I am of opinion that a decree of valuation by the High Commissioners must be viewed as distinctly and authoritatively dividing the stock from the teinds. I am also of opinion that stipend is due out of teind; and that a decree of locality ordaining the payment of stipend out of teinds cannot be enforced as a decree for payment out of stock, and cannot take effect within the line drawn by the decree of valuation which separates the teind from the stock, leaving the teind outside the line to be dealt with by decrees of locality, but securing and protecting the stock inside the line against any demand for stipend. A decree for payment of stipend out of stock, when once the teind has been authoritatively ascertained and separated from the stock, is contrary to principle, and, as I think, is out of the question. The excess above the teind may for a time be small, and the heritor may not be disposed to resist, but when he does resist, then, in my opinion the heritor is entitled to meet the demand by surrender according to his valuation.

Where the valuation is, as in this case, by the High Commissioners, then the benefit of the decree of valuation cannot be lost by dereliction. That is I think settled by authority. The plea of prescription has been ably urged, but I concur in thinking that it cannot be sustained. The heritor's right to surrender cannot, in my opinion, be lost by the mere lapse of time, or by long payment of stipend above the sum in the valuation. The heritor's right under the valuation is conferred by a decree to which the law and practice of Scotland gives great weight and authority. In consequence of that decree there arises to the heritor a right to surrender what the decree has declared to be teind and has valued accordingly, and a right to hold, as against the exaction of stipend, what the decree has declared to be stock. The valuations by Sub-commissioners are in a different position. They are not conclusive in the same manner, or to the same effect. But we are not now dealing with a valuation by Sub-commissioners. In this case we have a decree of approbation by the High Commissioners. It cannot be derelinquished, and I do not think that the plea of prescription or loss of the right to surrender, by non-usage, can be urged against the heritor to exclude his surrender. He was not bound to exercise his right of surrender, or to found on his valuation, unless he chose, or until he chose. So long as he did not surrender he continued to pay his stipend in terms of decrees of locality. When the surplus payment became sufficiently large to induce him to resist further payment, he is entitled to stand on his valuation, and surrender his teinds.

This is, I think in accordance with the rule of law laid down in the case of *Lamington* on 24th January 1798, and recognised and enforced in the series of subsequent cases of *Fearn*, *Maxwell*, *Nenthorn*, *Madderty*, and others, terminating in the recent case of *Fogo* v. *Colquhoun*. I think it is impossible now to doubt, or to depart from, the rule so authoritatively laid down in these cases.

I am further of opinion that a reduction by the heritor of the decree of locality under which he has been paying stipend is not necessary. The right to surrender on the valuation is an outstanding privilege, of which the heritor may avail himself whenever he finds it necessary to put a stop to surplus payment. Every decree of locality authorising and directing the payment of stipend out of teind, is, I think, granted on the footing that, if there is a valuation by the High Commissioners it may be founded on, and a surrender in terms thereof may be made by the heritor at any time. The heritor's act of surrender is not a challenge of the decree of locality, but the exercise of a right which does not imply an objection to the locality to be enforced by reduction, but rather a satisfaction of the decree by surrender. The right to surrender is of the nature of a privilege, a *res meræ facultatis*, not lost by lapse of time, or presumed to be abandoned by delay or non-usage.

For these reasons, on which I shall not enlarge. I concur with your Lordship in opinion that, on principle, and on the authorities from the case of *Lamington* to the case of *Fogo* v. *Colquhoun*, the heritor in this case is entitled to surrender his teinds in terms of the old valuation of 1637 by the High Commissioners.

Lord Jerviswoode concurred.

On the question of expenses:—

Lord Deas—I am very much disposed to think that though Lord Minto has been successful he is not entitled to expenses. He has been making these over payments since 1791, and they have all that time exceeded the teind; therefore the interest to make this surrender arose in 1791, and if he had then done so there would not and could not have been any judgment in the matter, for the incumbent could have had no objection. His own neglect to do this has given rise to this question. It is hard to ask the minister, whose stipend is his only income, and who is bound to defend the benefice as well as himself. Accordingly I propose expenses should be allowed to neither party.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the Earl of Minto, and heard counsel for Lord Minto and the minister, Recal the Lord Ordinary's interlocutor reclaimed against, and remit to the Lord Ordinary to sustain the surrender of the Earl of Minto's teinds, and proceed further as shall be just and consistent with said surrender; and find no expenses due to either party."

Counsel for Lord Minto — Solicitor-General (Clark) and Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Pennell—Watson and Kinnear. Agents—W. H. & W. J. Sands, W.S.

*L.*, Clerk.

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*Thursday, November* 13.

## SECOND DIVISION.

[Sheriff of Caithness.

### SHEARER *v.* GUTHRIE.

*Lease—Quarry—Essential Condition—Retention of Rent.*

A lease of a quarry was granted for a term of years; *inter alia* it was agreed on the part of the landlord that he should "form a road from the said quarry to the county road." The landlord not having fulfilled this obligation timeously, the tenant refused to pay rent

for the period during which there had been no access. A petition for sequestration in security of the rent due having been brought by the landlord,—*held* that the tenant was not bound to pay the rent, the making of the road being an essential accompaniment to and condition of the lease, and petition *dismissed.*

This case came up on appeal from the Sheriff-court of Caithness. A petition had been presented to the Sheriff on January 14, 1873, stating "that the respondent occupies, and has occupied, a pavement and slate quarry on the farms of West and North Calder, in the parish of Halkirk, since the term of Whitsunday 1872, under the petitioner, the proprietor thereof, in virtue of a lease dated the 19th day of July and the 2d day of August, both in the year 1872, for seven years from and after the said term of Whitsunday 1872, and that at the fixed yearly rent of £5 sterling; as also the lordship or quarry rent of 3d. sterling for every superficial yard of flags which should be taken away from the said quarry or grounds; which rent and lordship is thereby stated to be payable at two terms in the year, Whitsunday and Martinmas, beginning the first term's payment at Martinmas 1872, and the next term's payment at Whitsunday thereafter, for the year's possession from Whitsunday 1872 to Whitsunday 1873.

"That the said lease further provides that, with the view of ascertaining the said rent and lordship, the said Donald Shearer should regularly assort and measure all the flags raised, and mark the contents thereon with tar or paint, and enter the number or contents of such flags in a book or books to be kept by him, which should be at all times patent to the petitioner or his factor, and should be balanced half-yearly at the 10th day of November and 14th day of May in each year, and should be the rule for ascertaining the amount of lordship payable; that is to say, at the term of Martinmas in each year the tenant should pay lordship at the foresaid rate per superficial yard on the total number of yards taken away from the said quarry between the 14th day of May and 10th day of November preceding such term; and the said Donald Shearer is further bound by the said lease to raise in each year thereof from the quarry let at least 10,000 superficial yards of marketable pavement, and the lordship of 3d. per superficial yard, it is declared by said lease, should in no year be paid on less than 10,000 yards, whether quarried or not.

"That the said Donald Shearer has by his agent intimated to the petitioner that the quantity carted by him from the said quarry for the half-year to Martinmas 1872 does not amount to 5000 yards. There was therefore due and payable by the respondent to the petitioner at the term of Martinmas 1872, in respect of the respondent's occupancy of the said quarry—*First*, £2, 10s. sterling, being the proportion of the fixed yearly rent of £5; *Second*, Lordship on 5000 yards, the quantity upon which the said Donald Shearer is bound to pay lordship for the said period from Whitsunday to Martinmas 1872, at the rate of 3d. per superficial yard, which lordship amounts to £62, 10s.; amounting said two sums to the sum of £65, with interest thereon at the rate of £5 per centum per annum from the said term of Martinmas 1872.

"The respondent has been often asked to make payment of these sums, but he has hitherto refused to do so, and they are still due and resting-owing to the petitioner. In consequence thereof, the present application has become necessary."

The prayer sought sequestration in security for the rent alleged to be due; and thereafter warrant to sell sufficient of the effects to meet the claim.

On 21st March the Sheriff-Substitute pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, before answer, allows to the respondent a proof of his averments, and to the petitioner a conjunct probation: Appoints the same to be proceeded with and concluded on the 11th of April next, at eleven o'clock forenoon, and decerns."

Against this interlocutor the petitioner appealed, and, on 28th April the Sheriff-Depute (THOMS) pronounced an interlocutor as follows:—

"*Wick, 28th April* 1873.—The Sheriff having considered the petitioner's appeal, together with reclaiming petition for him, answers thereto for the respondent, and whole process, Sustains said appeal, and recalls the interlocutor submitted to view: Finds, as matter of fact, that by lease dated the 19th July and 2d August 1872, the respondent bound himself, as tenant, to pay to the petitioner, as proprietor of a pavement and slate quarry on his farms of West and North Calder, in the parish of Halkirk, in the county of Caithness, a fixed rent of £5, and also a rent by way of lordship of 3d. per yard in any event on at least 10,000 superficial yards of pavement for each year of the lease for seven years from Whitsunday 1872, the term of entry; that the respondent entered upon, and has wrought the said quarry under the said lease at and from Whitsunday 1872, and is still in possession thereof under the said lease: that a half-year's moiety of said annual rent of £5, and of the said lordship at 3d. per yard on 10,000 superficial yards of pavement, amounts to £65 sterling, and was not paid by the respondent at the term of Martinmas 1872; and that the said sum of £65 as such moiety remained unpaid at the date of presenting this petition, on 14th January 1873, for sequestration in respect of the rent so due at Martinmas 1872; Finds, in point of law, that the articles mentioned in the prayer of the petition were then liable to sequestration, and to be sold as therein prayed for; that no relevant defence to the granting of said prayer, under the reservation after mentioned, has been set forth by the respondent; and that, but for the consignation after mentioned, the petitioner would have been entitled to have had the prayer of his petition granted, under reservation to the petitioner of any claims for further rent and interest from the respondent competent to him, and to the respondent of any claims of retention and for implement and damages or otherwise against the petitioner, competent to him, and to each of them his defences to such claims as accords; Finds that on 14th January 1873 the respondent consigned in the hands of the clerk of court the sum of £65 sterling; Finds the petitioner entitled to a warrant to uplift said consigned sum with the interest which has accrued thereon, under reservation as aforesaid; Therefore, under reservation as aforesaid, grants warrant and authority to the petitioner to uplift from the clerk of court the said sum of £65, with any interest which has accrued thereon, and ordains the sheriff-clerk to pay to the petitioner the said sum of £65, with any interest which has accrued thereon, and decerns: Finds the respondent liable to the petitioner in expenses, allows an account

thereof to be lodged, and, when lodged, remits the same to the Auditor to tax and to report."

The respondent appealed to the Court of Session.

The respondent stated that in the month of January 1871 the petitioner published in the "Northern Ensign" newspaper and other newspapers circulated in the county of Caithness an advertisement in the following terms:—

"*Notice to Pavement Merchants and others.*

"It is believed that flag rock is to be found in several portions of the estate of Scots-Calder, and the proprietor is willing to enter into arrangements for opening and working quarries in any part of the estate. . . . . The proposed through line of railway from Sutherland into Caithness passes through a portion of the estate, where some good flags have been found when quarrying for estate buildings and fencing; and the proprietor is prepared to arrange for sidings or roads from any quarries that may be worked."

In consequence of this Mr Shearer made an offer which was duly accepted, and having taken means to search for a quarry, he succeeding in discovering one about the term of Whitsunday 1871, and proceeded to open it. Finding that it might be profitably worked, he intimated the fact to Colonel Guthrie's agents, and at once placed on the ground the necessary plant and machinery, and carried on the operation of quarrying; and before the term of Whitsunday 1872 he had raised 9405 yards of pavement, but in consequence of the petitioner's failure to form a road from the quarry to the county road, he has been unable to cart away any more than 853 yards. The remaining 8552 yards still lie in the quarry, and are rapidly deteriorating. Between Whitsunday 1872 and Martinmas 1872 he raised from 4000 to 5000 yards, which also still lie on the ground, the respondent having been unable from want of a road to remove them.

The petitioner averred that the intimation was not made till Whitsunday 1872, and that the draft lease was sent to the respondent on 21st June 1872, but it was not returned until a day or two before it was signed by him. It was so signed on 18th July 1872, and in respect that the respondent stated he had not quarried such a large quantity of flag in the first year (which was free of rent or lordship, and is not included in the lease), as he had expected, the currency of the lease was extended by a year. The respondent refused to sign the plan relative thereto. Immediately after the respondent signed the lease, arrangements were made for forming the road, and it was commenced within a week, or at least a very short time thereafter.

The petitioner also explained that his agent frequently, at meetings with the respondent, had stated that he could not incur any expense in making a road until it was first ascertained that a quarry would be found and the respondent had entered into a lease, which was not done until 18th July 1872; and further, that the road was immediately thereafter commenced, and is finished, and the petitioner's obligation thereanent has been implemented.

The petitioner pleaded—"(1) The said sums having been due and payable to the petitioner at the term of Martinmas last, he is entitled to sequestration and decree as craved, with expenses. (2) The defences made by the respondent being virtually a claim for loss and damage, and further, being illiquid and groundless, his pleas ought to be repelled, and the petitioner found entitled to decree as craved. (3) The respondent's defence being irrelevant, ought to be repelled."

The respondent pleaded—"(1) The respondent through the petitioner's failure to form a road from the quarry to the county road, having been prevented from carting any stones from the quarry during the period of charge, and from obtaining any benefit from the subjects let, is not liable in the rent sued for. (2) The petition should be dismissed, or the respondent assoilzied, with expenses."

Authorities—Hunter, ii. 243; Bell's Comm., i. 72 *Cumming* v. *Williamson*, May 28, 1842, 4 D. 1304 *Gray* v. *Renton*, Dec. 10. 1840, 3 D. 203; *Kilmarnock Gas Co.* v. *Smith*, Nov. 9, 1872, 11 Macph. 58, 10 Scot. Law. Rep. 49.

At advising—

LORD COWAN—If your Lordships consider the nature of the application here made, it becomes evident that it is one for payment of rent alleged to be due *ex contractu* at Martinmas 1872. Now, if we look at the lease establishing the claim, we find therein the following clause, "and the said Charles Seton Guthrie shall form a road from the said quarry to the county road;" this obligation in the lease to make a road I am unable to regard in any light save that of its being an inherent part of the contract. The condition on which the rent was become actionable had not been fulfilled by the landlord, the road was yet unmade, and that being the nature of the lease, there was not, I think, any room for the petition at all. I do not think that even the view upon which the Sheriff has proceeded in allowing parties a conjunct proof is one upon which your Lordships should act at all. The law pleaded to the Court on behalf of Colonel Guthrie I do not doubt, but these doctrines do not apply to a case of this nature. Here a condition embodied in and essential to the lease was not implemented until after the period at which the rent was due, and the tenant in these circumstances was entitled to resist payment of that rent.

LORD BENHOLME—The case has certainly been argued very highly, and I do not think the authorities quoted were much to the point. They will certainly not avail here. To hold that the obligation to furnish a road—a road necessary for any emergement whatever in the sense of the lease of the property leased—to hold that this was not an essential condition of the lease, cannot be maintained. I rather agree with Lord Cowan, that we should just simply dismiss the petition, and allow the landlord to follow out his claims as he thinks proper.

LORD NEAVES—I am of the same opinion. The case for the tenant may be put thus, "The rent you ask is due for a certain period of time. During that time I never got from you the subject at all, I have got it in one sense but *minus* a most important and essential accompaniment." I do not say that for every little matter this would have been an excuse; but the only real question is that of essentiality. Now, can there be a doubt that a quarry in some inland part of the country must have—must essentially have—some road and means of access from the ordinary public thoroughfares. When by the non-fulfilment of a condition embodied in his lease a tenant is prevented from removing the stone which forms the subject of that

lease, is it to be held that he nevertheless is bound to pay the rent? I cannot think so. There is no reason to doubt that a road might have been made before Martinmas—no excuse of that kind is alleged. On these grounds, I quite agree with your Lordships that in bringing this petition before the Court it was the duty of the petitioner to state what he had done with the road. I think the petition should be thrown out, with expenses.

LORD JUSTICE-CLERK—I am of the same opinion.

The defender's counsel asked the Court to grant warrant in their interlocutor to uplift the consigned money, as the process being now at an end it would otherwise require fresh proceedings in the Sheriff Court to do so.

The Court pronounced the following interlocutor:—

"Dismiss the petition, Find petitioner liable in expenses, and Grant warrant to uplift the consigned money."

Counsel for Shearer—Watson and Trayner. Agent—P. S. Beveridge, S.S.C.

Counsel for Colonel Seton Guthrie—Lancaster and Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

*M*, Clerk.

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*Saturday, November* 15.

## SECOND DIVISION.

[Lord Ormidale, Ordinary.

### AGNEW AND MANDATORY *v.* SPROTT.

*Trust—Reference to Oath.*

In an action of declarator of trust the pursuer referred to the defender's oath. The defender having sworn that the copy of a document founded on as constituting the trust (the original not being forthcoming) was discovered by him many years subsequently in his predecessor's repositories, and that he was not until then aware of the existence of that copy,—*held* that the oath was negative of the reference.

This was a case at the instance of John Agnew and his mandatory against the Rev. William Sprott, United Presbyterian minister, Glasgow. The summons concluded for declarator that the defender held in trust certain heritable subjects in the village of Stewarton, in Wigtownshire, and that the disposition granted to his ancestor by the pursuer's ancestor, although *ex facie* absolute, "was really taken and granted without any money or price having been paid for the same at or upon the granting thereof, and was truly intended, with the title following thereon, only as a security for the repayment by the said deceased John Agnew to the said William Sprott and his foresaids of a sum of £145 sterling, then advanced by the said deceased William Sprott to the said deceased John Agnew, which sum of £145 sterling, with interest thereon till the date hereof, has been already repaid to and received by the said deceased William Sprott and his foresaids, including the defender, through his and their intromissions with the rents of the said property from the date of the said disposition until the present time."

The principal pursuer is the only son and heir-at-law of the late John Agnew, sea captain, some time residing at Stewarton, in the parish of Kirkcolm, and county of Wigtown, who died intestate on 18th January 1839, and he made up a title as nearest lawful heir-in-general to his father. By holograph mandate, 6th February 1873, he authorised his sister, Miss Margaret Anne Agnew, to act as his mandatory in the present action. On 16th April 1838 the deceased John Agnew sold, conveyed, alienated, and disponed to and in favour of William Sprott, writer in Stranraer, who acted at the time as his law agent, his heirs and assignees whomsoever, heritably and *ex facie* irredeemably, certain heritable subjects at Stewarton.

The pursuer maintained that this disposition, although *ex facie* absolute, was really executed as a security to the said William Sprott and his heirs for repayment of a sum of £145 sterling, then advanced by him to the said John Agnew; and that it was understood and agreed between the parties that when the said sum, with lawful interest, should be repaid by John Agnew or his heirs, or when by intromissions with the rents and profits of the subjects William Sprott and his foresaids should have repaid themselves the said sum and interest, he or they should denude and reconvey the same to John Agnew or his heirs.

In answer, the defender stated that he thought it proper to explain that on making particular search among his uncle Mr William Sprott's papers, in the summer of 1872, he found a writing, styled on its back, "Copy Back-Letter by William Sprott to John Agnew, 16th April 1838." Of the existence of this document he was previously unaware, and even now he knew no more regarding it than itself conveyed, nor was he aware of the existence of any original of the document.

William Sprott entered upon possession of these subjects, and died intestate on 7th January 1845, being succeeded by his brother John Sprott, who died insane and intestate, and was succeeded in the property and possession by his nephew William Sprott, the defender.

The defender at the date of the disposition was only eleven years of age; and then and afterwards he knew nothing of his uncle's private affairs; and when his uncle died he was only seventeen years of age.

Finally, the pursuer averred that by the intromissions of William Sprott, John Sprott, and the defender with the rents and profits of the subjects, the sum of £145, with legal interest to the date of this action, had been repaid.

All this the defender denied, adding that he had always been willing, without prejudice to the absolute nature of his title and his legal rights generally, to sell and reconvey the subjects, upon payment of the original price, with interest, and reimbursement of his outlays and expenses; and he now, upon the same footing, repeated his offers to do so.

The pursuer pleaded—"(1) The disposition of 16th April 1838, although *ex facie* absolute, having been truly granted in security for the repayment of a sum of money advanced by the defender's author to the father of the pursuer, the pursuer is entitled to decree of declarator as craved. (2) The nature of the agreement between the parties to the disposition having been well known to the defender at the time, can be competently proved by the oath of the defender. (3) The sum advanced having been repaid with interest; the pursuer is entitled to decree as craved."