The Committee were of opinion that the minute and receipts founded on by the appellant were not conclusive as to the annual value, in respect that they did not disclose the whole consideration received by the proprietor, and upon a review of the whole circumstances, and from their knowledge of the letting value of such premises as those in question in the village in which they are situate, and similar villages, were of opinion that the subjects might fairly be expected to let at £40, and accordingly fixed the annual value at that sum, and unanimously dismissed the appeal.

Stevenson obtained a case for the opinion of His Majesty's Judges.

Argued for the appellant—There was no finding, and no grounds were stated for the inference that the lease was not a *bona fide* one. Nor was there any element of consideration other than rent. The case was distinguished from *Rintoul* v. *Assessor for Dunfermline* February 11, 1901, 39 S.L.R. 568, in respect that when the appellant entered into the lease there was no agreement that he should be clubmaster. It was proved that the appellant had drawn a salary as clubmaster for three months only, and the lease had been current more than two years. In these circumstances the salary paid to the appellant for his services could not be regarded as constituting a consideration other than rent. The rent fixed by the lease was therefore the proper measure of the yearly value of the subjects.

On February 12, 1902, the Court remitted the case to the Valuation Committee to explain on what grounds they had come to the conclusion that the minute of lease and the receipts for rent were not conclusive as to the annual value of the subjects.

The Valuation Committee reported to the effect that they did not consider the minute of lease and the receipts for rent conclusive from their knowledge that the club had been managed and conducted from the outset by the appellant and his family who resided on the premises.

LORD KYLLACHY—It does not seem to me that this is a case in which we should disturb the judgment of the local tribunal on what is, after all, a mere question of fact.

LORD STORMONTH DARLING—I agree.

The Judges were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellant—Burt. Agents—Davidson & MacNaughton, S.S.C.

Counsel and Agent for the Assessor—Party.

COURT OF SESSION.

Thursday, March 13.

FIRST DIVISION.

[Lord Ordinary on Teinds.

PRESBYTERY OF STIRLING *v.* GRAHAM.

Teinds — Declarator that Parishes not Legally United—Actings of Commissioners under Acts 1606, *c.* 23, *and* 1617, *c.* 3—*No Record of Formal Union of Parishes—Union Asserted in Subsequent Writs and Recognised by Civil and Ecclesiastical Authorities—Presumption—Omnia rite ac solemniter acta.*

In an action for declarator that two parishes had never been legally united, it appeared that in each of the two parishes there had been from time immemorial a separate chapel or church (both originally chapels belonging to an abbey and subordinate to another church), and that for nearly 300 years, although the cure of the two churches had been served by one minister, the other parochial machinery had been kept up independently in each of the two districts. There was no clear evidence that the two districts had ever been well-constituted separate parishes, and there was no record in existence of a formal union of the two districts into one parish having been made by a lawful authority. In 1606 commissioners were appointed for modifying stipends, and in 1617 commissioners were appointed with power to unite parishes. The records of the Commission of 1606 were altogether lost and the records of the Commission of 1617 were in great part lost. Subsequently to these Commissions there had been a consistent course of administration founded upon the basis of a union by statutory commissioners, and a union was asserted by Crown charters of date 1619 and 1621 and by an Act of Parliament of 1621, and had been accepted as existing by the Crown, by the Church Courts, and by the Court of Teinds for nearly 300 years.

Held that, having regard to the course of procedure which had followed upon the public act of the Commission of 1606 and 1617, the records of whose administration had been lost, the presumption *omnia rite ac solemniter acta* applied, and that the *onus* therefore lay on the pursuers to show that the two parishes in question had not been lawfully united, and (2) that, on the evidence, the pursuers had failed to discharge this *onus*, and action *dismissed*.

The Presbytery of Stirling and certain residenters in the parishes of Larbert and Dunipace brought an action against John Hatt Noble Graham, of Larbert House, Larbert, Stirlingshire, and others, heritors

of Larbert and Dunipace, to have it declared (*Second*) . . . "that the parishes of Larbert and Dunipace have never been legally united, and that it is now expedient and proper that the cure of the said churches and parishes shall be served by separate ministers in all time coming; (*Third*) . . . that any ecclesiastical union or arrangement at present subsisting or heretofore made, whereby one minister has served the cure of both of the said parishes and churches, shall now terminate and be null, void, and ineffectual in all time coming, and that one minister shall serve the cure in each of the said two parishes and churches now and in all time coming."

There was also a series of conclusions for giving practical effect to the foregoing conclusions.

The pursuers averred, *inter alia*, as follows:—"(Cond. 3) The parishes of Larbert and Dunipace in the county and Presbytery of Stirling have, since the middle of the sixteenth century, been served by one minister. These parishes, however, have never been legally united civilly or ecclesiastically. *Quoad civilia* the said two parishes are now, and have all along been, separate, and *quoad sacra* they are now, and have all along been, separate, except that since the latter half of the sixteenth century one minister has served both cures. The said parishes always had separate parochial boards so long as said boards existed, and prior to the creation of parochial boards the funds for the poor were administered by the respective kirk sessions and heritors of Larbert and Dunipace; and they have, and so long as the bodies have existed always have had, separate parish councils and school boards. Before the creation of school boards each parish had a separate parochial school; and each parish has, and always has had, separate well-defined boundaries. In these and in many other respects the said two parishes differ, and have always differed, from parishes which have been legally united. Long before 1617 the two parishes were served by one minister without being legally united, and the same arrangement which originated in the latter half of the sixteenth century was continued and has subsisted till the present time. (Cond. 4) Further, the said parishes have, and always have had, separate kirk sessions, which meet, and always have met, separately for the transaction of the business of their respective parishes; they have, and always have had, separate session clerks; the session clerk of Dunipace being expressly appointed at least on one occasion *ad vitam aut culpam*; they have, and always have had, separate glebes and separate churchyards, as well as separate bodies of heritors who meet, and always have met, and who always have been, and still are, assessed separately for the fabrics of the churches and manse; they have, and always have had, separate heritors' clerks; and they have, and always have had, separate communion rolls. By the law and practice of the Church of Scotland the communion roll can be made up only by the kirk session of the parish. The heritors of each of the said two parishes are, and have always been, separate bodies, meeting only in their own parish, except when manse repairs have had to be considered. Even as regards manse repairs, the amount required has been divided between the two parishes, each paying one-half of the assessment, and the respective clerks levying this on the heritors of the respective parishes in proportion to their valued rents. Only one manse has been kept up, as since the middle of the sixteenth century there has only been one incumbent serving the cures of both parishes. A grass glebe of five acres Scots was designed for Dunipace parish in 1806. The Dunipace glebe was always let by the minister serving the two parishes. (Cond. 5) Further, the said parishes have, and always have had, separate registers for the registration of births, deaths, and marriages. The residenters in Larbert and Dunipace parishes respectively have their banns of marriage proclaimed in their respective churches. In the case, as sometimes happens, of one of the contracting parties residing in Larbert parish and the other in Dunipace parish, the banns of marriage are proclaimed in both churches, and proclamation dues are paid to the session clerks of both parishes. (Cond. 7) In each of the said parishes of Larbert and Dunipace there already exists a suitable place of worship in good repair, viz., a church known as the Parish Church of Larbert, situated at Larbert, and providing accommodation for 1080 persons, and a church known as the Parish Church of Dunipace, situated in Dunipace, and which has accommodation for 604 persons. (Cond. 8) Owing to the extent of the said parishes, the distance of the said parish churches from each other—about 4 miles—and the great increase during the last two centuries in the population of the said parishes, and especially in the parish of Larbert, it has become impossible for one minister to give satisfactory pastoral superintendence to the said two parishes, and there are many serious disadvantages incident to there being only one minister for a district so large and populous as that comprehended in the said two parishes. (Cond. 10) There is sufficient teind in each of the said two parishes of Larbert and Dunipace respectively to afford an adequate stipend to the minister of each of the two parishes, both for the present stipend and also to meet any future augmentations which may be granted to them. The state of the teinds is estimated as follows, viz., that of the parish of Larbert at £900 or thereby, and that of the parish of Dunipace at £500 or thereby. (Cond. 11) Both the Synod of Perth and Stirling and the General Assembly of the Church of Scotland in 1898 have approved of the proposal that there should be for the future a minister for each of the said two parishes; and there is a general desire on the part of the parishioners in the two parishes to that effect."

The defenders in answer admitted that the parishes had, since or about the year

1618, been served by one minister, but explained that this was because the said parishes were united in or about that year by the Teind Commissioners appointed in 1617. They also admitted that there had been separate school boards, parochial boards, and parish councils since these respective bodies were established, that there was a glebe and churchyard in each parish, and that there were two registers and two churches in good repair. They denied that the said parishes had and always had two separate kirk-sessions, session-clerks, and communion rolls, and that the heritors were two separate bodies. They explained that it had been the practice for the heritors of each parish respectively to take charge of and assess themselves separately for the ecclesiastical fabric within the respective areas of the "original parishes." This did not apply to the manse of the united parishes, which is in the "original parish" of Larbert, and had been maintained by the whole body of the heritors of the two parishes acting together.

In a statement of facts the defenders stated, *inter alia*, as follows—"(Stat. 1) The church of Larbert and the church of Dunipace were originally chapels of the Abbey of Cambuskenneth. Subsequent to the Reformation Larbert and Dunipace appear to have been recognised as separate parishes, and proposals for their union were discussed in the Presbytery of Stirling towards the close of the sixteenth century. These proposals appear to have fallen through for the time being owing to the inability of the parishioners to agree as to which church should be the parish church of the new parish. In 1597, and again in 1602, there appear to have been settlements of a minister in Larbert as a separate parish. . . . (Stat. 2) By the Act 1617, c. 3, anent the plantation of kirks, certain Parliamentary Commissioners were appointed, with power, *inter alia*, as follows:—'With special power also to the said Commissioners to unite sik kirks ane or mair as may conveniently be unite, where the fruits of ane alone will not suffice to entertain ane minister.' . . . (Stat. 3) The Commissioners so appointed united the parishes of Larbert and Dunipace in the year 1617 or 1618. The decree of the Commissioners by which the parishes were united is not now extant, the whole of the original records of that Commission having been lost, but the existence of such a decree is amply attested by contemporary documents. Upon 24th February 1619 Mr Alexander Norie was presented by King James VI. to the ministry of the united parishes of Dunipace and Larbert." The defenders referred to the extract presentation of Mr Alexander Norie on 24th February 1619 to Dunipace and Larbert (*infra*), the Act of 1621, c. 5, (*infra*), and an extract-charter under the great seal of King James VI. in favour of David Livingston of Donypace, dated 8th February 1621 (*infra*), as instructing the union of the said parishes . . . . (Stat. 4) "Since the said parishes were united as aforesaid by the Commission of 1617 there has been only one ministerial charge therein, and one locality. The Crown was the patron, and the presentations granted from time to time bore to be to the cure of a united parish. In several processes of augmentation and locality the parishes have been treated by the Court of Teinds as united. In 1701 the signature to the formula in the books of the Presbytery of Stirling bears to be made by the 'elders of the paroch of Larbert and Dunipace.' Although the elders from the Larbert and Dunipace districts have from about the beginning of the eighteenth century been in use to meet in two sections at times for the transaction of certain business, and in particular to deal with cases of discipline and of poor relief, they still continued to meet at other times as one kirk-session. A minute of meeting of session on 25th June 1705, for example, bears that the sederunt consisted of 'the minister and elders of both paroches. . . . Meetings of the whole body of the elders as one session when occasion required continued throughout the century. . . . . It has always been the practice to send a representative elder to the Presbytery and Synod from these parishes, but on no occasion, from the earliest records down to 1841, had the two sections been separately represented. In 1841 a claim to separate representation in the presbytery was made for the first time by Dunipace, but the Commission was not sustained. In 1842, and again in 1843, during a period of much disquiet in the Church, the presbytery appear to have sustained a separate commission from Dunipace as warranted under the Chapel Acts then in force. In 1844, however, they declined to do so, the Chapel Acts having been repealed, and thereafter Dunipace had no separate representation. The existence of two kirk-sessions has never been recognised by the General Assembly or by the civil courts. On the other hand, the union of the parishes has been recognised by the General Assembly on sundry occasions. In particular, in 1802 complaint was made to the General Assembly by certain heritors that the incumbent neglected the Dunipace Church by holding infrequent service there, and that he had ceased altogether to celebrate the communion in that church. The General Assembly found no cause to interfere, and upon 25th May 1802 dismissed the complaint." . . .

The pursuers, in answer to the foregoing statement of facts for the defenders, stated, *inter alia*, as follows:—"(Ans. 1) Admitted that the church of Larbert and the church of Dunipace were originally chapels of the Abbey of Cambuskenneth. Admitted that both before and after the Reformation Larbert and Dunipace were recognised as separate parishes, and explained that they have all along continued to be separate parishes in every respect, except that since the sixteenth century one minister has discharged the ministerial duties of both. . . . Dunipace and Larbert, though separate parishes in other respects, were in the latter half of the sixteenth century under one 'reader.' . . . Towards the close of the

sixteenth century, namely in 1597, a minister was appointed in place of a reader to serve the single parish of Larbert, and in the year following he was made responsible for the service of Dunipace parish also without having been appointed to that charge and without any union of the parishes having taken place. Reference was made to the minute of the Presbytery of Stirling, of date June 28, 1598 (*infra*). . . . The stipend allowed to the old 'reader' was at this time (1598), without any formal or legal union of the two parishes of Dunipace and Larbert being effected, simply handed over to the said Reverend Henry Forrester, the minister who had been 'planted' in the parish of Larbert alone on 26th July 1597, but who like the 'reader' was now to serve, and did in point of fact henceforth serve, both the parishes. (Ans. 3) Denied that the Commissioners appointed by the Act 1617, c. 3, united the parishes of Larbert and Dunipace either at the time alleged or at any other time. Explained that no union of Larbert and Dunipace was ever effected by any statute or by the parliamentary Teind Commissioners acting under any of the parliamentary commissions. No decree of the kind alleged uniting the two parishes is now extant or ever existed. No such decree is anywhere recorded, and no such decree appears in the volume of the Registered Extracts, which contain a regular series of the decrees of the Commissioners of Tithes from their first appointment in 1617 onwards. . . . The Commissioners appointed by Parliament prior to 1617 had no power whatever to unite parishes, and *de facto* the parishes of Larbert and Dunipace were not united by any such Commissioners. The allusions in the documents founded on by the defenders, and in the Statute of 1621, c. 5, to the uniting of the two kirks of Larbert and Dunipace refer only to the informal arrangement whereby one minister has served the cure in both parishes, which has been continued since the end of the sixteenth century, and to the circumstance that one stipend had been assigned to the minister from both parishes by Commissioners who assumed the duties of fixing the stipends after the Reformation, and later by Commissioners appointed in connection with the fixing of the yearly duties to be paid to the king by certain lords of erection for their lands, and for fixing ministers' stipends from sundry benefices pertaining to abbeys erected into temporal lordships. . . . Explained . . . (*a*) that if the Commission of 1617 had united these parishes they would have designated which of the two churches should be the church of the united parish for the future, that being the usual practice of the said Commission, and there would have been no necessity in 1621 for the two 'warrandis' referred to in the passage quoted from the statute of that year; (*b*) that the said statute (1617, c. 3) bears that its chief purpose was to appoint ministers and fix stipends, and that it is ancillary to these duties that the Commissioners are empowered to unite parishes in cases where the teind is insufficient in each parish to afford five chalders or 500 merks; but (1) the parishes of Larbert and Dunipace had each sufficient teind, (2) the stipend of Larbert and Dunipace in 1620 was only 200 merkis and two chalders of victual (equal together to four chalders), whereas if the Commissioners of 1617 had united Larbert and Dunipace they would have been bound in accordance with the terms of the said statute to have fixed at least five chalders or their equivalent in merks, viz., 500 merks—100 merks being then regarded and taken as the value of one chalder; (*c*) that the whole history of the two parishes for the last three centuries and more is wholly inconsistent with the defender's theory that these parishes were ever legally united by the Teind Commission. (Ans. 4) Admitted that since the latter part of the sixteenth century one 'reader' or minister has existed, and that as there has been only one minister there is only one locality . . . *Quoad ultra* denied. With regard to the signature to the formula in the books of the Presbytery of Stirling, explained that on the occasion referred to the elders signed as the elders of two separate sessions, and were specially convened for the purpose by the presbytery clerk. In point of fact, from the end of the sixteenth century onwards the elders for the parish of Dunipace and the elders for the parish of Larbert have met and transacted business as separate sessions in separate parishes, and have acted as separate sessions in every possible capacity. Admitted that on a few occasions the two sessions met together. The sederunts of such meetings expressly show, and it is the fact, that they met as two sessions, not as one. Denied that the two sessions were not represented separately by presbytery elders. Explained that the presbytery elders were commissioned from time to time by each of the sessions acting entirely without reference to one another. . . . The separate existence of each kirk-session has all along been recognised by the presbytery." . . .

The pursuers pleaded, *inter alia*, as follows:—"(2) The pursuers are entitled to obtain decree . . . in respect (*a*) that the said parishes were never legally united, and that the said parishes are respectively entitled to have a minister elected to serve the cure of each parish separately; (*b*) that the former arrangement, whereby one minister served the cure of both parishes, is by reason of the change of circumstances which has taken place impracticable and unreasonable, and ought now to be terminated. (3) The pursuers are entitled to obtain decree dissolving the ecclesiastical union between the parishes, disuniting them to that effect, whether a majority of heritors and those having rights to the teinds in the parishes consent or not, in respect that an erection of new parishes is not required."

The defenders pleaded, *inter alia*, as follows:—"(3) The action is irrelevant. (4) The pursuers are barred by their own actings in raising a process of disjunction and erection from insisting in the present

action; in any event they are so barred so long as that process is in dependence at their instance. (5) The parishes of Larbert and Dunipace having been united by Commissioners acting under statutory powers, or having otherwise been lawfully united, and that union having been acted upon for 280 years, the Court of Teinds cannot disjoin the said parishes except by a process of disjunction and erection in the manner provided by statute. (6) The pursuers' averments being unfounded in fact, defenders are entitled to be assoilzied with expenses."

On 2nd March the Lord Ordinary (Low) remitted to the Clerk of Teinds to examine the Teind Records and to report "(1) how far the parishes of Larbert and Dunipace have been treated by the various Teind Commissions as separate or as united parishes; (2) any information from other sources that may occur to him or may be suggested by the parties bearing upon the question of the union or separate existence of the parishes."

The Clerk of Teinds reported, *inter alia*, as follows:—Larbert and Dunipace were both chapels belonging to Cambuskenneth Abbey, and were for a long period before the Reformation subordinate to the church of Egglis or Kirktoun, latterly called St Ninians, after the patron saint. . . . The position of Dunipace was made the subject of inquiry by the Bishop of St Andrews, through the Dean of Linlithgow, and the result is contained in letters by the Bishop, dated 6th April 1267, in which the Bishop states—'Inuenimus ipsam ecclesiam de Donypas capellam esse ecclesie parochialis de Kirketoun et non matricem ecclesiam.' It does not appear that the church there, so long as connected with the Church of Rome, occupied any other position than that of a chapel. The chapel at Larbert seems to have been in the same position. . . . For some time after the Reformation few ministers were available, and there was much difficulty in providing stipends for them. . . . Recourse was accordingly had to the employment of readers, and their payment out of the thirds of benefices. By the year 1574 a plan had been adopted of combining three or four and sometimes a greater number of contiguous churches under one minister, with a reader to each church. This appears from the register of ministers and readers for that year, the group in which Larbert and Dunipace were embraced being 'Sanct Ninianis Kirk, Larber, Donypace, Kippane, and Kirk of Muir'; and the reader and stipend for Dunipace and Larbert are entered as—'Alexander Robesoun, reidare at Donypace and Larbar, 40 merks and kirkland.'. . . In 1599 under 'Lathbert Donypace,' there is an entry—'Mr Henry Forrestare minister his stipend xxvj$^{li.}$ xiij$^{s.}$ iiij$^{d.}$ out of the thrids of Cambuskenneth assignit of befoir to Alexander Rōbsoun sumtyme reidare at Dunypace be the takismen or parochineris of Lethbert (Dunipace is not mentioned) and out of the thrid of the said Abay and auld assignatioun thairof 1 ch. (chalder) beir and 1 ch. meill.'. . . In 1606 the abbacies of Dryburgh and Cambuskenneth and Priory of Inchmahomo were erected by Act of Parliament into a temporal lordship, called the lordship of Cardross, in favour of the Earl of Mar, including 'the kirk of the kirktoune alias Sanct Ninianis kirk with the pendicles thereof viz. the chapell or chapell kirkis of Laithbart, Donypace, mure, and Gargunnock,' and the 'paroch' kirks were erected into parsonages. . . . A Crown charter of the church lands including 'terras ecclesiasticas S. Niniani' was granted on 10th June 1610 in favour of the Earl of Mar, and on 10th April 1615 another charter was granted in favour of the Earl of Mar for services 'et ob actum Parliamenti Jul. 1606,' conveying the teinds which had formerly belonged to the monasteries of 'Inchmahomo, Dryburgh, et Cambuskenneth,' including those 'Ecclesie de kirktoun alias Sanct Ninianis Kirk cum pendiculis vizt. Capellis sive ecclesiis de Larbar, Donypace, mure et Gargunnock,' and the charter contains a special condition—'Insuper ordinavit sufficientes ministros apud quamlibet dict. ecclesiarum providere qui per regem nominarentur et haberent stipendia subsequen. secundum modificationem dominorum commissionariorum.' The stipend of the minister 'de Lairbart et Donypace' is mentioned as '1 celd. farine 1 celdram hordei 200 merc cum vicaria mansione et gleba.' On 24th February 1619 a presentation was issued by the king in favour of 'Mr Alex$^{r.}$ Norie to ye ministrie of the said Kirk of Donypace qrinto the Kirk of lairbert is now unit.'. . . It does not appear anywhere that the teinds were insufficient for the payment of two ministers for Larbert and Dunipace. . . . Only a few of the decrees uniting parishes under the Act of 1617 have been recorded under the provisions of the Act of 1707, c. 9, to supply the lost records. That there were several unions imputed to the Act of 1617, c. 3, of which the teind office has no record, is partly ascertained from the reports of statistics of various parishes in Scotland in 1627. The reporter has been unable to find any evidence that Larbert and Dunipace were dealt with under the Act of 1617." The reporter also referred to the Crown charter dated 8th February 1621, in favour of David Livingston, *infra*, and to the Act 1621, c. 5, *infra*. "There is no evidence amongst the teind records that the Commission of 1621 ever transacted any business."

The documents and Acts of Parliament founded on by the parties and referred to in the Report of the Teind Clerk, and the judgments, were (so far as material and not quoted elsewhere in this report) as follows:—The minute of the Presbytery of Stirling, of date June 28, 1598, was in these terms:—"*At Stirling, the 28th day of June* 1598.—*Inter alia*—The brethren agrees that the Lords Modifears of Ministers' stipends shall assign to Mr Henry Forrester Minister at Laithbert 40 merks out of the thrid of Cambuskynneth with the Kirk land to be payit by the taxsmen or parishioners of Dunipaice and Laithbert whilk of before was assigned to Umquhile

Alexr. Robesone sometyme Reider at the Kirks of Laithbert and Dunipaice."

The Act 1606, cap. 23, entituled 'Commission anent the Erections,' on the narrative that sundry benefices had been erected by the present Parliament into lordships and baronies, &c., granted commission to certain commissioners to modify a duty to be paid to the king and his successors out of the erections, and also to modify yearly stipends to 'eurie minister serveing or that heirefter sall serve at euerie kirk the cure, thair zeirlie stipendis in all tymes coming by thair manses and gleib of all thair kirkis qr of the patronages are disponit be or souerane Lord in this present parliament in the erectionis of temporall Lordshippis and baroneis or utherways quhatsumeuir to the effect that the haill kirkis baith already plantit and as zit unplantit may be providit to sufficient stipends in all time cuming and that euerie kirk may be provydit to ane minister to serve the cure at ilk kirk.'"

The extract presentation of Mr Alexander Norie, of date February 24, 1619, to Donypace and Lairbert was, *inter alia*, in the following terms:—"Our Souerane Lord being informit of the guid qualificatun lratur and guid conversatun of His Maties louit Mr Alexr Norie Student of Divinitie . . . ordanes ane lrĕ to be maid under the privie seill in dew forme nominatand and pntand the said Mr Alexr Norie to ye ministrie of the said kirk of Donypace qrinto the kirk of Lairbert is now unit. Lyand within the Shrefdome of Stirling dureing all the dayes of his lyfetyme and to the constant and modefeit stipend of the saids tua unittit kirkis of Donypace and Lerbert modefeit in ye erectioun of the lait abbacie of Cambuskynneth in ane temporall Lordschip callit the Lordschip of Cardros In fauors of his hienes traist cousyn and counsellor Johne erll of Mar Lord erskyne garioche and Cardros etc. or by ye cymissioneris of pliament to ye saidis unittit kirkis as fallowis to witt ye viccarage of the saids kirkis of Donypace and lairbert wt mans and gleib yrof togidder with twa chalderis evictuell viz. ane chalder beir and ane chalder of aitt meill and twa hundrethe mekis guid and usuall money of Scotland now vaicād in his maties hands and at his hienes gift and dispŏun be deceis of umqle Sir Alexr Robiesone or be deceis of qtsumeuir uyer maner of way that the samy hes vaikit or may vaik in his hienes hands requyreing and desyreing thairfoir the rycht reverend father in God John Archibischop of St Androis within quhais dyocie the saidis unittit kirkis Lyis to try and examiniat the lratur qualificatun and conversatun of the said Mr Alexr Norie."

An extract charter under the Great Seal by King James VI. in favour of David Livingston of Donypace, of date February 8, 1621, made a grant in favour of David Livingston and his heirs-male of, *inter alia* —"terras de Donypace cum pertinen et terras capellæ Scti Alexandri cum pertinen in pntia per dictum Davidem Levingstoun ejusqz subtenentes occupat et possess jacen infra parochiam de Donypace et vicecomitatum nrum de Striviling una cum omnibus et singulis decimis rectoriis et vicariis fructibus redditibus emolumentis ac divoriis ad duas ecctias seu capellas de Donypace et Larber pertinen et spectan nunc insimul unit per quosdam certos commissionarios ad eum effectum ptatem haben cum decimis omnium terrarum et prediorum jacen intra parochias earund rexive, viz., omnium et singularum terrarum de Quarell . . . cum omnibus et singulis earum partibus pendiculis et pertinen jacen intra dict duas parochias de Donypace aut Larber aut aliquam earund nunc unit ut dictum est."

The Crown charter to the Earl of Mar, of date April 10, 1615, is quoted so far as relevant in the report of the Clerk of Teinds, *supra*.

The Act 1617, c. 3, anent the plantation of kirks, appointed Parliamentary Commissioners, with power, *inter alia*, as follows—"With special powers also to the said Commissioners to unite sik kirks, ane or mair, as may conveniently be unite, where the fruits of ane alone will not suffice to entertain ane minister."

The Act 1621, c. 5, entituled "Anent the Plantation of Kirks as yet unplanted," empowered a Parliamentary Commission, *inter alia*, to adjudicate and determine upon "Item two warrands given in under his Highness' hand concerning the appointing and determining which of the two kirks of Lairbert and Donypace formerly united should be the ordinary place of public divine service of the saidis twa parochines as in the samen twa patentis conteaning their owin several desyris at mair lenth is containit."

The minutes of the Presbytery of Stirling of date February 16, 1590, and April 20, 1591, are quoted *infra*, in the opinion of the Lord Ordinary.

The decreet of locality of the united parishes of Larbour and Dunnapace, July 15, 1636, was, *inter alia*, in the following terms:—"Anent the summonds be the Lords Commissioners for Surrenders and Teinds against the heritors, titulars, tacksmen, and liferenters of the lands within the united paroches of Larbour and Dunnapace, and all others having or pretending to have interest in the matter under written, and Mr Alexander Norie, minister at the parish kirk thereof, for his interest, make and mention that for saemeikleas the lands and teinds, great and small, within the parochines of Larbour and Dunnapace in the Presbetry of Stirling, were in ane process of valuation led and deduced, the sub-commissioners of the said Presbetry valued and estimate to the particular availls and quantitys contained in the process led there anent as the samin at length bears swa that there rested only that the saids valuations of the lands and teinds above written lyand within the saids parochines should be allowed and approven be the saids Commissioners to the effect His Majesty's annuity might be cleared, the church sufficiently provided, and ilk heretor might know the true value and worth of his teind, and be resolved what course to

take anent the buying and settling the right of their teinds: And anent the charge given to the said defenders to have compeared before the saids Commissioners at ane certain day bygane to have heard and seen the foresaid valuation ledd and deduced before the saids sub-commissioners been ratified, approven, and allowed be the saids Commissioners to the effect and causes above written, or else to have alleadged ane reasonable cause why the samen should not been done, with certification if they faillzied the said Commissioners would ratifie, allow, and approve the saids valuations of the saids parochines of Larbour and Dunnapace, conform to the tenor of the Act of Parliament made anent the valuation of teinds and of the Acts made and conceived be the late Commission anent the approbation and allowing of the valuation of teinds in all points as the said summonds and executions thereof bears, whilk being this day called, and Sir Robert Spotiswood of Dunnapace, knight. presedent of the session, titular of the teinds of the said parochine, compearand personally, the said Mr Alexander Norie, minister, being also personally present, who produced the locality of the modified stipend, consisting of six chaulders victuall of the qualitys under written, and twenty pounds money for furnishing the communion elements, and that by and attour the vicarage teinds of the saids parochines ipsa corpora, and craved the samen to be ratified and approven, conform to the late Act of Parliament ordaining ilk minister within this kingdome his stipend to be locallie desyned within his own paroch, and the remanent defenders being oft timis called and not compearing, the saids commissioners, conform to the power and commission granted to them be his Majestie and Estates of Parliament for plantation of churches and settling the minister's stipend, have decerned and ordained, and by thir presents decerns and ordaines the saids numbers of six chalders victuall of the qualitys after specified, with the said sum of twenty pounds money for the communion elements, to be locally paid to the said Mr Alexander Norie, and his successors, serving the cure at the said Kirks of Larbour and Dunnapace, be the persones after nominate and their successors out of the parsonage teinds of the lands particularly aftermentioned, at the terms and tymes mentionate in the decreet of modification made thereanent, conform to the locality following, viz.—[Here followed the specification of the locality]—And the said Commissioners decerns and ordaines the localitie above written by and attour the vicarage teinds of the saids parochines ipsa corpora to stand, continue, and endure, and to be repute and holden ane constant and perpetuall local stipend and provision of the saids Kirks of Larbour and Dunnapace, and ane competent modification for furnishing the communion elements yearly thereat, and to be paid to the said Mr Alexander Norie and his above written, and their successors serving the cure at the saids kirk be the persons above named and their successors out of the parsonage teinds of their lands above declared, conform to the divisione above expressed. Because the said Mr Alexander Norie, minister, produced in presence of the saids Lords Commissioners the localitie above speed. subscribed with his hand and be the said Sir Robert Spotiswood in token of their consents thereto of the date of thir presents, whereby they agreed that the samen should stand as ane constant stipend and provisione of the said Kirks of Larbour and Dunnapace, and modification for the communion elements yearly thereat, and the said Sir Robert Spotiswood, titular, being personally present, as said is, consented and agreed thereto."

On 14th December 1900 the Lord Ordinary pronounced the following interlocutor—"Assoilzies the defenders from the second conclusion of the summons in so far as declarator is therein sought that the parishes of Larbert and Dunipace have never been legally united: *Quoad ultra* dismisses the same and the whole remaining conclusions of the summons in so far as the same have not already been disposed of, and decerns: Finds the defenders entitled to expenses, and remits," &c.

Opinion.—"The pursuers, who are the Presbytery of Stirling and certain residenters in the parishes of Larbert and Dunipace, seek in this action to have it declared that these parishes 'have never been legally united, and that it is now expedient and proper that the cure of the said churches and parishes shall be served by separate ministers in all time coming.' There then follow conclusions for giving practical effect to that declarator.

"The circumstances under which the action is brought are these:—

"The churches both of Larbert and Dunipace were originally chapels belonging to the Abbey of Cambuskenneth, and were subordinate to the Church of St Ninians. After the Reformation they appear at first to have been served by readers, one reader being appointed for both churches. In 1597 Mr Henry Forrester was appointed minister of Larbert, but he also served the cure of Dunipace. A minute of the Presbytery of 28th June 1598 bears that 'the brethren agrees that the Lords Modifears of Ministers' Stipends shall assign to Mr Henry Forrester, minister of Laithbert, 40 merks out of the thrid of Cambuskynneth, with the kirk land, to be payit by the taxmen or parishioners of Dunipace and Laithbert, whilk of before were assigned to Umquhile Alexr. Robesone sometyme Reider at the Kirks of Laithbert and Dunipace.' From an entry in the Register of Ministers and Readers for the year 1599, quoted by the Teind Clerk in his report, it appears that the arrangement proposed by the Presbytery was carried into effect. At that time but few ministers were available, and it was not unusual for the minister of one parish to have one or more neighbouring parishes for which ministers could not be obtained committed to his charge.

"Such an arrangement was continued as regarded Larbert and Dunipace until the

year 1619, when Mr Alexr. Norie was presented by the Crown 'to ye ministrie of the said Kirk of Donypace qrinto the Kirk of Lairbeth is now unit.' Until that date, whenever there was a minister of Larbert he also served the cure of Dunipace, and if there was no minister of Larbert the charge of both parishes was committed to the minister of an adjoining parish. Dunipace seems never to have had a minister of its own as a separate parish. Since 1619 one minister has always been appointed to the two parishes, and in the presentations which have been produced the parishes are described as united. Further, in all summonses for augmentation of stipend the minister has sued as minister of the united parishes, and the Teind Court have in their proceedings treated the parishes as being united and there has been only one locality. Further, prior to 1617, when for the first time Commissioners were appointed with power to unite parishes, Larbert and Dunipace are not referred to anywhere as being united, whereas after that date they are referred to as united parishes in presentations of ministers to the parishes, in charters, in summonses, and in the records of the Church courts.

"I have already referred to the presentation of Mr Norie to the 'kirk of Donypace qrinto the kirk of Lairbert is now unit.' That is the first reference to the parishes as being united, and as the Commissioners appointed in 1617 concluded their labours in 1618, the fact that a presentation by the Crown in the following year for the first time described the parishes as 'now united,' raises a presumption that they had been united by the Commissioners. The next document produced is a Crown charter of confirmation granted in 1621 to David Livingston of Dunipace. In it are disponed the lands of Dunipace 'jacen infra parochiam de Donypace et vicecomitatum nrum. de Striveling,' along with the teinds 'ad duas ecclias. seu capellas de Donypace et Larber pertinen et spectan., nunc insimul unit per quosdam certos commissionarios ad eum effectum ptatem haben.' The only Commissioners answering that description at that time were those appointed under the Act of 1617. I need not quote other documents; it is sufficient to say that from 1619 onwards the parishes are described as united in a great variety of writs. The defenders' case accordingly is that the parishes were united by the Commissioners of 1617.

"The case presented by the pursuers was to the following effect:—They maintain that it is capable of demonstration that the parishes were not united by the Commissioners of 1617, and that it is plain that they had not been united either by a bishop prior to the Reformation or by Act of Parliament. The presbytery, however, had caused the minister of Larbert to serve the cure of Dunipace also, and had authorised him to draw stipend from Dunipace as well as from Larbert. Sometime between 1608 and 1615 the stipend of Larbert and Dunipace was augmented. That was almost certainly done by the Commissioners appointed by the Act 1606, c. 23, who were directed to modify a sufficient stipend to every minister, but who were not given power to unite parishes. The position of matters therefore was this—Both parishes were in fact served by one minister, and the Lords Commissioners had modified to him one stipend out of both parishes. The parishes in that way came to be regarded as being united although they had never been legally united. That that was the origin of the reputed union is corroborated by the anomalous condition of matters which has existed in the parishes ever since. There have always been two churches, the parishioners of each parish resorting to their own church. The heritors of each parish have maintained their own church, and the cost of building and maintaining the manse, which is situated in Larbert, has been divided equally between the two parishes. There have always been two kirk-sessions, each having its own clerk. Cases of discipline and the like arising in either parish have been dealt with by the kirk-session of tha parish, and banns of marriage have been published in the church of the parish in which the party resided as if it was a separate parish. There has been a separate school and schoolmaster for each parish. The poor funds of each parish were separately administered, and each parish has had a separate parochial board, school board, and parish council after these bodies were established. Separate road trustees were elected for Dunipace and Larbert, and the road assessments were imposed upon the ratepayers of the two parishes separately.

"Now, the crucial question seems to me to be, whether the pursuers have established, as they claim to have done, that no union of the parishes was effected by the Commissioners of 1617, because if that can be established, then I think that it would be sufficiently plain that the reputed union of the parishes had only sprung from the facts that the minister of Larbert had been appointed by the presbytery to serve the cure of Dunipace also, and that the Commissioners of 1606 had modified a stipend to him out of the teinds of both parishes. If that were shown to be the case, the pursuers would, at all events, have taken a long step towards obtaining the declarator which they seek.

"The first proposition of the pursuers is that in 1617 the stipend was above the minimum of 500 merks, and that therefore the Commissioners had no power to interfere. By the Act 1617, c. 3, the Commissioners were directed to appoint and assign out of the teinds of every parish a perpetual local stipend to the ministers at all kirks that shall be found by them either as yet not provided at all, or where the provision is less than 500 merks yearly rent in money; and it was declared that kirks which were planted with ministers whose stipend extended to 500 merks were 'expressly excepted out of this Commission.' Now, the stipend modified by the Commissioners of 1606 amounted in all to 683 merks, and the pursuers therefore argue that the case did not fall within the scope of the

Commission, but was expressly excluded. That would have been a very good argument if the stipend for each parish had been 683 merks, but the fact was that that was the stipend for both parishes, and therefore the stipend of each of them, or of one or other of them, must have been below the minimum. The Commissioners therefore were bound in terms of the Act to deal with both parishes, or with that one of them which had not a sufficient stipend.

"The pursuers next found upon the fact that the Commissioners did not alter the stipend, which is found to be the same in 1619 as it was prior to 1617. That is shown to have been the case by a Crown charter which was granted to the Earl of Mar in 1615, and the presentation of Mr Norie in 1619. The charter conveys, *inter alia*, the teinds of the monastery of Cambuskenneth, including those of the churches of Larbert and Dunipace, under burden of the stipends '*secundum modificationem dominorum commissionariorum.*' The stipend of the minister 'de Lairbar et Donypace' is stated at two chalders of victual, 200 merks, and the vicarage. From another source the value of the vicarage appears to have amounted to 283½ merks, which when added to the 200 merks and the money value of the victual stipend, makes the sum of 683 merks which I have already mentioned. In the presentation of Mr Norie the stipend is stated to be—'Ye vicarage of the said kirks of Donypace & Lairbert with twa chalderis evictuell viz ane chalder beir and ane chalder of aitt meill and twa hundrethe mekis guid and usuill money of Scotland.' That is the same stipend as is mentioned in the charter of 1615.

"It therefore does appear that the Commissioners of 1617 did not alter the stipend. and that being the case the pursuers contend that they could not possibly have united the parishes. As I have already pointed out, the Commissioners were first directed to appoint a stipend to the ministers at all kirks where the provision was less than 500 merks yearly, and then they were given this special power — 'With special power also to the saids Commissioners to unite sik kirks, ane or moe, as may conveniently be unite, where the fruits of anyone alone will not suffice to entertain ane minister.'

"The argument is that a question of uniting parishes could only arise if and when the Commissioners were dealing with the stipends, and it being proved that they did not deal at all with the stipend of Larbert and Dunipace, it followed that they did not unite these parishes.

"Now, it does not seem to me to be a necessary inference from the fact that the amount of the stipend was not altered by the Commissioners, that they did not deal with it. The duty of the Commissioners was to appoint a stipend out of the teinds of 'every parochin' to the ministers at 'all kirks' that they should find 'as yet not provided at all with ministers and stipends,' or where the provision was less than 500 merks. The Commissioners were therefore bound to deal with the parishes of Larbert and Dunipace, because neither of them alone had a stipend of the minimum amount, and Dunipace had no minister. I should here point out, however, that I am now assuming that the Commissioners did deal with parishes in the district in which Larbert and Dunipace are situated. They may not have done so, because they had not completed the work entrusted to them when the Commission expired at Lammas 1618. I shall afterwards consider what evidence there is that the Commissioners did deal with Larbert and Dunipace, but in the meantime I am merely examining certain grounds upon which the pursuers argue that Larbert and Dunipace did not fall within the view of the Commission.

"Sir John Connell in his work upon the Law of Tithes (vol. i., pp. 115-116) describes the way in which the Commissioners carried out the provisions of the Act. He says that they divided Scotland into districts, and issued summonses against the patrons, ministers, and heritors of each of the parishes within each district, requiring them to attend the Commissioners in Edinburgh. 'Then,' says Connell, 'the state of the tithes and the former provision of the ministers of the different parishes were reviewed in their order, and stipends were assigned in terms of the Act.' The Commissioners therefore must (assuming that they dealt with the district in question) have inquired into the position of matters as regarded the state of teinds and the provisions for the ministers in Larbert and Dunipace, and they must have ascertained that there was not, and had never been, a minister of Dunipace, that the minister of Larbert had served the cure of both parishes, and that he had had a stipend assigned to him out of both parishes, which, although above the minimum amount of one parish, was below the minimum amount if divided between two parishes.

"In these circumstances it seems to me that a very natural course for the Commissioners to have followed would have been to unite the parishes and continue, or of new modify, the existing stipend, which had been modified by the Commissioners of 1606 for both parishes. It is true that the existing stipend was larger than that which the Commissioners seem to have been in use to modify; but it was the existing stipend, and assuming that the Commissioners of 1606 exceeded their authority in giving to the minister of Larbert a stipend from both Larbert and Dunipace, that matter was put right by uniting the parishes, and, the parishes being united, it was in accordance with the spirit of the Act of 1617 that the minister serving the cure of the parishes should not be put in a worse position than he had previously occupied.

"But then it was argued that there was another circumstance which showed that the Commissioners could not have united the parishes, and that was that the teinds of each parish were sufficient to provide the minimum stipend. If that was the case, it must, I think, be admitted that

it would have been *ultra vires* of the Commissioners to unite the parishes, because the Act only gave them power to unite parishes if 'the fruits of any one alone will not suffice to entertain ane minister.'

"The Teind Clerk says in his report that 'It does not appear anywhere that the teinds were insufficient for the payment of two ministers for Larbert and Dunipace.' I have no doubt that that statement is correct, but I think that it would be equally correct to say that it does not appear anywhere that the teinds were sufficient; and it is worthy of note that the Presbytery minutes show that until the stipend of 683 merks was modified by the Commissioners of 1606, great difficulty was experienced in getting a minister to serve the cure of the parishes on account of the meanness of the provision.

"It therefore seems to me that it cannot be assumed that it was incompetent for the Commissioners to unite the parishes, because the teinds of each of them were sufficient to supply a stipend for a minister.

"The next point with which I shall deal is one which arises upon the Act 1621, cap. 5.

"By that Act a Commission was appointed to complete the work which had been left unfinished by the Commissioners of 1617. The Act also authorised the Commissioners to determine certain special questions which had been raised by 'the particular petitions and supplications after specified, given in to them' (the estates of Parliament) 'by the persons under written.' Among these 'petitions and supplications' is the following — '*Item*, two warrants given in under his Highness hand, concerning the appointing and determinating which of the two kirks of Lairbaire and Donypace, formerly united, should be the ordinary place of public Divine Service of the said two parochines, as in the same two patents conteining their own several desires at more length, is contained.'

"Both parties found upon that clause. The defenders rely upon the clause as being a statutory recognition of the union of the parishes, and upon that point I shall have something to say afterwards. The pursuers, on the other hand maintain that the clause shows that the parishes had not been united by the Commissioners of 1617 because (1) if they had united the parishes they would have fixed which of the two churches was to be the church of the united parishes; and (2) the two warrants referred to can be identified with two writs mentioned in the Presbytery minutes in 1590 and 1591, which would have been superseded if the parishes had been united by the Commissioners.

"In regard to the first of these points, no doubt if the Commissioners united parishes they might very well have appointed one church to be the parish church of the united parishes, and indeed it may be that it would have been in accordance with their usual practice to have done so. But they were not bound to do so, and one can readily imagine circumstances which would render it inexpedient to appoint the church of either parish to be the church for the united parishes; for example, the distance might be too great. I therefore do not regard the fact that one of the churches was not appointed to be the parish church as being of much importance.

"In regard to what is meant by the two warrants, the pursuers refer to the Presbytery minutes of 16th February 1590 and 20th April 1591. The former minute narrates that there 'comperit Alexr. Roberstone, messenger, who in our Soveraine 'Lord's name chargit the brethren of this Presbytery to require the parishioners of the kirk of Lairbert to elect, nominate, and choose persons for stenting of the Samin. And gif they delay or refuse, that the said Presbytery or their Commissioners elect and nominate sic persons as they shall think maist meet for making of ane taxation and stent for bigging and repairing of the said kirk of Lairbert, presently ruinous, within ten days next after his charge, under the pain of rebellion and putting of the Presbytery to the horn.'

"The presbytery accordingly took steps in the matter, and found 'ane gude number of pepill varie willing to have their ruinous Kirk repairit.' On 6th April 1591, however, it was reported to the Presbytery by the parishioners of Larbert that John Livingston of Dunipace had 'stayit repairing of the said kirk.' John Livingston was accordingly summoned to appear before the presbytery on 20th April to answer 'for staying that godly work of repairing of Lairbert Kirk.' He duly appeared, and explained that he had been ignorant that the work had been commenced by advice of the presbytery. He had, however, in the meantime been preparing a counter move, because the minute of the same meeting narrates there 'comperit Alex. Roberstone, Messenger, who in our Sovereign Lord's name Chairgit the brethren of this Presbytery to require the parishioners of Dunypaice to elect and choose persons for stenting the same, and the parochin of Lairbert for making of ane taxation to repair the Kirk of Dunypaice according to our Sovereign Lord's letters in all points direct at the instance of John Livingstone apperand of Dunypaice.'

"The minute then bears that the presbytery thought good to crave the suspension of the said letters, on the grounds (1) that the parishioners of Larbert were very willing to repair their own church; (2) that the flocks of God might be better attended by two pastors to the two churches than by one; and (3) that John Livingston had been summoned by the parishioners of Larbert to appear before the Secret Council for the same matter.

"It does not appear what further steps, if any, were taken, because the question of repairing the churches is not again referred to in the presbytery minutes prior to 1621.

"I think there can be no doubt that the charges given to the presbytery were upon letters of horning, because that was the recognised method of enforcing the obligation to repair a parish church.

"Now, the pursuers' contention is that these letters of horning, issued in 1590 and 1591, reappeared in the Act of 1621 under the general head of petitions and supplications given in to the estates of Parliament, and particularly described as 'Warrants given in under His Highness' hand,' and as 'patents.' That description appears to me to be singularly inappropriate to letters of horning issued by the Court of Session thirty years previously. Letters of horning were not presented to the estates of Parliament, and letters of horning would not, I imagine, be described as 'patents.'

"Then the subject-matter of the warrants is described as 'concerning the appointing and determinating which of the two kirks of Lairbaire and Donypaice, formerly united, should be the ordinary place of public Divine Service of the said two parochines.' I think that it is plain that the first of the letters of horning could raise no question of that sort, because the charge was only to compel the parishioners of Larbert to repair their own church. In regard to the second letters at the instance of John Livingston, Mr Ure ingeniously argued that they must have contained a claim that the church of Dunipace should be the church of Larbert as well, otherwise the parishioners of Larbert could not have been charged to repair the church of Dunipace. We know nothing more about the contents of the letters than what appears in the presbytery minute, but I cannot understand how the question whether the church of Dunipace should be made also the church for the parish of Larbert could possibly be raised or determined under letters of horning. My impression is that the letters were a mere device on the part of John Livingston to prevent or delay the repair of the church of Larbert, to which for some reason or other he seems to have been opposed.

"The probability therefore is that the warrants or patents were not the letters of horning, although I confess that I have no idea of what kind of writs they were. I do not, however, think that in any view the pursuers can take benefit from the Act of 1621, because the question said to have been raised in the warrants assumed that the parishes had been united, and it is to be presumed that Parliament would not have remitted that question to Royal Commissioners unless it had been satisfied that the union was legal and valid.

"I have now indicated my opinion upon the evidence relied on by the pursuers as establishing that the parishes were not united by the Commissioners of 1617, and I shall now consider what evidence there is that these Commissioners dealt with the parishes and united them.

"It is common ground that if the parishes were not united by the Commissioners, the only thing in the nature of a union between them was that the minister of Larbert had been instructed by the Presbytery to take charge of Dunipace, and that the Commissioners of 1606 had modified a stipend for both parishes. Now, in 1619 these were recent matters of which many people connected with the parishes and then in life must have had personal knowledge. Yet in that year the Crown presented a minister to both parishes upon the narrative that they were 'now' united—the word 'now,' I think, indicating that the union had only recently been accomplished. Then two years later a charter was granted to David Livingston of, *inter alia*, the teinds of the parishes, and they are there described as having been united by Commissioners having power to that effect. Now, up to that date the only Commissioners who had power to unite parishes were those appointed in 1617.

"It seems to me that the inference from these two writs that the parishes were united by the Commissioners is very strong. The King in 1617 appointed Commissioners with power to unite parishes, and in 1619 he presented a minister to the cure of these two parishes, which had in fact been separate in 1617, on the narrative that they were 'now united.' The inference plainly is that they had been united by the Commissioners. The same thing may be said of the charter of 1621. It must have been well known in that year whether the Commissioners had or had not united the parishes, and it is difficult to believe that the framer of the Crown charter would have described the parishes as being united in terms which would plainly be untrue if they had not been united by the Commissioners.

"In regard to the Act of 1621 I have only this to add to what I have already said, that it seems to me that the natural inference from the description of the parishes as 'formerly united' is that they have been united by the Commissioners of 1617. At a comparatively short time before the Act was passed it would have been impossible to say that the parishes had been united, and in describing them as united the Act was speaking of something which had been done at most a few years previously. Now, nothing had then been done which Parliament could recognise as a union of the parishes unless they had been united by the Commissioners of 1617. It was, however, pointed out that in the clause of the Act immediately succeeding that which I have quoted reference is made to a petition by the parishioners of certain parishes which are described as 'united by the former Commission.' The pursuers quite legitimately founded upon the difference between that description and the description of Larbert and Dunipace, as showing that when parishes had been united by the former Commissioners the Act said so. I quite recognise the force of the argument, but I am inclined to think that the two expressions mean the same thing.. The framers of these old Acts, although they generally succeeded in making their meaning clear, were not careful to maintain the same phraseology throughout; and further, it is probable that the framer of the Act had, when drawing the part of it to which I am referring, the various petitions and supplications before him, and took the descriptions of parishes which he found in them. If the warrants referred, as I think they

must have done, to some application made after the parishes were united, to have one of the churches appointed to be the church of the united parishes, they may very well have described the parishes simply as 'formerly united.' Further, I repeat that it is not to be assumed that Parliament would have remitted to the Commissioners to determine whether one of the two churches was to be the parish church of the united parishes unless it had been plain that the parishes had in fact been legally united.

"The evidence therefore stands thus. Prior to the Commission of 1617 no document whatever can be found in which the parishes are spoken of as being united, while almost immediately after the close of the Commission a minister was appointed to the parishes on the ground that they were 'now united,' a Crown charter was granted to the teinds of the parishes, describing them as 'united by certain Commissioners having power to that effect,' and an Act of Parliament was passed in which the parishes were described as 'formerly united.' Then from that date down to the present time the parishes have had only one minister, who has been the minister of the united parishes, and the Teind Court and the Church courts have dealt with the parishes as being united.

"That seems to me to constitute a very considerable body of evidence in favour of the view that the parishes were united in 1617. The pursuers, however, contend that any inference which can be drawn from the circumstances with which I have been dealing is entirely displaced by the position of matters which has existed in the parishes all along, because, except that there has been one minister and one stipend, the parishes have been in every respect entirely separate. The pursuers therefore maintain that any union which there may have been cannot have been a formal union of the parishes established by decree of a competent tribunal.

"Now, although there are instances in the books of parishes which have been united but which have nevertheless remained separate in regard to certain matters, I do not think that there is any instance of united parishes having so completely kept up the machinery of separate parishes as in the present case. I think, however, that the existence of separate organisations in the two parishes may in large measure be explained by the fact that each of them was allowed to retain its church. The continued existence of a church in each of the old parishes accounts for the existence of two kirk-sessions, each of which supervised those parochial matters which concerned only the church and district which they represented. In like manner, the heritors of each parish maintained their own church, and in that way the heritors of the two parishes remained in many respects distinct bodies. Then there appear to have been two parish schools, but I think that it may be surmised that the same considerations which left to both parishes their churches may also have rendered it expedient to have separate schools. Now, when each parish had its kirk-session, its body of heritors, and its parish school, the transition to the parochial bodies which have been created by modern legislation was not difficult. It is also to be noticed that the minutes which are produced show that although there were separate kirk-sessions and separate bodies of heritors where matters peculiar to the respective districts were concerned, these bodies met together as the heritors and session of the united parishes when matters of common interest required to be dealt with. Therefore, although the condition of the parishes presents an unusual and anomalous state of matters, I do not think that it is necessarily inconsistent with the idea that the parishes were united by the Commissioners of 1617.

"My opinion therefore is that the pursuers have failed to prove that the parishes were not legally united, and that, I think, is sufficient to enable me to dispose of the declaratory conclusion to that effect. The pursuers are seeking to set aside a union of the parishes which has been recognised and acted on for nearly three hundred years. The onus of proof is therefore upon them, and in my judgment they have failed to discharge that onus.

"I must now deal with an alternative view of the case which was presented by the pursuers. They contended that even should they not be found entitled to decree to the effect that the parishes have never been legally united, they are nevertheless entitled to decree of declarator in terms of the remainder of the second conclusion, namely, 'that it is now expedient and proper that the cure of the said churches and parishes shall be served by separate ministers in all time coming,' and also in terms of the third conclusion, under which decree is asked 'that any ecclesiastical union or arrangement at present subsisting, or heretofore made, whereby one minister has served the cure of both of the said parishes and churches, shall now terminate and be null, void, and ineffectual in all time coming, and that one minister shall serve the cure in each of the said two parishes and churches now and in all time coming.'

"Now, the competency of this action was sustained by the First Division, because it was founded upon the averment that the parishes had never been legally united, and because the leading conclusion of the summons was for declarator that that was the case. If the parishes had never been legally united, then an action of disjunction would have been a process inappropriate to the circumstances, and accordingly the plea that this action was incompetent was repelled. But it seems to me that, if the pursuers are not entitled to have it declared that the parishes were never legally united, the basis of the whole action falls, because in that case the parishes must be regarded as being united parishes, which can only be disjoined in an action of disjunction in the Teind Court.

"I am therefore of opinion that the pursuers are not entitled to decree in terms of any of the conclusions of the summons, and

it seems to me, as at present advised, that the proper interlocutor to pronounce is one assoilzieing the defenders from that part of the second conclusion which seeks to have it declared that the parishes have never been legally united, and *quoad ultra* dismissing the action."

The pursuers the Presbytery of Stirling reclaimed.

The arguments of the parties on the facts sufficiently appear from the opinions of the Lord Ordinary and Lord Kinnear. The following cases were referred to in the argument:—*Campbell* v. *Campbell*, November 13, 1852, 15 D. 5; *Chrystison* v. *Anderson*, February 15, 1631, Mor. Dict. 7946; *Presbytery of Selkirk* v. *Scot*, November 21, 1753, Mor. Dict. 15,823.

At advising—

LORD KINNEAR — The summons in this case asks for a declarator "that the parishes of Larbert and Dunipace have never been legally united, and that it is now expedient and proper that the cure of the said churches and parishes shall be served by separate ministers in all time coming," and for a decree "That any ecclesiastical union or arrangement at present subsisting or heretofore made, whereby one minister has served the cure of both the said parishes or churches, shall now terminate, and be null, void, and ineffectual in all time coming, and that one minister shall serve the cure in each of the said two churches and parishes now and in all time coming." These two conclusions seem to point to a certain extent to a discretionary decision of this Court, by which upon grounds of expediency we are to bring a former arrangement to an end and find that it is null and void, and to introduce for the future a new and different arrangement for service of the cure in these parishes. But the question that we really have to determine at present is not one of expediency or of comparative advantages to the parishioners at all, but is really a question of legal right, because the only case that can be maintained in this Court, whatever procedure may be taken for obtaining the disjunction of parishes in the Court of Teinds, the only procedure which can be taken in this Court depends exclusively on legal rights, and the decree that we are asked to pronounce must be a decree that as matter of law there never has been a competent and effectual union of these two parishes of Dunipace and Larbert, but that they are two entirely separate and distinct parishes; and have never been anything else, and if we can come to that conclusion, then all the other conclusions suggested by the terms of the summons, so far as I have read them, follow as a matter of course. Now, it is admitted that Larbert and Dunipace have been supposed to be united parishes, and have been treated as such by the Crown, by the Presbytery and General Assembly, and by the Commissioners of Teinds, and that the cure has been served by one minister as the minister of one parish for a period of very nearly 300 years, and it must I think be plain that the pursuers undertake a very formidable task indeed when they ask us to say that this persistent practice of 300 years has been all along wrong, and that all the official and other persons concerned were quite mistaken in supposing that there ever was a united parish of Larbert and Dunipace, because in fact there were always and are now two separate and distinct parishes.

The history of the parishes is somewhat obscure, and although we have had the advantage of very able arguments from counsel on both sides, and also of the learned researches of the Teind Clerk, to whom we are greatly indebted, I am disposed to think that the obscurity has not been altogether dispelled. But still I think there is evidence enough to enable us to come to a satisfactory conclusion. I am not going to examine the evidence in detail, although it would be easy however tedious to do so, since every point that can be made upon it, and every scrap of documentary evidence that can be founded on has been brought before the Court with the greatest minuteness, and also with the greatest clearness by the counsel at the bar. But I do not think it necessary to follow them in their examination in detail of all the documentary evidence, because the point really appears to me to turn upon one or two outstanding facts, which are, I think, very clearly and quite sufficiently explained in the opinion of the Lord Ordinary. And I may say that I concur with the Lord Ordinary in the general view which he has taken of these facts, and in the conclusion at which his Lordship has arrived.

I think, in the first place, that the Lord Ordinary is perfectly right in saying, and indeed it is obvious from what I have already observed that in my judgment he is right in saying, that the onus lies upon the pursuers, and that it is a very heavy onus. Mr Ure said that we must start in this inquiry with the fact that there had been from all time two distinct, separate, well-recognised parishes of Dunipace and Larbert, and therefore that we must be satisfied that these two parishes had been formally united by the legal act of some competent authority to which it was possible to point with perfect clearness as the authority that had joined the two parished.

I cannot agree with that way of looking at the matter. In the first place, I think that as matter of law when you undertake to show that a persistent practice of nearly 300 years, recognised by every kind of official authority, has been all wrong, all the presumptions are against you. And in the second place, I think that Mr Ure's point is historically quite inaccurate. I do not think that there is any evidence that Dunipace and Larbert ever were well-recognised, distinct, and separate parishes. When we first find mention of them in the historical evidence that has been brought before us they were certainly not parish churches, but they were chapels belonging to the parish church of Kirkton or St Ninian's, and the

parish church of Kirkton itself, with its chapels of Dunipace and Larbert, and some others, had been bestowed upon the Abbey of Cambuskenneth. The Teind Clerk in his report points out that at an early period a question had been remitted for inquiry to the Bishop of St Andrews, which was raised by a claim on behalf of Dunipace to be considered as an *ecclesia matrix*, which according to Ducange is the same thing as a baptismal church. Now, it might probably be inferred from a claim of this kind being made on behalf of the church of Dunipace that there was, or at all events those who made the claim thought there was, a full and sufficient parish attached to that church; but then, unfortunately, the claim failed, and the Bishop, after inquiry, reports that Dunipace is not an *ecclesia matrix* or baptismal church at all, but that it is a chapel of the church of Kirkton and nothing more; and therefore no inference can be drawn from that proceeding, except that an attempt was made at a very early period of its history to have this church treated as something more than a chapel, but that the attempt failed. Now, I think there is no evidence that down to the Reformation, or for a considerable time afterwards, these churches were ever treated as anything but chapels. They remained chapels of Kirkton, as Kirkton remained a benefice of Cambuskenneth, and they so stood when the Reformation came. It does not at all follow that they might not at the Reformation, and when the new system of church administration which was founded upon the ruins of the old church, came to be organised, be recognised as distinct parishes. I should not suppose that is at all improbable or indeed a difficult hypothesis to establish if there were evidence for it, because, I presume, though the question is not perhaps very clear, that the way in which chapels of that kind would grow into parishes is simple enough. In the first place when they were founded the churches would be duly consecrated, and the benefactor who founded them would probably bestow on them a grant of teinds, and then there are many instances to show that after he had got his church consecrated and had given his teinds to it, he was very apt to make a grant of the whole benefice he had brought into existence to a religious house, or perhaps, as in this case, to a greater church, and the consequence of that arrangement would be that parsonage teinds which had been appropriated to this chapel would come to be collected by a religious house or great ecclesiastic, and the vicarage teinds would come to be collected by the official who served the cure. But the ecclesiastics entitled to the teinds would still collect parsonage and vicarage teinds respectively within a certain known district defined by boundaries as in right of the chapel, and accordingly a district which had become attached to a church of this kind would be perfectly well known and recognised at the Reformation, and when the new system was coming into operation would be recognised as a parish—a parish belonging to a certain church which had served the cure of souls within that district, and which had been endowed with teinds produced within the district. And therefore the process by which chapels might develope into parish churches would be simple enough; and if there was any evidence to show that this had happened in the case of Dunipace and Larbert, there would be no difficulty in accepting the conclusion that these, as soon as the new system began to come into force, were recognised as two distinct and separate parishes. But then I think there is no such evidence. In the first place, there is no evidence that there ever were at any time separate ministers in the two parishes. Immediately after the Reformation there was at Larbert and at Dunipace, and throughout the greater part of the country, no minister at all—the cure was served by readers, and one reader only was appointed to serve Larbert and Dunipace together. I do not think any inference can be drawn from that contrary to the pursuers' case that there were two parishes, because that was nothing but a provisional arrangement which was forced on the church because there were no means for providing sufficient endowments for the minister or for supplying the parish with proper equipment at all. But the fact still remains that that was what happened, and then when a minister was first appointed he was appointed to the church of Larbert without mention of Dunipace, but he seems to have served the cure in Dunipace and to have drawn part of his stipend from Dunipace just as if it had belonged to him. There was therefore no separate establishment or separate equipment of parishes immediately after the Reformation. But then it appears from the Act of Parliament of 1606, by which the benefices of the Abbacy of Cambuskenneth and certain other abbacies—the abbacies of Dryburgh and Cambuskenneth and priory of Inchmahome—were erected into a temporal lordship in favour of the Earl of Mar, that up to that date the position of the two churches was exactly what it had been throughout the previous course of history. They were still recognised as chapels belonging to Kirkton, and nothing more, because this Act of Parliament, which ratifies the erection in favour of Lord Mar, sets out, after a very elaborate enumeration of a great variety of benefices which were conferred on that Lord, and all of which were erected into one temporal lordship, certain churches, and among them "the Kirk of the Kirktoune *alias* Sanct. Ninianis kirk, with the pendicles thereof, viz., the chapell or chapell kirkis of Laithbart, Donypace, Mure, and Gargunnock." Then the Act provides—"Therefore our said Sovereign Lord has erected and erects all and sundry particular parish kirks of the said three abbacies above written into several and distinct parsonages and vicarages, and ordains the same in all time coming to be called the parsonages and vicarages of" so-and-so (inserting certain

names). And it is observable that the parish kirks which are thus to be erected in all time coming as parsonages and vicarages include the kirk of Kirkton or St Ninians, but do not include the pendicles of Larbert and Dunipace, and therefore it seems to me to be clear enough that this statute still treats these two churches as having exactly the same ecclesiastical status and no more that they had had throughout their previous history. They are set out as chapels that belong to the parish kirk of Kirkton and St Ninians, and then the Act goes on to say that all the parish kirks are to be parsonages or vicarages in future. It sets out among the rest Kirkton or St Ninians, but takes no notice of its pendicles or chapels of Larbert and Dunipace.

Now, it is obvious to remark as to this charter, and as to the statutory ratification also, that the framer of the charter of erection would no doubt take his list of benefices from the register of the Abbey of Cambuskenneth, just as they stood, and therefore that no very certain inference can be drawn from the mere repetition of benefices which would be found in the records of the abbey. I think that is a perfectly fair observation, but at the same time the fact remains that the two chapels are not now treated, when an occasion offered for treating them, as distinct and separate parishes at all, but are still treated as nothing but chapels which are dependent on the parish church of Kirkton. Now, if that was the state of things up to the time when the new administrative arrangements of the church came into force, it is very important to see what was the treatment of these two churches after these arrangements had assumed a consistent and regular form; and I quite agree with the Lord Ordinary therefore that the material point of time we have to consider in this inquiry is the year 1619, when for the first time we have a formal presentation of a minister to serve the cures of Larbert and Dunipace. I think the Lord Ordinary's observations upon the evidence in regard to that time are perfectly sound, and I do not think it necessary to repeat them at length, although I shall advert to one or two points which appear to me to be the most important among them. But I am not quite sure that I altogether concur with the Lord Ordinary in one respect in the view which he takes of the arrangement made at that time. The first material piece of evidence is the presentation of Mr Alexander Norie, on 24th February 1619, to Dunipace and Larbert; and this presentation, which is instructed from the public records, sets out that our Sovereign Lord being informed of the good qualification, literature, and good conversation of His Majesty's lovite Mr Alexander Norie, student of divinity, nominated and appointed "the said Mr Alexander Norie to the ministry of the said kirk of Dunipace, whereunto the kirk of Larbert is now united, lying within the sheriffdom of Stirling, during all the days of his lifetime, and to the constant and modified stipend of the said two united kirks of Dunipace and Larbert, modified in the erection of the late Abbacy of Cambuskenneth" into a temporal lordship. Now, you have here a perfectly definite assertion by the Crown that Dunipace and Larbert are united churches, and that in respect of their having been united the Crown presents this gentleman to be minister of both these united parishes. The Lord Ordinary says, and I think quite justly, that this implies that a formal union had been made of the two parishes, and that sets us upon the inquiry how and when it had been made, and his Lordship comes to the conclusion, upon very strong grounds, that it had been made by the Commission of 1617. The only point on which, as I have said, I am not sure that I entirely concur with his Lordship's view on this matter is, that he seems to me to consider it more indispensable to the defenders' case to show that the union was in truth made by the Commission of 1617 than I think really necessary.

The other suggestion that has been made, and with a good deal of ground to support it, is that whatever union had been made may probably have been before 1615, and therefore that it must have been made by the Commission of 1606, which was a Commission for modifying stipends; and if that were so, then a point arises to the pursuers that whereas the Commissioners of 1617 had conferred upon them in express terms the power to unite kirks, no such power was given to the Commission of 1606, and therefore that if the Commission of 1606 made any union it could only be a practical union which would arise from their assigning one stipend for both districts or parishes, if so be, of Dunipace and Larbert. And then I think the Lord Ordinary seems to suppose that if that were so, the inference would be that all the subsequent administration which proceeded upon the assumption of a formal union was really a mistake induced by its being supposed that the Commissioners of 1606 had power to make and in fact made the union by assigning one stipend to two parishes. Now, on that point I am not quite prepared to agree with the Lord Ordinary. I think if it were shown—which it cannot be, it is mere matter of conjecture—but if it were shown that the Commission of 1606 had made a practical union by assigning one stipend to these two parishes, and that that had been accepted by the Crown, by the titular, by the Church Courts, and by the Commissioners of Teinds, and acted on for more than 280 years, it would be too late now for us to say that that was all wrong. It must be remembered that there is no conclusive evidence that there were then two well-constituted parishes, and that therefore the hypothesis is not that the Commissioners were altering an old arrangement, but that finding things in confusion they made provision for new rights in such a way as to involve the union into one parish of two districts, which might or might not have been separate parishes, but which were certainly not effective parishes before. The only point that really can be made

upon the assumed procedure in 1606 would be this, that that was not really a formal or legal union at all, and that would mean that it could not have been accepted as a binding and legal union by the Crown and the official bodies that I have mentioned. But then the answer is, they did accept it; they did say, "There is a union," and acted upon that assumption. There are only two possible inferences that could be drawn. One is, that that was accepted as sufficient by the authorities of the country at the time, and the whole parties interested, and the other, which is perhaps more probable, that the union was not in fact made by the Commission of 1606 but by the subsequent Commission of 1617, which had undoubtedly power to make it. And therefore, with that observation, which is not so much a dissent from the Lord Ordinary on any point of fact as a difference as to the views which may be taken of the legal consequence of assumed facts, I come back to the view the Lord Ordinary takes, that all the evidence tends to show that there was a union by the Commission of 1617.

There is in the first place the presentation, which is a very distinct assertion by the Crown that there was such a union. Then there follows in order of date a charter of 1621, which also sets out the fact of the union—I mean the charter in favour of David Livingston of 1621 in which the two churches or chapels of Dunipace and Larbert are expressly mentioned as being now united together into one. Then immediately after, or a few years later, when Mr Norie is still minister, there comes what I think is an extremely important piece of evidence indeed—a locality of the united parishes of Larbert and Dunipace in 1636. That sets out that there had been brought before the Lords Commissioners for surrenders and teinds a process by Mr Alexander Norie, minister of the parish kirk of Larbert and Dunipace, in the Presbytery of Stirling, and that, upon the summons being called, there appeared for the titulars and heritors Sir Robert Spottiswoode of Dunipace, and president of the session, titular of the teinds of the said parish; and then follows the locality, which proceeds upon the basis of Mr Norie being the minister of the united parishes of Larbert and Dunipace, and Sir Robert Spottiswode being the titular of the parish. There you have both sides of this arrangement represented, and both accepting as final and conclusive the arrangement which made the two parishes into one. Between the dates that I have mentioned, also I think in 1621, there is a very important piece of statutory evidence upon which the Lord Ordinary comments at some length, and that is the Act of 1621, by which a new Commission was instituted, and in addition to the general powers and duties which are bestowed upon the Commissioners, they are directed to perform a number of pieces of special business which look as if they were pieces of work remaining over from the proceedings of some former Commission, and among these they are required to determine which of the two kirks of Larbert and Dunipace formerly united should be the ordinary place of public divine service for the said two parishes. Now there is an Act of Parliament setting out in the plainest possible way that these two parishes have been united, and that it is now desirable to determine which of the two churches shall be the ordinary place of divine service for both parishes. I agree with everything the Lord Ordinary has said in his discussion of that Act and on the argument upon it. I think that the point which was made for the purpose of identifying the two warrants which are described in the Act as patents, and which are said to concern this matter of determining which of the two churches is to be the parish church in future, has completely failed. I do not think the pursuers' counsel have at all succeeded in identifying these warrants as patents. But I think it is quite immaterial what they were. The meaning of the statute seems perfectly plain. It is this, that the Commission of 1617, or a former Commission, having united the two parishes of Larbert and Dunipace, they have left unsettled the very important practical question which of the two existing churches should be considered as the parish church in future, and therefore the Commission of 1621 is told to settle and determine that question once for all. That seems to me conclusive as to the history of what had previously taken place. Now, unfortunately, the Commission of 1621 does not seem to have performed that duty which was imposed upon it, and no final decision as between the two churches has ever been made, and the two churches have both continued to be attended by parishioners and to have divine service conducted in them ever since. But the fact remains that the Crown charter in the first place, and Acts of Parliament in the second place, assert in the plainest terms that a union has been made, and that there is in future to be only one united parish instead of two separate parishes.

Now, there are two answers which are made to the Lord Ordinary's argument on the Commission of 1617, and which were made with great force and great ability by the pursuers' counsel. But I think that both of them completely failed.

The first point is that the Commissioners of 1617 could not have effected this union, because in the first place they were not entitled to interfere and modify a stipend except in cases where the actual stipend paid to the minister was below a certain minimum, and that in the case of Larbert and Dunipace the minimum had not been reached; and secondly, that the Commissioners were not entitled to enter within the bounds of an erected benefice at all. As for the first point, I shall only say that I think the attempt to show that the actual value of the benefice exceeded the minimum has failed. We are informed by the Teind Clerk that the records of the Abbacy of Cambuskenneth and the subsequent valuations do not afford sufficient materials for determining exactly what the value of the teinds of Larbert

and Dunipace really was. Mr Elliot says that there was a want of accurate information as to what the districts attached to Larbert and Dunipace produced as parsonage and vicarage teinds. The revenues of the Abbey of Cambuskenneth are given in slump sums of money and quantities of victual so that the portion belonging to each cannot be set down, and then he goes on to explain that the valuations which immediately followed the decrees-arbitral and the Statutes of Charles I. were not completed, so that we have not the evidence which might have been derived from the valuations coming nearest the time as to which we are inquiring. And the consequence of all that appears to me to be that there is no evidence as to the value of the teinds of these two parishes sufficient to justify us in holding either it was above or that it was below the minimum specified in the Act of 1617. But then it is said, irrespectively of the value of the benefices, the Commissioners could not interfere with a benefice which belonged to a lord of erection. I am not satisfied that that is proved either. There is no such limitation in the statute creating either Commission, and although it might be that the lord of erection might oppose their interference with his benefice, there seems to me to be nothing in the nature of the relation between the lord of erection and the minister whom he was bound to maintain which would make it at all incompetent or impossible for the Commissioners to interfere. If they interfered for the purpose of modifying the stipend, and at the same time turning two parishes into one, then the probability is that the lord of erection would welcome their interference. There could be no interest in him to object to such a proceeding.

But then we really are out of the region of speculation as to whether the Commission of 1617 interfered to modify this stipend of Larbert and Dunipace, and therefore interfered or at least had an opportunity of interfering to make a union, because it is set out in quite plain terms in a charter of 1620, which is to be found in the Register of the Great Seal, by which the King confirms to Lord Mar a number of grants, and among others grants of teinds, and then sets out in the reddendo that certain payments are to be made in return for the grants, and, *inter alia*, "for the said teinds"—that is, as a return for said teinds, "payment to the minister of the said churches," which include those in question, certain stipends according to the modification of the Lords Commissioners for the Plantation of Churches called the Interim Act, and with the augmentations of the Commissioners appointed under the eighth Parliament held in June 1617. And therefore you have the clearest possible evidence that the Commissioners of 1617 did interfere with the modification of stipend payable by this particular lord of erection to the minister of this parish.

The second objection which is taken by the pursuers to the Lord Ordinary's argument has a much wider reach, because Mr Ure says it is all a mistake to suppose that these various instruments on which the Lord Ordinary founds—charters, Acts of Parliament, and all the others that can be referred to—set forth a union of parishes at all; that all they describe is a union of kirks, and, says Mr Ure, what we are in search of is a union of parishes and not a union of kirks. Now, I think that criticism is altogether unsound. In the first place, I do not think it doubtful that in the law language of that time statutes or charters, when talking of union of kirks, mean the union of parishes and nothing else; and there cannot be a better illustration than the terms of the very statute the meaning and effect of which we are discussing—the statute creating the Commission of 1617—because the power given to the Commissioners is in so many words—"With special power also to the said Commissioners to unite sik kirks ane or mair as may conveniently be unite where the fruits of ane alone will not suffice to entertain ane minister," and therefore "union of the kirks" means that the Commissioners have power to unite parishes, or it means nothing, but at all events it means and says exactly the same thing as the pursuers ask us to determine by the conclusions of their own summons. Are there to be two parishes united so that one minister can serve the cure, or are they to be disunited so that each district is to have a separate minister? There is really no distinction in the use of the terms, and I think the argument is altogether unhistorical, because it must be observed that at the time we are considering, the Parliament and the Crown were not dealing with fully equipped parishes in the sense in which parishes are now equipped. They did not recognise the differences that we recognise between parishes *quoad civilia* and parishes *quoad sacra*, because the whole institution was an ecclesiastical institution only. The division of a parish was at that time a church division and nothing else, and the parish meant nothing but the district attached to a church within which the fruits of the benefice were to be recovered by the ecclesiastic who had right to them as the minister of that church, or as held under another religious house, and the cure of which he served. It was a church division and no more. Subsequent legal rights and liabilities which arose out of it came much later. It is quite true that at the same time as the new system for the administration of parishes was growing up, there were also growing up the Scottish systems for education and for the help of the poor which were also related to parishes. But still these were only in their infancy. They were growing, but the parish was a church district and no more. Accordingly, I do not understand what is meant when it is said that a statutory commission to unite kirks, united kirks only and did not unite parishes. What they did was undoubtedly to say that there should be one benefice and one cure of souls. And that is the meaning of uniting the churches. It could mean nothing else but that there was to be

only one minister for these two churches and the parishes attached to them. And accordingly I think that that objection of Mr Ure also completely fails, and that the Lord Ordinary's reasoning is perfectly sound.

I quite appreciate the point which is made, and made with great force, to which the Lord Ordinary refers, that all the other parochial arrangements have continued since then, namely 1617, to be much more separate and distinct than the parochial arrangements of two united parishes ordinarily are. That is certainly undeniable, but then I think the Lord Ordinary is correct when he says that that arose as matter of fact from the existence and continuance of two churches—a separate church in each parish. And although this led to a great deal more of separate administration than in cases where in a more completely united parish there would have been one single body of administrators alone, still the separation is not enough to show that the parishes are not still treated as one united parish. Whether there is any inconvenience or any disadvantage to parishioners arising from the anomalous state of matters that is pointed out is a totally different affair. That may very well be, and if it is so great that the union ought to be brought to an end, then the pursuers have a remedy by going to the proper tribunal in order to obtain disjunction of the two parishes. But that is a remedy that can be taken only subject to a statutory condition which we are not empowered to consider, and which as yet, at all events, has not been satisfied. All we have to consider is whether the present arrangement is contrary to law or not, and for the reasons I have given I have come quite clearly to the conclusion that we cannot say that it is contrary to law. There has been a consistent course of administration, founded upon the basis of a union by statutory commissioners, which is asserted, as I have said, by Crown charters and by Acts of Parliament, and has been accepted by the Crown, by the Church Courts, and by the Court of Teinds for nearly 300 years; and for this Court now to set all that aside upon the ground that everything was altogether mistaken, and that the whole course of procedure was all wrong, would, I think, be a very violent step for a court of law to take. It would be quite contrary to a very well-settled rule of law, which is of very great importance in the consideration of matters of this kind, and it is this, that when a course of procedure has followed upon the public act of an administrative body of great authority, the records of whose administration have been altogether lost and destroyed, the presumption of law is *omnia rite ac solemniter acta*—everything must be presumed in favour of the regularity of the proceedings on which so long a course of practice has followed.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—I agree.

LORD PRESIDENT—LORD M'LAREN, who is unable to be here, is of the same opinion. I take no part in the judgment, having heard no part of the argument.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Ure, K.C. — R. S. Horne. Agent — P. Gardiner Gillespie, S.S.C.

Counsel for the Defenders and Respondents—Johnston, K.C. — C. N. Johnston. Agents—Forrester & Davidson, W.S.

Note.—This case is reported *ante*, February 2, 1900, 37 S.L.R. 455, 2 F. 562.