was probable that if the present application was made public Violet Revel or Low would endeavour to defeat its object by disappearing with the child in question. He further moved the Court to grant warrant instantly to officers of law to recover the child in question, stating that no question of neutral custody need arise as the petitioner intended to proceed to London to receive the child. The following were referred to:—*Paul, Petitioner*, 1838, 16 S. 822; *Earl of Buchan* v. *Lady Cardross*, 1842, 4 D. 1268; *Leys* v. *Leys*, 1886, 13 R. 1223, at p. 1227, 23 S.L.R. 834; the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 2.

The Court pronounced this interlocutor—

"The Lords appoint the petition to be intimated in the minute book in common form (*hoc statu* dispense with intimation of the petition on the walls) to be served edictally upon Violet Revel or Low mentioned in the petition, and ordain her to lodge answers thereto, if so advised, within eight days after such intimation and service: In respect it appears that the child Jeanne Carfrae Low mentioned in the petition has been improperly carried off from the jurisdiction of this Court, or otherwise is kept in concealment without the consent, permission, or knowledge of the petitioner, Grant warrant to messengers-at-arms and other officers of the law to take the person of the said child into their custody wherever she can be found, and to convey and deliver her into the custody of the petitioner to be kept by her till the further orders of the Court: and Authorise all Judges Ordinary and their procurator-fiscals in Scotland to aid the said messengers and officers in the execution of this warrant by taking such precognition as may be necessary for discovering the place to which the said child has been removed or where she is concealed: and Recommend to all magistrates in England and elsewhere to give their aid and concurrence in carrying this warrant into effect: Dispense with the reading of this interlocutor in the minute book, and authorise a certified copy of this interlocutor to be used in place of an extract."

Counsel for the Petitioner—J. A. Christie. Agents—Mylne & Campbell, W.S.

COURT OF TEINDS.

Saturday, March 6.

SECOND DIVISION.

[Lord Sands, Ordinary.

GALLOWAY *v.* EARL OF MINTO.

Teinds — Stipend — Valuation of Teinds — Teinds Valued in Money and Stipend Localled in Victual — Tender of Money Value of Teinds for the Year in Satisfaction of Victual Stipend—Surrender.

A heritor whose teinds have been valued in money but have had a stipend localled upon them in victual is bound, where the sum claimed as stipend in terms of the decree of locality exceeds the amount of the valued teinds, either to pay the amount or to surrender the teinds in perpetuity, and cannot satisfy the minister's claim by tendering for the particular year the amount of the teinds as valued.

Teinds — Stipend — Valuation of Teinds — Unvalued Teinds—Tender of One-Fifth of Rent for the Year in Satisfaction of Victual Stipend—Act of 1633, *cap.* 15.

Held (by Lord Sands, Ordinary) that where stipend claimed in terms of a decree of locality exceeds one-fifth of the rent of lands whose teinds are unvalued, the heritor must either pay the amount or lead a valuation and surrender: he cannot satisfy the minister's claim by tendering one-fifth of the rent of the lands as the full value of the teinds.

Opinion (*per* Lord Sands, Ordinary) that the Act of 1633, cap. 15, ratifying an Act of the Teind Commissioners of 23rd March 1631, whereby provision was made in the case of unvalued teinds for payment by the heritor according to the fifth part of his present rent, did not alter the radical character of teinds as a right to one-tenth of the increase; it did not convert the teinds to a right to one-fifth of the rent; it provided means, meant at the time to be temporary, of liquidating the value of the teind where it was necessary to do so, in all cases where leading had been given up: and that there was no call on a minister, founding on his decree of locality, to liquidate the value of unvalued teind.

The Reverend Alexander Galloway, Minister of the parish of Minto in the county of Roxburgh, *pursuer*, brought an action in the Court of Teinds against the Earl of Minto, proprietor of the lands and barony of Minto and other lands in that parish, *defender*, in which he sought to have it found and declared—"(*First*) That under and by virtue of a decreet of modification, dated 8th February 1907, pronounced by our said Lords, as commissioners foresaid, in a process of augmentation, modification and locality raised at the instance of the present pursuer against the heritors of the parish

of Minto, our said Lords modified, decerned, and ordained the constant stipend and provision of the minister of the kirk and parish of Minto to have been for last half crop and year 1906, yearly and in time coming, such a quantity of victual, half meal, half barley, in imperial weight and measure, as should be equal to three chalders of the late standard weight and measure of Scotland, in addition to the then old stipend and allowance for communion elements, payable the money stipend and communion elements at Whitsunday and Martinmas yearly by equal portions, and the victual betwixt Yule and Candlemas yearly, after the separation of the crop from the ground, or as soon thereafter as the fiars prices of the county of Roxburgh should be struck, and that in money according to the highest fiars prices of the county annually, and decerned and ordained the said stipend, as augmented, and allowance for communion elements to be yearly and termly paid to the pursuer and his successors in office, ministers serving the cure of the said kirk and parish, by the titulars and tacksmen of the teinds, heritors, and possessors of the lands and others, intromitters with the rents and teinds of the said parish, out of the first and readiest of the teinds, parsonage and vicarage of the same, beginning the first payment thereof for said last half crop and year 1906 at the term of Whitsunday 1907 as regards the money stipend and communion elements, and as regards the victual stipend between Yule and Candlemas, after the separation of the crop from the ground, or as soon thereafter as the fiars prices of the county should be struck, and so forth yearly and termly in all time coming: (*Second*) That by decree of locality, dated 18th June 1908, our said Lords localled on the defender's said lands of Cockersheugh, Minto, Newlands, and Hassendean Bank, the quantities of victual following, viz., (*a*) for the lands of Cockersheugh 3 bolls, 3 firlots, 1 peck, 2⅜ lippes; (*b*) for the lands and barony of Minto 102 bolls, 2 firlots, 3 pecks, 3⅜ lippies; (*c*) for the lands of Newlands 7 bolls, 0 firlots, 0 pecks, 1⅜ lippies; and (*d*) for the lands of Hassendean Bank 34 bolls, 0 firlots, 1 peck, 2⅛ lippies, half meal, half barley: (*Third*) That the proportion of the stipend of the said parish of Minto payable by the defender for crop and year 1917, according to the said decreets of modification and locality, and to the fiars prices struck for the county of Roxburgh for that year is as follows—(*a*) for the lands of Cockersheugh £16, 9s. 10½d.; (*b*) for the lands and barony of Minto £445, 0s. 8d.; (*c*) for the lands of Newlands £30, 1s. 11¾d.; and (*d*) for the lands of Hassendean Bank £124, 8s. 5d., making together the sum of £616, 0s. 11¼d.: (*Fourth*) That the said sum and the defender's proportion of stipend for the said crop and year is unpaid and unsatisfied: (*Fifth*) That the defender is not entitled to tender, and the pursuer is not bound to accept, in full satisfaction of the foresaid sum of £16, 9s. 10½d., payable from the defender's lands of Cockersheugh, in the said parish, under and by virtue of the said decreet of locality, the sum of £6, 11s. 6d., being the pretended amount of the whole teinds of the said lands: (*Sixth*) That the defender is not entitled to tender, and the pursuer is not bound to accept, in full satisfaction of the foresaid sum of £445, 0s. 8d., payable from the defender's lands and barony of Minto and others, in the said parish, under and by virtue of the said decreet of locality, the sum of £339, 12s. 2d., being the pretended amount of the whole teinds of the said lands and barony: (*Seventh*) That the defender is not entitled to tender, and the pursuer is not bound to accept, in full satisfaction of the said sum of £30, 1s. 11¾d., payable from the defender's lands of Newlands, in the said parish, under and by virtue of the said decreet of locality, the sum of £12, being the pretended amount of the whole teinds of the said lands: (*Eighth*) That the defender is not entitled to tender, and the pursuer is not bound to accept, in full satisfaction of the said sum of £124, 8s. 5d., payable from the defender's lands of Hassendean Bank and others, so far as lying within the parish of Minto, under and by virtue of the said decreet of locality, the sum of £98, 12s. 4d., being the pretended amount of the whole teinds of the said lands," &c.

The parties, after condescending on the decreet of modification of 8th February 1907 libelled in the summons and which was admitted by the defender, *averred*—"(Cond. 2) . . . By decree of locality in the said process, dated 18th June 1908, the Court of Teinds localled on the defender's said lands of Cockersheugh, Minto, Newlands, and Hassendean Bank the quantities of victuals, half meal, half barley, libelled in the summons. Admitted that the then comparative fall in fiars was, among other reasons, presented as a reason for modifying a permanent stipend for the cure at a higher figure. The Court of Teinds considers such facts in relation to the probable trend of corn prices for a tract of time. (*Ans.* 2) . . . Explained that the State of Teinds lodged in the process of the said locality showed the whole teinds of the parish to amount to £632, 12s. 6½d., whereof teinds to the value of £313, 12s. 7d. were then free or unexhausted, that the existence of this large amount of free teinds and the then low prices of grain were then put forward by the present pursuer as reasons for asking an augmentation, that the teinds of the parish are the only estate on which the Court can local stipend, that no claim has ever been made hitherto for payment of stipend in excess of the teinds, and that should the pursuer's present claim be sustained he will, during the continuance of the present abnormal fiars' prices, draw stipend considerably in excess of the whole teinds of the said parish. Further explained, that the recent abnormal rise of fiars' prices has had no effect in increasing either the proprietor's returns from, or the teinds of, the said lands, and that by the said decreet of locality the quantities of victual therein set forth are only ordained to be paid 'out of the first and readiest of the teinds, parsonage and vicarage,' of the parish, conform

to the division therein set forth, and that under the said decreet the stipend localled on the defender's lands is payable only out of the teinds thereof. (Cond. 3) The fiars prices of grain for the county of Roxburgh for crop and year 1917 were struck as at 26th February 1918, and were as follows:—barley, £3, 5s. $7\frac{5}{12}$d. per quarter; meal 3s. $9\frac{6}{12}$d. per stone of 14 lbs. (*Ans.* 3) Admitted. (Cond. 4) According to the said fiars prices the amounts of money payable under the locality foresaid by and out of the several parcels of land held by the defender in the said parish as his contribution to the stipend for crop and year 1917, conform to the said decree of locality, are as follows:—

Lands of Cockersheugh -	£16	9	$10\frac{1}{2}$
Lands and barony of Minto -	445	0	8
Lands of Newlands - -	30	1	$11\frac{3}{4}$
Lands of Hassendean Bank -	124	8	5
In all - - -	£616	0	$11\frac{1}{4}$

The defender has been duly called upon to obtemper said decreet, but he refuses or delays to do so. His agents on his behalf (while referring to controversies which have arisen owing to the recent rise in fiars prices) tendered a sum of £456, 16s. in full of the sums so allocated upon the various lands, which sum could not be accepted. The explanation in answer is denied. (*Ans.* 4) Admitted that the sums stated are arrived at by converting the quantities of victual localled upon the teinds of the said several parcels of land according to the fiars prices for crop and year 1917; and that the defender refused to pay the said sums and paid instead the sum of £456, 16s. as the whole sum which he was liable in respect of his rights to the said lands and teinds to pay to the pursuer for crop and year 1917. *Quoad ultra* not admitted. Explained, under reference to answers 6, 7, 8, and 9, that the whole teind of the said lands amount to the said sum of £456, 16s. (Cond. 5) The said sum of £456, 16s. tendered by the defender is understood to be made up as follows:—

For Minto and Newlands -	£351	12	2
For Cockersheugh, being one-fifth of the amount of the rental as ascertained in 1906	6	11	6
For Hassendean Bank, being a proportion of one-fifth of the amount of rental as ascertained in 1906: (some portion of the rents of these lands is presently allocated to an adjoining parish) -	98	12	4
	£456	16	0

(*Ans.* 5) Admitted under reference to answers 6, 7, 8, and 9, and subject to the explanation that £98, 12s. 4d. is one-fifth of the entire rental of the whole lands of Hassendean Bank as ascertained in 1906."

It appeared from the statements of parties in articles 6, 7, 8, and 9 of the condescendence and relative answers, that while in the case of the lands of Cockersheugh and Hassendean Bank there existed no known valuation of the teinds, in the case of the lands of Minto and Newlands there was a decreet of valuation dated 2nd June 1819.

The pursuer *pleaded*—"1. The pursuer being in right of the decreet of modification and locality libelled, and the said decreet being enforceable against the various lands in the parish held by the defender and against the defender as intromitter with the teinds thereof in accordance with the fiars of the county, decree of declarator should be pronounced as concluded for. 2. The pretended 'tender' of a proportion of agricultural rental or of teinds by the defender being invalid and inept in respect (1) that tender without surrender is incompetent, and inept in answer to the pursuer's claim for stipend as specified; *separatim* (2) that the amounts of money tendered are not the teinds of the lands; *separatim* (3) that the defender so far as without heritable rights to the teinds in question or any of them is not in a position to surrender; *et separatim* (4) that the defender does not offer or propose to surrender to the incumbent of the cure the whole teinds duly valued—decree should be pronounced in terms of the conclusions of the summons. 3. The defences being irrelevant the defender's pleas-in-laws should be repelled."

The defender pleaded—"1. The pursuer being entitled under the decree of locality libelled to payment of stipend only out of the teinds of the lands specified, and not being entitled to encroach upon the stock, the defender should be assoilzied from the whole conclusions of the summons. 2. The defender being only liable to pay stipend in each year in respect of the lands of Newlands and the lands and barony of Minto to the extent of the valued teinds of these lands, should be assoilzied from the conclusions of the action so far as referring thereto. 3. The defender being liable to pay stipend in each year in respect of the lands of Hassendean Bank, including Cockersheugh, only to the extent of one-fifth part of the present rent of the said lands, should be assoilzied from the conclusions of the action so far as referring thereto. 4. *Separatim*, in the event of it being held that the decree of locality libelled imposes liability on the defender to pay stipend in excess of the amount of the teinds of his said lands, the same is *ultra vires* and inept, and ought, if necessary, to be reduced."

On 16th January 1920 the Lord Ordinary (SANDS) found and declared in terms of the conclusions of the summons.

Opinion.—"King Charles I was beheaded at Whitehall upon 30th January 1649, Francis Ferdinand, Crown Prince of Austria, was assassinated at Sarajivo upon 28th June 1914. History is a quaint humorist, for both of these historical events appear to have a relation, causal or consequential, to the subject-matter of the present action. In the opinion of many competent scholars King Charles I, by his teind legislation, which has here to be examined, alienated from himself powerful influences, support by which would have altered the course of his history. The assassination of Francis Ferdinand led by a short and clear causal sequence to the present action concerning the valuation of teinds and the payment of stipend in Scotland. The rise in the money

value of agricultural produce, and the consequent increase in the amounts of stipend measured therein occasioned by the European war, has disturbed the proportionate relation of rent to stipend, and has induced heritors to endeavour to find a legal mitigation of the burden. In considering whether any relief can be obtained I shall have occasion to examine some of the equitable considerations upon which the present system and rules are based. In doing so, however, I cannot give effect to special considerations of equity which the present abnormal situation might suggest. It may be that a rule which originated in considerations of equity and convenience may under extraordinary circumstances yield inconvenient or inequitable results. But if it is so established as to have become a rule of law effect must be given to it by the Court.

"This case raises two questions which under present circumstances are of general importance, and it has, I understand, been brought into Court by mutual understanding between the two interests affected as a test case. The two questions are (1) Whether where teinds have been valued in money and a stipend has been modified and localled in victual, the heritor may in any year tender to the minister, instead of the money value of the victual stipend localled upon the teinds of his lands converted according to the fiars' prices, the money value of his teinds, without at the same time surrendering his teinds as valued to the minister for all time coming? (2) Whether where teinds are unvalued, tender in any year of one-fifth of the rent satisfies the claim of the minister for stipend irrespective of the value of the amount of stipend localled upon the teinds?

"I confess that my impression on first hearing these questions propounded was that the former question was the first stile the heritor had to get over, and that if he failed there he could hardly approach the second. This was not, however, the way in which the matter presented itself in argument. As the argument developed it appeared to me that the heritor regarded the second question as the more hopeful one from his point of view, and though I am far from suggesting that he jettisoned the first he seemed to argue it more slightly and less confidently. Doubtless he realised that whilst there is no direct decision upon either question, he was faced as regards the former with the difficulty that a whole branch of the law of teinds, viz., surrender, appears to be based upon the assumption that this question falls to be answered in favour of the stipendiary minister. I take this question first. Whether or not it is more difficult than the second it is certainly less recondite. It does not take research back beyond George III, whilst the second question takes it back to Charles I.

"Towards the close of the eighteenth century there was considerable activity in the Court of Teinds. Most parishes had stipends modified subsequent to the Union, and it was long considered doubtful whether the Court could grant any second augmentation to such a stipend. When this question had been decided by the House of Lords in favour of the minister there were a number of applications to the Court and new questions emerged. One of these questions was—Whether where teinds had been valued in money it was competent to modify a stipend in victual? Upon this matter there was much difference of opinion and dubiety of decision, but it was settled in the affirmative by the case of *Mitchell* v. *Douglas*, 1798, Mor. 14,827, generally known as the *Lamington* case. The law and practice of surrender have their origin in this case.

"Where teinds are valued in money and a victual augmentation has to be localled it is necessary to convert the money into the terms of victual in order to determine what is the fair share to allocate upon the surplus teinds of a particular heritor, and also in order to ascertain how much victual stipend the teinds will carry where they are likely to be exhausted by the augmentation. This conversion is effected by taking the average prices (now by statute the fiars prices) for seven years, and ascertaining how much, valued on this basis, the money teind represents. One of the arguments against the modification in victual where there were money valuations was, that, as prices fluctuate, the average price taken for the purpose of conversion might be much exceeded in the future, and that in that case if the heritor had to pay the money value of the victual stipend he might be paying a larger sum than the total of his valued money teind. If the interlocutor of the Court in the *Lamington* case had been silent as to this difficulty it would have been open to the heritor here to argue that the Court brushed it aside because the stipend is payable out of teind, and the decerniture must be held to be impliedly limited in each year to a quantity of victual equal in value according to the prices of the year to the teind as valued in money. The Court did not, however, take this course. They did not leave the matter to stand upon any supposed implied qualification, but they inserted an express one. In doing so, however, they expressly recognised that the stock cannot be encroached upon by the Court in allocating stipend. Obviously it could not be contended that localling in victual to the full amount of the corresponding money value of the valued teind does in terms encroach upon thes tock. But, on the other hand, it might be argued that this will almost certainly be its effect, as it would be unreasonable to suppose that future prices will never in any year exceed the present average. The Court having these considerations fully in view pronounced the following judgment:—'Find that victual stipend may be allocated upon heritors whose teinds are valued in money, the value of the money being in the present or any similar case computed at a medium of the fiars prices for the county which have been struck for the last seven years preceding the interlocutor of augmentation agreeably to the rule followed in the case of the process of sale (*Sir Alexander Ramsay against Mr Maule of Panmure* on the 14th May 1794), and with

this explanation, that as the stock cannot be encroached upon it shall be optional to any heritor instead of delivering and paying the quantity of victual and money stipend thus laid upon him at any time to give up and pay in all time thereafter to the minister the whole of his valued teinds, according as the same shall have been ascertained by his decree of valuation.'

"The foregoing finding is introduced as a supplement to an interlocutor which simply affirmed an interlocutor modifying an augmentation in victual. The finding is certainly a strange one to be introduced into an interlocutor between two parties litigating a particular case, for its terms are general, and it seems designed to formulate a general rule for the future. It reads like an enactment by a commission with quasi-legislative authority. In the eighteenth century the Court of Session assumed somewhat analogous powers as, for example, when they passed the Act of Sederunt in regard to the striking of fiars' prices, and the Act anent Removings. But in such cases the authority arrogated was not exercised by way of a general finding and direction introduced into a decision in a particular case. (In this connection it is of interest to refer to the opinion of Lord Kinnear, adopted by his colleagues, in the case of *Presbytery of Stirling* v. *Heritors of Larbert and Dunipace*, 1901, 2 F. 562, to the effect that teinds are just one department of the business of the Court of Session, that there is no distinct Court of Teinds, and that 'Court of Teinds' and 'Commissioners of Teinds' are really misnomers, though of statutory use. In the case of *Matheson* v. *The Marchioness of Stafford*, 1862, 24 D. 436, however, it was held that the Clerk of Teinds is not a clerk of the Court of Session, and that teind summonses must be signed by him, although a Writer to the Signet may sign a Court of Session summons. Again, in the case of *Pearson* v. *The Magistrates of Dunbar*, 1862, 24 D. 1837, the Lord President (Colonsay) stated that under the constitution of the Court of Teinds the presiding judge has no vote. Another peculiarity is that according to the tradition of the Teind Office the Procurator of the Church leads in the Court of Teinds.) If in the *Lamington* case the Court had taken the view of the law here contended for by the heritor, and had intended merely to make express what, according to the heritor's contention in the present case is implied in all such decrees of locality, this could easily have been done. They might have said, 'It shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, in any year to pay to the minister the whole of the valued teind.' But instead of 'in any year to pay to the minister' the Court said 'at any time to give up and pay *in all time thereafter* to the minister.' I shall consider later the ratio of the Court in taking this course. Meantime I remark—(1) The terms of the judgment seem clearly to imply that, in view of the Court which pronounced it, tender in any year of the amount of the teinds as valued in money is not in itself a good answer to the demand of a stipendiary minister for the value of the victual stipend contained in his decree of locality. (2) Inasmuch as the inductive words of the special declaration in the judgment are 'as the stock cannot be encroached upon' in the view of the Court a heritor who declined to surrender could not complain of an encroachment upon stock if in a particular year the converted value of victual stipend was greater than the amount of his valued teind. The matter came up again in two other cases—*Skene* and *Cummertrees*, both in 1798, mentioned in a note to the report of *Lamington*, Mor. 14,831—when similar judgments were pronounced, so that the matter must have been very fully considered by the fifteen at a time when according to tradition the Bench was very strong manned.

"The question of surrender arose again in the *Eddleston* case, 1805, Mor. Teinds, App. 28, when it was held that heritors who had surrendered their teinds had no interest in a new locality, and could not be made liable in the expenses thereof. The report bears that in the view of the Court 'the option given to heritors to surrender their whole teind must be always available to them at whatever time they choose to adopt it, for the Court of Teinds never can encroach upon the stock whether by a payment in money or grain.' This seems to imply that in the view of the Court in 1805, as in 1798, surrender was the heritor's only protection against a demand for payment in excess of his valued teind.

"Surrenders are recognised by the Teinds Act 1808, 48 George III, c. 138, which provides—Section 14—'Provided always that the right of any heritor to surrender his valued tiend in place of subjecting his lands to the amount of the stipend localled upon them shall not be taken away by what is herein enacted.'

"This proviso seems to contemplate that the heritor has the option either to subject his lands to the stipend localled or to surrender his teinds, and that accordingly if he does not surrender his teinds he subjects his lands to the stipend localled. This provision appears to supersede any question as to whether the action of the Court in introducing the system of surrender by the general finding in the *Lamington* case was *intra vires*.

"This closes the first chapter on surrender. The general rule was now clearly established, and subsequent decisions are of an incidental or explicatory character.

"As I have already, perhaps sufficiently, indicated, it appears to be clear that surrenders were introduced for the following reasons. Many teinds had been valued in money. There was at that time (curiously contrary to the general trend as between landlord and tenant) a strong desire to maintain, and even to extend, the system of modifying stipends in victual, and this was made virtually compulsory by the Act of 1808. But if a victual stipend was localled upon a money teind there was always a risk that by a rise of prices the money value of the stipend would come to be greater than that of the teind. This might have been avoided by localling so far short of the

corresponding money value as to obviate any appreciable risk. But this would have been unjust to the other heritors where there were free teinds and to the minister where there were none. In the opinion of the Courts at this time, tender in any year of the amount in a decree of valuation in money was not an answer to the minister's charge for the stipend in his decree of locality so long as the minister's claim was not as titular, but as a stipendiary entitled not to the teinds but to a stipend payable thereout of by the heritors and intromitters. Accordingly the Court, conformably with legal principle in substance, but in form by the exercise of the equitable quasi-administrative authority which the Court of Teinds was in use to exercise, introduced the system of surrender.

"The legal commentators who have written upon the subject since surrenders were introduced all take the same view of the purpose for which the expedient was devised, viz., to allow the heritor a means of avoiding being called upon under the decree of locality to pay more than the amount of his valued teinds, and there is no suggestion that such an expedient was unnecessary in respect that the heritor could in any year satisfy the decree by paying the amount in his valuation without surrendering for all time coming.

"Thus Connell states (1, 250) that surrenders were introduced 'to obviate the objection that the heritors might come to pay stipend beyond the amount of their valuations.' This statement is amplified in another passage (1, 524).

"Again, as justifying the contention that teinds may be surrendered even where there is a final locality Connell says (1, 532) —'There would be no doubt a great hardship in obliging heritors to pay more than their valued teind until the stipends were again augmented.' Obviously, however, there would be no such hardship and no need for a surrender if in any year the heritor could refuse to pay more than his valued teind without committing himself as regards the future.

"Buchanan (249) after explaining that a heritor is liable personally in the stipend laid on the teinds of his lands by the decree of locality, states, 'But an heritor may always avoid any charge beyond the amount of his teind (if valued) by surrendering his *valued teind*.' More (Notes ccxxxix), Duncan (334), and Elliot (68) explain the matter similarly to Connell and seem to assume that surrender is the only deliverance for the heritor from payment of the converted value of the money stipend locallled upon him.

"There are dicta to the like effect in comparatively recent cases, but before noticing them I refer for a moment to the case of *Shaw* v. *Parish of Dailly*, mentioned in Connell (1, 531) and briefly reported in Shaw's Teind Cases, 70. In that case the teinds were all valued in money and the stipend was modified in victual. On proceeding to equate the two on the basis of the fiars prices for seven years it was found that the whole teind was one and a half chalders short. The minister then proposed alternatively either that the whole stipend modified to him should be locallled upon the heritors, or otherwise that the modification should be reduced and the whole teinds of the parish be modified to him as stipend. The advantage of this latter course to the minister would be that if prices fell he would still get the whole of the valued teind. The Court adopted the latter course, viz., of reducing the modification and modifying of new to the minister the whole teinds of the parish, which in effect was much the same as compelling a surrender. But it is difficult to understand why the Court preferred this cumbrous alternative to the former unless in their view the locallling of the whole stipend would have made that stipend payable each year irrespective of the value of the teinds until the teinds were surrendered. This alternative would have been the simple and logical one if it was open to the heritor to tender his valued teind in any year when the converted stipend exceeded it in amount.

"The case of *Cameron* v. *Chisholm Batten*, 1869, 7 Macph. 565, was one of a claim by a minister for payment of arrears of stipend said by the heritor to be in excess of the amount of his valued teind. The case was very special and the question of surrender was not in issue, but Lord Cowan figured the case of a surrender as an answer to a claim for arrears—'I have only to add that I do not think a surrender now made would improve the defender's position in regard to this action so as to affect the minister's claim for stipend prior to its date under a final decree of locality, and this action is only for arrears. A surrender does not operate *retro*.'

"This statement seems to me to exclude the idea that there can be no liability beyond the amount in the valuation, even where there is no surrender. The statement that surrender does not operate *retro* would have been otiose if the claim of the minister as regards byegones was limited as to each past year to the amount of the valued teind, and the heritor could satisfy the demand for each past year by tendering the valued teind.

"In the second *Chisholm Batten* case (*Chisholm Batten* v. *Robertson*, 1873, 11 Macph. 292) Lord Benholme said—'If any order of payment in the shape of a decree of locality turns out to be in excess of the teind the heritor is entitled to get quit of it by surrendering his teind.' By 'get quit of it,' Lord Benholme must mean 'get quit' of the excess payment in any year when it may occur, for surrender does not get quit altogether of the decree. It would have been easy to say 'need not comply with it,' had Lord Benholme been of opinion that this was the heritor's right even without surrender.

"The question of surrender is dealt with by the Lord President in the case of *Minto* v. *Pennell*, 1873, 1 R. 156. The passage is too long for quotation. But I think it is impossible to read it otherwise than in the view that surrender is the heritor's only remedy. The Lord President points out

that it may come to be a question whether it is worth the heritor's while to surrender, or whether it may not be better for him to submit to a slight over payment in one year beyond the amount of his valued teind. Such a question could never arise if it were always sufficient for him to tender his valued teind. In the same case Lord Ardmillan says—'In consequence of a decree of valuation there arises to the heritor a right to surrender what the decree has declared to be teind and has valued accordingly, and the right to hold as against the exaction of stipend what the decree has declared to be stock. . . . He was not bound to exercise his right of surrender or to found upon his decree of 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 over-payments, he is entitled to stand on his valuation and surrender his teinds.' The English may not be very elegant, but I think the meaning is clear that the heritor must pay according to his locality unless and until he surrenders.

"The result of my examination of the authorities is that for the past 120 years it has been assumed that an heritor must pay the stipend localled upon him under a final decree of locality unless he surrenders his teinds; that a system of procedure has been based upon this assumption, and that this assumption has been recognised by statute, by judicial dicta, and by all legal commentators during that period. I have not verified it, but it has been remarked that there is neither statute nor express decision that the eldest son succeeds to heritage in Scotland; that apart from the statements of text writers, all that can be said is that this doctrine has been assumed in a number of decided cases. On the other hand, the doctrine accepted by the profession, and acted upon in practice for more than a hundred years, that the right to a casualty cannot be defeated by an elusory feu-duty, now hangs by the slender thread that one judge, out of a majority of seven judges of the whole Court, who gave effect to the contrary view, proceeded solely upon the pleadings in the particular case. The minister's case for payment according to his locality may not be so strong as that of the heir-at-law, but it seems certainly stronger than that of the feudal superior to a substantial casualty in disregard of the elusory feu-duty. Conveyancing devices contrived by practitioners rested upon the latter. But there rested upon the former a system contrived and initiated by the Court and recognised in at least a score of reported cases. It is true that surrender serves the ancillary purpose of relieving the heritor surrendering from further expense in the localities, but this has always been regarded as a subsidiary and incidental benefit. It was not for this that the system of surrenders was designed. If a heritor satisfies the decree by tendering his valued teind without surrendering, there has been a judicial misapprehension which has persisted for more than 120 years. I am unable to take this view. I must hold it to be a rule *positivi juris* that the heritor must pay as localled upon until he surrenders.

"It may be well, however, in case the matter is deemed to be one that can now be reconsidered, to consider upon what grounds the Court proceeded in recognising this rule and devising surrenders.

"The Court of Teinds, in administering their special branch of the law, whilst respecting ultimate right, has treated the system as somewhat flexible, and has made equitable adaptations to meet special circumstances. This is fully borne out by such a study of their decisions as the inquiry in this case has entailed. To cite, as one of many examples, a case I have referred to above—*Cameron* v. *Chisholm Batten*, 1869, 7 Macph. p. 562. In that case it was held that it was competent to ordain a heritor, who had obtained a reduction of a decree of locality, to continue to pay stipend in terms of that decree until a new locality was prepared, although the stock was thereby encroached upon.

"The principle of equitable adaptation was recognised when the Court initiated the system of surrenders. The ultimate right of the heritor not to have his stock encroached upon was respected. He was allowed a remedy. If he pays out of stock it is his own choice. But might not this have been secured by allowing the heritor to satisfy the decree in any year by tendering his valued teind? Why should the obligation be put upon him to surrender? I think that this can be explained as an equitable adjustment. It frequently happens that the whole or nearly the whole of the teind valued in money has to be appropriated in making up the locality to meet the augmented stipend, and that may be so even although there may be other free teind in the parish, this latter happening to be of a more privileged character in order of liability. As I have already pointed out, the allocation is effected by converting the money value of the teind into victual according to the average prices of the seven years preceding the modification. Now if those be average years in average times, the result of what the heritor here proposes, where the allocation is up to the full equivalent of the valued teind, is that in every second year the minister will not get the equivalent of his full amount of victual, whilst in every other year the heritor will have something in hand for himself. There may come a cycle of years in which the one or the other state of circumstances will obtain. But the minister has no remedy and cannot get his stipend made up out of the other free teind in the parish. Fluctuations in the value of victual can never be a ground for reducing a locality (indeed if it were possible and a new locality were made up, as the learned Teind Clerk pointed out in reply to a question in the course of the argument, it would be the same as the old one, for by statute the seven years of prices to be taken for an average are the seven years prior to the last modification). The truth is, as I think

was pointed out in one case—that in order to secure the theoretical justice in such a case it would be necessary to make up a new locality every year. This is out of the question, and accordingly the Court appears to have proceeded upon the view that whilst the heritor must have a remedy against being called upon to pay stipend out of stock, he is not to be allowed to take it both ways according to the old coin spinning device, but must surrender his teinds.

"There is another consideration which I think supplies a reason of equity and convenience for the rule. The minister is not titular, claiming the teinds as his own. The teinds, until surrendered, belong to the heritor or titular. The minister is a stipendiary. The valuation is not his document—his only document is his decree of locality. Valuations were not primarily a question between him and the heritor, but between the heritor and the titular, and it has been held to be no ground for objection to a valuation that the stipendiary minister was not convened. Now, as the reports show, valuations may be open to all sorts of challenge and often raise difficult questions in regard to the identification of land, &c. When the heritor tables his valuation, or proposes to lead a valuation and surrender, the minister must face these questions. He has no escape. But he is called upon to do so once and for all with a view to the permanent settlement of the benefice. It would be quite another thing if he were liable to be called upon at any time when he demands his stipend in terms of his decree to be met by the exhibition of an alleged valuation and be obliged to take up the matter with nothing at stake and nothing that could be definitely settled save the amount of stipend for the particular year.

"These considerations appear to me to afford a sufficient explanation of the equitable adjustment in the system, whereby the heritor, if he resists payment of the full amount localled, must surrender his valued teind. I am not sure, however, whether there may not be a broad ground of principle, and not merely an equitable adjustment, in the requirement of surrender. The teind was a share in the produce of the soil, the value of which fluctuated annually. There were two elements of uncertainty—the crop for the year and the prices of the year. A valuation in victual eliminated the former. A valuation in money eliminated both. Now what did this latter valuation import? It imported, not that a certain fixed sum of money was the value of the teinds of the land in any particular year, but that a constant annual payment of a specified sum of money was the value of the teinds of the lands for all time, the equivalent for the annually fluctuating drawn teind. That annual payment is now the estate of teinds which belongs to the titular, and out of which the minister's stipend falls to be paid. It is against this estate, and this alone, that the stipend is chargeable. Under the decree of locality the stipend is payable out of the teinds, and the estate of teinds is a constant annual payment. Under the rule of surrender the general principle is recognised that where a person holds an estate charged with a certain burden for which he is not personally liable except as an intromitter with the revenue of that estate, he may satisfy the obligation and relieve himself of all further liability by surrendering the whole estate. The minister makes a certain demand. The heritor objects that this is a demand which seeks to impose a liability upon him greater than the yield of the estate with which he intromits. The minister replies—'The estate with which you intromit is a constant annual sum of so much. The amount demanded in one particular year and the constant annual sum are not commensurable. You cannot say that the former is in excess of the latter. Your estate of teinds is a constant annual sum; if you think payment according to my locality is more than that and encroaching upon your stock, then surrender the estate.'

"I do not require to consider whether this would be a conclusive argument if the question now arose for the first time whether an heritor must surrender in the circumstances figured. I think, however, that the considerations indicated negative the idea that the rule which has stood for 120 years rests upon such an obvious misconception that it is now open to reconsideration.

"I am accordingly of opinion that the case for the heritors as regards the teinds valued in money fails, and that the multitude of heritors who, rather than surrender and lose the benefit of low prices, have been content in dear years to pay stipend in excess of their valued teind, have not so acted under essential error induced by the action of the Court.

"The second branch of the case, although cognate to the first, raises a different and more recondite question. Certain of the heritor's lands are unvalued. The amount of victual stipend localled upon these lands, when converted into money at the current fiars prices, is said to amount to more than one-fifth of the rent of the lands, and the heritor in these circumstances claims right to satisfy the decree in any year where this occurs by tendering one-fifth of the rent. Prior to the third decade of the seventeenth century no such question could have arisen. The teind was the tenth stook which the titular was entitled to draw upon the ground. It is true that the actual leading of teinds had ceased to be universal. In many cases an annual commutation was paid in money or rental bolls, but the amount of these was fixed by express agreement or usage and had no reference to the rent of the lands. How comes it, then, that one-fifth of the rent has come now to be generally regarded as the value of the teind? The answer to this is to be found in the decreets-arbitral of King Charles I, and the legislation of 1633 which followed thereupon. A system of valuation was thereby established. Under this system two methods of valuation were prescribed, according as the teinds had hitherto been actually drawn or had been satisfied by fixed conventional payments in money or rental bolls. In

the former case the titular was entitled to prove by evidence what had been the actual value of the teinds. In the latter case the commutation in use to be paid, which in some cases was much below the actual value of the teind, in other cases apparently exorbitant, was not regarded as a satisfactory index, and accordingly it was provided that in such cases the teind should be held to be one-fifth of the constant rent. But why one-fifth? This is explained by Lord Benholme in the case of *Jamieson* v. *Little*, 1867, 5 Macph. 914, and although in that case Lord Benholme was one of the minority I think that as regards the matter his historical and arithmetical explanation is right. The tenth stook was worth more than one-fifth of the rent payable for the land, stock, and teind together, or 'blended' as it was called. In other words it was worth more than one-fifth of the rent a tenant would pay for the land on the footing that the teind was not to be drawn—the footing on which land was generally let in the case of a commuted teind. The teind was in reality equal in value to one-fourth of this rent. Accordingly in the cases where the titular proved the actual value of the teind or tenth stook he proved an amount equal probably to one-fourth, not one-fifth, of the rent for stock and teind which the land would bring. But for reasons of policy into which it is unnecessary to enter, the King desired to give a relaxation or discount, and accordingly the 'King's Ease' was provided. This was a deduction of one-fifth of the proven value of the drawn or led teind. As the drawn teind was equivalent in value to one-fourth of the rent the matter stood thus, and the two methods are reconciled (V.T. being the valued teind, D.T. the drawn teind, and R. the rent)—

$$\text{V.T.} = \text{D.T.} - \frac{\text{D.T.}}{5} \text{ but D.T.} = \frac{\text{R}}{4}.$$

$$\therefore \quad \text{V.T.} = \frac{\text{R.}}{4} - \frac{\frac{\text{R.}}{4}}{5} = \frac{\text{R}}{5}.$$

Accordingly in an ordinary case—that is, where the drawn teind as proved was equal in value to one-fourth of a fair rent for stock and teind—after deduction of the King's Ease the matter just worked out at a sum equivalent to one-fifth of the rent. On the other hand, where the valuation was made by taking one-fifth of the rent King's Ease did not fall to be specifically deducted, for one-fifth of the rent corresponded with the real value of the teind after deduction had been made of the King's Ease. The two modes were meant in effect to bring about as nearly as might be the same result. A great deal has been written upon the matter, but the most satisfactory explanations of the system of valuation are to be found in the judgments of Lord Curriehill and Lord Benholme in the case of *Jamieson* above referred to.

"Land was sometimes let for one-third of the produce plus the teind, or four-tenths of the produce, which shows that the teind or tenth was deemed equivalent in value to one-fourth of the rent. (There is an old note on the matter to Stair, ii, 8, 24, which, however, contains extraordinary arithmetical blunders, $\frac{1}{8}$ of $\frac{4}{10}$ being given as $\frac{1}{8}$ instead of $\frac{2}{25}$, whilst a tenth part is said to be 'reduced' to an eighth part by taking away one-fifth of it. This note appears in the 1759 edition, and has survived the vigilance of both Brodie and More.) That one-fourth, not one-fifth, of the rent for stock and teind was the approximate value of the teind is illustrated by two cases where the Court had occasion to determine the true value without evidence of what had actually been drawn—*Moncrief* v. *Yeoman*, 1677, Mor. 15,733; *Hope* v. *Balcomie*, 1706, Mor. 15,736. In both these cases one-fourth of the gross rent was taken. Incidentally these cases are quite incompatible with the view suggested, that the legislation of 1633 changed the radical estate of teinds as one-tenth of the produce to one-fifth of the rent. (In recent times the rent has been popularly estimated at one-third of the produce. This would make the real value of the teind or tenth of the increase a little less than one-third of the rent. That was before the war. But according to recent calculations of Mr James Inglis Davidson present rents represent only one-sixth of the produce, and accordingly the real value of the teind or tenth of the produce is three-fifths of the present rent.)

"No doubt the language in the instructions by King Charles and the statutes is obscure and takes too much for granted. We are apt to conclude that our difficulty in understanding the matter arises from our remoteness from the period and our unfamiliarity with contemporary usages, and the circumstance that teinds are not now relatively the weighty matter of the law which they once were. Matters puzzling to us must have been plain and simple to Spottiswood and Johnston of Warriston. Perhaps, however, we do ourselves a measure of injustice in so thinking. There was undoubtedly great confusion, both in law and practice, in regard to teinds for more than a century after the Reformation. As I have indicated, the Legislation of 1633 prescribes two modes of valuation to be followed under certain states of circumstances respectively. The proper appreciation of the circumstances in which the one or the other mode had to be resorted to lay at the root of the whole process of valuation. Yet Stair, Sir George Mackenzie, Forbes, and Bankton all seem to give an account of the matter which was contrary to contemporary practice and decision, which according to Erskine involved a 'manifest absurdity,' which Connell demonstrates to be inconsistent with the Decreets Arbitral and relative Instructions, and which the whole Court, majority and minority, alike regarded as erroneous in the case of *Jamieson*, 5 Macph 914.

"The one-fifth rule has its origin in the Decreets Arbitral and the Statutes of 1633, but how far did it extend? (1) It was made the rule in valuations where the teinds were not in use to be drawn, and as the drawing of teinds came gradually to fall into desuetude it became the universal rule in valuations. (2) It was adopted by the Commissioners in localling stipends as

a measure of the respective value of the teinds of lands where there had been no valuation, although its complete and binding authority for the purposes of locality was doubted by the Court so late as 1842—*Glenlyon* v. *Clark*, 5 D. 69. (3) It was applied by the Court as the measure of the value of teinds as between titulars and heritors in all cases where the teinds were not in use to be drawn, and as drawing went out, it gradually came to be of universal application for this purpose.

"The suggestion has been made, and it receives encouragement from the opinions of some of the judges in the *Calton* case (*Burt* v. *Home*, 5 R. 445), that it was made a universal rule in all cases as between heritors and titulars by the Act 1633, c. 15, dealing with the King's Annuity. As I shall endeavour, however, to show later, this theory seems to be based upon a misconstruction of that statutory direction, and it is quite inconsistent with many decisions and a whole course of practice in regard to the drawing of teinds which subsisted for a century and a half thereafter. Incidentally, too, I may point out that it is inconsistent with the statement of Stair (iv, 24, 2, and 10) that where the heritor has intromitted with the teind the action of the titular is for not one-fifth of the rent but the value of the tenth stook. If the effect of the Act 1633, c. 15, had been to entitle the heritor in every case to tender one-fifth of the rent, it is inconceivable that the drawing of teinds would have continued for a century and a half thereafter, as the procedure was undoubtedly more onerous to the heritor than payment of one-fifth of the rent. The Statute of 1633, c. 15, will, however, be more conveniently considered in relation to the cases in which it has been canvassed, and I now accordingly turn to the modern decisions.

"In the case of *Wallace* v. *Duke of Portland*, 1828, 6 S. 808, it was held that the titular was not obliged to accept one-fifth of the rent of the year current when the crop was reaped, but was entitled to draw the teind upon the ground. Of consent the value of the teind of which he had been disappointed was taken in this case at one-fifth of the average rent under a new lease which had since been entered into. On the ratio of this decision he would theoretically have been entitled to prove the actual value of the teind or tenth stook, but it had been held in several cases in the eighteenth century that this could not be done where the titular had not been in use actually to draw the teind, as there were in that case no satisfactory materials for the proof. In the case of *Graham* v. *Pate*, however, 1799, Mor. 11,063, it was apparently held that a titular has no claim for arrears when he cannot prove the actual value of the drawn teind, and is not allowed in these circumstances to claim a fifth of the rent as arrears. According to Lord Balgray in *Urquhart* v. *Earl of Moray*, 1823, 2 S. 567, when a somewhat similar decision was pronounced, Graham was a 'solemn' decision. It is difficult to reconcile it with earlier decisions where *faute de mieux* a fifth of the rent was taken in determining the amount of the arrears — *Galloway* v. *MacGuffock*, 1706, Mor. 15,736; *Smith* v. *Oliphant*, 1748, Mor 15,660; *cf. Bruce* v. *Arnot*, 1698, Mor. 15,735. Both lines of decision, however, are adverse to the theory of one-fifth of the rent as a universal rule. The case of *Wallace* seems to have fallen curiously out of view. It is not referred to in *Learmonth* or *Burt*, which I shall presently refer to (except incidentally in Lord Adam's dissent in the latter case), although it seems to cut very deep into the view of the effect of the legislation of 1633 taken by the Court in *Learmonth* and by the majority in *Burt*.

"The case of *Glenlyon* v. *Clark*, 5 D. 69, recognises two propositions—(1) That land is teindable and subject in a process of valuation at one-fifth of the rent although the land is not and never has been under tillage. (2) That where there has been no valuation one-fifth of the rent is not a necessary rule between the minister and the heritor in a process of locality. In this case the question was whether the minister could insist upon one-fifth of the rent. It was pointed out that the one-fifth rule as regards the actual value of the teind was favourable to the heritor in the case of land under tillage, and to the titular or minister in the case of land under pasture. As it was held that the minister could not insist upon the rule where it favoured him, I think this involves that the heritor could not in a question with the minister insist upon the rule where it was his interest to do so. In that view the case would be an authority in the minister's favour in the present case. But two flaws in *Glenlyon* have been suggested in more recent decisions—(First) It has been said that the Court did not pay sufficient attention to the practice of two centuries in localities where one-fifth of the rent had been taken as the rule. This criticism, however, is subject to certain observations. Lord Deas, who in later cases was the protagonist of the one-fifth rule, indicates that notwithstanding the practice he would have agreed with the judges in *Glenlyon* that the one-fifth was not a binding rule in localities but for the Statute 1633, c. 15, which was said not to have been before them. Again, taking one-fifth of the rent was convenient and obviated a troublesome inquiry on very doubtful data, and it is not easy to elevate such a practice into an absolute rule of law. Further, in the great majority of cases down to the date of *Glenlyon* the minister had no interest in the question so far as the locality to be made up was concerned, the teinds not being exhausted.

"A second criticism of *Glenlyon*, however, which was advanced in the cases of *Learmonth* v. *City of Edinburgh*, 20 D. 190, and *Burt* v. *Home*, 5 R. 445, is that the Court ignored the Statute 15 of 1633. I shall here only remark that in ignoring that statute the Court sinned in very good company, for it is not referred to by any institutional writer or in any of the almost innumerable reports of teind cases except incidentally in relation to the King's annuity.

"In the case of *Learmonth* v. *City of*

Edinburgh, 1857, 20 D. 190 (the *Bruntsfield Links* case) it was held that where the teind of pasture land is unvalued the teind must be estimated in a locality at one-fifth of the rent of the land as at present let. This does not stand with one of the propositions in *Glenlyon*, and the judges recognised this, but they got out of the difficulty upon a technical view of the decision in the *Glenlyon* case, where procedure was sisted to await a valuation.

"Next there was the *Calton* case (*Burt* v. *Home*, 1878, 5 R. 445), in which the whole Court was divided—eight to five. As on the one hand this case is a binding authority, and on the other hand there were weighty dissents since endorsed by eminent judicial opinion, it is necessary to consider carefully what was actually decided, and is therefore binding. This appears to have been—(1) That land long built upon is teindable. (2) That in the case of such lands, *i.e.*, land from which there was no agricultural fruit, one-fifth of the rent which the land would bring if cleared of houses and let for tillage was to be taken as the teind in a locality.

"Finally there came the case of *Baird* v. *Wemyss* (8 F. 699), where it was held that where land was in grass and policy plantations the teind payable to the titular is one-fifth of the rent which the lands would bring if let in their present state. In the report of this case it appears that Lord President Dunedin and Lord Kinnear, whilst recognising that the *Calton* case was binding, expressed their disapproval of it, and pointed out that in view of the great judicial difference of opinion in the case only what was in terms decided need be accepted as authoritative. In particular, they deprecated the theory that the legislation of 1633 altered the character of teinds as annual *debita fructuum* and converted them *per aversionem* into one-fifth of the agricultural rent of all lands in Scotland.

"As I have already indicated, great stress is laid both in *Learmonth* and in the *Calton* case upon the Statute 15 of 1633. That statute, which is entituled 'Anent His Majesty's Annuity of Teinds,' *inter alia* ratifies and approves an Act of the Teind Commissioners of 23rd March 1631, 'whereby it is ordained that in all teinds which should be unvalued betwix and the first of August thereafter that the heritor shall pay his just teind according to the fifth part of the present rent aye and until the constant rent be determined.' This it will be observed is a mere ratification and enacts nothing save what is contained in the Act of the Commissioners ratified.

"I think it well to quote here the Act of the Commission at length, for though it is printed in Connell's App., p. 136, that is not in everybody's hands, and any observations I have to make cannot be followed without the exact text of the Act. The danger of partial quotation appears from the judgment of Lord Ivory in *Learmonth's* case, where he quotes a large part of the Act but leaves out a bit at the beginning and a bit at the end which in my view are crucial.

"The text of the Act is as follows:—

'*Act made by the Lords Commissioners anent the Payment of His Majestie's Annuity and Leading of Teinds, 23rd March* 1631.

At Holyroodhouse, the twentie-third day of March, im vie and threttie-one years. Forsuamicle as the King's Majestie, by his former warrant, direct to the commissioners for the surrenders and teinds, *gave order for the expeding the valuation of led teinds*, wherein such a progress has been made as within short time the valuation of led tithes will be concluded; *but as to the teinds which are brooked by the heritors joyntly with the lands*, wherein the probation is common, both to titular and heretor, his Majestie is informed that the samen proceeds very slowly, and that partly by reason of the negligence of titulars and heretors in pursueing their valuations, or by the contestation betwixt them after report, wherein so much time is spent on every particular that the work is mightilie hindered, and like to be frustrated, except some remedie be provided thereto; and his Majestie considering that the difficultie and contestation ariseth for the most part on the constant rent of the stock and teind, whereas no difficultie can be in the present rent, his Majestie thinks it nowise reasonable, where the present rent is certain, that upon the contestation of the constant rent, aither the titular should be frustrate of the payment of the just teind or his Majestie of his annuity; and therefor his Majestie, with advice and consent of his saids commissioners for the surrenders and teinds, has ordained, and by their presents ordain, all heretors and titulars to conclude their valuations betwixt and the first day of August next to come; and if any contestation thall happen to fall out betwixt them after that day, in that case his Majestie, with advice foresaid, ordains that the heretor shall paye his just teind, according to the fifth of the present rent, together with his Majestie's annuity furth of the samen, according thereto, and that of all years bygone and in time coming, ay and while the constant rent of the said stock and teind shall be fully aggried upon betwixt them, at the sight of the saids commissioners; *and if it shall happen any led teind to be unvalued* after the said first day of August, either in default of the heretor or titular, in that case, as his Majestie allows of the order taken by the saids commissioners for leading of the teinds, by aither of them who shall not be found in default of the not valuation, his Majestie, with advice of his saids commissioners, thinks it reasonable and just that the intromitter with the teind shall be obliest, in payment of his Majestie's annuitie, according to the just worth of the teinds led, during the years of his leading, deduceing only thereof the fifth part for the ease, and that whilk is payed to the minister for his stipend, and that ay and while the valuations thereof be concluded; and the saids commissioners ordains letters to be direct, charging officers at arms to pass to the mercat croce of the head burghs of this kingdom, and other places needful, and there, by open proclama-

tion, to make publication hereof, wherethrow none pretend ignorance of the samen.'

"It has to be kept in view in considering this Act that for purposes of valuation there were two classes of teinds, viz.—'led teinds,' *i.e.* teinds which the titular had been in use to draw, and 'teinds which are brooked by the heritors jointly with the lands,' or, as it is sometimes expressed, teinds where the teind is blended with the stock. In this latter case the titular did not draw the teinds but got a payment, either in money or in rental bolls. In the former case the teinds were to be valued by a proof of their actual annual worth and a fifth was to be deducted for the King's Ease. In the latter the constant rent was to be ascertained, and a fifth of it was to be taken. It must also be kept in view that though under later practice the actual present rent is taken as the datum, that was not the original intention or the original practice. Regard was to be had, not merely to the present rent but also to what the lands might be expected to yield in future in fixing the 'constant rent.'

"The Act here under review begins by recognising that as regards 'led teinds' the valuations are proceeding satisfactorily. Next it passes to 'teinds which are brooked by the heretors jointly with the lands'; it deals with these and with no others down to the words 'and if it shall happen,' when it reverts to the subject of 'led teinds.' (The italics show the breaks). If there were any doubt about this it would, I think, be made clear by the fact that the licence to the heritor to pay one-fifth of the present rent is 'ay and until the constant rent of the said stock and teind shall be fully agreed upon.' This refers solely to teinds of the second class above described, for in the case of led teinds there was no question of a constant rent, as rent, present or constant, did not come into the question. The matter is made still more clear by the last clause, which deals specifically with 'led teinds.' In this case there could be no such 'contestation' between the heritor and the titular as to the value of the teinds as is figured earlier in regard to blended teinds. The value of the teinds was 'the just worth of the teinds led.' All that was necessary was to give a direction as to how His Majesty's annuity was to be ascertained in this case and that is done.

"In my humble opinion, accordingly, an analysis of the Act absolutely disposes of the theory encouraged by some of the dicta in *Learmonth* and the *Calton* case, that the Act of Parliament and relative Act of Commission substituted generally a fifth of the rent for the old teind. This certainly was not the interpretation put upon the Acts in practice. Although the leading of teinds was admittedly more onerous than payment of a fifth of the rent, teinds continued to be led down to the beginning of the nineteenth century, as is shown by numerous decisions. In no case is it suggested that where teinds are in use to be led, the heritor can relieve himself therefrom by tendering one-fifth of the rent. Further, though this is not perhaps so important, I do not think that the Act 15 of 1633 was intended to be of such wide application as might appear from its terms. Where the heritor enjoyed his own teinds he paid money or delivered rental bolls to the titular. In most cases this was a commutation less in value than the teind or even one-fifth of the rent, and it was fixed by a standing tack or other bargain. I do not think that it was intended to interfere with these arrangements, which, as the reports show, continued to subsist long after 1633. The case which it was intended to meet was the case where, although the teinds were not in use to be led, there was no definite standing bargain and a dispute arose between the heritor and the titular as to the amount payable. The authorities were most unwilling to encourage any extension of the actual leading of teinds, and accordingly the Act allows the heritor to meet the demand of the titular who has not been in use to lead his teinds and has no definite bargain by tendering one-fifth of the rent.

"These views coincide generally with those of Lord Justice-Clerk Moncreiff and Lord Adam, who go much more thoroughly into the matter of the statute than do any of the Judges of the majority in the *Calton* case. But Lord Moncreiff goes further and holds that the Statute 15 of 1633 was simply a statute to regulate payment during the dependence of a process of valuation and not otherwise. To a certain extent I coincide with that view. At that time the intention was that the whole of the teinds should be valued *quam primum*. Every titular or heritor was taken to be a person called upon to raise a process of valuation. No stipend could be modified until this was done. It was not contemplated that the processes of valuations might not be completed for thirty, still less for three hundred years. The framers of the Act here in question had in view a temporary mode of payment. The Act, however, though contemplated as temporary, is not expressly limited to the case where there is a process actually in dependence. On the other hand the undoubtedly temporary light in which the matter was regarded, as shown by the terms of the Act of the Commission, militates against the theory that the Act altered the character of teinds and converted them into a fifth of the rent. On the contrary, I think the Act was intended simply as a temporary expedient to provide a rough rule of payment between the titular and the heritor to avoid dispute and delay until the valuation was carried through. Lord Moncreiff's opinion as to the temporary character of the provision as operating only during the dependence of a valuation seems to be in accordance with the view both of Stair and Erskine as to the state of the law in their time as I shall presently show, and also in accordance with a long course of practice and decision down to the case of *Wallace* v. *The Duke of Portland*, 6 S. 808, to which I have already referred.

"That Lord Moncreiff was right in these propositions, viz.—(1) that the Act 15 of 1633 did not convert the right of teinds into a right to one-fifth of the rent, (2) that it

applied only to one class of teinds, viz., teinds not in use to be led—appears clear, I think, from a statute which, curiously enough, is not I think noticed in any of the elaborate opinions in the *Calton* case. The Statute of 1693, cap. 23, was a statute renewing the appointment of the Commission on Teinds. When valuations were first introduced it seemed to have been considered (doubtfully) that pending the process the right of the titular to draw teinds should be suspended. In view of this it came to be the custom for the Commissioners to grant a warrant to the heritor to draw his own teinds *pendente processu*—a warrant which would obviously have been unnecessary if 1633, cap. 15, applied in such a case and the heritor could tender one-fifth of the rent. In virtue of this practice it came about that heritors started processes of valuation in order to stop the leading of their teinds, and then did not insist on proceeding with these processes. The object of the special provision in the Act of 1693 was to check this. It provides—'And whereas many times heritors intent action for the valuation of their teinds against the titulars and others having right thereto of design only that upon pretence of a depending action for valuation they may get a warrant for leading of their own teinds, and thereafter suffer the action for valuation to lie over and do not insist therein, by which the titular and others have right to the teinds are exceedingly prejudiced, for remied whereof it is statute and ordained that any warrant to be granted hereafter by the Commission to heritors for the leading of their teinds shall endure only until a protestation for not insisting be obtained at the instance of the defenders.'

"The expression the 'heritor leading' or 'drawing' 'his own teinds' in the old reports is a confusing one. I suppose it must date back to a time when heritors who had tacks of their teinds drew the teinds from their own tenants, taking rent only for the stock. But in the seventeenth century it generally meant that the teinds were not drawn at all. (There are, however, traces in the reports that even down to the eighteenth century heritors sometimes drew teinds from their own tenants.) What this Act accordingly shows is that when a process of valuation of teinds in use to be drawn was begun, the drawing of teinds was suspended by a warrant until the valuation was completed. As appears from the Teind Records the valuation once completed drew back in these circumstances to the date when drawing was suspended. But the titular in that case had to lie out of his teind, and the object of the Act was to protect the titular against abuse by allowing him on protestation for non-insistence to resume drawing his teind. All this would have been quite unnecessary and inappropriate if the one-fifth of the rent rule under 1633, cap. 15, applied to these cases. In *Learmonth's* case Lord Curriehill states of the legislation of 1633—'Thus the landowners of Scotland acquired here most important boons . . .; (2) So long as no valuation was made, and they intromitted with and retained the tithes of their lands, they were no longer to be dealt with as delinquents committing spuilzies, but only to be bound to pay a yearly sum equal to one-fifth part of what was called the present rent, being the yearly rent or value of the lands of each successive year.'

"Similarly in the *Calton* case Lord Mure states that this legislation put an end to the right to draw teinds.

"With great deference I am quite unable to reconcile these statements with the fact that the drawing of teinds, though burdensome to both the heritor and his tenants, continued until far on in the eighteenth century (if not in one or two cases into the nineteenth century, Mr Elliot (10) mentions one case in his own time), that the right to draw them is recognised in many reported cases, and is explicitly affirmed by Erskine (ii, 10, 35,); and that the competency of an action of spuilzie for intromission was also recognised (see Stair, ii, 8, 23). Lord Curriehill in *Learmonth* quotes the form of a petitory action for teinds bygone in Stair (iv, 24, 8), where one-fifth of the rent is mentioned, as evidence of the universality of the rule of taking one-fifth of the rent. But Stair distinguishes between the possessory and the petitory action (iv, 24, 2, and 10), and in regard to the former he says—'But the possessory action is only competent for drawn teind where the teind master has been in possession to draw the same the year immediately preceding, for then he has *possessory action for spoliation of the teinds.* But if he was not in possession the year immediately preceding the year in question, he will only get use of payment till he use inhibition, which is the legal way of interrupt by tacit relocation of teinds.' 'Spoliation of the teinds' in Stair's words is spuilzie, which according to the dictum of Lord Curriehill quoted above, disappeared under 1633, cap. 15. The statement by Erskine is—'Though every landlord has had it in his power since the year 1633 to get the leading of his own tithes by suing a valuation, yet if he neglect that method of relief he must submit to all the inconveniences of the former law and suffer the titular to draw the tithe' (Erskine, ii, 10, 35).

"Under the legislation of 1633 a valuation terminated the right to draw teinds, and the initiation of a process of valuation entitled the heritor to have it suspended. But even in the latter case, under 1693, cap. 23, the right revived if the heritor was dilatory in insisting in the process. This raises the interesting if not very practical question, whether a titular who receives a payment in respect of teinds under a prorogated tack or otherwise could now bring an inhibition, and if the heritor failed to bring a process of valuation, could proceed to draw his teinds upon the ground? It has been found in the *Learmonth* and *Calton* cases, contrary to the opinions of Lord Justice-Clerk Moncreiff and those who agreed with him, that the Act 1633, cap. 15, introduced not merely a regulation *pendente processu*, but a permanent rule that the claim of a titular to teind could be satisfied

by tender of a fifth of the rent. It is true that, as I think has been shown, the learned judges in their opinions overlooked that the Act of 1633, cap. 15, in this regard applied only to one class of teinds. But then that class is the only class that now exists. The drawing of teinds gradually died out. No titular could now come forward and maintain — 'These teinds have never been blended with the stock; I have been in use to draw them and propose to continue to do so.' The only case, therefore, in which as it appears to me a right to draw teinds might now conceivably be asserted would be where the titular had used inhibition, and the heritor declined to acknowledge liability to pay one-fifth of the rent. Under such circumstances it might still, perhaps, be contended that the titular had an option either to sue a petitory action or to adopt the possessory remedy. An action of spuilzie was entertained, and the right of the titular to draw the teind was affirmed so late as 1828 — *Wallace* v. *Duke of Portland*, 6 S. 808, already cited— but as the heritor had tendered one-fifth of the rent for the year under a subsisting lease, *i.e.*, 'the present rent' in the words of the statute, this case (though in line with earlier decisions and with Stair's and Erskine's explanations) is hardly reconcilable with the view of 1633, cap. 15, adopted in the *Learmonth* and *Calton* cases.

"The conclusion to which I come is that the legislation of 1633 did not alter the radical character of teinds as a right to one-tenth of the increase, or convert it to one-fifth of the rent, but that it provided means, meant at the time to be temporary, of liquidating the value of the teind where it was necessary to do so, in all cases where leading had been given up.

"I confess I have some doubts whether the rule which came gradually to be established, of taking one-fifth of the rent as equivalent to the teind in processes other than that of valuation, was based upon the Act 15 of 1633, as establishing a definite rule. As I have already stated, that Act is never noticed. I incline to the view that as regards localities it arose in this way. The Legislature in establishing the one-fifth rule in processes of valuation had recognised one-fifth as a reasonable proportion of the rents in question between the heritor and the titular where there could be no proof of the value of teinds actually led. The Teind Commission, which, as I have already indicated, allowed itself a measure of elasticity of equitable adjustment, just followed the analogy of the statutory rule where it could find no other definite data. As Lord Ivory puts it in one case, they made a '*talis qualis ad hunc effectum*' valuation.

"In any view, however, I think I am bound by recent decisions to hold that in any case where it is necessary to determine the value of unvalued teind (led teinds being now entirely obsolete), one-fifth of the rent falls to be taken, and that the opinion in the case of *Glenlyon* that this rule is not absolute in the case of making up a locality is not now law. If the question can be regarded as open upon what this rule is based, I should be prepared to base it, as regards claims by a titular, on the Act 15 of 1633 (whilst not clear that historically it was so based), but as regards the procedure in localities, upon practice of long standing, proceeding upon the analogy of valuations. I am respectfully disposed to think that the judges in *Glenlyon* attached too little importance to long standing practice. On the other hand, I do not agree with the view of Lord Deas in the *Learmonth* and *Calton* cases, that the Act 1633, c. 15, by itself established a general rule, that unvalued teinds were for all purposes and under all circumstances to be taken as one-fifth of the present rent.

"Where a titular of unvalued teind demands his teind, I think that, as the authorities now stand, what he is entitled to is one-fifth of the rent. The present rent is to be taken when the lands are let for agricultural or pastoral purposes (*Learmonth*), the rents which the lands would bring if so let in their present state when the lands are in the possession of the heritor (*Baird*), and the potential agricultural rent of the lands considered as restored to tillage when the lands have been built over (*Burt*). (Incidentally I may point out that substantial titularities in outside parties are now so rare that one is apt to lose sight of the fact that teinds are a separate estate, and that even where the heritor has the title to his own teinds he is in right of two properties—the lands and the teinds. If the teinds are unvalued, as heritor he is due to himself as titular one-fifth of the rent. The habit of mind of our ancestors was to envisage two persons—the titular and the heritor; our habit of mind is to envisage only one person who combines both characters.)

"Again, where a locality falls to be made up, one-fifth of the rental of the lands must be taken as the teind where there has been no valuation.

"These, apart from cases of valuation and sale, are the usual cases in which it is necessary to put a value upon unvalued teinds. The heritor here maintains that there is another case, viz., where he is dissatisfied with the result of the locality in a particular year. The stipend, he maintains, is payable out of the teinds, and therefore he is entitled in any year to have his liability limited to one-fifth of the rent. To this the minister replies—'There is here no case for ascertaining the value of the teinds. Such a procedure, except in a process of valuation, is without precedent in our law after a locality has been adjusted. It is quite true that the stipend is modified out of the teinds. But that was satisfied when the locality was made up and became final. What was then ascertained was that the teinds of these lands could bear so many chalders of victual. Once that was ascertained the then money rent, which was merely a factor in the ascertainment of the quantity of victual, disappeared. If it be maintained that there was then a provisional valuation, it was a valuation in victual, not in money, for what had to be ascertained was the value of the teind in victual according to the fiars prices

of the seven preceding years. Law and practice sanction one way and one way only of opening up the matter, viz., by bringing a valuation.'

"One proposition advanced by the minister is certainly true, that the heritor's claim here is novel. At the time of the Napoleonic wars, during the Crimean war, and in the seventies, there were very high prices, and during all these periods there were parishes where the teinds were exhausted, though no doubt these cases were much more numerous in the last of the periods mentioned. In many cases heritors were called upon to pay more than one-fifth of the rent, but this question was never raised. Nor is there any suggestion of a right to tender one-fifth of the rent to a stipendiary minister in any text-book.

"This consideration though it cannot be ignored is not conclusive, and it is necessary to look more closely into the matter. In doing so the question arises at the outset, What year's rent is to be taken? There are alternative suggestions covered by the conclusions of the summons. One is the present rent, *i.e.*, the rent of the current year. This appeared to me eventually not to be insisted in by the Lord Advocate for the heritor, but as this is a test case it may be well to glance at it. If reliance is to be placed upon the Act 1633, cap. 15, this appears to me to be on the face of it the contention most favourable to the heritor. But it is open to obvious objection upon grounds of equity and expediency. I need not recapitulate all that I have said upon this matter in dealing with the question of valued teind, most of which is applicable here. I may point out, however, that if the rents fell the minister would get less than the victual localled to him, whilst if they rose he would get no more. Further, when the augmentation exhausted the particular teinds of a certain order of liability, in every second year on an average the minister would not get the full value of the victual localled to him, and he would have no redress although there might be other free teind in the parish. Again, the present rent is nowhere liquidated. The valuation roll does not correspond with the teindable rental. All sorts of questions arise in valuations (for example of a case take the *Calton* one, where the datum is the potential annual value of built-upon land if restored to agricultural uses). It is one thing to require a titular to face these questions, or to require the stipendiary minister to do so if a permanent valuation binding upon himself and the benefice is sought, but it is quite another thing to require the minister to do so when it is a question of his alimony for a particular year.

"These appear to me to be weighty considerations against the recognition of an annual accounting according to the present or potential rent, unless it is incumbent by statute. I do not think it is. All that the Statute of 1633, cap. 15, does is to sanction a temporary rule of payment between the titular and the heritor pending valuations which they are invited to bring. There is no practice and no authority for extending its application to questions between a stipendiary minister and the titulars and heritors concerning the stipend of each year after a final decree of locality has been adjusted and approved of.

"The only authority which I have been able to find which might be deemed suggestive of annual accounting according to the rent for the year are certain dicta of Lord Justice-Clerk Moncreiff in the case of *Chisholm-Batten* v. *Cameron*, 1873, 11 Macph. 292—'The liability of the proprietor to the minister is to account for a certain proportion of the annual rent. The original enactment 1633, cap. 15, bound the heritor to pay one-fifth of the present rent, and although in the process of locality it was found quite reasonable to strike that liability at an average, still the principle is that the heritor pays year by year according to the present rental. But when the heritor leads a valuation then his liability is altered. He then is to pay according to the constant rent. He was formerly bound to pay a proportion of the present rent; after the decree he must pay the constant amount fixed by the decree.' The weight to be attached to these dicta is perhaps somewhat lessened by the consideration that the Lord Justice-Clerk here, incidentally and *obiter*, proceeds upon a construction of the Act of 1633, cap. 15, which subsequently, after full examination of the *Calton* case, he entirely rejects. The paragraph starts with the proposition that 'the liability of the proprietor is to account to the minister for a certain proportion of the annual rent.' If this meant, as one would naturally read it, to pay to the minister a certain proportion of the annual rent it would be an erroneous statement of the nature of the heritor's liability, which is to pay a fixed amount annually as localled. It can only mean to 'account to the minister for his stipend *out of* a certain proportion of the annual rent.' 'Year by year according to the present rental' seems to favour the idea of an annual accounting. But I cannot think that, even upon the assumption that an annual accounting according to the rent of the year should turn out to be the heritor's right, the Lord Justice-Clerk meant to express as an accepted proposition an idea so novel. At that time (1873) prices were very high, and many heritors were paying more than one-fifth where the teinds were unvalued. I gather that the accent is on the words 'in principle,' and that what the Lord Justice-Clerk means is to express the strict theoretical principle, and not to suggest any practical rule of accounting. There is one reading—and I think it is the true one—of the paragraph which is fatal to the idea either of the present rent or the money rent at the date of the locality—'In the process of locality it was found quite reasonable to strike that liability at an average.' Now in the process of locality there is no averaging of rent. There is an averaging of prices, and the amount localled is calculated upon the relation of this average to the rent. If this is the Lord Justice-Clerk's meaning it seems adverse to any attempt of the heritor to escape from the amount localled (except of course by lead-

ing a valuation) during the subsistence of the locality. The 'liability' which was 'struck at an average' was the liability to pay so much victual, the value of which on an average of years was found to correspond with the share of the heritor's liability for stipend in relation to the amount of one-fifth of his rent.

"The Lord Advocate, however, as I have stated, appeared to me to put his case upon the rent as appearing in the rental adjusted in the locality. It appears to me, however, that this contention cuts itself adrift from the Act of 1633, cap. 15. That Act sanctions in certain circumstances a tender of one-fifth of the present rent. I cannot understand how the rent, not of this year or last year, but the rent of it may be 100 years ago (there are subsisting localities which became final further back) can be treated as the 'present rent' under the Act 1633, cap. 15. The theory relied upon seemed to be that of a provisional valuation under the Act of 1633, cap. 15, which must endure so long as the locality lasts. But the Act of 1633, cap. 15, has nothing to do with valuation. Its purpose was to provide, not a system of valuation permanent or provisional, but to provide a temporary rule of present payment in default of any valuation. Further, if there is a provisional valuation in making up the locality it would rather appear to me that is a valuation in victual, not in money. The rent is, as I have already said, a factor in arriving at it. The working theory I take to be this—You take one-fifth of the present rent, this you convert into victual at the fiars prices of the last seven years. This is done for all the lands in the parish not already valued in victual, and having got this *ad hoc* valuation on a commensurable basis, viz , victual, you allocate the augmentation accordingly (subject, of course, to certain rules as to preference between teinds). This appears to me to be a valuation in victual, for not until you have got the victual value can you proceed to local. The money rent has now disappeared. It was a mere factor in arriving at the valuation in victual which has now to be used. The valuation, if so it is to be called, which is made in a locality is a valuation *ad hoc*, and can have no operation beyond the '*hoc*.' But what is the '*hoc*'? It is the allocation of a stipend modified in victual. The problem is to ascertain the share of this effeiring to the teinds of the land in question, or otherwise when the augmentation exhausts the teinds to ascertain how much victual stipend these teinds can carry. In the old days when rent was payable in victual this could have been done simply by taking one-fifth of the victual rent. As rents are now payable in money it is necessary to start with money, but though money may be the start the end must be victual, for it is so much victual that is allocated. It is, I understand, the practice for reasons of convenience of a technical character to reduce all the teinds, including those valued in victual, to money, and to divide the victual that has to be allocated proportionally. But I do not think the practice stamps the valuation as in money and not in victual. To figure a parish in which the only free teind was the unvalued teind of a parcel of land yielding a teindable rental of £250, and an augmentation of three chalders fell to be allocated. Suppose the value of a chalder is £20. It appears to me that the question there is—How many chalders is the teind of this land worth? Rent, £250, one-fifth is £50=2½ chalders. 2½ chalders are then allocated, because 2½ chalders is the victual value of the whole teind of the lands. Doubtless the same result could be arrived at by starting with the question—What are three chalders worth in money? setting this in a sum of proportion against one-fifth of the rent and then translating back into victual. But the former process, not the latter, seems to me to correspond with the underlying idea. If one has to pay death duty in this country upon a French investment, the amount of the duty must be expressed in pounds sterling, just as the teind must be allocated in victual. One first of all takes the value of the investment in so many francs, just as one takes the teind first of all in money at one-fifth of the rent. But one converts the francs into pounds sterling in order to ascertain the amount of the tax. It appears to me that this is a valuation of the security in sterling money, sterling money being the end, and the francs merely a step in the process. I do not know whether it is legitimate to push the analogy further, but it seems temptingly apposite. If the amount of the duty has been so adjusted as at the date of death (analogue the locality), the person liable could not be heard afterwards to insist that the rate of exchange had altered, and that he was not liable in the sterling duty as adjusted in relation to the sterling value at the date of death, but in a lesser duty corresponding to the depreciated value of the franc. As the franc had depreciated since the value of the investment and the relative death duty had been ascertained in sterling, so the pound sterling has depreciated since the value of the teind and the relative stipend was ascertained in victual.

"In old days the teinds of lands were often valued in victual, and these valuations of course subsist down to the present day as valuations in victual. Doubtless in many cases in which valuations were so made the rent, one-fifth of which was taken as the basis, was a grain rent. But there were cases where, though there were some money rents, the Court, for the sake of uniformity, or otherwise, valued the whole teind of the lands as expressed in victual. Now suppose there were such a valuation, I think it clear that a heritor with such a valuation in his hand could not now be heard to say that as regards the lands for which there was a money rent at the date of valuation he was entitled now to fall back upon one-fifth of the then money rent because that was one of the factors in the ascertainment of the value of his teinds as expressed in victual. On the pursuer's theory of a provisional valuation made for the purpose of the locality, and to subsist throughout the locality, it seems difficult to hold that if this valuation was in victual, the money

factor is on a different footing from the money factor in a regular valuation such as I have figured. The view which I have indicated, that the valuation in making up the locality is a valuation in victual, seems to be in accordance with the direction of the Statute of 1808 (section 9) that money teind is to be converted into grain or victual.

"One-fifth of the rent as taken at the date of the locality does not seem to be in a stronger position than was valued teind prior to the introduction of surrenders. But prior to the introduction of surrenders there had been a number of cases (some noticed in Connell, book iv, c. 2, others in the report by the Teind Clerk in *Duncan* v. *Brown*, 1883, 10 R. 332), in which, owing to teinds being valued, or an old valuation turning up, it was found that lands were localled upon to an amount in excess of the valued teind. In such cases a remedy was allowed, but the remedy was not the tender of the amount of the valued teind as satisfying the decree of locality, but the reduction of the locality. There is no trace in these cases of the idea that the demand for the amount in the locality might be satisfied in any year by the tender of the valued teind. No doubt the matter is somewhat complicated by the consideration that in these cases a new locality was generally an equitable necessity, in order to allow the minister to get his stipend allocated upon other lands. But, on the other hand, the reduction did not operate *retro* (see *per* Lord Craighill in *Duncan* v. *Brown*), but only from the date of the new locality either as between the minister and the heritor or among the heritors *inter se*. The heritor could not suspend the minister's charge upon the locality even though he were bringing an action of reduction of the locality.

"If one postulates the existence of a separate titular, the contention of the heritor in the case might lead to an anomalous result. I can see no grounds for maintaining that the provisional valuation in the locality can have any operation as between a titular and an heritor. Now if the rent of the land had greatly increased since the date of the last locality, the titular would be entitled to demand one-fifth of the rent less the stipend. In this way, although the minister might be unable to draw the full amount of his stipend as localled, there might be surplus teinds payable by the heritor to the titular. The decree is against the titular as well as the heritor, but the titular would be entitled to say to the minister — *Quoad* you the teind is valued at one-fifth of the old rent, *quoad* me it is unvalued and I am entitled to one-fifth of the present rent. Perhaps, however, it is not necessary to figure the now comparatively rare case of a separate titular to realise the anomaly. For in the ordinary case the heritor, in the event of a rise in rent, would be able, although one-fifth of the present rent was in excess of the stipend, to tender one-fifth of the rent as at the date of the locality and to retain the balance. In other words, having neglected to have his teinds valued, he would be in a more favourable position than if he had led a valuation, because, if I am right as regards the first part of the case, he could not then have tendered the amount of the valued teind without surrendering.

"No doubt there are dicta to the effect that the value put upon the unvalued teinds at the date of the locality is a valuation for the purposes of the locality, and subsists during the locality, but such dicta must be taken *secundum subjectam materiam*. It is a valuation for the purposes of the locality in so far as it is a valuation for the purpose of making up the locality. Its effect is operative during the locality as governing the rights of heritors *inter se*. Thus where, as in *Duncan* v. *Brown*, 1883, 10 R. 332 (*cf. Chisholm-Batten*, 7 Macph. 565, 11 Macph. 292), an heritor obtains a valuation which shows that his teinds were overvalued in the locality and surrenders and reduces the locality, he cannot go back, in an accounting with the other heritors, upon what was done under the old locality. But I am unable to hold that the money value appearing in the proven rental at the date of the locality is a valuation in this sense that an heritor is being called upon to pay stipend out of stock because the amount localled turns out in some year to be more, not than one-fifth of the present rent of the land, but one-fifth of what was found to be the rent of the land—it may be in the year 1847—when a locality was made up and the then rental was made a factor in the apportionment. The ascertainment of one-fifth of the rent of the land as at the date of the last locality was certainly not a statutory and final valuation of the teinds of the heritor. The contention that this is to be treated as the value of the teind ever afterwards until there is a new locality, appeared at one stage of the argument to be rested upon the theory of a sort of judicial contract in the process of locality. But a vice of this argument is that the contract, if such it be regarded, is in the general case a contract of the heritors *inter se* for the purpose of apportioning the burden in which the minister has no interest. There are some interesting dicta in the meagre report of *Williamson* v. *Campbell*, 1822, Shaw T.C. 21. Lord Hermand regards the so-called valuation in the locality as merely a '*Vidimus*' (an expression which occurs also in the report of the case of *Knox* v. *Heritors of Slamannan*, 1773, Mor. 14,809). On the other hand the Lord President, who apparently differed from his colleagues, treats it as a valuation for all the purposes of the locality, though not binding in a question between the titular and the heritor. His representation of the matter would not, however, help the heritor in the present case, for he seems to carry it so far as to hold that, if the heritor desires to stand to this valuation as limiting his liability he must surrender upon it to the minister. It humbly appears to me that what Lord Hermand describes a '*Vidimus*,' and Lord Ivory as a '*talis qualis* valuation,' does not satisfy the requirement specified by Lord

Ardmillan (*Minto* v. *Pennell*, 1873, 1 R. at 163, foot), to found a claim by a heritor to resist payment according to his locality as being an encroachment upon the stock, viz., that 'the teind shall have been authoritatively ascertained and separated from the stock.'

"I have dealt with the different aspects of this case as they were presented in argument or have been suggested by an examination of the authorities. I shall now sum up my conclusions with regard to this branch of the case—the validity of a tender of one-fifth of the rent in the case of unvalued teind. (1) As regards the present rent this was eventually not insisted in in argument, and I have stated reasons for thinking that it could not be successfully insisted in. (2) As regards the money rent at the date of the last locality I am unable to find any warrant in authority or in principle for holding it in a question with a stipendiary minister to be the present rent in the sense of the Act 1633, cap. 15. Nor can I find any warrant apart from that statute for holding it to be the measure of the present victual value of the teinds in the absence of any decree of valuation.

"I have stated my reasons in the first part of this judgment for rejecting the contention that an heritor who has not surrendered can satisfy the decree of locality in any year by tendering the amount of his valued teind. *Prima facie* the case of one-fifth of the rent, the amount of which has not been ascertained in a process of valuation, is in a weaker position than the valued teind. There is no doubt this difference, that in the latter case the heritor has not until he obtains a valuation the opportunity of limiting his liability by surrender. It would be strange, however, if the heritor who has neglected the means which the law allows, and which it is the policy of the law to encourage, viz., a valuation of his teinds, should be in a better position than the heritor who has obtained a valuation, and should be able to tender for the single year without any surrender. If I am right as regards the first part of the case, the heritor if he now obtained a valuation of his unvalued teinds must pay according to the locality or else surrender. It would seem to be anomalous that having failed to have his teinds valued he can obtain the benefit of a valuation plus relief from the obligation to surrender which a valuation would have implied.

"The strength of the heritor's case, no doubt, consists in this, that the decree of locality, echoing the decree of modification, directs that the stipend is to be paid out of the teinds. I have already indicated the answer to that argument as regards the teind valued in money. As regards the one-fifth of the rent, that argument, for reasons I have already sufficiently indicated, appears to me not to be applicable to the one-fifth of the money rent as at the date of the locality. In other words, I am unable to hold that the present measure of the value of the teind out of which a minister's stipend falls to be paid is the value in money of one-fifth of the rent as estimated many years ago in the process of making up a locality. In one aspect the discarded actual present rent seems in a stronger position. If a titular were now to sue for unvalued teinds he would sue for one-fifth of the present rent under the Act of 1633, cap. 15, as interpreted by decision. But the stipendiary minister is in a different position. The titular is *in petitorio* as regards the amount of the teind for the year. He must put a figure upon it, and until he establishes that figure he can get nothing. The minister is not *in petitorio* as regards the amount of the teind. He does not need to put any figure upon it. The decree of locality has always been deemed the measure of his right (apart from surrender), and the idea of an annual accounting with the heritor according to the rent of the year is quite novel and without warrant in authority or practice.

"My examination of the history and authority upon the matter has led me to the following conclusions:—1. The estate of teinds is one-tenth of the increase, and the radical nature of the right has not been altered by any of the means provided by statute or custom for liquidating the liability without the drawing of the teind. 2. Means for so liquidating the right, by estimating it at one-fifth of the rent, have been provided by statute or custom as applicable in the following circumstances:—(1) Where it is desired to have the teinds permanently valued, (2) where valuation and sale are desired, (3) where a titular seeks to recover teinds by a petitory action, (4) where it is necessary in framing a locality to apportion the augmentation in accordance with the value of the teinds of the respective heritors.

"There were two other ways of liquidating, the former of which is in desuetude in respect of the disuse of drawing teinds, and the latter has not been exemplified in recent times. Where the heritor had been in use to draw the teind the liquidation was by a proof of the average value of the teind as in use to be drawn, and if the process was one of valuation a fifth was deducted as the King's Ease. Where it was necessary to liquidate the real value of the teind irrespective of statutory rule or custom based thereupon, and there was no evidence of the value of the led teind, one-fourth of the rent was taken.

"3. There is no call upon the minister, founding upon his decree of locality, to liquidate the value of unvalued teind.

"4. If the heritor desires to limit his liability by liquidating the value of his teind, the course pointed out by law, and sanctioned by constant and uniform practice, is to lead a valuation.

"5. Neither authority nor practice support the contention that a minister's claim for stipend in terms of his locality can be met by the heritor's referring him to documents pigeon-holed in the Register House, showing the data upon which the liability of the heritor, in terms of the decree of locality, was originally ascertained.

"With reference to the last proposition, if it were necessary to look at the matter technically, I should entertain doubts whe-

ther these documents, though no doubt, if extant, they may for certain purposes, be used as evidence, are authoritative documents determining any matter of right between the minister and the heritor, or whether, on the other hand, they are not all superseded by the decree of locality which, with the extracts thereof, is the only authoritative document. I doubt whether there is any legal principle which necessitates the preservation of these preliminary documents, any more than the preservation of the proof or other steps of process in an ordinary action where final decree has been pronounced, recorded, and extracted.

"I have to add that if I am in error in holding that the provisional valuation used in making up the locality is simply a valuation for an immediate purpose, and does not subsist as qualifying the decree, then, in my opinion, for the reasons I have stated, it is a valuation in victual not in money. It is stating it otherwise, but it comes to the same thing, if it be taken, as suggested by a passage from Lord Justice-Clerk Moncreiff which I have quoted, as a valuation made on an average basis, viz., the average value of the teind as determined by the value in victual of one-fifth of the rent according to the average fiars prices for the seven years preceding the date of the augmentation.

"I have come to the conclusion, for the reasons I have stated, that the pursuer is entitled to declarator in terms of the conclusions of the summons. As I have already indicated I understand that neither the minister nor the heritor has involved the other in this serious litigation for the adjustment of the present stipend of this particular parish. The action is a test one, and this particular parish and estate have been selected because the circumstances enable both branches of the question to be tried in one action. In the case of stipends the convenience and the inconvenience occasioned by the enormous upheaval in prices have not been evenly distributed between heritors and ministers any more than among the clergy themselves. There have been great fluctuations in the past, cycles of high prices and cycles of low prices, but these have not been comparable, either in suddenness or in extent, with the present upheaval. Undoubtedly a burden has thereby been imposed upon many estates by this enormous rise in fiars prices, without any corresponding general increase in rents, which could not have been contemplated a few years ago, and which synchronises in many cases with an enormous increase of other charges upon the somewhat inelastic rent of agricultural land.

"After the foregoing judgment had been communicated to the parties it was represented to me on behalf of the defender that I had somewhat misconstrued his attitude in argument as regards the actual present rent—that the Lord Advocate's concession came to no more than that if the actual present rent was less than the rent at the date of the locality the heritor must tender the latter and not the former. This it is said leaves open the question whether, if the present rent be greater than the rent at the date of the locality, the heritor may tender the former in satisfaction of the decree. In view of the test nature of the case I have not in my judgment ignored the argument for the present rent, although I took it not to be ultimately insisted in. But in case of any misunderstanding I think it right to state that it was not so categorically abandoned that it is necessary to regard the defender as foreclosed."

The defender reclaimed, and argued—Teinds were not a mere burden on the land but a separate estate out of which stipend was payable. In the case of valued teinds the valuation finally fixed the amount for all purposes. If the teinds were not valued one-fifth of the rent of the land was the yearly value of the teinds of the land for all purposes. The jurisdiction of the Court was founded on the Acts of 1633, c. 17, 1707, c. 9, and the Court of Session Act 1825 (6 Geo. IV, cap. 120), sec. 54. It was *ultra vires* of the Teind Court to order stipend to be paid by any heritor except out of his teinds, and if it did the decree could be reduced or suspended—*Macartney* v. *Campbell*, March 4, 1817, F.C.; *Oswald* v. *Martin*, 1835, 14 S. 32; *Lord Elibank's Trustees* v. *Hope*, 1891, 18 R. 445, 28 S.L.R. 295; *Lord Elibank's Trustees* v. *Hart*, 1888, 15 R. 927, 25 S.L.R. 659; More's Notes on Stair, Teinds i, Note W, p. ccxxxix. Teind was *debitum fructuum* and a singular successor was not responsible for the arrears of his predecessor. The ruling decree throughout was the modification—*Waddell* v. *Dundas*, 1876, 3 R. 361, *per* Lord President (Inglis) at p. 362, 13 S.L.R. 213; Ersk. ii, 10, 47; Connell on Tithes, vol. ii, 94; Elliot on Teinds, p. 50. The locality was mere machinery with which the minister had nothing to do. The titular was entitled to make up the locality, the object of which was to limit the heritor's liability and not to increase it—Connell on Tithes, vol. i, 477; Elliot on Teinds, 64. Otherwise the minister in virtue of his degree of augmentation could go against any heritor, where there was free teind and no locality, for the whole of the increase, and the only limit was the amount of the free teind. If there was only one heritor no locality was necessary or competent. The decree of augmentation showed that the stipend was modified out of the first and readiest of the teinds, parsonage and vicarage—C.A.S., H.2, Sched. I—and it was localled on the teinds and not on the lands. There was inherent and expressed in these two decrees a limitation of the liability to the amount of the teinds. The difficulty arose through the allocation of the stipend in victual and the valuation of the teind in money. In order to equiparate the two in making up the locality it was necessary to convert the victual stipend into money. The rise in the price of grain might ultimately show that the teind was unable to meet the demand for victual stipend made on it. This, however, did not entitle the minister to encroach on stock. This had been recognised in the case of an interim locality and there was no reason why it should not apply to a final decree—*Oswald* v. *Martin*, *cit. sup.*; *M'Niell's Trustees* v. *Campbell*, 1872, 10 Macph. 753, 9 S.L.R.

480; *Chisholm-Batten* v. *Cameron*, 1873, 11 Macph. 292, 10 S.L.R. 195. This was expressly recognised in the *Lamington* case—*Mitchell* v. *Douglas*, 1798, M. 14,827—the interlocutor in which expressly proceeded on the narrative that the stock cannot be encroached on. It was true that that decision for the first time recognised surrender as a remedy; but it did not mean that surrender was the only remedy, and could not be held to deprive heritors of other remedies competent to them at common law. There was always a possibility of a fall in prices and of the Court refusing to grant an augmentation to maintain the stipend. This would leave a certain amount of free teind which would be an argument against surrender. Surrender might, however, be preferable in many cases, because it settled the question once and for all and saved the common agent's expenses. In the case of surrender all that the minister who then became the titular could get out of the heritor was the money teind. The minister was simply the assignee of the titular, and if the latter had no greater interest than the moneyed teind neither had the minister—*Lamington* case, *cit.* Campbell's Collection of Session Papers, MS. Opinions of Lords Eskgrove and Meadowbank. The difference between the remedies was between handing over the right to get money and getting the money and handing it over. The argument that surrender could not be the only remedy was enforced by a reference to teinds dedicated to pious uses, such as college teinds, which could not be bought—Act of 1690, c. 30—and therefore could not be surrendered—Ersk. Inst. ii, 10, 37. In such cases, therefore, if the remedy craved in the present case were incompetent the heritor when the demand exceeded the amount of his teind would have no remedy at all. The right to a remedy was however a paramount right which could not be limited by enforcing a surrender—*Oswald* v. *Martin*, *cit.* The fact that the remedy here craved had never before been expressly recognised did not demonstrate that it was incompetent. It was a remedy that would only be required in very exceptional circumstances such as those of the present time—Report of Departmental Committee on Fiars' Prices, 1917. It had, however, as a matter of fact been adumbrated in the case of *Williamson* v. *Campbell*, May 22nd 1822, Shaw's Teind Cases 21, where "surrender" was used by the Lord President as meaning "to pay over the amount of teind year by year." Further, where there was a definite statutory rule no amount of contrary practice would overcome it—case of the *Queensberry Leases*, 1819, 1 Bli. 339, at p. 455; *Earl of Home* v. *Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13, *per* Lord Robertson at p. 22, 40 S.L.R. 607; *Governors of George Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, *per* Lord Dundas at 1129, 49 S.L.R. 852. The *Lamington* case arose only in a locality, and had been followed only in localities, and could not rule in the present case because nobody could have tendered there as the defender tendered here. (2) In the case of unvalued teinds the Lord Ordinary assumed that for all purposes except against the minister the value was one-fifth of the rent. There was, however, no reason why the minister should be in a better position than the titular, because as stipendiary he was not entitled to any more than he would be as titular. A titular was trustee for the minister, and the heritor, where he was his own titular, was also trustee for the minister, and in every case he was trustee of one-fifth unless in the case of led teinds—*Burt* v. *Home*, 1878, 5 R. 445, *per* Lord Deas at p. 458, 15 S.L.R. 472. In all cases since the Statute of 1633, where teind was not in use to be drawn, it was held to be one-fifth of the rent—Connell on Tithes, App. 136. This was the proportion settled by the Act of 1633.

Argued for the respondent—There was no precedent for the defender's claim. The practice of two hundred and seventy years was against him. The defender in tendering for the yearly duty one-fifth of the rental was not tendering the teind. In the old days what was taken off the land was not teind but teind sheaves. Teind was the heritable incorporeal right producing these fruits. Therefore what the defender tendered was not teind but a sum at which the annual value had been fixed, or a sum which was taken as the annual value where unvalued. The case of *Baird* v. *Wemyss*, 1906, 8 F. 669, 43 S.L.R. 614, decided that the legislation of the seventeenth century had not in any way altered the position from what it was before, *i.e.*, from *debitum fructuum* to annual payment. Therefore even when the teind was valued the annual value was not the teind but the equivalent of the teind sheaves. It followed from this that it was incompetent to tender the valued teind in satisfaction of the decree of augmentation. The only remedy was to surrender the teind. The form of the decree of valuation supported this view because it spoke of "yearly duty"—Elliot, Teind Court Procedure, p. 95. Surrender was always competent as surrender to the cure, not to the individual minister. This was on the theory that the teind was the patrimony of the Church. The Court in the *Lamington* case did not introduce this method as something novel, but merely recognised it as something always competent though not hitherto resorted to. The Teinds Act 1808 (48 Geo. III, c. 138) codified procedure in augmentations and localities, and by section 14 expressly recognised the right to surrender the valued teind. The alternative was clearly put there, viz., the heritor must either subject his lands to being localled on or surrender the teinds—*Williamson* v. *Campbell* (*Locality of Newburgh*), Shaw's Teind Cases, 21; *Chisholm-Batten* v. *Cameron*, *cit. sup.*, 11 Macph. 292, Lord Benholme at p. 279, 10 S.L.R. 195. Further, surrender was a *res mercæ facultatis* available at any time and which could not be prescribed—*Earl of Minto* v. *Pennell*, 1873, 1 R. 156, 11 S.L.R. 66. In the case of *Learmonth* v. *City of Edinburgh*, 1857, 20 D. 190, the dicta of the Lord President (M'Neill) at p. 199, and of Lord Curriehill at p. 203, showed clearly that a

tender such as was here proposed would be negatived. That case was fatal to the defender's contention, and the same conclusion could be drawn from *Duncan* v. *Brown*, 1882, 10 R. 332, *per* Lord Rutherfurd Clark at p. 340, 20 S.L.R. 223. Surrender must be unconditional and perpetual—*Earl of Dalhousie* v. *Minister of Barrie*, 1915, 1 S.L.T. 392. The heritor could only surrender where there was free teind by reducing the locality and by setting up a new locality so as to compensate the minister for the consequence of the surrender—*Davidson* v. *Stuart*, 1919 S.C. 20, *per* Lord Cullen at p. 35, 56 S.L.R. 27. As regards the stock the Court, it was true, could not encroach on stock, but the minister had on the basis of his decree of locality the right to encroach on stock. The stipend was fixed in victual, so that the rise and fall of fiars' prices might cause an encroachment on stock, but if the heritor wished he had his remedy in surrender, otherwise he took the good with the bad—Ersk. Inst. ii, 10, 47. (2) In the case of unvalued teinds the defender's position was that he was entitled year by year to have a revaluation not on an average of years but on present rent, and to tender one-fifth of whatever his present rent might be. This would make the minister dependent on the fluctuations of each year. The one-fifth was not a substitute teind. It was only a measure of the value *ad hoc*, and in no sense was it teind, and it did not bind the minister—Act of 1633, cap. 15.

At advising—

LORD JUSTICE-CLERK—In this case the pursuer is minister of the parish of Minto, and he seeks decrees of declarator against the defender, who is the leading heritor in that parish, designed to determine certain questions as to the liability of the defender with regard to the payment of stipend.

In 1907 a decree of augmentation and modification was pronounced in favour of the pursuer. Thereafter, in 1908, by a decree of locality certain quantities of victual were localled on the defender's teind. According to said decrees the amount of stipend payable by the defender when duly converted into money is £616, 0s. 11½d.

The defender avers that as regards his lands in said parish they are divided into two classes. As to the first of these he has obtained a valuation of the teinds thereof. The second class consists of lands the teinds of which have not been valued.

The defender contends that as to the first class he is not bound to pay to the pursuer more than the amount at which the teinds of these lands have been valued, and that as to the second class—where the teinds have not been valued—he is not bound to pay as stipend more than one-fifth part of the present actual rent of the lands.

According to the defender's contention the amount due and payable by him to the pursuer is considerably less than what is claimed by the pursuer under the said decree of locality. The defender has paid the amount which he admits to be due, viz., the value of the teinds as to the first class and one-fifth of the present rent as to the second class, and he maintains that having thus paid all that can be legally claimed from him for stipend he is entitled to be assoilzied.

The Lord Ordinary rejected the defender's contention and granted decree as concluded for. In his note the Lord Ordinary dealt exhaustively with the arguments relative to the two classes of the defender's lands above referred to. But at the hearing before us the defender conceded that if he was wrong as to the valued teinds he could not succeed as to the unvalued teinds. The question as to them was not argued before us and it is therefore unnecessary for us to deal separately with these unvalued teinds if our judgment is against the defender as to the valued teinds.

The question we have to decide therefore is, whether when a minister claims from a heritor under a decree of augmentation, modification, and locality, the amount of money which represents the victual teind localled upon the heritor, it is enough for the heritor to tender and pay in any year the amount at which the teinds of these lands have been valued, in full of all that can be legally demanded from him.

The defender's ground for so maintaining is, that stipend can only be claimed out of the teinds and that the stock cannot be encroached on in order to pay the stipend, and that as he has paid the whole value of the teinds under said decree of valuation for the year in question no more can be asked from him, and he maintains that he is not bound to surrender his teinds as a condition of his being freed from greater liability.

The pursuer says that where, owing as here to the rise of the price of victual, subsequent to the decree of locality, as is the case here, the amount of stipend when converted into money exceeds the value of the heritor's teinds, the only option open to the heritor is either to pay the value of the victual localled on his teinds as so converted or to surrender the teinds of these lands to the minister.

I think it was admitted, and at any rate I am satisfied it is correct, that there is no case in which defender's contention has either been sustained or even advanced, nor can I find any trace of such a contention being considered or dealt with in any of the text-writers. On the contrary, in my opinion, there are many decisions which seem to me entirely to negative the soundness of the defender's contention.

The parties are agreed that if the defender duly surrendered his teinds that would absolve him from all liability under the decree of locality. But the defender says that surrender is not his only remedy, and he refuses to surrender.

The right of the heritor to surrender his teinds as an answer to a demand for payment of stipend seems to have been first recognised by the Court in the case of *Lamington* (*Mitchell*, M. 14,827) in 1798. In the last case in which this right to surrender was considered (*Davidson* v. *Stuart*, 1919 S.C. 20), decided in November 1918, all the

authorities were reviewed, and the judicial decision was, it seems to me, in favour of the present pursuer's contention.

The Lord Ordinary in *Davidson's* case, I think, in terms decided the point now raised as to the valued teinds adversely to the defender's contention, and his interlocutor on that point was not challenged.

The rule as to surrender in such a case as we are now considering was thus expressed in the case of *Mitchell*—"As the stock cannot be encroached upon it shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, at any time to give up and pay in all time thereafter to the minister the whole of his valued teinds according as the same shall have been ascertained by his decree of valuation."

In our law of teinds and stipend that rule so expressed in 1798 has ever since been universally accepted and acted on, and in my opinion this Court could not now possibly decide contrary to that rule.

In my opinion, further, no such rule could ever have been laid down or accepted if the heritor had possessed the right or option for which the defender contends. The rule in the interests of the heritor gave him an option whenever the sum claimed as stipend in terms of the decree of locality exceeded the amount of the valuation of the teinds to surrender his teinds rather than pay; but if the heritor had a right to meet the demand not by a surrender, which of course operated for all future time, but by a payment of the amount of the valued teind for the particular year, that was obviously a much less onerous condition on the heritor than a final surrender, and if the heritor had such a right I cannot conceive that our Judges, at that date far more experienced in the administration of teind law than we can pretend to be—now that such cases are much less frequent—would ever have made such a pronouncement as was made in the *Lamington* case or that that pronouncement would have been without question accepted and followed ever since. Where the heritor, under the options which the *Lamington* case declares him to have, surrenders his teinds he is not in any way regarded as acting contrary to the decree in the locality but as implementing it.

In the *Earl of Minto* v. *Pennell* (1 R. 156) Lord Ardmillan said—"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 merely a satisfaction of the decree by surrender."

Lord Cullen in *Davidson's* case said that "the right of a heritor owning the teinds of his lands and holding a valuation thereof to surrender them as valued at any time to the minister in substitution of his liability for locallled stipend, was laid down in the *Lamington* case in 1798 in clear terms."

So, too, Lord Mackenzie in *Davidson's* case said—"The right to surrender was first recognised in the *Lamington* case. If attention is paid to the terms of the interlocutor, it is seen that what the heritor who surrenders does is not to overturn but to implement the order in the decree of locality."

In the same case Lord Skerrington said—"The right of surrender is an inherent condition of the decree of locality."

The cases of *Chisholm Batten* (7 Macph. 565), *Colquhoun* v. *Fogo* (11 Macph. 919), and *Earl of Minto* v. *Pennell* (1 R. 156), seem to me conclusively to recognise and establish so far as we are concerned the soundness of what was laid down in the *Lamington* case in 1798.

In my opinion the heritor in the defender's position has the option of surrendering his teinds as an answer to the minister's claim, but he has no right or option to meet that claim by such a payment as the defender has made.

The minister's claim stands on his decree of locality; the defender not only does not propose to make a surrender but he refuses either to pay the sum in the locality or to surrender his teinds, and in my opinion, therefore, he must submit to decree as concluded for.

In my opinion the reclaiming note should be refused.

LORD DUNDAS—In my opinion the interlocutor reclaimed against is right. I agree generally with the thoughtful and elaborate judgment of the Lord Ordinary, but I do not think it necessary to discuss or determine all the topics with which it deals, though I have endeavoured to apply my mind to them. The actual grounds on which my opinion is based can be stated with comparative brevity.

The Lord Ordinary correctly states the two questions raised by the case. The first of these was placed in the forefront of the full and able argument submitted by the reclaimer's counsel at our bar; and we were informed that, contrary to the impression indicated by the Lord Ordinary, this course was also adopted at the debate in the Outer House. Indeed, the reclaimer's counsel frankly intimated to us that if he should fail to convince the Court upon the first point, he could not argue the second with any hope of success. In my judgment the reclaimer must fail as regards the first, and therefore *ex concessis* as regards the second point. It seems to me that a consideration of the *Lamington* case (*Mitchell* v. *Douglas*, 1798, M. 14,827), and what has followed upon it, makes it impossible for the reclaimer to succeed, so far at least as the Court of Session is concerned.

In the *Lamington* case a "special interlocutor" was pronounced by "the fifteen," which included "this explanation, that as the stock cannot be encroached upon, it shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, at any time to give up, and pay in all time thereafter, to the minister, the whole of his valued teind, according as the same shall have been ascertained by his decree of valuation." It was argued that this could not have been intended as a universal rule, applicable to all cases, because it would not apply to college teinds and the like. But it does not follow that, though the rule laid

down would not apply to certain minor and exceptional cases, with which the *Lamington* case had no concern, and which may not have been present to the minds of the judges, it was not deliberately announced as a general rule to be applied in ordinary cases, such as the one then before the Court or that which is now before us, where exceptional conditions, such as those attaching to college teinds, are not concerned. I am of opinion that the *Lamington* case did intend to lay down a rule of general, though it may be not of universal, application. But it was further argued that the interlocutor in *Lamington* does not expressly state that surrender, out and out, of his right to teind is the *only* alternative to payment of the localled stipend which is open to a heritor; and does not preclude the existence and exercise of other courses, *e.g.*, that which the defender here seeks to resort to, viz., to satisfy the minister's demand by offering the amount of his valued teind,— or one-fifth of the present rental of his land where the teind is unvalued,—in any year when it may suit the heritor's interest to do so. I confess that this argument does not appeal to me. As mere matter of construction I should hold that the *Lamington* interlocutor, when it states that "it shall be optional to any heritor, instead of delivering and paying the amount of the victual and money stipend thus laid upon him, at any time to give up and pay in all time thereafter to the minister the whole of his valued teind," indicated as *the* alternative—not merely *an* alternative—to payment of the localled stipend, an out-and-out surrender of his valued teind for all time. That this construction is the correct one seems to me to be beyond question when one considers the language of the 1808 Act, the views expressed by text-writers, and the long series of judicial dicta and decisions, all of which, with perhaps the exception of Lord President Hope's opinion in the *Newburgh* case (1822, Shaw's T.C. 21), are referred to and discussed by the Lord Ordinary. I do not propose to repeat, but would rather adopt, what his Lordship has to say on these matters. I agree with his pregnant observation that there would obviously be "no need for a surrender if in any year the heritor could refuse to pay more than his valued teind without committing himself as regards the future"; and with his summary of the matter thus, "the result of my examination of the authorities is that for the past 120 years it has been assumed that a heritor must pay the stipend localled upon him under a final decree of locality unless he surrenders his teinds; that a system of procedure has been based on this assumption, and that this assumption has been recognised by statute, by judicial dicta, and by all legal commentators during that period." I cannot conceive that the lawyers of Scotland—bench, bar, and agents alike—should have failed during all these years to suggest that a course such as that now sought to be adopted by this defender was available to heritors whose interest it might be to adopt it. There must have been occasions, notably in such times as those succeeding the Napoleonic wars, when it would have suited the interest of many a heritor to take up this defender's attitude, yet there is no trace of any attempt to do so. It is doubtless true, as the Lord Ordinary observes, that the conditions prevailing at the present day are without exact parallel in the past; but they differ in degree only, not in kind, from those which have affected Scotland in bygone times; and it was not, I think, disputed, and could not be, that if, as I hold, a rule of law has become established in the sense I have indicated, considerations of supposed equity or convenience cannot absolve the Court from the duty of enforcing it. In my judgment the course proposed by the defender is not only without precedent but is opposed to authority. It could only, I think, be given effect to by a decision of the House of Lords or by the Legislature.

On these short grounds I am for adhering to the Lord Ordinary's interlocutor.

LORD GUTHRIE—This case concerns the amount of teind payable by a heritor to a minister. The minister sues for £616, 0s. 11d.; the heritor offers £457, 4s. 4d. The difference is unimportant; for this is a test case involving a principle of valuation, which, if the contention of the pursuer, the minister, is correct, and if fiars prices continue at anything like the present rate, must seriously affect—the pursuer would put it must continue to affect—the liabilities of heritors for payment of teinds or their value in all parts of Scotland.

I agree with the Lord Ordinary's conclusion and with the grounds of his opinion. If I had differed from him I should have done so with hesitation, in view, first, of his learned and able discussion of the historical origin and the principles and practice of and under the law of teinds affecting this case, and his exhaustive discussion of decisions, statutes, and legal commentaries, and in view, second, of his exceptional experience in a branch of the law described by Professor Cosmo Innes in his Scotch Legal Antiquities (p. 24)—"In teinds there still lurks the mysterious and alluring obscurity that furnishes the best field-days at our bar." In no branch of the law is experience of practice, as well as familiar knowledge of history and principles, more essential. Mr Nenion Elliot, the late learned Clerk of the Teind Court, in his standard work on Teinds or Tithes and Procedure in the Court of Teinds in Scotland, published in 1893, treats the system with due respect. But before his appointment as Clerk of Teinds he wrote as follows in his Teind Papers, containing an Account of Tithes in Scotland, with Suggestions for the Amendment of the System, published in 1874—"The absurdity of the present system of awarding augmentations and of assessing the stipend upon the heritor can hardly be appreciated without some account of it . . . when the augmentation is granted it is not awarded in money; and herein is found one of the greatest absurdities and inconveniences of the system.

. . . The system of awarding in Scotch chalders, converting these into imperial weights and measures, and then converting them into money, as drawn by the minister, is unworthy of an enlightened age. . . . The calculations remind one very forcibly of those engaged in by the celebrated calculators of Laputa, brought to light in the travels of Gulliver. . . . Such calculations are ridiculous at this time of day, and it is wonderful that no remedy has hitherto been devised for removing them from the system."

The Lord Ordinary states that "there was undoubtedly great confusion, both in law and practice, in regard to teinds for more than a century after the Reformation." Mr Elliot thinks the confusion still exists. His pamphlet was published forty-six years ago, and applies in terms to the present case, which is one of a valuation in money and an augmentation in victual, followed by a locality in which the victual is converted into and allocated in money. No remedy has yet been devised, and the Court must do its best with the system as it stands. It is evident, however, the Court would be slow to innovate on practice which, as alleged by the minister and admitted by the heritor, has obtained for more than 120 years, and to introduce a principle for which there is no equitable necessity, and which finds no support in any statute or judicial dictum or in the work of any legal commentator.

The case appears at first sight complicated by three circumstances, none of which, however, appear necessary for the settlement of the essential question between the parties. *First*, the defender's teinds of Minto and Newlands are valued, while those of Cockersheugh and Hassendean are unvalued. *Second*, the defender has admittedly a heritable right to the teinds of Minto and Hassendean, while he has no heritable right to the teinds of Newlands, and it is in controversy between the parties whether he has a heritable, or at all events a statutory, right to the teinds of Cockersheugh. *Third*, it is in dispute, in regard to the unvalued Cockersheugh teinds, whether the defender could surrender them even if he were in a position now to expede a valuation. I look upon these points as non-essential, because in regard to the first the defender admits that if he is not entitled to succeed in his contention as to his valued teinds he cannot hope for success in regard to his unvalued teinds. The second point disappears when it is admitted that whatever the defender's legal interest in the teinds, he has been, and is, an intromitter with them. As to the third point, if it be the fact that the defender cannot first lead a valuation and then surrender, while his position might involve hardship it could not affect the legal result of the pursuer's argument.

Confining attention then to the defender's valued teind which he is in a position to surrender, the question is whether, when he is called on under a locality to pay more than the amount of his valued teind, he can satisfy the minister's claim by tendering the whole amount of his valued teind, or whether he must pay the amount contained in the locality unless he surrenders his teinds in perpetuity? The heritor claims that in such circumstances he has two alternatives, namely, either in any year when it suits him to tender the amount of his valued teind or to surrender once for all; the minister maintains that there is only one alternative open to the heritor in the event of his being called upon in any year to pay more than the amount of the valued teind, namely, to surrender for all time coming.

A heritor in the circumstances of the defender undoubtedly finds himself in an anomalous position when a demand is made on him under a locality for payment of more than his valued teind. His predecessor got his teind valued with all due statutory and judicial formalities in order to ascertain his maximum liability for teind, so that, as Lord Ardmillan puts it in *Minto* (1 R. 163), "the teinds shall have been authoritatively ascertained and separated from the stock." Now he is faced with a demand founded upon equally formal statutory and judicial proceedings, under which he is called on to pay more than the whole amount of his valued teind. But it is to be observed that when in 1819 the defender's predecessor got his valuation of the Minto and Newlands teinds (a proceeding to which the minister did not require to be called) it was the settled practice, sanctioned if not rendered compulsory under section 9 of the Statute of 1808, for modifications to be in victual, which was converted into money according to an average of the preceding seven years' fiars prices. The defender's predecessor could have obtained his valuation in victual, in which case there could have been no question, as here, of two inconsistent money values—the one fixed in the valuation, and the other resulting from the conversion of the victual stipend into money. He chose to take it in money, and must be held to have known that the precise difficulty which has now arisen, namely, of victual stipend being in excess of valued teind, might at any time arise. This was additionally evident if one considers the great rise in prices which had attended the immediately antecedent Napoleonic wars. Having taken the valuation in the form he did I am unable to see how, so long as he remains a heritor or intromitter with the teinds, he can escape the liability imposed on him by a subsequent decree of the Court acting strictly in accordance with statutory and long-established consuetudinary forms. When the valuation in money was obtained in 1819 it must have been known that in certain circumstances this result might follow.

The heritor is not left without a remedy. Lord Minto as an individual need not pay anything to the minister, because he has an absolute right to surrender and cease to be a heritor, but so long as he remains a heritor he must pay under the locality in question. If he chooses to abandon his interest in the teinds by surrendering them, then of course he will be free not only from all liability to pay more than the valued teind, but from liability to pay anything in the name of teind.

I adopt the Lord Ordinary's convincing

and masterly review of the relative positions of the heritor's valuation and the minister's modification and locality as appearing from the statutes, legal decisions, and institutional writers. It seems to me that whether the "explanation" in the interlocutor in the *Lamington* case (1798, Mor. 14,827) be a mere declarator of an existing right, or an expedient specially devised in the exercise by the Court of quasi-legislative functions to meet an exceptional inequity, the phrase in the interlocutor "as the stock cannot be encroached on" merely means that "the Court of Teinds can never encroach upon the stock, whether by a payment in money or grain," as is said in the report of the *Eddleston* case, 1805, Mor. Teinds, App. 28. But heritors rather than surrender their rights may allow such encroachment, and are in the regular habit of doing so. And I agree with his conclusion that in this case the defender, as a continuing heritor or intromitter with the teinds, must make payment for the year 1917 of more than the whole of his teind valued or unvalued, and that he can only escape such payment by surrendering the teinds (in the case of the unvalued teinds first obtaining a valuation) and thus ceasing to be a heritor or intromitter with them, which he neither proposed or now proposes to do. It is said that the heritor's proposal to tender his valued teind as the measure of his liability has never been made before, because on no previous occasion has there been such an abnormal increase in the fiars prices. But it is not denied that heritors have been in use to pay in excess of their valued teind. Indeed, in answer 9 in this very case the defender, dealing with the unvalued teinds of Hassendean and Cockersheugh, seems to admit his obligation to pay more than the value of his teinds, because he avers that the one-fifth of the rental which he offers "is in excess of the whole teinds of the lands of Hassendean Bank and Cockersheugh for crop and year 1917."

The individual excess sums in such cases may have been small, but in aggregate down the generations they must have amounted to a vast sum, and at such times as the Napoleonic wars even the individual sums must in many cases have been considerable. While I can, although with difficulty, conceive it possible that the argument now maintained for the defender might have been omitted through the ignorance or remissness of the eminent counsel for the heritor in the *Lamington* case (Henry Erskine, Charles Hay, afterwards Lord Newton, and Adam Gillies, afterwards Lord Gillies), I cannot imagine that the Bailie Macwheebles of the past and present acting for impecunious lairds, to whom every copper, especially an annually recurring copper, was of importance, lairds (like the Baron of Bradwardine in Waverley, whose wily "doer" was Bailie Macwheeble) of a litigious turn, and politically and ecclesiastically hostile to the Church of Scotland, would not long ago have claimed the option now claimed by the defender. They did not do so, because they knew they had one option, and one option only—"the option," it was so put in the *Eddleston* case (1805, Mor. Teinds, App. 28), "either to pay or to surrender," as was said by the Lord President (Hope) in *Williamson* v. *Campbell*, 1821, Shaw's Teind Cases, p. 21. In other words, adapted from another connection, "Your money, or—your teinds."

LORD SALVESEN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Hon. Wm. Watson, K.C.—A. M. Mackay. Agents—Menzies & Thomson, W.S.

Counsel for the Defender and Reclaimer—Macphail, K.C.—J. S. C. Reid. Agents—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Tuesday, March 9.

FIRST DIVISION.

[Scottish Land Court.

M'COLL *v.* BERESFORD'S TRUSTEES.

Landlord and Tenant — Process — Small Holding — Competency — Motion for Rehearing after Special Case Applied for— Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49) — *Rules of the Scottish Land Court, Rules* 90, 95, *and* 98.

An application was presented to the Land Court to have the applicant declared a landholder or a statutory small tenant and to have his rent fixed accordingly. The Land Court refused the application. The applicant presented a requisition for a special case and lodged a draft case. Thereafter he lodged an application for a re-hearing on the ground that he desired to lead further evidence which had not hitherto been brought before the Court. He refused to withdraw his requisition, but stated that pending the re-hearing he did not intend to proceed with the special case. The landlord opposed the motion for re-hearing as incompetent standing the requisition. The Land Court refused it as incompetent on the grounds that having disposed of the application by a final judgment it was *functus* and in view of the appeal there was no longer any case before it, and that if the motion were granted two courts would be considering the same point concurrently. *Held* that the motion was competent.

The rules of the Scottish Land Court provide:—Rule 90—"Any party whose interests are directly affected by a final order pronounced in an application may move the Court on one or more of the grounds enumerated in rule 95 to order that the application shall be re-heard, in whole or in part, upon such terms and conditions or otherwise as the Court shall think right."

Rule 95—"A motion for re-hearing may be made upon one or more of the following grounds— . . . (3) That the party moving was prepared to adduce pertinent and im-