LORD CHELMSFORD.—The costs will be taxed by the taxing officer of this House; therefore we need not enter into any discussion upon that point. The appellant will get the proper costs, that is to say, the costs arising from the opposition to the competency of the appeal whatever they may be. We cannot decide what they ought to be.

Lord Advocate.—Of course not. I only wanted to direct your Lordships' attention to the fact, that it was merely the costs occasioned to the appellant by this objection to the competency of the appeal.

LORD CHELMSFORD.—I think the House ought not to hear any discussion about what the costs should be.

LORD CHANCELLOR.—I think it would be best to put it in this general way: The costs which arose out of the petition presented to the Appeal Committee against the competency of this appeal.

Dean of Faculty.—The question was reserved to be argued at the bar of your Lordships' House; and you will find statements relating to it in the cases submitted to your Lordships; so that the preparation of the cases involved dealing with the question of the competency of the appeal.

LORD CHANCELLOR.—I think, my Lords, it would be much better to use words which do not anticipate the function of the taxation of costs, but which express the principle upon which the House proceeds, and with that view I propose to your Lordships these words:—"The costs occasioned by the presentation of a petition against the competency of the appeal."

Interlocutors affirmed, and appeal dismissed with costs—the respondents to pay the costs occasioned by the presentation of the petition against the competency of the appeal.

Appellant's Agents, Adam and Sang, W.S.; William Robertson, Westminster.—*Respondents' Agents*, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.

JULY 10, 1873.

MRS. CAMPBELL PATERSON, *Appellant*, *v.* REV. JOHN MACLEOD, D.D., of Morvern, *Respondent.*

Teinds—Valuation—Presumption—Identity of Lands—Prescription—*The plea of positive prescription is inapplicable to a claim to the benefit of a valuation of teind, this being neither the kind of title nor the kind of possession which the Statute requires.*

A defence of alleged valuation of teind having failed for want of identifying the lands in respect of which the teind was valued:

HELD (affirming judgment), *That no plea of negative prescription is admissible.*[1]

This was an appeal from a decision of the Teind Court, involving the question, whether teinds of the lands of Knock and others in the parish of Morvern, belonging to the appellant, Mrs. Campbell Paterson, were or were not valued. The respondent, Dr. Macleod, the parish minister, had raised an action of augmentation of stipend. The Court of Teinds modified a stipend, but remitted to the Lord Ordinary to inquire, whether there existed a fund for the purpose of augmentation. Thereafter the Lord Ordinary allowed the minister to lodge a condescendence as to the teinds of the parish, and the heritors to lodge answers. The minister alleged, that the teinds of the lands of Knock were unvalued. In answer, Mrs. Paterson, the proprietrix, set forth, that her lands of Knock were valued, and produced a decree of approbation and valuation obtained in 1786 in the Court of Teinds. This decree ratified a valuation of the sub-commissioners of the Presbytery of Argyle in 1629, an old copy of which was also produced. In the valuation of 1629 no mention occurred of the lands of Knock, but the appellant contended, that they were included under other names, and the name of Knock occurred in the decree of 1786 as the modern name of certain lands mentioned in the older valuation. The appellant contended, that the decree of 1786 was now conclusive, and was fortified by prescription, both positive and negative, and that the sub-valuation included the whole lands of the parish, and had been so treated in a process of augmentation in 1804. It was contended, that the minister of the parish at the date last mentioned had an interest to shew in that process, that the teinds of Knock were unvalued, and that, as he did not do so, the negative prescription was running against him since that date.

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[1] See previous reports 7 Macph. 614: 41 Sc. Jur. 325, 435, 618; 42 Sc. Jur. 245. S. C. 11 Macph. H. L. 62: 45 Sc. Jur. 461.

The Lord Ordinary held, that the teinds of the lands of Knock had been valued in 1629, and that such valuation was approved in 1786, but the Inner House recalled this interlocutor, and held, that the teinds of Knock had not been included in the old valuations.

The Dean of Faculty (Gordon), *Pearson* Q.C., and *G. Webster*, for the appellant, contended, that—(1.) It was *res judicata* that the teinds of Knock and Gualachelish were valued. (2) That independently of the decree of approbation and valuation in 1786, being in itself well founded at the time it was pronounced, it was not now competent to impugn or call in question its validity or efficacy. As to the positive prescription—Ersk. iii. 7, 3; *Minister of North Leith*, M. 10,890; *Mure* v. *Dunlop*, M. 10,820; *Gordon* v. *Kennedy*, M. 10,825; *Solicitor of Teinds* v. *Budge*, Hume, 455; *Lord Lynedoch* v. *Liston*, 14 S. 374. As to negative prescription—Stair, ii. 12, 9; Ersk. iii. 7, 8; *Macintyre* v. *Maclean*, Shaw's Teind Cases, 160; *Fife Trustees* v. *Commissioners of Woods and Forests*, 11 D. 889; *Dundee Harbour Trs.* v. *Dougall*, 1 Macq. 317; *ante*, 14; *Kinloch* v. *Bell*, 5 Macph. 360; *Lord Advocate* v. *Johnston*, 5 Macph. 414. (3.) It was incompetent for the Court of Teinds to review, alter, or refuse to give effect to the findings and decernitures contained in the decree of approbation and valuation obtained by the proprietors in 1786, or to cut down or nullify these by referring to alleged titles of the lands or any other extraneous evidence. (4.) If the interlocutors appealed against were carried into effect there would not only be a double allocation of stipend on the teinds of the lands belonging to the appellant, but an encroachment on the stock. (5.) Though it were held competent to impugn the decree of approbation and valuation without a reduction being raised by the respondent, there were no grounds for holding, that the teinds of the lands of Knock were not valued by the sub-commissioners in 1629, or that their report was not duly approved of and the teinds of these lands effectually valued by the Lords Commissioners in 1786—*Thomson* v. *Officers of State*, M. 10,687; *Macneill* v. *Campbelltown*, 5 Paton, 244; *Smythe* v. *Liston*, 15 S. 216.

The Lord Advocate (Young), and *R. Crauford*, for the respondent, contended—That it was proved, that the lands of Knock were not valued by the sub-commissioners in 1629. The decree of 1786 did no more than ratify and approve the sub-valuation so far as it concerned the pursuers' lands libelled. The plea of the positive prescription was unfounded, for a valuation of teinds is not a title of property or possession of a heritable subject, and because the appellant and her predecessors had no possession of the teinds as owners, and adverse to others, as required by the Act 1617, c. 12; *E. Panmure* v. *Parishioners*, M. 10,760; *Macintyre* v. *Maclean*, 8th March 1828, F. C. The plea of the negative prescription was unfounded, for the decree of 1786 did not purport to value the lands in question—Ersk. iii. 7, 9. If it can be read as a valuation, that is an intrinsic nullity appearing *ex facie* of the decree, and not protected by the negative prescription.

Cur. adv. vult.

LORD COLONSAY.—My Lords, the question to be decided under this appeal is, whether the teinds of certain lands now belonging to the appellant and described in her titles as, "All and Whole the sixteen shilling and eight penny land of old extent of Knock, and the sixteen shilling land of old extent of Cullichelish acquired from Allan Maclean of Knock," are to be held as having been included in the valuation made by the sub-commissioners in 1629 and approbation of their report in 1785 and 1786. That question has arisen in a process of augmentation, modification, and locality raised by the minister of the parish of Morvern against the heritors of that parish, of whom the appellant is one.

It is not disputed, that the teinds of all lands comprehended in the report, and approbations thereof, have been exhausted long ago. But it was maintained by the minister, that certain subjects which appear in the titles of the heritors are not mentioned in the report of the sub-commissioners, or comprehended in their valuation. On the other hand, the heritors maintained, that the subjects referred to, whatever may be the names by which they have at any time been known, were valued along with the whole lands belonging to their predecessors under the names given in the report of the sub-commissioners.

The subjects condescended on by the minister as being unvalued, were twelve in number, and belonged to four heritors. The Lord Ordinary decided, that all these subjects must be held to have been included in the valuation of the sub-commissioners in 1629, approved of by the Teind Court in 1785 and 1786. He also found that certain objections stated by the minister to the decreet of approbation in 1786 were excluded by the negative prescription.

Against that judgment the minister presented a reclaiming note to the Second Division of the Court. There the heritors made a stand on a plea of *positive* prescription, which had been stated by them on the record, and which had not been specifically dealt with by the Lord Ordinary. The Second Division directed, that the question whether the plea of positive prescription was applicable to the case, should be argued before themselves and three of the Judges of the First Division. The question having been argued before seven Judges, the plea was repelled by a majority of six Judges to one.

That point having been disposed of, the Second Division, after some further procedure, recalled

the interlocutor of the Lord Ordinary as to the lands now in question, but concurred with the Lord Ordinary's finding, that all the other lands condescended on by the minister as being unvalued must be held to have been included in the valuation of 1629, and the approbations thereof in 1785 and 1786.

When an heritor pleads, that the teinds of his lands are valued, it is incumbent on him to shew, that they have been valued by competent authority. A valuation by sub-commissioners, when duly approved of by the Court of Teinds, is sufficient. But in many cases it happens, that there is difficulty in identifying some of the lands of the heritors with any of those named in the valuation on which he founds. The reasons are obvious. Take, for example, the present case. More than 200 years had elapsed from 1629 till the present question arose. In the interval all the properties have changed hands; most of them have been subdivided and separated, and formed into new groups and new designations. Old names not altogether abandoned have undergone change of sound in pronunciation, and change of orthography in transcription, so as to be not easily recognized. Some names may have passed away entirely, and some subjects that were treated as nameless pertinents may have come into prominence under separate names, and so it happens, that of twelve subjects which the minister condescended on as being unvalued, ten were after much research and discussion, and having regard to the circumstances of the case, held to have been included in the valuation either separately or in columns with others.

The question therefore comes to be, whether the appellant has been able to shew with reasonable certainty, that the lands described in her titles in the terms I have quoted were included in the valuation of 1629, although "*Knock*" is not therein named, and notwithstanding the evidence relied on by the minister as excluding any evidence that they were valued.

The position taken by the appellant in the record is, that the lands in question, and which are described in her titles in the terms I have already quoted, belonged in 1629 to Murdoch Makileane of Lochbowie, and were comprehended in his lands there valued, and which are thus described in the valuation: "The lands of Ardneis, Achabeig, *Cowlecheylis*, Auchaforsoy, Achingawen, Unybeig, Darriness, Corwan, and Cliverlead, *with the pertinents*." The appellant maintains, that the lands in question are there comprehended under "Cowlecheylis" and pertinents.

The minister, on the other hand, alleges, that in 1629 the lands in question belonged to Angus M'Lean, parson of Morvern, not to Murdoch Makileane of Lochbowie, and were not valued. This is denied by the appellant. The minister further alleges, that in 1629, Knock and Gualachaolis were as now "incorporated with each other." The appellant admits, that Knock and Gualachaolis "have always been incorporated with each other." But this agreement in words is not an agreement in meaning. The minister means, that the Knock which belonged to the parson of Morvern had incorporated with it a Gualachaolis, though not named. The appellant means, that the Cowlecheylis or Gualachaolis which belonged to Lochbowie had incorporated with it a Knock though not named. I therefore do not think that anything can be rested on this verbal concurrence.

But the minister founds upon a series of title deeds as shewing, that in 1620 the lands of Knock did belong to the parson of Morvern, and after tracing them down to 1706, when they were conveyed by Allan M'Lean of Knock to Allan Cameron of Glendessary without ever having belonged to Lochbowie or any person deriving from him, he also founds upon another series of title deeds as tracing Lochbowie's lands down through a totally different course of transmission till 1698 when they were acquired by the said Allan Cameron of Glendessary from Lochbowie:—thus shewing, as he contends, that the Knock, which belonged to the parson of Morvern, could not have been comprehended in the valuation of Lochbowie's lands as alleged by the appellants. I shall as briefly as possible trace these two chains of transmission in order to see how far they bear out the contention of the minister. In doing so I shall take them separately, and in each case follow the chronological order of the transmission. (*After tracing the history of the lands, his Lordship continued*)—If then the title deeds as printed by the parties are to be relied on, there was a sixteen shilling or sixteen shilling and eightpenny land of Knock, which was the property of the parson of Morvern in 1620, and of his son in 1640, and was subsequently transmitted to Glendessary as I have described; while the Cowlecheylis that belonged to Lochbowie, and was valued in 1629, was a twopenny land, and formed an integral part of his twelve merk land before 1620, and so continued until the twelve merk land, without having undergone any disintegration, and without any trace of a Knock having been connected with it, came likewise into the hands of Glendessary, and all the titles from Glendessary downwards bear, that Knock had been acquired from Allan Maclean of Knock, and that the twopenny land of Cowlecheylis had been acquired from Lochbowie. It seems next to impossible to reconcile with these facts the allegation of the appellant, that the Knock described in her own title as having been acquired from Allan Maclean of Knock was in 1629 in reality comprehended in the twopenny land of Cowlecheylis which belonged to Lochbowie. The titles, when carefully examined, are clearly adverse to that allegation, and if the decision of the case is to depend upon

the evidence afforded by the titles, or any inference that can be drawn from them, I think it must be adverse to the appellant.

But the appellant maintained a very powerful argument founded on the terms of the report of the sub-commissioners in 1629, and on the interpretation said to have been given to that report in the approbations thereof in 1785 and 1786, and also on the manner in which the teinds of the parish have been dealt with from that time till the present, and the presumptions thence arising. I now proceed to consider these elements of the case, and the inferences to be drawn from them.

In the report of 1629 the sub-commissioners set forth, that they had been directed to try and inform themselves, by all lawful means, of the work "of all lands of each paroche in the said presbetrie," and that they had "faithfullie, trulie, and diligentlie procidit en tryeing and cleiring the sds. valuations of the parochynes underwryten." The reasonable inference from that statement would be, that they had valued *all* the lands in each parish, subject, however, to be rebutted by evidence, that certain lands had been omitted. Further, in regard to what was then the parish of Killcomkeill, in which the lands in question were situated, it appears, that the Bishop of Lesmore, patron of the Kirk of Killcomkeill and chief titular of all the teinds thereof, appeared by his procurator, and they "appoint nothing against the premises." Then, again, it appears, that persons from whom the sub-commissioners derived their information as to the value of the lands belonging to Lochbowie, and of the lands belonging to the parson of Morvern, was the parson of Morvern himself, who certainly must have known everything regarding Knock; yet while he gives up, and values the teinds of his own lands of Ulling, contained in his charter of 1620, he makes no mention whatever of Knock, which was contained in the same charter, and which, as we have seen, was also contained along with Ulling in his son's sasine in 1640. The reason of this silence as to Knock is not apparent. One suggestion might be, that the parson had parted with it between 1620 and 1629, but that would not be consistent with the subsequent titles. Besides, if he had parted with it, some other person must have acquired it, but no person appears to have given it up for valuation, and the question is—Was it or was it not valued? The minister suggests, that the parson was both proprietor in occupation of the land, and possessor of the teinds. This suggestion is plausible rather than altogether satisfactory. If, however, Knock was in fact omitted, it is not incumbent on the minister to find out the cause of omission. On the face of the report, there is no trace of its having been valued *eo nomine*, and in the record the only suggestion by the appellant is, that it was comprehended in Lochbowie's twopenny land of Cowkeyliss, a suggestion which, for reasons I have already stated, cannot be accepted.

Then as to the two processes of approbation in 1785 and 1786.

The first was a simple process of approbation brought by the Duke of Argyll with reference entirely to lands belonging to himself in various parishes, including some lands in what was in 1629 the parish of Killcomkill. These were the lands which had been valued in 1629 as belonging to Lachlane MacLeane of Morvarne, and have nothing to do with the subject matter of the present case.

The process of approbation of 1786 was brought by the then heritors of lands in the old parish of Killcomkeill, other than the Duke of Argyll. One of these heritors was Campbell of Ardslignish, a predecessor of the appellant. The persons called as defenders were the Officers of State, the Duke of Argyll, the minister of Morvern, and the Moderator of the Synod of Argyll. None of these entered appearance except the Duke of Argyll, and his interests were not affected by anything done. The process was one for approbation, valuation, and division. The summons contained a conclusion for approbation of the report of the sub-commissioners, a conclusion for division of the *cumulo* valuation of the teinds of such of the lands belonging to the different pursuers as had been valued *in cumulo*, and that such division should be made in terms of a mutual agreement between the pursuers, or conform to a division to be proportioned on a proof of the present rental of the lands, and to be approved of by the Court or by any other proper rule, and also a conclusion of a precautionary character to the effect, that if the Lords should refuse to approve of the report of the sub-commissioners concerning the valuation of the stock and teind of "the lands therein before enumerated, or any part thereof," a new valuation should be led of the teinds of "the several lands before enumerated, or such parts thereof." The lands there referred to were the same as were enumerated in the report 1829, except such as belonged to the Duke of Argyll, and had been included in the approbation of 1785. The summons made no mention of Knock, or of a sixteen shilling or sixteen shilling and eightpenny land of Gualachelish. The only lands mentioned in the summons as belonging to Ardslignish were Acheaka, and the portions he had acquired of Lochbowie's twelve merk land, viz. Arnies, Achabeg, and Cowlkelis.

Let us now see what course was followed in that process. In the first place, nothing was done under the conclusion for valuation. That conclusion may, therefore, be disregarded. There remained the conclusion for approbation of the report of 1629, and the conclusion for dividing or apportioning such of the valuations of teind as had been made *in cumulo*. The conclusion for approbation was necessarily limited to the contents of the reports, and no decree

of approbation to be pronounced in that process could legally go, or could be intended by the Court to go, beyond the conclusions of the summons, or to give the character of valued teind to the teinds of lands that had not been reported as valued by the sub-commissioners under some name or prescription, and if the process had been as in the case of the Duke of Argyll, a mere process of approbation, the expression "Cowlkeylis now called Knock," which has caused so much difficulty in this case, would in all probability never have been called into existence. But there was a conclusion for division of teind, and the parties appear to have agreed that the division of teinds valued *in cumulo* should be made in proportion to the valued rent of the lands belonging to the several heritors. Accordingly a certificate of the valued rent of the parish of Morvern, so far as regarded the lands of the parties to the cause, was obtained. A more full extract from the valuation roll of the county is printed, from which it appears, that the roll was made up in 1751, at which time Glendessary was proprietor both of the lands that had belonged to Lochbowie, and of those acquired from Allan M'Lean of Knock. The certificate produced in 1786 for the pnrpose of dividing the *cumulo* was made after Glendessary estate had been sold and partitioned, and at the time when Ardslignish was proprietor of the parts of that estate which fell to him. In both of these documents it will be seen, that "Knock and Gualichelish" are coupled together, and opposite to them is placed one sum of valued rent £5 11*s.* 1*d.* Probably they were possessed as one tenement when the roll was made up. There is no other name at all similar mentioned either in the roll or in the certificate. We have already seen, that Knock was acquired by Glendessary from Allan M'Lean of Knock, but whether Gualachelish, thus coupled with it, represents the twopenny land of Cowlekeylis acquired by him from Lochbowie, or the sixteen shilling and eightpenny land of Gualachelish mentioned somewhat mysteriously in the instruments of sasine in 1707, or both, does not appear. The appellant, of course, assumes that it was the first, but whether it was or not, it was plainly something different from Knock. There are two things, Knock and Gualachelish, that go to make up the £5 11*s.* 1*d.* of valued rent.

When the teinds that had been valued *in cumulo* came to be apportioned according to the valued rent of the land, the clerk who made the scheme of division appears to have assumed, that the report of the sub-commissioners comprehended all the lands in the parish, and in dividing and in apportioning the teinds of Lochbowie's twelve merk lands which had been valued *in cumulo* at 21 bolls meal, 1 boll 2 firlots 1 peck bear, and £40 Scots, he apportioned to Arnes and Archibeg, which then belonged to Ardslignish, a proportion corresponding to their valued rent, which was £4 3*s.* 4*d.*, and he apportioned to what he described as "Cowlcheylis, *now called* Knock," a proportion of teind corresponding to the sum of £5 11*s.* 1*d.*, which in the roll and certificate of valued rent stood opposite to Knock *and* Gualachelish. This is the first appearance of the expression "now called." There is no warrant for it in the summons or in the titles or in the report, or in any document that has been referred to. The clerk who prepared the scheme no doubt saw from the report, that one of the parcels comprehended in Lochbowie's lands was called Cowlekeylis, and it was his duty to apportion to that parcel part of the *cumulo* teinds of Lochbowie's lands. He also saw that in the certificate of valued rent of the parish the only name at all similar to Cowlekeylis was coupled with Knock, and one sum of valued rent put opposite to them. Then, apparently assuming that all the lands in the parish should be embraced in the report, and not finding Knock mentioned *eo nomine*, but finding it in conjunction with the only name at all similar to one which he did find mentioned, he may have assumed, that Gualachelish had come to be called Knock. It is apparent that in his own mind Cowlchylis, not Knock, was the thing he was dealing with, as indeed it was the only thing he required, or was entitled to deal with, but he adds, "now called Knock," so as to identify it with the valued rent of £5 11*s.* 1*d.* By thus apportioning to Cowlchylis a share of the *cumulo* teind corresponding to a sum of valued rent which comprehended Knock as well as Cowlkeylis, it follows, that more has been put on Cowlkeylis than its proper proportion, and consequently that less than the proper share has been put on all the other parcels of land comprehended in the *cumulo* valuation, and that the owners of these other parcels obtained an unjust advantage. It is scarcely supposable that Lochbowie's Cowlkeylis, which was only a twopenny or one merk land, could by itself have a valued rent of £5 11*s.* 1*d.*, seeing that his sixpenny or three merk lands of Arneis and Achibeg have in the same roll only a valued rent of £4 3*s.* 4*d.*

If the clerk fell into this mistake in the way suggested, or in any way, none of the parties present had any interest to correct him, but the reverse. Ardslignish would be benefitted by having his unvalued teinds of Knock treated as valued. The other heritors would be benefitted by having part of the *cumulo* teind diverted to Knock, thereby lightening the burden on them. But the division and apportionment of that *cumulo* was not a matter in which the minister was interested. He would get the whole amount, whatever might be the apportionment among the several owners of what had been Lochbowie's 12 merk lands. The scheme of division, being unopposed, was of course approved of, and decree was of course given in conformity with it. Whether that decree opposes a technical bar to the contention of the minister, I shall consider presently. In the mean time it is a judgment of the Court to the effect, that the parsonage and vicarage teinds "of the lands of Auchnaha, Arnies, and Auchabeig, and Cowlkeylis, now

called Knock, with the pertinents, belonging to John Campbell of Arslignish, are of the worth and avail there specified, and are to continue so in all time coming."

The next thing that occurred was, that in the year 1860 the minister of Morvern raised a process of augmentation, modification, and locality. In that process the report of 1629 and the approbation therefore in 1785 and 1786, and the foresaid scheme of division, were founded on, and were recognized and treated as shewing, that the whole teinds of the parish had been valued in 1629. No objection was stated to the regularity or sufficiency of any of these documents, although questions were raised which gave an interest to examine them. In that process of augmentation arrangements were made and judgments pronounced on the assumption, that the whole teinds of the parish had been valued in 1629, and so matters rested until the present process, raised in 1863, disturbed the prevailing belief. The terms of the report in 1629, and of the decree of approbation in 1786 and the proceedings in the process of augmentation in 1800, raise a presumption, that in 1629 the teinds of the whole lands in the parish were valued, though Knock was not specially named; and very clear evidence to the contrary will be required to rebut that presumption. But I am of opinion, that if it be competent to go into the inquiry, the presumption would be rebutted by the titles referred to by the minister, and an examination of the proceedings in the process of approbation. I think that the allegation of the appellant, that Knock had always been incorporated with Lochbowie's twopenny lands of Cowlkeylis, if meant to apply to the Knock in question, is disproved by the titles, which shew, that it never belonged to Lochbowie, but belonged to a different family, and if the allegation means only, that there was a Knock incorporated with Lochbowie's Cowlkeylis, it is of no value, because the Knock alleged to be unvalued is the Knock acquired from Allan M'Lean of Knock.

I think that the other suggestion in the case for the appellant, that in the interval betwixt 1620 and 1640 Lochbowie may have possessed Knock by some right of liferent, another temporary right, cannot avail the appellant, because in that view it could not have formed any part of the nine parcels composing the twelve merk lands that were valued, and it is not mentioned as having been valued, and is not in any way referred to in the report of the sub-commissioners.

There still remains to be considered the question, whether the decree of approbation in 1786 excludes the contention of the minister. That involves points which I shall deal with separately.

First, what is the true reading and legal construction of the decree of approbation? I think it is merely an approval of the report of 1629, and of the valuation there made of the lands there mentioned, and cannot be held to extend to any different lands. If it had extended to different lands, it would have been *ultra vires*. But it did not do so. The summons or libel had reference only to lands enumerated in the report. The conclusions of the summons were limited in like manner, and the decree of approbation refers throughout to "the pursuer's lands libelled," and no other lands. It is true, that in that part of the decree which has reference to the conclusion for dividing such of the teinds as had been valued *in cumulo*, we find, that in the approving of the scheme of division the words of the scheme are adopted, viz. "teinds of the land of Auchnaha, Arnies, and Auchabeig and Cowlkeylis, now called Knock." These words, with the exception of "now called Knock," are quite in accordance with the report and the summons. The addition of these words can import nothing more than that what was called Cowlkeylis at the date of the valuation is *now* (in 1786) called Knock—has *now* got a name which it had not formerly. There is no finding that *the* Knock known by that name at and before the date of the valuation was valued, neither is there any finding that *it* was then or is now Cowlkeylis. In short, whether Cowlkeylis was or was not now called Knock, that *alias* conferred on Cowlkeylis cannot be made to mean legally, that the Knock acquired from Allan M'Lean of Knock was part of Lochbowie's twelve merk land, and that the Court has so decreed when it would have been *ultra vires* to have done so. I therefore think that the terms of the decree do not exclude the contention of the minister.

Second, is it then excluded by prescription? As regards the positive prescription, I concur with the majority of the Judges in the Court below. I think that the plea is inapplicable. There is neither the kind of title, nor the kind of possession which the Statute requires.

Then, as regards the negative prescription. I think that it cannot be founded on to the effect of excluding the contention of the minister. If I am right in the view I take of the true legal construction of the decree in 1786, it is not inconsistent with the contention of the minister as to Knock, and there is no room for the plea of negative prescription. But further, it is to be observed, that the real question here being one of identity, the plea of prescription can have no place unless the identity, or, in other words, the matter in issue, is assumed in favour of the appellant and against the pursuer.

On the grounds I have stated, I think that the Court of Session came to a right conclusion in holding that the appellant's lands acquired from Allan M'Lean of Knock were not included in the valuation by the sub-commissioner in 1629, and are unvalued. I therefore think that the interlocutors appealed from should be affirmed, and the appeal dismissed with costs.

LORD CAIRNS.—My Lords, it appeared to me throughout the argument of this case, that the real question to be decided was not so much, perhaps not at all, the question of positive or

negative prescription, upon which so much learning and care appear to have been bestowed in the Court below, as what we should rather term a question of fact, viz. aye or no, were the lands included in the titles of the appellant valued in the valuation of the teinds of the parish by the sub-commissioners in the year 1629, and particularly, were those lands, which in the titles of the appellant are now described as "Knock, or as now called Knock," so included?

Now, my Lords, if we were to deal with this case upon considerations of presumption only, I own it appears to me, that the way in which the valuation of the sub-commissioners was treated in the years 1785 and 1786 in the processes of approbation to which my noble and learned friend has referred, would go very far to shew, that the whole of the teinds of the parish had been included in the valuation of the sub-commissioners in 1629. Indeed, I might add, that that valuation of 1629 *ex facie* would rather raise in the mind of any one perusing it the idea that the sub-commissioners conceived, that they were valuing the whole of the teinds of the parish, and further than that, when we come to the process of augmentation which was concluded in the year 1804, and was raised by the father of the present respondent, who was then minister of the parish, and who appears to have by his procurator represented, that the teinds of this parish were all valued by the sub-commissioners of the presbytery of Argyle in the years 1629 and 1630,—I say, when we come to that process of augmentation, it certainly would appear to me, and it did appear to me in the argument, that that presumption was very much advanced and very much strengthened, and that if the case were to rest there, and if we had nothing more to guide us, the inference to be drawn from these circumstances to which I have referred would be so strong, that it must be accepted as leading to the conclusion, that the whole of the teinds of the parish had been included in that valuation.

But, my Lords, in this case we are not left to presumption. The case having been argued in the course of last session, speaking for myself, I may say, that much of the delay that has occurred in deciding it has arisen from the circumstance, that I have felt, as I think every person would feel, a strong desire to give the fullest weight that was allowable to those considerations of presumption, and I felt some unwillingness to have the inference which had been raised in my own mind by those circumstances of presumption that had been so strongly urged dislodged by a different view without the clearest proof that that presumption could not be entertained. But I am obliged to confess, that when I came to look at the titles which have been so fully explained by my noble and learned friend, (whose explanation I do not mean to repeat), I am driven altogether out of the conclusions which I might have derived from the presumptive evidence to which I have referred. And after a great deal of time and trouble has been expended in looking at these titles, I have evidence before me which appears to me to be perfectly clear, and which I cannot disregard, that the lands included in the titles of the appellant, and which are there described as "Knock," or as "now called Knock," are not the same lands as those described by the old name of "Knock" found in the earlier titles, and are not included under that old name. How the change has come about has been accounted for by my noble and learned friend, but whether the suggestion he has made is a correct one or not, we have this fact as clear as if the matter had only occurred a few months ago; we have the devolution of the title of the different lands in the parish clearly marked in a succession of charters and deeds, and it appears to me from that to be perfectly clear, that the titles under which the present appellant claims to shew that her land was included, are not the titles under which this land must be included, and that there is in the valuation of 1629 and in the lands therein described no name or denomination of territory under which we can range the land which is the subject of the present appeal. My Lords, I own I have some regret at the conclusion at which I have to arrive, more especially as I find, that the late minister of the parish himself was clearly under a different impression. But that of course could not prejudice the case we have now to decide on; and I must say, that I agree entirely in the conclusion at which my noble and learned friend has arrived, and in the motion with which he has concluded his statement, namely, that this appeal be dismissed.

LORD HATHERLEY.—My Lords, I confess that I approached the consideration of this case with the same degree of doubt and difficulty as that which has been expressed by my noble and learned friend who last addressed the House with regard to a claim made for teinds, in a case where, at least as long since as 1786, there appears to have been an assumption on the part of many of those who were interested in the consideration of the matter, that the teinds in question had been valued by a process of valuation which took place as long as nearly 250 years ago, especially as we find that that assumption was not only acquiesced in, but actually put forward by the minister himself in the year 1804, now some 70 years ago. Having regard to the principles which have prevailed in all systems of jurisprudence, and especially having regard to some not otherwise than recent cases in your Lordships' House with reference to the amount of presumption which ought to be justly entertained when claims are put forward contrary to that which has been the current view of parties (especially parties interested) for a long period of years, I was anxious to look into the case (and I do not think it was a misplaced or an improper anxiety) to see if there was anything which would justify your Lordships' House in coming to the conclusion, that the

general agreement, apparently of thought and opinion, during so long a course of time as that to which I have referred, was founded in right and in title.

But as it happens in this case, (and we owe the demonstration of it in a great degree to the extreme attention which has been devoted to the case by my noble and learned friend who first addressed the House,) there really is not the thinnest interstice in which there can be interposed a presumed arrangement or a presumed agreement which would justify the claims set up by the appellant to treat this particular parcel of land as having been valued in the valuation of 1629, for we have, with a degree of distinctness and completeness which could scarcely be expected in a title derived from so remote an antiquity, a clear deduction of title, which has been made much more clear, I admit, to my own mind, by the statement of the noble and learned Lord who first expounded the deduction of titles. We have a clear and continuous stream of documents of title which evince the course in which the land now in question, namely, the land of "Knock," came down from the parson of the parish in 1629, and we have another exactly similar stream of clear and continuous titles with reference to the land belonging to M'Lean of Lochbuy, which comprehended another parcel which the appellant in this present case wished to represent as including the land of Knock. It is impossible, as was demonstrated by the deductions of title traced by my noble and learned friend, so to include "Knock" in the lands which came from M'Lean of Lochbuy. Having these two clear and distinct streams of title, beginning from a period considerably antecedent to the valuation, beginning from 1620 (nine years before the valuation) in the one case, and from a period still more remote in the other case, we find these two streams at last in confluence in the title of Cameron of Glendessary, and we find nothing from that time forwards which can leave room for a presumption of an arrangement to be interposed at any time by which your Lordships can now say, that the land of Knock was comprised in the valuation of the Lochbuy land under another title, namely, Cowlkeylis. It appears to me to be clearly made out, that the "Knock" in question is the Knock which belonged to the parson at the time when the valuation was made, and it appears to be equally clear, that it is not named or included in that valuation.

Under these circumstances, and being anxious to say these few words in order to shew, that I am not unmindful of the duty which is incumbent upon every Court to presume all that can be presumed in favour of what have been believed for a long course of time to be respective rights and titles of the parties, I think it is impossible in this case to make a presumption which will exclude the positive and clear matters of fact which have been placed before our minds, and therefore I find myself compelled to join with my noble and learned friends in the conclusion at which they have arrived.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agents, Andrew Webster, S.S.C.; Connell and Hope, Westminster.—*Respondent's Agents*, John Martin, W.S.; Willoughby and Cox, Clifford's Inn, Westminster.

JULY 28, 1873.

THE EDINBURGH STREET TRAMWAYS CO., *Appellants*, *v.* A. and C. BLACK and Others, *Respondents*.

Statute—Tramways Act, 1870—Special Act—Agreement incorporated in Special Act—*The Edinburgh Tramway Company, on applying for a Special Act of Parliament, agreed with certain frontagers on their line, that the Tramway Act*, 1870, *should apply to their Special Act "as if the same were a provisional order." This agreement was made part of the Special Act which passed in* 1871, *and the Special Act authorized part of the line to be made differently from the Tramways Act*, 1870.

HELD (reversing judgment), *That the Tramways Act*, 1870, *did not override the later Act, and the provisional order referred to by the agreement meant a confirmed provisional order.*[1]

The "General Tramways Act" 1870, 33 and 34 Vict. cap. 78, provides in part I. (provisional orders authorizing the construction of tramways), § 9—"Every tramway in a town which is hereby authorized by provisional order, shall be constructed and maintained as nearly as may

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[1] See previous report 11 Macph. 418; 45 Sc. Jur. 291. S. C. L. R. 2 Sc. Ap. 336; 11 Macph. H. L. 57; 45 Sc. Jur. 582.