they were unvalued is assigned on the face of the decreet, and the Court will judge of the validity of that reason.

But in regard to another portion of the lands here,—I mean the lands which are not so excepted from valuation, — the general principle arises, whether, taking first the case of Findone, the valuation is to be made as comprehending the whole of the lands libelled.

Now it appears from the libel that the action was brought for the purpose of having the heritors' lands valued, and it describes them in this way,— "that the teinds, parsonage and vicarage, of the said persewars, their lands, baronie, and others under-written, viz., the Meddens and Badentoy, with their pertinents, lying within the parochial of Banchory-Devenick and sheriffdome of Kincardine, are yet unvalued." Therefore Calsayend, Meddens, and Badentoy are not stated as part of the barony of Findone, but the lands and barony of Findone are brought forward to be valued. Now what does that mean? It is not uncommon to talk of all the lands in a barony, and the whole barony, as the lands and barony of so and so. That is the construction which my friend the Lord Advocate endeavoured to put upon this expression here. It might be or it might not be so. But I think it is clear that it is not necessarily so; because there may be lands of Findone which are only part of the barony of Findone. And therefore "the lands and barony of Findone" are not necessarily an expression for one and the same thing, as "the lands in the barony of Findone." I think it appears here that there were lands in the barony of Findone which were not part of "the lands of Findone," because I think it is stated in the record, and not contradicted, and it seems to be assumed by the parties that the lands of Barclayhill formed part of the barony of Findone, and they are not part of the lands of Findone. Therefore it is clear that in regard to the expression in this case, "the lands and barony of Findone," they are not of equal extent with "the lands of Findone," because the barony of Findone comprehended at least Barclayhill, which was not part of the lands of Findone; and it may have comprehended other things which were not part of the lands of Findone as well as Barclayhill.

Now the minister, the defender in the present action, says that there were a great many other things besides Barclayhill which were not part of the "lands of Findone;" and if we see that there was land which was parcel of the barony of Findone which did not form part of the lands of Findone, and which was not valued here, it is not unreasonable to suppose that inquiry may show that there were other parcels in the same condition. The minister says that there were; and he has specified a number of such lands in article 3 of his condescendence.

Now all that the Court has done is to say that this decreet does not exclude inquiry, and that inquiry should be made. That is the whole extent of the judgment, and I think that is a reasonable judgment to pronounce. The Court has not said how far the onus may rest, or how long the onus may rest, upon the pursuer or upon the defender. That is left open for investigation. It may shift in the course of the inquiry; and some things may be adduced which will throw the onus upon the one side, and other circumstances may be proved which may throw it upon the other. It is upon the balance of the whole evidence that the Court has eventually to determine whether, upon the fair construction of this decreet, it did or did not comprehend any of those parcels of land which the minister describes in article 3 of his condescendence.

Then with regard to the barony of Portlethen, the same general observations apply, though there is not here the special difficulty which I mentioned in the other case, of detecting upon the face of the proceedings the parcels of land which formed the barony, and were known by that name. But the same principle applies. I must say, however, that in making up this record I think it would have been better that the minister should have been required to condescend upon the particular lands in the barony of Portlethen, which he says were not valued for teinds. He has done so in regard to Findone, but he has not done so in regard to Portlethen. I should have liked that that should have been required, because then it would have limited the inquiry to those particular lands, and not have left open a wide range as is here done. However, that is still open to correction. I think we cannot alter the decreet by reason of that not having been done, for it does not appear to have been objected to by the other party.

Upon these grounds, my Lords, I am of opinion that the judgment which has been suggested by your Lordships is the correct one. I observe in the condescendence and in the opinions of the Court that this decreet was based upon the rental produced by the heritors. I am not quite sure that that was so, as I read the decreet, because the decreet of valuation states that the minister produced another rental, and he referred that rental of his to the oath of the heritors, and the heritors deponed upon that rental. Now, it was upon the result of that oath that the judgment proceeded, and we have not that before us; it is one of the things which has vanished; and that is one reason why there is a difficulty in this inquiry; but I do not think it affects the merits of the judgment which has been pronounced, and therefore I will not go further into it.

Order appealed from affirmed, and appeal dismissed, with costs.

Agents for Appellant—Hill, Reid, & Drummond, W.S., and William Robertson, Westminster.

Agents for Respondent—Tod, Murray, & Jamieson, W.S., and Martin & Leslie, Westminster.

COURT OF SESSION.

Saturday, May 18.

SECOND DIVISION.

PETITION SMITH FOR RECAL OF SMITH'S SEQUESTRATION.

Bankruptcy—Recal of Sequestration—Affidavit—Voucher. Circumstances in which held that a sequestration was properly awarded upon an affidavit and relative voucher, *ex facie* unobjectionable, and an accounting for the purpose of showing that the debt upon which sequestration was obtained refused as incompetent.

This is a petition for the recal of the sequestration of the late Thomas Smith, spirit dealer, Edinburgh, presented by his son, a pupil, with concur-

rence of his tutor *ad litem* appointed by the Court. Sequestration of the deceased's estate was obtained on the 10th of August 1866, on the petition of Charles Dick & Son, brewers, Edinburgh, upon a bill amounting to £103, 10s., payable four months after date, and bearing date 10th August 1863. The petitioner stated that Smith, having found himself in embarrassed circumstances, called a meeting of his creditors, which was attended by the petitioning creditors, and that they, along with the other creditors, agreed to accept of a composition of 4s. in the pound, and thereby discharged all prior claims; and therefore it was maintained they were not entitled to apply for sequestration. The respondents, on the other hand, said that the said composition had never been paid by Smith, and they accordingly pleaded their right to keep up the whole debt due by Smith to them, and to rank for it in the sequestration. The petitioner further stated that upon the death of his father in November 1864, the respondents had lodged a claim for £111, 3s. 6d. with his executrix, and which was paid to them. This was admitted by the respondents. The petition for recal contained the following additional statement:—

"The said bill, which is dated 10th August 1863, is for the sum of £103, 10s., and is payable four months after date. It was not subscribed by the said Thomas Smith, and the words "Thomas Smith" written therein were not written by him. He (Mr Smith) never saw the said bill, and never knew of its existence. It was not delivered by him to the respondents, and they became possessed of it without his knowledge. No value was given by the respondents for that bill.

On 13th February 1867 the Lord Ordinary (MURE) pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators, and thereafter considered the closed record and productions; Before answer, allows the petitioner a proof of his averment that the bill for £103, 10s. on which sequestration proceeded was not the writ of the deceased Thomas Smith, and to the respondents a conjunct probation; Appoints the proof to take place on Thursday the 7th day of March next, at 10 o'clock A.M., and grants diligence against havers and witnesses. One word delete.

"DAVID MURE.

"*Note.*—As the bill and relative affidavit on which sequestration are awarded are *ex facie* free from all objection, the Lord Ordinary does not, as at present advised, think it would be competent to allow the petitioner to enter into a general accounting with the respondents, in order to show that they were not creditors of the late Thomas Smith to the amount of the bill in question, and that the sequestration ought on that account to be recalled; But if the petitioner can show that the bill was not signed nor granted by the deceased, or, in other words, is a forgery, the Lord Ordinary is disposed to think that that will be a sufficient ground for recalling the sequestration. "D. M"

The petitioner then abandoned his allegation that the bill referred to in the petition for sequestration was not the genuine writing of the bankrupt, whereupon the Lord Ordinary discharged the order for proof and circumduced. The Lord Ordinary thereafter pronounced the following interlocutor:—

"*8th March* 1867.—The Lord Ordinary having resumed consideration of the Closed Record and proceedings: Finds that there is no sufficient reason for recalling the sequestration; Therefore refuses the petition, and decerns: Finds the respondent entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"DAVID MURE.

"*Note.*—The challenge of the genuineness of the bill, founded on by the petitioning creditor in proof of his debt, having now been given up, the case falls to be disposed of on the footing that the affidavit and relative voucher on which sequestration was awarded were *ex facie* unobjectionable. And as the Lord Ordinary on further consideration adheres to the opinion indicated in the note to his interlocutor of the 13th of February, as to the incompetency of allowing the petitioner to enter upon a general accounting as to transactions between the petitioning creditor and the bankrupt, going back to the year 1862, with a view to the recal of a sequestration duly awarded in terms of the statute, he has refused the petition. "D.M."

The petitioner reclaimed.

MAIR, for him argued—The petitioner is, *de plano*, entitled to recal of the sequestration in respect of the admissions of the respondents as to the composition which the creditors agreed to take from the bankrupt, and which discharged the original debt of the respondent, and also as to the payment to the respondents of the debts claimed by them from the executrix. At any rate, the petitioner is entitled to an inquiry into the circumstances set forth in the record, in order to have it ascertained whether the composition was paid, and whether any debt was due to the respondents. *Milne* v. *Milne*, June 13, 1850, 11 D. 1007.

GIFFORD and MACKINTOSH, for respondents, were not called upon.

The Court agreed with the Lord Ordinary in holding that the procedure was regular, and that the sequestration was properly awarded upon an affidavit and relative voucher, which was *ex facie* unobjectionable. They further concurred in holding that it was incompetent to allow the petitioner an accounting with the petitioning creditors; and even if that were competent, there was nothing to induce the Court to follow that course, because there was nothing suspicious in the statement of the petitioning creditors, and much that was improbable in the statement of the petitioner for recal.

Agent for Petitioner—W. Officer, S.S.C.

Agent for Respondents—George Cotton, S.S.C.

Tuesday, May 21.

SECOND DIVISION.

WYLIE AND HILL *v.* BELCH.

Suspension—Lease—Minerals—Working to Profit—Report. Circumstances in which held, under a lease which provided that the minerals let might be given up upon the report of an engineer, named in the lease, that they had become unworkable to profit, that the report, which has a condition of taking benefit under the lease, had not been set up, and suspension of a charge for rent due under the lease accordingly refused.