Each case I observe was decided on the special terms of the contract, and none of them was quite like this. But if they do support the contention, then in my opinion they are inconsistent with *Watson* v. *Shankland*, and that is an authority which I am bound to follow.

"As the defenders admitted at the Bar that the subjects arrested exceeded in value the amount of the pursuers' claim, I am of opinion that the pursuers are entitled to decree as concluded for."

The arrestees reclaimed.

At the calling of the case counsel for the arrestees moved that the case be sisted following the decision in *Ferguson & Company* v. *Brown & Tawse*, 1918, 55 S.L.R. 437, and stated that his clients were prepared to find caution. No objection was taken for the pursuers (respondents).

The Court sisted the cause upon caution being found by the arrestees.

Counsel for the Pursuers—Constable, K.C. —J. H. Millar. Agents—Wallace & Pennell, S.S.C.

Counsel for the Arrestees—Moncrieff, K.C. —W. T. Watson. Agents—Webster, Will, & Co., W.S.

COURT OF TEINDS.

Tuesday, November 5.

[Lord Anderson, Ordinary.

DAVIDSON *v.* STUART.

Teinds—Process—Surrender—Competency—Final Decree of Locality—Surrender of Valued Teinds where No Free Teind in Parish—Vesting of Stipend Quantum Valeat.

A heritor obtained a decree of valuation of his teinds on 23rd November 1916. On 19th February 1917 he wrote a letter to the minister intimating that he surrendered his teinds, but did not refer to the valuation or mention the amount of the valued teinds surrendered. On 12th March 1917 he executed a deed of surrender of his teinds, which referred to both of those matters. There was no free teind in the parish, but a final decree of locality was in force. ***Held*** that (1) the heritor could competently surrender his valued teind without reducing the final decree of locality; (2) that the teinds had been validly surrendered by the deed of surrender, which specified the amount of the valued teind surrendered; and (3) that while the stipend for crop and year 1916 vested in the minister at Michaelmas 1916, its amount was not fixed until the fiars' prices for 1916 were struck in 1917, by which time the surrender had taken effect and the stipend for 1916 fell to be paid as modified by the surrender.

Opinion per Lord Cullen, concurred in by the Lord President, that the document of surrender should state the amount of the valued teind.

John Davidson, heritable proprietor of the lands of Adderstone and Adderstoneshiels and of the teinds thereof, *pursuer*, brought an action against the Reverend John Stuart, minister of the parish of Kirkton, in which the said lands were situated, *defender*, concluding in the second place for decree of declarator and interdict to the effect that "the pursuer has validly surrendered to the defender and his successors in office as ministers of the said parish of Kirkton the teinds, both parsonage and vicarage, of the said lands and others belonging to the pursuer and hereinbefore described, and that at the said sum of £96 sterling per annum, being the just, constant, and true value of the teinds, parsonage and vicarage, of the said lands and parts, pendicles, and pertinents thereof, and that as at the 19th day of February 1917, or at such other date as may be found by our said Lords in the course of this process to be the date of said surrender, and that the pursuer is bound only to make payment to the defender and his successors in office of the sum of £96 sterling per annum in full of all stipend exigible by them from the pursuer or his successors in the said lands and others, and that from and after the said date; and the defender and his successors in office ought and should be interdicted, prohibited, and discharged from charging the pursuer or his successors in the said lands upon a decree of locality of the Court of Teinds, dated 30th October 1903, of the stipend of said parish of Kirkton, or upon any future decree of locality of the stipend of said parish, for any sum in excess of the sum of £96 sterling, or from otherwise seeking to recover from the pursuer or his successors in the said lands any sum in excess of the said sum of £96 sterling per annum as stipend due by him or them in respect of the said lands."

The pursuer *pleaded, inter alia*—"1. The pursuer's teinds amounting to the sum of £96, the defender is not entitled to any sum in respect of stipend over and above said amount. (2) *Separatim*, the pursuer having validly and effectively surrendered the teinds of his said lands is not bound to pay to the defender any sum in excess of the valued amount of said teinds, and decree of declarator and interdict should be pronounced as craved."

The defender pleaded, *inter alia*—"4. The pursuer cannot be heard to propone the conclusions second written unless and until he has first (*a*) reduced the existing decreet of locality of the stipend of Kirkton, and (*b*) provided the defender at the pursuer's expense in a new process of locality wherein the due and full stipend modified to the cure may be fully allocated on and against the existing free teinds of the parish. 5. The pretended surrender being inept in form, *et separatim* of no force, avail, or effect till the authority of the Court of Teinds is interponed in a proper process, the first part of the second conclusion should be dismissed."

On 19th March 1918 the Lord Ordinary (Anderson) sustained the pursuer's second plea-in-law, and granted decree in his favour in terms of the second or alternative conclusion of the summons, with interdict corresponding thereto.

Opinion, from which the *facts* of the case appear:—"This is an interesting and important case. The pursuer is heritable proprietor of the lands of Adderstone and Adderstoneshiels, with the teinds thereof, lying within the parish of Kirkton and county of Roxburgh. These lands were acquired by the pursuer from Professor Pringle Pattison in June 1910. The defender is the minister of the parish of Kirkton.

"In the year 1903 the defender applied to the Court of Teinds for an augmentation of stipend. By decree of modification and locality, which was approved final on 3rd March 1905, the Court of Teinds modified the constant stipend of the parish at 22 chalders victual and £8, 6s. 8d. for communion elements, and localled upon said lands of Adderstone and Adderstoneshiels, out of the said gross stipend, 46 bolls odds of meal and barley and £1, 4s. 4d. of money sterling. On the basis of the fiar prices prevailing at the date of said decree of locality the result of the modification and locality was to leave £44 or thereby of free teind in the parish, of which £15 or thereby applied to the said lands of Adderstone and Adderstoneshiels.

"One of the effects of the present war has been to increase abnormally the prices of meal and barley. The result has been that heritors are being called upon to pay stipends which have increased enormously, and are increasing, out of an income which in the majority of cases has either remained stationary or has even diminished. In the ordinary case the heritor has his land let on agricultural lease. Unless in the rare case where the rent is payable in grain a landowner is not benefiting in the shape of increased rents by the enhanced prices prevailing for farm produce. Other burdens on proprietors, such as cost of repairs, wages of estate workmen, public burdens, and interest on borrowed money, are all rising. Rental of a non-agricultural character, *e.g.*, shootings, fishings, and mansion-houses, has either ceased to exist or has been greatly reduced. A few figures will show the extraordinary revolution which has been effected by the war on the ecclesiastical finances of this small parish. Prior to the date of the last modification in 1903 the whole teinds of the parish (the sums are stated in round figures) were valued at £353, the stipend was £264, the free teind £88. A modification of three chalders was granted, absorbing about one-half of the free teind, and raising the stipend to nearly £300. The value of the chalder was then £13-£14. The value of the chalder on the fiar prices for 1917 was £32-£33. The stipend for crop and year 1916 was in money value £621, which had to be met out of a teind of £353. Thus the defender's stipend, calculated on the basis of present fiar prices, greatly exceeds in amount the value of the teinds of the parish. The pursuer paid the stipend for the year 1914, although it was in excess of his teinds, the excess being only slight. The difference was so serious in the case of the year 1915 that although the pursuer paid the stipend for that year he resolved to take steps to meet the anomalous situation which had arisen. Accordingly in the year 1916 he raised before the Court of Teinds an action of valuation of his teinds, in which he obtained a decree of valuation of teinds on 23rd November 1916. By said decree it was found and declared that the rent, stock, and teinds of said lands was of the constant yearly value of £480 sterling, one-fifth whereof for teind, parsonage and vicarage, was £96 sterling, which sum of £96 was declared to be the value of the teinds to be paid in place thereof in all time coming.

"The next step taken by the pursuer was to send a letter to the defender on 19th February 1917 intimating that he surrendered the teinds of his said lands to the defender and his successors in office. On 12th March 1917 the pursuer, in corroboration of said letter, and without prejudice thereto, executed and delivered to the defender a deed of surrender of the teinds of his said lands.

"The pursuer had on 1st March 1917 (for the purpose of meeting the stipend due for year 1916) sent to the defender a cheque for the said ascertained yearly value of his teinds, to wit, £96, less income tax, £19, 0s. 10d.=£76, 19s. 2d., but the cheque was returned, and on 7th March 1917 said sum was consigned in bank in the names of the pursuer and defender.

"Notwithstanding the said tender and the deed of surrender the defender has intimated a demand for the stipend for the year 1916, being £191, 5s. 5d., less income tax, £37, 18s. 8d.=£153, 6s. 9d., and has threatened to charge the pursuer for payment of said sum.

"In these circumstances the pursuer on 25th January of the present year raised this action.

"It would be startling if the pursuer had no legal remedy for the extraordinary situation created by the war. By the law of Scotland the stipends of ministers of the Established Church are payable out of the teinds of heritable estates. An augmentation of stipend can only be granted if there is free teind in the parish out of which the increased award can be met. The Court of Teinds is a statutory creation which has jurisdiction only over teinds, and in particular has no jurisdiction over stock. Hence if the free teind has been exhausted there can be no enhancement of stipend. There is no authority for enforcing payment of stipend wholly or partially out of stock. If there is no free teind, even the small sum necessary for the provision of communion elements cannot be awarded out of stock—*Wilkie*, M. 2493; *Buchanan*, 4 Macph. 1023. The decree of the Court of Teinds modifying and localling a stipend makes all this quite plain. In the present case the decree ordains the pursuer's predecessor to pay the localled amount of stipend 'out of the teinds' of his lands. As the total annual value of these teinds has been found to be £96, the demand of the minister for payment of £191, 5s. 5d. implies that the pursuer is asked to pay to the defender a sum of nearly £100 not from teinds but from stock.

"*Prima facie* there is no justification in law for this demand in so far as it exceeds the full value of the teinds.

"The defender's counsel did not seriously

contend that there was no legal remedy open to the pursuer to meet the existing state of matters, but they joined issue with their opponents on two points — (1) It was maintained for the defender that the first declaratory conclusion of the pursuer's summons was incompetent; and (2) While the defender conceded that it was competent to the pursuer to surrender his teinds, and so determine his liability under the decree of locality, it was contended that the pursuer had not followed the proper procedure in this matter of surrender. The defender's counsel contended generally that surrender of teind was only competent if the surrender was accompanied by rectification of the locality. As the arrangement made by the Court for the payment of stipend has been dislocated by the surrender, it was maintained that the pursuer's duty was to put matters right by procuring a new locality. It thus appears that rectification implies reduction of the subsisting decree of locality in order to prepare the way for a new scheme of locality. There are only two ways of getting rid of subsisting decrees of locality—(1) By a process of augmentation, which results in a new decree of locality superseding the former decree; and (2) by reduction of the subsisting decree in a process for rectification of the locality. The general contention of the defender for rectification thus expands itself into these propositions which were maintained — (1) That surrender of teinds must always be preceded or accompanied by reduction of the subsisting decree of locality; (2) that surrender must be made in an open locality; and (3) that the surrender must be a judicial step, effected by minute of surrender, which requires a judicial *imprimatur* to make the transaction complete.

"The contention of the pursuer's counsel on the other hand was that surrender of teinds may take place at any time, whether the locality is or is not open, and may be effected in any way adequate to express and carry out the heritor's intention to surrender. It was argued for the pursuer that where the free teind, as is the case in the defender's parish at the present time, was exhausted, rectification was an impossibility and reduction of the subsisting decree a futility.

"It was not suggested by the defender's counsel that there was any other mode of rectification save one, namely, by the transference to other heritors of the loss sustained by the minister through the pursuer's surrender, and it was not contended that this burden could be laid on anything other than unexhausted teind.

"The question I have to decide is which of these conflicting views is right.

"The form of the pursuer's action is that of declarator and interdict, and he has proponed two alternative declaratory conclusions. These conclusions have different practical consequences. By the first declaratory conclusion the pursuer proposes that he should remain titular of the teinds, but that his liability under the subsisting decree of locality should be limited to the full value of his teinds, to wit, £96 per annum. I do not propose to determine whether or not this conclusion has legal justification. It is conceded that there is no authority for granting it, and on a subject so technical as that of teinds I conceive that it is my duty to proceed on the lines of settled practice and decision. It may be that the course suggested by the pursuer in this conclusion of the summons has never been sanctioned because of the practical consequences which would ensue. Under this conclusion the heritor would appear to obtain all the actual and prospective advantages of the transaction and the minister all the disadvantages. While the minister under present conditions would be deprived of a part of the stipend which the Court had granted him, he would not on the return of normal conditions reap any compensating gain. The heritor would then be restored to pre-war conditions and have in hand a certain amount of free teind. It would appear to be equitable that if the minister is to suffer now he should be placed in a position wherein he might have a chance at a later date of recouping himself for present loss. It may be that considerations such as these determined the practice sanctioned by the Court in such circumstances as the present, which was to compel the heritor to surrender his teinds out and out to the minister.

"By a surrender the minister becomes titular of the teinds, and for all time coming he and his successors are placed in a position to draw the full annual value of the teinds. By this method, if there is present disadvantage, there may be prospective compensating advantage.

"I propose therefore to refuse the first declaratory conclusion proponed by the pursuer, and to confine my attention to the second or alternative conclusion which is suggested.

"It being common ground that the pursuer can meet the present situation by a surrender of his teinds, the only matter of dispute between the parties is as to the proper method of making this surrender. Is it then an essential preliminary to a surrender of teinds that the decree of locality should be reduced and the surrender made in an open locality?

"On principle the most formidable consideration from the defender's point of view is that there is extant a decree of Court ordaining the pursuer to pay each year the value of a certain quantity of victual. But the terms of the decree are not absolute. They are qualified to this extent that the annual payment has to be made out of teinds. Under our former practice whereby stipends were modified only and were not allocated, any individual heritor in the parish might be charged to make payment of the whole stipend. But his liability was limited by the value of his teinds (Erskine ii, x, 47), and if the amount demanded exceeded the value of the teinds, a suspension of the charge to the extent of the excess might be brought. After interim decrees of locality were introduced under A.S., 5th July 1809, the same remedy was open to any heritor if the stipend allocated against

him by interim decree exceeded his valued teind—*Macartney*, 4th March 1817, F.C. If, then, it was sufficient, to elide liability, merely to suspend the charge and the decree so far as supporting an improper charge, it would seem to follow that reduction of the decree was not essential in order to counter an unjustifiable demand made by the minister. If a suspension of a charge were accompanied by a judicial surrender of the whole teinds, it seems to me that the whole charge would fall to be suspended, and the heritor would thus get rid of his whole liability under the decree of locality without having to reduce it. So far as principle is concerned I do not see why an heritor should not at any time, and whether or not the locality is open, take up the position that instead of paying stipend from his teinds he will surrender these to the minister and thus enable the minister to pay his stipend therefrom. It was maintained on behalf of the defender, on principle, that equitable considerations required that the heritor surrendering should rectify the effects of his surrender. But if the heritor has a legal right to surrender in order to elide his liability for stipend, I do not see that he is responsible for the consequences of this legal act. In the case of the *Earl of Minto*, 1 R. 156, 11 S.L.R. 66, Lord Ardmillan, at p. 164, says—'the heritor's act of surrender is not a challenge of the decree of locality, but the exercise of a right which does not imply an objection to the locality to be enforced by reduction, but rather a satisfaction of the decree by surrender.' If surrender is really a satisfaction of the decree, these consequences which are destructive of the defender's contention seem to follow :—(1) That the surrender may be made at any time at which the decree of locality is being enforced by the minister ; (2) That the surrender may be made in any way; and (3) That the minister has no further claim on an heritor who surrenders. The minister's claims against the heritor are limited by the terms of the decree of locality ; if these claims are fully satisfied by the surrender of teinds, what legal justification is there for asking the heritor to do something more, to wit, to proceed to rectify the locality? On principle, therefore, I am unable to hold that it is a fundamental necessity in the matter of surrendering the teinds to reduce the decree of locality.

"As regards authority, it is nowhere laid down that as a necessary step of procedure a surrender of teinds must be preceded by a reduction of the subsisting decree of locality. On the contrary, the weight of anthority appears to me to be against this contention. Prior to the *Lamington* case (*Mitchell*, 24th January 1798, F.C., M. 14,827) a decree of locality obtained *in foro* was regarded as *res judicata*, and as such was not open to challenge by the heritor—Connell, i, 522. The case of *Mitchell* decided 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 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 a number of later cases the subject of the surrender of teinds and the circumstances in which this could take place were considered by the Court—*Dalgleish*, M. 15,714; *Eddleston* case, M. *voce* "Teinds," App. No. 13; *Nenthorn* case, *ibid.* in note to Eddleston ; *Fearn* case, 21st November 1810, F.C. ; *Ogilvie*, 5th June 1811, F.C. ; *Maxwell*, 3rd July 1816, F.C. ; *Macartney* (*cit.*). In none of these cases is it suggested that reduction of the decree of locality is a necessary preliminary to an effective surrender; in all of them the Court held that the surrender might be made 'at any time.' No countenance is given to the view that surrender can only take place in an open locality, and that it requires the *imprimatur* of the Court to make it effective. The import of these decisions and a correct statement of the law is, in my opinion, contained in a note of Lord Ivory (No. 276) to Erskine, ii, x, 47, where this is said—'An heritor whose teinds have been valued is entitled at any time to surrender his teinds at the valuation ; and this however long he may have been in the custom of paying beyond his valued teinds, even though these payments have been made under the sanction of prior decrees of locality.'

"In the case of *Oswald*, 14 Sh. 32, Lord Mackenzie said at p. 35—'Suppose that a final scheme of locality had subjected an heritor in a certain sum, and he afterwards discovered a decree of valuation and produced it, and offered to surrender his teinds, that would be a complete protection to him if the valuation was admitted to be valid and regular.' This appears to me to be a correct statement of the law, and if, after the word 'discovered,' the words 'or procured' be added, the statement of the law becomes complete. The contention of the defender that reduction of the decree of locality must be the first step in the surrender of teinds appears to me to be conclusively negatived by the decision in the *Earl of Minto*, 1 R. 156, where it was expressly determined (1) that it is not necessary for the heritor who desired to surrender his teinds to reduce the decree of locality ; and (2) that the right to surrender being *res meræ facultatis*, could not be affected by the negative prescription.

"It is doubtless the case that in special circumstances the duty of rectifying the locality may be thrown upon the heritor—*Cameron*, 7 Macph. 565; *Duncan*, 10 R. 332. The special circumstances in which rectification may have to be undertaken by the heritor appear to be these—(1) When the subsisting decree of locality has been challenged by the heritor on the ground that it has proceeded upon an erroneous valuation of his teind, and (2) when there is free teind available for rectification purposes. If it be the case that the heritor or his predecessor had failed to produce a valuation of the teinds when the stipend was being allocated, the subsequent rectification, proceeding on a correct valuation, would probably have to be made at the heritor's expense. It is to

be noted that in the cases of *Cameron* and *Duncan* the heritors challenged the subsisting decrees of locality on the ground that these had proceeded on excessive valuation of their teinds, In the earlier stage of the litigation in the *Cameron* case—that reported in 7 Macph.—the question of surrender was not before the Court. Surrender was evidently resolved upon by the heritor at a later date and as a counter to the demand of the minister for payment of the amount of stipend which had been paid for the prescriptive period, and the report of the later litigation in this case (11 Macph. 292) shows that the Court recognised the surrender as an effective response to the minister's claim. In the present case the pursuer does not challenge the decree of locality. He does not complain of its terms, but only of its legal effect in circumstances which are abnormal and which were not foreseen when the decree was granted. It is true that stipend was localled on the pursuer's predecessor on a valuation of teinds of £98, 10s. 8d., which is slightly in excess of that determined by the Court in 1916. But I am satisfied that the pursuer would not have challenged the decree of locality on this ground, and would not have obtained a decree of valuation had this been his sole reason for doing so.

It is an essential condition of rectification that there should be available free teind, and at the present time there is none in the parish of Kirkton. The defender's counsel recognised the difficulty which the absence of free teind created, and was driven to suggest that the pursuer must, at all events, make an offer of rectification in order to make his surrender effective. I am not prepared to ordain the pursuer to offer to perform what cannot be performed.

"If it be urged that surrender ought not to be sanctioned at the present time because under present circumstances rectification cannot be carried out, the answer to this contention is to be found in what was laid down by the judges in the cases of *Mitchell* and the *Earl of Minto*, where the present situation is foreshadowed. In the report of the case of *Mitchell* in Morison, at p. 14,830, a 'majority of the Court' laid it down that if the fiar price of the grain which the heritor paid to the minister should ever come to exceed his whole money teind, he will be entitled to the alternative of giving it to the minister in place of the grain allocated upon him. And in the case of the *Earl of Minto*, the Lord President says, at p. 162, 'if there is a final decree of locality, giving a stipend to the minister in victual, and a decree of valuation valuing the teinds in money, it may happen that the victual stipend will be in excess of the valued teind at one time and not at another. It may not be in excess of the valued teind at the time that the augmentation is given, and yet afterwards, either within the years of prescription or beyond the years of prescription, it may come to be in excess of the valued teind by a rise in the price of victual. It is obvious therefore that this right of surrender, which is here very properly said to be in the option of the heritor at any time, is a thing which the heritor may have an interest to do at one time and not at another. But it may not be his interest to do it at once after the final decree of locality is pronounced, because the victual stipend may not be above the valued teind, or may be so slightly above it that it is not worth his while to make a surrender. At a future time, either within or beyond the years of prescription, as I said before, it may be his interest and very worth his while to make a surrender.'

"Suppose that all the heritors in this parish surrendered their teinds to the minister. This is a not unlikely event. It is a small parish in which there are only four stipend-paying heritors, of whom another, in addition to the pursuer, has surrendered the teind. If the minister was made titular of all the parochial teinds could he claim anything more from any heritor? I do not see how he could succeed in any such claim. The situation at the present time appears to me to be the same as if this complete surrender had been made.

"The pursuer's counsel maintained, in my opinion rightly, that the pursuer had no available ground on which to sue reduction of the subsisting decree of locality. To reduce the existing decree, it was argued, would be a futility. It would be futile to do so, so far as the heritor's interests are concerned, as there is no known procedure in the Teind Court for diminishing a stipend, and so bringing it below the teindable rental at a current rate of fiar prices. It would also be futile so far as the minister's interests are concerned, for there is no free teind which could in a new locality be saddled with the loss resulting to the minister from the pursuer's surrender of teind.

"I regard the cases of *Mitchell* and the *Earl of Minto* as being the vital authorities in the determination of this case, the former as conclusively founding the practice as to the surrender of teinds, the latter as explaining authoritatively and convincingly what the practice was which the case of *Mitchell* had settled.

"The defender's counsel founded on the Act of 1808 (48 Geo. III, cap. 138, sections 8, 9, 10, 11, and 14), and A.S. of 20th June 1838, section 3. I am of opinion that no assistance in determining the question which I have to decide is obtainable from these enactments. Section 8 of the Act of 1808 provides that stipends which shall be augmented shall be wholly modified in grain or victual, unless where it shall appear necessary; section 9, that money stipends shall be converted into grain or victual according to the fiar prices of the county on an average of seven years; section 10, that where there are no fiars applicable in the county where the parish is situate, the fiar prices may be taken from two or more adjoining counties; section 11, that ministers are not to receive stipend in kind, but to receive it in money according to the fiar prices of the grain into which the same shall have been modified; and section 14, that the right of surrendering teinds is not to be taken away by anything enacted in the statute.

"The A.S. of 1838 deals solely with interim

schemes of locality, and therefore is not directly applicable to the circumstances of the present case, there being a subsisting final decree of locality. The third section, which was specially founded on, makes it competent for the Court in certain circumstances to saddle an heritor with the expense of preparing a new interim scheme of locality. In my opinion it did not require an Act of Sederunt to confer this discretionary power as to expenses which is inherent in the Court. The argument based on this section was, that if an heritor might be penalised when an interim scheme of locality was dislocated, the same rule ought to be applied when a final decree of locality has been subverted. This might be conceded without helping towards the decision, the circumstances being such as in my opinion do not warrant the pursuer being made responsible for the preparation of a new scheme of locality.

"A subsidiary question was argued as to the stipend for crop and year 1916, which the defender maintained was vested in him at Michaelmas 1916, prior to the pursuer's decree of valuation. The question is what was vested in the defender at that date? According to the law affecting stipends and teind nothing in excess of the value of the pursuer's teinds could vest in the defender. Hence no larger sum than £98, 10s. 8d., the proved value of the teinds on which the pursuer's share of stipend was localled, could ever vest in the defender. Moreover, the amount due as stipend was not fixed until the spring of 1917, by which time the pursuer not only had his decree of valuation but had made a surrender of his teinds. I am therefore of opinion that the surrender of teinds in February 1917 applies to and affects the stipend for crop and year 1916.

"At the conclusion of the debate the defender's counsel for the first time challenged the form of the deed of surrender of teinds which the pursuer had executed. As this matter has not been raised on record I am of opinion that it is not properly before the Court. So far as I can judge from what is before me the deed of surrender is expressed in terms which are habile and adequate to effect the intention of the pursuer to surrender his teinds to the defender. I am further of opinion that the date on which surrender was made was 19th February 1917, when the pursuer by letter intimated that the teinds were surrendered. What followed by way of granting a formal deed was merely executorial of the surrender which had then been made.

"On the whole matter I propose to sustain the pursuer's second plea-in-law and grant decree in his favour in terms of the second or alternative conclusion of the summons, with interdict corresponding thereto.

"In addition to the authorities I have referred to, the following were cited:—Statutes, 1617, c. 3; 1633, c. 15; 1633, c. 17; 1661, c. 61; 1690, c. 30; 1693, c. 23; *Maxwell*, June 2, 1813, F.C.; *Madderty* case, July 9, 1817, F.C.; *Weatherstone*, 12 Sh. 1; *Gray*, 16 Sh. 92; *Learmonth*, 20 D. 190, and 21 D. 890; *Earl of Rosslyn*, 4 Macph. 140; *Kinloch*, 5 Macph. 360, at 367; *Colquhoun*, 6 Macph. 105, and 11 Macph. 919; *Thomson*, 7 Macph. 99; *Campbell's Trustees*, 5 R. (H.L.) 119; *Burt*, 5 R. 445."

The defender reclaimed, and argued—In the abstract stipend could only be paid out of teind and the Teind Court had no jurisdiction over stock; yet a heritor might have to pay more stipend than the value of his teind—Connell on Tithes, vol. i, pp. 516, 518, and 523. When the decree of locality was allowed to become final it was *res judicata* and was the fixed rule of payment—Connell on Tithes, vol. i, pp. 517, 519, and 520, referring to the *Dunichen* case. At the end of the eighteenth century surrender was introduced as an equitable remedy, and it was introduced by the Court in the *Lamington* case—*Mitchell* v. *Baillie*, 24th January 1798, F.C., M. 14,827. That equitable remedy was allowed only under conditions the general purpose of which was to protect the minister against a loss caused by the disorganisation of the existing locality through the surrender. Those conditions were that the surrender must either be in an open locality, or if in a closed locality must be coupled with an offer to reduce the locality and rectify the disturbance of allocation caused by the surrender. All that was quite independent of the question whether or not there was any free teind. Under the older law a decree of locality could only be overturned on condition that the minister obtained his relief—Connell on Tithes, vol. i, p. 526. When surrender was introduced the same condition was attached—Connell on Tithes, vol. i, pp. 522-3. When there was a final decree of locality in force reduction was essential and was a solemnity—*Dalgleish* v. *Heritors of Peebles*, 1803, M. 15,714; *Kinloch* v. *Bell*, 1867, 5 Macph. 360, *per* Lord Barcaple, Ordinary, at p. 362, *per* the Lord Justice-Clerk (Inglis) at p. 368, Lord Benholme at p. 370, and Lord Neaves at p. 371; *Cameron* v. *Chisholm-Batten*, 1869, 7 Macph. 565, *per* Lord Benholme at p. 569, 6 S.L.R. 371; *Chisholm-Batten* v. *Cameron*, 1873, 11 Macph. 292, 10 S.L.R. 195; *Weatherstone* v. *Marquis of Tweeddale*, 1833, 12 S. 1; *Duncan* v. *Brown*, 1882, 10 R. 332, 20 S.L.R. 223; the Teinds Act 1808 (48 Geo. III, cap. 138), sections 8, 9, and 11; A.S. 5th July 1809, sections 2, 3, and 5; A.S. 20th June 1838; Elliot, Teinds, pp. 67 and 68. In the cases of *Macartney*, 4th March 1817, F.C.; *Fearn*, 21st November 1810, F.C.; *Maxwell*, 2nd June 1813 and 3rd July 1816, F.C.; *Oswald* v. *Martin*, 1835, 14 S. 32, and *Gray* v. *Touch*, 1837, 16 S. 92, the locality was open. In *Common Agent of Eddlestone*, 4th December 1805, F.C.; M., Appendix, *voce* Teinds, No. 13, the only question was whether the heritor whose surrender had led to a new augmentation being allowed should bear the cost of that process. *The Earl of Minto* v. *Pennell*, 1873, 1 R. 156, 11 S.L.R. 66, was a decision upon a question of the negative prescription. Further, and in any event, a surrender of teinds could not be effectively made by so informal a deed as in the present case. No surrender was valid unless and until it had received a judicial imprimatur. Even in such cases as *Macartney* (*cit.*), where the surrender was

founded on in a suspension, the Court's authority was interponed before the surrender became effective. Further, the stipend for the crop and year 1916 vested in the defender at Michaelmas 1916 and was unaffected by the pursuer's surrender—Ersk. Inst. ii, x, 54; *Cameron* v. *Chisholm-Batten* (*cit.*), *per* Lord Cowan in 7 Macph. at p. 571. The following were also referred to—the Acts 1606, c. 8; 1612, c. 5; 1617, c. 9; 1621, c. 5; 1633, c. 17 and 19; 1661, c. 61; 1690, c. 30; 1693, c. 23; *Thomson* v. *Earl of Zetland*, 1868, 7 Macph. 99; *Lord Elibank's Trustees* v. *Hope*, 1891, 18 R. 445, 28 S.L.R. 295.

Argued for the pursuer (respondent)—The sole object of the process of reduction desiderated by the defender was the rectification of the locality so as to secure the minister from prejudice. In the present case that was impossible, for the loss which might fall upon the defender as the result of the present surrender could not be made up from the other heritors, for they were all paying stipend in excess of their teind. A heritor's liability for stipend was always limited to the amount of his teind—*Morton* v. *Scott*, 1625, M. 14,784; *Kirk* v. *Gilchrist*, 1629, M. 14,786, but owing to a rise in fiars prices it might easily happen that a heritor found that the amount of the stipend localled upon him exceeded the value of his teinds. To meet such a case the remedy of surrender was allowed. Its sole essential was that the heritor must give up irrevocably the whole of his teind. The right to surrender was not clogged with any condition that the heritor must reduce the existing decree of locality—that might be equitable in certain cases to protect the minister, and it was then in the discretion of the Court to impose that condition. Where there was no free teind, there was no authority for a reduction. *Kinloch's* case (*cit.*) and *Cameron's* case (*cit.*) were not authorities to the opposite for in them there was free teind. In the *Lamington* case (*cit.*), which introduced surrenders, there was no hint that a reduction was an essential, neither was there in the cases of *Dalgleish* (*cit.*), *Eddleston* (*cit.*), *Fearn* (*cit.*), *Ogilvie*, 5th June 1811, F.C., and *Maxwell* (*cit.*). In *Minto's* case (*cit.*) the opinions were in favour of the pursuer. The surrender might quite well be by way of suspension—*Macartney* (*cit.*), *Oswald* (*cit.*), *Gray* (*cit.*). A reduction was appropriate only when there was some rectification to be effected which made the reduction necessary—Juridical Styles, vol. iii, p. 230. The surrender might be quite informal, but if the letter was not sufficient there was a formal deed of surrender delivered to the minister and presbytery. That the record would not disclose the state of the teind and stipend unless the surrender was by formal registered deed was immaterial, for the Register of Sasines did not necessarily or usually disclose the state of the teind and stipend; that could only be ascertained by inspecting the receipts for stipend and the documents in the office of the Clerk of Teinds. Further, the stipend for crop and year 1916 was affected by the surrender in the present case; all that vested in the defender at Michaelmas 1916 was the stipend, whatever that might be. The stipend was not fixed till February 1917, when the fiars' prices were struck, and by that time the pursuer had made his surrender. The following were also referred to—Ersk. Inst. II, X, 47 and 54; *Jackson* v. *Cochrane*, 1873, 11 Macph. 475, 10 S.L.R. 290; *Hutcheson* v. *Earl of Cassilis*, 1664, M. 14,788.

At advising—

LORD CULLEN—The circumstances giving rise to the questions in this case are fully set forth in the very clear and able opinion of the Lord Ordinary, and it is unnecessary here to repeat them at length.

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 for his liability for localled stipend, was laid down in the *Lamington* case, 24th January 1798, F.C., M. 14,827, in clear terms, and since the date of that case it has been fully recognised. It is unnecessary to refer to the various subsequent cases in which the right has been re-stated.

The pronouncement in the *Lamington* case did not deal with the matter of the form of a surrender, or the procedure for accomplishing the act, and there appears to have been a variety of practice. Sir John Connell, writing in 1830, mentions that, following on the *Lamington* case, surrenders had been in use to be made in different ways—by a proceeding in a process of locality, if one was pending, and, where no such process was pending, by a bill of suspension of a charge or threatened charge on a decree of locality; by notarial intimation and protest (an instance of which is to be found in the papers in the *Eddleston* case, 1805, M. App. *voce* Teinds, No. 13); or by a simple letter addressed by the heritor to the minister. Sir John Connell favoured the view that a surrender should always be made by a judicial act. He added that he believed that by the latest practice of the Court of Teinds a reduction had been found necessary "to entitle an heritor to surrender his teinds in a manner different from what he has been localled upon," the other creditors being called in the process.

As regards the form of a document of surrender, one thing seems clear, namely, that it has never been supposed that the heritor should grant a heritable conveyance of his teinds to the minister. It has been sometimes said that the minister is by virtue of the surrender placed in the position of being titular of the surrendered teind—by which is meant, as I take it, that while he has no formal title to the teind he draws the valued amount from the heritor as teind under a perpetual right to draw it granted by the heritor. The essential character of the document of surrender accordingly is that it is an unilateral one executed by the heritor, or with his authority, whereby he agrees that the amount of his valued teind shall be paid and made over by him and his successors in title to the present minister and his successors in the cure in all time coming.

Much the most common form in modern practice is the familiar condescendence and surrender signed by counsel proponed in a pending process of locality, which, in the absence of successful objections thereto, is sustained by an interlocutor of Court, its validity thus becoming *res judicata* as between the surrendering heritor on the one hand, and the minister and other heritors on the other hand. This mode of making a surrender has the great advantage of being permanently recorded in a judicial process of locality accessible to all having interest to inquire into the state of the teinds in the particular parish. It is, however, only available where there is a pending process. And a heritor may desire, as did the present pursuer, to surrender after a final locality has been settled and extracted. Thus the question comes to be here raised how the heritor in such circumstances falls to proceed in proponing his surrender.

The pursuer maintains that, in the condition in which the teinds and stipend of the parish of Kirkton stand, the interests of the defender are sufficiently satisfied by the execution and delivery of the letter of 19th February 1917, or alternatively of the formal deed of 12th March 1917.

The defender, on the other hand, maintains the general proposition that no matter what the position of the teinds in a parish may be a surrender can only competently be proponed in a pending process of locality, and that if there be no pending process the heritor desiring to surrender must first take steps to open up the last one by reducing the existing final decree, and must thereafter go on to obtain, under a remit to the Teind Clerk, a rectified scheme of locality giving effect to his surrender which he propones in the proceedings. This procedure is, according to the defender's contention, required as matter of solemnity on which he is entitled here to insist. Alternatively, he maintains that reduction of the existing final decree at least is required as a solemnity before a surrender by the pursuer can receive effect whether rectification follows or not.

In support of these contentions the defender appeals to the cases of *Cameron* v. *Chisholm - Batten*, 1869, 7 Macph. 565, 6 S.L.R. 371, 1873, 11 Macph. 292, 10 S.L.R. 195; *Duncan* v. *Brown*, 1882, 10 R. 332, 20 S.L.R. 223; and *Lord Elibank's Trustees* v. *Hope*, 1891, 18 R. 445, 28 S.L.R. 295. I shall advert later to these cases, which do not seem to me to verify the defender's contentions in the present case. But I may, before doing so, observe that the defender's contention that a surrender may be competently made only in a pending process of locality is inconsistent with the authorised practice of procedure by bill of suspension. Connell, as already mentioned, refers to this practice, and no better evidence of its recognition can be required than is afforded by the Act of Sederunt of 20th June 1838, C.A.S. 1913, H. ii, 22, which contains regulations applicable to the case—"When a surrender shall be made by a bill of suspension presented by an heritor after the interim decree, in place of a minute of surrender in the process of locality," and makes it competent to the minister and the common agent to take steps in the process of locality in consequence of the surrender, and to obtain a new interim scheme at the expense of the surrendering heritor. The provisions of the Act of Sederunt relate to interim schemes in a pending process of locality, but they negative the defender's contention that a surrender is required to be made always in such a process. And it is just where a process of locality is still current that such a requirement would be most appropriate. Where a heritor is charged, or threatened with a charge, on a final decree, I take it that procedure by a bill of suspension in which he propones a surrender must be equally competent, subject of course to possible conditions as to further procedure entailed by his surrender. Further, a heritor who has not been charged or threatened with a charge on a final decree of locality so as to be able to bring a suspension, may nevertheless desire to surrender in order to prevent payments of localled stipend accruing against him under that decree. And in such case there would seem to be room for his proceeding by way of an extrajudicial surrender, subject again to questions of expenses of further proceedings by way of rectification which his surrender may call for.

In the cases above mentioned to which the defender appeals, the heritor who desired to surrender subsequent to a final decree of locality proceeded by way of reducing that decree and then obtaining a remit for the making up of a rectified scheme. There were free teinds in the hands of other heritors which made a rectification possible and appropriate in the interests of the minister so as to indemnify him against the injurious consequences of the surrender, and this mode of procedure on the part of the heritor was in the case of *Cameron* judicially approved. In his opinion in the first report of that case Lord Cowan seems to speak of a reduction of a final locality as being in his view always necessary where a surrender is to be proponed subsequent to it, although in his opinion in the later report of the case he is more reserved. Lord Benholme on the other hand seems to have regarded the reduction as a step taken in order to "inchoate" a rectified locality, and it may be that Lord Cowan in his earlier opinion was speaking with reference to cases where rectification in consequence of a surrender is called for. The strict proposition that reduction of a preceding final decree of locality is necessary before a heritor can competently surrender appears to me to be negatived by the case of *Earl of Minto* v. *Pennell*, 1873, 1 R. 156, 11 S.L.R. 66, the ratio being that the surrender does not introduce a vice into the locality, which was legal and valid when made, but is a proceeding whereby the heritor gets rid of liability for localled stipend under it by giving up his valued teind to the minister in substitution therefor.

The matter of procedure by way of reduction and rectification where a surrender is to be made subsequent to a final decree of locality appears to me to stand thus—The

effect of a surrender is not always the same in regard to the minister's interests under the locality apportioning his modified victual stipend among the heritors of the parish. If the heritor surrendering has been localled on for x amount of victual, and surrenders valued teind which amounts or is equivalent on due conversion to a smaller amount of victual than x, the effect so far is to deprive the minister of part of his localled victual stipend, and if there is free teind in the hands of other heritors in the parish there is room for restoring the minister against such effect of the surrender by a re-apportionment of the stipend among the heritors, the decree of modification entitling the minister to have the victual stipend made good out of the whole teinds of the parish so far as they are required for the purpose. Such was the state of matters in the cases founded on by the defender, and in such a case it may be reasonable to require that the surrendering heritor who has chosen to disturb the existing locality should undertake or be at the expense of the necessary procedure by way of first reducing that locality and thereafter obtaining a rectified scheme for the minister's indemnification. But a surrender may not have the effect on the localled victual stipend above figured; and the present is a case in point. When the existing final locality of 1905 was made up the pursuer's teinds were unvalued. On the basis of the proven rental he was localled on for a certain amount of the modified victual stipend proportioned to the amounts falling to be borne by the other heritors. The amount so localled on the pursuer—about £80 worth of victual on the basis of the seven years' average of prices governing the conversions in the process—did not exhaust his unvalued teind on the basis of the proven rental, but left about £16 of free teind in his hands. By his surrender he gives up £96 of valued money teind. In considering the effect of this it must be kept in view that if a new rectified scheme of locality were now made up it would be a scheme of locality of the stipend as modified in the process of augmentation of 1903, and that the conversions into victual would, under the Act of 1808, be governed by the same seven years' average of the fiars' prices prior to the raising of the augmentation. The pursuer would be entered for £96 of surrendered money teind, and a conversion of this amount of money teind into victual on the basis of the said average of prices would mean that the pursuer had thrown into the apportionment among the heritors a larger amount of victual than the amount which was localled on him under the final locality of 1905. And as the modified victual stipend of the minister remains fixed under the decree of modification however fiars' prices may vary, and as a locality is only an apportionment of it as so fixed among the heritors, the operation of the pursuer's surrender if given effect to under a rectified scheme would thus be to reduce the amount of victual falling to be localled on the non-surrendering heritors in proportion to the increase in the pursuer's contribution. That the pursuer should make this change is his own affair. While on the basis of the said seven years' average of fiars he is throwing in a larger amount of victual than that localled on him under the final locality of 1905 out of his then unvalued teind, he gains by escaping from having to make good that localled amount in money on the basis of the very high fiars' prices now prevailing. It is, however, clear that rectification is not called for in the minister's interests, to which it would be prejudicial. If that is so, there is no room for a reduction of the final locality in order to "inchoate" a rectification; and reduction by itself as a solemnity and a condition-precedent to a surrender is in my opinion, as already stated, not required.

I accordingly am of opinion that in view of the circumstances above stated the pursuer was entitled to make an extrajudicial surrender of his valued teind without the necessity for undertaking or being brought under liability for the expenses of procedure by way of reduction and rectification, which could be of no advantage to the minister.

I do not forget that a surrender by one heritor is a proceeding which other heritors in the parish may have an interest to object to when it is put into operation adversely to their interests, and that the pursuer's extrajudicial surrender does not call his fellow-heritors into the field. But if I am right in the views which I have expressed these other heritors have no interest to object to his surrender at present, or so long as the stipend as modified under the augmentation of 1903 stands as the stipend of the cure; and there may never be another augmentation. If there should be, and a new scheme of locality should come to be made up, the pursuer would need to found on his surrender, and other heritors would, no doubt, then have the right to object to it in one form or another, provided they could show an interest. But this situation may never arise, and on the existing basis I do not see why the pursuer should not be entitled to utilise his surrender as against the minister, who alone is presently interested, without convening other heritors who do not now have, and may never have, a legitimate interest to object to it.

The pursuer tables his letter of 19th February 1917, and alternatively the formal document of 12th March 1917, for acceptance as embodying his surrender. The letter is open to criticism in respect it does not refer to the valuation or mention the amount of the valued teind, and does not state that it is the valued teind that is being surrendered, but only in general terms surrenders the teinds of the lands. I do not think that it would be according to practice for a surrender similarly couched and proponed in a process of locality where such matters are usually decided to be sustained. I think the practice requires a specific surrender of the stated amount of the valued teind, which appears to me to represent a correct form of surrender; and as the formal document of 12th March 1917 is not open to such criticism, and as it is immaterial to the pursuer's interests whether the one document or the other be accepted as embodying his sur-

render, I would propose that while otherwise adhering to the Lord Ordinary's judgment under review we should vary it so as to make the second conclusion of the summons refer to the date 12th March 1917 instead of the date 19th February 1917.

The first conclusion of the summons was not insisted in by the pursuer, and I therefore express no opinion regarding it.

On the footing of the pursuer having made a valid surrender by the document of 12th March 1917 another question is raised by the defender, which may be shortly disposed of. The defender points out that at Michaelmas 1916 the stipend for the crop and year 1916 vested in him. From this he seeks to deduce that the pursuer could not by a surrender after Michaelmas 1916 disturb the localled stipend for said crop and year as it stood under the existing locality at that term. This is a *non sequitur*. No doubt the stipend of the cure for the crop and year 1916 vested in the defender at Michaelmas 1916. But it vested in him *quantum valeat;* and one of the incidents of its value was the right of the pursuer according to established law to surrender his valued teind at any time in substitution for his liability for localled stipend.

Lord Mackenzie—The right of the pursuer to surrender his teinds, of which he obtained a decree of valuation on 23rd November 1916, is undoubted, and is not disputed by the minister of the parish, who defends this action. The ground of the defence is stated in the fourth plea-in-law—"The pursuer cannot be heard to propone the conclusions second written unless and until he has first (*a*) reduced the existing decreet of locality of the stipend of Kirkton, and (*b*) provided the defender at the pursuer's expense in a new process of locality wherein the due and full stipend modified to the cure may be fully allocated on and against the existing free teinds of the parish."

The Lord Ordinary has granted decree in terms of the second conclusion of the summons, and declared that the pursuer has validly surrendered his teinds at the sum of £96 sterling as at 19th February 1917. In my opinion the conclusion to which the Lord Ordinary has come is sound, subject to a modification as regards the date.

The action arises out of the state of matters created by the extraordinary rise in the fiars' prices, which resulted in the demand made upon the pursuer by the minister for stipend for crop and year 1916, amounting to £191, 5s. 5d. This was the amount brought out at the existing fiars' prices under the final decree of modification of locality of the parish of Kirkton, dated 3rd and 17th March 1905. This is the decree which it is contended by the defender constitutes an obstacle in the way of the surrender until it is reduced.

It is necessary, in the first place, to observe that upon the facts admitted in this case there could not be as matters at present stand any re-allocation which would benefit the minister. There is no free teind. Indeed, the immediate effect of the re-allocation would be prejudicial to the interests of the cure, for on the basis of the locality figures there was free teind in the hands of the pursuer, which he surrenders. The result of this would enure to the benefit of the other heritors, who would be localled on for a smaller amount of victual. If therefore, as was indicated in argument, the present case was intended to test the abstract question of the proper form of procedure where there is free teind, the facts do not raise that question.

It is necessary, in the next place, to observe that it is somewhat of a misnomer to speak of reduction of a decree of locality where the circumstances are as they are in the present case. The right to surrender was first recognised in the *Lamington* case, January 24, 1798, F.C., M. 14,827. 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. It was suggested in the course of the argument that this was a contradiction in terms, for it could not be implement of a decree warranting a demand for £191, 5s. 5d. to tender £96. This overlooks the fact that it is an essential condition of the decree of locality that the payment shall be made "out of the first and readiest of the teinds, parsonage and vicarage." There is no warrant for demanding payment out of the stock, and the purpose of the judgment in the *Lamington* case was to protect the heritor from any such claim. The interlocutor in the *Lamington* case concludes with this clause—"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 teind, according as the same shall have been ascertained by his decree of valuation."

The terms of section 14 of the Act of 1808 (48 Geo. III, cap. 138) show that an alternative method of implement was expressly recognised by the Legislature. That section is as follows:—"Provided always, and be it enacted, that the right of any heritor to surrender his valued teind 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."

The question of the proper form of surrender is dealt with in Connell on Tithes, i, pp. 532-3, in a passage which negatives the idea that where there is not an open locality reduction of the final decree of locality is a pre-requisite to surrender. It is stated on page 532 that the surrender has sometimes been made in the form of a bill of suspension. There are instances of suspension in the cases of *M'Cartney*, March 4, 1817, F.C., and *Oswald* v. *Martin*, 1835, 14 S. 32. This form of procedure is recognised in the A.S., 20th June 1838, and by the Lord Justice-Clerk in *Cameron* v. *Chisholm-Batten*, 1869, 7 Macph. 565, 6 S.L.R. 371. Proceeding by notarial protest is mentioned by Connell, and of this an instance has been found in the papers in the *Eddleston* case, 1805, M.

App. *voce* Teinds, No. 13. Connell further states that surrender is sometimes simply by a letter addressed by the heritor to the minister. This is what has been done in the present case. On the following page, p. 533, there are two passages which were founded on by the defender. The first is to this effect—"After a locality has been arranged and completed, it becomes a proper decree of the Teind Court, and a judicial proceeding only should be permitted to overturn a judicial decree." The next passage is thus —"By the latest practice of the Court of Teinds, however, I believe a reduction of a locality has been found to be necessary to entitle a heritor to surrender his teinds in a manner different from what he has been localled upon." Reading these passages in view of subsequent decisions, my opinion is that the right of a heritor to surrender is not in the abstract clogged with any condition, although there may be circumstances in which, differing from the present, it may be considered necessary that after surrender there should be rectification and re-allocation.

The first stage of the case of *Cameron* v. *Chisholm-Batten* was founded on by the defender, but the effect of what is contained in the opinions there is to a large extent modified by the views expressed in the later stage (1873, 11 Macph. 292, 10 S.L.R. 195). In this state of the authority I think the Lord Ordinary is well warranted in holding that the defender's contention that reduction of the decree of locality must be the first step in the surrender of teinds is conclusively negatived by the decision in the case of *Earl of Minto*, 1873, 1 R. 156, 11 S.L.R. 66. In addition to the opinion of the Lord President I may refer to what Lord Ardmillan says—"In consequence of that 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 a right to hold, as against the exaction of stipend, what the decree has declared to be stock. . . . The heritor's act of surrender is not a challenge of the decree of locality, but the exercise of a right which does not imply an objection to the locality to be enforced by reduction, but rather a satisfaction of the decree by surrender." The cases of *Weatherstone*, 1833, 12 S. 1; *Duncan*, 1882, 10 R. 332, 20 S.L.R. 223; and *Lord Elibank's Trustees*, 1891, 18 R. 445, 28 S.L.R. 295, were referred to, but there does not appear to me to be any authority which prevents the principle laid down by Lord Ardmillan being given effect to here without the necessity of a reduction or re-allocation.

It was, however, contended that even if reduction were not needed a surrender could not be effectually made by letter, and that some judicial proceeding is required, or something equivalent to a feudal title. There does not seem to be any precedent for a feudal title. Nor do I think the minister has made out the necessity for judicial proceedings in the absence of any present need for re-allocation. I think the heritor has a right to surrender at any time, as laid down in the *Lamington* case. The question whether a surrender can properly be made in the terms of the letter of 19th February 1917, which makes no reference to the decree of valuation, is doubtful, and one which it is not necessary to determine. The deed of surrender executed on 12th March 1917 sets out the decree of valuation. It was delivered to the minister, and was intimated to the moderator and clerk of the Presbytery, and is sufficient in my opinion to operate an effectual surrender.

It was suggested that the pursuer should be put under caution to bear the expense of re-allocating the burden if and when the time should come from a fall in the fiars' prices, of there being free teind in the parish. I am unable to hold that there is any warrant for asking this, even supposing the practical difficulties in the way of giving effect to it could be overcome.

There remains the question whether the surrender, which I hold to be made in March (instead of February) 1917, applies to and affects the stipend for crop and year 1916. In my opinion it does. The argument for the minister was that he took a vested right to a certain amount of stipend as at Michaelmas 1916. The true view is that what vested in him then was the stipend, whatever it might be. Until the fiars' prices were struck the heritor could not decide whether he would surrender or not.

I am therefore of opinion that the Lord Ordinary's judgment, with the modification of 12th March for 19th February as the date of surrender, should be affirmed.

LORD SKERRINGTON—The leading proposition which the defender's counsel endeavoured to establish was that it was incompetent for a heritor to surrender his teinds without first setting aside any final decree of locality which imposed upon him and his teinds a liability for payment of stipend. It was argued that if a heritor endeavoured by means of a surrender to get rid of his liability to pay stipend under a final decree of locality he necessarily challenged that decree. Counsel admitted however that the ordinary and familiar method of making a surrender is by minute of surrender lodged and sustained in a depending process of locality. Now the dependence of such a process with reference to a new augmentation of stipend does not either nullify or open up previous final decrees of locality with reference to former augmentations. Accordingly if a surrender implies a challenge or contradiction of a final decree of locality a reduction would be just as necessary if the surrender was made in the course of a pending process of locality as it would be in any other case. Further, having regard to the admitted practice of making a surrender in the course of a suspension in the Bill Chamber it cannot be successfully maintained that reduction is a necessary condition. The case of *Earl of Minto* v. *Pennell*, 1 R. 156, 11 S.L.R. 66, is a direct authority to the contrary. Lord Ardmillan as it seems to me correctly stated the true effect of a heritor's surrender of his teinds, viz., that he thereby satisfied the decree of locality. This view is consistent with the explanation of the meaning and effect of its

decree which was given by the Court in its interlocutor in the *Lamington* case. It had been argued that as the greater part of the teind in the parish had been valued in money it would be unjust to modify the stipend in victual. The Court being unwilling to deprive the minister of the advantage of having his augmentation modified in victual explained on the face of its interlocutor that no injustice would be done by following this course, seeing that a heritor might at any time surrender his teind. Accordingly the right of surrender is an inherent condition of the decree of locality. In support of his contention the defender's counsel placed great reliance upon certain observations made by Lord Cowan in the case of *Cameron* v. *Chisholm-Batten*, 1869, 7 Macph. 565, 6 S.L.R. 371. At first sight these observations seem to support the proposition that in a case like the present reduction is necessary, but when one reads the whole passage it appears that Lord Cowan was not referring to a case where a heritor had either surrendered or proposed to surrender his teind. On the contrary, in the concluding passage of his opinion he stated—"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 his stipend prior to its date, under a final decree of locality, and this action is only for arrears. A surrender does not operate *retro*." Accordingly the observations in question mean no more than that a heritor who is unable or unwilling to surrender his teind cannot merely by producing a valuation avoid liability to pay stipend as allocated by a final decree of locality. That seems sound law. I may note in passing that Lord Cowan's observations would have been in point if the pursuer's counsel had ventured to support by argument the first and leading conclusion in the present action. In the opinion which he delivered in the second stage of the *Cameron* case, 11 Macph. 292, 10 S.L.R. 195, Lord Cowan reserved his opinion upon the question whether a heritor who wished to surrender his teind required to reduce any final decree localling stipend thereon.

For the foregoing reasons I am of opinion that the defender's leading proposition in law, which is set forth in his third plea, is unfounded and must be rejected. His fourth plea-in-law raises a different question, viz., whether, if a heritor surrenders and thus deprives the minister of his existing rule for payment of his stipend under a final decree of locality, the minister may not have an equitable claim to be supplied with a new decree of locality at the expense of the heritor. For that proposition there is authority, by way of analogy, in cases where a heritor reduces a final decree of locality. In such cases the Court has declared that the effect of the decree of reduction shall be merely to convert a final into an interim decree of locality, and has also declared that the minister's stipend shall be paid in terms of the reduced decree until the minister shall be furnished with a new decree of locality at the expense of the pursuer of the reduction. There is force in the suggestion that the same equity should be enforced in the case of a surrender. One must keep in view that the right of surrender is the creation of the judges of this Court, and I think that they are fully entitled to decide that a surrender shall not be treated as effectual if it is made in such a manner as to be unfair either to the benefice or to the minister for the time being.

As regards the interests of the benefice, it may be said that a surrender in the form of a mere letter which might be lost or destroyed by its recipient, that is, the minister to whom it is addressed, is not satisfactory as evidence of a transaction which is intended to affect the interests of the cure in all time coming. Accordingly I approve of Lord Cullen's suggestion that in the present case the surrender should bear the date of the formal deed, a copy of which was delivered to the clerk of the presbytery.

As regards the other matter, the defender, who is the minister for the time being, has in my judgment failed to show that he possesses any interest to have the existing final decree of locality reduced and to be furnished with a new and rectified locality. It follows that the pursuer is entitled to judgment in his favour in the form suggested by your Lordship.

Lord President—I agree with the conclusion reached by the Lord Ordinary and with the reasoning in his full and able opinion. And as I have had an opportunity of reading the opinion of Lord Cullen, in which I fully concur, I can express my own view of this case within narrow compass. The position of the minister is defined by him with copious exactitude in the record. He avers (Ans. 3) "that no competent and effective surrender of teinds of lands to the minister of the cure has been made, or can competently be made, *in hoc statu* or by the devices referred to in the condescendence under answer, or either of them." *In hoc statu* here means so long as the final decree of locality stands. The minister further avers (Ans. 3) "that it is only competent to a heritor possessing his own teinds to surrender the same in a competent process before the Teind Court; that is, one in which the matter of allocation of the burdens for maintaining the cure is for the time open, so that a minute of surrender may be properly sustained and any proper effect may be given to the same in the adjustment of the succeeding locality." And finally the minister avers (Ans. 5) "that the pursuer can in any event only avail himself of his decreet of valuation if and when he reduces or otherwise sets aside the existing decreet of locality, and at his own expense puts the defender in the position to obtain a re-allocation of the competent stipend upon the existing free teind of the parish." The issue raised is therefore clear and simple enough.

It being admitted that the pursuer holds a valuation of his teinds, can he surrender without reducing the final decree of locality? I answer without hesitation that he can. The law was, as I think, so laid down more

than a century ago in the *Lamington* case, 1869, 7 Macph. 565, 6 S.L.R. 371; 1873, 11 Macph. 292, 10 S.L.R. 195. It has never since been questioned. On principle I cannot see how it ever could be. If the heritor gives up, and the minister takes, the whole teind, what need is there for further or other procedure so far as the heritor is concerned. None that I can see. But the question although never debated, was authoritatively and finally settled by a unanimous judgment of this Division in the case of the *Earl of Minto*, 1873, 1 R. 156, 11 S.L.R. 66. There the heritor had for forty years made overpayments of stipend under a final decree of locality. The heritor, holding a valuation of his teinds, surrendered. The minister objected to the surrender on the ground that it was too late to reduce the decree of locality. The Court, however, held that it was quite unnecessary to reduce the decree in order to give due effect to the surrender. The Lord President (Inglis) there said—"I think the counsel for the minister . . . proceeded always on the assumption that in order to get rid of the payments in excess, and the effect of the decree of locality under which they were made, it was necessary for the heritor to reduce the final decree of locality. Now that, I apprehend, is a mistake. I do not think it is at all necessary for the heritor to reduce the final decree of locality." Lord Deas expressly lays it down that "no action of reduction of a decree of locality is required in order to enable a heritor to surrender his teinds." And Lord Ardmillan amplifies the doctrine thus—"I am further of opinion that a reduction by the heritor of the decree of the locality under which he has been paying stipend is not necessary. The right to surrender on the valuation is an outstanding privilege of which the heritor may avail himself whenever he finds it necessary to put a stop to surplus payment. Every decree of locality authorising and directing the payment of stipend out of teind is, I think, granted on the footing that if there is a valuation by the High Commissioners it may be founded on, and a surrender in terms thereof may be made by the heritor at any time. The heritor's act of surrender is not a challenge of the decree of locality, but the exercise of a right which does not imply an objection to the locality to be enforced by reduction, but rather a satisfaction of the decree by surrender." There can therefore, I think, be no doubt that on the main question raised in this case the minister's position is clearly untenable. No doubt he might be able to show that there were special circumstances present which would warrant this Court in attaching some condition to the heritor's surrender, as was done in the case of *Cameron*, 7 Macph. 565, 6 S.L.R. 371, and 11 Macph. 292, 10 S.L.R. 195. But the minister here avers no circumstances which can raise a plea for conditional surrender. Indeed he does not, as I understand, dispute the very specific averments made by the pursuer to the effect that "a reduction and rectification of the locality as the defender suggested would not be beneficial to the defender but detrimental to him, as he would therefore receive less from the other heritors of the parish whose teinds have not been surrendered than he does at present." Counsel for the pursuer satisfied me that this would be so. But it is needless to dwell upon the matter, for if any condition were to be imposed on the heritor qualifying his right to surrender it was for the minister to aver and establish the existence of circumstances which would warrant that course being taken.

On the two subordinate questions raised in this case I agree with the view expressed and the conclusion reached by Lord Cullen. I am therefore for affirming the Lord Ordinary's interlocutor with the variation suggested by Lord Cullen.

The Court repelled the pleas-in-law stated for the defender, found that the pursuer had made a valid surrender of his teinds as at 12th March 1917, being the date of the deed of surrender of teinds subscribed by him, and with that variation adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—Wilson, K.C.—J. A. Christie. Agents—Steedman, Ramage, & Company, W.S.

Counsel for the Defender — Constable, K.C.—A. M. Mackay. Agents—Menzies & Thomson, W.S.

COURT OF SESSION.

Saturday, November 23.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WRIGHT & GREIG, LIMITED *v.* M'KENDRY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of*"—*Death from Fall Caused by Fit.*

A workman in the course of his employment in a bonded store, the floor of which was concrete, was seized by a fit and fell, fracturing his skull and thereby sustaining injuries which caused his death. *Held* (*dis.* Lord Salvesen) that the death was caused by accident arising out of his employment.

Wright & Greig, Limited, whisky distillers, Glasgow, *appellants*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (MACKENZIE) at Glasgow granting an application by Mary M'Kendry, Bedlay Street, Springburn, Glasgow, *respondent*, for compensation for the death of her brother Alexander M'Kendry by an accident arising out of and in the course of his employment.

The Case stated—"The case was heard before me and proof led, at which one of the referees appointed under said Act sat with me as medical assessor on this date,