conveyance in her contract of marriage with William Gibson Bloxsom, the party of the fourth part; in regard to the *second* question, that it falls to be answered in the negative, and that one-third of the funds settled by Mrs Murray in her antenuptial contract of marriage vested, on the death of the survivor of the spouses, in the children of Mrs Bloxsom; in regard to the *third* question, that the parties of the first part are bound to pay the said share of the said sum of Four thousand pounds to the parties of the third part, the trustees under Mrs Bloxsom's marriage-contract, and to pay the said one-third share of the fund settled by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children, on delivery of a receipt and discharge by him in that capacity; in regard to the *fourth* question, that it falls to be answered in the negative, and that one-third share of the funds bequeathed by Mrs Murray in her deed of settlement vested at her death in the children of Mrs Bloxsom; in regard to the *fifth* question, that it falls to be answered in the negative; and in regard to the *sixth* question, that the parties of the second part are bound to pay the said share of the sums bequeathed by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children as aforesaid, upon a receipt and discharge by him as such: Find and declare accordingly: Find the parties entitled to payment out of the several funds falling to Mrs Bloxsom or her children, in proportions corresponding to the amount thereof respectively of the expenses incurred by them in relation to the special case, as the same shall be taxed by the Auditor of Court, and decern."

Counsel for the First and Second Parties—Balfour, Q.C.—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Third and Fourth Parties—D.-F. Mackintosh—J. A. Reid. Agents—J. & A. F. Adam, W.S.

Counsel for the Curator *ad litem*—R. V. Campbell. Agent—Andrew Forrester, W.S.

Friday, December 23.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF FIFE *v.* WHARTON DUFF.

Teinds—Over and Underpaying Heritors—Decree of Approbation—Prescription.

In 1792 F obtained a decree of approbation of a sub-valuation made in 1629, although in the interval he had been paying stipend in excess of the valued teind. Subsequently to the date of the decree of approbation, F continued, under interim decrees of locality pronounced in successive processes of augmentation, modification, and locality, to make overpayments of stipend. It was not until 1844 that the decree of approbation was produced and founded on. In 1882 a final decree of locality was obtained. F then raised an action to recover from another heritor the amounts alleged to have been underpaid by her, corresponding to F's overpayments from the year 1812 to 1881. The defender pleaded prescription as regarded the claim, except for the last forty years. To this F replied that he was *non valens agere* during the years of prescription, because he could not sue for repayment of the alleged overpayments till a final decree of locality had been obtained. The Court *held* that the reason why F had not produced the decree of approbation in the interim processes was that he preferred making the overpayments to running the risk of having the decree challenged on the ground of dereliction; that he had made his overpayments designedly, as if no such decree existed, in order to validate his decree of approbation by prescription; that he was therefore not entitled to plead that he was *non valens agere;* and that his claim beyond forty years from the date of raising the action was prescribed.

Observations on the cases of *Weatherstone* v. *Marquis of Tweeddale,* November 12, 1833, 12 S. 1, and *Campbell's Trustees* v. *Sinclair, &c.*. July 18, 1877, 4 R. 1126—*revd.* April 15, 1878, 5 R. (H. of L.) 119.

This was an action at the instance of the Earl of Fife against Miss Anne Wharton Duff of Orton, in the county of Elgin, concluding for payment of £3293, with interest, which the pursuer alleged to be due to him by the defender in respect of stipend of the ministers of the parish of St Andrews Lhanbryde, underpaid by the defender and her predecessors from the teinds of the lands of Barmuckity and others belonging to them in the said parish from 1812 to 1881.

The circumstances out of which the action arose were as follows—Between 1812 and May 1886, the date of the present summons, three different processes of augmentation, modification, and locality of stipend of the parish of St Andrews Lhanbryde had been raised. The first of these was in September 1812, and the second was in September 1842. These two were conjoined on 9th February 1844. The third action was raised in September 1863, and it was conjoined with the two previous actions in January 1868. The final locality was dated May 1882, when it was discovered that throughout the parish there had under the interim schemes of locality from 1812 to 1881 been a number of under and overpayments.

The pursuer averred that as heir *in mobilibus* of the then proprietors of part of the lands in respect of which overpayments were made, he was entitled to relief from the defender as representing the proprietor of part of the lands in respect of which underpayments had been made.

The defender, while admitting her liability to account for underpayments for forty years before the date of the action, averred as follows—That in 1629 the teinds of the lands in the parish of Lhanbryde were valued by the Sub-Commissioners of Elgin, and that in 1792 the then Earl of

Fife obtained a decree of approbation and valuation in terms of the Sub-Commisioner's report notwithstanding that in the meantime he had been paying stipend in excess of the valued teind; that in the various proceedings in the localities already referred to this decree of approbation and valuation was never founded on or produced until prescription had run upon it, and it had become unchallengeable; and that had it been founded on it would have been reduced and set aside. The defenders also averred that it was not until the proceedings in July 1844 that the pursuer's predecessor founded upon the decree of approbation and valuation of 1792, and then maintained, for the first time, that as the whole amount of the valued teind in St Andrews Lhanbryde was more than exhausted he was not liable for any part of the augmentations under the interim schemes of 1814, 1824, or 1843.

The pursuer pleaded, *inter alia*—"(2) The defender as owner of the lands of Barmuckity, and also as representing former owners thereof, having underpaid teind during the period libelled, is bound to pay to the pursuer the proportion of overpayments applicable to the said lands, with interest as concluded for, and with expenses."

The defender pleaded, *inter alia*—"(2) The defender is not liable for any alleged overpayments for any period beyond forty years. (3) The decree of approbation and valuation of 1792 having been withheld, notwithstanding the orders of the Court to produce the same, so as to fortify it against reduction by concealing it for the period of the long prescription, the pursuer is barred from claiming any overpayments which were only made on the assumption of the decree being invalid; or *separatim*, is barred from insisting on any such payments for the years prior to 1844, or at all events prior to 1832."

By interlocutor of 18th December 1886 the Lord Ordinary (KINNEAR) sustained the second plea-in-law for the defender, and granted leave to reclaim.

"*Opinion.*—The pursuer has made overpayments under interim schemes of locality from 1812 to 1881, and he brings this action to recover from the defender as an underpaying heritor her proportion of the overpayments. The defender admits her liability to account for underpayments for forty years before the date of the action. But she maintains, on the authority of *Sinclair's Trustees* v. *Campbell*, decided in the House of Lords 5 R. (H. of L.) 119, that the pursuer's claim to recover for underpayments before that date is cut off by prescription. She also maintains that apart from prescription the pursuer is barred by the conduct of his predecessors from insisting on his claims for the period prior to 1844. But whatever weight may be ascribed in considering the plea of prescription to the conduct which is said to create a bar, it does not appear to me that apart from prescription it affords a sufficient answer to the pursuer's claims. It appears that in 1629 the teind of the lands in the parish of Lhanbryde were valued by the Sub-Commissioners of Elgin; that in 1792 the Earl of Fife obtained a decree of approbation and valuation in terms of the report, notwithstanding that in the meantime he had been paying stipend in excess of the valued teind. It is argued for the defender that if this decree of approbation and valuation had been founded on in the localities before it had been fortified by prescription it would have been seen to be a bad decree by reason of prior dereliction, and must therefore have been reduced. It is alleged therefore that it was purposely withheld till 1844, when it was for the first time produced and founded on in the locality then pending. But now that it has been brought forward it is admittedly a good and valid decree, and since all inquiry into the grounds on which it is said that it might once have been challenged is now excluded by prescription, it must be assumed that is was a good decree from the first. Even if it were challengeable the defender had at no time any title to challenge it, and she cannot assume that it could or would have been disputed by the Officers of State or the minister who were parties to the proceeding in which it was pronounced. She does not maintain that the pursuer is barred from founding upon his decree as fixing the true measure of his liability, and indeed this is already determined in his favour by the approval of the final scheme in which it has received effect. If she is not in a position to plead prescription, therefore, I am unable to see any ground for maintaining that the decree of valuation, and the decree of locality following upon it, are not to receive effect for the purpose of adjusting accounts between the pursuer and the other heritors as well as for the purpose of fixing their respective liabilities to the minister for the future.

"The question therefore comes to depend upon the validity of the pursuer's plea that the dependence of a process of locality does exclude prescription. This appears to me to be a question of great difficulty in the present state of the decisions, but I am unable to find any solid ground for distinguishing between the present case and that of *Sinclair's Trustees* v. *Campbell* as decided by the House of Lords.

"In that case the House of Lords held that the long prescription barred any right to recoupment which had accrued to an overpaying heritor prior to the period of forty years before he insisted in his claim for repetition. It is true that in so holding the noble Lords who took part in the judgment did not expressly overrule the decision in the *Marquis of Tweeddale* v. *Weatherstone*, 12 S. 1, which is clearly undistinguishable from the present case. But I think it manifest from the reasoning upon which their judgment proceeded, that, with the exception perhaps of Lord Gordon, they would have concurred in formally overruling that decision if they had thought it necessary to do so. I think they disapproved of the doctrine on which the judgment of the Court of Session was based, and that they intended by their decision to give effect to a contrary doctrine.

"It is true that there is a marked distinction in fact between the position of the underpaying heritor in that case and the position of the defender. There were two successive proprietors against whom a claim was made for repetition of overpayments of stipend—General Campbell Fletcher's Trustees and Mr Andrew Fletcher—and the first of these might probably have been relieved without touching the question of prescription, for the House of Lords thought that they had not been duly cited, and had not been

parties to the process of locality. But the second was admittedly well cited, and had taken part in the process by voting in the election of a common agent. But then he had ceased to be a heritor by the sale and conveyance of his lands in the parish, for forty years before the claim for repetition was brought forward, and the Lords undoubtedly attached great importance to the consideration that he had thus become a stranger to the process of locality before the establishment of the liability of his lands for stipend which gave rise to the claim. But I do not think that they intended to decide that, independently of prescription, the mere fact of his having sold his land during the dependence of a process of locality would relieve an underpaying heritor of his liability or deprive an overpaying heritor of his right to an accounting when the true rights of parties had been ascertained. It is clear that it could not be so held consistently with the principle on which the right to an adjustment of accounts is based. And there is nothing in the decision of the House of Lords to throw any doubt upon that principle, except as regards its operation to exclude prescription. It is true that some doubts were expressed—and similar doubts have been expressed in this Court—as to the accuracy of the hypothesis which traces the right to a judicial contract. But the doctrine itself does not appear to me to have been questioned. On the contrary, it is distinctly laid down in the opinion of Lord Selborne, where his Lordship says—'It is settled by the law of Scotland that if one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the underpaying is liable in repetition to the overpaying heritor.' And his Lordship goes on to quote what was said in *Haldane* v. *Ogilvy*, where it was 'laid down that the claim of an overpaying against an underpaying heritor is "strictly and simply a claim of debt, a claim for money advanced by the creditor for the debtor at a time when their respective pecuniary liabilities were misunderstood."' It would probably be more accurate to say 'that their pecuniary liabilities had not yet been ascertained,' than that they had been misunderstood. For although there may be cases where a heritor has paid too much or too little, because he has misunderstood his rights or liabilities, the general rule is that payments under an interim scheme are made provisionally, on the assumption that the shares in which the burden of stipend ought to be borne by the various heritors have not yet been determined. The law may reasonably impute to a heritor a knowledge of his liability for teind, for that depends upon his own right alone. But his proportionable liability for stipend within the full amount of his teind depends upon the liability of others, of which he can know nothing until a scheme of locality has been adjusted. The underpaying heritor therefore is not in the position of a debtor who has paid too little in the belief that he was paying according to his liability, but of a contributor to a common fund who has paid provisionally in the knowledge that the true amount of his share of the burden remains to be ascertained. If it turns out when the proportional liabilities of all the heritors are determined that he has paid too little, it follows that under the provisional arrangements of the interim scheme his debt to the minister has been paid by those of the heritors who have paid too much. And it appears to be implied in the very nature of the process that he must reimburse those who have paid his debt. Lord Selborne observes in a later part of this opinion that the claim which thus arises to the overpaying against the underpaying heritor is one 'which arises in contemplation of law, and is constituted as a legal cause of action at the time when each overpayment takes place.' But if this be so, it seems impossible to hold that the mere fact of his having sold his land before a final locality had been adjusted can relieve him of a debt or deprive him of a claim which had already accrued.

"It would appear to me, therefore, that the importance which was attached in the House of Lords to the fact of the underpaying heritor having sold his land arises less from any aid which it could afford to the plea of prescription, than because it served to meet the argument that was founded upon a supposed contract between the heritors. And accordingly it is with reference to this argument that the Lord Chancellor observes that the heritor who had sold had thenceforth no power over the litigation, and no means of expediting it. But the question still remains whether, assuming a debt to have accrued with each year's underpayment, the overpaying heritor's right to repetition will be barred by the lapse of the period of prescription. And the House of Lords has decided that question in the affirmative. But it could not be so decided without rejecting the only ground on which the opposite doctrine had previously been maintained. The ground, as I understand it, is that notwithstanding that a debt had in fact been incurred with each yearly overpayment, it could not be known that it had been so incurred until the final locality had been approved of. Till then it was thought to be impossible for the overpaying heritor to bring this action, because it could not be known that he had in fact overpaid. It was supposed therefore that there was a *non valentia agere* during the whole period of the dependence of a locality which necessarily interrupted the running of prescription. This is a difficulty which applies just as clearly and directly to the case of a heritor who has sold during the progress of the locality as to a heritor who still retains his land when the locality is brought to an end. But it is a difficulty which was fully before the House of Lords in *Campbell* v. *Sinclair*, and it was held to be no sufficient reason for excluding the plea of prescription. It appears to me therefore to have been decided by the House of Lords that the dependence of a process of locality does not operate to bar prescription.

"But if prescription is pleadable against such a claim as the present, it appears to me that this is a very favourable case for maintaining the plea. The first process of augmentation was raised in 1812, and the heritors were appointed to produce their rights and valuations on the 25th of June 1814. And yet it was not until July 1844 that the Earl of Fife produced the valuation of 1792, and protested that the whole

amount of his valued teind having been exhausted he was liable for no part of the augmentations either under the interim schemes of 1814, 1824, or 1842. During the whole time between 1814 and 1844 he had been paying on the footing that his teinds were not valued, and yet he must have known of the existence of his valuation, and no reason can be suggested to account for his withholding it. He allows forty years more to pass before he brings his action, in which he seeks repetition with interest of annual payments extending over a period of seventy years. It is said that the defender cannot complain of the delay, because she and her predecessors might have pressed on the proceedings in the locality. But the delay which followed the production of the valuation would appear to have been caused by a protracted litigation between Lord Fife and the Crown. The defender had no part in that litigation, and no power to expedite the proceedings.

"In these circumstances I think she is fairly entitled to say that after the lapse of forty years from the production of the valuation, all claim for repetition of overpayments made before that date must be presumed to have been abandoned, unless it can be maintained against her that that presumption is excluded by the dependence of a process of locality which bars prescription. But that cannot in my opinion be maintained, since the contrary is decided by the House of Lords in *Campbell* v. *Sinclair*."

The pursuer reclaimed, and argued—That his claim against an underpaying heritor was one of debt, and so that he was entitled to recover the sums which his predecessors had overpaid from the underpaying heritors or their representatives. There was here a series of persons remaining in the locality all through, and therefore liable in payment. Upon that account the principle of the decision in the case of *Sinclair's Trustees* v. *Campbell*, 5 R. (H. of L.) 119, did not apply. The question of prescription did not enter into the present question at all, as it ran from the date of the final decree, which was May 1882. Lord Fife in this process of locality was *non valens agere*, as it was out of his power to force on the locality. In the case of *Weatherstone* v. *Marquis of Tweeddale*, Nov. 12, 1833, 12 S. 1, the judicial contract was the basis of the judgment, and until that case was overruled the principles there laid down must hold, and were decisive of the present question.—See also *Wishart and Others* v. *City of Glasgow Bank*, July 19, 1879, 6 R. 1341; Bell's Principles, sec. 627; Ersk. iii. 7, 36.

Replied for the respondent—The present question was decided by the House of Lords in the case of *Sinclair's Trustees*, which had overruled the case of *Weatherstone*. It was impossible these two cases could stand together, otherwise there would be a general rule laid down applicable to such cases, and also a general exception. The mere circumstance that a heritor sold his lands and left the parish during a process of locality would not free him from liability, because he was a party to the contract when the locality commenced, and the lapse of forty years would not affect such a case—the heritor leaving would still be liable for underpayments. If a creditor neglected to press his claims for forty years, he could not be heard to plead hardship if he lost his rights. If prescription could not begin to run until the date of the final locality, then the judgment in the case of *Sinclair's Trustees* was wrong.

At this stage of the argument their Lordships, by interlocutor of 17th June 1887, remitted to the Teind Clerk "to report generally the course of proceedings in the locality or conjoined localities of St Andrews Lhanbryde, during the dependence of which the alleged overpayments of stipend were made, and specially (*first*) to what cause or causes is to be ascribed the long delay which occurred in adjusting a final scheme of locality; and (*second*) whether there were overpayments of stipend by the Earl of Fife prior to the decree of approbation sufficient to infer dereliction of the sub-valuation of his teinds."

On 16th July the Teind Clerk lodged his report. In his opinion the time which elapsed between the date of the summons and the date of the modification when the augmentation was granted in each case was not unusually long. The same comment fell to be made with reference to the period which elapsed between the date of the modification and the date of the interim locality in each case. He was further of opinion, from the various documents in the different localities, that the Earl of Fife's agents were well aware of all that was going on from the raising of the summons in 1812 down to 1825; that they had numerous opportunities to contest the overpayments that were being made, but that they were unwilling to enter into a discussion which would have involved the production of the decree of approbation of 1792. With reference to the two points upon which the Court especially desired the opinion of the Clerk of Teinds—(*First*) As to what causes were to be ascribed the long delay which occurred in adjusting a final scheme of locality, the reporter submitted that "the delay must be chiefly ascribed to the heritors in not producing their rights to teinds and valuations thereof in the first action. Had these been produced, all questions between the Crown and the heritors, and also the liabilities of the individual heritors, might have been settled in the first action within the seven years that action was asleep. When the discussion between the Crown and the Earl of Fife took place in the second action, the chief points in discussion were settled within five years, and the remaining question might have been settled within two years. It is true the Crown did not press the objections which had been made in 1824, but the heritors nevertheless continued to pay their shares of stipend, and in the case of the Earl of Fife to make a large overpayment in the knowledge that the decree of approbation of 1792 was in existence, and fixed the teinds at a much smaller quantity than was being paid. None of the heritors were so much interested in the rectification of the locality as the Earl of Fife, as appears from the statement produced, and yet it was not till 1844 that the decree of 1792 was founded on. With so much knowledge of the valuation shown in the common agent's account it is thought the delay in its production may fairly be attributed to an unwillingness to found upon the decree during the currency of the forty years from 1792 to 1832." With reference to the *second* of the points remitted for the consideration of the Clerk

of Teinds, viz., as to whether there were overpayments of stipend by the Earl of Fife prior to the decree of approbation sufficient to infer dereliction of the sub-valuation of his teinds, the reporter was of opinion that there was good ground for challenge of the decree of approbation of 1792 if it had been founded on within forty years of its date. He further added—"With reference to the approbation of 1792 it is only fair to state that the proceedings in that action were not unduly hurried. The action was raised in 1784, and it related to the parishes of Alves, New Spynie, Elgin, St Andrews and Lhanbryde, Urquhart and Speymouth, the ministers of which along with the Crown and other titulars were called. None of the ministers entered appearance, and no defences were lodged. From the proceedings, however, it appears that the Crown at various times requested delay, and in the end did not oppose decree on 21st November 1792. At that time, however, it had not been finally settled that the ministers had a right to future augmentations. The decisions of the Court of Teinds had been adverse to such claims, except in very special cases, and it was not till the year 1808 that all doubt was removed by the decision of the House of Lords in the *Prestonkirk* case, which was followed by the Act of same year regulating augmentation proceedings. In considering the question of dereliction, it may be mentioned that it was not material in what kinds of victual the teinds were valued or allocated. For teind purposes between the years 1717 and 1792 the standard conversion was £100 Scots money for all kinds of victual. It is also proper to mention that where stipend was allocated in victual it was paid by the delivery in kind of the victual allocated. This mode of payment continued and is still applicable to cases which have had no modification since the Act of 1808 was passed. By that Act, however, it was provided that stipends augmented thereafter, though modified in victual, should be paid according to the highest fiars' prices of the county. In this case no doubt the old style of payment by delivery would be continued till the minister obtained his new interim locality, the new mode of payment being alluded to in the entry from the common agent's account before referred to. It seems therefore unnecessary to indicate in a money form the excess in value of stipend over the teinds between the years 1717 and 1792, when the overpayment took place."

Parties were further heard on this report.

Argued for the reclaimers—The position of the pursuer was that he held a decree of approbation, fortified by prescription, against which an allegation of something almost amounting to fraud on the part of the pursuer was made by the defender. This allegation, however, was not substantiated by the researches of the Teind Clerk, while the correspondence produced showed that, though not founded upon in the process of 1812, the decree of approbation was undoubtedly referred to. It was the duty of the defender's predecessors to have got this decree set aside (as they had due notice of its existence) before it was fortified by prescription. The pursuer was not interested in the interim schemes, as he counted upon effect being given to the decree of approbation in the final scheme, and he claimed now to be placed upon the 1792 valuation.

Replied for the respondent—The pursuer was personally barred by his actings from succeeding in his present demand. He paid from the first as if there had been no valuation, and by so doing the defender's predecessors were prejudiced. The aim of the pursuer was to obtain a certain advantage by concealing this sub-valuation until it could not be challenged. This was not a case in which the defender should be called upon to pay for the advantage which the pursuer had by this means obtained; at any rate, the defender was entitled to absolvitor for the period prior to 1844—*Kinloch* v. *Bell*, Feb. 12, 1867, 5 Macph. 360.

At advising—

LORD ADAM—This action is brought to recover payment of a sum of £3293, 2s. 6d., alleged to be the amount, with interest, due by the defender to the pursuer in respect of the stipend of the minister of the parish of St Andrews Lhanbryde, underpaid by her and her predecessors from the lands of Barmuckity and others from the year 1812 to the year 1881 inclusive.

The corresponding overpayments by the pursuer and his predecessors were made under interim decrees of locality pronounced in three successive processes of augmentation, modification, and locality raised by the ministers of the parish, and embrace a period, it will be observed, of sixty-nine years.

The sums concluded for amount to about £1068, 4s. 5d. of principal, and to £2224, 12s. 7d. of interest.

By the interlocutor brought under review the Lord Ordinary has sustained the defender's second plea-in-law, which is that the defender is not liable for any alleged overpayments for any period beyond forty years from the date of the raising of the action. The Lord Ordinary explains in his opinion the grounds of his judgment. He says that he cannot distinguish this case from that of *Sinclair's Trustees* v. *Campbell* in the House of Lords, the judgment in which, he thinks, necessarily, although not expressly, overrules the case of *Weatherstone* v. *Marquis of Tweeddale*. In regard to that case (*Sinclair's Trustees*) he says—"The House of Lords held that the long prescription barred any right of recoupment which had accrued to an overpaying heritor prior to the period of forty years before he insisted in his claim for repetition. It is true that in so holding the noble Lords who took part in the judgment did not expressly overrule the decision in *Weatherstone* v. *Marquis of Tweeddale*, which is clearly undistinguishable from the present case. But I think it manifest from the reasoning upon which their judgment proceeded that, with the exception perhaps of Lord Gordon, they would have concurred in formally overruling that decision if they had thought it necessary to do so. I think they disapproved of the doctrine on which the judgment of the Court of Session was based, and that they intended by their decision to give effect to a contrary doctrine."

I cannot concur in this opinion, and it is entirely rested on the ground that the judgment in *Sinclair's Trustees'* case necessarily overruled *Weatherstone's* case. I may be allowed to refer

to a few passages of their Lordships' opinions in order to show that they did not intend to overrule *Weatherstone's* case, and that their judgment depended on and was given with reference to a different state of facts. These were that General Fletcher's trustees never had been parties to the locality proceedings, and that Mr Fletcher had sold his lands in the parish, and had ceased to be a party to the proceedings for upwards of forty years before the claim for repetition of overpayments was brought against them, facts which do not exist in this case, and did not exist in *Weatherstone's* case, where the parties or their authors had been parties to the proceedings throughout.

Lord Chancellor Cairns, after referring to the principle that when payments are made under an interim scheme of locality there is an implied contract that when a final scheme has been settled there shall be an adjustment of over and under payments, says—"For that proposition one authority, certainly going to that extent, has been referred to, and is the foundation of the decision of the Court below, the case, namely, of *Weatherstone* v. *Marquis of Tweeddale*, and in the observations which I am about to make I will assume, although it is not necessary now to decide it, that the principle of the decision in that case is correct and well founded. My Lords, it does not appear to me to apply to the case before your Lordships. . . . But what your Lordships have to deal with here is the case of a person who went out of the parish, and left the parish altogether more than forty years ago. You may assume that at the time when he left the parish he was a person who had underpaid—in this case he had paid nothing at all—and that there might have been a right to make him contribute in that respect the payment which he ought to have made, but, as I said, he left the parish, he disappeared, he became from that moment a stranger to the proceedings, and from that time he was no party to the litigation, if there was a litigation; from that time the common agent ceased to represent him. Therefore I am at a loss to see upon what principle it is that the period of forty years having elapsed—the period after which there is a presumption of the abandonment of every claim having run—there is to be an exception grafted on that prescription that a person who, as I have said, has become a stranger to the litigation is after the the period of forty years to be held liable."

It will be observed that the Lord Chancellor assumes that *Weatherstone's* case may have been well decided, and rests upon the fact that the parties had not been parties to the locality proceedings for upwards of forty years.

Lord Hatherley says—"Whatever may have been said in that case of *Weatherstone* v. *Marquis of Tweeddale* in order to apply it to a case like the present I should have expected to find facts similar to those existing in the case in which such observations were made, and I find nothing at all comparable in the state of circumstances for decision in the case of *Weatherstone* v. *Marquis of Tweeddale*. . . . My Lords, it does not appear to me that the case of *Weatherstone* v. *Marquis of Tweeddale* can be in any way compared with this."

Lord Selborne says—"Even if the authority of *Weatherstone* v. *Lord Tweeddale* in this question of prescription stood higher than under these circumstances it appears to me to stand, it would still not be an authority applicable to the present case," and after explaining that case he adds—"The doctrine, so explained, seems to be applicable to those only who have been throughout, or at least within forty years before action is brought, parties to the locality proceedings, which in the present case none of the appellants were. I do not think it consistent with the principle of any of the authorities on this subject to hold that the cause of action is in any case of this kind originally constituted by the final decree of locality, and it would certainly be inconsistent with all principle to hold that it was or could be so constituted as against persons who (like the appellants in the present case) were at the date of the final decree, and had been for many years previously, strangers to the locality proceedings. When the appellant Andrew Fletcher sold his estate in 1833 and ceased to be a heritor, he became a stranger to these proceedings, and had no longer any power (as I apprehend) to intervene in them for any purpose. If the respondents had desired to enforce such liability as he may have been then under to them, and with that view to bring the locality proceedings to a close, it was for them to do so."

Lord Gordon, after adverting to *Weatherstone's* case, says—"I think the principles involved in that case were right, but I think these principles do not apply to the present case."

Weatherstone's case may or may not have been rightly decided, but looking to the expressions of opinion which I have just read, I cannot agree with the Lord Ordinary in thinking that their Lordships disapproved of the doctrine on which the judgment in that case was based, and that they intended to give effect to a contrary doctrine. I think, as I have said, that the judgment in *Sinclair's* case rested upon the fact that the defenders either had never been, or had for forty years ceased to be, parties to the locality proceedings, and I think that their Lordships (with the exception of Lord Gordon, who, as we have seen, expressed his opinion that the decision was right) guarded themselves from expressing any opinion as to what the result might be if the parties or their authors had been parties to the proceedings throughout as in this and in *Weatherstone's* case.

The question therefore raised in this case being, as I think, open for consideration, I think that it is so far ruled by *Weatherstone's* case, and that that case was rightly decided.

It appears to me that the principle upon which an overpaying heritor is entitled to obtain relief of his overpayments from an underpaying heritor is one well established in the law of Scotland, and does not depend upon any peculiarity of the law or practice in teind cases. It is the principle that when one of several debtors who are jointly and severally liable to a creditor pays that creditor either the whole or more than his proper share of the common debt he is entitled to full relief from his co-debtors. Now, all the heritors in a parish are liable to the minister in payment of his stipend to the extent of their free teinds. When the minister has obtained a decree of augmentation and modification he is entitled to proceed against any one of the heritors and to recover from him the full amount of

his free teinds, so far as may be necessary to operate payment of the stipend, leaving such heritor to seek his relief against the other heritors, who are equally liable with him in payment of it. The title of an overpaying heritor to obtain relief of his overpayments from an underpaying heritor does not depend upon the fact that the overpayments have been made under an interim decree of locality, though that may have most important effects in questions of prescription, but upon the fact that he has paid to their creditor the whole or part of the debt for which he and the underpaying heritor were both liable *in solidum*, and of which therefore as in any other case he is entitled to relief to the extent to which he has paid more than his share of the common debt.

I think therefore that the liability to relieve, and the consequent ground of action, arises when each overpayment is made, and that therefore the long negative prescription necessarily applied as each payment was made, unless, as Lord Cairns says in *Sinclair's Trustees'* case, there is to be an exception grafted on that prescription. In *Sinclair's Trustees'* case the exception was sought to be found in the principle affirmed in *Weatherstone's* case, that where payments of stipends are made under an interim decree of locality there is an implied judicial contract among all the parties that when the legal obligations of the heritors shall be determined by final decreet their several interests shall be adjusted from the commencement of the process or processes according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed.

But it was pointed out in the House of Lords, in *Sinclair's Trustees'* case, that as *Sinclair's Trustees* had never been parties to the proceedings they could have been no parties to any such implied contract, and that as regards Mr Fletcher, he had sold his lands and ceased to be a heritor for upwards of forty years before the claim was made; that he became a stranger to the proceedings, and had no longer any power to intervene in them to any purpose, and therefore could not be affected by them. No doubt the overpaying heritor could not sue during the dependence of the locality proceedings, and was therefore *non valens agere*, but, as I understand the case, it was held to be the duty of the overpaying heritor, if he desired to enforce a claim against an underpaying creditor, to bring the locality proceedings to a close within the years of prescription, and that therefore it was his own fault if his right of action was cut off.

I think that the effect of payments having been made under an interim decree of locality, where all the parties have been parties to the proceedings, is more accurately expressed by Lord Selborne in *Sinclair's Trustees'* case than it is in *Weatherstone's* case, though, as his Lordship says, it may be "more a matter of words than of substance." His Lordship adds—"That as between the parties or actors, who were before the Teind Court in a process of augmentation and locality, a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding by which they were all bound, and that the dependence of such a process between them would keep that right alive until a final decree."

I think, as so stated, the principle is perfectly sound, and I can add nothing to what was said on this point by the Judges of the Court of Session in deciding *Sinclair's* case. The principle necessarily excludes any right of action until the amount of overpayments has been ascertained after a final decree, and also, unless there be exceptional circumstances, necessarily prevents prescription from running during the progress of the proceedings, as during that time the overpaying creditor could not sue, and was therefore *non valens agere*.

I think therefore that if the defender's plea of prescription depended for its validity solely on the lapse of time it would not be well founded, as the Lord Ordinary has held it to be, because I think the answer would be good that the pursuer was *non valens agere* until the locality proceedings came to an end in a final decree of locality.

But this plea of *non valens agere* is an equitable plea. Professor Bell, in section 627 of his Principles, says of it — "This is an answer in equity to the plea of prescription, and proceeds on the principle, not the words, of the law;" and certainly the statutes introducing the long prescription do not in terms provide that inability to sue shall have the effect of stopping the currency of prescription.

It is perfectly well settled, however, that it has this effect. Nevertheless it is, as Professor Bell says, an equitable plea, and it may not in every case be admitted. Thus Lord Selborne held in *Sinclair's Trustees'* case that the overpaying heritor could not plead it, because it was his own fault that he was *non valens agere*.

I think therefore that the Court is entitled to consider whether in the circumstances of this case it is equitable that the pursuer should be allowed to take off the effect of the long prescription which undoubtedly has run against his claim by pleading *non valens agere*.

Since the case was before the Lord Ordinary we have had a report from the Teind Clerk, which discloses some very material facts bearing on this point. It is clear from that report that any of the parties to the locality might but for their own negligence have brought the proceeding to a close in ample time to have enabled them to take proceedings for the recovery of overpayments, if they desired to do so within the years of prescription. If therefore the claim had been, as in *Sinclair's Trustees* case, against a person not a party to the proceedings, I should have held, as Lord Selborne did in that case, that the plea of *non valens agere* was of no avail, because it was the party's own fault that he had allowed his claim to be prescribed. But to apply this principle as between the parties to these proceedings would, I think, be contrary to the principle of the decision in *Weatherstone's* case. It would imply that the negative prescription applies in all cases of over and under payments made under an interim decree of locality, for I have no doubt that every locality may be brought to an end within the years of prescription, and that it is equally the fault of all parties concerned if it is not. I am not prepared to sustain the defender's plea of prescription on that ground.

But it also appears from the Teind Clerk's report, that the interim decree of locality, under which the overpayments in question were made, was approved as an interim rule of payment on 5th July 1815.

It further appears from that report, and the correspondence produced, that the Earl of Fife, the pursuer's author, through his agents, was at and before that time in the full knowledge of the decree of approbation of 1792.

On the 3rd June 1815 the common agent writes to Lord Fife's agents,—"I now enclose to you copy of a scheme of locality of the stipend of St Andrews Lhanbryde, which was given in and allowed to be seen this morning, preparatory to its being approved of as an interim rule of payment, as the minister is out of all patience. I looked into Lord Fife's valuation in 1792, which I see embraced the lands which his Lordship then had in St Andrew's parish, as well as those in Lhanbryde, but it will be of little avail to you I suspect in the latter, and was unnecessary and even prejudicial as to the former—the St Andrews lands—from the whole parish having been valued by a decree of the High Commissioner on 25th January 1713, wherein Lord Fife's lands were valued at a lower rate than by the approbation in 1792. So far as respected the Lhanbryde lands, that approbation was, I am afraid, quite unavailing, because the lands had paid nearly double the teind, as it would have been by the decreet 1792, from 1722 downward, and have done so to this hour."

It further appears from the Teind Clerk's report that large payments in excess of the sub-valuation of 1629, which had been approved of by the decree of 1792, had been made from 1717 down to the date of the decree of approbation, a period of seventy-five years. The decree of approbation therefore, although *ex facie* a valid document, was open to challenge, and would probably, if not certainly, have been reduced if challenged by anyone having a title. The decree of approbation was not produced or founded on, with the result that additional sums were allocated on the Earl's lands by the interim locality of 1815, and still further sums by the rectified interim locality of 1824. It was not until 1844 that the decree of approbation was produced and founded on.

It is thus apparent that it was not in ignorance of the state of his rights to teinds and valuations that the decree of approbation of 1792 was not produced and founded on by the pursuer's author prior to the interim scheme of 1815.

If the Earl had produced it, one or other of two results would have followed, either (the decree being *ex facie* valid) it would have received effect if not challenged, and the Earl would not have made the overpayments of which he now seeks relief; or if it had been challenged and reduced, the payments actually made would not have been overpayments. The Earl elected not to produce the decree of approbation, and his reason is obvious; he preferred making the payments in question to running the risk of having the decree challenged. He continued to make these payments till by the lapse of time the objections to which the decree of approbation was exposed were cut off by the negative prescription. He has thus taken the benefit of the lapse of time to fortify his decree, but he says that the defender shall not have the benefit of the same lapse of time to support her plea of prescription. It is no doubt true that the Earl was *non valens agere* during these years, in the sense that he could not sue for repayment of these alleged overpayments till a final decree of locality had been obtained. But it is equally true that he made the payments designedly, and that he need never have been in the position of requiring to sue except of his own free will. These payments were the price he was willing to pay for the purpose of validating his decree of approbation, and having succeeded in that purpose he now wishes to have the price repaid. The negative prescription undoubtedly strikes in terms at his claim, and the question is, whether in the circumstances it would be just and equitable to allow its effect to be taken off by, as Lord Cairns expresses it, grafting on it this exception. In my opinion it would not be just or equitable. It was by the acts of his predecessors, and for their own purposes, that the pursuer is now in a position to require to sue for these overpayments. I do not think that the principle of *Weatherstone's* case applies to such a case as this, and I think that in the circumstances we ought to hold that the pursuer's claim beyond forty years from the date of raising the action is prescibed.

I am therefore of opinion, though not on the same grounds as his Lordship, that the Lord Ordinary's interlocutor should be adhered to.

Lord Mure concurred.

Lord President—I have had an opportunity of reading Lord Adam's opinion and considering it very thoroughly, and as I entirely agree in the views stated by his Lordship I shall only add a very few observations, which I should have thought unnecessary were it not that in consequence of the recent judgment of the House of Lords in the case of *Sinclair's Trustees* there appears to be some misunderstanding as to the present position of the law regarding cases of this kind.

I do not think there is any difficulty in defining the precise grounds in law on which a claim like the present rests, and I do not think it at all necessary to refer to any doctrine of implied contract as the foundation of such a claim. When the minister of a parish obtains a decree of augmentation and modification he is enabled to recover his stipend from any of the heritors who have free teind in their hands, and it is his right to go against any one of these heritors, for they are all conjunctly and severally liable. Of course he cannot recover from any one more than the amount of free teind in that heritor's hands, but to that extent he is entitled to obtain from the individual heritor either the whole of his stipend or as much of it as the free teind in that heritor's hands will furnish. What, then, is the position of the heritors under such a decree of modification, and what is their relation to the minister? They are simply *correi debendi*, and if one of several *correi debendi* pays more than his proportion of the common debt there arises to him at once a right of relief against those who have paid less than their proportion, and that right of relief is the foundation of such a claim as the present.

If a number of persons are bound in one contract, conjunctly and severally, we know very well the liability attaching to each, but there is a good deal of difficulty in adjusting the precise proportion that each has to pay and in enforcing it as between *correi debendi.* And that gives rise, according to the practice of our law, to what is called an action of contribution—that is, just a series of actions of relief, and the claim, whether in one case or the other—whether in this or any other case such as I have supposed—is a direct claim of relief at the instance of one of several *correi debendi* against his co-debtors. The circumstance that the obligation arises under an interim locality, for the purpose of regulating so far as can be done the proportions in which the heritors are to pay the stipend, does not seem to alter the right of a party who has a right of relief, and it does not seem to matter that the proportions may be altered in the final locality, because the heritors are liable for their proportions even before the decree of locality is pronounced, so that this pursuer's claim is really nothing else than a right to claim relief as one of several *correi debendi* against his co-debtors.

That such a claim is liable to be met with the plea of the negative prescription cannot, I think, be doubted. It is liable to be extinguished by the lapse of forty years like any other debt, for it is nothing but a debt, although it is in the nature of a claim of relief, and therefore looking to the Statute of 1617 alone one would say that there is no answer to the plea of negative prescription.

But then we all know that in the administration of the law under that statute equitable considerations have been admitted for the purpose of limiting that plea to a considerable extent. Negative prescription cannot be said to run, according to that equitable rule, until the creditor could first have made his demand for payment of his debt, and the ground of that equitable exception to the application of the statute is nowhere that I know of better stated than in the passage of Mr Erskine's Institutes, to which we were referred—"The negative prescription begins to run only from the time that the debt or right can be demanded in judgment or sued upon, because till then negligence cannot be imputed to the creditor, and prescription is the penalty of negligence. The Act of 1617 does indeed precisely fix the date of the obligation to be the period from which that prescription begins its course; and in the same manner the Act of 1579, c. 82, declares that actions of removings against tenants shall prescribe in three years after warning given to the tenant; but the words of these and other such statutes are in practice equitably explained, or rather corrected, into an agreeableness with this rule, that the course of prescription cannot by its nature commence against an obligation till that obligation be productive of an action."

Now, that qualification of the strict rule of the Statute 1617 will also undoubtedly apply to the present case, and therefore if the creditor in this obligation of relief has been prevented, not by his own fault, from bringing forward and enforcing his claim, then the years of prescription will not run from the date when the claim arose, but this equitable rule will be applied, and prescription will not begin to run until he should have sued upon his claim.

Now, the question in the present case therefore comes to be, when could this claim have been sued upon, or whose fault or negligence is it that the claim has not been capable of being sued upon at an earlier date? and there, I think, lies the point of the present case.

The Earl of Fife in the year 1815, when the first of these overpayments commenced, was in possession of a decree of approbation of a sub-valuation of the teinds in question. Now, it was suggested to him that that decree of approbation might be liable to challenge. It was thought that there had been such a constant series of overpayments beyond the sub-valuation that it was thereby impaired, that the plea of dereliction would have applied, and if stated, either in a process of approbation or in a reduction of the decree of approbation, would effectually set aside that decree.

Now, what was his position in these circumstances. He was well aware of this decree, and also of the objection which might be stated against it. If the decree had been challenged when produced by him, and that could have been only done, so far as I see, either by the titular or the minister, then it would have been set aside effectually as regards all parties, and the overpayments alleged by the Earl of Fife would not have been overpayments at all. On the other hand, if it had not been challenged by the minister or the titular, nobody could have challenged it in the locality, and there would have been no call upon Lord Fife in that case to make these overpayments at all, so that the fact of these overpayments being made, whichever view you take of this decree of approbation, was due entirely to the conduct of the Earl of Fife's predecessors. It was they who allowed these overpayments to be made by their own conduct.

Now, that surely is not a man placed in the position contemplated by the equitable doctrine stated by Mr Erskine, for he is not only negligent—he is a great deal more than negligent, he has acted against himself—he was positively heaping up the number of payments against himself, which he never would have done or thought of doing if his decree of approbation was good; and these overpayments, on the other hand, were perfectly right and properly made by him if the decree of approbation was bad.

Now, I cannot say that a party who is in this position, and keeps up a decree of approbation till it becomes fortified by prescription, is in a position to say that his claim cannot be met by the negative prescription until forty years after it has become a final decree, because if he had produced it, and it had been given effect to, the interim locality might have been rectified upon his application, and this debt would never have been incurred. For these reasons I entirely concur with the opinion of Lord Adam, and am for affirming the interlocutor of the Lord Ordinary.

LORD SHAND was absent from illness.

The Court adhered.

Counsel for the Pursuer — D.-F. Mackintosh—Lorimer. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender—Low—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 23.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LATTA (MUIRHEAD'S FACTOR) *v.* CRELLIN AND OTHERS.

Succession—Payment, Acceleration of—Widow's Repudiation of Settlement.

A truster directed his trustees to pay his wife, if she survived him, an annuity during her life, and to give her the liferent of a house, and, after making arrangements in regard to his business, directed his trustees to "draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." The deed then provided that "as soon after the death of my said wife as convenient" certain heritable subjects should be conveyed to three of his children, and that the residue should be divided equally amongst his children. It was declared that if any of the truster's children predeceased the term of payment their provisions should lapse and become part of the residue, unless the predeceasing child left lawful issue, in which case such issue should succeed to the parent's share. The widow repudiated the settlement, and obtained her legal rights of terce and *jus relictæ*. *Held* that the children's provisions vested *a morte testatoris.*

Charles Muirhead died upon 23rd May 1865, and was survived by his wife, two sons, Charles and James, and two daughters Mrs Agnes Muirhead or Christie, and Mrs Jessie Muirhead or Carter or Crellin.

By his trust-disposition and settlement, dated 18th June 1861, he conveyed his whole heritable and moveable property to the trustees and executors therein named for certain specified purposes. These trustees either predeceased the truster or declined to act. On 14th July 1876 Mr John Latta, S.S.C., Edinburgh, was appointed judicial factor on the trust-estate. After directing his trustees to pay an annuity to his wife, and give her the liferent of a house, and after making arrangements with regard to the carrying on of his business after his death, the truster directed his trustees as follows:—"*Fourth*, My said trustees are hereby directed to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue after paying my wife's said annuity with the principal. . . . *Sixth*, As soon after the death of my said wife as convenient, my said trustees are hereby directed to dispone, assign, convey, and make over to my daughter Jessie Muirhead or Carter . . . (*first*) my house, main-door, North Charlotte Street; and (*second*) the other just and equal half *pro indiviso* of my said dwelling-house and stable in Young Street, Edinburgh." By the *Eighth* purpose it was provided—"All the foregoing purposes being satisfied, I direct my said trustees to realise the whole residue and remainder of my means and estate, and . . . as soon after my wife's death as convenient . . . to divide the residue, and to pay over and divide the same as follows, viz., one just and equal fourth part or share thereof I direct my said trustees to pay over to my said son Charles Muirhead, another just and equal fourth part or share thereof I direct my said trustees to pay over to my daughter Jessie Muirhead or Carter, another just and equal fourth part or share thereof I direct my said trustees, in their option, to pay over to, or invest for behoof of, my said daughter Agnes Muirhead, exclusive of the *jus mariti* or right of administration of any husband to be after the date hereof married by her, and the remaining fourth part or share thereof I direct my said trustees to invest in their own names, on such securities as they may approve of, for behoof of my said son James Muirhead in liferent, for his liferent use only, and to his lawful children equally among them, share and share alike, and their respective heirs in fee: . . . And if any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the predeceasing child or children leaving lawful issue, in which case such lawful issue shall succeed equally among them to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the predeceasing child dying without lawful issue, and that child's provisions becoming part of the residue of my estate, my said trustees are directed to divide the residue of my estate into as many shares as I have children surviving the said term of payment, or children who, though dead, have left lawful issue, and to pay over, divide, and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

On the death of Mr Muirhead his widow elected not to accept of the provisions in her favour in the trust-deed, and claimed her legal rights of *jus relictæ* and terce. A sum of money was paid to her in settlement of her *jus relictæ*, and she granted a discharge of the same. She was paid yearly a sum in lieu of her terce until 23rd August 1886, when she accepted a bond of annuity for £60 by her three surviving children (Mrs Crellin being then dead), and granted a discharge, dated 31st August 1886, of her claim for terce, and also of all her claims as widow of Charles Muirhead.

Mrs Jessie Muirhead or Carter was married to James Crellin in January 1866, and by her antenuptial contract of marriage she conveyed to trustees all sums that she might be entitled to under her father's settlement. On 2nd July of that year she executed a will, by which she left to her husband James Crellin all the estate belonging to her not previously conveyed by the marriage-contract. She died upon 10th December 1866, and there were no children of the marriage. James Crellin died on 20th January 1885, leaving several children by a former marriage.

The amount accumulated in terms of the fourth purpose of Mr Muirhead's trust-deed