review by delivery of six copies of the note to the known agent of the opposite party." Now, it cannot be doubted that that provision is expressed in imperative terms. It provides that certain things are to be done in order to enable parties to bring an interlocutor of a Lord Ordinary under review. One condition is, that "the party applying for a review shall, along with his note, . . . put into the boxes printed copies of the record."

The Act of Sederunt does not superadd any additional condition or penalty. It merely makes a regulation which gives force and effect to the statutory provision. That regulation is contained in the 77th section of the Act of Sederunt, and is in these terms—"Provided always, that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute if the record has been closed." . . . Now, that is a mere direction to the Clerk of Court to give effect to the statutory provision by refusing to receive a reclaiming-note when the record is not appended thereto. Taking the statute and the Act of Sederunt together, it appears to me that there is no room for doubt or hesitation as to the meaning or practice or as to the force of the Act of Sederunt. Accordingly, we find that it has been decided over and over again that any failure to comply with these provisions is quite fatal. The first case on the point is the case of *Brown* v. *Moodie*, 17 Jur. 568, in which the failure consisted in the summons and defences not being appended, while the closed record was. That was in the time—before 1850—when the revised condescendence and answers formed a separate paper. The original summons and defences were part of the record, but it also consisted of the revised condescendence and answers. The case accordingly shows that the whole record must be appended in order to comply with the statute. In two cases the reclaimers failed to box the record at all, viz.—*National Exchange Company* v. *Drew & Dick*, Nov. 16, 1860, 22 D. 27, and *Bell* v. *Ogilvie*, January 28, 1862, 24 D. 375—and there the statutory provision was held imperative, and the want of the record was held to be fatal. The cases even go further, for in *Carter* v. *Johnston*, February 6, 1847, 9 D. 598, the record was closed upon the original summons and defences and pleas-in law for the pursuer, and the omission to print the pursuer's pleas as part of the record was held to be fatal. Then there is another case illustrative of the same principle, and giving effect to it in somewhat hard circumstances—*Muir* v. *Muir*, Oct. 17, 1874, 2 R. 26. In that case an extensive amendment on the record had been made in the Outer House in writing, and the record appended to the reclaiming-note was the original printed record with the addition of the amendment in MS., and the omission to print the amendment was held fatal to the reclaiming-note, though it looked like a mere piece of inadvertence. Besides the cases I have mentioned, there have been various others to the same effect, and it seems to me impossible to dispute that the practice has been uniform, and I think it would be spending judicial time idly if we were to have further argument upon the matter. This is a reclaiming-note against the judgment of a Lord Ordinary pronounced *in foro*, and the closed record is an indispensable appendage to the reclaiming-note, without which the reclaiming-note cannot be received.

LORD ADAM—I have had an opportunity of considering the cases to which your Lordship has referred, and to my mind they are perfectly conclusive of the matter.

LORD KINNEAR—I am of the same opinion. I think the question is absolutely concluded by authority.

LORD M'LAREN was absent.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuer—Cosens. Agent—A. Gordon Petrie, S.S.C.

Counsel for the Defender—M'Lennan. Agent—Thomas Liddell, S.S.C.

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*Friday, January* 16.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

(TEIND CAUSE.)

## SPEIR *v.* LORD WILLOUGHBY DE ERESBY.

*Teinds—Sub-Valuation and Approbation—Construction—Prescription.*

In a note to a sub-valuation certain lands were declared to be "nocht valued becaus yai ar sett decimis inclusis," and among these the lands of D. An action of approbation was subsequently brought by the proprietor of the lands of P, which had been valued in the sub-valuation, and by the proprietor of the lands of D, in which the lands of D were described as "formerly a part of the lands of P." The summons referred to the report of the Sub-Commissioners, and concluded for approval of that report in so far as concerned the valuation of the pursuer's lands before specified, and the Court ratified, allowed, and approved the report of the Sub-Commissioners in so far as concerned the valuation of the pursuer's lands libelled, interponed their decreet and authority thereto, found and declared in terms thereof that the yearly avail of the stock and teind of the lands of P were and should be in all time coming 40 bolls victual, and decerned conform to the conclusions of the libel. More than forty years after the date of the

decree a question was raised whether the lands of D were valued.

*Held* that the said lands were valued by the decree of approbation.

*Teinds—Res judicata.*

An augmentation of stipend having been granted and modified, a process of locality followed, in which an interim scheme was approved. To this scheme the Lord Advocate, on behalf of the Crown, as having right to the bishop's teinds, lodged objections. He stated that the teinds of the lands of D, and of certain other lands in the parish, the teinds of which were held upon heritable rights, were unvalued, and objected to the scheme of locality in so far as it laid no portion of the augmentation upon the teinds of these lands, and protested against any portion of the present or any future augmentation being laid upon the bishop's teinds until the teinds of the whole of these lands were exhausted. The common agent having looked into the matter, lodged a note in which he allowed that the teinds of certain of the lands in question, including the lands of D, were unvalued, and stated what he believed to be their rental. Thereafter the Lord Advocate lodged a note stating that he was satisfied with the extent to which the common agent had given effect to his objections as regarded the rents stated for the lands which were yet unvalued, and craved the Lord Ordinary to sustain the objections, and to remit to the clerk to rectify the locality. By interlocutor of 25th June 1858 the Lord Ordinary allowed this note to be received and seen, and by interlocutor of 9th July he remitted to the clerk to rectify the locality, and to report. The clerk reported a rectified scheme, but it was never approved, and no further proceedings took place in the locality until after a new augmentation was granted in 1869.

In 1890 the question was raised whether the teinds of the lands of D were valued or unvalued, and it was *held* that it was not *res judicata* that the teinds of these lands were unvalued, in respect that the interlocutor of 9th July 1858 did not import a judgment to that effect.

In 1869 the minister of the parish of Muthill raised a process of augmentation, modification, and locality, and obtained an augmentation of 3 chalders. By the rectified locality of the stipend of the parish, dated 16th May 1873, the whole of this augmentation was localled on the teinds of the lands of Middle Drummawhance, half of Drummawhance, and three-quarters of Easter Drummawhance, belonging to Mr Speir of Culdees, and of certain other lands belonging to Lord Willoughby de Eresby, in the proportion respectively of 19 b. 2 f. 2 p. 3 l. on the former, and 19 b. 1 f. 3 p. 1 l. on the latter. The other teinds in the parish were either bishop's teinds or valued and exhausted.

Mr Speir objected to the above allocation of the stipend, on the ground that the teinds of the one-half of Wester Drummawhance and of the three-quarters of Easter Drummawhance were valued and exhausted, and founded on a decreet of approbation and valuation dated 5th July 1797, of which he produced an extract, whereby the stock and teinds of the lands of Pitkellonie, Over and Nether, were valued at 40 bolls victual, and he maintained that it appeared *ex facie* of this decree that the teinds of the half of the lands of Wester Drummawhance above mentioned, and of those portions of the lands of Easter Drummawhance which belonged to Mungo Graeme of Gorthy, were thereby valued as part of the lands of Pitkellonie, and further, that those parts of the lands of Easter Drummawhance which belonged to Mungo Graeme were identical with the three-quarters of Easter Drummawhance now belonging to the objector.

The extract-decreet narrated the summons of approbation and valuation at the instance of James Drummond of Perth, and Anthony Murray of Crieff, against the Officers of State, patrons of the parish of Muthill, and titulars of the teinds thereof, and the minister of the parish, "the which summons maketh mention that the pursuer, the said James Drummond of Perth, stands heritably infeft and seised in all and whole the lands of Pitzalton now called Pitkellony Over and Nether, . . . lying within the parish of Muthill and sheriffdom of Perth, conform to instrument of sasine in favour of the said James Drummond, dated the 31st day of January 1786, and registered in the Particular Register of Sasines for the shire of Perth the 20th day of February thereafter: That the other pursuer, the said Anthony Murray, stands heritably infeft and seised in all and whole the just and equal half of the town and lands of Wester Drummawhance, with . . . and pertinents thereof, lying within the parish of Muthill and sheriffdom of Perth, and likewise all and whole these parts and portions of the lands of Easter Drummawhance which belonged to the deceased Mungo Graeme of Gorthy, with the teinds thereof included, with . . . and whole pertinents thereof, lying within the said parish of Muthill and sheriffdom of Perth, conform to instrument of sasine in favour of the said Anthony Murray, dated the 12th day of May 1791, and registered in the Particular Register of Sasines for Perthshire the 5th day of July thereafter, and which lands of Easter and Wester Drummawhance were formerly a part of the said lands of Pitkellonie;" . . . "that the Sub-Commissioners appointed for valuing the stock and teind of the lands within the Presbytery of Muthill, now Auchterarder, by their report dated the 20th day of October 1629, found and declared 'the lands of Pitkellonie, Over and Nether, pertaining to James Drummond of Pitkellonie, pays stock and teind fourtie bolls victual' as the principal report of the Sub-Commissioners in the hands of the clerk of the High Com-

mission will testify: Therefore the report of the Sub-Commissioners above recited ought and should be ratified, allowed, and approven by the said Lords Commissioners aforesaid in so far as concerns the valuation of the pursuers' lands before specified, and their decreet and authority should be interponed thereto, and in terms thereof it ought and should be found and declared that the stock and teind of the pursuers' said lands shall be now and in all time coming the particular quantity of victual before specified and contained in the said report, conform to the laws and daily practice of Scotland used and observed in like cases in all points." The extract-decreet further set forth that the summons "being called, and the said pursuers compearing by Mr William Erskine, advocate, their procurator, who for instructing their active title and right to pursue the foresaid action and cause, produced in presence of the said Lords the instrument of sasine libelled on of the dates, tenor, and contents above-mentioned; and for verifying the points and articles of the libel, produced a book or record containing the principal report of the Sub-Commissioners of Muthill, and particularly the valuation of the pursuers' lands libelled, of the date, tenor, and contents above-mentioned, as the said writes in themselves more fully bear: And the Officer of State compearing by Mr Andrew Balfour, advocate, His Majesty's solicitor for the late bishop's tythes, their procurator, and the other defenders being lawfully summoned to this action, . . . and not compearing. The foresaid summons and writes produced, with the desire of the pursuers' procurator after mentioned, being all at length read, heard, seen, and considered by the said Lords, and they therewith being well and ripely advised, the Lords of Council and Session, Commissioners aforesaid, approved, and hereby have ratified, allowed, and ratify, allow, and approve the report of the Sub-Commissioners of the Presbytery of Muthill in so far as concerns the valuation of the pursuers' lands libelled, and have interponed, and hereby interpone, their decreet and authority thereto, and in terms thereof have found and declared, and hereby find and declare the just worth and constant yearly avail of the stock and teind of the lands of Pitkellonie, Over and Nether, with the pertinents, lying in manner libelled, to be now and in all time coming 40 bolls victual, which quantities of victual above mentioned 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 of the said lands above mentioned in all time coming. . . . . And ratified, allowed, and approved the said report, in so far as concerned the valuation of the pursuers' lands libelled, and interponed their decreet and authority thereto, and decerned, conform to the conclusions of the libel."

Lord Willoughby de Eresby lodged answers to the objections by Mr Speir. He denied that the teinds of the said lands of Drummawhance were valued, and in support of that contention he referred to the report of the Sub-Commissioners appointed to value the stock and teinds of the parish of Muthill, dated 20th October 1629, which was approved of by the decree of approbation and valuation founded on by the objector. He further denied that the portions of Easter Drummawhance referred to in the summons of approbation and valuation as having belonged to the deceased Mungo Graeme of Gorthy were identical with the three-quarters of Easter Drummawhance belonging to the objector. He also pleaded that it was *res judicata* that the lands in question were unvalued, and in support of this plea founded upon an interlocutor of Lord Mackenzie (Ordinary) of date 9th July 1858.

The report of the Sub-Commissioners referred to declared, *inter alia*—"Pitkellonie Ower and Nether, pertaining to James Drummond of Pitkellonie, payes stok and teind fourtie bolls victual;" and appended to it there was the following note—"*Nota.* Landis in this parochin of Muthill nocht valued becaus yai ar sett decimis inclusis viz., Banibeg, Tourachane, Craigincholiche, Tomyricla, Kildeis, Braco, Gannacham, Thrie Drumaquhensis, Wards of Muthill."

The facts bearing on the plea of *res judicata* were as follows:—An augmentation of the stipend of the minister of the parish of Muthill was granted and modified in March 1849. In the process of locality following thereon an interim scheme was approved in March 1850. By that scheme the teinds of the parish were divided into teinds exhausted, teinds held on heritable right, and bishop's teinds. By the same scheme the whole of the augmentation was laid on the teinds of the lands of Braco and Middle Drummawhance as being held in heritable right, and no part was laid on bishop's teinds.

In June 1850 the Lord Advocate on the part of the Crown, as having right to the bishop's teinds, lodged objections to the interim scheme. He stated that certain lands in the parish, including the half of Wester Drummawhance and three-fourths of Easter Drummawhance, were described in the report by the Sub-Commissioners in 1629 as "nocht valued because they are set *cum decimis inclusis.*" The objector further stated that he could not discover from the present locality who was the proprietor of the half of Wester Drummawhance and three-fourths of Easter Drummawhance, but that the common agent could of course do so, and objected to the interim locality in so far as it laid no portion of the present augmentation upon the teinds of the lands mentioned, and protested against any portion of the present or any future augmentation being laid upon the bishop's teinds until the teinds of the whole of these lands were allocated upon and exhausted.

In July 1851 the common agent lodged answers to these objections, in which he stated with regard to the lands of Drummawhance, that he had not had an opportunity of making an investigation into the ancient titles of the Ardoch family, who

were said to have been the proprietors of the half of the lands of Wester Drummawhance, and of three-fourths of the lands of Easter Drummawhance so far back as 1870, but that he expected to have that accomplished during the ensuing vacation by tracing the lands through the titles down to the present time.

In January 1854 the common agent lodged a note in which he gave the result of his investigations. The note concluded thus—"The common agent contrasting the several lands of Drummawhance which appear to be unvalued for teind with the proportion valued for teind must hold that the real rent of the lands Drummawhance in so far as unvalued for teind (*i.e.*, the lands of Middle Drummawhance) cannot be taken at a less sum than £750, one fifth of which will be appropriated for teind. At the same time if the proprietor of Culdees and Drummawhance can bring evidence to show that the rental is overstated, it will be remedied in preparing for a final locality."

In November 1856 a rectified scheme of locality was prepared, in which a portion of the augmentation was allocated upon a portion of the bishop's teinds belonging to the Crown.

In December 1856 the Lord Advocate lodged objections to the rectified scheme, in which he referred to the objections formerly lodged by him to the interim locality on the ground that it omitted certain lands, to the teinds of which heritors had right, and did not lay any portion of the augmentation upon the teinds of these lands. The objector pointed out that the common agent had in the note subsequently lodged by him given effect to these objections in so far as concerned some of the lands in question, and among these the Drummawhances. He therefore objected to the rectified scheme in so far as a portion of the augmentation was allocated upon the bishop's teinds, instead of upon the teinds of the lands mentioned held under heritable rights, and among them the Drummawhances, and protected against any portion of the augmentation being laid upon the bishop's teinds until the whole teinds held under heritable right were exhausted. The objector further craved that effect might be given to his former as well as to his present objections, that the same might be sustained, and the interim and rectified schemes objected to rectified accordingly.

On 21st May 1858 the Lord Ordinary pronounced an interlocutor in which he sustained the objections and remitted to the clerk to rectify the locality. This interlocutor was recalled of consent on 4th June 1858, and the objections and answers were ordered to be revised.

In June 1858 the Lord Advocate lodged a note in which he stated that "he is satisfied a revisal is quite unnecessary, as he is content, so far as regards the present locality, to rest satisfied with the extent to which the common agent in said answers and note has given effect to his objections, both as regards the lands the teinds of which are held upon heritable right, and as regards the rents which he states for these lands which are yet unvalued." He then set forth the lands as to which his objections had been given effect to, among which were included the half of Wester Drummawhance and three-quarters of Easter Drummawhance at a rent of £400, and he craved the Court to "sustain the objections to the interim schemes in so far as they lay no portion of the present augmentation on the above lands, and remit to the clerk to rectify the same, and to allocate the present augmentation *primo loco* on the teinds of the said lands."

On 25th June 1858 the Lord Ordinary allowed the note of the Lord Advocate to be received and seen, and on 9th July he pronounced the interlocutor particularly founded on by the respondent, by which he remitted to the Clerk to rectify the locality and to report.

Thereafter the Clerk prepared a rectified locality, but it was never approved of as final, and apparently was never acted upon. No further proceedings took place in the case until after the new augmentation in 1869.

The record having been closed on the objections by Mr Speir, and the answers for Lord Willoughby de Eresby, the Lord Ordinary (KYLLACHY), on June 19, 1890, pronounced the following interlocutor:—"Finds that the lands of one-half of Wester Drummawhance and the parts and portions of Easter Drummawhance which belonged to Mr Graeme of Gorthy are included in the valuation of the lands of Pitkellony, dated 20th October 1629, and approved 5th July 1797, and in respect the parties are at issue whether the latter lands cover the whole of the three-fourths of Easter Drummawhance mentioned on record, allows the objector a proof on that point, and the respondent a conjunct probation; meantime reserves all question of expenses, and grants leave to the parties to reclaim."

"*Opinion.*—The main question raised under this record, which has been made up between Mr Speir of Culdees and Lord Willoughby de Eresby, is whether certain lands belonging to the former, and being one-half of the lands of Wester Drummawhance and three-fourths of the lands of Easter Drummawhance, are to be held as having been valued as part of the lands of Pitkellony, by sub-valuation dated 20th October 1629, and decree of approbation thereof dated 5th July 1797.

"The lands in question, it may be explained, were treated as valued down to the institution of the present locality in 1846, and thereafter down to the preparation of the rectified scheme in October 1860. Nor have they been treated as unvalued in any scheme approved interim or final prior to the interim locality now objected to, which was approved interim in 1873, and has since then formed the rule of payment of stipend.

"Mr Speir (the objector) maintains that the decree of approbation expressly applies the sub-valuation to the lands in dispute, identifying them as part of the lands

of Pitkellony, of which the stock and teinds were valued by the Sub-Commissioners at 40 bolls victual. At least he maintains that this identification will be complete on his proving—as he says he is prepared to prove—that the three-fourths of the lands of Easter Drummawhance are identical with the parts and portions of Easter Drummawhance which belonged to the deceased Mungo Graeme of Gorthy.

"The respondent on the other hand maintains that the lands in question were expressly excepted from the sub-valuation, as being held, or supposed to be held, *cum decimis inclusis*, that this appears from a note appended to the sub-valuation, and that the decree of approbation cannot in these circumstances be read as including those lands, or if it must be so read, cannot receive effect as valuing them. He further maintains that the question is *res judicata* having been decided in his favour by an interlocutor in the present process dated 9th July 1858. He has also a minor point to the effect that at all events one quarter of the three-fourths of Easter Drummawhance did not belong to Mungo Graeme of Gorthy, and do not therefore in any view fall within the valuation.

"I confess that I am not able to read the decree of approbation otherwise than as the objector reads it—that is to say, I do not think it is doubtful that on its just construction it imports a finding that the one-half of Wester Drummawhance and the parts of Easter Drummawhance which belonged to Graeme of Gorthy were included in the valuation by the Sub-Commissioners of the lands of Pitkellony. There is no doubt that the summons of approbation so concluded, and that decree was granted conform to the conclusions of the summons; and I am not able to attach the importance which the respondent attaches to the absence in the operative decree of renewed reference to the fact that the lands of Pitkellony—which were the lands valued—included the parts in question of the lands of Drummawhance. That matter is, afer all, one affecting only the correctness of the extract. There can be no doubt as to what was the judgment of the Court.

"But if the decree of approbation does, upon its just construction, profess to value the lands in question, or identify them as valued by the Sub-Commissioners under a different name, I do not see how the respondent can now challenge that decree or claim that it shall be denied effect. It may be that the 'Three Drummawhances' mentioned in the note to the sub-valuation are the lands or include the lands to which the present question relates. It is not certain that that is so, but it very probably is so. But so taking it, the result only is that the decree of approbation was erroneous—that is to say, was wrong on its merits. It was certainly its function to apply the sub-valuation to the various parcels of land which, under old names, or some common name, the sub-valuation included, and if it did so erroneously, either from misreading the sub-valuation, or ignoring or misreading the note on which the respondent founds, I am not aware that after forty years have passed there is any remedy. The judgment is now as much *res judicata* as if it had passed *causa cognita*, and I do not suppose it can be suggested that if the respondent or his authors had appeared in the process of approbation, and raised the present question, and had done so unsuccessfully, they could at any time afterwards have contended that the decree of approbation was disconform to the sub-valuation, and that therefore they were not bound by it.

"I am therefore against the respondent on the merits of Mr Speir's objection. But it remains to consider whether the objection is not foreclosed by previous judgments in the present process of locality.

"There is no doubt that the question as to the valuation of the lands of Easter and Wester Drummahwance was raised in the present locality so far back as the year 1850—the Lord Advocate on the part of the Crown having in that year lodged objections claiming that the 'Three Drummawhances' should be treated as unvalued. There is no doubt also that the common agent appears upon such inquiry as he happened to make, to have conceded that unless the proprietor brought forward further evidence before the locality was approved final, the objection of the Lord Advocate must receive effect. It is also true that after some delay the Lord Advocate in June 1858 moved to have his objections sustained and the locality rectified, and that on 9th July 1858 the Lord Ordinary (Mackenzie), having allowed the Lord Advocate's note to be seen, pronounced the following interlocutor:—'*Act.* BUCHANAN—*Alt.* A. B. SHAND.—LORD MACKENZIE.—9th July 1858.—The Lord Ordinary remits to the clerk to rectify the locality and to report. T. MACKENZIE.'

"There was no reclaiming-note. The clerk did report a new rectified scheme, but the same was never opproved. Nothing more was done in the locality until after the new augmentation in 1869, when the present interim locality was established giving effect for the first time practically to the Lord Advocate's objection.

"The question is, whether all this constituted a *res judicata*. I am of opinion in the negative. It is not perhaps to exclude that plea that there there has as yet been no final locality. The more important fact is that there has as yet been no proper trial of the question. For I cannot hold that a remit to the clerk to prepare a rectified scheme and to report amounted to a final judgment or foreclosed further discussion. I rather think that the interlocutor making that remit may still be reclaimed against, I mean, *e.g.*, along with the interlocutor approving the final locality. But whether that be so or not, I am not able to hold that as the interlocutor stands it is a *res judicata*.

"I shall therefore pronounce findings to the effect that the lands of one-half of Wester Drummawhance, and the parts and portions of Easter Drummawhance which belonged to Mr Graeme of Gorthy, are included in the valuation of the lands of Pitkellony

dated 20th October 1629, and approved 5th July 1797, and as the parties are at issue whether the latter lands cover the whole of the three-fourths of Easter Drummawhance mentioned on record, I shall allow the objector a proof on that point, and the respondent a conjunct probation. Meantime I shall reserve all questions of expenses."

The respondent reclaimed, and argued—1. Fairly read, the decree of approbation did not value the lands of Drummawhance, but only the lands of Pitkellonie, there being nothing to show that the lands of Drummawhance were included in the lands of Pitkellonie. Supposing, however, that the decree left it doubtful whether or not the lands of Drummawhance were dealt with as part of the lands of Pitkellonie, that was a patent ambiguity which required to be removed by proof—Bell's Prin. sec. 524; *Morton* v. *Hunter & Company*, 1830, 4 W. & S. 379; *Macleod* v. *Smith, &c.*, May 25, 1869, 7 Macph. 821—*aff.* July 10, 1873, 11 Macph. (H. of L.) 62; *Cameron* v. *Macpherson*, April 1, 1853, 15 D. 657. 2. It was *res judicata* that the teinds of the objector's lands of Drummawhance were unvalued. The question whether they were so or not was raised in 1850 by the Lord Advocate, who maintained that they were unvalued. He had a title to raise that question on behalf of the Crown as the holder of the bishop's teinds. The interests of the heritors were represented by the common agent, whose duty it was to defend the rights of the heritors against anyone who might attack them, and who had a title to resist the Lord Advocate's contention on behalf of the present objector. He, however, was satisfied on inquiry, and allowed that the Lord Advocate's contention was well founded. The result was that on the motion of the Lord Advocate the Lord Ordinary remitted to the Clerk to rectify the locality and report, and that interlocutor not having been reclaimed against became final. The present objector having stood aside and allowed these proceedings to go on, must therefore be held bound by the result—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 54; A. of S., 12th November 1825, sec. 16; *Earl of Hopetoun* v. *Ramsay, &c.*, March 27, 1846, 5 Sidney Bell's App. 69; *Dundas* v. *Waddell*, December 19, 1878, 6 R. 345, and February 27, 1880, 7 R. (H. of L.) 19; *Earl of Mansfield, &c.* v. *Stewart*, January 30, 1880, 7 R. 552; *Duke of Buccleuch* v. *Common Agent in Locality of Inveresk*, November 10, 1868, 7 Macph. 95.

Argued for the objector—1. The lands of Drummawhance were clearly valued by the decree of approbation. The summons of approbation concluded for such valuation, and decree was given in terms of the conclusions. There was no such ambiguity in this case as arose in the case of *Macleod*, where a number of lands were valued under a general name, and it was doubtful whether certain lands called Knock, specially mentioned neither in the sub-valuation nor in the operative part of the decree of approbation, had been valued under the general name. The present case was in complete contrast to that case, and fell under the principle of the following authorities—*Earl of Fife's Trustees*, February 28, 1849, 11 D. 889; *M'Intyre* v. *M'Lean*, March 7, 1828, S. (Teind Cases) 160, and 3 F. 794. 2. The respondent's plea of *res judicata* was ill-founded. In the first place, the interlocutor of 9th July 1858 did not imply a judgment on the merits of the Lord Advocate's objections. Further, the common agent acted for the general body of heritors, and not for a dissentient, and accordingly in 1850-58 the common agent could not have represented the interest of the objector in opposition to the Lord Advocate. The question whether the teinds of the objector's lands of Drummawhance were unvalued had accordingly never been raised between parties who were proper contradictors, and had a good title to raise it—*Lady Willoughby de Eresby* v. *Speir*, 14 S.L.R. 162; *Deans of the Chapel Royal*, February 20, 1867, 5 Macph. 414, and March 18, 1869, 7 Macph. (H. of L.) 19.

At advising—

LORD ADAM—By the rectified locality of the stipend of the parish of Muthill dated 16th May 1873 the whole of the augumentation of the stipend, modified 31st January 1870, is localled on the teinds of the objector Mr Speir's lands of Middle Drummawhance and others, and the respondent Lord Willoughby's lands of Benebeg and others, in the proportion of 19 b. 2 f. 2 p. 3 l. meal and barley respectively on the former, and 19 b. 1 f. 3 p. 1 l. of meal and barley respectively on the latter.

Mr Speir objects to this allocation, on the ground that the teinds of certain parts of his lands of Drummawhance so localled on are valued and exhausted. The parts of the lands of Drummawhance the teinds of which the objector says are valued are the one-half of Wester Drummawhance and three-quarters of Easter Drummawhance.

If he is right in this, then the effect will be to throw the whole of the augmentation on the teinds of the respondent's lands, the whole other teinds in the parish being either bishop's teinds, and so postponed in the order of allocation, or valued and exhausted.

The objector produces in support of his objections a decree of approbation and valuation of date 5th July 1797, by which the stock and teind of the lands of Pitkellonie, Over and Nether, are valued at 40 bolls victual, and he maintains that it appears *ex facie* of this decree that the teinds of his half lands of Wester Drummawhance, and of those parts and portions of the lands of Easter Drummawhance which belonged to the deceased Mungo Graeme of Gorthy, are thereby valued as part of the lands of Pitkellonie; and he further maintains that the parts of the lands of Easter Drummawhance which belonged to Mungo Graeme are identical with the three-quarters of Easter Drummawhance now belonging to him. This last question has not been disposed of by the interlocutor under review, the Lord Ordinary having allowed a proof as to that matter.

The respondent, on the other hand, main-

tains that the teinds of the said lands of Drummawhance are not valued, because it appears from the report of the Sub-Commissioners, of date 20th October 1629, and which was approved by the decree of approbation and valuation founded on, that certain "landis in this parochin of Muthill nocht valued becaus yai ar sett decimis inclusis," and among these lands are "three Drummawhances."

The respondent further maintains that it appears from the report of the Sub-Commissioners that the lands of Pitkellonie, Over and Nether, were valued as pertaining to James Drummond of Pitkellonie, and he avers and offers to prove that the three Drummawhances did not then belong to James Drummond of Pitkellonie, but to Sir William Grahame of Braco, and therefore could not have been valued as part of Pitkellonie.

It appears to me that the first question for consideration is, whether on a sound construction of the decree of approbation and valuation of 1797 the teinds of the objector's lands in question are thereby valued If they are so valued, then all objections not appearing *ex facie* of the decree will, having regard to its date, 1797, be cut off by the negative prescription.

The extract-decree narrates the summons of approbation and valuation at the instance of James Drummond of Perth and Anthony Murray of Crieff against the Officers of State as patrons of the parish and titulars of the teinds thereof, and the minister of the parish; and that the pursuer the said James Drummond is heritably infeft in the lands of Pitzalton, now called Pitkellonie Over and Nether, conform to instrument of sasine in his favour dated 31st January, and recorded in the Particular Register of Sasines for the shire of Perth 20th February 1786, and that the other pursuer the said Anthony Murray is heritably infeft in the just and equal half of the town and lands of Wester Drummawhance, and likewise those portions of the lands of Easter Drummawhance which belonged to the deceased Mungo Graeme of Gorthy, conform to Instrument of Sasine in his favour dated 12th May, and recorded in the Particular Register aforesaid 5th July 1794, and which lands of Easter and Wester Drummawhance, it is averred, were formerly a part of the said lands of Pitkellonie.

The summons then set forth that the Sub-Commissioners by their report dated 20th October 1629 had found and declared that the lands of Pitkellonie Over and Nether, belonging to James Drummond of Pitkellonie, pays stock and teind 40 bolls victual, and concluded that the report of the Sub-Commissioners should be ratified, allowed, and approved by the Lords Commissioners in so far as concerns the valuation of the pursuers' lands before specified, and their decreet and authority interponed thereto, and that it should be found and declared that the stock and teind of the pursuers' said lands should be the particular quantity of victual before specified and contained in said report.

Now, I think there is no doubt or difficulty as to what is here meant by the "pursuers' said lands," and that they are the pursuer James Drummond's lands of Pitkellonie Over and Nether, and the other pursuer Anthony Murray's parts of the lands of Drummawhance, Easter and Wester.

It accordingly appears to me that the summons clearly concluded that it ought and should be found and declared that the stock and teind of the lands of Pitkellonie Over and Nether, and of the parts of the lands of Drummawhance Easter and Wester in question, should be in all time coming the particular quantity of victual "before specified." If, therefore, decree was pronounced by the Lord High Commissioners in terms of the conclusions of the summons, it would appear to me to be clear that the objector's lands in question are valued by the decree of approbation and valuation.

Now, we learn from the extract-decreet that the pursuers appeared by their procurator, who produced a book or record containing the principal report of the Sub-Commissioners of Muthill, and particularly the valuation of the pursuers' land libelled, that appearance was made for the Officers of State, but not for the minister, and that the Lords "ratified, allowed, and approved the said report in so far as concerned the pursuers' lands libelled, and interponed their decreet and authority thereto, and decerned conform to the conclusions of the libel."

The extract of the decree so pronounced is given out in the following terms—"The Lords of Council and Session, as Commissioners foresaid, have ratified, allowed, and approved, and hereby ratify, allow, and approve the report of the Sub-Commissioners of the Presbytery of Muthill in so far as concerns the pursuers' lands libelled" (that is, the pursuer James Drummond's lands of Pitkellonie, Over and Nether, and the pursuer Anthony Murray's lands of one-half of Wester Drummawhance and the parts of the lands of Easter Drummawhance which belonged to Mungo Graeme), "and have interponed, and hereby interpone their decreet and authority thereto, and in terms thereof have found and declared and hereby find and declare the just worth and constant yearly avail of the stock and teind of the lands of Pitkellonie, Over and Nether, with the pertinents lying in manner libelled, to be now and in all time coming 40 bolls victual, which quantities of victual above mentioned 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 of the said lands above mentioned in all time coming"—that is, of the lands of both of the pursuers.

It appears to me to be clear that the teinds of the objector's lands in question are valued by this decree as having been parts of the lands of Pitkellonie, Over and Nether, at the date of the sub-valuation.

For the reasons which the respondent now alleges, it is possibly not consistent with the facts of the case that the objector's

lands were included in the sub-valuation. But the decree affirms that these lands were valued, and confirms the valuation of the Sub-Commissioners. It is too late, however, now to inquire into that matter. The objections which the respondent urges are extrinsic objections, not arising *ex facie* of the decree, and all such objections are, as I have said, cut off by the negative prescription. On this part of the case, therefore, I agree with the Lord Ordinary.

The respondent, however, pleads that it is *res judicata* that the lands in question are unvalued, and he founds upon an interlocutor of the Lord Ordinary of 9th July 1858 in these terms—"The Lord Ordinary remits to the Clerk to rectify the locality and to report." That interlocutor certainly does not appear on the face of it to be a judgment of the Court on any question of right, but to be merely a direction that a farther step of procedure should be taken in the cause.

But as I understand the respondent's contention, he maintains that it is a direction to rectify the locality so as to give effect to certain objections stated by the Lord Advocate in the locality in which the question had been raised between him and the common agent as to whether the teinds of the lands in question were valued or not, and that the common agent had admitted that they were not valued.

In order to see how this matter stands it is necessary to refer in some detail to the proceedings which took place in the locality.

It appears then that an augmentation of the stipend was granted and modified in March 1849. In the process of locality following thereon an interim scheme was approved in March 1850. By this interim scheme the teinds are divided into teinds exhausted, teinds held on heritable right, and bishop's teinds. By the scheme the whole of the augmentation is laid on the teinds of the lands of Braco and Middle Drummawhance as being held on heritable right, and no part is laid on bishop's teinds.

Although that was so in June 1850, the Lord Advocate on the part of the Crown, as having right to the bishop's teinds, lodged objections to the interim scheme.

In these objections various lands were specified, the teinds of which were alleged to be unvalued. These lands were the lands stated in the sub-valuation to be unvalued and included the "three Drummawhances." It was farther set forth that the objectors could not discover from the locality who was proprietor of one-half of Wester Drummawhance and three-fourths of Easter Drummawhance, but that the common agent could ascertain, and he objected to the interim locality in so far as it laid no portion of the stipend on the teinds of the lands above mentioned, and protested against any part of the present or any further augmentation being laid upon the bishop's teinds until the teinds of the whole of these lands were allocated upon and exhausted.

In July 1851 the common agent lodged answers to these objections in which he stated, as regards lands of Drummawhance, that he had not had an opportunity of making an investigation into the ancient titles of the Ardoch family, who are said to have been the proprietors of the half of the lands of Wester Drummawhance and of the three-fourths of Easter Drummawhance as far back as 1760, but that he expected to have this accomplished during the ensuing vacation by tracing the lands through the titles down to the present time.

In January 1854 the common agent lodged a note in which he apparently sets forth the result of his investigations, and concludes thus—"The common agent, contrasting the several lands of Drummawhances which appear to be unvalued for teinds, with the proportion valued for teinds, must hold that the real rent of the lands of Drummawhance in so far as unvalued for teinds cannot be taken as a less sum than £750, one-fifth of which will be appropriated for teind."

No part of the augmentations had, as I have said, been laid by the interim scheme upon the bishop's teinds, but by a rectified scheme of locality, dated November 1856, which was approved of in the course of these proceedings, a part of the augmentation was laid upon the bishop's teinds.

In December 1856 the Lord Advocate objected to this rectified scheme in so far as the bishop's teinds were thereby affected, and protested against any portion of the augmentation being laid upon them until the whole teinds held in heritable right were exhausted, and he craved that effect be given to the former objections as well as the present, that the same be sustained, and that the interim and rectified schemes objected to be rectified accordingly.

On 21st May 1858 the Lord Ordinary pronounced an interlocutor by which he sustained the objections for the Lord Advocate, and remitted to the clerk to rectify the locality.

This interlocutor was recalled of consent on 4th June 1858, and the objections and answers were ordered to be revised.

In June 1858 the Lord Advocate lodged a note in which he stated that he was satisfied that a revisal was unnecessary, "as he is content so far as regards the present locality to rest satisfied with the extent to which the common agent in the answers and note has given effect to his objections, both as regards the lands the teinds of which are held on heritable right, and as regards the rents he states for these lands which are yet unvalued." He then sets forth the lands with regard to which his objections have been given effect to, including among these the half of Wester Drummawhance, and three-fourths of Easter Drummawhance, at a rent of £400, and he craves that "your Lordship will sustain the objections to the interim schemes in so far as they lay no portion of the present augmentation in the above lands, and remit to the clerk to rectify the same, and to allocate the present augmentation *primo loco* on the teinds of the said lands."

The note for the Lord Advocate was allowed to be seen, and thereafter on 9th July 1858 the Lord Ordinary pronounced the interlocutor (which is particularly founded on by the respondent), and which he remitted to the clerk to rectify the locality and to report.

It appears that the clerk prepared a rectified locality, but I understand that it has never been acted on, and certainly has never been approved as final. No further proceedings have taken place in the case.

Now, I agree with the Lord Ordinary that the question whether the teinds of the lands now in question were valued or unvalued was raised in the course of the proceedings as between the Crown and the common agent. It is true that it was not raised in the form in which it is raised in the present case, viz., whether the lands in question were valued in 1797 as part of the lands of Pitkellony.

Neither was the question directly raised in the course of the proceedings, but it was necessarily involved in the question whether or not the lands in question were liable to be localled on for one-fifth of the real rent as being unvalued, and if the interlocutor of 9th July 1858 is to be held as importing a judgment of the Court to that effect, then I think it is *res judicata* that the teinds of these lands are unvalued.

But then I agree with the Lord Ordinary that the interlocutor in question does not import a judgment to that effect. It will be observed that the note of the Lord Advocate craves the Court to sustain his objections, but the interlocutor does not do so, but merely remits to the clerk to rectify the locality. I agree with the Lord Ordinary that such a remit does not imply any judgment on the merits of the objections and answers, and I think the interlocutor submitted to review ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court refused the reclaiming-note.

Counsel for the Objector—D.-F. Balfour, Q.C.—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Asher, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

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*Tuesday, January 20.*

## SECOND DIVISION.

## GUINNESS, MAHON, & COMPANY *v.* THE COATS IRON AND STEEL COMPANY AND OTHERS.

*Process—Court of Session Act 1868, sec. 29—Amendment of Record—New Defence after Proof and Decree in the Outer House.*

A firm of bankers brought an action against two firms of ironfounders, and the individual partners thereof, for payment of certain sums contained in three promissory-notes granted by said firms, and endorsed to the pursuers. After a proof the Lord Ordinary pronounced decree in terms of the conclusions of the summons. Certain of the partners of one of the firms reclaimed, and moved to be allowed, upon payment of all expenses hitherto incurred, to amend their record for the purpose of advancing an entirely new defence.

*Held* that under the 29th section of the Court of Session Act 1868 they were entitled to have their motion granted.

Messrs Guinness, Mahon, & Company, bankers, Dublin, brought an action against The Coats Iron and Steel Company, Coatbridge, and Matthew Dean Goodwin, David Goodwin, William Jardine, and John Smith, the individual partners of said company, as such partners and as individuals, and against James Goodwin & Company, engineers and founders, Ardrossan and Motherwell, and James Goodwin, John Goodwin, David Goodwin, Matthew Dean Goodwin, Robert Boyd Goodwin, John Topping Goodwin, and David Boyd Goodwin, the individual partners of said firm, as such partners and as individuals, for payment, jointly and severally, of three sums of £1800, £2200, and £2000 due under three promissory-notes respectively, all of date 16th April 1889, and payable three months after date, and granted by the said Coats Iron and Steel Company and James Goodwin & Company in favour of Messrs Hume, Webster, Hoare, & Company, bankers, London, and endorsed in favour of the pursuers.

The pursuers averred, *inter alia*, that they were the holders for value of the three promissory-notes above referred to, which were granted by the defenders The Coats Iron and Steel Company and James Goodwin & Company, payable at the Union Bank of Scotland, Limited, Cornhill, London, E.C., on 19th July 1889; that the said promissory-notes were presented on behalf of the pursuers, then the onerous holders thereof, on 10th January 1890 at the place of payment aforesaid, and that payment was refused.

The defenders denied the accuracy of many of the pursuers' statements, referred to a special agreement, and pleaded that they should be assoilzied. Their agents, however, sent the following letter to the agents of the pursuers upon 5th July 1890—