upon his becoming chargeable in December 1871, Cramond, as the parish of birth, was legally liable for his support.

It must be kept in view that the residential settlement which pupil children living with their father acquire derivatively from him becomes their settlement in *their own right*, and any question occurring after the father's death as regards the retention or the loss of such residential settlement, is to be judged of on that footing. Throughout the decisions, and especially from the case of *Lasswade* downwards, this has been recognised in the opinions of all the Judges by whom those decisions were pronounced. And therefore, when the question arises under the 76th section of the statute, either as to the acquisition of a residential settlement, or as to its non-retention or loss, the same principles are to be regarded in its solution, whether it is the personal residence of the pauper himself on which the settlement depends, or the settlement of the pauper's father, from whom derivately it has been acquired by the pauper. And I am not aware of any authoritative opinion until very recently pronounced to the contrary.

The case of *Adamson* v. *Barbour*, as decided in the House of Lords in 1854, on social considerations very fully explained by the Lord Chancellor and Lord Brougham, negatived the views which had been taken in this Court, that where the father of a family is dead, or has deserted them leaving them in poverty, that a distinction prevailed between residence and birth settlements. It was found that the whole family of pupil children and their mother, wherever born, fell to be supported by the father's parish, whether his settlement was derived from residence or from birth. I do not find, however, that, excepting in that class of cases, all distinction between derivative settlement was by that judgment put an end to. On the contrary, there have been repeated decisions since that judgment recognising the principle that a derivative residential settlement continues with the child acquiring it until it has been lost under the 76th section of the statute through non-residence, or until a new settlement has been acquired through the child's own residence in another parish. The case of *Hume* v. *Halliday*, in 1849, affords an apt illustration. There the derivative residential settlement was held to have been lost through non-residence for the period required by the statute, and on that ground the parish of birth was found liable. And it may be noticed that in the Lord Ordinary's interlocutor, to which the Court adhered, the residential settlement acquired by the pauper through the father is expressly stated to be "in his own right and as his own proper settlement;" and Lord Jeffrey in reference to the same matter states "that it is actual residence," and not properly derivative by presumption of law. The cases also of *Allan* v. *Higgins*, 1864, and *Beattie* v. *Adamson*, 1866, proceed upon a recognition of the same principle; and I may farther refer to the case of *Fraser* v. *Robertson*, June 5, 1867, which, having regard to the circumstances of the case, could not have been decided as it was except upon principles altogether hostile to the views contended for on the part of St Cuthbert's. The note of the Lord Ordinary (KINLOCH) and the opinion of the Judges of the Second Division are quite in accordance with the other decisions to which I have referred.

The cases on which the argument for St Cuthbert's was mainly founded were (1) that of *Craig*, in July 1863, (2) the case of *M'Lennan*, June 1872, and (3) the case of *Ferrier* v. *Kennedy*, Feb. 1873. Now the first of these cases was a competition between the birth parish of the father and the pauper's birth parish, and though in the other two cases opinions were expressed which appear to go the length of holding that a minor *pubes* and forisfamiliated cannot found on any derivative settlement from his father, whether that settlement be by residence or birth,—I cannot hold that question to have been decided by the case of *Craig*, while, as your Lordship has fully explained, the decisions in those other cases are capable of being arrived at on other grounds.

On the whole, in the circumstances of this case, I think judgment must be given against St Cuthbert's.

LORD BENHOLME—My opinion coincides. I think that in this case the derivative settlement acquired through the father was lost neither by puberty nor by the second marriage of the pauper's mother. I think that it must accordingly govern your Lordships' decision.

LORD NEAVES—I am of the same opinion. The pauper in this instance started with a good residential settlement derived from his father. It would be an extravagant proposition to maintain that when a pauper's mother marries again the pauper follows the settlement of his step-father. The only effect of a mother's marriage might be to prevent a person becoming a pauper at all, but such a marriage could not alter the pauper's settlement.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

> "Find that the parish bound to support the said pauper is the parish of St Cuthbert's; and find the parish of Cramond entitled to expenses."

Counsel for Inspector of St Cuthbert's—The Dean of Faculty (Gordon) Q.C., and Marshall. Agent—E. Mill, S.S.C.

Counsel for Inspector of Cramond—Watson and Burnet. Agents—W. & J. Burness, W.S.

Friday, November 7.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

EARL OF MINTO *v.* REV. JAMES PENNELL. (LOCALITY OF BALLINGRY).

Teind—Surrender—Valuation—Over-payment—Decree of Locality.

Where an heritor's teinds were valued, and he had continued to make over-payments under a subsequent final decree of locality for more than forty years,—*held* that his right of surrender was not thereby barred.

The Earl of Minto was one of the heritors of the parish of Ballingry, of which the Rev. James Pennell was minister. The teinds of the parish were valued by decree of approbation of the High Commission, dated 24th March 1637, but under a final decree of locality pronounced in 1791 Lord Minto and his authors had been in use to make

payments of stipend in excess of the valued teind. In these circumstances Lord Minto proposed to surrender his teinds.

The Minister objected, and pleaded—"(1) The Earl of Minto and his predecessors and authors having, under final decrees of locality, paid to the successive ministers of the parish of Ballingry amounts of stipend exceeding the value of the teinds now proposed to be surrendered, the respondent has by such prescriptive over-payments acquired for himself and his successors in office a right to insist that said payments shall be continued, notwithstanding the alleged decree of approbation founded on by the said Earl. (2) The Earl of Minto is not entitled by surrendering his teinds to free himself from the obligation to continue to make the said payments of stipend in the same way as has been done during the prescriptive period."

Lord Minto pleaded—"(1) The teinds of the Earl of Minto's lands having been valued, he is entitled to surrender the same according to the decree of valuation. (2) The said Earl not having made payment of stipend under final decrees in excess of said valuation for the prescriptive period, is entitled to surrender his teinds, conform to said valuation. (3) Assuming the said Earl to have made such payments in excess of said valuation, he is not thereby barred from surrendering his teinds, but is entitled to have effect given to said valuation."

The Lord Ordinary pronounced the following interlocutor—

"*Edinburgh, 27th March* 1873—The Lord Ordinary having considered the revised minute of surrender for the Earl of Minto, and the revised answers thereto for the Rev. James Pennell, minister of Ballingry, Nos. 263 and 264 of process, with the proof, and having heard the counsel for the parties; Finds that for a period greatly exceeding forty years the Earl of Minto and his predecessors and authors have, under a final decree of locality, dated 1st June 1791, paid to the successive ministers of the parish of Ballingry stipend for the lands of Cartmore, situated in said parish, to an amount, in victual and money, exceeding in value the valued teind contained in the decree of approbation, dated 24th March 1637, held by the said Earl and his predecessors and authors, and now proposed to be surrendered; Finds that the minister of Ballingry, for himself and his successors in office, has, by prescription, acquired right to insist that the said payments shall be continued notwithstanding the said decree of approbation; Finds that the Earl of Minto is not entitled by surrendering his teinds to free himself from the obligation to continue to make the said over-payments in the same way as has been done during the prescriptive period, and decerns; Appoints the same to be put to the Roll for the purpose of ascertaining the precise amount of the said prescriptive over-payments, and reserves all questions of expenses.

"*Note*—The Lord Ordinary concurs in the opinion of Lord Gifford, that the decree of locality of 1st June 1791 is a final locality. The reclaiming petition presented by one of the heritors against the interlocutor approving of the locality was not insisted in, and must be held to have fallen. This final decree of locality cannot be reduced, as it is protected by prescription. The Lord Ordinary is of opinion that this decree and the minister's title to the benefice, constitute a good title on which to found prescription. The argument for the Earl of Minto, that each new augmentation supersedes and renders inoperative the previous final decree of locality, is, the Lord Ordinary thinks, altogether untenable. The stipend due by the Earl of Minto, his predecessors and authors, for the lands of Cartmore since 1791, has been localled upon and paid by them in respect of that decree. No part of the subsequent augmentation was localled upon them, but the localling of the old stipend was continued. The amount of stipend so localled upon them by this final decree of 1791 for the lands of Cartmore, has been paid by them to the minister in victual and money since its date, and, as was admitted for the Earl at the debate, it exceeded in value the valued teind contained in the decree of approbation. This being the case, the Lord Ordinary is of opinion that the minister has, for himself and his successors in the benefice, acquired by prescription a right to insist that the over-payments shall be continued, notwithstanding the decree of approbation.—*Madderty*, July 9, 1817, F.C.; *North Leith*, Feb. 10, 1666, Dict. 10,890; *Boswell*, July 22, 1668, F.C.; *Greenock*, Dec. 21, 1757, Dict. 10,980; *Alexander* v. *Oswald*, 3 D. 40.

Lord Minto reclaimed.

Argued for him, that the decree of locality of 1791 could never deprive him of his right to surrender his teinds at any time. The right to surrender was one *meræ facultatis*—it might be exercised or not in the option of the heritor, and could never be lost *non utendo*.

Authorities for Lord Minto—Connell, 1, 250, and cases collected there; *Locality of Madderty* (*Moray*), July 9, 1817, F.C., 371; *Locality of Fearn* (*Munro*), Nov. 21, 1810, F.C., 38; *Locality of Eastwood* (*Maxwell* v. *Blair*), July 3, 1816, F.C., 182; *Gray* v. *Touch*, Nov. 22, 1837, 16 S. 92; *Macartney* v. *Campbell*, March 4, 1817, F.C., 309; *Chisholm Batten* v. *Cameron*, Jan. 16, 1873, 11 Macph. 292 *Fogo* v. *Colquhoun*, July 18, 1873, 10 Scot. Law Rep. 637.

Argued for the minister, that he had right to the over-payments under the final decree of locality of 1791, which could only be set aside by a process of reduction or suspension, and, further, that his right and the decree of locality were protected by the negative prescription.

Authorities for Pennell—*Tawse* v. *Earl of Glassgow*, June 20, 1821; Shaw's Teind Cases, 8; *Robertson* v. *Macknight* (*Locality of Fettercairn*), Feb. 6, 1873, 11 Macph. 389; *Mags. of Edinburgh* v. *Montgomery*, Oct. 16, 1872, 11 Macph. 14.

At advising—

LORD PRESIDENT—The question in this case is Whether the Earl of Minto is entitled to surrender his teinds in the parish of Ballingry, in the manner proposed in the minute of surrender. These teinds were valued by a decree of approbation of the High Commission, dated the 24th of March 1637 and that decree of approbation proceeded upon a contract which was made between the patron and the parson of the parish, on the one hand, and the heritors of the parish on the other. It is not at all an uncommon thing in the history of the Teind Commission to have approbations proceeding upon contract; and when all the parties interested in the teinds are parties to the contract, the decree of approbation is just as effectual as if it had pro-

ceeded upon a valuation by the Sub-commissioners. Now, being a decree of the High Commission, the effect of it cannot be lost or derelinquished in the same way as a decree of sub-valuation can be lost or derelinquished. It stands good, and is binding on all parties concerned, unless it can be set aside. But no attempt has ever been made to set aside this decree of approbation. It is therefore settled for all time coming that the value of the teinds belonging to the Earl of Minto in the parish of Ballingry is 16 pounds Scots money, or £1, 6s. 8d., sterling; and that is the amount of valued teind which Lord Minto proposes to surrender in this process.

But the minister contends that Lord Minto is barred from founding upon this decree, and is bound to make a larger payment to him in name of stipend, because, under a final decree of locality pronounced in 1791, and for a period past the years of prescription, he has made payments of stipend in excess of the valued teind. The Lord Ordinary has given effect to the minister's contention; and in doing so he proceeds upon the authority of the case of *Madderty*, which we had occasion to consider very recently. But the case of *Fogo* v. *Colquhoun* was decided in this Division of the Court on 18th July last; that judgment had not been pronounced when the Lord Ordinary issued his interlocutor, and of course he had not the benefit of having that judgment before him. But the effect of the judgment of the Court in *Fogo* v. *Colquhoun* is to explain the case of *Madderty* in a way inconsistent with the Lord Ordinary's interlocutor. In the case of *Madderty* there was a sub-valuation, and after that sub-valuation there was a use of payment for a very long time of stipend in excess of the valued teind as contained in the sub-valuation. After the payments in excess of the sub-valuation had been made for a period long past the years of prescription, under final decree of locality, the sub-valuation was approved by a decree of the High Commission; and the judgment of the Court in the case of *Madderty* was that that decree of approbation could only receive effect with this qualification—that the valued teind must be taken to be, not what was contained in the decree of sub-valuation, but what was contained in that decree of sub-valuation *plus* the excess which had been paid in the interval between the decree of sub-valuation and the decree of approbation. Now the application of that in the case of *Fogo* was various. In one respect the case of *Fogo* was precisely in the same position as the case of *Madderty*, and in regard to particular lands, the names of which I don't at this moment recollect, we gave effect to the authority of the case of *Madderty* in *Fogo* v. *Colquhoun*. But where the sub-valuation had been approved by the High Court prior to the final decree of locality under which the payments in excess were made, we arrived at an opposite conclusion, and held that these payments, however long continued, being upon a decree of locality subsequent to the decree of approbation, could not have the effect of interfering with that decree of approbation. And, accordingly, we found that the heritor was entitled to surrender his teinds upon the value as found by the decree of approbation, without reference to the payments in excess, which had been made under a subsequent decree of locality. Now it appears to me that that last branch of the case of *Fogo* v. *Colquhoun* is precisely applicable here; because here the decree of approbation is long before any payments have been made—long before it has been ascertained that any stipend was paid at all out of these teinds.

But it has been maintained on the part of the minister that the right of the heritor here to surrender his teinds, and so to get rid of those payments in excess, is cut off by the negative prescription, and that he cannot be heard now to say that his teind is of any smaller value than that which has been paid by him under the final decree of locality. Now this is a plea which was not maintained by the minister in the case of *Fogo* v. *Colquhoun*, nor indeed does it seem to have been maintained in any of the numerous cases of this class which have occurred; and it is a plea very well worthy of consideration undoubtedly. But I think the counsel for the minister, in maintaining that plea, proceeded always upon 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 don't think it is at all necessary for the heritor to reduce the final decree of locality. If that had been so, there might have been more to be said for the plea of the negative prescription here, because it would then have assumed the form of being pleaded as a ground of challenge against a right of an action of reduction. But if no reduction is necessary, and if the decree of approbation is always available to the heritor whenever he thinks fit to avail himself of it, that places the plea of the negative prescription in a very different aspect. It is necessary always to keep in view what is precisely the nature of a surrender. The first time that the right of an heritor to surrender his teinds was fully recognised by the Court was in the case of *Lamington*, and the interlocutor of the Court in that case fixes a general rule which has been observed ever since, and which is expressed in very distinct terms, and furnishes an authoritative guide to us in dealing with surrenders. The Court in that case found that "victual stipend may be allocated on 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*, 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 teind, according as the same shall be ascertained by his decree of valuation."

Now here it is assumed, or at least settled, that although teinds are valued in money, it is still quite competent to the Teind Court to award an augmentation to the minister in victual; and 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. No doubt, if he once does it he cannot go back upon it again. 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 well worth his while, to make a surrender. Now it seems to me that that is a kind of right that cannot be lost by the negative prescription. It is *res mercæ facultatis;* it is a thing that is within his option to do at any time, as the interlocutor in the *Lamington* case expressly says. And therefore I am of opinion that the plea of the negative prescription cannot avail here; that the heritor is quite entitled to surrender his teinds whenever he finds that it is for his interest to make that surrender, because the money stipend has come to be in excess of the valued teind. Nor does it make any difference to my view that the matter of fact here, as admitted on both sides, is that from the year 1791, when the final decree of locality was pronounced, the victual stipend has always been slightly in excess of the valued teind. That wont affect the question in the least degree, if I am right in the ground of my opinion.

It is not said to what extent it was in excess. It cannot have been a very great sum, for there is no very great sum involved altogether: and it may be very easily understood that if the difference was a very slight one it may not have occurred to the heritors as at all desirable to interfere with the existing arrangement. But I am very clear that, whatever the excess might be, the right to surrender remains with the heritor at any time, whenever he shall find it convenient or desirable for his own interest to do so.

Lord Deas—In the case of *Fogo* v. *Colquhoun* your Lordships sanctioned a distinction with reference to this question of prescription between the case of a decree of valuation by the High Court, and a decree of approbation by the High Court of a sub-valuation. I had doubts about the soundness of that distinction, but your Lordships decided in favour of the distinction, and so that doubt must necessarily be held to be removed. The doubt might be taken in two ways; in the first place, whether there was any sufficient ground for such a distinction; or, in the second place, whether the case of *Madderty* had not been wrong decided. But your Lordships proceeded upon the footing that the case of *Madderty* must be followed wherever the circumstances were the same, and that it was a sound distinction. That being so, the only question that remains to be considered here is the argument upon the long negative prescription—an argument which was not stated in the case of *Fogo* v. *Colquhoun*, but which was very fully and ably stated in this case, the authorities upon it being fully and accurately quoted. These authorities are not to be called in question. It would be very perilous at the present day to go back upon that matter, and your Lordships do not propose to do so. The question is, Whether, assuming that all the authorities quoted were sound, they must be held applicable to a case of this kind—viz., to a decree of locality—Whether a decree of a locality is one of those decrees the right to challenge which is cut off by the long negative prescription? Now, as I took the liberty of remarking to Mr Watson in the course of his very able argument, that has never yet been so held in terms. The only question is, whether in principle the rule that has been applied to other decrees must not be applied to a decree of valuation. I think there are two reasons against that. In the first place, as your Lordship has said (and I think rightly), there is no action of reduction necessary to set aside the decree of valuation in order to enable a heritor to surrender his teinds; and the large effect which has been given to the old statutes upon negative prescription has been in holding them to cut off all rights of action, or at least so many rights of action may be held to be cut off that it would be very difficult to find an exception. But if your Lordship is right in holding that no action of reduction is necessary in order to enable the heritor to surrender, then in those cases it wont apply either directly or in principle. In the next place, there is the great peculiarity here that what the heritor wants to do is to surrender his teinds. Now the right to surrender his teinds is certainly not cut off by the negative prescription. Well, if he can exercise that right, and more particularly if he can exercise that right without reducing the decree of locality, then any applicability in point of principle that these cases on the negative prescription would have had, entirely fails. That being so, and the question being whether the heritor is entitled to surrender his teinds, taking the case of *Fogo* v. *Colquhoun* as well decided, I don't find any ground for differing from the view taken by your Lordship in this case. But it is quite understood that this judgment does not impugn that long series of judgments on the matter of the negative prescription which I have already referred to. It leaves them all in full force, but holds that they don't apply to a case of this kind, in the first place, where no reduction is necessary; and second, where the thing to be done is a thing which the heritor may do at any time—viz. to surrender his teind.

Lord Ardmillan—The question which we have to dispose of relates to the right of the Earl of Minto as a heritor in the parish of Ballingry to surrender his teinds in terms of an old valuation. He has produced a decreet of valuation by the High Commissioners for surrenders and teinds, dated 24th March 1637, and he maintains that he is now entitled to surrender his teinds in terms of that decree, whereby, in approbation of a certain contract and agreement, the lands of Cartmore, now belonging to the noble pursuer, are valued in stock and teind at £80 Scots, whereof for teind the fifth part is £16 Scots. The Lord Ordinary has decided that the Earl of Minto, founding on this valuation, is not entitled, by surrendering his teinds, to free himself from the obligation of continuing payment as hitherto, in terms of decrees of locality.

I do not concur in the view taken by the Lord Ordinary in his judgment, which, however, was pronounced before the decision in the case of *Fogo* v. *Colquhoun*, which your Lordship has clearly explained.

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

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

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

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

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

LORD JERVISWOODE concurred.

On the question of expenses:—

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

The other Judges concurred.

The Court pronounced the following interlocutor:—

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

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

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

L., Clerk.

Thursday, November 13.

SECOND DIVISION.

[Sheriff of Caithness.

SHEARER *v.* GUTHRIE.

Lease—Quarry—Essential Condition—Retention of Rent.

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