in the valuation roll at a rent of £4 and upwards were entitled to vote in the election of members for the School Board. If, therefore, the entry were made in the valuation roll as the appellants desire, 54 persons would be deprived of a privilege secured to them by statute.

In regard to the obligations laid upon the tenant, it was stated for Colonel Buchanan that these were only such as are laid upon all tenants in country districts, and if effect were given to this plea on the ground stated, no case of lands or houses could be held as affording a value to rate upon. Every such value would have to be ascertained and proved *separatim*, apart from the lease altogether, and hence general confusion would take the place of the lease-rent basis adopted.

It was admitted by the Assessor that farm leases bound the tenant to maintain the houses, but was denied as regards houses let by themselves.

The Commissioners were of opinion that the actual rent conditioned to be paid by the lease should be entered, and sustained the appeal.

Held that the Commissioners were right.

COURT OF SESSION.

Thursday, November 19.

SECOND DIVISION.

[Lord Shand, Ordinary.

MURRAY *v.* COUNTESS OF ROTHES.

Teinds—Contract—King's Annuity—Relief—Augmentations.

The teinds of certain lands were sold to the proprietor by the holder, one of the Lords of Erection; the disponee undertook the payment of stipend and of all augmentations that might be granted to the minister, and the disponer undertook to relieve him of the King's annuity, amounting to 6 per cent. of the whole teind, and of such taxations as might be imposed. The disponee subsequently purchased the right to the King's annuity, and thereby extinguished that burden. In process of time the augmentations exhausted the remaining 94 per cent. of the teind, and the minister came upon this 6 per cent. The representative of the disponee claimed relief from the representative of the disponer.—*Held* that the disponer's representatives were bound to give relief under the contract, and that the teind had been conveyed as an "*universitas*" subject to this burden, and that the burden had been abolished for the benefit of the party by whom it was abolished.

This was an action at the instance of Joseph Murray, Esq. of Ayton, in the county of Fife, against the Right Honourable Henrietta Anderson Morshead Waldegrave Leslie, Countess of Rothes, and the Honourable George Waldegrave Leslie, her husband, for his interest, both residing at Leslie House, in the county of Fife. The summons concluded for declarator that the defenders were bound to warrant the teinds, parsonage and vicarage, of the lands of Glenduckie, in the parish of Flisk and county of Fife, belonging to the pursuer, and disponed—the said teinds,—by contract of alienation and disposition thereof by John Earl of Rothes, patron of the parish, and Mr John M'Gill, minister, in favour of John Aytoune of that ilk, dated 18th, 20th, and 23d February 1632, "to be free, safe, and sure, to the pursuer, his heirs, assignees, and disponees, from all minister's stipend, future augmentations, and other burdens, imposed or to be imposed upon the said teinds after the date of the said contract of alienation, excepting only the sum of £2, 15s. $6\frac{8}{12}$d. sterling after mentioned, and 19 bolls 2 pecks oats, 6 bolls 2 firlots 1 peck 1 lippy bear, and 1 boll 3 firlots and 1 lippy wheat, being the amount of stipend payable out of the said teinds to the minister serving the cure of the parish of Flisk, under a final decreet of locality dated 19th December 1764, and pronounced in a process of augmentation, modification, and locality, at the instance of the minister against the heritors of the said parish, and which amount includes the stipend payable out of the said teinds to the minister of the said parish, as at the date of the said contract of alienation and disposition as therein specially set forth, except the sum of £2, 15s. $6\frac{8}{12}$d. sterling, being the equivalent to 50 merks Scots, undertaken by the said contract and disposition to be paid from said teinds to the minister of said parish, and which sum of £2, 15s. $6\frac{8}{12}$d. is given credit for in manner after mentioned; and which quantities of victual also include the additional stipend imposed on the said teinds by the said final decree of locality: And that the defenders should be decerned to make payment to the pursuer of the sum of £38, 8s., being the amount of stipend and augmentation, after deducting income-tax, paid by the pursuer to the minister, for crops and years 1872 and 1873, furth of the teinds of the foresaid lands and others, over and above the said sum of £2, 15s. $6\frac{8}{12}$d., and the stipend effeiring to the said teinds, in terms of the final decree of locality of 19th December 1764; and also of the sum of £4, 14s. $5\frac{4}{12}$d., being the sum of 5s. 6½d. paid by the pursuer to the said minister, as part of the whole valued teind of said lands now exhausted, for each of the several crops and years from 1855 to 1871 inclusive, over and above the amount localled in terms of the decree of 19th December 1764: And that the defenders should be decerned to make payment to the pursuer of interest at the rate of 5 per centum per annum on each of the said several sums from the date when each became due until payment: And further, that the defenders should be decerned to relieve the pursuer, and his heirs, assignees, and successors of all ministers' stipends, future augmentations. and other burdens, imposed or to be imposed from the date of the said contract of alienation and disposition, upon the teinds of the foresaid lands, over and above the said sum of £2, 15s. $6\frac{8}{12}$d. sterling, and the minister's stipend payable yearly furth of the said teinds in terms of the decreet of locality of 19th December 1764, and that by making payment thereof to the said minister, or other person or persons entitled thereto, yearly, at the respective dates when the same shall become due, or by paying the same to the pursuer or his foresaids, in order that they may operate their own relief: And that the defenders should be decerned to grant to the pur-

suer, at his expense, security by infeftment upon the lands which have descended to them from the Earl of Rothes, by whom the contract of alienation and disposition of teinds was granted, for implement of the obligation of relief therein contained."

The pursuer is proprietor of the lands of Glenduckie, in the parish of Flisk and shire of Fife, and of the teinds thereof. By report of the Subcommissioners for the Presbytery of Cupar, dated 1st August 1631, the lands of Glenduckie were valued at 15 chalders victual for stock and parsonage teind, and 5 merks for the vicarage teind, whereof 5 chalders bear, 1 chalder wheat, and 9 chalders oats. This report was approved by the High Commission, by decree of approbation of valuation dated 17th February 1632. At the date of the report the lands of Glenduckie belonged to John Aytoune, who immediately thereafter entered into a contract with the Earl of Rothes as patron, and the Rev. John M'Gill as parson of the parish, whereby he acquired right to the teinds; and in February 1632, by contract of alienation and disposition, the Earl of Rothes as patron and Mr John M'Gill as parson, for payment of 2000 merks Scots, and other considerations specified therein, sold and disponed in favour of John Aytoune and his successors in the lands of Glenduckie All and sundry the teind sheaves and vicarage teinds of the same, granting procuratory of resignation for resigning the same to His Majesty for new infeftment to be granted to John Aytoune and his heirs and assignees, to be held of the Crown for a yearly payment of one penny, "togither with annuatie dew to His Majesty," the amount being specified in the deed. The deed contains a clause whereby John Aytoune, with advice and consent of Mr Andrew Aytoune of Logie, "bind and obleige yame and yair foresaidis to relieve ye said nobill Erle and his above writtine of ye samyne annuities, and of all taxationes to be imposit upon ye teyndis of ye said parochine proportionallie, and *pro rata* effeirand to ye reat and quantitie of ye foresaids teynds of ye lands and utheris particularlie above mentionat, and present valuatione of ye samyne above writtine and few dewtie yairof to the said Johne, according to ye said valuation." They further bind themselves to relieve the Earl of the upholding of kirks and kirkyard dykes, and bind and oblige themselves and their foresaids in the following terms — viz., "to pay to ye minister serving ye cuire at ye said kirk of Flisk, and his successors serving ye cuire yairat, in pairt payment of yair stipend for yair service of ye cuire at the said kirk, ane chalder victuall of ye qualities following," &c. Further, the deed contains the usual clauses of assignation and warrandice, binding the Earl of Rothes, his heirs and successors, to do nothing in defeasance of the conveyance, and to convey to John Aytoune all tacks and other rights connected with the said teinds; also it contains the following clause:— "And likewayes, ye said nobill Erle binds and obleiges him, and his above writtine, to warrant, free, relieve, and skaithles keip ye said Johne Aytoune of yat ilk, and his foresaids, of ye remanent of ye said minister's stipend remaining owir and above ye forsaid chalder victuall, and fiftie merks money, appoyntit to be payit be the said Johne Aytoune and his above writtine; and likewayes of all utheris impositiones imposit or to be imposit upon the teyndis of ye said parochine, either for augmentatioune of ye said minister's stipend, or to onie uther use whatsomever (except ye annuities and taxations above specified of ye foresaid teynds of ye particulare lands above mentionat, appoyntit to be payit by ye said Johne Aytoune and his above writtine, in manner above expressit), and of all coast, skaith, dammedge, and expenss and intres yat ye said Johne Aytoune, and his successors and utheris foresaids, shall happine to susteine and incurr throw their not thankfull and tymous relief yairof." The deed further proceeds to acknowledge the receipt of 2000 merks paid to the Earl by John Aytoune. By the Act 1633, cap. 15, it was provided that the King's annuity out of the teinds should not be annexed, but disposable according to His Majesty's pleasure, and on May 7, 1642, the King made a grant of the same in favour of John Earl of Loudoun, with power to him to sell and dispose of it to those who should be willing to buy at a competent price. John Aytoune purchased from Lord Loudoun the annuity payable out of the teinds of his lands of Glenduckie, and others, for £300 Scots, and obtained a disposition in his favour, dated April 10, and registered November 1, 1644. In 1723 William Ayton, grandson of John Aytoune, conveyed the lands of Glenduckie, and the teinds thereof, to the pursuer's great-grandfather Patrick Murray, by disposition duly registered in the books of Council and Session 19th June 1740. The disposition contains a general clause of assignation of writs, and a special clause assigning in particular the contract of alienation above mentioned, with the procuratory of resignation and other clauses therein contained. The inventory of writs signed with reference to the disposition of the same date, contains, among other writs, the contract of alienation, and the disposition and discharge of annuity by Lord Loudoun. The teinds of Glenduckie, when conveyed to John Aytoune, were subject to a payment to the minister of one chalder of victual, consisting of 10 bolls oats, 4 bolls 2 firlots bear, and 1 boll 2 firlots wheat, and 50 merks of money. The pursuer admitted his liability to continue this payment without relief from the defender. The first augmentation after the date of the contract was modified on the 2d of March 1763, and a certain allocation was made upon the pursuer's predecessor, Mr Murray of Ayton. The locality was approved December 19, 1764. The contract of alienation was produced in the course of the process, and in terms thereof Mr Murray claimed relief of the augmentation from the Earl of Rothes. The claim was redeemed by Lord Rothes by payment of the sum of £112 as the agreed value of the additional stipend, with £5 of expenses, to Mr Murray, conform to a discharge dated 16th January 1767. But Mr Murray was paid the consideration for the full difference in victual of the original stipend and the victual of the augmentation, without giving Lord Rothes credit for the 50 merks which were part of the original stipend. Another augmentation was granted in 1794, but in the locality following, in 1797, the victual localled on Mr Murray's lands was in some respects disconform to his valuation, or was converted into different qualities. Mr Murray paid the full amount so localled, and effect was given to these payments in the account hereafter mentioned. A third augmentation was awarded on the 6th of February 1812, and the pursuer averred that the stipend so modified exhausted the whole teinds of

the parish, and therefore it was unnecessary to prepare a scheme of locality. The minister uplifted the whole teind agreeably to the decree of valuation, and the pursuer's father (who was in possession at that date), and the pursuer himself, have ever since paid the whole valued teind of Glenduckie as stipend to the minister.

The defender denied that the teinds were exhausted by the augmentation of 1812, and called upon the pursuer to have the stipend properly localled, that the true amount of augmented stipend of which she was bound to relieve Mr Murray might he ascertained; and the defender further explained that, in any view, she was only bound to relieve him of the amount of the valued teind, under deduction of the king's annuity, amounting to 6 per cent of the value of the teind.

The pursuer also stated that after the usual procedure in the Teind Court, the minister's stipend was in 1852 increased to £150 a-year, under the provisions of the statute 5 George IV., chapter 72, the whole valued teind of the parish being less than that sum. After 1794 the parties differed as to the mode of relief; and after the augmentation of 1794, mutual actions were brought by the predecessors of the pursuer and the defender the Countess of Rothes, respectively—the one action being for payment of the excess of the stipend last localled, and the other for repetition of the 50 merks which had been omitted in the settlement of 1767.

In the course of these actions mutual memorials were ordered by the Court; and on advising these memorials on 16th January 1805, the following interlocutor was pronounced:—"The Lords find the Countess, and her husband for his interest, bound to relieve the pursuer Alexander Murray of Ayton of the augmentation of stipend libelled, laid upon his lands for the year 1794, yearly since that time and in all time coming (the terms of payment in time coming being always first come), together with the interest due and to become due thereon; and of consent find the said Alexander Murray liable in payment to the Countess, and her husband for his interest, of the annual sum of 50 merks Scots, which he no longer paid to the minister after the locality in the year 1764 (although the Earl of Rothes, at the settlement which then took place, relieved him of every part of the minister's stipend), with interest from the respective terms of payment, according to the state given into process for the Countess; and find no expenses due to either party; and remit to the Lord Ordinary to proceed accordingly."

Mr Murray thereafter petitioned the Court to the effect that Lady Rothes should be bound to settle once and for all by a capital payment. Further discussion took place on this point, in the course of which Lady Rothes, while declining this arrangement, agreed to give real security for implement of her obligation of relief. On 10th December 1805 the following interlocutor was pronounced: — "The Lords having advised the petition and answers with what is above stated, of consent find the petitioner entitled to security by infeftment upon the lands which have descended to the respondent the Countess of Rothes from the Earl of Rothes, who was party to the agreement in 1632, for implement thereof; appoint the Countess, and her husband for his interest, on the expenses of the petitioner, to grant such security, and decern; and *quoad ultra* refuse the petition and adhere to their former interlocutor." No security over the said lands has yet been granted by the said Countess or her successors in obedience to this interlocutor.

The defender explained that no question as to the king's annuity arose in these actions, as it was only after 1812 that the king's annuity was encroached upon.

After these interlocutors had been pronounced, a remit was made to Mr Scott Moncrieff, accountant; and the result of the whole accounting was to bring out a balance due by the Countess of Rothes to Mr Murray of £289, 15s. 11d. This balance having been paid, a final settlement took place between the parties, at Martinmas 1834, of their mutual claims down to that date. The mutual actions were thus still in dependence, and the remit was in course of execution when the augmentation of 1812 was granted. During the whole period of these proceedings the present pursuer and his father continued to pay the whole valued teind to the minister. The pursuer also stated that from 1834 to 1873, both inclusive, the whole teind has been duly paid to the minister for stipend, and till after 1871 the defender and her predecessors regularly made payment to the pursuer of the various sums for which they became liable in relief in terms of the obligation, with the exception of the sum of 5s. 6½d. for each of the years from 1855 to 1871, both inclusive. That the defender refused to make any further payments in respect of the obligation, and, in particular, refused to make payment of the sums for which she was liable to the pursuer in relief for crops and years 1872 and 1873. The amount of the relief claimed for these two years was £38, 8s., and to this there fell to be added the sum of 5s. 6½d. (equivalent to 5 merks Scots) for each of the years from 1855 to 1871, both inclusive, amounting in all to £4, 14s. $5\frac{4}{17}$d. sterling.

The defender, in answer, stated that payments by her to the pursuer up to 1871 had been made in error, and in ignorance that credit had not been given to the defender for the amount of the king's annuity, and that the correct amount of stipend payable to the minister from the said teind had never been ascertained.

The pursuer pleaded—"(1) By the contract of alienation and disposition above mentioned, the Earl of Rothes, granter thereof, and his heirs and successors, became bound and liable in payment of relief as now concluded for. (2) It is *res judicata* that the defender, the Countess of Rothes, is liable in payment and relief as concluded for, as heir and representative of the granter of the said obligation. (3) The pursuer, as coming in place of the said John Aytoune, and in respect of his right to the said lands and teinds of Glenduckie, is entitled to enforce the said obligation against the defender, as the representative of the granter thereof. (4) The said obligation having been regularly and duly assigned, or otherwise transmitted to the pursuer, the present proprietor of the lands, teinds, and others, to which the same relates, is enforceable at the instance of the pursuer against the defender, as representing the granter thereof. (5) The defender and her predecessors having by repeated acts recognised and acknowledged their liability under the said obligation to the pursuer and his predecessors, are now barred from disputing the same. (6) The defender, the Countess of Rothes, and her husband for his inter-

est, are bound to grant real security to the pursuer, by infeftment, over the lands which have descended to the said Countess from the Earl of Rothes, who was party to the said contract, for implement of the said obligation of relief, in terms of the interlocutor above mentioned of 10th December 1805. (7) In the circumstances, and in respect of his titles above set forth, the pursuer is entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(1) This case ought to be sisted until the amount of stipend truly payable out of the said valued teind is legally ascertained and adjusted. (2) The defender is only bound to relieve the pursuer of the amount of stipend alleged to have been paid by him, under deduction of the amount of the king's annuity."

The Lord Ordinary (SHAND) pronounced the following interlocutor—

"*Edinburgh, 17th August* 1874—Having considered the cause,—Repels the first plea in law for the defenders, sustains the second plea stated by them, and appoints the cause to be enrolled for further procedure if necessary: Finds the defenders entitled to expenses, &c.

"*Note*—The defender's counsel did not offer any argument in support of their first plea in law, which is founded on the averments contained in the answer to article 10 of the condescendence. It seems to be clear that after what has taken place in the various Localities of 1763, 1794, and 1812, and having in view the fact that the minister's stipend was increased to £150 in 1852, under the Small Stipends Act, the defenders cannot successfully maintain their first plea in this case as an answer to the pursuer's demand, but must instruct these averments in support of that plea as a ground of action in a reduction of the localities, or in some other competent process, to which the other heritors in the parish whose interests are involved must be made parties.

"The remaining question raised by the second plea is, whether in reference both to the declaratory conclusions of the action, and the conclusions for payment, the defenders are entitled to have the amount of the king's annuity referred to in the contract of 1632 deducted in fixing the measure of their obligation, and the sums due in respect of the augmentation of stipend granted since 1763?

"The transaction embodied in the contract of 1632, entered into between the Earl of Rothes, the predecessor of the defenders as patron of the parish of Flisk, and the minister of the parish, on the one part, and John Aytoune, the pursuer's predecessor, then proprietor of the lands of Glenduckie, in that parish, on the other part, was not the sale on the ordinary footing by the titular to an heritor of the teinds of his lands as valued. In such cases the heritor, having acquired right to the teinds, became thereafter liable to the risk and burden of all augmentations, as well as the payment of the teind already allocated to the minister. In the present case the titular who sold the teinds undertook to free the heritor of the burden of additional and future burdens arising from augmentations granted to the minister.

"The question between the parties relates to the extent of the titular's obligation, and has arisen in this way: Immediately before the contract was entered into the teinds of the lands of Glenduckie had been duly valued by decree by the commissioners approving of a report of the Sub-commissioners of the Presbytery of Cupar, and at the date of the contract the valued teinds were subject to two defined existing burdens, viz.—(1) the stipend then payable to the minister, consisting partly of victual and of 50 merks money, or £2, 15s. $6\frac{8}{12}$d sterling; and (2) the annuity payable out of the teinds to the king, the amount of which was determined with reference to the valuation by Acts of the commissioners in 1627 and 1631, being at the rate of six per cent on the valued teind, excepting that part of it already payable to the minister as stipend. The contract provided that the heritor in purchasing the teinds, for which he paid the price of 2000 merks, should undertake these known and existing burdens, and that the titular, on the other hand, should bear the burden of all future charges on the teinds arising from augmentations or otherwise. Three augmentations were granted after the date of the contract. The heritor's claim of relief in respect of the first of these, granted in 1763, was admitted by the titular, who made a slump payment of £112, as the estimated value of his obligation, on the footing of its being bought up. This sum of itself, it may be observed, rather exceeded the original price of 2000 merks received by the titular on the sale of the teinds. Another augmentation was granted in 1794, and for this burden also the titular acknowledged liability. The third augmentation, granted in 1812, exhausted the whole teinds of the lands, including that part of the teind which had been formerly paid or payable as king's annuity. Of this burden, to its full extent, the titular also for many years has relieved the heritor, but the defender, the Countess of Rothes, has since 1872 disputed her liability to relieve the pursuer to the full extent demanded, maintaining that, in so far as the augmentation of 1812 has created a charge on that part of the teinds formerly payable as king's annuity, the pursuer is bound to bear the burden himself. The present action has been raised to try this question, and the pursuer's grounds of action are—(1) that by the contract of 1632; and (2) by the contract and long usage on it, the defenders are bound to relieve him of the whole augmentation of 1812, including that part which exhausts the amount formerly payable out of the teinds as king's annuity.

"It may be here mentioned that in 1644 the pursuer's predecessor, John Aytoun, the heritor of the lands, bought up the claim for the king's annuity by a transaction with his Majesty's commissioner, John Earl of Loudon; for a payment of £300 Scots he obtained a conveyance and discharge of all claim for the king's annuity payable from the teinds of various lands belonging to him, including the lands of Glenduckie, from the year 1630, and in all time coming. It appears to me that this transaction, to which the titular was no party, and in which I think he had no interest, cannot in any way affect the question raised in this case; and I am of opinion, on the merits of that question, that the pursuer is not entitled to relief to the extent he asks, but that the defenders are right in their contention that the pursuer must himself bear the burden of the augmentation of 1812 to the extent of the amount formerly payable as king's annuity.

"An account of the origin and history of the king's annuity payable out of teinds is given by Sir John Connell in his Treatise on Tithes, vol. I. p. 264 *et seq.*, and p. 213, under reference to the Acts and documents there mentioned, some of which

are printed in the appendix. It is sufficient here to say that the revocation by Charles I. of the grants in favour of Lords of Erection was enforced to the effect of the King's insisting on receiving an annuity out of all teinds liable to the burden of supporting the clergy, excepting the part then actually paid to the ministers, in name of stipend, for serving the cure, and to colleges, hospitals, and other pious uses. The Act 1633, cap. 15, ratifies the Acts of the Commissioners of 1627 and 1631, fixing the amount of the annuity at six per cent on the amount of the teind liable to augmentation of stipend; and the right was enforced at least until 1674, if not to a later date, as appears from the memorial amongst the Blair Drummond MSS., dated in 1688, forming No. 76 of the appendix to Sir John Connell's work, from which document it also appears that about one-half of the heritors liable in the annuity took advantage of the opportunity given to them of purchasing the King's right, and getting the annuity conveyed to them and the claim discharged. From the decree of the Commissioners, dated in 1632 (the date of the agreement in question), forming No. 74 of the appendix just mentioned, it appears to have been determined that so long as the heritor paid his valued teind to the titular the King's annuity was payable by the titular, but that after the heritor bought his teinds he became liable in payment of the annuity as one of the burdens to which they were liable.

"The annuity was thus a burden on the teinds, and payable out of the teinds by the heritor who had acquired right to them; and the obligation undertaken by the heritor in the agreement of 1632, by which the present case is to be determined, was so far in accordance with the ordinary rule.

"The heritor is only entitled to relief from the titular of future burdens on the teinds in so far as the obligation has been expressly undertaken by the titular in granting the conveyance, and the clause of warrandice contains the obligation of relief, which is said to impose the liability sought to be declared and enforced. That clause follows various other clauses providing that the heritor shall pay, *inter alia*, the King's annuity and the existing stipend, and the obligation on the titular is to warrant, free, relieve, and skaithless keep the heritor "of ye remanent of ye said minister's stipend," over and above the stipend then payable, and of all other impositions on the teinds, either for augmentation of stipend or for any other use whatever, "except ye annuities and taxations above specified," being the King's annuity and the stipend then payable. The clause of warrandice thus, in terms, excepts these two burdens on the teinds. It extends merely to the remainder of the teinds after these burdens have been deducted, and it is only reasonable to assume that the price paid for the teinds was estimated on the footing that the titular's obligation could not, in any event, be extended beyond that of warranting the remainder of the teinds, as thus defined, to be free from future burden.

"If this be the true construction of the clause just noticed, or the true meaning of the transaction which forms the subject of the agreement, as that transaction is to be ascertained from the deed as a whole, there is, I think, an end of the pursuer's claim to the relief demanded; for he is here claiming relief not on account of burdens imposed on the remainder of the teind after deducting the King's annuity, but of a burden imposed on that part of the teind formerly payable as annuity, and which was, when so payable, a burden on the heritor without any claim of relief. Taking the case as if the liability for annuity had not been brought up, and assuming that shortly after the date of the agreement the minister's stipend had been augmented so as to exhaust the whole teind, including the amount payable as annuity, I cannot see any good reason for the heritor demanding relief of the whole augmentation without crediting the amount of the annuity. The clause of warrandice applies, I think, in express terms to the remainder only of the teind after deducting the amount of the annuity. It expressly excepts the annuity, and if the minister in place of the King came to have right to that part of the teind, this was a change only in the creditor, to whom the heritor must make the payment for which he alone was liable, and for which he had no claim of relief. It did not enlarge the heritor's obligation, for he had just to pay to the minister what he was formerly bound to pay to the King; and I think it would have been against both the letter and the spirit of the agreement of 1632, and unjust to the titular, that his obligation should be enlarged, and the liability of the heritor diminished, from the mere circumstance that the King's annuity was no longer payable as such, but as stipend to the minister.

"It was not maintained in the argument for the pursuer that the heritor could have been at any time compelled to pay more than the full amount of his teind. If the whole teind was allocated to the minister it is not said that the annuity also would have been payable; either the annuity would have ceased, or the stipend must have been restricted by the extent of the annuity, for the owner of the teinds could not be required to pay any part of his teind twice over. Had the King's annuity been of the nature of a fine, or a premium paid by the heritor, in order that he might obtain an indisputable title to his teinds, the case would have been different, and the whole teind might have been liable to stipend notwithstanding payment of the annuity; but the annuity was really part of the teind.

"I am not aware of any direct authority on the question whether after the Act 1633, c. 15, the benefice had a valid claim to the whole teind, preferable to the King's annuity, so that future augmentations would supersede and extinguish the annuity. The memorial already referred to (Connell II., Appendix, p. 234), contains a statement that the King's annuity was, unlike the rest of the teind, free of future burdens. If the question had been raised, however, I think that it must have been held in accordance with the general principles stated by the majority of the Judges in the case of *Prestonkirk*, February 1808 (Connell II., Appendix, p. 313), that the teinds must if necessary be wholly applied for the benefit of the minister, and that the annuity must in that case cease; and his view is strongly confirmed by the circumstance that in the origin of the right it was limited only to that part of the teinds not at the time applicable to stipend or other pious uses.

"However this may be, and whether the King's claim or the minister's claim were preferable, it is, I think, clear that both could not exist so as to make the heritor liable for more than his

whole teind. This being so, if the annuity was preferable, then the heritor should have resisted any part of the augmentation being localled on that part of his teind which was or had been liable to annuity, and his failure to do so cannot throw an additional burden on the titular. If, on the other hand, all right to the annuity would cease by the whole teind being allocated as stipend, the heritor must, I think, pay the amount of the annuity to the minister in place of the King, and I see no just reason for compelling the titular to relieve him of this, which was all along his burden.

"The heritor's purchase in 1644 of the right to the King's annuity cannot, I think, make any difference on the result. If the King's right, like the heritor's right, to his surplus teind, was liable to be extinguished by future augmentations for the benefit of the cure, as I think it was, the purchase of the annuity was the acquisition of what might turn out to be a temporary advantage only. The price given was probably estimated in that view, and the burden actually ceased from 1630 till 1812. In the same way, the right to teinds was acquired by heritors at nine years' purchase only of their free teind, because of the liability of that teind to future burdens, and in most instances a temporary advantage only was gained, as future augmentations were from time to time the cause of an increasing charge, which in many instances has now exhausted the whole teind.

"Holding, as I do, on the grounds now explained, that there is no obligation on the titular under the deed of 1632 to grant the relief asked, I am farther of opinion that nothing has occurred in the actings of the parties which has imposed the obligation. There have been no judicial proceedings in which the question was ever raised for determination. It is true that in a settlement of the heritor's claims in 1834, embracing the period from 1812 to that date, the titular in error paid the whole augmented stipend, and omitted to deduct the annuity, and that the same error was repeated in the different settlements from 1834 till 1872. The defenders probably have no claim to repetition of the sums for which they should have claimed deduction at the time, but I see no grounds whatever which preclude them from requiring the mistake to be corrected in future, and from disputing the existence of any obligation on their part to relieve the pursuer to the full extent claimed. Long usage following on a contract, particularly a contract of old date, is often most important, as giving a contemporaneous exposition of the meaning of parties in a deed which is expressed in obscure and ambiguous terms. There is nothing of the kind here. The contract is not in any view ambiguous in its terms; and the usage is, comparatively speaking, recent. Such usage cannot, I think, create an obligation which did not previously exist.

"The defenders have been found entitled to expenses, because they have been always ready to settle on the footing of a deduction of the amount of the King's annuity being made from the pursuer's claim. As already noticed, they did not maintain their first plea in law in the argument.

"Should this judgment be adhered to, or become final, I should anticipate that the parties will have no difficulty in settling without farther litigation."

Against this judgment the pursuer reclaimed.

Pursuer's Authorities—*Macdonald*, 12 July 1828; *Speirs*, 20 D. 651; *Payne*, 22 D. 831; *Spottiswoode*, 15 D. 458; *Connell*, vol. i. 266, 610, vol. ii. 77; *Marquis of Tweeddale*, M. 15,652; Stair, ii. 8, 12; Erskine, i. 10, 39; Bankton, ii. 8, 156; *Earl of Wemyss*, M. *voce* "Stipend," Appx. No. 6; *Wedderburn*, 4 P. 621; *Mitchell*, 3 P. 140.

Defender's Authorities—*Forbes*, 339; *Connell*, i. 271: Stair, ii. 8, 35.

At advising—

Lord Justice-Clerk—My Lords, it were impossible not to say of this case that it is one of considerable difficulty. The Lord Ordinary has bestowed great pains upon it, and we have had the advantage of a very good argument from the bar.

The question at issue appears to be whether by the agreement of 1632 Lord Rothes became absolutely bound to relieve the disponee John Aytoune of Aytoune of all augmentations that might in future be granted. The Lord Ordinary has found that he was not so bound (and consequently, that his representative Lady Rothes is not so bound) in so far as extended to the 6 per cent. which represented the "King's Annuity;" or, in other words, that he was only bound to relieve the disponee of augmentations to the extent of 94 per cent., and that the obligation of warrandice did not exceed that percentage.

Lord Rothes, as one of the Lords of Erection, held these teinds. He granted a lease of them to Sir Alexander Seton, and then took an assignation from Sir Alexander. Ultimately he granted to Aytoune a disposition under an agreement containing mutual obligations of relief. The disponee by the agreement undertakes to relieve the disponer of the King's annuity and all taxations to be imposed upon the teinds. The King's annuity was a payment made to King Charles I. as a compromise in place of his resuming the whole of the teinds, and the burden was constituted by Act of Parliament in 1633, and in 1632, the year in which this agreement was entered into, negociations were going on which terminated in this Act. On the other hand, the disponer obliges himself to relieve the disponee of all natural burdens excepting the existing stipend—these of course being the claims of the minister for augmentations,—and this obligation is express, with the exception to which I have already alluded. The disponee thus got the right to everything under the burden of the King's annuity. The payment of this annuity lasted until 1674, when it fell into desuetude, but Mr Aytoune extinguished the burden by purchase, and he and his successors continued to possess them with full right until 1812. In that year, however, the remaining 94 per cent. of the teinds had been exhausted, and the minister came upon this 6 per cent. The augmentation has since that time been paid out of this by Mr Murray and his predecessors, and Lord Rothes' representatives have relieved them of it. It was hardly maintained that the King's right was preferable to that of the minister, but the real question is, whether the obligation in the deed extends to augmentations exhausting the whole teind inclusive of the 6 per cent. In the argument there was some confusion between Lady Rothes' right to be relieved of the King's annuity and her obligation to relieve Mr Murray of claims by the minister. They are entirely distinct. Lady Rothes has never been distressed for or called on to pay the King's annuity, so the claim for

relief has not arisen. But the minister's claim for stipend has been made, and of this Lady Rothes undertook to relieve Mr Murray. The words seem to me clear. Lord Rothes said "I will relieve you of any claim by the minister, and you relieve me of any claim by the Crown for the annuity." The disponee has fulfilled his part of the bargain, and I think he is entitled to fulfilment of that of his author.

LORD NEAVES—I am of the same opinion. I can only regard this deed as a conveyance of the *universitas* of the teind under a certain burden. Now, a man is entitled if he can get rid of such a burden to do so in any way in which he is able, and once it be got rid of, the person who had to bear the burden is the person who must be benefited, and is in right to possess the estate free from the burden—when an augmentation was made that encroached on the burden he became entitled to relief.

I could have understood the plausibility of an argument that the augmentation which took place was entirely the result of the action of the disponee; but that view is not taken or maintained. Therefore I hold that the burden has been abolished for the benefit of the party who abolished it. I think that the augmentation was one upon the *universitas* of the teind.

LORD ORMIDALE—I am also of the same opinion. We have here an action, not raised by the Countess of Rothes, but at the instance of Mr Murray, who does not conclude for any payment of King's annuity or taxations subsequent to the date of the deed, but concludes merely for relief from augmentations. The defenders, however, raise the disputed question by maintaining that they are bound in relief of augmentations only subject to the exception not only of the stipend due at the date of the obligation founded on, but also of stipend or teind equivalent to the amount of the King's annuity, although they have never paid or been asked to pay any such annuity, and cannot now be troubled on the subject. I can see no ground for this defence. On the contrary, for the reasons stated by Lord Neaves, which meet with my entire concurrence, I consider it to be quite untenable. We must therefore look to the terms of the contract, which appear to present no room for difficulty or doubt in the matter. There is contained therein an undertaking by Lord Rothes, the disponer, to relieve the disponee of all future augmentations, and not only that, but of all future impositions *except* the annuity and taxations. That this obligation is binding in the present instance is clear, I think, under the only admissible construction of the contract.

LORD GIFFORD—I have come to the same result. The true question is, what did the parties mean and contract in the disposition of sale of 1632? In particular, what is the precise meaning and effect of the obligation of relief undertaken by the seller? Now, the subject sold was the whole teind, not the teind after deduction of the King's annuity. This teind was under several burdens or liabilities. It was subject to the existing burden of the stipend and of the King's annuity, and also of course of augmentations of stipend and of any taxations to be imposed, if any there should be. Now, we find in the disposition a bargain as to all these. In the first place, the existing stipend was payable by the purchaser; secondly, future augmentations were payable by the vendor; and thirdly, the purchaser undertook the burden of the King's annuity, and of taxations if imposed. All these burdens are variable, and it so happens that one of them has not only gradually diminished, but has entirely vanished, and therefore the purchaser, who was to run the risk of its growing greater, gains the benefit of its disappearance. In reality, I think that the existing burdens in 1632 were not intended to be a rule of guidance. It appears to me that each of these burdens must be taken as of uncertain or variable amount, and the parties respectively take their chance of their incidence, and so the King's annuity is treated as a tax subject to increase and equally to decrease; and if it diminishes or disappears the benefit inures, not to the party who had nothing to do with it, but to the heritor who assumed the burden.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Joseph Murray against Lord Shand's interlocutor of 17th August 1874,—Recal said interlocutor, and decern in terms of the conclusions of the summons in so far as regards the obligation of relief; and in respect the pursuer does not now insist in the conclusion for security for implement of said obligation, assoilzie the defender from the same, and decern: Find the pursuer entitled to expenses, and remit to the Auditor to tax the same, and to report."

Counsel for the Pursuer and Reclaimer — Solicitor-General (Watson), Q.C., and Kinnear. Agents—Murray & Falconer, W.S.

Counsel for the Defender—Dean of Faculty (Clark), Q.C., and Adam. Agents—Tods, Murray, & Jamieson, W.S.

[*R.*, Clerk.

Thursday, November 19.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ALEXANDER BAIRD *v.* WILLIAM BRUCE MOUNT.

Lease—Miscropping—Pactional Rent—Discharge.

A tenant was bound by his lease to pay additional rent in the event of his miscropping, payable at the same terms as the ordinary rent. He miscropped during the last three years of his lease, and for the first two of these years received a discharge for the ordinary rent.—*Held* that the landlord's claim for additional rent for these two years was barred.

This action was raised by a landlord for the purpose of recovering from an agricultural tenant certain sums in name of pactional rent, said to be due on account of miscropping during the last three years of the lease. The clauses in the lease on which the action was founded were as follows—"That during the last three years of the lease there shall never be more than two-fifth parts of the whole lands let in crops of corn, nor less than two-fifth parts thereof in one and two year old grass, one-fifth at least being two year old, the