It is said that the pursuer had sexual intercourse with the defender after he knew of her adultery, but I do not think that this is established by the proof. The question has also been raised, whether sexual intercourse is essential to establish condonation? I am aware that different opinions have been expressed upon this question, and it is sufficient to say that I am not at present satisfied that it is essential, if there is otherwise adequate evidence of full forgiveness.

If, for example, a man, in a different station in life, in full knowledge of his wife's adultery, took her back to live with him in his house, placed her at the head of his table, and gave her the full control of his household, went about with her as his wife, and invited his friends to meet her at his house, this might not unreasonably be regarded as unequivocal evidence that he had fully forgiven her offence. There is, however, nothing in this case to indicate that the pursuer took the defender back to live with him as his wife. He appears rather to have allowed her to come to his house only out of pity, when the parochial authorities had refused to afford her shelter any longer. She appears to have slept with the eldest daughter, and there is no evidence that he lived with her at bed and board as his wife, or did anything to indicate that he had forgiven the wrong which she had done to him.

LORD M'LAREN—[*After dealing with the facts relating to the acts of adultery founded upon, in regard to which his Lordship stated that he agreed with the Lord President, his Lordship proceeded as follows*]:—A more interesting question is the point raised as to condonation. I agree that there may be different ways of forgiving an injury of this kind. As at present advised, I have no doubt as to the validity of a discharge of his right by a husband who in full knowledge of all circumstances binds himself not to take proceedings for divorce, and at the same time makes it a condition that his wife should live separate from him. I think also that if in knowledge of the circumstances a husband restores his erring wife to her position at the head of his house, and entrusts her with the management of his domestic affairs, that is enough, and it is unnecessary to inquire if he has had her as his companion at bed as well as at board. But, on the other hand, it is a principle of Scotch consistorial law that one act of intercourse would bar an action for divorce, on the ground that it is not conceivable a man so wronged would consort with his wife unless he had forgiven her, or had made up his mind that he had not been wronged. But these questions do not arise in this case, because I agree with the Lord Ordinary in thinking that it has not been shown in fact that there was intercourse after the husband had knowledge of his wrong, the wife only having been admitted to his house as a shelter for her when destitute and till the questions between them should be settled.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Trotter. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for the Defender — Christie. Agent—Walter Finlay, W.S.

Friday, March 7.

FIRST DIVISION.

NEILL'S TRUSTEES *v.* NEILL.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power Partially ultra vires—Restriction of Fee to Liferent—Gift to Parties not Object of Power—Vesting.

A truster directed his trustees to hold the shares of the residue falling to his daughters for their behoof in liferent alimentary, and to and for behoof of their respective children *per stirpes* in fee, "payable and divisible the said fee in such shares or proportions, under such conditions and restrictions, and otherwise in such way and manner as my said daughters may respectively appoint by any writing under their respective hands, which failing, then to and among such children equally, and that upon their respectively attaining the age of twenty-one years, and upon the death of their said respective parents." It was further provided that in the event of any of the daughters dying leaving issue, but of such issue not surviving to take in terms of the destination thereinbefore contained, then the share of the residue liferented by such daughter should devolve upon her surviving brothers and sisters along with the issue of any brother or sister who might have deceased leaving issue. In the event of any of the daughters dying without issue, or of such issue not surviving to take, it was provided and declared that it should be competent for her to test upon her share.

N, a daughter of the truster, died leaving three sons, having executed a settlement the effect of which was that her trustees were directed to pay half of her share in her father's estate to her sons absolutely on the youngest attaining twenty-five years of age, while they were to pay an alimentary liferent of the other half to her sons, and hold it "for behoof of their respective issue *per stirpes* in fee," with a power of appointment to the sons. No power was given to the sons to test upon the half as to which they were restricted to a liferent. *Held* that the appointment was wholly invalid, and that a fee of one-third of the share of her father's estate liferented by N vested in each of her sons on their respectively attaining the age of twenty-one.

Mrs Elizabeth Clark or Neill died on 26th November 1900, and was survived by her husband William James Neill and three children, James Clark Neill, who attained majority in August 1900, Norman Clark Neill, aged seventeen, and Kenneth Mackenzie Clark Neill, aged ten.

At the time of her death Mrs Neill was in the enjoyment of a liferent of the sum of £150,868, being part of the trust-estate of her father the late James Clark, and also of other property, heritable and moveable.

Mr Clark by his settlement, which was dated 17th August 1880, had conveyed the whole of his estate to trustees for certain trust purposes, and, *inter alia*, directed as follows:—"(*Lastly*) And with regard to the residue of my means and estate . . . I direct my trustees to hold and apply, pay and convey the same to and for behoof of all my children equally, and their respective issue, as follows, viz.—One-half of the shares falling to sons to be paid and conveyed on my death to such of them as shall then be twenty-five years of age, and to such of them as shall not then have attained that age on their respectively attaining the age of twenty-five years, and the other half of the shares falling to sons and the whole of the shares falling to daughters to be held and applied, paid, and conveyed to and for their behoof in liferent for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes* in fee, payable and divisible the said fee in such shares or proportions, under such conditions and restrictions, and otherwise in such way and manner as my said sons and daughters may respectively appoint by any writing under their respective hands, which failing, then to and among such children equally, and that upon their respectively attaining the age of twenty-one years, and on the death of their said respective parents: Declaring with regard to the shares of residue before directed to be paid to my sons absolutely, that in the event of any of my sons predeceasing the said term of payment and conveyance leaving issue, such issue shall, on their respectively attaining the age of twenty-one years, be entitled to the share (whether original or as augmented by accretion) which their parent would have taken on survivance: And farther, that in the event of any of them predeceasing the said term without leaving issue, then the share which such predeceaser would have taken on survivance shall fall and accresce to his surviving brothers and sisters along with the issue of any brother or sister who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance: But subject always, such accretion, in as far as in favour of sons, to the extent of one-half thereof, and in as far as in favour of daughters to the whole extent thereof, to the same liferent, and also to the same destination, declarations, and conditions in all respects as are herein contained with regard to the original shares of residue provided to them respectively in liferent and their respective issue in fee: And farther declaring, with regard to the shares of residue before directed to be held for behoof of my sons and daughters respectively in liferent and their respective issue in fee, that in the event of any of my said children dying without leaving issue, or in the event of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, then the share of residue (whether original or as augmented by accretion) which may have been liferented by such child shall devolve upon his or her surviving brothers and sisters along with the issue of any brother or sister who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance: But subject always such accretion, in as far as in favour of sons, to the extent of one-half thereof, and in as far as in favour of daughters to the whole extent thereof, to the same liferent, and also to the same destination, declarations, and conditions in all respects as are herein contained with regard to the original shares of residue provided to them respectively in liferent and their respective issue in fee: And farther, I provide that between the date of my death and the term of payment and conveyance of the shares of residue before directed to be paid to my sons absolutely, my trustees shall be entitled to apply the whole or such portion as they may think proper of the annual income of each son's entire share, and even a part of the fee itself, towards his suitable maintenance, education, and upbringing: And also that between the expiration of the liferents in favour of sons and daughters and the period of payment and conveyance to their respective issue, my trustees shall be entitled to apply the whole or such portion as they may think proper of the income effeiring to each beneficiary's share, and even a part of the fee itself, towards his or her suitable maintenance, education, and upbringing: And farther, and notwithstanding anything hereinbefore contained, I provide and declare . . . (*Secondly*) that in the event of any of my sons or daughters dying without leaving issue, or of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, it shall be competent to him or her to test upon the share of residue (whether original or as augmented by accretion) that may have been liferented by him or her, and that in favour of such person or persons, or for such uses and purposes and in such way and manner all as he or she may think proper."

Mrs Neill by a trust-disposition and settlement dated 8th March 1900 disponed to trustees, for the trust purposes therein mentioned, all property and estate belonging to her at the time of her death, "or in regard to which I may have the power of disposal, and without prejudice to said generality, the share of residue, original or accrescing, of the trust-estate of my late father James Clark, in regard to which I am by his will given a power of disposal or

of testing in the respective events therein mentioned." . . . After making various provisions (including a provision for an annuity of £1000 to her husband out of the revenue of her personal estate) she directed her trustees, in the fifth place—"Whereas by the said will of my late father James Clark I am empowered to divide the fee of my share of his estate among my children in such shares or proportions, under such conditions and restrictions, and otherwise in such way and manner as I may appoint by any writing under my hand: And whereas it is my wish that no division among my said sons, either of my personal estate or of my share of my father's trust estate, shall take place, nor shall any right or interest thereto vest in them until the youngest attains the age of twenty-five years complete, and thereafter that one-half of the share to which each of them may be entitled either from my personal estate or from the trust-estate of my deceased father shall be invested for them in liferent and their children in fee, while the other half shall be paid over to them absolutely: . . . Therefore . . . in the sixth place — On the youngest of my said sons attaining said age of twenty-five years complete I direct my said trustees, subject always to due provision being made for payment to my said husband of said annuity, to divide the residue and remainder of my said personal estate—one-half to my eldest son, the said James Clark Neill, and the other half equally between my two youngest sons, the said Norman Clark Neill and Kenneth Mackenzie Clark Neill, and to divide my said share, original or accrescing, of my said father's trust estate equally to and among my said three sons and the survivors and survivor of them: And I direct my said trustees to pay over one-half of the respective shares, whether from my personal estate or my said share of my said father's trust-estate, to my said sons and the survivors and survivor of them, and with respect to the remaining half of said respective shares, I direct my said trustees to hold the same for behoof of my said sons and the survivors and survivor of them in liferent for their or his liferent alimentary use only, and to and for behoof of their respective issue *per stirpes* in fee, payable and divisible the said fee in such shares and proportions, under such conditions and restrictions (including right to limit the right of any such issue to a liferent or liferent alimentary), and with such terms of payment and vesting, and in such way and manner as each such son may appoint by any writing under his hand, and failing such appointment, then equally to and among such issue, but only on their respectively attaining the age of twenty-one years complete, and on the death of their respective parents, until which events no right shall vest in them: Declaring with regard to the one-half of their respective shares directed to be paid to my said sons absolutely, that in the event of any of them predeceasing the said term of payment and vesting leaving issue, such issue shall on their respectively attaining the age of twenty-one years be entitled to such one-half, whether original or accrescing, as their parent would have taken on survivance; and further, that in the event of any of them predeceasing the said term without leaving issue, then such one-half as such predeceaser would have taken on survivance shall fall and accresce to his surviving brothers or brother equally along with the issue of any brother who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance, but subject always such accretion, to the extent of one-half thereof, to the same liferent, and also to the same destination, declarations, and conditions in all respects as are hereinbefore contained with regard to the one-half of their shares before directed to be held for behoof of my sons in liferent and their issue in fee; and further declaring with regard to the one-half of their shares before directed to be held for behoof of my sons in liferent and their issue in fee, that in the event of any of my said sons dying without leaving issue, or in the event of any of my said sons dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, then such one-half, whether original or accrescing, shall devolve upon such son's surviving brothers or brother along with the issue of any brother who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance, but subject always such accretion, to the extent of one-half thereof, to the same liferent, and also to the same destination, declarations, and conditions, in all respects as are herein contained with regard to the original one-half of their shares before directed to be held for my said sons in liferent and their issue in fee: In the seventh place, should it from any cause be found that I am not entitled to limit the right of my said sons in my share of my said father's trust estate to a liferent, I direct my said trustees to hold the whole of the residue of my personal estate for behoof of my said sons, James Clark Neill, Norman Clark Neill, and Kenneth Mackenzie Clark Neill in liferent, for their respective alimentary liferent use only, and for their respective issue in fee, but always in the following proportions:— One-half thereof for the said James Clark Neill and his issue, and the other half thereof for the said Norman Clark Neill and Kenneth Mackenzie Clark Neill equally between them and their respective issue, and that all in terms of the destination, and under the declarations and conditions herein contained with reference to the original one-half share of both estates directed to be held for behoof of my said sons in liferent and their issue in fee: And I declare it to be my intention that the said residue of my personal estate shall in that event come in room and place of and be substituted for the one-half of both estates hereinbefore settled on my said sons in liferent and their said issue in fee." . . .

Questions having arisen as to the import of Mrs Neill's testamentary directions, a

special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mrs Neill's trustees, (2) James Clark Neill (Mrs Neill's eldest son), (3) Norman Clark Neill and Kenneth Mackenzie Clark Neill (Mrs Neill's two younger sons), and (4) Mr Clark's trustees.

The following were the contentions of the parties as set out in the case—"(1) The second, third, and fourth parties contend that Mrs Neill had no power under Mr Clark's trust-disposition and settlement to restrict the right of the second and third parties in any part of the share of Mr Clark's estate which was liferented by her to a liferent; that the appointment made by her is wholly inept, and that therefore the fee of the said share falls to be paid to the second and third parties in terms of Mr Clark's trust-disposition and settlement on their respectively attaining the age of twenty-one years. Otherwise they contend that the said appointment is invalid in so far as purporting to restrict to a liferent the right of the second and third parties to one-half of the said share, and that the second and third parties are entitled to payment of the fee of the said one-half on their respectively attaining majority, or otherwise that they are entitled to payment of the fee of the whole of the said share on the youngest of them attaining twenty-five years of age. Further, the second and third parties contend that the fee of the said share or at least one-half thereof vested in them on the death of their grandfather the said James Clark. The fourth parties contend, however, that no part of the said fee will vest in the second and third parties until they respectively attain majority. The first parties maintain that the appointment is valid, and that in any event the fee of said share does not vest and is not payable in terms of Mrs Neill's trust-disposition and settlement until the youngest of her three sons attains the age of twenty-five. (2) The second and third parties maintain that until they respectively attain majority, or until the youngest of them attains the age of twenty-five years, as it may be held, they and the survivors or survivor of them are entitled to payment of the income of said share, or otherwise that the fourth parties are entitled to make advances to them, or any of them, out of the income or the capital of their presumptive parts of said share for their maintenance, education, and upbringing. The first parties, however, maintain that the fourth parties are bound to hold the share of Mr Clark's estate, of which Mrs Neill enjoyed the liferent, until the period of distribution thereof prescribed by Mrs Neill in her trust-disposition and settlement, and that the fourth parties are precluded by the terms of Mrs Neill's trust-disposition and settlement from paying over the income thereof to the second and third parties, and from making any advances to the second and third parties out of the interest or capital of said share."

The questions of law submitted for the judgment of the Court were as follows:—"1. (*a*) Is the appointment by Mrs Neill in her trust-disposition and settlement of her share in her father's estate wholly invalid, and is the fee of the whole of the said share payable to the second and third parties on their respectively attaining the age of twenty-one years, or is the said appointment effectual to any, and if so, to what extent? or (*b*) Did the fee of said share in whole or in part vest in the second and third parties on the death of the said James Clark? if not, at what period will the same vest in them? 2. (*a*) Are the second and third parties now entitled until the date or dates of payment of the fee of the share of Mr Clark's estate which was liferented by Mrs Neill to payment of the income of such share? or (*b*) Are the fourth parties now entitled to make advances of interest or of capital to the second and third parties out of their respective presumptive parts of said share towards their maintenance, education, and upbringing?"

Argued for the second party—The power conferred on Mrs Neill did not entitle her to restrict her children's right to a liferent. They were given an absolute gift in fee by their grandfather, and what followed was merely the manner of administration. She had no power even of delaying payment. The exercise by her of the power was bad in three respects—(1) She had postponed the date of vesting, which was a serious inroad on the rights of the beneficiaries, by excluding them from benefitting in any way in the fund which Mr Clark said was to be payable to them at twenty-one. (2) The class which he intended to benefit consisted of those grandchildren who attained to that age, and her power was limited to that class, but by this postponement she was altering the constitution of the class. Moreover, she was attempting to restrict the right of her children to a liferent, which was incompetent. There had never been a case where the giving of a mere liferent such as this without any power of disposal had been held a good exercise of the power of division of the fee, though a liferent together with a testamentary power of disposal had been held good—*Lennock's Trustees* v. *Lennock*, October 18, 1880, 8 R. 14, 18 S.L.R. 36; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450; *Matthews Duncan's Trustees*, February 20, 1901, 3 F. 533, 38 S.L.R. 401; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273. (3) It could not be said here that "children" was equivalent to "issue," and accordingly Mrs Neill had introduced a class of beneficiaries whom her father did not intend to benefit, and the power was invalidly exercised in this respect. The whole exercise of the power was so complicated, as Mrs Neill herself recognised in the seventh purpose of her will, that it must stand or fall together.

The third parties adopted the argument of the second party, and further argued that the fee in their share vested in them on the death of their grandfather—*Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975.

Argued for the first parties—It was not maintained that this case fell precisely within the decision in *Lennock's Trustees* v. *Lennock*, *supra*, or that it was competent to introduce grandchildren who were not objects of the power. But the real question was whether they were not really included within it, and in fact they were, for "children" was equivalent to "issue." Otherwise the expression "children *per stirpes*" would have no meaning—*Harley* v. *Mitford*, 1855, 21 Beavan 280. But even if this was a bad exercise of the power to that extent, it did not invalidate the whole of the appointment, nor was there anything to prevent Mrs Neill from fixing the period of payment to be when her youngest child attained the age of twenty-five. By doing so she introduced no strangers to the power. Accordingly, even if the liferent restriction was invalid there was no reason why this direction should fall.

The fourth parties argued that vesting was postponed till the children respectively attained majority, and founded upon the case of *Wilson's Trustees* v. *Wilson*, 3 F. 967, 38 S.L.R. 706.

At advising—

LORD ADAM—[*After narrating the clauses of the deeds bearing upon the questions as set out above, his Lordship proceeded*]—There can be no doubt as to the effect of Mrs Neill's appointment of what she terms her share of her father's trust-estate if it is a valid appointment. As regards one-half of it, she has directed it to be paid to her sons absolutely on the youngest attaining twenty-five years of age, and as regards the other half she has directed an alimentary liferent to be paid to them, and given the fee to their issue, with a power of appointment to the parent of the fee among his issue. But she has given no power to her sons of testing on their respective shares. Now, I think it is quite settled law that where the fee of a fund is given to certain persons with a power to another person to apportion that fund among them, it is incompetent so to exercise the power of apportionment as to reduce the fee so given to a mere liferent, and that any such attempted exercise of the power is invalid.

On this part of the case we were referred to the series of cases beginning with *Lennock's Trustees*, 8 R. 14, and ending with *Matthews Duncan*, 3 Fr. 369, but I do not think it necessary to refer to them at length, because in this case we have a pure case of an attempt to reduce a fee to a bare liferent, no fee either restricted or otherwise being apportioned to the fiars.

That being so, we have to revert to Mr Clark's settlement to see whether as maintained by the sons he has conferred a right of fee of this part of his estate upon them, and if so, whether the terms of the power of appointment conferred upon Mrs Neill entitled her to reduce that right to a liferent.

As we have seen, the trustees were directed to hold, apply, and pay this part of the trust-estate to and for behoof of his daughter in liferent and her children in fee, and power was given to her to divide and direct payment of the fee in such shares and proportions, and under such conditions and restrictions, and otherwise in such way and manner as she might appoint, and failing such appointment then to her children equally upon their respectively attaining twenty-one years of age and on her death.

It appears to me that under this direction an absolute fee of this part of the trust-estate was conferred on Mrs Neill's children, and that the trustees were bound to hold it for them; and I do not see how the power given to Mrs Neill to attach restrictions and conditions as to the payment of the fee to her children should entitle her to direct that either the whole or in this case one-half of the fee should not be paid to them but paid to her grandchildren. That is not attaching conditions or restrictions to the payment of the fund to the objects of the power, but directing that payment shall not be made to them but to her grandchildren who are not objects of the power.

I am therefore of opinion that the appointment by Mrs Neill is wholly invalid, and that question 1 (*a*) should be answered accordingly.

With reference to question 1 (*b*) I am of opinion that a share of the fee did not vest in any of Mrs Neill's sons until they should respectively attain twenty-one years of age. It will be observed that the fee to Mrs Neill's children is qualified by the direction that in case she should die without leaving issue, or of such issue not surviving to take in terms of the destination, then that the share of the residue liferented by her should devolve on her surviving brothers and sisters along with the issue of any brother or sister who might have deceased leaving issue. "Not surviving to take in terms of the destination" appears to me to mean surviving the period of payment, which was the attainment of majority.

It could not be known until this event arrived whether her issue would take the fee of the share or whether it would go to her brothers and sisters. I therefore think that this destination-over suspended the vesting until her issue survived to take.

With reference to the second question, it has no application now to the second party, because he having attained majority is entitled to payment of his share of the fund in question.

As regards the third parties, I think that 2 (*b*) should be answered in the affirmative. By his settlement Mr Clark specially authorised his trustees between the expiration of the liferent in favour of his sons and daughters and the period of payment to their respective issue to apply the whole or such portion of the income of such beneficiary's share, and even a part of the fee itself, towards his or her suitable maintenance, education, and upbringing. If, as I think, a fee did not vest in the issue until they should attain majority, "beneficiary's share" must here mean prospective share,

I understand that the parties do not desire an answer to the remaining questions, having arranged the matters therein referred to.

LORD M'LAREN—I have had the advantage of reading Lord Adam's opinion and concur therein. I only wish to add one general observation as to the question whether under a power of appointment it is lawful to the appointer to sever out a liferent for one person. That would entirely depend on how the fee is disposed of. If it is lawful to give £5 to one of the appointees and the balance to the others, it could hardly be held to be objectionable to give so much a year to one party if the capital is divided among the objects of the power. But that case is unlikely to occur, because a testator generally wishes to give the fee to the children of the person to whom he gives the liferent, as in the present case. I think the only ground of objection is that children are introduced who are not objects of the power of distribution, and that of course is fatal to the deed, which is an attempt to exercise that power.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

"The Lords having considered the Special Case and heard counsel for the parties, in answer to question 1 (*a*) of the case, find and declare that the appointment of Mrs Neill in her trust-disposition and settlement of her share of her father's estate is wholly invalid, and in answer to question 1 (*b*) find and declare that the fee of one-third of the said share vested in the second party on his attaining twenty-one years of age, and that a fee of one-third of the said share will vest in each of the third parties on their respectively attaining twenty-one years of age: In answer to question 2 (*a*), find and declare that the third parties are not entitled now to payment of their presumptive shares, but 2 (*b*) that the fourth parties are entitled to make advances of interest or of capital to the third parties out of their presumptive shares."

Counsel for the First Parties—W. Campbell, K.C.—Craigie. Agent—W. B. Rainnie, S.S.C.

Counsel for the Second Party—Sol.-Gen. Dickson, K.C. — Macmillan. Agent — J. Pearson Walker, S.S.C.

Counsel for the Third Parties—Guthrie, K.C.—Crole. Agent—A. H. Glegg, W.S.

Counsel for the Fourth Parties — Ure, K.C.—M'Clure. Agents—Ronald & Ritchie, S.S.C.

COURT OF TEINDS.

Friday, March 7.

(Before the Lord President, Lord Adam, Lord M'Laren, Lord Kinnear, and Lord Low.)

CLARK *v.* GRANT.

Teinds—Process—Augmentation—Pending Application for Decree of Approbation of a Report of Sub-Commission—Clause of Reservation in Decree of Augmentation.

In a process of augmentation certain heritors stated that they had discovered a report of the Sub-Commissioners of Teinds and were about to take steps to obtain a decree of approbation of that report, and maintained that either the process of augmentation should be sisted or a clause reserving the rights of the heritors should be inserted in the decree of augmentation.

The Court *granted* decree of augmentation and *refused* either to sist the process or to insert an express reservation of the rights of the heritors in the decree, in respect that an express clause of reservation was unnecessary, because the *de plano* decree of augmentation would not affect the rights of the heritors.

The Reverend J. S. Clark, minister of Dunbarney, brought a process of augmentation. The augmentation asked was five chalders. On the cause being put out in the teind roll to fix the amount of augmentation, certain heritors appeared to oppose the application on the grounds (1) that there was no free teind, and (2) that in any view the augmentation asked was excessive.

The last augmentation was in 1863. In that year certain heritors opposed the augmentation on the ground that the teinds were exhausted, and in support of this contention produced an extract decree of valuation of the Commissioners, of date 26th July 1635. In *Kirkwood* v. *Grant*, November 7, 1865, 4 Macph. 4, it was held by the Court of Teinds that this decree of valuation of teinds was not an effectual valuation of the teinds in a question with the minister of the parish, in respect that it appeared that the minister had not been called and was not a party to the process. This judgment of the Court of Teinds became final. But in a later case (*Heritors of Old Machar* v. *The Minister*, July 26, 1870, 8 Macph. (H.L.) 168, 7 S.L.R. 726) the House of Lords held that such a decree of valuation was not invalid although the minister of the parish had not been cited as a party to the process in which the decree had been pronounced. This later decision was precisely contrary to the decision of the Court of Teinds in *Kirkwood* v. *Grant*, *supra*.

Since the date of the decision in *Kirkwood* v. *Grant*, *supra*, the heritors had discovered a report by the Sub-Commissioners dated 1635, and were about to take steps to obtain a decree of approbation of that report.