

the defenders have no right to take objections to their own titles. On all other points I agree with your Lordship.

LORD ARDMILLAN—I entirely agree with your Lordships that the interlocutor of the Lord Ordinary should be adhered to; and I would only remark, that after the decision in the case of *Morton v. Hunters & Co.*, 26th November 1830, 4 W. and S., 379., I think the objection founded on the omission of the procurator's designation would be untenable.

LORD JERVISWOODE concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Solicitor-General and Mackay. Agent—Alexander Howe, W.S.

Counsel for Defenders—Marshall and Keir. Agents—Dalgleish & Bell, W.S.

Saturday, May 17.

## SECOND DIVISION.

CAMPBELL v. BREADALBANE AND OTHERS.

*Proving the Tenor—Teinds—Causus Amissionis.*

Where a valuation by Sub-Commissioners, made in 1629, was alleged to be partially destroyed by exposure and tear and wear, but an old copy of said valuation existed, and appropriations at the instance of several heritors,—Tenor found proved, and adminicles sustained.

The summons, in this action, at the instance of the Duke of Argyll, heritable proprietor of certain lands in the parish of Kilninver, now united to Kilmelford, in the county of Argyll, against the Earl of Breadalbane, patron of the parish of Kilninver, concluded that "it ought and should be found and declared, by decree of the Lords of our Council and Session, Commissioners appointed for Plantation of Kirks and Valuation of Teinds, that a report or valuation by the Sub-Commissioners appointed for valuing the stock and teind of the lands within the Presbytery of Argyll, dated the day of 1629, is, in so far as regards the pursuer's said lands of Schellachane, Darilea, Lagganargit, and Letternamuck, in the parish of Kilninver, now united to Kilmelford, of the following tenor:—Finds and declares be the deposition and aith of veritie of Sr Donald Campbell of Ardnamurchane, Knytt Barronett, that his lands of Schellachane, lyand within the said parochyne of Killinjuvar, payit, pays, and may pay yearly in tyme coming of constant rent in stocke sixteen bolls meall and ffoure boilles bear; And finds and declares that the samen has payit and payis of personage teynd ffour bolls meall yearlie, and that the viccarage brokes and small teyndis of the same has been tane up *ipsa corpora* in tyme bygane, and are worth and may pay yearly the sowme of ffoure poundis money: And that the said Sr Donald his lands of Darilea and Letternamuke hes payit, pays, are worth, and may pay of rent in stoke twenty-two stanes cheis, and the samen are littill gers rooms, hes payit, pays, nor may pay no personage teynd, and that the viccarage of the same is worth and may pay yearly the sum of 48 sh. money; And that his lands of Lagganargett payit, pays, and may pay as a constant rent in stock 25 stanes cheyis and 3 stanes butter, and that he has payit and pays yearly of parsonage teind 2

flirlots meil, and that ye vicarrage of the samen is worth and may pay yearly the sum of 48 sh. foresaid: As also it ought and should be found and declared by our said Lords Commissioners that the decree to be pronounced herein shall be in all respects as valid and sufficient a document to the pursuer of the valuation of the foresaid lands and teinds, in all cases and causes whatsoever, improbation as well as others, as the said original report or valuation would be, notwithstanding that the same has been partially destroyed, mutilated, and defaced: And in case of any of the said defenders appearing and occasioning unnecessary expense to the pursuer in the process to follow hereon, such defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £100, or such other sum as our said Lords Commissioners shall modify as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases, as is alleged."

The pursuer stated that in the year 1629 the Sub-Commissioners appointed for the valuation of the stock and teind of the lands within the Presbytery of Argyll issued their report, which contained, *inter alia*, the valuation of lands in the parish of Kilninver, mentioned in the summons, and then belonging to Sir Donald Campbell of Ardnamurchane.

The said report or valuation of the said Sub-Commissioners of Teinds is in the custody of the keeper of teind records, but it has been partially destroyed, mutilated, and defaced by exposure to handling, and from the tear and wear to which it has been subjected in course of time. The paper upon which it was written is very friable, and bears traces of having been injured by damp. More particularly, that part of the document upon which the valuation of the pursuer's said lands was written is in a very tattered condition. The valuation of the pursuer's said lands was written very near the end of the report, and the document exhibits marks of having been folded or rolled up in such manner that the concluding pages must have been upon the outside, and consequently most exposed to injury. So far as can be ascertained, the said report has always been kept among the records of the High Commission, and within the memory of man it has never been in any other condition than that in which it now is.

The first process of augmentation, modification, and locality in the united parishes of Kilninver and Kilmelford was raised in 1758, and in the course of the proceedings the heritors alleged the existence of the said sub-valuation of 1629, and obtained a diligence for its recovery; but it was eventually discovered to be in the hands of the teind clerk for the time being, and the Lord Ordinary ordered the defenders to furnish the minister with a copy. Thereafter the following interlocutor was pronounced:—"*Edinburgh, 14th January 1761.*—David Dalrymple, for the pursuer, represented that at last calling an excerpt was given in for Mr Campbell of Melfort, one of the heritors, of the valuation of the Sub-Commissioners of the Presbytery of Argyll as to his particular lands; but that now the pursuer had recovered an exact double of the valuation of both the united parishes, and consented that the same be sustained as the rule of rating the teinds in this process. Robert Campbell, for the heritors, agreed thereto. The Lords sustain the valuation of the

Sub-Commissioners of the Presbytery of Argyll as sufficient for ascertaining the rental in this process, make avizandum therewith, and remit to the Lord Ordinary to prepare the cause."

There is in the custody of the keeper of teind records an old copy of said valuation of the Sub-Commissioners. The precise date at which said copy was made is not known, but the pursuer believes and avers that it was about the time of the proceedings referred to in the process of augmentation, &c. of 1758. At that time there were no inventories of process or productions in teind processes, and no office marks were put upon papers lodged. The said copy of the sub-valuation is not in all respects a precise transcript of the original. It contains a number of variations in the spelling of words, and other clerical inaccuracies, but in all the material parts of the report it exactly corresponds with those parts of the original document which have remained entire.

In the said process of augmentation, &c., there was prepared and lodged a scheme of the proven rental which bears to have been made up "from the sub-valuation anno 1626," and sets forth that "by the valuation of the Sub-Commissioners of the Presbytery of Argyll, sustained by interlocutor of the Lords 14th January 1761 as sufficient for ascertaining the rental in this process, the teinds, parsonage and vicarage, of the respective heritors their lands within the said united parishes are valued as follows." There then follows the valuation of the whole lands in the united parishes, and the total amount of the teinds in both parishes is stated to be 153 bolls, 2 firlots meal, and £218, 6s. Scots money. Thereafter the following interlocutor was pronounced:—"Edinburgh, 3d February 1761.—The Lord Coalston, Ordinary for preparing the cause, the minister of the united parishes of Kilmelphort and Kilninver against the heritors, having considered the libell, with the copy of the valuation of these parishes by the Sub-Commissioners of the Presbytery of Argyll, in the year One thousand six hundred and twenty-nine, produced, which by interloqr of the Lords of the fourteenth day of January last is sustained as sufficient for ascertaining the rental in this process, and remit—Finds that the parsonage and vicarage teinds of the several heritors their respective lands within the said united parishes extends to the quantities of meal and sums of money contained in the within scheme, amounting in whole to one hundred and fifty-three bolls two firlots of meal of parsonage teinds, and two hundred and eighteen pounds six shillings Scots money of vicarage teinds, with which the Lord Ordinary makes avizandum to the Lords." Upon the Lord Ordinary's report the augmentation was granted, and a locality proceeding upon the valuation foresaid was finally approved of by the Court on the 3d August 1763. Throughout these proceedings the lands now belonging to the pursuer, which are libelled in this summons, were held as having been valued by the Sub-Commissioners in their report of 1629, at the precise quantities of victual and sums of money specified in the said old copy of that report.

"The next process of augmentation, modification, and locality in the said united parishes of Kilninver and Kilmelford was raised in 1796, and throughout the proceedings in that process the said report of the Sub-Commissioners was adopted, and received effect. The whole of the heritors

were, by interlocutor of the Court dated 1st June 1796, held as confessed in a rental made up from the said report, and the quantities of victual and sums of money at which the pursuer's lands are stated in the proceedings to have been valued by the report exactly correspond with the amount stated in the old copy foresaid.

"Further, the said report of the Sub-Commissioners has been ratified and approved of at the instance of several of the heritors. In particular, in the year 1632 the Earl of Breadalbane obtained three separate degrees of approbation of said report, in so far as regarded lands belonging to him in the united parishes, including the lands of Scammadel, which had previously belonged to Alexander M'Dougal, and afterwards to Donald Campbell of Scammadel. Further, Messrs Harrison, Ainslie & Company (the Lorne Furnace Company) obtained a decree of approbation of the said report in so far as regards their lands on 20th December 1869; and the trustees of the late John Macneill of Glenmore, one of the heritors, also obtained a decret of approbation in July 1870."

The defender, the Reverend John Campbell, minister of the united parishes, pleaded that the alleged report of the Sub-Commissioners is not a completed document—(1) "The said alleged report of the Sub-Commissioners of the Presbytery of Argyll does not appear or bear to be, and is not, a completed or concluded report. It is an unauthenticated document. It terminates abruptly without any docket, and is not subscribed by a quorum or by any of the persons mentioned at the outset of the document as the Sub-Commissioners appointed to make and report to the High Commissioners a valuation of the lands and teinds therein referred to. At the foot of some of the pages occurs the signature 'Geo. Campbell,' but no such person is mentioned at the outset of the alleged report. Numerous pages of the said 'report' are entirely unsigned. (2) The history of this alleged report, which is extensively and throughout mutilated and vitiated in *essentialibus*, is entirely unknown. In particular, it is unknown when or whence the document came into the teind office, or by whom it was brought thither. It is further unknown when or how the said alleged report came to be in its present dilapidated and fragmentary condition, and the pursuer has not made any definite or satisfactory averment on the subject. (3) The history of the 'old copy' of the alleged report is also unknown. This 'old copy' does not bear to be, and is not alleged to have been, made by judicial authority or under judicial sanction, control, or supervision of any kind. It does not bear to be, and is not even averred to have been, made by any official at the teind office, or by any party skilled in deciphering old handwriting, whose duty it was to preserve or perpetuate the contents of such a document as the alleged report, or for whose ability to do, or accuracy in doing so, in the form and terms of this 'old copy,' there exists any sufficient evidence or guarantee. On the contrary, from the pursuer's statement on the subject it is to be inferred that this 'old copy' was made by the very parties who on the ground of interest were disqualified from being entrusted with the execution of such a task."

The pleas in law for the defender were—" (1) The pursuer has not made any relevant or sufficient averments of the occasion or cause of the loss or mutilation of the said alleged report, or of that

part of it to which the conclusions of proving the tenor relate. (2) As the said alleged report is not duly authenticated, and is *ex facie* an incomplete and unfinished document, it is not one which can competently be made the subject of a proving of the tenor. (3) The pursuer has not condescended on any adminicles relevant or sufficient to instruct the tenor of the writ sought to be set up, and no such adminicles exist. (4) The present action being incompetent, or otherwise irrelevant or unfounded, decree as concluded for should be refused, and the defender assolizied from the conclusions of the summons, with expenses."

Authorities cited:—7 Macph. 956; 5 B. S. p. 98; E. I. 4, 15, 14; E. Comm. p. 299; Dickson on Evidence, 1, 299.

At advising—

LORD BENHOLME—My mind is clear that we should sustain the adminicles and find the tenor proved. The report is impugned by the defender, on the mere supposition that it was not authenticated. He does not say the docquet is wanting, though there is room for it, or that there never had been a docquet there. Then we have approbations which showed the Court thought it could be sustained as an original sub-valuation. There are also copies, and it is strange parties would take the trouble to copy a worthless document.

The other Judges concurred, and the Court sustained the adminicles and found the tenor proved.

Counsel for Pursuer—Rutherford and Solicitor-General. Agent—A. Howe, W.S.

Counsel for Defender—Duncan. Agents—M'Niell & Sime, W.S.

Saturday, May 17th.

## FIRST DIVISION.

[Lord Mure, Ordinary.]

### DICK LAUDER v. SHIELS.

*Feu—Conditions of feu—Writ of confirmation—Competency—Titles to Land Consolidation Act, §§ 10, 98, § 100.*

The heir in possession of an entailed estate was empowered to grant feus thereof by an Act of Parliament, which imposed certain conditions under which the feus were to be granted. The Act also provided that these conditions were to be inserted in all subsequent investitures, and that the heir of entail omitting to do so should incur an irritancy. *Held* that the provisions of the 10th, 98th, and 100th sections of the Titles to Lands Consolidation Act, 1868, did not debar the superior from referring to the Act of Parliament in a writ of confirmation.

This was an action of declarator, irritancy, and removing, at the instance of Sir Thomas North Dick Lauder, heir of entail in possession of the estates of Grange, against Daniel Shiels, Edinburgh, who was proprietor of a certain portion of the said estate, Sir Thomas North Dick Lauder being his superior. The circumstances which gave rise to the case were as follows:—By the Act 6 Geo. IV. c. 28, entitled "An Act to enable Sir Thomas Dick Lauder, Baronet, and the heirs of entail succeeding

to him in the estate of Grange, to grant feus thereof upon certain terms and conditions," the said Sir Thomas Dick Lauder and the heirs of entail succeeding to him and in possession of the said estate were authorised to grant feus upon the conditions therein set forth. Section 4 of the Act provided that every charter or contract by which a feu right in the said lands was granted should contain the following clauses:—(1) a clause declaring it to be incompetent for the vassal to assign the precepts of sasine contained in the feu-charters or feu-contract; (2) a clause declaring it unlawful to interject any mid-superior; (3) a clause providing that the feu-duties and casualties should be paid to the heir of entail in possession entitled to receive the rents for the time being; (4) a clause providing that the conveyances and infeftments should be made out, taken and extended by the agent of the heir of entail. Then followed a declaration that any sale or conveyance inconsistent with these conditions should be null and void; and then there was this provision:—"All which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu-charter or feu-charters, or feu-contract or feu-contracts, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feu or feus, otherwise such feu-charter or feu-charters, feu-contract or feu-contracts, and such sasines, conveyances, transmissions, charters, and investitures of any such feu or feus, shall not only be void and null, but the said Sir Thomas Dick Lauder, and every other heir of entail in possession of the said entailed lands and estates, omitting to insert the same in the original feu-charter or feu-charters, feu-contract or feu-contracts, or omitting to repeat the same in the subsequent charters or other investitures granted by him, or them, of such feu or feus, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail; and, in the like manner, the said vassal or vassals, or other person or persons in the right of the said feu or feus, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feu or feus, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feu or feus, shall forfeit and lose all right and title thereto, and the same shall belong to the said Sir Thomas Dick Lauder, or the heir of entail in possession as said is, in the same manner as if such feu or feus had never been granted."

In 1865, Sir John Dick Lauder feued a portion of the estate to Daniel Mackay, by whom it was disposed to William Alexander Aikman, who in turn conveyed it to the defender. In the conveyances of the subject, and also in the infeftments of Messrs Mackay and Aikman, the provisions of the Act of Parliament were observed. The defender, however, refused to take a writ of confirmation containing a reference to the Act of Parliament, and in terms similar to the writ of confirmation of the disposition by Mr Mackay to Mr Aikman.

The defender consented to a clause being inserted in the writ to the following effect, "With and