1809.

SMITH, &c. *v.* MACNEIL.

[Fac. Coll. vol. xii. p. 527.]

The Rev. Dr. JOHN SMITH, and the Rev. Dr. GEORGE ROBERTSON, Ministers of the Parish of Campbeltown, . . } *Appellants;*

Major HECTOR MACNEIL of Ardnacross, *Respondent.*

House of Lords, 20th Feb. 1809.

TEINDS, OLD SUBVALUATION OF—ACTION OF APPROBATION.—An action of approbation of the report of the subcommissioners of the subvaluation of the teinds of the lands of Ardnacross, belonging to the respondent, taken in 1629, was brought, in order to have the same approved of, with the view of showing that the teinds of these lands, prior to the minister's last (second) augmentation, were exhausted. The minister objected on various grounds: Held, that the respondent was entitled to decree of approbation, and that the objection stated, that the minister was not cited to appear, was sufficiently disposed of by the fact, that as he was stipendiary, it was sufficient that the titular appeared to have been made a party to the subvaluation.

The appellants, the ministers of Campbeltown, having recently prevailed, notwithstanding a previous augmentation in 1796, in obtaining a second augmentation of stipend, in a new process, in which the Duke of Argyle and the respondent were called as parties; the respondent found it necessary to bring the present action of approbation to have the old report of the subcommissioners, or subvaluation of teinds taken in 1629, in so far as regarded his lands of Ardnacross, approved of, with the view of showing, by that subvaluation, that the teinds, prior to this *last* augmentation, were exhausted within the parish within which these lands were situated, so as in effect to form ground for reduction of that augmentation *in toto*.

At the time when Charles I. executed the general revocation of church lands and teinds, and commenced the process of reduction of all such grants, His Majesty, in Jan. 1627, appointed certain commissioners to confer with those who had any interest in the church lands or teinds, and to value teinds, and to name subcommissioners in various parts of the country for that purpose. Subcommissioners were accordingly chosen by each presbytery in Scotland; and their nominations having been approved of, commissions were issued to them, directing them as to the form of precedure. And by the act 1633, c. 19, appointing a new commission for

valuation of teinds, the commissioners are directed to prosecute and follow forth the valuation of such teinds, parsonage, or vicarage, within the kingdom, as then remained unvalued, " and also receive the reports of the sub-commis- " sioners appointed within ilk presbytery, of the valuation " of whatsoever teinds, led and deduced before them, ac- " cording to the tenor of the subcommission directed to that " effect; and to allow, or disallow the same, according as " the same shall be found agreeable or disagreeable, from " the tenor of these subcommissions."

Until the subcommissioners' report of the valuation were approved of by the commissioners, their legal effect was not determined; but still, when fairly made, they were deemed thereafter as the standing rule according to which the tithes were paid.

The lands of Ardnacross, belonging to the respondent, were situated within the parish of Kilchounstaune, forming part of the united parishes of Kilcheran, Kilmichael, Kilchounstaune, and Kilchewane; and had been valued by the subcommissioners as ordered and directed. The same valuation had been approved of, at the instance of the Duke of Argyle, in so far as his lands were concerned, in a process raised by him for that purpose, in which he obtained decree in 1772. But the respondent having omitted to get the valuation approved of as to the lands of Ardnacross, brought the present action of approbation. The appellants objected to this process of approbation. 1. That the minister serving the cure of the parish in which the lands of Ardnacross were situated, had neither been called as a party, nor did it appear from the proceedings that he was cited to appear, or that he had appeared, although he had a most material and substantial interest therein; and, 2. That the subcommissioners, in fixing the amount of the teinds of the lands of Ardnacross, had not adhered to the mode of proof required by common law, or by the special terms of those instructions under which they acted; and that, therefore, there was no legal evidence of the amount of the respondent's teinds: And, upon these grounds, they contended that he was not entitled to obtain a decree of approbation of the report of the subcommissioners. To this it was answered, 1. That although no mention was made of the minister in the proceedings, he might, notwithstanding, have been present or been cited; that the presumption of law was, that *omnia rite et solemniter acta*; 2. And even supposing the presence or the cita-

1809.

SMITH, &c. *v.* MACNEIL.

Ante vol. iii. p. 584.

tion of the minister was essential to the validity of a subvaluation, this rule only applied where the minister was parson, that is, when he drew the whole teinds of the parish, as occurred in the case of Ferguson *v.* Gillespie, but where, as in this case, the minister was a stipendiary, it was quite enough that the titular is made a party.*

The Lords Commissioners of Teinds pronounced this in-

Jan. 28, 1801. terlocutor: "The Lords having advised the memorials for "both parties, with the libel and report of the subcommis- "sioners of the presbytery of Argyle libelled on, they repel "the objections offered to the approbation of the said re- "port, and ratify, allow, and approve the report of the said "subcommissioners, in so far as concerns the valuation of "the pursuer's lands libelled, and interpone their decreet "and authority thereto, and decern conform to the conclu- "sions of the libel; reserving the consideration of expenses "to the ministers of Campbeltown, until this day eight days."

June 3, 1801. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Though the teinds of the respondent's lands of Ardnacross are said to have been valued by the subcommissioners of the presbytery of Argyle in the year 1629; yet, from the record of their proceedings, it appears that the minister serving the cure of the parish neither attended, nor was cited to attend, for his interest; and he being a necessary party, all these proceedings, in so far as regarded the interest of the minister serving the cure of the parish, are radically null and void. 2. The subcommissioners, in fixing the amount of the teinds of the respondent's lands of Ardnacross, have not adhered to the mode of proof required either by the common law, or by the terms of those transactions under which they acted. By the common law, proof may be made by writing, by witnesses, or by the oath of party; and the subcommissioners were empowered to try and inform themselves, by all the lawful ways and means they can, of the true worth of the lands, stock, and teind; and they are specially empowered to proceed by writ, witnesses, or oath of parties. In trying the value, however, of the teinds of Ardnacross, no witnesses were examined, no writing was produced, nor was there any reference to the oath of party; but the whole proceed-

* The Court decided the question upon this second point.

ed upon the declaration of a person in the name of the proprietor of the lands, which was consented and agreed to by the titular of the teinds. But this declaration proves nothing except that there was a collusion between the parties, which cannot affect the interest of the minister, who neither appeared, nor was cited to appear, in any part of these proceedings. 3. And the present question is and can in no way be affected by the proceedings and decree obtained in the process of approbation brought by the Duke of Argyle. In that process the present objections were not stated or discussed. Neither can the decree of absolvitor, in the reduction brought of that decree of approbation influence the present questions; the sole defence, in that reduction, made by the Duke, having been that of *res judicata* in *foro contentioso*, which prevailed in a point of form which is not applicable to the circumstances of the case between the present parties. 4. If the heritor or titular has a right to appear, in order to have his lands valued as low as possible, so has the stipendiary minister an interest to appear, that they may be valued as high as possible, in order to leave room for future augmentations. These two parties have opposing interests to maintain, and to argue, in these circumstances, that the citation of the titular supersedes the necessity of citing the stipendiary minister, is plainly against all rule of right and substantial justice.

Pleaded for the Respondent.—It is not pretended that there was any thing in the subvaluation in question unfair or collusive; and it appears *ex facie* of the proceedings, that the subcommissioners acted upon legal evidence, viz. old rentals of forty years standing, and payments of rents in conformity thereto. This is the very evidence specified in the letter of King Charles I., dated the 28th Feb. 1628; and which, when not controverted by any of the parties, has, in practice, been always held as sufficient. And it plainly appears from the report of the subcommissioners, that the parsonage teinds of the parish of Kilchoustaune had been "rentalled, "attour the space of forty years immediately preceding," at the valuation thereby put upon them; the appellants do not deny that so far the evidence was strictly legal; but it was only with regard to parsonage teinds that the rentals of forty years ever were held to be necessary, and therefore the rule did not apply to vicarage teinds, the *ipsa corpora* of which was generally uplifted by the minister himself. But, 2. The valuation was made in the presence of the proper par-

1809.

SMITH, &c. v. BOGLE.

ties, viz. the landholder whose tithes were valued, and the titular who had right to these tithes; and, of course, had the primary and material interest to see them valued as high as possible. And, after so long a time, the general rule of law is, to presume that the procedure was conducted *rite et solemniter*. And therefore, on the same ground, to presume the minister's presence in the valuation.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *David Boyle, Wm. Alexander.*

For Respondent, *Sir Samuel Romilly, Henry Erskine, Gilbert Hutchison.*

[Fac. Coll. vol. xiii. p. 363.]

JAMES SMITH, Merchant in Leith, WILLIAM SIBBALD, Merchant there, and Others, Underwriters on the Cargo of the Ship Concordia, ... } *Appellants;*

ROBERT BOGLE, Jun., Merchant in Glasgow, *Respondent.*

House of Lords, 16th March 1809.

INSURANCE—CONCEALMENT—UNSEAWORTHINESS.—In effecting an insurance on a certain cargo, the vessel in which the cargo was to be shipped from Jamaica to Clyde, was represented to be a very good vessel, and that no material damage had occurred from her touching on a rock in going into the harbour, while the letters which the insured had received from his correspondents in Jamaica, previous to effecting the insurance, gave a very different account of the vessel, and intimated doubts whether she would be fit to take any cargo, or sail with convoy at the time specified. On proceeding on her voyage with her cargo to Port Antonio to join convoy, she experienced rough weather—did not reach in time for convoy—was found disabled, and, after survey, was finally abandoned, as unfit to proceed on her voyage. Held the underwriters liable under the policy. Reversed in the House of Lords.

Wishing to effect insurance, the respondent wrote to his agents, Messrs. Scott, Smith, Stein and Co., the following letter: "Gentlemen, I find that sugars intended to have "been shipped per Minerva, on account of R. W. Fearon, "and on which you insured £1050, have not gone on board; "but that they are intended to be shipped in the Concor- "dia, Simpson, expected with the June fleet; I suppose