stated that he had supplied the bankrupts with cement, which on one occasion was injured by a severe frost, causing the work to be done over again. On the assumption that M'Lay's bills were arranged, it was his opinion that the estate could have paid 10s. in the pound.

The petitioner himself being interrogated, "Were these" (M'Lay's) "bills in the ordinary course of business, or were they accommodation bills?" deponed—"They were commenced just in the ordinary course of business. M'Lay's firm were working to us and we to them, and there was an accounting in respect of that work, settled by the bills first, and they were renewed from time to time till they became accommodation bills. We paid one of these bills of M'Lay on the understanding that they were to meet ours a fortnight afterwards. They failed to do that, and that was the cause of our having to take out sequestration." Assuming M'Lay's bills out of the way they would have been able to pay nearly 10s. in the pound. He attributed the losses of the firm principally to bad weather, very severe frost having occurred during the currency of heavy contracts, and on one occasion to a flood when executing a contract to lay pipes across a stream, and on another to the absconding of a person for whom they had done work. In other cases they had taken the contracts too cheap.

The report of the Accountant in Bankruptcy was to the same effect as that of the trustee.

The Sheriff-Substitute (Cowan) pronounced this interlocutor:—"Refuses the prayer of the petition, because the petitioner has not paid the sum of 5s. per pound sterling to his creditors, and because it is not proved that his failure to do so has arisen from causes for which the petitioner cannot justly be held responsible, and decerns.

"*Note.*—The petitioner's failure to pay 5s. per pound is plainly attributable to his liability for the bills amounting to £800, to which he put his name for Messrs M'Lay. However these bills may originally have been *bona fide* bills, they latterly and for a long period had become pure accommodation bills. And it is the belief of the trustee that had the *bona fide* bills been retired at the time they became due instead of being converted into accommodation bills the estate would have paid 5s. per pound. In these circumstances the Sheriff-Substitute holds that the petitioner is responsible for the loss thus resulting to the creditors through his improper trading."

The petitioner appealed to the Court of Session, and argued—There was nothing in the evidence to show that the failure to pay 5s. was due to other than innocent misfortune in trade. The bills in question were not accommodation bills, but *bona fide* renewals of current bills, and even if they were that was not of itself a circumstance disentitling a bankrupt to his discharge.

At advising—

Lord Justice-Clerk—I think the reports of the trustee and the Accountant in Bankruptcy are enough to warrant us in giving discharge.

Lord Young—That is quite my opinion, more especially where no creditor is interposing to object to the discharge being granted or complaining of the debts on these bills, and when there is not even a suggestion of impropriety in the conduct of the bankrupt. I think it is natural that two contractors who are doing work for each other should grant and accept each other's bills, and that that should degenerate into a system of accommodation, and that the result should be a balance against one of them of £800, is not unlikely. But I cannot see anything improper in that. I think the reports of the trustee and the Accountant in Bankruptcy are in accordance with the circumstances, and as the evidence shows that the inability, apart from these bills, to pay five shillings in the pound arose from innocent misfortune, without hesitation I think that discharge should be granted.

Lord Rutherfurd Clark—I agree. I think the reports of the trustee and the Accountant in Bankruptcy are strong circumstances in the bankrupt's favour, though I do not much like the origin of some of these debts.

Lord Craighill was absent.

The Court recalled the Sheriff-Substitute's interlocutor and granted discharge.

Counsel for Petitioner—Salvesen. Agent—J. A. Trevelyan Sturrock, S.S.C.

Monday, June 22.

TEIND COURT.

(Before the Lord President, Lords Shand, Rutherfurd Clark, Adam, and Kinnear.)

SMOLLETT *v.* SIMPSON.

Teinds — Sub-Valuation—Approbation—Dereliction.

In an action brought by a heritor in the Teind Court in 1884 for approbation of a report of the sub-commissioners in 1630 valuing the teinds of certain lands, the minister lodged defences, in which he stated that though the victual teind was calculated according to standard measure, yet stipend had for more than a hundred years been paid according to the county measure, which exceeded the former. He also stated that a small payment had been made to the minister of an adjoining parish out of the lands valued. He pleaded that the pursuer and his predecessors had derelinquished the sub-valuation sought to be approved. *Held* that there was no evidence of an intention on the part of the heritor to abandon the sub-valuation, and defences therefore *repelled.*

This was an action brought in the Teind Court by Patrick Boyle Smollett of Bonhill against the Duke of Montrose, as titular of the teinds of the parish of Bonhill, and the Reverend William Simpson, minister of the parish, for approbation of a sub-valuation of the teinds of the pursuer's lands of Bonhill dated 16th March 1630.

By this sub-valuation the teinds of the eight

pound land of Bonhill were valued at the following quantities of victual and money, viz.—

	B.	F.	P.	L.
Meal, .	24	1	2	1⅗
Bere, .	7	2	1	2⅗
Total victual,	32	0	0	0

Money 13s. 4d. sterling.

The victual teind was here stated according to the Dumbartonshire county measure, which exceeded the standard measure.

The stipend to the minister of Bonhill, for which the pursuer and his predecessors had been localled on since a period prior to 1807, amounted to the following quantities of victual and money, viz.—

	B.	F.	P.	L.
Meal, .	23	0	0	0
Bere, .	11	0	0	0
Total victual,	34	0	0	0

Money, 13s. 4d. sterling.

The victual stipend was here stated in standard measure.

The minister lodged defences in which he stated that for a period long exceeding forty years the bere stipend had been paid, not according to standard measure, but according to local measure, and that, making an allowance for an under payment of the meal stipend, there still remained a total over-payment, calculated on the average fiars prices, of £1, 5s. 2d. annually. The minister further alleged that the pursuer annually paid teind out of his said lands to the minister of Dumbarton, which amounted on an average to 15s. 6d.

The pursuer founded on two processes of augmentation in the parish of Bonhill, in the earlier of which the locality was declared final in 1807. In the later a locality was approved interim in 1827, and was rectified in 1883, but had not become final at the date of this action. Prior to the locality of 1807 the stipend paid to the minister of Bonhill for the lands in question was that above specified.

In the locality of 1807 the minister alleged dereliction of the sub-valuation, and the common agent proposed to allocate a portion of the augmentation upon the teinds in question. Objections were lodged for the pursuer's predecessor, denying that there had been any dereliction, and pointing out that the apparent over-payment of victual arose from the difference between the county and standard measure. Effect was given to these objections, the old stipend above specified being simply continued, and no part of the augmentation being laid upon these teinds. In the locality of 1827 the question of dereliction was again raised by the minister, but the old stipend paid for the pursuer's lands was again continued.

The minister pleaded that the sub-valuation had been derelinquished by over-payment.

The pursuer argued — It was admitted that though the stipend localled was standard measure, yet the minister had for more than forty years been allowed to collect the bere teind according to local measure. The legal obligation on the heritor was what appeared in the locality, viz., 34 bolls standard measure, and this was just equivalent to the amount appearing in the sub-valuation, viz., 32 bolls county measure. The question now at issue had been raised in the localities of 1807 and 1827, and decided in favour of the heritor. Dereliction involved consent, and there was none here—*Richmond* v. *Officers of State*, July 19, 1871, 9 Macph. 1020; *E. of Kinnoull*, Shaw's Teind Cases, 105; *Edmonston* v. *Graham*, Feb. 18, 1807, F.C. The locality of 1827 was still *interim*, and payments made under it could be rectified. The payment to the minister of Dumbarton was an old use and wont payment which could never infer dereliction. Besides, it had not been shown that this payment was made from lands included in the valuation.

The defender argued—The intention of the heritor to derelinquish could here be inferred from the facts proved. The stipend had been paid so far as regarded bere according to the county and not the standard measure since a period prior to 1807. These overpayments were absolutely continuous. The proceedings in the former processes could not affect the minister as he was not a party. The payment to the minister of Dumbarton was not a mere use and wont payment, and must have been made from land included in the valuation. He was entitled to take this payment into account in a question of dereliction—*Fogo* v. *Colquhoun*, *supra*. In the case of *Richmond* the payments were small, and had been made under protest.

Lord President—I do not think we require to hear further argument in this case, as I am satisfied that there is not a sufficient foundation for holding that there has been dereliction here.

The valuation of Mr Smollett's lands in the parish of Bonhill is set out in the summons, and there is no doubt about it. The stipend which he and his predecessors have been localled on is 23 bolls of meal and 11 bolls of bere, standard measure, together with 13s. 4d. sterling of money, and the question is whether in paying that he has paid more than by the report he was bound to pay?

In one sense he certainly was, because it turns out that as regards one portion of the victual teind—viz., the bere—the pursuer has been paying according to the county measure, which exceeds the standard measure, and that therefore he has been paying in money more than he was bound to, though he was only paying for 23 bolls of meal and 11 bolls of bere, as entered in the locality. The minister annually presented his claim for stipend, with reference to the fiars' prices, for the amount of victual teind entered in the locality, which, however, was calculated according to the local measure, and this led to Mr Smollett and his predecessors making overpayments in fact though not in form.

Is it possible to deduce from this an intention to abandon the sub-valuation? The heritor did not and could not know that he was paying more in money than he was bound. No doubt he did not investigate into the circumstances, but mere negligence, if that can be called negligence, is not sufficient to infer dereliction, for there must be a distinct intention on the part of the heritor to abandon the sub-valuation.

With regard to the payment to the minister of Dumbarton, I think the defenders have failed entirely, for they have not made out that the

stipend paid to Dumbarton is payable out of the lands embraced in the sub-valuation. I think it is extremely doubtful in respect of what lands the payment was made. Moreover, it has been treated as a use and wont payment, that is to say, a payment which does not depend upon a decree or a locality, or any of the ordinary conditions upon which an allocation of stipend is made—a payment of which the origin is not traceable.

I think it is impossible to infer that there was an intention to abandon the sub-valuation, and I am therefore of opinion that the defences should be repelled and decree granted in terms of the conclusions of the summons.

LORD SHAND, LORD RUTHERFURD CLARK, LORD ADAM, and LORD KINNEAR concurred.

The Court repelled the defences, and granted decree of approbation.

Counsel for Pursuer — Mackintosh — Low. Agents—J. & J. H. Balfour, W.S.

Counsel for Defender — Pearson — Dundas. Agents—Mylne & Campbell, W.S.

Tuesday, June 23.

SECOND DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

MORRISON *v* STATTER AND ANOTHER.

Agent and Principal — Master and Servant — Managing Shepherd Buying Sheep at Market — Authority to Buy.

Sheep were bought in his own name by the head servant on a farm on which the tenant did not reside. He had no right to buy or sell on his master's behalf without express authority, and on the occasion of his purchase he had instructions to buy sheep, but not of the age or at the price of those he bought. *Held* that he had no implied authority from his position on the farm to bind his master for the purchase into which he had entered.

This was an action by Donald Morrison against John Calder and Thomas Statter for damages for breach of a contract to buy certain sheep at a certain price. The defender Calder denied that any such contract had been made. The defender Statter, who was employer of Calder, and for whom the pursuer alleged the purchase was really made, also denied the contract.

Statter was tenant, among other farms, of the farm of Knockie, Invernesshire, and he was at that farm a few times in each year. His evidence as to Calder was that he was his servant at Knockie; that he was a gamekeeper, and also looked after the shepherds and all upon the farm, and made a weekly report to him (Statter); that for any other duties he got special instructions; in particular, that he only bought and sold on special instructions, Statter usually buying himself; that at the time in question he had special instructions to buy, if he could, sheep of a different age and at a much lower price than those which were the subject of this action, the place of purchase being immaterial, but had no authority to buy the sheep the pursuer alleged him to have bought, or to go to the price he was alleged to have agreed to pay, but that he was "tied to a price."

The pursuer produced a missive of which Calder denied the authenticity, but which was held proved to be his. It was signed by Calder, and bore that he had bought the sheep in question, and at the price sued for. Statter was not mentioned in it. Delivery not being taken, the pursuer had re-sold the sheep by auction, and the action was for £87, 6s. 2d. as damages thereby suffered.

The Sheriff-Substitute (BLAIR) found Calder liable for failure to implement the contract, and that the measure of his liability — *Warin and Craven* v. *Forrester*, 30th November 1876, 4 R. 190, *aff.* 5th June 1877, 4 R. (H. of L.) 75—was the difference between the contract price and the market price at the date when delivery was tendered and refused, being £37 in all. He further found that Calder had no authority as Statter's agent to enter into any such contract, that Statter had not consented to or ratified it, and therefore assoilzied Statter.

"*Note.*— . . . The pursuer contends that, though the defender Calder was the original party to the contract, he is entitled to demand performance from the defender Statter, in respect that the defender Calder was the authorised agent of the defender Statter, and that the contract was made on behalf of Statter.

"But a contract made by an agent can only bind the principal by force of a previous authority or subsequent ratification, and the burden of proving this authority or ratification lies on the pursuer.

"I think, on the evidence, there can be no doubt that the pursuer has failed to prove that Calder had this authority, or that Mr Statter subsequently ratified the contract entered into between the pursuer and Calder. The power to bind his master to such a contract as this was not within his usual employment, for Mr Statter says he buys his own sheep, and does not allow Calder to buy for him, except under special instructions. If, then, Calder was Mr Statter's agent, Calder was his instrument to make a contract only within the limits of the authority given him, and Mr Statter expressly states that he did not and would not have authorised Calder to make such a contract. The defender Calder also states that he had no authority from Mr Statter to make the contract in question. Now, when a principal could not have authorised the contract, then it is plain that the contract from the beginning can have no operation at all against him. Accordingly, the proper course for the other contracting party is to sue the agent as principal on the contract itself. It is obvious that the contract itself was a contract between the pursuer and the defender Calder, and therefore the defender Calder is liable on the contract itself; but even if it were to be held that he acted as unauthorised agent for another, he would be still liable on an implied warranty of his authority to bind his principal; in short, the professed agent must be treated as principal." . . . .

The pursuer appealed, and argued—Calder was in the common position of almost every grieve in