been made a party to the valuation. Such is plainly the principle on which was decided the case of Thomson *v.* The Officers of State, 20th July 1763.

That the titular must bring his action at the expiry of the tack, unless he had made up his mind that the valuation was, in terms of its own import, to stand in all time coming, is clearly ascertained by two cases referred to in the pleadings.

In the case of the teinds of Thornydikes, an action of sale was raised upon a previous decree of valuation. The defender, the Earl of Home, alleged that he, the true titular, had not been called either to the valuation or to the present process of sale. He produced his titles to the titularity, there being still a subsisting tack in favour of the tacksman, Home of Bassindean, who had been a party to the valuation. The Court, whilst they decerned in the sale, provided for the titular's interest as follows:—"Have reserved and hereby reserves to the true titular, his reduction and action to prove a greater valuation, to take effect at the expiration of the said tack and prorogations thereof, or at the reduction of the decree of valuation, and of this present decreet of sale."

And in the case of Easter Glens, which was a valuation upon a contract passed between the heritors and the tacksman of the teinds, in terms precisely similar to what occur in the present case; notwithstanding the titular's opposition, the Lords Commissioners decerned in approbation of the valuation, "reserving the Viscount of Strathallan's (the titular's) right, after the expiry of the tack and prorogation, and to quarrel the agreement before the Judge Ordinary, as accords of law."

The titular then, at the expiry of Buccleuch's tack, had the option of reducing the valuation or of homologating it. He was no longer *non valens agere*. His own right had emerged. If he again let the teinds, his tacksman accepting the valued teind must be held to act for him. The independent right of the former tacksman, constituted before the date of the valuation, was now expired. The titular had now, by himself or by others in his right, to deal with the heritor.

It appears to me that the course of dealing for more than two hundred years, consummated by the present pursuers' acceptance of the valued teind for ten years at the close of that period, not only constitutes a prescriptive dereliction of the right of action, but an annual or termly homologation of the valuation, which the pursuers now seek to reduce, such as probably has never previously occurred in any case.

It is needless to refer to those less direct acts of homologation of this decree of valuation, that have occurred in the course of the several augmentations and localities of this parish; for the constant and long-continued and direct homologation of the pursuers and their predecessors in the titularity either by themselves or by their tacksmen, are the most decisive acts as against them, that can be conceived.

On the point of prescription, reference was made by the pursuers, to the case of the Marquess of Tweeddale *v.* Smith of Gibliston, 7th July 1708, an extract of the decree in which case is printed in their Appendix C.

In this case the plea of prescription was repelled; there being, in fact, no *termini habiles* for the adoption of that plea. In order to see this, it is necessary to attend to certain dates. The date of the decree itself, which was the subject of reduction, was 16th Feb. 1631. At that date there was a subsisting tack of the teinds of the parish of Carbie, within which the defender's lands lay, which had been originally granted by Charles, Prince of Wales, with consent of his father, King James, in 1619, in favour of a personage well known in Scottish history, Thomas, first Earl of Kellie. This nobleman well deserved the honours and emoluments he derived from the Crown, having been instrumental in saving the King's life on occasion of the Gowrie conspiracy, and having then killed with his own hand Alexander Ruthven, one of the conspirators.

The tack itself, together with its ratification by Charles in 1637, is fully set out in the extract. The tack was granted for the lifetimes of the Earl, of his son Alexander, Lord Fenton, and of the heir-apparent of the latter, viz., his son Thomas, afterwards second Earl of Kellie; and furthermore, for a period of nineteen years after the death of the longest liver of these three.

At the date of the ratification, 13th July 1637, Alexander, Lord Fenton, was dead. But it appears from the decree of valuation, that both he and his father were alive in 1631. The first Earl died in 1639, and the second Earl, who was the last survivor of the three liferenters, died in 1643. During the currency of the additional period of

nineteen years, it appears that an inhibition was raised by Alexander, third Earl of Kellie, then the tacksman, upon the foresaid tack. The inhibition was dated 24th August 1644, and was produced by the pursuers of the reduction.

It is manifest, then, that from the expiry of this tack, which was in the year 1662, to the year 1673 (which is an important date in reference to the question of prescription), forty years could not have run against the titular, even although the valuation had been acted upon (which does not appear). In 1673 the defender's father purchased the lands of Gibliston; and it was admitted by the defender that for the next twenty-two years, the valuation, if it ever had been in force, was altogether abandoned, and the heritor had paid a chalder more than the amount of the valuation. The excuse for this abandonment was also very significant—viz., that the defender's father, who had been the factor for the Earl of Kellie, was ignorant of the existence of the valuation. It is very remarkable that whilst the defender urged the plea of prescription in support of the valuation, he alleged no more than that the heritors had been allowed to draw the *ipsa corpora* of their teinds. But he did not allege that the decreet of valuation was the footing of their possession, prior to 1673 more than it had been subsequent to that period. Nay, the most he could allege, as to the terms of possession; was that "the pursuers had failed in proving that the heritors paid a greater duty *for the years of prescription.*"

It seems that nothing was known as to the terms of possession previous to 1673; although the inhibition raised by the third Earl of Kellie the very year after he succeeded to the tack, suggests clearly that he did not acquiesce in the justice or validity of the valuation. So that, in answer to the defender's plea of prescription, the pursuers replied—"The petitioner might have with much more ground, opposed prescription against Giblistoun's decree, if the same had been necessary; for the said decreet was lying latent and neglected during the years of prescription; and the petitioner could give no evidence that either he, his predecessors, or authors did ever make use of the same; so that from the very time that the same was obtained, it had been abandoned, and never took effect.

The plea of prescription, therefore, was plainly inapplicable, there being no *termini habiles* for the currency of prescription. Deprived of the protection of that plea, the decree could not be defended.

On the grounds I have stated, I concur in the result of the opinion of the majority of the consulted Judges.

Lord Neaves—If it be true that a decree of valuation such as this, followed by the heritor of the lands drawing his teinds for forty years is good upon the positive prescription, that is a very simple way of viewing the case. It has been stated, and one of your Lordships has given his adherence to that view, but I cannot find that it is adopted by either the majority or the minority of the consulted Judges, and I certainly regret that my brother who preceded me had not furnished us with some of the data on which he considers that point of the positive prescription to have been sustained in the judgment of this Court, because the case of M'Intyre in the ordinary channels of information that we possess is dealt with, not as a case under the positive prescription, but as a case under the negative prescription; and it is a case as reported to us which seems very relevantly brought under the negative prescription, and one in which not a great deal of difference of opinion seems to have been entertained. As I understand that case, the objection was directed against a decree of approbation of the Court proceeding upon a valuation of the sub-commissioners, and the objection was that certain portions of lands were contained in the approbation which were not contained in the decree of the sub-commissioners. But the decree of approbation, which was not held to be liable to any objection otherwise, had stood for forty years. *Ex facie* of itself it was perfectly unobjectionable, and it contained expressly those lands as to which the question in dispute arose. The ground of reduction was that the approbation was not warranted, as I understand it, by the sub-valuation; but as presented to us in the reports, and apparently in the opinions, and that seems to be the view which a very learned Judge (Lord Curriehill) who considered this case, takes on page 17 of his opinion, the discrepancy between the final decree of the supreme Court of Teinds valuing these express lands, and the sub-valuation, which had not *per expressum* contained these lands—for one could not tell how the identity might have been traced otherwise—was cut off by the negative prescription. It is so reported there, but if it was meant to be solemnly decided, in opposition, I think, to some dicta of some of the Judges, that a decree of valuation estimating the value of the amount of teinds was a title for the positive prescription, I regret that it was not brought more fully before the Court, in order that we might see it in that light, instead of trusting to the no doubt very valuable communication which Lord Benholme has made. But looking at it as now made, it does not appear to me to be a case analogous to the present at all. The question there might have been whether these lands were not for forty years held and brought under the decree of sub-valuation so as to make their identity unchallengeable. That was the question which might have been raised—that you are not to pick holes in this deed because I have possessed these lands as the same with the lands in the sub-valuation. That is a very different question from the one here raised. Whether the positive prescription would apply to that, I shall not say; but I demur most earnestly to the idea that a decree of valuation is anything analogous to those rights which the law has held to be the subject of the positive prescription. The Act of Parliament upon that subject refers to infeftments, but unquestionably it is not limited to infeftments. It has been extended to all rights of a kind that are analogous to infeftments, and in these tacks have undoubtedly been included. A long tack has been held the subject of prescription as much as an infeftment; but where has it been held that a decree putting a valuation on a man's teinds is the subject of the positive prescription? I cannot find any analogy for that. It is said that it entitles the party to possess permanently the *ipsa corpora* of his teinds, because they have been valued. But I think there is a fallacy in that, for it is not the decree of valuation that gives that in itself. It is not a decree pretending to dispone or give a right of teinds. It does not bear, and it does not on the face of it distinguish whether a man has an heritable or not an heritable right to the teinds. It merely fixes, by a pecuniary estimate, the amount of those teinds. Then, no doubt, the Act of Parliament gives a right to possess those teinds, if they have been valued; but that right given by the Act of Parliament needed no

prescription to enforce it, and it is only by welding the two together, and making the decree of valuation and the Act of Parliament into a title or disposition to the teinds, that it can be brought to that. I humbly conceive that to be a very forced way of making it the basis for prescription; and therefore I think that that which in the case of an heritable right to the teinds is clearly not a title to prescription, because it does not affect the right to the teinds at all, is just as little a title to the positive prescription, whether the party has or has not an heritable right to his teinds, the valuation in itself being not a dispositive deed at all, and not a title of property or possession at all, but being a mere fixing of a pecuniary estimate of that which was not before estimated in a pecuniary way, the title of possession depending on separate rights that must stand by themselves—the one an heritable right to the teinds, if the party has it, and the other the Act of Parliament, which depends on the validity of the valuation; and if the valuation is not good, or is cut down, the benefit of the Act of Parliament will be lost. These humbly appear to me to be the more correct views on the subject of the positive prescription as regards this matter; and therefore I do not understand this case to be proceeding upon the opinions of the majority of the Court in recognising the positive prescription. We have here a decree of the High Commissioners proceeding like an ordinary judicial decree, and following upon a signeted summons citing parties in the usual judicial manner; and Lord Curriehill seems to have arrived at the conclusion that that is not a judicial proceeding at all, and that it is not necessary to call anybody to it, and that the absence of no party, however interested in the matter, is of the slightest moment; that the valuation of a man's estate of teinds can go on behind his back; and that it is no objection whatever that either minister or titular or anybody else has not been called, for the teinds are valued by the commissioners, and valued, too, upon an agreement by parties who *ex hypothesi* were not the parties entitled to transact with reference to that matter. I cannot enter into that view at all. I think it was necessary in these valuations that the parties whose estates were valued should be convened. The parties who were interested were the heritors, who were to pay teinds, and the titular who was to receive them, and the minister who was to have a stipend out of them; and if prescription is out of view, and homologation, and everything else, I think the absence of any one of these parties is a fatal objection. It is very true that in many cases reports of the sub-commissioners, which showed that the parties were not formally convened before them, or did not bear that they were in the irregular and imperfect manner in which these things were done have been sustained, but in what circumstances? Where the approbation gave an opportunity to all concerned to appear and be heard; and if there is a sub-valuation and an approbation calling all parties, then the two together will make a good valuation. But where there is only a valuation of the High Court, I am not at all convinced that it can be laid down that this is not a judicial proceeding to be conducted upon this fundamental principle that every man interested is entitled to be called, and to be present, to hear the valuation of his property; and I think that of special importance where the commissioners do not choose to proceed, as sub-commissioners very often do, by personal inquiries on the spot, but where the High Commissioners seeking to value, did not proceed in what I think is the normal and proper way of doing—namely, by cognition of the valuation of the lands on evidence, but chose to take a mere agreement between the party paying the teinds and another party who is not truly interested. According to this view, though it had been an acknowledged decree, and though prescription were held to be wholly excluded, any two men entering into an agreement and having the authority of the High Commissioners interponed to it would make it a good valuation. I don't see where it is to stop, if you loosen the whole of that procedure, which the principles of justice and law appear to me to require. I think that the party interested in the estate must be convened, and I cannot help thinking that the plea of *res inter alios* is, in the absence of prescription, a good plea. The one may not be the heritor, and the other may not be the titular, and they may make an agreement on which the teinds are valued, and that is to be held to be a good valuation, because it required no particular mode of doing it, if it satisfied the minds of the High Commissioners who sat upon it. That is totally out of the question. I confess I think there is far more room for saying that it is a relevant plea, and if the two prescriptions are not in view, if it is not my author that was present, and if the teinds now belonging to me were not valued in presence of one whom I represent, and who represented the interest that I now hold, that is not a good valuation. Now, I consider that to be the real position of this question. I do not think it necessary to go into some of the niceties as to where the titularity lay at that time, except to say that I see not the slightest reason to suspect or believe that it was in the Earl of Buccleuch, and that is sufficient for my view of the case. He was tacksman undoubtedly, and in that sense he had the titularity—that is to say, he had a temporary conveyance by the tack of the right that belonged to the titular, and in that sense he was titular. But it is in vain to say that he was titular. By no process that we know could he be titular. The Reformation did not give it to him. Whether it gave it to the Crown, or whether it remained in abeyance from the absence of functionaries to represent the corporation in whom it was vested, may be another question; but it was not in the Earl of Buccleuch. And I cannot help thinking that when you see that he had but this temporary title to it, and that the arrangement was made by agreement between him and the heritor, the presumption is that it was merely a settlement of their rights as between them, and they were undoubtedly not entitled to contract as to other persons' rights than their own. I see no objection to a valuation of that kind being good as long as the parties stood in the relation in which these parties stood; but I see the greatest possible objection to its being held to foreclose absent parties, and in particular the true titular who was not there called. Now, if that be the case—if I cannot adopt the positive prescription and cannot dispense with the necessity of calling the parties truly interested to an ultimate decree of proper valuation by the High Commissioners—the question is—Is there anything else in the case? The negative prescription appears to me equally inapplicable, and I do not see how it could be brought to bear on it. I do not know that the negative prescription will cut off my right to say that the man against whom a decree is pronounced is not my author at all, and that he is a perfect

stranger in the matter. On the other hand, how did the principal titulars waive any objections of this kind, or allow things to go on in a manner inconsistent with them? They continued to let these teinds. They exercised their right of titularity by letting them from time to time, at such tack duties, and at such *grassum*, whether right or wrong, as they thought convenient, or expedient for themselves; and we have not very much knowledge of what the teinds from the pasture lands of these parishes would at that time have yielded, suppose that they had wanted to draw their teinds. They enter into such contracts, as they were entitled to do from time to time for convenience sake, believing perhaps that the Buccleuch family being there, it might save them a great deal of trouble to do so, rather than that they should go and attempt to draw their teinds from parties in a part of the country, where perhaps they might not always have had the ready and available use of the arm of the law, if there was much objection made, and where many obstacles might have been opposed to them, which would have been a very different thing in the family of the local magnate, who were here selected, with great propriety, to draw the teinds. After '48, it cannot be said that any negative prescription could arise, and as little do I see any acts of approbation and homologation in the knowledge of all the circumstanees that can amount to a bar against these parties. On these grounds, I concur with the minority.

The LORD JUSTICE-CLERK adopted the opinion of Lord Ormidale.

The Lord Ordinary's interlocutor was therefore adhered to in accordance with the opinions of the Judges.

Agent for Pursuers—James Allan, S.S.C.

Agents for Defenders—Mackenzie & Kermack, W.S.

Tuesday, Feb. 19.

BOTH DIVISIONS.

PAUL *v.* HENDERSON (*ante*, p. 179.)

Arbitration — Judicial Reference — Exhaustion of Matters Submitted. Circumstances in which a reason of reduction of a decreet-arbitral on the ground that the arbiter had not exhausted the reference, in respect he had not disposed of a sum of money consigned by one of the parties in the course of the proceedings, was repelled.

In this action of reduction and count and reckoning three grounds of reduction were previously repelled, and a fourth was reserved to be argued before the Second Division and three Judges of the First Division—there being a division on the point among the Judges of the former Division of the Court. The question arises out of the management by the defender of a small property to which Mr Andrew Walter Paul, of New York, succeeded in 1838, as an heir *pro indiviso*. The action was originally brought by Mr Thomson Paul, W.S., commissioner for Mr Paul, for the purpose of calling the defender to account for his intromissions. The summons in that action was signeted Nov. 3, 1856. It was called in Court, and appearance was entered for the defender; but no further proceedings took place, the parties having agreed to the following submission :—

"We, Thomson Paul, writer to the signet, factor and commissioner for Andrew Walter Paul, designed in the foregoing summons, and having authority to enter into the submission for and in name of the said Andrew Walter Paul and myself, as his factor and commissioner, pursuers in the foregoing summons, and David Henderson, also therein designed defender, have submitted and referred, and do hereby submit and refer, to the amicable decision, final sentence, and decree-arbitral to be pronounced by John Maitland, Esq., accountant of court, as sole arbiter chosen by them, the foregoing summons, with the whole conclusions thereof, and all defences thereto competent to the said David Henderson, with power to the said arbiter to consider the premises, hear parties thereanent, and take such probation as to him shall seem necessary; and whatever the said arbiter shall determine in the premises betwixt and the , or betwixt and any other day to which he shall prorogate this submission, we bind and oblige ourselves, our heirs, executors, and successors, to implement and fulfil to each other, under the penalty of £20 sterling, to be paid by the party failing to the party observing or willing to observe the same over and above performance. In witness whereof," &c.

The pursuer made the following statements in support of the ground of reduction that the decree of the arbiter sought to be reduced did not exhaust the reference :—

"On 27th November 1858, the defender, at his own hand, and without any order or pretence of an order in the pretended submission, lodged in the Bank of Scotland the sum of £15, 8s. 9d., the sum represented in his said account to be the balance due on 8th September 1856 on his intromissions with the pursuer's share of said rents. For that sum he took a deposit-receipt in the following terms :—'Bank of Scotland, 27th November 1858. £15, 8s. 9d. Received for the Governors and Company of the Bank of Scotland, from Mr David Henderson, draper in Linlithgow, the sum of fifteen pounds eight shillings and ninepence sterling, the said sum to be subject to the orders of John Maitland, Esq., accountant of the Court of Session, sole arbiter in the action at the instance of Andrew Walter Paul, residing in New York, and Thomson Paul, writer to the signet, his factor and commissioner, against the said David Henderson.' This receipt was lodged in the said pretended submission."

The pursuer then sets forth that the decreet-arbitral was issued on 27th June 1863, and he narrates several of its findings. He then says—"By the fourth finding, the pretended arbiter professed to find that the defender 'is indebted and due to the said Andrew Walter Paul and his said commissioner and attorney the balance brought out on his account of intromissions, amounting to fifteen pounds eight shillings and threepence three farthings (should be £15, 8s. 9d.), and the said sum of four pounds eleven shilling and sevenpence halfpenny, making together the sum of £19, 19s. 11¾d., with interest thereon at the rate of five per cent., from the 8th September 1856 to the 15th of May 1863, under deduction from principal of the sum of fifteen pounds eight shillings and threepence, consigned on the twenty-seventh of November eighteen hundred and fifty-eight, by the said David Henderson, in the Bank of Scotland, *in my name, as arbiter in this submission, and subject to my orders*, and under deduction from interest of interest corresponding to the balance so consigned, at the rate foresaid, on which date the sum of principal and interest due by the said David Henderson, as on the said fifteenth of May