only manner in which the proceeding can be questioned, would be a denial of justice. Even if the Court had exceeded its jurisdiction in directing the inquiry, it was, after all, in an interlocutory matter, a mere step in the cause, and (as it was truly said in the argument) if there had been a plea to the jurisdiction, and the Court had decided against it, it would not have been competent to appeal at that, the earliest stage of the cause. I am satisfied that it was competent to the Court to take the course it did, and that it was expedient for the thorough determination of the cause, to enable the Court to frame proper issues, and the jury to deal more easily with the matter to be submitted to them.

I am therefore of opinion that the appeal is incompetent, and that it ought to be dismissed, with costs.

Lord Cranworth—My Lords, this matter lies in so very narrow a compass, that I do not think I should be justified in troubling your Lordships at any length after what has fallen from my noble and learned friend. This appeal is in my opinion clearly incompetent, because it is an appeal from an interlocutor not disposing of the whole merits of the cause. Upon that the question is founded. An appeal to the House is regulated by statute, and it can only be competent when it is an appeal against an interlocutor disposing of the whole merits of the case, or when the decision appealed against being of a temporary or interlocutory nature, the appeal has been sanctioned by the Court below, or there has been a division of opinion among the judges. Under neither of these categories does the present appeal range itself. That appears to me to be the whole question now before us. Whether the Court has taken the most proper course, will have to be decided if there should be an appeal upon the whole merits eventually. But the attempt to sustain this appeal, on the ground of its being an appeal against an excess of jurisdiction, or against an erroneous excess of jurisdiction, seems to me to be a confusion of terms. Of course the Court has no jurisdiction to decide anything that is contrary to law; but if it wrongly decides anything in the cause, that can be set right upon appeal only at the time when the Court has authorised that to be done.

Lord Colonsay—My Lords, it has not appeared to me, from almost the commencement of the argument, that there is any difficulty in this case. It appears to me that the provision of the Act of 1808 is quite conclusive upon the question. The only attempt to get out of this provision of the Act of 1808 has been by the endeavour to assimilate this to the case of an inferior court having exceeded its jurisdiction, and being now to be corrected by a Supreme Court in regard to such excess of jurisdiction. But this case is not of that character. There can be no doubt at all that the Court of Session had jurisdiction to deal with this case. But the argument is, that in a step of the procedure they have not followed the statutory regulation, which has been referred to; or, in other words, the argument is, that in every case in which there can be found in any statute anything of a directing nature as to the course which is to be followed in the preparation of a cause, if the Court of Session commits an error in the application of that direction, an appeal is competent, although the order of the Court may not deal with any part of the merits of the cause, or be the result of divided opinion, and there be no leave given by the Court. That is an extravagant proposition; it is contrary to the interpretation that has been put upon the Act for nearly sixty years. There is no precedent for it, and I can see no principle for it. I am therefore clearly of opinion that the appeal is incompetent.

With regard to the step itself that was taken, it may not be necessary at this stage to say anything, but I cannot refrain from expressing my opinion that the procedure which was adopted by the Court was not in contravention of any statute. I think it was a competent procedure. What may be the benefit of it hereafter remains to be seen, but it was not out of the ordinary course of procedure, nor does it appear to me to interfere in any way with any direction in any of the statutes. The provisions contained in the earlier statutes, as to sending the case at once to the Jury Court, were provisions to enable the Jury Court, not the Court of Session, to proceed with the preparation of the cause as well as to try the cause. But those very statutes contained provisions that if questions arose, either of law or of relevancy, which the parties denied to be disposed of, the case was to be sent back to the Court of Session in order that that Court might deal with those matters, and might send the case again for trial by a jury. But these things have been swept away, because now there is no Jury Court; but the procedure of preparing the cause throughout remains with the Court of Session, and it is not imperative on them to send a cause before a jury until they see whether or not there is a relevant and proper case presented to them for consideration. Now, when I look at this record, I see that there may be great difficulty in regard to that matter. There may be difficulty in regard even to the relevancy in the strict sense of the word; but in regard to a wider and perhaps more inaccurate use of the word "relevancy,"—I mean as to the sufficiency and perspicuity of the statements of the parties—there was great occasion, I think, for something to aid the Court in dealing with the case, and the course taken by the Court, of having the books examined by an accountant, so as to enable them to read all these volumes through the eyes of an accountant selected by themselves, and whose report, when it is made, the parties will have an opportunity of observing upon, was, I think, a very prudent step to take in reference to such a case as this. But that is not necessary to the decision of the point now before us, which really turns upon the competency of the appeal, and I have no doubt that the appeal is incompetent.

Lord Advocate—My Lords, there are two appeals before your Lordships' House; of course your Lordships' judgment will apply to both?

Lord Chancellor—Yes.

Appeals dismissed as incompetent, with costs.

Agents for Appellant—Morton, Whitehead, & Greig, W.S., and Loch & Maclaurin, Westminster.

Agent for Respondent—James Webster, S.S.C., and John Graham, Westminster.

COURT OF TEINDS.

Wednesday, June 19.

JAMIESON AND OTHERS *v.* MINISTER OF ORWELL AND OTHERS.

Teinds—Valuation—Approbation. A report by Sub-Commissioners for valuing teinds in 1630, bore that certain lands were "worth of yearly rent,

in stok by teynd, 40 bolls victuall—thairoff, 10 bolls bear and 30 bolls black aitts." Held, in an action of approbation, that the Court could competently approve of the report, and give the value of the teind as one-fourth of the reported value of the stock. Objection, that the valuation was led in the absence of the minister, repelled.

The pursuers, Andrew Jamieson and others, proprietors of certain portions of the lands of Middleton of Collenoquhies, in the parish of Orwell and Presbytery of Dunfermline, brought this action against the minister of the parish and others, for the purpose of procuring an approbation by the Court of so much of a report by the Sub-Commissioners for valuing the teinds of the lands within the boundaries of the Presbytery of Dunfermline as related to the said lands of Middleton of Collenoquhies. The report, so far as regards the lands within the parish of Orwell, is dated 8th February 1630, and reports the value of the lands of Middleton of Collenoquhies in the following terms:—"The Middletoun of Collenoquhy is worth of yearly rent, in stok by teynd, 40 bolls victuall—thairoff, 10 bolls bear and 30 bolls black aitts." That is to say, the report gives the value of the stock merely, *by* or beside the teind, and does not report the value of the teind, either separately or jointly with the stock. The principal report having been mutilated, its tenor was proved in 1787. The conclusions of the summons were to have the report ratified and approved of, in so far as regards the lands of Middleton of Collenoquhies; and to have it found and declared "that the stock of the said whole town and lands of Middleton of Collenoquhies shall be now, and in all time coming, 10 bolls of bear and 30 bolls of black oats, being the particular quantities of victual above specified and contained in the said report; and that the teind, parsonage and vicarage, of the said whole town and lands of Middleton of Collenoquhies shall be now, and in all time coming, one-fourth part of the said particular quantities of victual above specified and contained in the said report."

The pleas in defence principally urged by the defender were, (1) that the sub-valuation libelled having been of the stock as separate from, and exclusive of, the teinds of the lands in question, could not, at any time, competently have been held by the High Commissioners, and cannot now be held by the Court of Teinds as in their room, either as being *per se* a valuation, or as affording a legal *datum* for a valuation, of the teinds; and (2) that it was incompetent to approve of the valuation, "in respect that it was led, and its tenor was proved, in the absence and without the consent of the defenders' predecessors in office for the time respectively."

The argument of the defenders on the first of these pleas was, that under the commission issued by King Charles I., on 2d February 1629, to the Lords of Commission and the Sub-Commissioners, and the decreets-arbitral issued in September 1629, two modes of procedure were open to the Sub-Commissioners. In the first place, both the instructions and decreets-arbitral dealt with the case where the teinds were possessed and enjoyed by the heritor himself along with the stock. In this case the Sub-Commissioners were specifically directed to receive a proof of "what the lands pay presently, and what they have paid in times bygone, and what they may pay of constant rent of stock and teind in time coming." And the decreets-arbitral in that case declared the rate and quantity of the teind to be "the fifth part of the constant rent" of the land. In this case, accordingly, the report of the Sub-Commissioners (if framed in terms of their instructions) and the general decreet-arbitral taken together, at once operated as a valuation of the teinds of the lands on approval of the report by the High Commissioners.

The second, and only other possible case, was that where the teinds were *de facto* separated from the stock, and were in use to be drawn in kind either by the titular himself or his tacksman, "not being heritors of the lands." Then the Sub-Commissioners were "to inform themselves by all the lawful ways and means they can, of the just and constant worth of the teinds, both great and small," *per se*. From the proven teind a deduction of one-fifth was to be allowed as the "King's ease." The Sub-Commissioners were, however, authorised, after the teind had been thus separately proved, to receive likewise from the heritor a proof of the rent of the land if he chose to adduce it. This having led to doubt and discussion, the Court ultimately ruled that in cases where the values of both stock and teind were reported they fell to be added together, and one-fifth of their amount *in cumulo* was taken as the teind, apparently on the construction that the *cumulo* value of stock and teind, thus separately proved, fell within the rule of the first branch of the decreet-arbitral. But, in order to let in such constructive application of the first rule, it was essential that the High Commissioners should have the requisite data in the shape of separate proofs of both stock and teind before them. The Sub-Commissioners had no discretion, but were expressly enjoined to inquire and report as to the value of the teinds *in cumulo*, along with the stock where both were "brooked jointly," or of the teinds alone, or of both the stock and teind separately proved where the teinds had been in use to be drawn in kind; in the latter case, proof of the value of the teinds being the primary matter of instruction, and essential. The defender held it to be thus clear (1) that in all cases the Sub-Commissioners were directed to lead proof as to the value of the teind, either by itself or along with the stock, and that no authority was given them to report the value of the stock alone; and (2) that, without such proof of the value of the teind, either separatively or cumulatively, the King's general decreet-arbitral were imperative. They did not contain a decree that the teind itself unproved should be held to be one-fourth of the stock alone proved. The subsequent statutes 1633, c. 17 and 19, made no alteration on the state of matters, and under them the Court had no authority to deal with a report like the present, which was alike outwith the King's commission, the decreets-arbitral, and the statutes of 1633.

The pursuers, on the other hand, contended that it was clear beyond dispute, both from the history of the practice as given by almost every author who has written on the subject of teinds, as from various reported decisions, that the Court have, from the first introduction of the system of valuations, held a proof of the stock to be, in certain circumstances, a sufficient *datum* for fixing the value of the teinds; and if they have held a proof of the value of the stock merely, led before themselves, to be a sufficient *datum*, there is no reason why they should not hold a report of such a proof, led by the Sub-Commissioners, to be also sufficient. They relied on the authority of Sir George Mackenzie, Forbes,

and Connell, as establishing the proposition that, where the titular failed to appear, or to lead a separate proof of the drawn teind, the Commissioners considered themselves warranted in allowing a proof of the stock merely, and in fixing the value of the teind at one-fourth of the stock; and so, also, in cases where the titular appeared and attempted, but failed, to lead a satisfactory proof of the value of the drawn teind. This being so, where the Sub-Commissioners report to the High Court the value of the stock merely, can the High Court approve of the report, and give the value of the teind at one-fourth of the reported value of the stock? The pursuers maintained that it could, unless there was something in the terms of the sub-commission debarring the Sub-Commissioners from taking any proof of the value of the stock except where a proof was also led of the value of the teind separately or jointly with the stock. But there was, the pursuers contended, no such limitation of the powers of the Sub-Commissioners.

As to the second plea of the defender, founded on the non-appearance of the minister, the pursuers contended that it was a settled point that, if the titular was duly made a party to the proceedings before the Sub-Commissioners, their report may be approved of although the minister was not called.

G. Dundas and Cook for pursuers.

Horn and Cheyne for defenders.

Cases were appointed to be lodged for the parties, and the Court gave judgment on the revised cases.

Lord Curriehill—This action concludes to have it found that the yearly value of the teinds of the pursuer's lands of Middleton of Collenoquhies is one-fourth part of 40 bolls of victual, in virtue of a report by the Sub-Commissioners of the Presbytery of Dunfermline, dated 8th February 1630. The defender, the minister of the parish, pleads two objections to the validity of that report—*first*, that what was thereby valued was only the stock belonging to the heritor, and not the teinds; and *secondly*, that the minister of the parish was not called as a party to the proceeding. The solution of these questions depends upon the nature and extent of the functions of these Commissioners. These are specified in a Royal Commission issued under the Signet on 2d February 1629, a copy of which is in Connell, Appx., pp. 95 and 118. And, in order to understand the true import of that document, it is proper to attend to the circumstances in which it was issued.

The titular, the Earl of Morton, was entitled to draw these teinds; that is to say, to appropriate and remove one-tenth portion of the *ipsa corpora* of each crop after it was shorn. The time and mode of making such appropriation was at that time regulated by the statute 1612, c. 5.

King Charles I., in execution of his design of commuting the right of titulars to draw the *ipsa corpora* of teinds into a right to levy from the heritors an equivalent annuity in money or victual, appointed for that, among other purposes, the Commission of Surrenders in 1627. And that Commission having requested His Majesty himself to fix the *rate of teinds*, the submissions by different classes of persons who were interested in them were entered into in the year 1628. The decrees-arbitral were not pronounced until the 2d of September 1629. But during the dependence of these submissions, the Commissioners, under the authority of His Majesty, appointed Sub-Commissioners in the different presbyteries to make and report valuations of the subjects within the different boundaries, to which the rate of teinds to be determined by the decrees-arbitral might be applicable.

It was to instruct these Sub-Commissioners how to perform that duty the instructions beforementioned were issued under the Signet on 2d February 1639. These instructions applied to three different classes of cases:—

1. In the class of cases in which the titulars had, by conventional arrangements with the heritors, allowed them to draw the teinds indiscriminately with the stock of their lands, the Sub-Commissioners were directed to inform themselves "what the lands payes presently, and what they have paid in times *byegone*, and what they *may pay of constant rent of stock and teind* in time coming." But although they were so to *inform themselves* of the past and the present rentals, as well as what *might* be the *constant rent in time coming*, yet what they were directed *to report* to the general Commission was only "the true worth and *value thereof in constant rent, according to their judgment*." What was denominated the worth and value in *constant rent* was thus something different from the then existing or the prior rentals of the stock and teind, and was to consist of an estimated value of what might prospectively be the *yearly rent* for which the stock and teind jointly might be let in future.

2. In the other class of cases in which the titulars had exercised their legal right of *drawing* their teinds, "for the space of seven years, within these fifteen years bygone, at the least" (that is to say, for seven of the fifteen *crops* which had been reaped since the mode of drawing teinds had been regulated by the statute 1612, c. 5, already mentioned), the Sub-Commissioners were to value the *actual drawn teind*. But they were not permitted to do so in any case, unless the titular himself should think proper to bring forward such a proof. There was conferred upon them by the same Royal Commission, in cases of that class, what was called the *prerogative of probation;* and if they either were unable to adduce such proof, or did not choose to avail themselves of that exclusive privilege, neither the heritors nor any other party could proceed to value the *ipsa corpora* of the teinds.

3. But although the titulars might be unable or unwilling to exercise this prerogative, of valuing the *ipsa corpora* of the one-tenth of the produce which belonged to them, the heritors in such cases were allowed to value the constant *rent* of the remaining nine-tenths thereof, consisting of the stock which belonged to them; it being provided by the instructions that if, in such cases, "the heritors be likeways desirous that the *rent* be likewise tried with the teinds according to the true and constant *worth and rent of the lands*, we, with advice of our said Commissioners, allows the said Sub-Commissioners to do the same." This sentence is not clearly expressed, but its meaning appears to be clear enough. In the first place, what is denominated the constant "*rent of the land*" means the constant rent of the stock; for, in the cases where the teinds were drawn by the titular himself, it was only for the stock drawn by the tenant the rent would be payable. And, in the next place, the permission given to the heritor to value this rent "with the teinds" did not mean that, when he availed himself of this permission, *he himself* was to value the *ipsa corpora* of the teinds drawn by the titular, along with the rent of the stock; for the privilege of valuing the *ipsa corpora* of these teinds was bestowed exclusively upon the titular himself; and a separate valuation of them, along with the

constant rent of the stock by the heritor, could have been of no use whatever. The meaning plainly was, that in every case where the teinds were drawn by the titular, not only should he be allowed a proof of their value, but the heritor also might be allowed a proof of the rent of the stock, so that, in the event of the former not availing himself of his exclusive prerogative, the value of the constant rent of the stock might be available to the heritor as the rental upon which the teinds might be valued by the High Commissioners.

What the Sub-Commissioners were to value in all these cases was not the permanent yearly rate or annuity for which the titulars' right was to be commuted. The fixing of the amount of such yearly rent or annuity was reserved to the King himself under the submissions which were then in dependence; and the function of the Sub-Commissioners was merely to report a rental, according to which the amount of such annualrent or annuity might be estimated. His Majesty did, accordingly, perform that function by the decrees-arbitral which he pronounced on 2d September 1629; but I need not quote the terms of that document, as, by the statute 1633, c. 17, that rate was authoritatively settled by the Legislature. But, before quoting the terms of that enactment, let us attend to the terms of the report which was made by the Sub-Commissioners of the Presbytery of Dunfermline of the subjects in question, under the instructions of 1628.

The process was instituted before them by their procurator-fiscal; but the titular and also the heritors appeared as parties in the process. More than fifty subjects were valued.

All the different modes of estimating the values specified in the instructions were exemplified in that proceeding. The report contained the valuations of more than fifty different subjects. In more than thirty of these the rent of the stock and teind were valued jointly. In several cases in which the teinds were valued separately, and in some others the stock was valued alone. This was the case as to Middleton of Collenoquhies. The report bears that it was valued as "worth in yearly rent *in stok, by the teind*, 40 bolls victuall, thairof 10 bolls bear, and 30 bolls black aittes"—the words "by the teind" indicating that the teinds were drawn separately.

That report was never laid before the Royal Commissioners, whose functions terminated in 1633. But in that year the two statutes 1633, c. 17 and 19 were passed. The former of these statutes established that the *rate* of teinds was to be "the fifth part of the constant rent which each land payeth in stock and teind where the same are valued jointly, and where the teinds are valued apart and severally that the just rate thereof is and shall be such as the same is already, or shall be hereafter valued and proved before the said Commissioners or Sub-Commissioners, deducing the fifth part thereof for the ease of the heritors."

Simultaneously with that statute, the Act 1633, c. 19, was passed, appointing the first *Statutory* Commission for the Valuation of Teinds, &c. And as our functions, as the successors of that Commission depend also upon that Statute, let us see what are its enactments as to this matter. One of these is, that the Commissioners were "to receive the reports from the Sub-Commissioners appointed within ilke presbytorie of the valuation of whatsoever teinds, *led and deduced before them according to the tenor of the Sub-Commissioners direct to that effect; and to allow or disallow the same, according as the same shall be found agreeable or disagreeable from the tenor of their Sub-Commissions.*"

Another is, that the Commissioners should have the powers therein specified, "and generally with power to them to set down *whatever other order or course which shall be thought fit and expedient for dispatch of the said valuations*, rectifying thereof, or final closing of the same."

This Court, as the existing Statutory Commission, and having as to this matter the same functions as that appointed by that statute of 1633, is now called upon by the heritor to receive the report of the Sub-Commissioners as to Collenoquhies, to allow the same, and to find that the rate of the teinds thereof is one-fourth part of the reported value of the rent of the stock thereof. To support that demand the pursuer must show—*first*, that the report is agreeable to the tenor of the Sub-Commission of 1629; and, *secondly*, that in conformity with the rules prescribed by the statute 1633, c. 17, the rate of teind is one-fourth part of that reported rent.

As to the first of these matters, I am of opinion that the report is agreeable to the tenor of the Sub-Commission, and should therefore be allowed. The ground of this opinion appears from the analysis I have made of the instructions under which the Sub-Commissioners acted. On the one hand, the terms of the report itself, by stating that the rent of the stock was valued by the teinds, instruct that the teinds were not possessed jointly with the stock, but continued to be drawn separately by the titular in the exercise of his legal rights; and consequently, the constant rent of the stock and teind could not have been jointly under the first head of the instructions. On the other hand, that report also instructs that the titular, although he was present at the valuation, did not exercise his exclusive prerogative of valuing separately the *ipsa corpora* of the drawn teinds; and consequently, neither the heritor nor the Sub-Commissioners themselves, through their procurator-fiscal had authority to value these teinds in that manner. But the heritor was, in that predicament, authorised by the instructions to prove the value of the rent of the stock without the teinds. And this accordingly was done.

The report of that valuation having thus been agreeable to the tenor of the Sub-Commission, the Statutory Commission was bound, by the direction in the statute 1633, c. 19, to allow that report. And this being the case, it was the duty of that Commission, in the performance of its farther statutory function of fixing the *rate of the teinds* of that subject in conformity with the statute 1633, c. 17, to deal with the case on the footing that the constant rent of the *stock*, alone, was duly valued at 40 bolls of victual. To that extent it behoved the High Commission to deal with the case, just as it would have done if that valuation of the rent of the stock had been made by itself.

But holding this to be the case, the question remains, What was the rate of teinds which the Commissioners were to fix in cases where their only *datum* consisted of a valuation of the constant rent of the stock without the teinds? This question might have been puzzling to us if it had occurred before the former set of Commissioners who acted under the Royal Commission of 1627, because we do not now know all the powers which were conferred upon that body. But, fortunately, what we have to deal with is the rule which the Commission appointed by the statute 1633, c. 19, was bound or entitled to follow in such cases.

Although there is nothing very specific in that

statute itself upon the subject, yet it could not well be doubted that this meaning of the Legislature was that, as the rate of teind was to be one-fifth part of the constant rent at which the stock and teind jointly were to be valued, it was to be one-fourth part of the constant rent of the stock—as one-fifth of the whole, and one fourth of the remaining four-fifths are precisely the same. But, fortunately, we are not left to ascertain by such reasoning, however satisfactory, the rule which the Statutory Commissioners were to follow; for, as we have seen, the Legislature committed to them ample discretionary powers, to set down *whatever order or course they themselves should think fit and expedient for dispatching* the valuation, and for closing the same. And accordingly, they very soon exercised that power, by fixing the mode of valuing teind in cases where their *data* consisted of valuations of the stock only. They did so within a year after the passing of the Act in cases which came before them on 19th February 1634 in the following terms:—

"The Lords finds that the heritor has not place to prove the stock where the titular has the prerogative of the probation of the teind, except it be for certification as betwixt the Lord St Minnans and the Master of Elphinston.

"The Lords finds, when it shall happen, the heritor to *prove the stock* by way of certification, *the fourth-part is declared the teind* as betwixt the Laird of Stenhouse, titular, and the Master of Elphinston, heritor.

"The Lords finds, the same day, *the fourth part of the stock is declared teind* as betwixt Sir John Hamilton of Grange, titular, and the Laird of Cleghorn, heritor."

What was meant by the expression, "by way of certification," in these findings was, that the heritor, although he was not allowed to bring proof of the value of the *ipsa corpora* of the teinds which were drawn by the titular, had bestowed upon him the additional privilege of summoning the titular to exercise his exclusive prerogative, with certification, that if he should fail to do so within a specified period of time, he would afterwards be excluded from doing so. This was explained by the terms of the following finding by the Commission on 24th February 1643, in the case *Laird of Megginch* v. *Pitkindie*,—"that where the heritor summoneth the titular who was in possession of drawing the teind, to prove the worth thereof, and not compearing, the heritor has place to prove *the stock, and the fourth part thereof declared teind*, and the titular secluded thereafter from any sort of probation." These judgments are in the collection of decisions in the appendix to Connel; and although misgivings have been expressed in some quarters as to the authority of that collection generally, there appears to be no doubt, at all events, as to the genuineness of the reports of the cases I have mentioned; because Sir George Mackenzie, in his Observations on the Statute 1633, c. 19, refers to all these cases as recognised authorities in his time; and accordingly, that learned author states, as the established meaning of that statute, that where the titular fails to prove the separate value of the teinds, not only may the heritor prove the worth of the stock, but that "*quo casu* the fourth is declared to be teind." Thus then, if the present action had been brought before the first Statutory Commission appointed by the statute 1633, that Commission not only must have allowed the valuation in question as an effectual valuation of the rent of the stock of the lands in question, but would fix the rate of the teinds thereof at one-fourth of that rent. And this Court, in the exercise of its functions as the High Commission under the statute 1707, is subject to the same rules as the Commission of 1633 was; and it has accordingly followed these rules. For example, in the case of *Gordon* v. *Dunbar*, 22d February 1744, Mor. p. 15741, where the teinds, although these had always been drawn separately by titular, and were not, and could not, be valued separately, this Court found that the "rule for ascertaining the value of these teinds in a process of valuation at the instance of the heritors of the lands is, that the teinds be valued at the same rate as where a joint duty is paid for stock and teind,—*that is, that they be valued at a fourth part of the rent paid to the pursuer for the stock*, which comes to the same with a fifth part of the rent, where the rent is paid both for stock and teind."

Effect was afterwards given to the same principle in the case of *Mutter*, 25th June 1777.—Mor., Appx. to Teinds, No. 2.

And accordingly, Sir John Connel states (vol. i, p. 176) as the established rule, that "if the titular brought no proof of the value of his teinds, the heritor was allowed to prove the value of the *stock;* and, in that case, *a fourth part of the stock was taken as the teind*—on the ground, no doubt, that a fourth of the stock was equivalent to a fifth of the total rent."

I therefore think that, on principle and authority, the first objection pleaded against the report in question ought to be repelled.

The other objection is, that the minister of the parish was not summoned as a party to the proceeding. Considering that this valuation, although not hitherto approved of by the High Commission, has for more than two centuries been acted upon without challenge, and that the documents which were its grounds and warrants do not now exist, I incline to think that, in these circumstances, the presumption *rite et solemniter actum* should receive effect. But without resting my opinion on that ground, I think that in law it is not essential to the validity of that proceeding that the minister should have been summoned as a party to it.

In disposing of this question, we must distinguish the proceedings in which Sub-Commissioners in Presbyteries prepared such reports from processes before the High Commissions. The question whether or not it was necessary to call ministers as parties to such processes before the High Commissions is, as we know, being raised in several cases recently brought into Court; and I carefully abstain from expressing any opinion upon it, and deal with that question as applicable only to this report by the *Sub-Commissioners in* 1630. And here again, the question is, Were the statutory Commissioners of 1633, and their successors, bound to allow this report as being made agreeably to the tenor of their commission? I think that they were. Although the Sub-Commissioners were empowered "to call all parties having interest in the valuations before them," the meaning of that direction appears, from the expressions in the sequel, that only two parties, the heritors and the titulars, were contemplated as being interested. The Sub-Commissioners are thereby directed to proceed to trial "if *both* parties be present." And "*if neither titular nor heritor* will compear," they were to name a procurator-fiscal to lead the proof. And this is made still more clear by the conditions in the instructions as to the parties who were to be allowed to adduce proof. These, in the cases where the stock and teind had

been possessed jointly, were "the *titular* or *heritor, or either or both of them;*" and in the cases where the stock and teind had been possessed separately, the titular alone was to have the privilege of proving their value, the *heritor* being allowed the privilege of proving the stock. But the minister in all cases was entirely ignored. Nor is this wonderful, considering that in 1630 ministers had not acquired a legal right to periodical augmentations of their stipend; and consequently, had then little or no interest in the rates of the future value of the teinds. And at all events, not only the titular, but also all the heritors in each parish, had a more direct interest than the minister in preventing the teind of any individual heritor from being undervalued; because so long as there should be any free teind in the parish, the minister was safe; and if the teinds of any heritor should be undervalued, the burden of the share of the stipend which might be allocated upon each of the other heritors would be unduly increased. There is, accordingly, no authority for holding that the validity of the report of Sub-Commissioners is affected by the ministers not having been called as a party to the proceeding. On the contrary, this question has been put at rest by the case of *Campbelton* v. *Paton*, 244. That case, like the present one, was an action of approbation of a report of Commissioners, dated also in 1630, and of course made under the general instructions of 1629. The defence that the minister had not been called as a party to the proceeding was urged. But it was rejected by the unanimous judgment of this Court; and that judgment was affirmed by the House of Lords. The defender says contrary judgments have subsequently been pronounced by the Second Division of this Court, in the cases of *Brown* v. *Stewart*, 31st January 1851, and *Kirkwood* v. *Grant*, 7th November 1865. But that is a mistake. Neither of these cases related to the validity of a report by Sub-Commissioners. Both of them related to decrees of the High Commission. In *Brown* v. *Stewart*, the authority of the judgment of the House of Lords, as to the efficacy of such sub-valuations, was emphatically admitted, in as much as the Lord Justice-Clerk, notwithstanding his having avowed his hostility to that judgment, expressly stated:—"I do not intend to dissent from the rule in the case of *Campbelton, which must be repeated, I presume, having been affirmed in the House of Lords* in exactly the same circumstances;" and his Lordship explained, that "the *distinction* appears to me to be clear between a proceeding *before the Sub-Commissioners* and a process of approbation of their proceedings, in which latter process the minister is called, and may object to these proceedings on every other ground *except that he was not called before the Sub-Commissioners.* Lord Medwyn held not only that the judgment of the House of Lords was right, but also that, even in a process of valuation before the High Commission, it was not necessary to cite a stipendiary minister. And Lord Moncreiff, the only other Judge who gave an opinion in that case, stated that, "no doubt it *has been held*, and *still is held*, that it is not a sufficient objection to any report of the *Sub-Commissioners*, to the effect of throwing out a process of approbation of such a valuation,—if liable to no objection on its merits,—that it did not appear that the minister had been called in the process before the Sub-Commissioners.

In the other case, of *Kirkwood* v. *Grant*, none of the Judges indicated any opinion to the effect that the judgment of the House of Lords was not an authoritative decision as to valuations by Sub-Commissioners. They dealt only with the question which was before them, as to the efficacy of a judgment by the High Commission.

I am therefore of opinion, that both the objections stated to the report in question ought to be repelled; and that decree of approbation ought to be pronounced.

Lord Benholme—The opinion I have formed in this case is contrary to that which has been delivered by my brother Lord Curriehill.

The pursuers of this action found upon a report of the Sub-Commissioners of Teinds for the Presbytery of Dunfermline dated in 1630, setting forth that the pursuers' lands "is worth of yearly rent in stok, bye the teynd, 40 bolls victual, thereof 10 bolls bear, and 30 bolls black oats." These words constitute the whole statement contained in the report concerning these lands. No valuation whatever is given of the teinds, either separately or together with the stock, but only a valuation of the stock apart from the teinds. And upon this basis the summons concludes that your Lordships should declare the value of the teinds to be one-fourth part the said value of the stock.

This anomalous mode, of deducing the value of one thing from a valuation of another and quite different thing, plainly requires some very strong authority to sanction it; and it is contended by the pursuers that such authority exists. They have failed to satisfy me that, in the circumstances of the present case, it is competent for your Lordships to grant decree in terms of the conclusions of their summons.

It appears to me that the first matter to be considered is the terms of celebrated decrees-arbitral of King Charles I., pronounced in 1629, and the Acts of Parliament in 1633 following on them, by which the valuation of teinds in Scotland was introduced and established.

Now it is very remarkable that all these documents—the four decrees-arbitral, and the two statutes of 1633, chapters 17 and 19—are absolutely identical in the terms by which they declare the mode in which the teinds are to be valued. These are as follows (Decreet-Arbitral Acts, vol. ii, p. 112):—"Finds and declares that the rate and quantity of all teinds of the Kingdom is and shall be the fifth part of the constant rent which each land payeth in stock and teind, where the same are valued joyntly. And where the teinds are valued apart and severally, findeth that the rate and quantity thereof is and shall be such as the same shall be valued and esteemed to by the said Commissioners, or Sub-Commissioners, deducing always the fifth part thereof." These instructions are very distinct, and plainly dictate two modes, and only two modes, of valuing teinds,—one mode where the teinds and stock are valued together, in which case the fifth part of the whole is to be taken as the value of the teind; the other, where the teind is to be valued separately, without reference to the stock. There is no third mode allowed or hinted at, such as is proposed by the pursuer in this case, viz., that the teind shall be estimated at one-fourth part of the stock, valued separately, and exclusive of the teind.

I need say no more as to the tenor of these important documents, as it has not been pretended by the pursuers that they can be directly founded upon in support of their argument. But it has been suggested that the Royal Commission, dated 2d February 1829, under which these Sub-Com-

missioners acted, authorised this third and very anomalous mode of valuing the teinds. And I think it proper, therefore, to notice somewhat particularly the terms of this Commission, which is given in Sir John Connel's work as derived from an old M.S. It certainly would be strange to find any such material deviation in this Commission from the more important and decisive document by which alone it could have any sanction or authority. And, upon a very careful consideration of this Commission, I am unable to see in it the slightest support to the pursuers' argument in this case. This document, which is of considerable length, contains only two passages which have any bearing upon the present question,—a passage directing how the teinds are to be valued, and the other regulating the details of the proof. Of these it is obvious that the first is the more important. It is as follows—(Connel, ii, p. 96). The King's instructions to the Sub-Commissioners "give, grant full power and commission, express bidding and charge to try and inform themselves, by all the lawful means they can, according to the articles following, of the true worth of the lands, stock and teind, where the teind have been brooked in stock and teind in times bygone; and what the land payes presently, and what they have paid in times bygone, and what they may pay, of constant rent of stock and teind in time coming; and that they report to our General Commission the true worth and value thereof in constant rent to their judgment; with power likeways to the said Sub-Commissioners, or any five of them, to informe themselves, by all the lawful wayes and means they can, according to the articles following, of the just and constant worth of the teinds, both great and small, where the teinds have been drawn severally from the stock by the titular or his tacksmen, not being heritor of the land for the space of seven years within these fifteen years bygone at least; and if the heritors be likewayes desirous that the rent be likewayes tried with the teinds, according to the true and constant worth and rent of the land, wee, with advice of our saids Commissioners, allows the said Commissioners to do the same."

It will be observed that the two different ways of valuing the teinds specified in the decreets-arbitral and statutes are here distinctly set forth. But in reference to the case where the teinds, having been drawn separately, are to be valued by themselves, there is a permission given to the heritor to bring into comparison with the value of the drawn teind, as separately valued, the value of the remaining produce—that is, the stock of the land. The only use of the valuing the stock was to *try it* with the teind—that is, to test it or compare it with the teind; leaving it for the High Commissioners to determine whether the teinds were to be estimated at their own separate value, or whether the values of both stock and teind were not to be massed together, and a fifth of the whole to be taken, as in the other statutory mode of valuation.

It appears from the records of the High Commission that they sometimes acted upon this allowance granted to the heritor, by which he was enabled to modify the exorbitance of the proof of the value of the drawn teind led by the titular (who was entitled to the sole proof of this matter) by setting alongside of it the rent he derived from the rest of the produce.

The other passage of the commission relative to this matter directs the details of the proof, and is in perfect harmony with the former. It is as follows (Connel, ii, 98):—"Where the stock and teind are to be valued together, we, with advice foresaid, find, declare, and ordain that it shall be lawful to the titular or heritor, or either, or to both, to use their probation, and that the witnesses to be adduced by them shall be equal in number, not exceeding ten persons, if they please to use so many; and where the teinds have been severally led for the space of seven years, in manner foresaid, and is to be allowed by these, we, with advice of our saids Commissioners, ordaines and declares that the titular shall be preferred, and have *the prerogative of the probation*, reserving to the heritor to prove the true and constant worth of his lands by ten witnesses, if he pleases to use so many."

In this passage the mode of proving the drawn teind is distinctly regulated. The titular is to have the prerogative of the probation—that is, the sole direct proof of the value of the drawn teind. Of that value the heritor is to have no counter proof. But the severity of this regulation is qualified by reserving to him to set alongside that value the worth of his lands in stock apart from the drawn teinds.

Sir John Connel explains this matter as follows (Connel, i, 171):—"By the King's instructions to the Sub-Commissioners, where the teinds have been severally led for the space of seven years in manner foresaid, and is to be valued by the selff, we, with advice of our said Commissioners, ordains and declares that the titular shall be preferred to have the prerogative of the probation; reserving to the heritor power to prove the true and constant worth of his *lands* by ten witnesses, if he please to use so many;" and "the proof as to both was then reported to the Commission, whose province it was to determine between the two proofs, if they were at variance. When the heritor brought a proof, it would appear that, instead of proving the rent of the land, he was in use to prove the value of the stock, or the rent of the land minus the teind. Thus, in the minutes of the first Commission there is the following entry:—'19th March 1630—Question being made, where the titular has proven the teind, the heritor the stock, If the Sub-Commissioners may judge upon, or if both stock and teind should be reported to the Lords to judge? Answer being made, To report to the Lords according to the titular's probation, conforme to the Commissioners.' A valuation of this description of certain lands in the parish of Crail was in the following year reported to the High Commission, according to which 300 merks were returned as the rent of the lands, and 3 bolls bear and 10 bolls meal as the teind; and the High Commission, on 9th February 1631, pronounced a judgment ordaining 'the foresaid rent of 300 merks and the teind above written to be joined together, and out of the whole the fifth to stand for the teind.'

"In a subsequent case of this kind, the Commission pronounced a judgment leading to the same result, although apparently proceeding from a different principle. A contract was produced, dated 6th October 1643, between the titular of the parish of Balfron and one of the heritors, whereby the lands were valued in stock at 800 merks, and in teind at 200 merks. On June 17, 1696, the heritor brought a process for having this contract approved of, and craved that the valued teind should be struck at 200 merks—which was done; and decree of approbation was pronounced accordingly. The result was here the same as if the Court had adopted the rule acknowledged in the former deci-

sion,—of adding the two valuations together and taking a fifth of the whole as the teind; but the Court, in this case, seems to have struck the teinds at 200 merks on the ground, apparently, that they had been separately valued at this sum.

"A question similar to these occurred lately. The lands of Culcrieff were, by an old report of the Sub-Commissioners of the Presbytery of Muthil (now Auchterarder), valued, 'in stock 24 bolls, and of teind 14 bolls;' and the report was approved of in general terms by the High Court of Commission in 1771 and 1773.

"The lands of Callender, by a report of the same Sub-Commissioners, were valued 'communibus annis 4 chalders stock, and 26 bolls teind;' and the report was in 1797 approved of in general terms by the High Commission. In a process of locality respecting the stipend of the minister, a question occurred as to the import of these valuations. The proprietor of the lands contended that the teind in these valuations was struck at a rate much higher than the proportion which it must have borne to the stock; that the valuations ought not to be considered as made separately for stock and teind, but as reported jointly; and that the two should be added together, and one-fifth of the whole taken as the teind. In support of this argument, reference was made to the judgment of the High Commission in 1631, above mentioned. It was answered by the other heritors that the lands and teinds were clearly valued separately, and that, although the teind bore a high proportion to the stock, it did not follow that the valuations were erroneous, as there may have been reasons for the proceedings which do not now appear, and that the presumption of law was, that all things were *rite et solemniter acta.* As to the decision of the High Commission, it was said that this proceeded on consent of parties. There was a difference of opinion on the Bench as to this question, but the Court found 'that the sums of money and quantities of victual mentioned for the rent and for the teind, contained in the decree of approbation in question, must be joined together to form a rent of stock and teind, and out of the whole the fifth part to stand for the teind, parsonage and vicarage, of the lands."—(9th December 1812, *Murray* against common agent in the locality of Crieff.) In the argument maintained for the landholder in this case, it was assumed that there had been no separate valuation of the teinds, but that the stock and teind had been each struck at a certain proportion of the joint valuation. In the argument maintained for the other heritors, it was contended that the teinds had been valued separately, and that the grain specified for the teind was reported as the proper valuation of the teind.

"The minutes of the Commission above quoted explain the real import of the proceeding, viz., that the report as to the stock alluded to the proof led by the heritor, and the report as to the teind to that led by the titular. In such a case, the principal Commissions, in receiving the report of the Sub-Commissioners, had evidently the power of taking a medium between the opposite proofs; and the manner in which they exercised this power in 1631 has been taken notice of. The power of the High Commission in this and similar cases is also explained by the following judgment:—'19*th January* 1631.—The Lords Commissioners finds that they have power, in some cases, to moderate the quantity of the teind proven by the titular, as having the prerogative, as was found betwixt the *Laird of Cockburnspath* and the *Earl of Home.*'"

I must confess I find it impossible to understand the permissive clause in favour of the heritor contained in the Commission of 1629 in the light contended for by the pursuers, viz., as a permission to them to lead proof of the value of the stock *only*, when the titular had led no proof of the value of the drawn teind, and for the sole purpose of coming in place of such proof. If language has any meaning, a permission to try the value of the land *with* the teind can never mean a permission to prove the stock *without*, or instead of proof of, the teind. I arrive then at the conclusion, that, by the terms of the Commission of 2d February 1629, the Sub-Commissioners had no power to allow a proof of the stock as the sole basis of valuing the teind; but the proof of the stock there allowed was available only where a separate valuation of the teinds had been led—allowed to the heritor as a means of moderating or contracting that valuation. Farther, I have to remark that where the diet of proof was granted, not to the parties interested, but, as in the case of the present valuation, was entrusted to and carried through by the procurator-fiscal of Court, it was utterly incompetent for the Sub-Commissioners to allow that officer to lead any evidence of the stock alone under the clause of permission in favour of the heritor contained in the Commission. That permission could not extend to him, who was acting as a neutral party, and bound to obey the main instructions given in the Commission.

If I am right in this conclusion, there seems to be an end of this case. For this Royal Commission, of date 2d February 1629, was prior to the decreets-arbitral and the relative statutes. Its efficacy was dependent upon the sanction and confirmation given to its proceedings by these later documents; and that sanction was expressly conditional on the reports of the Sub-Commission being conformable to the tenor of their commissions. The words of the decree-arbitral are these:—"We ratify and approve the course and order taken by our special command, and direction for valuation of the whole teinds of the Kingdom, so far as shall be justly and lawfully done, according to the tenor of our commissions." And still more emphatic are the terms in which, by the Statute 1633, c. 19, the duty of the High Commission was prescribed, viz.:—"To receive the reports from the Sub-Commissioners appointed within ilke presbyterie, of the valuation of whatsoever teinds led and declared before them according to the tenor of the Sub-Commissioners direct to that effect; and *to allow or disallow* the same according as the same shall be found agreeable or disagreeable from the tenor of their Sub-Commission." I consider it abundantly clear that the report relative to the pursuer's lands was not conformable to the tenor of the Sub-Commission under which it was framed, and that the High Commission, about the period of its date, must have disallowed it. The lapse of more than two centuries will not enable this Court to do otherwise than their predecessors could have done.

I have hitherto considered this case in what I consider to be its proper light, viz., as involving the question, whether the report of this Sub-Commission is to be approved of by this Court as coming in place of the High Commission; and as turning upon the question, whether that report is agreeable to, or disagreeable to, the tenor of the Sub-Commission of 1829? I consider that to be the question raised by the statute of 1633; which ought to

regulate your Lordships' decision in the present case. And I have now to add that this is the first case in which the High Court, or this Court as the High Commission, have been called upon, deliberately and *causa cognita*, to approve of such a report of a Sub-Commission as that upon which the pursuers found, and from thence to deduce the value of the teinds.

I am anxious to state this as the true view of the present question, as distinguished from that other question, Whether the High Commission, acting as the primary court of valuation, might not, and have not, in a certain class of cases, been constrained and entitled to deviate from the two modes of valuation prescribed by the statute, and, from the necessity of the case, to introduce this third and anomalous mode of valuation contended for by the pursuers? But even if the questions were held to involve the powers of the High Court in that peculiar class of cases, and to identify the powers of the Court, as an original Court, with its powers as a Superior Court, approving or disapproving the reports of a Sub-Commission, I am clearly of opinion that the circumstances of the present case do not bring it within that peculiar class that would justify the Court in acting upon a report of the value of the stock alone, without any notice of, or attempt to prove, the value of the stock.

But, in the first place, I wish to make some observations upon the system of our valuations, with a view of pointing out what, in the average of cases, must be the prejudicial effect, as against the titular, of adopting the fourth part of the stock, instead of the fifth part of the rent of stock and teind, as the value of the teind.

By the Decreets-Arbitral of Charles I. and the relative Statutes, as I have already observed, two modes of valuation of tithes are authorised: *First*, Where the stock and teind are let jointly to the tenant for a *cumulo* rent, one-fifth of that rent is to be taken as the value of the tithe; *Secondly*, Where the teinds were drawn by the titular, they are to be valued separately, and they are to be estimated at only four-fifths of their actual amount.

Now, one very important question is this—What was the reason for making this deduction of one-fifth (under the name of King's Ease) from the true amount in the case where the tithes were valued separately? Two answers have been suggested. Lord Stair (ii, 8. 14) seems to think that the King's Ease was given on account of the exorbitant rents contained in the titular's tacks or rentals; its object being to correct that exorbitancy, by a deduction which would bring out the true value of the tithe as one-tenth of the gross corn produce. But this suggestion is founded upon the mistaken opinion of his Lordship (which has been satisfactorily exposed in later times), that the King's Ease was given in cases when the titular had let the tithes. The true view is, that the King's Ease was applicable only in cases where the titular drew the tithes. Now in such cases, where the titular took and could take no more than the teind sheaves, there was no possibility of that exorbitancy which Lord Stair supposes to have been the reason of the King's Ease.

The true answer to the question I have proposed, is to be found in certain expressions in the decreets-arbitral, especially in the *third* and *fourth*. It is to be observed, that in all the decreets the same rules of valuation are given; but the special reason of the King's Ease is given only in the two last. In these, after stating the rule of the one-fifth of constant rent in stock and teind, where the same are valued jointly, the other rule of separate valuation of the tithe is given, 'deducing always the fifth part thereof, to make the same equal to the constant rent, *communibus annis*.' It appears to me very plain that these expressions indicate the King's intention, that the two modes of valuation should bring out, as nearly as possible, the same result. The heritor in both cases was to obtain a *bonus* in the valuation of his burden, amounting to one-fifth. That was the intention, plainly declared, in reference to the one mode of valuation. And that a similar *bonus* was implied and intended in the other, where so small a proportion as one-fifth of the constant rent is taken, seems to be certain, from the *equality* which the King's Ease was declared to establish between the two modes of valuation.

My opinion upon this point is fortified by the high authority of Lord Elchies, who, in his Notes to the report of the case of *Douglas* v. *Officers of State*, observes, 'The decreets bear expressly that the King's Ease, when the teind was drawn, was given in order to bring it as near as possible to a fifth part of the rent that might be paid for stock and teind.' (Elchies, ii, p. 469.)

Mr Erskine's opinion on this subject to the same effect is clearly indicated by his reference to the leading case of *Hope* v. *Balcomie*, 10th December 1701. Mr Erskine (ii, 10, 33) observes, "The rule fixing the rate of tithes, which are valued jointly with the stock, to a fifth part of the constant rent, is limited to questions brought before the Commission Court, between the proprietor and titular. Where the titular is not a party, the Court of Session, who are not fettered by any rules prescribed by the aforesaid decreets-arbitral, have justly raised the price of the tithe to what they judge to be the true value of it, viz., to one-fourth part of the rent payable for stock and tithe—(Dalz. 29; *Hope* v. *Heirs of Balcomie*, December 10, 1701, Dict., 15,736)." Mr Erskine's statement of this case, although substantially correct, requires this explanation:—the rent of the stock only was proved. The Court assumed the drawn teind to be worth one-third of that rent, which being added to it, a fourth of the whole—that is of the stock *plus* one-third—was held to be the teind. An earlier case to the same effect is thus reported in the Folio Dictionary, ii, p. 440: "Though the fifth part of the rent is the legal estimation in questions betwixt titular and heritor, yet in other cases, where the true value of the teind is to be considered, the fourth part of the rent, payable jointly for stock and teind, is the rule. —(Stair, 9th February 1667, *Moncrieff* v. *Tenants of Newton*.)"

If the reason of the King's Ease, which these authorities seem to establish, be the true one, then it follows that four-fifths of the true teind, *i.e.*, eight per cent. of the produce, must correspond with one-fifth of the constant rent paid for stock and teind. And multiplying by 5, the total constant rent for stock and teind must be estimated at 40 per cent. of the value of the produce.

Besides the two modes of valuation prescribed in the statutes, a third mode, in some measure combining the two, was provided for in the Commissions, as has been already explained. Where the teind was drawn and separately estimated, the heritor was allowed, if he desired it, to prove the rent of the stock as set without the teind. In such cases the two values were added, and the fifth of their sum taken, without deducting the King's Ease. This third mode of valuation necessarily

brought out the same result as either of the other two, which is manifest by considering the tenant's interest in the matter. The consideration he had to give for the possession of the farm must be exactly the same in amount, whether the tithe was drawn by the titular or let to him with the stock. In the former case he had to submit to the abstraction by the titular of 10 per cent. of the produce. The difference between that per centage and the joint rent for stock and teind would constitute the rent he would have had to pay to the heritor for stock alone. Assuming 40 per cent. of the produce to measure the joint rent, the rent effeiring to the stock alone would amount to 30 (40 minus 10) per cent. And thus, in any one of the three modes of valuation, 8 per cent. of the gross produce was intended to measure the value of teind; in every case the heritor obtaining a bonus of one-fifth or 20 per cent. of the actual value of the tithe.

The approximate value of the rent of the stock *bye the teind*, that is to say, what the tenant pays to the landlord, besides allowing the titular to draw the tithe, cannot then be stated as more than 30 per cent. of the value of the whole produce. And even this is perhaps a high estimate; for Lord Elchies is probably correct in stating (ii, p. 471) that there are very few lands in Scotland "able to pay teind and third."

But assuming that 40 per cent. of the produce was an average rent for stock and teind, and 30 per cent. an average rent for stock bye the teind, it follows that the loose expression which occurs in some of our authors, that 5 per cent. of the former was the same as 4 per cent. of the latter, is absolutely incorrect. The expression would be correct if the two figures were changed respectively to 50 per cent. and 40 per cent. And probably its currency has arisen from the fallacy to which the opinion of Lord Stair gave rise, viz., that the deduction of the King's Ease was not intended to depreciate the value of the tithe below its true amount, and that, even under that deduction, it would amount to 10 per cent. of the total produce. This fallacy led, by necessary implication, to a corresponding one in reference to the other mode of valuation, viz., that one-fifth of the rent for stock and teind was equal to the real teind; that is to say, to 10 per cent. of the whole produce—in other words, that the rent of lands in Scotland was equal to 50 per cent. of the value of the produce. From these considerations, it appears plain that to value the tithe at one-fourth of the rent paid for the stock *bye the teind* was absolutely unfair to the titular, involving a discount of 25 instead of 20 per cent. of the true value of the tithe, besides being unauthorised by the decreets-arbitral, the commissions, or the statutes.

I may mention that, after I had written out what I have just read, I happened to light upon an authority, of which I was not aware, which strongly confirms the views and calculations I have ventured to submit as to the probable proportion (40 per cent.) which the rent of land might be held to bear to the whole produce, and consequently to the real value of the teind. A note subjoined by Sir William Pulteney to his edition of Lord Stair's work (B. ii., t. 8, § 24) is as follows:—"The valuation of teinds separately known from the stock was, by the King's decree-arbitral, reduced to the same rate with that which he fiixed for other teinds. The fifth of the rent was in general equal to one-eighth of the produce. Lands were at that time usually let for payment of third and teind, which rent was equal to four-tenths of the produce, and the fifth part of that rent was equal to one-eighth of the produce. Where the teind was drawn separately from the stock, the decreet-arbitral allowed deduction of one-fifth, by which deduction the teind in this case also was reduced to one-eighth of the produce."

If these views are correct, it is manifest that, by estimating the teinds at one-fourth of the stock, the discount of the real value of the teind allowed against the titular amounted to 25 per cent., instead of 20 per cent. allowed by either of the statutory modes. Yet it is true (and on this admission the whole strength of the pursuers' argument rests) that, in certain exceptional cases, the High Commission have been driven by necessity to adopt this mode of valuation. It is important, however, to observe what circumstances have been held necessary to justify so plain a deviation from the statutory rules by which their proceedings fell to be regulated.

The earliest instances of that deviation are mentioned and recounted by Sir George Mackenzie in the passage from his Observations on the Statutes, quoted in the pleadings. They were caused by the necessity of forcing on the statutory proceedings, in cases where the titular, having drawn the teinds, obstinately delayed to proceed with the proof, of which in such cases he had the prerogative. The Court devised a penal form of proceeding, in the shape of a certification, which, if incurred by him, was at once to exclude him from all proof, and to subject him to a mode of valuation unauthorised by law. It is unnecessary to speculate upon the legality of this assumed power on the part of the High Commission. It is sufficient, in reference to the present case, to say, that it could be justified only by the peculiar circumstances of each particular case, and by the misconduct of the party who was thus visited by a penalty devised by the High Commission, to prevent their functions from being obstructed.

The words of Sir George Mackenzie are as follows:—"Where the titular has the sole probation, the heritor cannot *eo casu* lead any probation of the stock *except it be for certification*, id est *except where the heritor summons the titular who was in possession of drawing of the teind to prove the worth thereof, with certification to him, if he appeared not, the heritor will prove the worth of the stock*, quo casu *the fourth part is declared to be teind—February* 19, 1634 *and February* 24, 1643."

Sir John Connel explains this penal procedure by way of certification, and refers to the following cases:—"The Lords find that where the heritor summondeth the titular who was in possession of drawing the teind to prove the worth thereof, and not compearing, the heritor has place to prove the stock, and the fourth part thereof declared teind, and the titular secluded thereafter from any sort of probation."—(*Laird of Meginch* against *Pitkindie.* MS.A., Appendix, No. 41. Connel, ii, p. 94.) "The Lords find, where dyets are assigned to the titular for proving of the drawn teind, and to the heritor for proving of the stock, with certificatione, in case the titular should faylie in probation; and if either dyets assigned *hinc inde*, the titular failing in his probation, then the probation of the stock to be admitted, and the fourth part thereof declared teind, and the titular secluded thereafter from all manner of probation."—(*The Laird of Lamingtoun* v. *Stewart of Coldinghame.* MS.A., Appendix, No. 41.)

Much may be said to justify this penal procedure, in the practice of the High Commission, inconsist-

ent as it is with the statutes and decrees-arbitral, which could be suggested in the practice of the Sub-Commission. It was in a measure forced upon the High Commission, who had no public officer like the procurator-fiscal of the Sub-Commissioners, to come in place of the parties interested in the teinds, who might prove negligent or recusant in appearing before them, or in leading their respective proofs.

Before the High Commission, if the titular, who in the valuation of drawn teind had the sole direct proof, was refractory and would not go on, the Court had no other remedy but to allow the heritor to exclude him by a certification, and then to lay before the Court the only other evidence which could be given on the subject, by proving the rent of the stock. The Court were obliged to resort to this irregular mode of valuation, unfavourable as it must be to the titular, in *pœnam* of his default, and in order to prevent a complete obstruction of their functions.

But the Sub-Commission lay bound under no such embarrassment. They were perfectly independent of the parties interested; and through their procurator-fiscal were empowered to expiscate all the matters necessary to comply with the injunctions of the statute as to valuations. When that officer's powers were called into action (as they were in the present instance) by the absence of the parties interested, he was entitled to take the place both of the titular and of the heritors. He was held entitled to represent both, and to carry on the valuation independently of both. The idea, that in such a case the procurator-fiscal, as representing the heritor, could take certification against himself for default as representing the titular, and, by so doing, entitle himself to deviate from the statutory rules of valuation, is simply absurd.

Another and a later cause for adopting this anomalous mode of valuation, was the *impossibility* which occasionally occurred of ascertaining the value of the teind in either of the modes prescribed by the statute. This occurred where, although the teind had been drawn, no proof could be led of its amount. In such cases the Court were forced to resort to the rent of the stock alone. The leading case in which this anomalous course was followed is the case of *Gordon* v. *Dunbar*, 17th November 1744. The report of this case, given by Lord Elchies, shows the difficulty the Court felt in adopting the anomalous rule, even when it seemed impossible from circumstances, to follow either of the statutory modes. And the subsequent cases ascertain the determination of the Court never to adopt it unless in cases of proved necessity. The case of *Sommerville* v. *Earl of Lauderdale*, 4th August 1773 (M.D., 15,764), shows the hesitation of the Court in adopting this anomalous rule, even when the only alternative was to lead a proof of what stock and teind *were worth*. For in that case, whilst the titular had led an insufficient proof of his drawn teind, the heritors' proof was equally rejected, because it was "confined to the stock, distinct from the teind, whereas it should have extended to both."

In reference to the reports of the Sub-Commissioners, it cannot be affirmed that there is any case in which, where the point has been raised, the High Commission have ever approved a report setting forth merely the rent of the stock *bye the teind*.

The penal certification against the titular which was introduced by the High Commission into its own practice, of which the earliest instance occurs in 1634, can never be held applicable to a report of the Sub-Commissioners in 1630. It may well be doubted whether, under any circumstances, the Sub-Commissioners could be justified in acting upon such a penal certification. But what is still more conclusive is, that there is nothing in their report to indicate that the titular had been at all in default. The report, in so far as it relates to the two parishes of Urwall and Kinross, embraces the proceedings of but a single day. No diet of proof is said to have been given, or, as it is expressed, no term was assigned to any one, except to the procurator-fiscal. He adduced the whole of the witnesses that were examined. And therefore the idea of a certification against the heritor is out of the question.

As to this second reason for admitting the anomalous mode of valuation—viz., the impossibility of following out either of the two statutory modes—it may be plausibly argued that, had a case of such impossibility occurred and been duly set forth in the report of the Sub-Commissioners, the High Court, had they thought the proof sufficient, might have acted upon such a case of necessity, in approving of the Sub-Commissioners' report, upon the same principle which induced them to admit this anomaly into their own practice. But here, again, the conclusive fact is, that no such case of impossibility is hinted at in the report under consideration.

I am therefore of opinion that the defenders' fifth plea in law ought to be sustained, and the defenders assoilzied from the conclusions of the summons.

I agree with my brother Lord Curriehill in thinking that the circumstance that the minister was not made a party to the sub-valuation is insufficient to invalidate the report.

The Lord Justice-Clerk, Lords Deas, Ardmillan, and Barcaple concurred with Lord Curriehill.

The Lord President, Lords Cowan and Neaves, concurred with Lord Benholme.

In accordance with the opinion of the majority of the Court, decree of approbation was pronounced.

Agents for Pursuers — Leburn, Henderson, & Wilson, W.S.

Agent for Defenders—John Rutherford, W.S.

COURT OF SESSION.

Friday, June 21.

FIRST DIVISION.

RATTRAY *v.* TAYPORT PATENT SLIP COMPANY AND ANOTHER.

(*Ante*, vol. iii, p. 150.)

Jury Trial — Servitude — Reparation — Compromise. Circumstances in which the Court gave effect to an arrangement between parties as to one branch of the case, and applied the verdict of a jury on the other branches, so far as consistent with the terms of the arrangement.

These were conjoined processes of suspension and interdict, and declarator and damages, at the instance of Mrs Susanna Rattray, proprietor of certain property in Tayport, against the Tayport Patent Slip Company and Robert Derrick, contractor, Leuchars. The conclusions of the action of declarator related (1) to a footpath claimed by the pursuer along the north bank of the Tay in a certain line; (2) an alleged servitude of bleaching and pasturing; (3)