persons who are liable that the debt itself be conveyed with all the cedent's rights therein.

"II. Another point raised by the defenders, however, is that Mr Mann, and not the pursuer, is the real *dominus litis* in the case. It is alleged that Mr Mann is the person really interested in the action, that he gave instructions for raising it, and is now directing it, and supplying funds for carrying it on. It is also alleged that the pursuer is a person without means, who has entered into a collusive agreement with Mr Mann for the purposes of this action. As no consideration appears to have been given for the assignation, I think that the same course must be followed here as was adopted in the case of *Jenkins* v. *Robertson*, 7 Macph. 739; and that before deciding anything as to the pursuer's right to sue this action, without either bringing forward Mr Mann or finding caution for expenses, the defenders must be allowed a proof of the allegations contained in answer to Cond. 10, so far as bearing on this point."

The defenders reclaimed, and argued—The assignation did not confer a right of action against anyone except the two persons named in the decree—*Cultie*, 2 Br. Supp. 197. What was assigned was the decree against Brodie and Neil—*Mathieson* v. *Thomson*, November 8, 1853, 16 D. 19.

Argued for the pursuer—The only question at present was the value of the assignation. Mann had a title to sue, and he assigned all he had to Rose. This was not a corroborative right; it was the right itself which the pursuer sought to make good—*Hepburn* v. *Tait*, May 12, 1874, 1 R. 875; *Thomson* v. *Magistrates of Kirkcudbright*, January 23, 1878, 5 R. 561; *Kyle* v. *Kerr*, November 16, 1822, 1 S. 20; *Barbour* v. *Bell*, January 25, 1831, 9 S. 334; *Potter* v. *Hamilton*, July 19, 1870, 8 Macph. 1064.

At advising—

LORD PRESIDENT—I am of opinion that the pursuer here has no title to sue.

The Lord Ordinary seems to have entertained some doubts upon this matter, though in the end he saw his way to sustain the title. Looking at the Lord Ordinary's note, however, I do not think that his Lordship quite realised the real question between the parties, for he says—"I have had some difficulty in sustaining the title, more especially as no authority or precedent was cited for allowing the assignee to a debt constituted against one person to raise action against another as being the true debtor."

I do not think the present pursuer has an assignation to a debt, but only an assignation to a decree. The sum in the decree is the amount of expenses awarded to a successful party in a litigation. What Mann assigned to the pursuer, therefore, was and could be nothing but the decree for expenses incurred in the litigation. It was a decree against certain parties therein named, and clearly it could not be used against any others.

But the ground of the present action is that the defenders were the true *domini litis* in this litigation. The ground of action, however, is not the decree, but the special facts set forth in article 9 of the condescendence. Looking, then, at this assignation, it is impossible to hold that the cedent was assigning a right of action against a different set of defenders from those mentioned in the decree.

I am therefore for recalling the interlocutor of the Lord Ordinary and dismissing the action.

LORD MURE concurred.

LORD ADAM—The only debt assigned here is a claim against Brodie and Neil constituted against them by this decree. But this decree is only a *modus probationis* in an action by Mann against those defenders. I therefore agree with your Lordship that the pursuer here has no title to sue.

LORD SHAND was absent from illness.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer—Gloag—Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defenders—James Reid. Agents—Macpherson & Mackay, W.S.

Friday, January 27.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE LORD ADVOCATE *v.* STIRLING.

Teinds—Valuation in cumulo—Surplus Teind.

The teinds of a barony situated wholly in one parish were valued in 1773. In 1853 part of the barony was included in a new parish, which was in that year disjoined and erected *quoad omnia*, with the provision that the stipend payable from the disjoined lands to the minister of the former parish was to continue, the remaining part of the valued teinds being allocated to the new parish. In the locality of the new parish the free teind of that portion of the barony assumed to be included in it was converted, in a year when the fiars' prices were abnormally low, into victual, and allocated to the minister. On reconversion into money according to the fiars' prices of the succeeding years, the amount in money exceeded the free teind, and an overpayment was therefore made to the minister. The titular of the original parish raised an action against the proprietor of the barony for payment of the surplus teinds of his lands in that parish. *Held*, upon a construction of the decree of 1773, that the valuation was *cumulo*, and that therefore in ascertaining the amount of surplus teind the heritor was entitled to deduct the payments made for both parishes from the valued teind of the whole barony.

This was an action at the instance of the Lord Advocate, on behalf of Her Majesty's Commissioners of Woods, Forests, and Land Revenues, against Patrick Stirling, Esquire, of Kippendavie, in the county of Perth, whose lands included the barony of Kinbuck, for payment of £91, 17s. 5½d. of surplus teinds for the lands of Easter and Wester Kinbuck, Mill of Kinbuck, Craigton, and Whitestone, for crops

and years from 1853 to 1881 inclusive. These lands were in the parish of Dunblane, and the Crown was titular of the teinds in the parish.

The facts of the case appear from the opinion of the Lord Ordinary.

The defender pleaded—"(2) The defender having paid to the ministers of Dunblane and Ardoch respectively, during the years 1853 to 1881 inclusive, the full amount of the valued teind of the barony of Kinbuck, except £18, 18s. 2d., and tendered that sum as condescended on, the Crown has no further claim against him for surplus teinds in respect of the said barony, and decree of absolvitor should be pronounced with expenses."

The Lord Ordinary (FRASER) decerned against the defender in terms of the conclusions of the summons.

"*Opinion.*—By a decree of valuation obtained at the instance of the Commissioners of Forfeited Estates, dated the 3d of February 1773, of the teinds of the barony of Kinbuck, now belonging to the defender, the Court found 'the rent, stock, and teind of the lands and barony of Kinbuck, comprehending the lands of Corscaplie, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling, the fifth part whereof, being £31, 9s. $2\frac{5}{12}$d. money foresaid, they declare to be teind, parsonage and vicarage.' At the date of this valuation the barony of Kinbuck was wholly situated in the parish of Dunblane.

"In the year 1853 the Court, under a summons of disjunction and erection, raised by certain persons interested, against the officers of State, representing the Crown as patron and titular of the parishes of Muthill and Dunblane, erected a new parish *quoad omnia* out of the parishes of Muthill, Dunblane, and Blackford. The interlocutor of the Court was 'Find, decern, and declare in terms of the conclusions of the libel as amended conform to the report of the clerk on the printed copy of the summons, reserving only for future consideration the amount of the stipend to be modified to the minister of the new parish.' The new parish was called the parish of Ardoch.

"By this decree of disjunction and erection, dated 21st February 1855, there were carried away from the parish of Dunblane the following lands, viz., Nether Cambushinnie and Middle Cambushinnie, which were declared to be part of the new parish of Ardoch.

"In the same year, 1855, the Court disposed of what they had reserved in their interlocutor—the question as to the amount of stipend to be modified to the minister of Ardoch, the new parish. They declared that the stipend payable at the date of disjunction to the ministers of Muthill, Blackford, and Dunblane, from the disjoined lands was still to be payable to these ministers, and the remaining teinds of these lands were allocated to the minister of Ardoch.

"The whole of the teinds of the parish of Ardoch are exhausted, and there is no surplus payable to the titular (the Crown); but it is averred that there is a surplus of teinds in the parish of Dunblane, which the Crown now claim under this action. The defender produces a state whereby he shows that, combining the payments which he has made of ministers' stipend to the two ministers of Ardoch and Dunblane from the year 1853 down to 1881 he has paid of valued teind the whole amount that could be claimed, with the exception of £18, 18s. 2d., which he offered to pay to the Crown before this action was raised, and which he is still willing to pay.

"According to the rectified state of teinds of the parish of Ardoch, after paying the old stipend to Dunblane, the balance amounted to £5, 15s. $4\frac{6}{10}$d. Now, the Act of Parliament 48 Geo. III. cap. 138, sec. 8, enacts that 'every stipend which shall be augmented after the passing of this Act shall be wholly modified in grain or victual, even although part or the whole thereof shall have been previously modified in money.' Therefore in the year 1853 the £5, 15s. $4\frac{6}{10}$d. required to be converted into grain or victual, and it was so converted, and at that time the fiars' prices happened to be very low. The conversion was into 3 b. 1 f. 1 p. $0\frac{4}{8}$ l. of meal, and 3 b. 1 f. 1 p. $0\frac{4}{8}$ l. of barley. This grain upon being reconverted into money according to the fiars' prices of each year of payment (which is the measure of the minister's right) exceeded the free teind of £5, 15s. $4\frac{6}{10}$d. applicable to Ardoch, seeing that these fiars' prices were higher during every year than they were in 1853, and that consequently the defender has been overpaying to the minister more than the free teind.

"He naturally now desires to have this matter adjusted, and the mode that he proposes is to slump together the payments he has made for stipend of the two parishes of Dunblane and Ardoch, and to deduct the combined sum from the valued teind of the whole barony. This is resisted by the Crown upon the ground that the two parishes are perfectly distinct; the valuations of the lands in both, it is said, are distinct and separate, and the only remedy that the defender has against being called upon to make overpayments is to surrender his teinds to the minister.

"Now, this question depends upon the construction to be put upon the decree of approbation and valuation of 1773. The pursuer contends that that decree contains a valuation of each separate portion of land composing the barony of Kinbuck, and therefore that each separate portion must be looked to by itself, and its teinds dealt with accordingly. On the other hand, the defender maintains that the valuation is a *cumulo* valuation, and as there has been no division of the valuation, his mode of stating the principle of accounting is correct. It is laid down by Connell as follows—'In valuing teinds, whole estates or several parcels of land belonging to the same landholder were generally estimated by a *cumulo* valuation, and when the lands which have been valued together come to be divided among different proprietors it becomes necessary to proportion the *cumulo* valuation of the tithes among the different parcels of land, and this is done by a suit before the Commissioners of Teinds' (Connell on Tithes, i. p. 221). Undoubtedly there has been no division under any suit before the Commissioners, and therefore if this be a *cumulo* valuation the law as laid down in the case of *Macvicar* v. *Tweedie*, July 12, 1866, 4 Macph. 1058, will apply. The rubric of that case is in the following terms—'In a process of

locality a heritor lodged a minute of surrender of his teinds. In the decree of valuation on which he founded, the teinds of his lands and of lands not belonging to him, and in part situated in a different parish, were valued *in cumulo*. The Court (*rev.* judgment of Lord Barcaple) *refused* to sustain the surrender in respect the amount of the heritor's teind was not ascertained by the decree of valuation founded on, and could not be ascertained without a process of division of the *cumulo* valuation contained in said decree of valuation.' There is no authority, so far as the Lord Ordinary can see, defining what is to be held as a *cumulo* valuation. The extract decree is a very long document and requires to be carefully considered. It narrates the whole of the proceedings in the action, as was the usual practice at its date. The first material part that needs to be referred to is where the Court interpones authority to the reports of the Sub-Commissioners, and 'found and declared, and hereby, etc., the just worth and constant yearly avail of the pursuers, their respective lands libelled in stock and teind, parsonage and vicarage, to be now and in all time coming the particular quantities of victual and sums of money following, viz., . . . and the rent, stock, and teind of the lands and barony of Kinbuck, comprehending the lands of Corsecaple, Nether Cambushinnie, Craigtoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling. The fifth part whereof being £31, 9s. $2\frac{5}{12}$d. money foresaid, they declare to be teind, parsonage and vicarage, which quantities of victual of the qualities foresaid, and sums of money above set down, the said Lords decern and ordain to stand, continue, and endure, and to be repute and holden the just worth, and constant yearly avail of the stock and teind, parsonage and vicarage, of the said pursuers, their respective lands above mentioned in all time coming. . . . The amount of this probation is that the yearly rent, stock, and teind of the pursuers, their respective lands libelled, lying in the parishes after mentioned, extended to the particular sums of money following, viz., . . . and the rent, stock, and teind of their lands lying in the parish of Dunblane . . . £157, 6s. $0\frac{4}{12}$d. sterling. The fifth part whereof for teind, parsonage and vicarage, is £31, 9s. $2\frac{5}{12}$d. money foresaid, all conform to a particular scheme thereof signed by the Lord Ordinary of that date, with the which the Lord Ordinary made avizandum to the Lords, as a report duly subscribed by the said Lord Alva, Ordinary, extant in process, bears, follows the scheme to which the foregoing prepared state relates.' Then follows the 'scheme of the valuation,' and it is in this scheme that there is found the particular values put upon the specific portions of land constituting the barony of Kinbuck, and it is from what is to be found in this scheme that the pursuer derives support for his contention. In regard to the parish of Dunblane the extract decree thus proceeds—'Parish of Dunblane, the lands and barony of Kinbuck, comprehending the lands following, viz., that part of the lands of Corsecaple possessed by James Dunn, £16, 17s. 10d. of money rent, £8, 2s. 8d. of @rent of money advanced by the Commissioners; that part thereof possessed by James Dawson, £16, 17s. 10d. of money rent, £5, 12s. annual rent of money advanced; that part of Nether Cambushinnie possessed by John Graham, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, 18s. 6d. of money advanced; that part thereof possessed by James Dow, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, £1, 9s. annual rent of money advanced; that part thereof possessed by William Finlayson, £8, 1s. 6d. of money rent, 9s. $0\frac{4}{12}$d. of minister's stipend, 16s. of @rent of money advanced; that part thereof possessed by John Reid, £4, 0s. 9d. of money rent, 4s. $6\frac{2}{12}$d. of minister's stipend, 10s. of annual rent of money advanced; that part thereof possessed by James Reid, £4, 0s. 9d. of money rent, 4s. $6\frac{2}{12}$d. of minister's stipend, 10s. of annual rent of money advanced,' and so forth with regard to other lands of the barony which were not disjoined. Then comes the other Cambushinnie which was disjoined—'That part of the lands of Middle Cambushinnie possessed by Patrick Meiklejohn, £14, 3s. of money rent, 17s. 6d. of minister's stipend, £3, 18s. 6d. annual rent of money advanced; that part thereof possessed by John M'Ewan, £7, 1s. 6d. of money rent, 8s. 9d. of minister's stipend, £1, 8s. 6d. @rent of money advanced; that part thereof possessed by Matthew Stirling, £7, 1s. 6d. of money rent. 8s. 9d. of minister's stipend, £1, 7s. 6d. @rent of money advanced; that piece of ground and cottary possessed by Andrew Eddie, £1, 2s. 4d. of money rent.'

"Then the decree narrates that the Court having taken the scheme into consideration, 'found and declared the just worth and constant yearly avail of the pursuers lands libelled, in stock and teind, parsonage and vicarage, to be then and in all time coming the particular sums of money following, viz., . . . and the rent, stock, and teind of their lands lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling. The fifth part whereof, being £31, 9s. $2\frac{5}{12}$d. money foresaid, they declared to be teind, parsonage and vicarage, and decerned in the valuation accordingly.'

"It is in these circumstances that the Court is required to decide whether the present case comes within the rule laid down in *Macvicar* v. *Tweedie*. Is this a *cumulo* valuation entitling the defender to say that there are no materials for separating the teinds of the lands which were disjoined from Dunblane and annexed to the new parish of Ardoch, and that consequently he is entitled to blend together the payments that he has made to both ministers? The Lord Ordinary is of opinion that this contention is not well founded. In the case of *Macvicar* v. *Tweedie* a number of lands were joined together, and the teinds were valued together, and the separate valuation of each was not ascertained by the Court, but only by minute of agreement between the parties to whom the separate lands were conveyed. The correctness of this agreement was denied. The facts appear more particularly in the report in the Jurist (vol. xxxviii, p. 590), but still more clearly in the Session papers which the Lord Ordinary has examined. Now, that is not the case with reference to the circumstances with which we have here to deal. Every portion of the teinds of the lands that were annexed to Ardoch were separately valued. No doubt in the final judgment of the Court the

whole of the separate valuations of the particular teinds are added up, and the total is declared to be the value of the teinds of the barony of Kinbuck; but this does not take away anything from the fact that we have got a valuation of the teinds of each portion of the barony. That valuation so standing, the defender is entitled to surrender his teinds to the minister, and get rid of all future liability. To decide otherwise would be to elevate the formal sentence of the Court to a position which was never intended, and to ignore altogether another portion of the valuation which had reference to the several parts of which the sum total is composed.

"The result is that the Lord Ordinary is of opinion that the contention of the pursuer in this case is right, and that judgment must be given for the Crown."

The defender reclaimed, and argued—It was admitted that the Crown was titular of the teinds of these lands, and that £18, 18s. 2d. of surplus teinds were due. The valuation of 1773 was *cumulo* for the whole barony, and until it was split up by a process of division it was impossible to say that any part of it applied specially to any part of the lands. The defender could not protect himself by surrendering the teinds. The minister could have objected to a surrender—*Macvicar* v. *Tweedie*, July 12, 1866, 4 Macph. 1058. The decree of valuation in that case was undistinguishable from the decree in question. In a question between the heritor and titular it was clear that the former could not pay more than the surplus of the teinds after payment to the minister. The titular could only ask that the heritor should account for the full amount of the valuation—*Glasgow University* v. *Pollock*, May 17, 1868, 6 Macph. 878. Until 1838 every decree of valuation bore reference to a statement of the proof on which the *cumulo* valuation proceeded. But the decree was not several because it contained the materials for apportioning the teind to the various lands. For instance, there was nothing in the decree here to localise Andrew Eddie's ground and cottary. The distinction between a *cumulo* and a several decree was that the first alone involved a right to go against the fruits of any part of the lands indicated in the decree. It was said that the minister had been paid out of stock, and that if the heritor had surrendered a proportion of the *cumulo* money valuation he would have been free. The origin of surrenders was to be seen from *Lamington's* case, M. 14,827. Assuming that there had been means for ascertaining the exact lands given over to the parish of Ardoch, a surrender was not possible to the heritor, for (1) this was a *cumulo* valuation; (2) it was not possible to get at the exact rent of the several parts.

Argued for the respondent—The whole case for the reclaimer was that the valuation did not show what the teind of any particular part of the lands was, and that therefore the present decree was in the same position as that in *Macvicar* v. *Tweedie*. But in that case there was nothing given but the result of the probation. Here there was a separate state and a scheme prepared by the Lord Ordinary, and proceeded on by the Court. This was in fact a *cumulo* and a several valuation in one. What were declared to be *cumulo* valuations were valuations of particular lands after they had been feued out in parcels. But that was different from the case of several parcels of land held by various people as in the present valuation—Connel on Tithes, i. 221; *Campbell* v. *M'Lachlin*, Sh. Teind Ca., 19; *Cameron* v. *Macpherson*, April 1, 1753, 15 D. 657. Again, after disjunction, part of the lands were in Dunblane and part in Ardoch, but the teind of the latter continued to be paid to Dunblane. *Simpson* v. *Orr Ewing*, December 8, 1882, 10 R. 323, was an application of the old and not of the modern rule—[Lord President—Is there any case where a titular has been allowed to go behind a decree of the Court?] Not in the usual case, but this was different. The titular said that the heritor was not bound to pay the alleged excess. If he had not chosen to surrender, then in a question between titular and heritor the latter must be taken as if he had surrendered, for the former was not to be prejudiced when he came to demand surplus teind in another parish. It was said that the titular might bring an action of division, but the heritor was the proper party—Jurid. Styles, iii. 483.

At advising—

Lord Adam—The Crown is titular of the teinds of the lands and barony of Kinbuck. The barony comprehends the lands of Corscaplie, Nether Cambushinnie, Craigton, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie. These lands in 1853 belonged to the defender's predecessor with the exception of Corscaplie, which had been previously sold, and they all lay in the parish of Dunblane.

In that year a summons of disjunction and erection was instituted for the purpose of having a new parish erected out of the parishes of Muthill, Dunblane, and Blackford, and in this action decree was pronounced in 1855, by which the parish of Ardoch was erected into a parish *quoad omnia*, on the footing that the ministers of these three parishes should respectively continue to draw the stipend from the disjoined lands which they drew at the date of disjunction.

The lands of Cambushinnie were by the decree disjoined from the parish of Dunblane and included in the parish of Ardoch. The teinds of these lands were consequently liable for the stipends for the ministers of both parishes, and have been since localled on accordingly.

By decree of valuation dated 3rd February 1773 the lands and barony of Kinbuck comprehending as aforesaid the lands of Corscaplie, Nether Cambushinnie, Craigton, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents, were valued at £157, 6s. $0\frac{4}{12}$d., one-fifth whereof, being £31, 9s. $2\frac{5}{12}$d. was declared to be teind.

The Crown as titular of the teinds of Craigton, Easter and Wester Kinbuck, and Whitestoun, being the parts of the barony belonging to the defender still remaining in the parish of Dunblane now sues for a sum of £91, 17s. $5\frac{3}{12}$d. which is alleged to be the surplus teind of these lands after deduction of the stipend paid to the minister for crops and years from 1853 to 188 inclusive.

It is averred by the Crown that these lands were severally valued by the decree of valuation, and that the sum sued for is the amount of sur-

plus teind due by the defender after deducting the amount paid to the minister from the amount of the several valuations of the lands.

The defender denies that these lands were severally valued. He maintains that all the lands comprehended in the barony were valued *in cumulo*, that consequently he is entitled to bring into the account the stipend paid by him out of the lands of Cambushinnie, now in the parish of Ardoch; that the whole sum paid by him in both parishes should be deducted from the amount of the *cumulo* valuations, and that if this be done the surplus teind amounts to the sum of £18, 18s. 2d. only, which he offers to pay to the Crown.

There is no question of figures at issue between the parties. If the pursuer is right in his contention, then the amount sued for is due; if he is not right, then the sum offered by the defender is the proper amount.

The question therefore at issue between the parties is, whether the defender's lands in the parishes of Dunblane and Ardoch have been valued severally or *in cumulo* by the decree of valuation?

The Lord Ordinary quite correctly says that this depends upon the construction of the decree of valuation, and so construing it he comes to the conclusion that the lands have been severally valued. I cannot agree with him in this conclusion, for I think it is quite clear that the several lands comprehended in the barony have been valued *in cumulo*.

The decree of approbation has been produced, and as was then generally or uniformly the case in these old valuations, it proceeds by setting out and narrating at length the summons and its conclusions, and then the decerniture follows. I may here mention that it is both a decree of approbation and of valuation, because some of the lands included in it had been previously valued by the Sub-Commissioners, and these lands are set forth, but it appears that other lands included in the decree had never been valued and the lands in question, the barony of Kinbuck, were in the latter position, and therefore as regards these lands it was a valuation for the first time, and that being so, after narrating the summons, the extract goes on as follows:—"The Lords of Council and Session," and so on, "have found and declared, and hereby . . . the just worth and constant yearly avail of the pursuers, their respective lands, in stock and teind, parsonage and vicarage, to be now and in all time coming the particular quantities of victual and sums of money following, viz., the lands following, pertaining at the time of the valuation to the Earl of Perth, now annexed to the Crown, lying in the parish of Comrie and shire of Perth, to wit . . . and the rent, stock and teind, of the lands and barony of Kinbuck, comprehending the lands of Corsecaple, Nether Cambushinnie, Craigstoun, Wester Kinbuck, Easter Kinbuck, Whitestoun, and Middle Cambushinnie, with the pertinents lying in the parish of Dunblane, £157, 6s. $0\frac{4}{12}$d. sterling, the fifth part whereof, being £31, 9s. $2\frac{5}{12}$d. money foresaid, they declare to be teind, parsonage and vicarage, which quantities of victual, of the qualities aforesaid, and sums of money above set down, the said Lords decern and ordain to stand, continue, and endure, and to be repute and holden the just worth and constant yearly avail of the stock and teind, parsonage and vicarage, of the said pursuers, their respective lands above mentioned, in all time coming."

Now, that is the decerniture, and the only decerniture, with reference to the teinds of the lands in question to be found in the extract, and that, in my humble opinion, constitutes a decree of valuation of these lands, and is the decree of valuation of these lands. And if that be so, it is quite clear that that is a cumulo valuation of these lands. There is no valuation of each separate subject, but the whole is valued at one sum of £157, 6s. $0\frac{4}{12}$d.—£31, 9s. $2\frac{5}{12}$d. of that being the teind thereof, and I have no doubt if you were to take this extract decree and compare it with a modern form of decree you would get no more than that it was a decree of approbation and valuation and nothing else. That is all you would get, and that is in my humble opinion enough to show that this old decree was a decree of valuation of all the subjects set forth in it.

But according to the old form of these extracts this extract goes on to set out the whole procedure in the case, and the materials on which the Court proceeded in pronouncing this decree as regards these lands. The pursuer was allowed a proof of the value of these lands, and he led proof accordingly, and after the proof was reported to the Court in the usual form on 17th June 1772, the Court remitted to Lord Alva to prepare the cause. That was not a remit to the Lord Ordinary to proceed with the cause; it was merely a remit to prepare the cause, and accordingly the process goes to the Lord Ordinary, who prepares a scheme which is just a summary of the proof, and it is that scheme which the Lord Ordinary in the present case holds is a decree of valuation of the several subjects, and upon which apparently he grounds his opinion that this is a several valuation of the lands. But that is in my humble opinion not in the least the character of this scheme. No doubt upon reading that scheme, which is printed in the print of documents for the Lord Advocate, you do find all the amounts set forth separately or severally, and you do find the values of them opposite each respective subject, but you also find the whole summed up. But, as I said, this scheme is nothing but a summary of the proof. That is all that it is, and it is prepared by the Lord Ordinary in terms of the remit to him to assist the Court in coming to a conclusion and to enable them to pronounce their decree of valuation. That is the nature of the scheme, and accordingly what the Lord Ordinary does with it is this—He does not find there is anywhere any finding by the Lord Ordinary or anybody else that these are valuations of the respective lands; there is nothing of that sort. What he does is this, he makes avizandum with the scheme to the Lords. That is all he does with it. And accordingly the scheme being before the Lords, they consider it, and they pronounce the decree of valuation which we now have here.

Now, if that is the nature of this scheme it is of course not a decree of valuation at all; and it is perhaps worthy of observation that in pronouncing decree the Lords did not follow *in terminis* this scheme, because you will see that

by this scheme it is very plainly shown that while in the analysis the whole lands are separately set forth and the values set against them, there is also therein set forth as a distinct and separate subject this piece of ground belonging to Andrew Eddie of which we have heard so much, with a rent amounting to £1, 2s. 4d., and there is deducted from that the sum of 3s. 4d. as the rent of Eddie's house, supposing his house to have been upon this ground, which would leave 19s. as the rent of a separate subject. But you will observe that that sum of 19s. is included in the sum of £157 as a portion of the rents, and when you come to look at the decree of valuation you do not find this piece of ground belonging to Andrew Eddie valued as a separate subject. It is only valued as a pertinent, and the result of that is simply this, that nobody now knows or can tell where this piece of ground of Andrew Eddie worth 19s. now is. Nobody knows in what parish or barony it is. Nobody can tell that, and if that be so, it will be observed that that puts us in exactly the same position as in the case of *Macvicar*, because in that case nobody knew where the 14 cot houses there in question were, and nobody could tell the value of these particular subjects. It is exactly the same here. Nobody knows where this piece of ground of Andrew Eddie is, or whether it was a separate piece of ground or was attached to one or other of the subjects, and I mention this to show that this valuation was truly a valuation *in cumulo* of these lands. I do not think it would have been of any consequence in this case if Andrew Eddie's piece of ground had remained as a separate subject in the decree of valuation, and therefore it will make no difference in the result of this *cumulo* valuation.

Upon these grounds I have no hesitation in coming to the opinion that the Lord Ordinary's interlocutor ought to be reversed, and that the defender ought to be assoilzied.

Lord Mure—I am quite satisfied with the explanations which Lord Adam has given about this decree of approbation and valuation.

It appears to me to be quite plain that the sum tendered by the defender in his defences is all that the Crown is entitled to, because there is no doubt of the fact that for the last twenty-five years the defender has paid away either to the minister of Dunblane or to the minister of Ardoch, the latter of which parishes consists partly of what was at one time part of the old parish of Dunblane, the whole valued teinds of his lands, with the exception of the small amount of £18, 18s. 2d. brought out in the state referred to in his defences, and which the defender has tendered to the Crown.

The fact that the valued teind has been all paid away with the exception of this surplus of £18, 18s. 2d. is not disputed. But then it is said that this is a mistaken payment, that the payment so made to the minister of Ardoch was made out of the teinds of the defender's lands still left in the parish of Dunblane. That is the ground on which the Crown claims the sum now sued for in this action, but I agree with Lord Adam in thinking that this depends entirely upon whether the valuation is a *cumulo* valuation or not, and for the reasons stated by Lord Adam I think that it is a *cumulo* valuation, and that the defender is entitled to be assoilzied from the conclusions of the action.

Lord President—I am of the same opinion. I think this is a decree of valuation *in cumulo* and nothing else.

The Court recalled the interlocutor, decerned against the defender for the sum of £18, 18s. 2d.; and *quoad ultra* assoilzied the defender.

Counsel for the Pursuer—Sol.-General Robertson—H. Johnston. Agent—Donald Beith, W.S.

Counsel for the Defender—D.-F. Mackintosh—Low. Agents—Dundas & Wilson, C.S.

Tuesday, January 31.

FIRST DIVISION.

GREENOCK HARBOUR TRUSTEES AND OTHERS.

Right in Security — Statutory Assignation of Rates and Duties Leviable by Harbour Trustees —Insufficiency of Funds—Ranking.

Special case in which the Court determined the preferences of the various classes of creditors of statutory harbour trustees who had, under a series of local Acts, borrowed money and granted in security assignations of the rates and duties leviable, and who had an insufficiency of funds to meet their liabilities.

Right in Security—Statutory Assignation of Works and Property Vested in Harbour Trustees.

Under powers conferred by statute certain harbour trustees borrowed money, and granted in security assignations of "the rates, duties, and other revenues of the trust, and the works and property of the trust." *Held* that the words "works and property" were inoperative, as it was obvious the statute did not contemplate creating a security over the works and property, which could not be made effectual without doing real diligence.

Right in Security—Interim Receipt with Obligation to Grant Formal Assignation of Rates and Duties.

Under powers conferred by statute certain harbour trustees were authorised to borrow money, and grant in security assignations of the rates and duties leviable. They borrowed money, and their treasurer granted an interim receipt, with an obligation to procure an assignation in exchange for the receipt. *Held*, on there being an insufficiency of funds to meet the claims of all the creditors, that the holders of interim receipts were not in the same position as if they had obtained formal assignations at the date of their advances, as the trustees were not empowered by their statutes to grant a security in such a form over the rates and duties.

This special case was presented to determine the preferences and priorities of the various classes of creditors of the trustees of the port and har-