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of business examined those writings, and in particular the subvaluation in 1629, he and they are to blame if they did not discover the informality which afterwards proved fatal. Vide Earl of Morton *v.* Creditors of Cunningham, 14th Nov. 1738, M. 14175; Dempster *v.* Creditors of Skibo, 27th June 1788, M. 13335; Hannay *v.* Creditors of Bargaly, 26th Jan. 1785, M. 13334.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, Wm. Adam.*
For Respondents, *W. Grant, J. Anstruther.*

NOTE.—Unreported in Court of Session.

[M. 15768.]

WM. FERGUSON of Raith, - - - *Appellant;*
Rev. JOHN GILLESPIE, Minister of Arrochar, *Respondent.*

Et e contra.

House of Lords, 17th February 1797.

APPROBATION OF OLD SUB-VALUATION OF TEINDS—DERELICTION—AUGMENTATION OF STIPEND—EXHAUSTED TEINDS.—A report of the sub-commissioners as to the valuation of the teind, was not approved of, nor had the sub-commissioners, on valuing the teinds, taken any proof of the value of the lands. (1.) Held, in action of approbation brought to have these old valuations approved of at the distance of 160 years, that approbation fell to be pronounced as to the lands of Nether Arrochar; but (2.) as to Upper Arrochar, it being objected that the minister was neither present, nor cited to appear before the sub-commissioners in the valuation, and the record did not bear either that he was present, or cited to appear; Held this a good objection to the approbation as regards those lands; and therefore, that there was no bar to the minister's augmentation. (3.) Also held, that it is not a dereliction of a former valuation, where the stipend is payable part in money and part in grain, that the whole has been paid in money for more than forty years.

The informality in the sub-valuations of the lands of Upper and Nether Arrochar, purchased by the appellant, having been discovered, as stated in the preceding case, this induced the minister of the parish to bring a process of augmentation before the Court of Session, as Lords Commissioners for the Plantation of Kirks and Valuation of Teinds.

setting forth, that as his stipend was greatly under the minimum of £43. 3s. 10⅔d., which was totally inadequate to the extent of the parish, and burden of the cure; and as the rental of the whole lands (nine-tenths of which belonged to the appellant), amounted to £1000 per annum, one-fifth of which by law was the teind of the parish, there was sufficient fund for an augmentation of the minister's stipend. In defence, the appellant pleaded, that the lands ought not to be fixed at a fifth part of the present rent, because the amount of these teinds had been fixed by two old sub-valuations, pronounced in the year 1629, from which it appeared they were valued at no more than 412 merks Scots, (£22. 7s. 9½d.) and twelve bolls of meal, (equal to £6. 10s.) and therefore, that the stipend already paid the minister, more than exhausted the whole teind, and consequently there was no room for augmentation. The sub-valuations had been approved of by the High Commission of teinds, by a decree of approbation in 1769, but erroneously, as they proceeded upon the footing that the 400 merks in the report as to Upper Arrochar, was for both stock and teind, whereas it was for teind only; and the decree, therefore, laboured under a radical defect. It being necessary to complete the sub-valuations by a decree of approbation, the appellant in consequence was obliged to bring also a process of approbation. There was also a deletion in one of these reports of the sub-valuations, the following words being deleted,—" of the teinds;" and the summons set forth, that the words " of the teinds," in the second of these reports, having reference to the lands of Upper Arrochar, having been improperly deleted, ought to stand as part of the valuation, and both reports approved of. The respondent being called as a defender, appeared, and besides disputing that the words " of the teinds" should stand a part of this sub-valuation, he pleaded in defence, that the appellant was not now entitled to obtain decree of approbation, because the benefit of such sub-valuation was lost by derelict ion, as the stipend which had been paid to the minister of the parish, beyond the years of the long prescription, exceeded the amount of teind ascertained and fixed by these sub-valuations by the sum of £3. 10s. $1\frac{2}{12}$d. (According to the appellant of £1. 16s. 9d.). The minister's process of augmentation was sisted until the issue of the process of approbation, as it depended upon it, whether there were any teinds out of which an augmentation could

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be modified; and on this the Lord Ordinary ordered memorials, and when these were reported to the Court, the Lords were satisfied that the objection stated to the sub-valuation, in consequence of the words "of the teind" being deleted, was irrelavent, and the objection on the ground of dereliction not good, but, in consequence of two other objections being suggested, 1st. That the amount of the teinds had been ascertained in these old valuations without any proof; and, 2d. That in so far as regards the lands of Upper Arrochar, to which the second sub-valuation relates, the minister of the parish neither was present nor cited as a party. Upon these points, the Lords, before answer, ordered additional memorials, after considering which, their Lordships pro-

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nounced this interlocutor:—"The Lords having advised "the libel of approbation, with the report of the sub-com- "missioners of the presbytery of Dumbarton libelled on, "memorials, and additional memorials for both parties, "they ratify, allow, and approve the said report, in so far "as regards the pursuer's lands of *Nether Arrochar*, and "interpone their decreet and authority thereto, and decern "conform to the conclusions of the libel in so far as con- "cerns these lands; Refuse to approve the said report in so "far as regards the pursuer's lands of Upper Arrochar: As- "soilzie the defender from that conclusion of the libel, "and decern."

The teinds of Nether Arrochar, . .	£6	13	4
Teinds of Upper Arrochar, . . .	22	6	$5\frac{4}{12}$
According to the sub-valuation, .	£28	17	$9\frac{4}{12}$

But the minister had always been paid £30. 11s. $2\frac{6}{12}$d.

As the above decision, in regard to the teinds of Upper Arrochar, left a sufficient fund for the minister's augmentation, taking a fifth of the present rental of those lands, independently altogether of the teinds of Nether Arrochar, the respondent did not seek to disturb the judgment on this last point, seeing that the decision made the lands liable to further burden of augmentation of stipend. But a reclaiming petition was presented by the appellant, wherein he contended, in answer to the objection, as concerns the sub-valuation of Upper Arrochar, regarding the minister not being present, nor cited to appear; that His Majesty, the arbitrator to whom had been submitted the settlement of teinds, had, by his letter to the sub-commissioners, directed that where there had been an old rental, and the

teinds had been paid conform thereto, these "old rentals "should stand for a valuation where the parties consent, or "do not oppose it;" and, consequently, it was not incumbent on him to show, nor necessary for the record of the sub-valuation to set forth, that the minister was present, in order to found a conclusion that he did not object, as in this public act he must be presumed to know; and the natural inference from his not being present was, that he had no ground to oppose the valuation. And though the report of the sub-valuation did not mention that the minister was present, it did not therefore follow that he was not lawfully cited to appear. The legal presumption rather was, *omnia rite et solemniter acta*, especially as to him, who was an essential party to be called; and, at the distance of 160 years, it was reasonable to presume that he was so called, in order to make the proceedings effectual against him.

Besides, there was *prima facie* evidence that the minister knew well of the proceedings and diets as to Upper Arrochar, because it appears from the report, in regard to the Nether Arrochar teinds, which was going on at the same time with Upper Arrochar, that the minister was present at various parts of the proceedings. He could not attend the one without being apprised of the diets in regard to the other. If he attended to the one, in which his interest was infinitely of lesser magnitude, the presumption is, that he was present and attended to the other. The respondent answered: That it was true, that his Majesty had ordered that the old rentals should stand as the valuation, where the parties consent, or do not oppose; but this only applied where parties having interest either appear, or are lawfully cited to appear; but here the minister did not appear, nor was cited to appear, of which the record itself bore evidence, because the report of the sub-valuators does not mention either the one or the other. He cannot therefore be held as not opposing what he was entirely ignorant of: Had he been cited to appear, or had he appeared, the argument deduced from his not opposing the valuation would have had considerable force; but when, *ex facie* of the record, the minister was neither present nor cited, no such conclusion or consequence can follow. Nor is the reasoning in regard to the sub-valuation of the lands of Nether Arrochar, which took place at the same time, and at some of which he was present, more conclusive, because the proceedings in these two cases were totally different. The properties at that time,

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belonged to different parties, which necessitated in each a separate procedure. The Court, of this date, adhered.

Thereafter the process of augmentation was resumed, and the minister was allocated a stipend of twelve bolls of meal, and £1000 Scots (*i. e.*) £83. 6s. 8d.), with £5 for communion elements.

An appeal was then brought to the House of Lords against the above interlocutors, in so far as concerns the lands of Upper Arrochar, and a cross appeal by the respondent in regard to Nether Arrochar.

Pleaded for the Appellant.—The appellant's predecessor in those lands, obtained, so long back as 160 years ago, according to the usual forms and act of Parliament observed in such cases, a valuation of his lands by the sub-commissioners appointed for that purpose. The commissioners, as directed by the letter from King Charles the First, having declared the old rentals to stand for a valuation, the titular consenting, and the minister, the only other person interested, not opposing, that valuation took effect accordingly, and has stood unimpeached for nearly two centuries; for the Court of Teinds having, in the present action, repelled the objection, founded on an alleged dereliction, did thereby virtually find and declare that the sub-valuation had been the rule of payment downwards from the date of the valuation. Accordingly, no augmentation has been made to the minister ever since; and an application made by the minister in 1767 was dismissed, the Court being of opinion, that as the Teinds were *valued* and exhausted, they had no power to give an augmentation in such circumstances. On this distinct understanding, namely, that the teinds were valued and exhausted, and the lands not liable to be further burdened with augmentation of stipend, the appellant had purchased these lands, paid a price upwards of £8000 above the proved value, and it is but reasonable and just to expect that this sub-valuation ought not to be set aside on light or critical objections in point of form. But if the objection is of any force at all, it can only be upon the ground that the minister was not called as a party to the valuation by the sub-commissioners, or that he had no notice of the proceedings, and no opportunity of appearing for his interest; and that by his not appearing, his interest has been hurt by collusion between the heritor and the titular. Both the *presumptio juris* and *presumptio hominis* are against those suppositions, as the lands of Nether Arrochar and Upper Arro-

char stood precisely in the same situation—their valuation was going on at one and the same time; and it is in evidence that the minister made several appearances in the valuation of Nether Arrochar, and consented as to these, that the "auld rental of the teinds" should stand as formerly. The presumption therefore was, that the minister was cited to the valuation of the *Upper* Arrochar, or that he had appeared: And it would be extremely hard to require, at the distance of 160 years, the evidence of a regular and formal citation, when it is so established a rule of Court, that the grounds and warrants of decrees cannot be demanded after a period of twenty years from their date. A less rigid rule ought here to be adopted. Both these subvaluations had already, in point of fact, been approved by a decree of approbation of 1769; and it was only in consequence of the mistake therein that the present process was resorted to; and also in order to have the improper deletion of the words, "of the teinds," in one of the sub-valuations restored. In that former process of approbation, the present objections were equally competent that are now urged by the minister, but they were not stated: As to the cross appeal, had the valuation been of the stock and teind jointly, and not of the teind only, it would have been so expressed: but the business of the sub-commissioners was to report as to the value of the *teind*, and of course the 400 merks must be taken as the tithe only; and the deletion of the words must have happened by mistake or accident. As to dereliction, there are no grounds for sustaining this plea—a plea that carries with it such heavy consequences is never to be presumed. That the fanciful distinction of a dereliction from payment, partly of money and partly of corn, instead of corn generally, does not apply. If one sort of grain had been substituted for another, there might have been a change in the species of the payment, but not where money has been paid in place of grain; and dereliction was not to be presumed where the difference in amount was so small, probably arising in converting the grain into money, or from pure favour shown to the minister. The sub-valuations being neither irregular, nor without proof, ought to be sustained.

Pleaded for the Respondent.—In a process of sub-valuation before the sub-commissioners, it was necessary that all parties interested in the teinds should be present, or should be lawfully cited to attend. And it cannot be alleged or pretended that the minister was present, although in this

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case he had the most important interest in the proceedings, being both titular of the teinds and parish minister, because the reverse is presumable from the evidence of the record, which mentions the names of so many other persons, but makes no mention whatever of the minister, and thus the proceedings laboured under a radical and fundamental defect. On the cross-appeal: On the point of dereliction. The stipend paid the minister for time far exceeding the long prescription is greater than the amount fixed and ascertained by the report of the sub-commissioners; and as it is clearly established law that any heritor who, *sciens et prudens*, pays either to the minister or titular more than the amount of the teind as fixed by the sub-commissioners, he must be considered as having abandoned the sub-valuation, and lost the benefit thereof by dereliction.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with £150 costs to the respondent in respect of the appeal: And it is farther ordered and adjudged, that the cross-appeal be dismissed this House: And it declared that the said order of dismissal of the said cross-appeal be without prejudice, it being unnecessary to enter into the matter of the same.

For Appellant.—*Sir John Scott, Wm. Adam.*

For Respondents.—*Ro. Dundas, Sir Wm. Grant, John Anstruther, Wm. Robertson, Arch. Campbell.*

[M. 2589.]

WM. CURTIS, E. MAITLAND, and JOHN NEWMAN, (Assignees under Messrs. GIBSON & JOHNSON's bankruptcy, London, } *Appellants;*

EDWARD CHIPPENDALE, Trustee on the Sequestrated Estate of WM. M'ALPINE & Co. Calico Printers, Scotland, } *Respondent.*

House of Lords, 23d February 1797.

COMPENSATION—RETENTION—BILL TRANSACTIONS—FOREIGN DEBT—RANKING.—Circumstances in which held (reversing the judgment of the Court of Session), that bankrupts in England were entitled to rank on a bankrupt estate in Scotland, without the latter