[28th *August* 1833.]

No. 5. Colonel GORDON, Appellant.—*Lord Advocate* (*Jeffrey*) —*Dr. Lushington.*

GAVIN GIBB DUNN, and others, Respondents.—*Solicitor General* (*Campbell*)—*Robertson.*

Teinds.—The titular of the teinds of a parish entered into a submission with an heritor to ascertain the value of his teinds, and a decreet arbitral was pronounced valuing the teinds, but the minister was no party: Held (affirming the judgment of the Court of Session), that the heritor could not obtain a judicial approbation of that decreet, whereby the rights of the minister would be affected.

2D DIVISION.
Lord Moncreiff.

IN 1759 the College of Aberdeen, titulars of the teinds of the lands of Slains and Furvie, entered into a submission (to which the minister was no party) with the then proprietor, Lord Errol, regarding the yearly amount of parsonage and vicarage teind payable by the latter. This was determined by decreet arbitral in 1760, which contained the following clauses:—" Excepting always the stipend to the minis- " ter, which I find ought to be paid at the terms and " delivered at the places appointed in the decreet of " modification and locality of the said parishes of Slains " and Furvie, or otherways ascertained by use and " wont." " But as it appears that there is payable out " of the said James Earl of Errol's lands, within the " said titularity, yearly, to the minister of Slains and

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" Furvie, twenty-seven bolls bear, which exceeds the
" teind bear as aforesaid in six bolls one firlot and
" three fifths of a peck, and notwithstanding thereof
" the said James Earl of Errol has been in the use of
" payment of the said twenty-seven bolls of bear to the
" said minister, but in respect the whole teind is
" hereby decerned to be paid and delivered to the
" titulars, with the exception above mentioned, I farther
" ordain the said titulars to free and relieve the said
" James Earl of Errol and his foresaids of the said six
" bolls one firlot and three fifths of a peck of bear in
" all time coming."

Part of these lands now belonged to the appellant. In 1802 a decree of valuation of the teinds of his lands was pronounced, reserving all prior valuations or decrees; and in a process of augmentation brought by the minister in 1809, this valuation was founded on. Thereafter, the College, as titulars, brought against Colonel Gordon, but not against the minister, a reduction of the decreet arbitral, and concluding for payment or accounting according to the valuation of 1802; but he was assoilzied.

In 1829 the respondent, as minister of the parish, brought a summons of augmentation, modification, and locality, in which Colonel Gordon appeared, and pleaded that the valuation by the decreet arbitral in 1760 was a valid and regular proceeding, and effectual against the minister and all concerned, and that it had not been abandoned by the process of valuation in 1802, which was brought in ignorance of the prior award; and besides the decree bears an express reservation of all former valuations, and therefore he was not barred or

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excluded from founding on the decreet arbitral.* . To this it was answered, that the decreet arbitral could have no force against the minister of the parish, as he had not been in any respect made a party to the submission; and the process of valuation in 1802 afforded conclusive proof that the proceedings in 1760 were regarded as of no force against the minister.

Meanwhile, Colonel Gordon brought in 1830 a summons of approbation of the decreet arbitral calling the College, the Minister, and the Crown.

In this action "the Lord Ordinary (20th December "1831) having considered the closed record, and heard "parties procurators thereon, and advised the whole "process in this action of approbation, sustains the "defences, assoilzies the defenders, and decerns; finds "expenses due, and remits the account, when lodged, "to the auditor, to be taxed.

"*Note.*—The Lord Ordinary holds these points to be "settled:—1. That in a process of valuation before "the high commission the minister of the parish must "be called in order to make the decreet binding on "his successors. (Forbes, 399, 401; 2 Ersk. 10, 35; "Minister of Kirkbean, February 4, 1708.) 2. That "in a process of approbation of a sub-valuation the "rule is the same. (Lord Salton v. Cook, May 22, "1827, F. C.; Minister of Speymouth and Duke of "Gordon, December 2, 1823.) 3. That where the

* Ersk. b. ii. tit. 10. sec. 27, 28, 29, 34; Act 1633, c.19; M'Neill v. Minister of Campbelltown, 3d June 1801, Mor. No 12, Apx. Teinds; Sir George Mackenzie's Observations on Statute 1633; Connell on Tithes, 2d edit. vol. i. p. 210; Forbes, p. 402; Case of Robertson in 1734 (1 Connell, 329, 1st ed.); Lockhart v. Duke of Hamilton, 20th Nov. 1793 (ib. 331); Hamilton v. Colbrook, 30th Nov. 1803 (ib. 332); Case of Hamilton, 1820.

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" benefice was a parsonage, and the minister, of course, " titular, a report of valuation by the sub-commissioners " cannot be approved of, unless it appears that it was " made in a process under the old statutes or commis- " sion, to which the minister was called as a party. " (Ferguson v. Gillespie (Arrochar), February 4, 1795, " affirmed February 15, 1797.) 4. That where the " minister was a stipendiary, and the titular was duly " called, a sub-valuation may be approved of, though it " does not appear that the minister was either called or " present. (Macneil v. Muir of Campbelltown, June 3, " 1801, affirmed February 20, 1809.) 5. That extra- " judicial contracts or transactions may be the grounds " of decrees of approbation, if it appears either that " they were consented to by the minister, or that he, " being duly called in the process of approbation, makes " no objection to the decree being pronounced. This " point might have been thought at least doubtful, but " seems to be settled by these cases:—Lockhart v. Duke " of Hamilton, November 20, 1793; Hamilton v. Col- " brook, November 30, 1803; Goldie v. Hamilton, " November 22, 1820. 6. In the last case mentioned " it was decided, that where the minister was duly " called in a process of approbation of such an extra- " judicial valuation, to which he had not been a party, " and did not appear to object to it, he could not " afterwards reduce the decree of approbation pro- " nounced. The ground of decision was, that the " decree must be held to be equivalent to a decree of " valuation by the high commission. (1 Conn. p. 215.) " But the Court were much divided in opinion on that " case; and the judgment does not well accord with " those in the cases of Kinnoul and Speymouth in 1823,

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" But taking all these points to be so far settled, it has " never been held or decided, that any extra-judicial " valuation, by contract or arbitration between the " titular and the heritor, to which the minister has been " no party, can be insisted on as the ground of a decreet " of approbation, where the minister appears in that " process, and expressly objects to it. That is the pre- " sent case. The judgment in the case of Knox v. the " Heritors of Slamannan, June 23, 1773, is express, " even in a case where the minister for the time had been " a party to the contract, 'that nothing can ascertain " 'the value of the teinds in a question with the minis- " 'ter, but a proper decreet of valuation by the proper " 'Court.' (1 Con. p. 216.) And in the case of Col- " brook, the Court expressly condemned the practice of " extra-judicial valuations, even while they granted the " approbation, on the defect of title and interest in the " objecting party. The Lord Ordinary conceives, that " any valuation obtained by arbitration is in quite a " different situation from a report of the sub-commis- " sioners. In the latter, though not bearing that the " minister was called, it may be held, that the procura- " tor fiscal of the presbytery acted for the interest of the " church. But, independent of this, such reports have " the express authority of the statutes, declaring that " they shall be the grounds of decrees of approbation. " Extra-judicial arrangements, however well conducted, " have no such sanction. There are strong specialties " in this case, arising from the clause of relief in the " decreet arbitral, from the decree of valuation in 1802, " and from the remarkable terms of the decree of ab- " solvitor in the process of reduction between the King's " College of Aberdeen and Mr. Gordon, in 1809. But

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"the Lord Ordinary, having a clear opinion on the "general point, does not think it necessary to go into "these specialties."

And in the augmentation, "the Lord Ordinary (20th "December 1831) having considered this closed record, "and heard parties procurators thereon, in respect that, "in the relative process of approbation, he has pro- "nounced an interlocutor assoilzieing the defenders, "repels the pleas set forth by Colonel Gordon in this "process, founded on the valuation expressed in the "decreet arbitral in 1760, reserving to him his rights "under the decreet of valuation in 1802."

The Court having adhered to these interlocutors*, Colonel Gordon appealed (15th Feb. 1832); and after hearing his counsel the House stopped the respondent.

Lord Chancellor.—My Lords, in this case I do not think it necessary that your Lordships should be occupied with hearing the counsel for the respondents. On a very careful examination of all the authorities referred to on the part of the appellant, I entertain no manner of doubt that the Court of Session, in affirming the interlocutor of the Lord Ordinary, came to the right conclusion, and that your Lordships must come to the same conclusion as the result of the authorities. The Lord Ordinary arrived at it after a careful, a judicious, and a learned examination of those authorities.

My Lords, the course of proceedings in which this question arises must never be lost sight of. It is a question of the approbation of an extra-judicial valua-

* 10 S., D., & B., p. 338.

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tion entered into between the titular and the land-owners in the absence of the stipendiary minister, and to which he is, for the first time, made a party, on an application to the Court for the approbation of the extra-judicial valuation. The Court have, by the raising of this action, which concludes simply for approbation of the extra-judicial valuation made seventy years ago, been placed in the same situation in which the Court was placed when the approbation was applied for in the earlier Hamilton case,—I mean the case of 1793,—upon an extra-judicial valuation which had been made an hundred years before, that is to say, the contract of valuation entered into by the Duchess Ann as the then owner of the lands; and the question here is, as it was there, Shall the Court hold the parties to be bound by the extra-judicial valuation? Is it justified in decreeing approbation of the former valuation? Is that former valuation binding upon the parties? My Lords, I refer, in the commencement of the few observations with which I think it necessary to trouble your Lordships, to the case of Hamilton in 1793, because it is said to be the beginning of a series of decisions bearing very much in favour of the appellant. Now, who were the parties there? The Duke of Hamilton, representing Duchess Ann on the one side, and the landowners on the other side. But it does not appear there that the minister did not also give his consent, the minister being the party who had a right to object—the Duke of Hamilton clearly having no right to object. Was or not that contract binding between the parties? That was the question in 1793. That it was clearly binding between the Duke of Hamilton and the land-owners is certain, for the Duke of Hamilton was bound

by the contract of Duchess Ann his ancestor; but the minister was not bound by that contract: and if the minister had chosen to take the objection, then they would have been there in precisely the same situation in which we are here; but the minister took it not. The simple question with which the Court had to deal was with respect to the rights as between other parties,—the landowners on the one side setting up the contract of Duchess Ann, and the Duke of Hamilton, on the other, resisting that contract, and stating that he was not bound by it. The Court there held that the Duke of Hamilton was bound by it; that, as between him and the landowners, it was as good as if the question had been between the landowner and Duchess Ann, the person with whom the contract was made; but that between the minister and the landowner the question was not raised, because the minister does not appear to have made an objection. If the minister had taken an objection—if the minister had said, "True, that is a "contract binding between the Duke and the landowner, "the Duke representing the maker of the contract on "the one side, and the landowner on the other; but, as "minister, I am not bound by it; it is as between you, "the opposing parties, res inter alios acta;" and the Court, in 1793, had repelled that objection, and found that the contract made one hundred and twenty years before was binding upon all parties as well as those two who were parties to the contract; that, being binding upon them, it was consequently binding upon the minister, who had been no party to the contract, either in the person of himself or his predecessor,—this would have been a case precisely like the present; but it is not a case at all like the present, because the minister

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did not object; and so with respect to the other two cases to which Lord Moncreiff, in that most able and distinct statement of the case to which I before adverted, refers,—and which I am not going too far in asserting to be a model for a judicial statement,—my Lord Moncreiff, contrary to what has been alleged, enters into the special circumstances and the result of the cases, and an approbation is most fully expressed of this interlocutor, particularly by the Lord Justice Clerk. It has been asserted to-day that those previous decisions had not been attended to—that this effect had been overlooked. Why, the subject matter of that series of cases is referred to in one of Lord Moncreiff's reasons, in which he lays it down, "that extra-judicial "contracts or transactions may be the grounds of decrees "of approbation, if it appears either that they were "consented to by the minister, or that he, being duly "called in the process of approbation, makes no objec-"tion;" and he cites those very cases, beginning with Lockhart v. the Duke of Hamilton in 1793; so that it was on a consideration of this series of cases, supposed to be so much in favour of the appellant, and on the principle to be elicited from them, that he was led to the conclusion, in which the Court agreed with him, that there was a fact which differed those cases from the present, inasmuch as here no approbation whatever of the minister was shown, and the Court was of opinion that his approbation must be shown.

My Lords, it appears to me that the great distinction between a sub-valuation and an extra-judicial valuation, or a valuation by decreet arbitral, as in this case, is too obvious to be for one moment overlooked. That distinction guides us through the whole of the cases, and

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leads us safely to the decision at which the Court below arrived. In all the cases referred to by the counsel for the appellant, and particularly that of Campbelltown, the valuation or the sub-valuation is an act done in a quasi judicial proceeding instituted under the authority of two statutes, the act of 1633 and the subsequent act of 1661, and carried on before persons appointed by the highest authority in the state—by the Crown, with the approbation and assent of the estates in Parliament; the commissioners themselves being the judges, that is, the different officers of state, peers of the realm of Scotland, and members of the Lower House, the representatives of the Commons, and in that case fifteen to be a quorum,—the sub-commissioners being as much public functionaries and officers authorized by public appointment, and statutably authorized, as the commissioners themselves,—and all their proceedings being expressly endued by the act of parliament with the force of decreets, sentences, nay acts of parliament. My Lords, in one case a power is given of what they call rectifying—that is, of reviewing a sub-valuation come to after a proceeding has been regularly instituted before the commissioners; and in that one case only does the statute give the power of rectifying to the minister, not being the titular—that is to say, where he is only stipendiary, not being the person endowed with the tithes. Where he is merely a stipendiary he shall in that case, and in that case alone, have the power to rectify the valuation. The question is, whether there has been collusion; and whether the collusion between the parties instituting and carrying on the proceeding has been such as to produce an injury to the interest of the stipendiary minister to the extent of one third?

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Now, my Lords, to show that this permission of the statute is confined distinctly to the case of valuations under its authority, it is only necessary to look to the way in which that matter is put. After going through the whole proceedings the act continues thus: — "At-"tour,"—that is to say, besides,—"for clearing of all "doubts and difficulties which may arise anent the "rectifying of valuations, or other particular heads "following, his Majestie and estates have declared, "and declare, that where valuations are lawfully led "against all parties having interest, and allowed by the "former commissioners, according to the order ob-"served by them, that the same shall not be drawn in "question, nor rectified upon pretence of enorme leison "at the instance of the minister, not being titular, or "at the instance of his Majestie's advocat, for and in "respect of his Majestie's annuitie, except it be proved "that collusion was used betwixt the titular and heri-"tor, or betwixt the procurator fiscal and the titulars "and heritors; which collusion is declared to be where "the valuation is led, with diminution of the third "of the just rent presently paid, and which dimi-"nution shall be proved by the parties oathes." This being in the most express terms confined to that particular case — the valuation led under the statute — can it be contended that we have the least ground for applying this restriction, which is merely a restriction upon the right of the minister, not being a titular, to a case not within the statute — to a case not within either the words or the spirit of the enactment, and to which the reason whereupon that enactment is grounded does not in the smallest degree apply — I mean to the case whereof a contract, an extra-judicial

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valuation, not in the course of proceeding instituted under the law, not carried on before commissioners appointed and authorized by the act, not having in any way the sanction which the act gives to valuations laid before those commissioners so appointed and so authorized—carried on between the parties—it being, in fact, only an expression of their own private contracting will between and among themselves, and which is of no manner of weight whatever, either within the words or the spirit of the act? My Lords, the case of Campbell then falls at once to the ground, as regards the argument for the appellant, which it is cited to support. That was the case of a sub-valuation—a valuation under the act. Accordingly, your Lordships will find that the whole of the argument in that case is grounded upon a reference to the act of 1633 and the act of 1661. On looking to the appeal case to see whether any other argument was raised, it appeared that there was a question of fact raised as well as of law.

With respect to the observation of the Lord Ordinary on a valuation by the procurator fiscal, I say nothing, because some doubt appears to exist whether, except in the case provided for by the terms of the commission of 1659, that would apply — whether in any case the procurator fiscal could value the land. It appears to me, from the expressions used by Sir John Connell in different parts of his work, and also the manner in which Lord Moncreiff mentions the procurator fiscal, as if he took it for granted as a matter of course that in such cases the procurator fiscal might have been used to be appointed to carry on proceedings representing interests in cases where the title did not appear.

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My Lords, this brings me to the observation which I threw out on a former day, when commenting upon the cases of appeal from the Scotch Court. I refer to an observation which I threw out respecting the discretion of advising appeals. I wish again to impress it upon your Lordships, and I do it with great satisfaction, because we are in the presence of learned counsel, all of whom must be perfectly aware that what I say cannot be supposed to have the most remote application to them. There is no duty which counsel ought more conscientiously to exercise, than that of advising appeals to this House from the Court of Session. They ought to feel that it is not a matter of course, when a case is brought to a learned counsel for his opinion, whether there is probable cause of appeal or not—that it is any thing but a matter of course that the learned counsel should sign his name to the statement,—of probable cause, merely because there was not an unanimous judgment in the Court below. The learned counsel are bound in such case to exercise the most abstinent discretion in recommending the expense, the delay, and the vexation which must be the consequences of an appeal to this House. I have no manner of doubt, from the names of the most respectable persons which are signed to this case, that in this instance they felt it to be an arguable point; and they may have been right in supposing that there was no former decision upon the question. It is certain that no decision had ever been made which ran upon all fours with the present case, and therefore in some respects this case might be thought fit to receive, in the last resort, the judgment of this House. My observation was pointed at cases that

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frequently occur in the Court below, in which reasons are given perfectly sufficient to support the judgment, but where, if one single inaccuracy is found among those reasons, I have seen appeals brought, not because the decision was erroneous, but because some of the reasons given for it by the Court below were bad. That is no reason —it is any thing but a reason—for bringing the judgment of the Court below by appeal to your Lordships, provided judgment is generally well founded.

My Lords, I have no hesitation in recommending to your Lordships to affirm the judgment of the Court below; and I should further recommend to your Lordships to affirm it with full costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of *238l. 8s.* for his costs in respect of the said appeal.

George W. Poole—Caldwell & Son, Solicitors.