Friday, July 12.

OUTER HOUSE.

(Before Lord Barcapel.)

MINISTER OF COLINTON *v.* FOULIS AND OTHERS.

Teinds—Valuation—Surrender—Minister—Titular. Circumstances in which, in a question between an heritor and a minister as to a proposed surrender of teinds in a locality, an objection by the minister to the valuation on which the surrender proceeded, founded on the allegation that it had been carried through without the presence or citation of the titular, repelled.

In the locality of Colinton, Sir James Liston Foulis of Woodhall, Bart., and his curators, lodged a minute of surrender of the teinds of the lands and barony of Woodhall, so far as not previously sold. The teinds of the whole barony were valued by a decree of valuation, dated 4th March 1631, at eight bolls bear, four bolls wheat, four bolls meal, and sixteen bolls oats.

The minister lodged objections to the proposed surrender, and stated the following pleas in law:—(1) The valuation founded on having been a mere transaction between the heritor of the lands and the tacksman of the teinds, the decree sustaining and allowing the same can have no operation after the termination of the tacksman's right; (2) There can be no permanent valuation of the teinds of a parish without the presence or at least the citation of the titular or party having right to the property of the teinds; and (3) There having been no intervention of the titular in the process in which the decree founded on was pronounced, and the right of the tacksman who appeared in the process as the sole party having right to the teinds having long ago expired, the said decree is no longer operative, and is null and void as a valuation of the teinds.

The Lord Ordinary repelled the objections for the minister, sustained the surrender, and pronounced the following interlocutor:—

"*Edinburgh, July* 12, 1867.—The Lord Ordinary having heard counsel for the parties, and considered the closed record in the question between Sir James Liston Foulis and his curators, minuters, and the minister, with the process and productions, repels the objections stated by the minister to the valuation founded on by the minuters; sustains the surrender tended by them, and decerns: Finds the minister liable in expenses; allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"E. F. MAITLAND.

"*Note.*—The objections stated by the minister to the valuation are founded solely on the allegation that it proceeded without the presence or citation of the titular. He pleads, first, that the valuation was a mere transaction between the heritor and a tacksman; and, secondly, that there can be no permanent valuation without the presence, or at least the citation, of the titular or party having right to the property of the teinds. These grounds of objection are not insisted or concurred in by the present titular, but are maintained only by the minister, whose predecessor in the benefice was present, and took part in the proceedings in the valuation. The Lord Ordinary, however, assumes that the present minister has a title to maintain the objection, which, if well founded in fact and law, would imply that there never was a statutory and valid valuation of the teinds in question. In the case of *Brydie* v. *Johnston* 11 S., 229, the minister was held entitled to object to a valuation to which his predecessor had been made a party, that it was led by the superior of the lands, though the objection was not sustained on the merits.

"The valuation founded on by Sir J. L. Foulis is contained in a decree of approbation by the High Commissioners, dated 4th March 1631. It appears from the extract-decree of approbation that a valuation of the parish of Hailes (now Colinton) had been led before the Sub-Commissioners, and was of that date presented to the High Commissioners and read in their presence, and sustained and allowed by them. In particular, the sub-valuation of the teinds of the lands of Woodhall and Bonally, part of which it is now proposed to surrender, was specially sustained and allowed.

"The form of procedure was peculiar, but such as is known to have been at that time practised by the High Commissioners in approving of sub-valuations. There does not appear to have been any summons of approbation, and apparently the proceedings were carried through by direction of the High Commissioners themselves, and not at the instance of any private party. Sir John Connell, i, 232, states that 'in 1631 and 1632 a number of the decreets of approbation simply bear that the Commissioners had heard, read, seen, or considered the report of the Sub-Commissioners produced, and that it was approved of after warning the parties to attend.' Among other instances of this practice he refers to the case of *Hailes* (Colinton) now under consideration. He gives an extract from the sederunt book of the Commissioners of an order by them for proclamation and warning to the titulars, tacksman, and heritors of the parishes of St Cuthbert's and Liberton to attend on 1st December 1630, 'for sighting of the valuations' of these parishes. He says further that 'about the same period, a practice became prevalent of the parties interested executing before the High Commissioners summonses of approbation of the reports of the Sub-Commissioners.' He cites as one of the earliest examples of this latter form of proceeding the case of *Achtertool* on 15th July 1631, which is after the date of the approbation in the present case. He also says, p. 233, that 'afterwards a form was introduced of issuing summonses in name of the Commissioners themselves,' which shows that they held themselves entitled to take the initiative in the approbation of valuation led before the Sub-Commissioners. The Lord Ordinary does not think it can be doubted that approbations carried through at that time in the first of these three forms were perfectly competent and effectual so far as regarded the mode of procedure.

"An approbation in that form of the lands in question, and the other lands in the parish of Colinton, was in point of fact carried through, as appears from the decree, an extract of which is produced. The first question which arises is,—whether any incompetency or nullity appears on the face of the decree. All extrinsic objections have been long cut off by the negative prescription. No defect which could be shown *aliunde* to have attached to the proceedings before the Sub-Commissioners, could, it is thought, have afforded an effectual ground of challenge against the validity of the decree of the High Commissioners sustaining and allowing the sub-valuation. But in point of fact no evidence what-

ever remains; at all events none has been produced regarding the procedure before the Sub-Commissioners. It only appears that there had been a subvaluation by which the teinds had been valued at the amount set forth in the decree of the High Commissioners. In the absence of all evidence to the contrary, effect must be given to the legal presumption in favour of the regularity and solemnity of such proceedings. For anything that appears, the titular may have been the pursuer of the subvaluation, or a party called to it; and it cannot be presumed that it was carried through behind his back.

"The objection is thus confined to the proceedings in the approbation. It would not be competent, after prescription has run, to look beyond the decree for evidence as to these proceedings, and, in fact, no other evidence exists. The objection taken to the approbation is, that it was carried through without the citation or presence of the titular, who is said to have been the Earl of Lauderdale; and that Sir James Foulis, then of Colinton, who was present and took part in the proceedings, and is called the titular on the face of the decree, was only tacksman under a long lease. The Lord Ordinary does not think that evidence is to be found on the face of the decree to prove that the titular was not cited. From the nature of the procedure and the terms of the decree, it does not appear in what form parties were cited or warned to attend. If the warning was given in the manner and terms cited by Sir John Connell as having been used in the cases of St Cuthbert's and Liberton, it was expressly addressed to the titulars as well as the tacksman. At all events, it cannot be assumed that the titular was not cited in the form of citation of parties then in use by the Commissioners. The present case is quite different from those in which the proceedings have commenced with a summons; there is an extract in the long form afterwards adopted, setting forth minutely the whole procedure. The statement in such an extract that certain parties were cited, may give rise to the presumption that others, who are not mentioned, were not cited. But the Lord Ordinary does not think that the terms of this extract-decree afford any such presumption—there is no setting forth of the prior steps of procedure, and of the parties cited. The commencement of the decree is in these terms:—'The whilk day the valuation of the kirk and parroch of Hailes was presented to the Commissioners for surrenders and teynds, and red in their audience, and Sr James Foulis of Colintoune, James Murray, maister of wark, parochiners of Hailes, and Maister James Thomson, minister at Hailes, being present, and at length heard hereupon, the remanent parochiners being lawfullie warned, oft tymes called, and not compeared, the Commissioners sustains and allows the said valuations as is hereafter sett doune in order.' Sir James Foulis, here mentioned, was an heritor in the parish, and also tacksman of the whole parsonage, teinds, and titular in his own right of the vicarage. The decree then proceeds with a separate approbation of the valuation of the teinds of each heritor's lands. The first of these is the valuation of the lands of Woodhall and Bonally, part of which now belongs to Sir J. L. Foulis, and are the lands the teinds of which he now proposes to surrender. They then belonged to Mr Adam Cunninghame. This part of the decree bears that 'Sir James Foulis of Colintoune, Knight, having right to the teynds of the parroch of Hailes, and Maister James Thomson, minister at Hailes, compearand personallie, and being at length heard hereupon; and the said Adam Cunninghame, advocate, now heritor of the said lands, being lawfully warned, ofttimes called and not compearand, the Commissioners sustains and allows the valuation foresaid.' It is mentioned in the more general and introductory part of the decree that the parishioners, meaning heritors, had been lawfully warned, and were ofttimes called and did not appear; and in the part of the decree relating to Woodhall and Bonally that is specially stated in regard to Cunninghame, the heritor of these lands. The same statement is made in regard to the absent heritors of each property in the parish as the valuations of their lands are severally approved. The object of that statement is not, however, to set forth all the parties who had been cited, but to show that the Commissioners, in approving of the valuations, after hearing Sir James Foulis and the minister, both of whom had an interest adverse to the heritors, did not proceed to judgment without giving them also an opportunity of being heard. As they looked upon Sir James Foulis as representing the titularity, they did not make any similar statement in regard to the titular. But the Lord Ordinary does not think that circumstance affords any presumption either that he was not originally warned in the same way as the other parties interested, or that he was not called in Court to answer to such citation as he had got.

"On these grounds, the Lord Ordinary is led to the conclusion that there is here no case for holding that the titular was not cited. If he was cited, his absence cannot give rise to any valid objection. In this view of the case there is no room for the more difficult questions which were disposed of in the recent case of the *Deans of the Chapel Royal* v. *Johnstone*, 5 M'P., 414, in which, from the form of the procedure and of the extract, it clearly appeared on the face of the decree that the only party called as representing the titularity was the Earl of Buccleuch, who was said to have been only a tacksman. But if it could be held that the terms of the extract-decree in the present case show that Sir James Foulis of Colinton, was the only party called to represent the titularity in the process of approbation, while, as the objector alleges, the Earl of Lauderdale was then the titular, the Lord Ordinary is of opinion that, in accordance with the decision in the *Chapel Royal* case, the objection would be cut off by the negative prescription. Upon the face of the decree in that part of it where the valuation of the lands in question was approved, it appears that Sir James Foulis was heard as 'having right to the teinds of the parish of Hailes,' and where the valuations of the other lands are successively approved he is said to have been heard as 'titular of the teinds of the parish of Hailes,' the two expressions being evidently used as synonymous. It is thus clear on the views given effect to by the majority of the Judges in the *Chapel Royal* case, that if no other party was called as titular, Sir James Foulis was received by the Commissioners as for the time being, at least, the party holding and entitled to represent the titularity, and his appearance in that capacity was sustained by them. It would be the less remarkable that they should have done so, as it appears from the statement in condescendence IV., which is not disputed, that he held a tack from the late Queen, wife of James VI., for his lifetime and nineteen years thereafter, which had been prorogated by the Commissioners for the Plantation of

Kirks, in 1618 for another liferent, and two terms of nineteen years from the ish of the original tack. The objection, that in such circumstances the Commissioners sustained the appearance of Sir James as titular, is just of the same kind with that which was held in the case of the *Chapel Royal* to fall under the negative prescription. If prescription applied when the objection was stated by the titular himself, it must do so equally where it is brought forward by the minister. This is not a case in which the plea of the minister is that the valuation does not apply to him, being *res inter alios acta.* His predecessor was not only called, but appeared, and was heard for the interest of the benefice. That may not affect the right of the present incumbent to appear and state objections to the competency or validity of the valuation. But in so doing he seeks to challenge the decree as fundamentally null as against all parties since the expiry of the tack, and in the present case he does so on a ground extrinsic of the decree itself. The right to insist on such a challenge of an *ex facie* valid and competent decree, falls under the negative prescription at whosoever instance it may be brought. In the present case there does not seem to be any question of practical importance as to the period from which prescription began to run. As the minister was not only called, but took part in the proceedings, the valuation was judicially known to him from its date; and on that ground the Lord Ordinary is of opinion that prescription ran from the first. Again, it was founded upon and given effect to in the locality of 1710, with express consent of the minister, who was thus made aware of its import and of the effect to which it was founded upon against him and his successors in the benefice.

"If the valuation bore to be, as is pleaded by the minister, a mere transaction between the heritor and a tacksman, that would have been properly pleaded *ope exceptionis* by way of objection to the surrender, but as, in the view which the Lord Ordinary takes, that form of the case for the minister is clearly untenable, and his contention resolves into a challenge of the decree on an extrinsic ground, it could only be effectually made in a reduction. If the Lord Ordinary had not, after fully hearing parties on the whole case, been satisfied that the ground of challenge is not maintainable on its merits, he would have allowed the minister an opportunity to bring a reduction, if so advised. But in the view which he takes of the case, he is in a position to decide it independently of the plea that a reduction was necessary. "E. F. M."

Parties acquiesced.

Counsel for Sir James Liston Foulis, Bart., and his Curators—Mr Hall. Agent—Andw. Grieve, W.S.

Counsel for Minister—Mr Cook. Agent—W. Traquair, W.S.

COURT OF SESSION.

Friday, July 19.

SECOND DIVISION.

TRUSTEES OF WILLIAM S. YOUNG AND OTHERS *v.* WILLIAM YOUNG AND HIS TUTOR *ad litem.*

Service—Conditional Institute—Substitute—Obligation to Infeft. By *mortis causa* settlement A disponed his whole estate, heritable as well as moveable, to himself and the child or children of his body, equally between them, and to their assignees and disponees, whom failing to B, C, D, and E, and their assignees and disponees, the share of any of them dying without issue to go to the survivors. The clause of obligation to infeft was directly and exclusively in favour of B, C, D, and E. A died without issue, and survived by all the grantees, and shortly afterwards B died without having expede service to A. In an action at the instance of B's testamentary trustees, and of C, D and E against A's heir-at-law, Held (1) that, by the terms of A's settlement B was a substitute, and, not having served to the granter, no right had vested in him capable of being transmitted to third parties; (2) that the obligation to infeft did not confer upon the substitutes a *jus crediti* capable of being enforced against the granter's heir-at-law, and vesting in them *a morte testatoris*, but that that clause must be read consistently with the dispositive clause, and as intended simply to afford facilities for completing their titles as subsitutes.

Observations (*per* Lords Cowan and Neaves), repudiating the authority of the case of *Hamilton* v. *Hamilton* as reversed by the House of Lords (1724).—Robertson's Appeals, 493.

This action of declarator, constitution, and adjudication in implement was raised against William Young, as heir of the late Joseph Young of Dunearn, by (1) Peter James Gavin and others, the testamentary trustees of the deceased William Simson Young (the defender's father); (2) David Young; (3) Margaret Meldrum Young, children of the deceased Thomas Young; and by (4) Joseph Matheson Purvis; (5) Jessie Mary Purvis; and (6) John Murray Purvis.

The summons concluded for declarator that the said Joseph Young died on or about 17th November 1864 without leaving issue, and also for declarator that the obligations contained in the deceased Joseph Young's settlement in favour of the said deceased William Simpson Young vested in the latter during his lifetime, and were transmitted by his settlement to his said trustees. The summons further concluded that, in implement of the obligation contained in the settlement of the deceased Joseph Young, the defender, as his heir, should be ordained to make up his title to the deceased's estates, and convey them to the pursuers. There was also the usual alternative conclusion to meet the case of the defender renouncing or failing to convey.

The pursuer's case was based entirely on the terms of Mr Joseph Young's settlement, under which they maintained a personal right to the lands vested in William Simson Young and the individual pursuers upon the death of the testator.

The following are the important parts of Mr Young's settlement:—

"I, Joseph Young of Dunearn, in order to regulate the management and distribution of my means and estate after my decease, and for the love and favour which I have and bear to the persons afternamed and designed, and for other good causes and considerations, do hereby give, grant, assign, alienate, and dispone to and in favour of myself and the lawfully-begotten child or children of my own body, equally between them, and to their assignees or disponees, whom failing to William Simson Young,