This question is one of some difficulty. I have come to the conclusion that it should be answered in the affirmative. On a consideration of the scheme of testamentary disposition as a whole, it seems to me very improbable that the testator should have intended that his son and heir in the baronetcy should be left unprovided for—it might be wholly unprovided for—should free income fail, in order to keep intact the fee or capital for the purposes of a destination under which the first beneficial interest is, under conditions not unlikely to be realised, conferred on the son himself, who is expressly empowered to charge the fee with provisions in favour of his wife and children. And when we turn to head *octavo* of the trust purposes we find that while the trustees are directed to pay Sir Iain an annuity of £3000 per annum the testator does not say that the annuity is to be payable solely out of the revenue of the trust estate. It is quite true, as observed by the trustees, that this direction is one of a series dealing with application of revenue. But this does not seem to me to go far enough to make out the trustees' contention. The testator, no doubt, hoped and expected that the revenue of the trust estate would be sufficient for all the payments which he directed to be made out of it. But for some of these the fee or capital was undoubtedly affectable. The annuities mentioned under head *sexto* are, we were told by counsel, burdens on the fee or part thereof. Again the interests of the heritable debts directed to be paid out of revenue under head *septimo* are undoubted charges on the fee. Thus the testator's scheme of administration *quoad* these annuities and interests represents only what he desired to have done out of revenue, *primo loco*, if there should be sufficient revenue available, the fee remaining liable in recourse in the event of there being a deficiency of revenue. It does not follow, therefore, from the fact of the annuity provision here in question occurring among a series of directions relating to the application of revenue that the testator necessarily excluded liability of the fee for its payment. No doubt he contemplated that there would be sufficient revenue to pay it. But the question remains whether he is to be understood as meaning that revenue alone is to be liable for it. Now he does not expressly adject this limitation to the direction to pay the annuity. And on a consideration of the scheme of his settlement as a whole I do not think there is any sufficient ground for holding the limitation to be implied.

The Court answered branch (*a*) of the first question of law in the affirmative.

Counsel for the First Parties — Dean of Faculty (Constable, K.C.)—Skelton. Agents —Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party — Chree, K.C. — Maconochie. Agents — Scott & Glover, W.S.

HOUSE OF LORDS.

Monday, December 12.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

GALLOWAY *v.* EARL OF MINTO.

(In the Court of Teinds March 6, 1920, S.C. 354, 57 S.L.R. 297.)

Teinds—Stipend—Valued and Unvalued Teinds—Right of Heritor to Tender, in Satisfaction of Stipend Localled in Victual, Money Value of Teinds without Surrendering them—Tender where Teinds Unvalued, of One-fifth of Rent of the Lands.

Held (*aff.* judgment of Second Division) that a heritor whose teinds have been valued in money but have had a stipend localled upon them in victual, is bound, where the stipend exceeds the amount of the valued teinds, either to pay the amount or to surrender the teinds in perpetuity. He is not entitled to tender for the particular year the amount of his teinds as valued.

Where the teinds are unvalued and the stipend localled exceeds one-fifth of the rent, the heritor must either pay the amount of the stipend or lead a valuation and surrender.

The case is reported *ante ut supra*.

The Earl of Minto appealed.

At delivering judgment—

LORD DUNEDIN—The respondent is the minister of the parish of Minto. The appellant is a heritor in the said parish. His lands consist of various parcels, and the title as to the teinds of the lands is not uniform. As to some he is the heritable owner in respect of conveyance and sasine, as to the others he is not. Some of the teinds are valued, others are not. The respondent is in right of a decree of locality following a decree of augmentation and modification in the year 1907. By that decree a certain amount of victual, half meal, half barley, is localled on each separate parcel of the appellant's lands. According to ordinary practice the amounts of victual so modified are converted into money at the fiars prices of the year, and demand is then made by the minister from the heritor for payment of the sum so brought out. The appellant here resists. He says the fiars prices are, owing to the war, so high that the amount that he is called on to pay is more than the money valuation which he holds in the case of the lands whose teinds are valued, and are more than one-fifth of the rent of the lands where the teinds are not valued, as those lands are entered in the proven rental in the locality on which the augmentation was granted. The sum so brought out he tenders. The respondent might have taken the short way of charging upon his decree, which would doubtless have been responded to by a suspension, in which process the appel-

lant would have had to consign the amount charged. But as there is no question of the ability or, indeed, of the willingness of the appellant to pay if he is wrong in his contention, and as this case will rule many others, it was thought better that the respondent should raise an action of declarator with petitory conclusions for the sums said to be due. It would be otiose to set forth the conclusions at length. It is sufficient to say that the declaratory conclusions negative the right of the appellant to make the offer he made as in full satisfaction of the debt, and the petitory conclusions ask for a decree for the sums brought out by a conversion of the victual localled according to the fiars prices. The action depended before Lord Sands (Ordinary), who gave decree as concluded for. On a reclaiming note to the Second Division their Lordships confirmed the judgment and dismissed the appeal. The Lord Ordinary appended to his judgment a note which I say with the greatest respect is a most admirable and painstaking exposition of the law on the subject. It is full of original research, and I may say at once that I agree with each and every one of the conclusions which he has reached. I do not, however, think it necessary or even expedient that I should follow him along the whole line of his investigation. It will be sufficient, and I think more to the purpose, if I indicate briefly, but I hope clearly, the reasons which make me advise your Lordships that the judgment should be confirmed and the appeal dismissed.

I take first the question of the valued teinds. Now I need not repeat the oft-recited history of how valuation of teinds came into being in the decrees-arbitral and the subsequent confirmatory legislation of Charles I. That is set out at great length in Erskine, and in the well-known authorities on the special subject of teinds, namely, Connell and Buchanan; and it has been repeated times without number in the judgments of learned judges of the Court of Session who have not always been at one as to the exact result of that legislation, as may be seen from a perusal of the opinions in the *Calton* case. But for the present purpose it is enough to point out that the process of valuation—besides the incidental purpose of providing for the King's annuity—was a process between the heritor and the titular; the minister (by which, of course, I mean a stipendiary minister and not a proper parson) did not need to be called, though in certain cases he might appear; and the process was intended to get over the obvious disadvantages of the titular drawing the teinds for himself. For till the tenth stook was taken, the heritor could not ingather his harvest without risking a spuilzie, and the advantage to the titular of knowing exactly how he stood had been already demonstrated by the extensive practice of taking rental bolls instead of the *ipsa corpora*. But that process of valuation assuredly did not alter the the true nature of the estate of teinds—they were after, as before, *debita fructuum* and not *debita fundi*—they are still teinds and not a mere money liability. This is no doubt inconsistent with the opinions of some of the judges in the majority in the *Calton* case. I said in the Court of Session in the case of *Baird* v. *Wemyss*, and I repeat it here, that in this matter I think those judges were wrong and the opinion of the minority was right. But while I say so as to this point, I think it absolutely necessary to add that I am very far from encouraging a reopening of the *Calton* case so far as the decision is concerned. It would, to my mind, be very improper for this House to disturb a decision which has now ruled practice for very many years, and on the faith of which so many decrees of augmentation and modification have been granted.

Now valuation might be expressed in money, and it might be expressed in victual. As a matter of fact it was sometimes expressed in the one, sometimes in the other, and sometimes in both. In the same way augmentation and modification might be expressed in either, and in old days was so. The practice, however, came to be general, and was stereotyped by the Act 48 Geo. III, chap. 138, which enacted that augmentation should be made in terms of victual. Before the practice was stereotyped it was evident that if there was a modification in victual while there was a valuation in money, then to make the two things correlate in the locality it was necessary to convert one into terms of the other, and that could only be done by means of the fiars prices. But if that were done it was also evident that if the fiars prices came to vary, as assuredly they would, it would be quite possible that the amount localled according to the conversion price of the year of the locality might come in the future to be greater than the money valuation to which it applied. Accordingly it was contended before the Court of Teinds that when there was a money valuation it was incompetent to modify any victual, but that the only modification should be in money, which would avoid any such possibility. That contention was the point of decision in the *Lamington* case of 1798, and to that case I call your Lordships' particular attention. The teind of the whole parish of Lamington had been valued partly in victual and partly in money, but the old stipend exhausted neither the victual nor the money. It had only left intact one boll, two firlots, one peck, and two-fifths of a lippie of victual. Then in 1793 the minister got an augmentation and modification of two and a-half chalders of grain and £8, 8s. 4d. sterling, with £5 sterling for the communion elements. Now this augmentation could obviously not be satisfied out of the remaining victual, and accordingly the sole heritors of the parish—Lord Douglas and Dame Elizabeth Baillie—contended by reclaiming petition that the augmentation was wrongly given in victual to the extent it had been, and should only have been given in money, and they asked for a recal of the interlocutor granting the modification. The report then bears that "as this plea involved

an important question which had never been fully considered, namely, whether an augmentation can be given in grain where the teinds are valued in money, the Court ordered memorials." These were given in, and the case came up for decision on 6th July 1796, when the Court by a majority adhered to the interlocutor, but as the judges were much divided in opinion it was agreed that the parties should be allowed to raise the case again before the Court. Accordingly on a reclaiming petition and answers the report bears that the following special interlocutor was pronounced:—"Find that victual stipend may be allocated upon heritors whose teinds are valued in money, the value of the money being in the present or any similar case computed at a medium of the fiars prices for the county which have been struck for the last seven years preceding the interlocutor of augmentation agreeably to the rule followed in the case of the process of sale—*Sir Alexander Ramsay* v. *Mr Maule of Panmure* on the 14th May 1794—and with this explanation, that as the stock cannot be encroached upon, it shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, at any time to give up and pay in all time thereafter to the minister the whole of his valued teind, according as the same shall have been ascertained by his decree of valuation."

Now it is quite evident not only that this represents a very solemn and considered judgment, but that the Court had fully before them the difficulty which might arise in the future, and provided for that difficulty. What did it matter from the heritor's point of view whether the augmentation, if to be given, was given in money or in victual unless he looked forward with apprehension that the fluctuating value of the victual might give rise to this very trouble; that the stipend as modified might come to be more than could be paid out of money valued teinds when that money valuation had been for the purpose of computation turned into victual according, not to the price of the year of demand, but of the seven years' average at the time of augmentation and locality? But for this point there was nothing, from the heritor's point of view, to dispute about, and what was the use of inserting the words "in all time thereafter" unless to explode the idea that all the heritor had to do was to pay the valuation in any one year as is contended in this case. Further, not only did the Court follow the case of *Skene* as is set forth in the report, but within a week they pronounced the same judgment in *Lord Mansfield's* case as in the *Lamington* case, *i.e.*, with the special addendum. And that this was thought of general application for the future is in that case very clearly shown. For the report then goes on to say that "afterwards, of consent of parties, this interlocutor was recalled, and the minister found entitled to the whole valued teind." That is, of course, equivalent to a compulsorily judicial surrender and certainly was for all time.

Now that was the decision, and it is now one hundred and twenty-three years since it was pronounced, and it is admitted that up to the present case no one has ever presented the argument that surrender is not necessary, but that tender of the sum in the valuation is enough. Further, the special writers—Stair and Erskine both wrote before the date of the decision—have all recognised the rule. I summarise what is set out by the Lord Ordinary at length. Connell, Buchanan, More in his well-known notes to Stair, Duncan in his Parochial Ecclesiastical Law, and Elliott, the late very learned teind clerk, in his little book, all assume that the rule in *Lamington* is a universal rule. Finally, in decided cases the dicta of judges are all the same way. Lord Cowan, in the first *Chisholm Batten* case, Lord Ardmillan in the second, and particularly Lord President Inglis in *Minto* v. *Pennell*, followed later in like terms by Lord Ardmillan, all agree as to the rule. I forbear to mention more recent dicta of judges still on the Bench, not out of disrespect for their authority but because they base their opinions on the authorities above cited. It was this consideration which moved the Second Division in confirming the judgment of the Lord Ordinary. It is also worthy of notice that the act of George III, specially preserves the right of surrender. One can scarcely resist the conclusion that this clause was penned in view of the rule in the *Lamington* case. Thereafter to ask this House at this time of day to affirm that in the *Lamington* case the words "in all time thereafter" were erroneously inserted, and to upset, not only this long course of decision and practice but also the unanimous decision of the Court of Session that this practice should not be upset, is a proposition I do not hesitate to say of unparalleled audacity. After all, the argument of the appellant is, in my view, based upon a very transparent fallacy. He says what is true, that the Court of Teinds can only modify out of teind and not out of stock. Then he says if the modification when translated in the locality comes to make a demand, calculated upon the fiars prices, which exceeds the money valuation, that is an encroachment on stock. But that assumes that the money valuation is the teind. It is not the teind, it is only the sum at which the teind is to be reckoned, if the whole teind is required of the heritor by the titular or the minister. The modification when it was made was granted upon the view borne out by the figures of the day, that there was teind out of which it could be got, and the locality was calculated upon the same basis. When the demand made by the minister seems to the heritor to exceed now, and be likely to exceed in the future, the sum which, if his whole teind is demanded, he can alone be bound to pay, and he objects, the answer in the minister's mouth is, "Then give me your teind, not pay me a sum of money, and keep your teind for the future." That, it seems to me, was the view of the Court in the *Lamington* case and has been recognised as sound ever since.

So much for the valued, now for the unvalued teind. As to this part of the case your Lordships are absolved from discussing the subject. It is recorded in all the judgments in the Inner House that the appellant before them conceded that if he were wrong as to the valued, he could not hope to succeed as to the unvalued teind. I will, therefore, say no more except this, in case the question should be mooted by someone else, that I agree entirely with the Lord Ordinary's view and with the way he has arrived at that view. The appellant, however, did raise another topic, namely, what was the position of the teind as to which he had no heritable right. This was not so much brought in as a separate point, but rather as an argument for showing that the addendum in the *Lamington* case could not be of universal application. What the appellant says is that you cannot surrender unless you have a heritable right. As regards the lands in this case they do not easily lend themselves to this argument. As to two parcels it is true that the appellant has no heritable right in the sense that he holds no conveyance, but he says himself he has a statutory right as patron of the parish. It must be remembered that valuation is always possible. So far as the teinds are not valued the appellant may start a valuation to-morrow. It is easily understandable why he has not done so, as he himself as patron was titular. There were no adverse interests, but with a view to surrender he may do it yet. Now if surrender meant the execution of a heritable conveyance it might be said that there could be no surrender when the teinds were not included in the sasine of him who sought to surrender. But surrender is nothing of the sort. The whole subject was dealt with in the recent case of *Davidson*, where the nature of surrender is dealt with.

There remain only the very rare cases of teinds which cannot be sold. They are given in Buchanan at p. 221. Even they can be valued, and a minute in such case, though not technically a surrender, might properly renounce all right which the heritor could claim to have.

My conclusions on the whole matter are these. The offer made by the appellant is inept as an answer to the demand of the respondent. If the appellant wishes to avoid the possibility of greater payment than the money valuation on the one hand and one-fifth of the rental on the other, his procedure is to execute a minute of surrender as regards such teinds as are valued; to get a valuation and then execute a minute of surrender as to those that are not. The minute should be, as the Lord President pointed out in the *Davidson* case, specific as to amount, should be executed by the appellant himself, and should be put into the locality process, if that is alive. For these reasons I move your Lordships to dismiss this appeal with costs.

I am authorised to say that my noble and learned friend Lord Atkinson concurs in the judgment which I have delivered.

LORD SHAW—I concur in the opinion of my noble and learned friend Lord Dunedin. I have read with much interest the latter part of the judgment of the Lord Ordinary, Lord Sands, as to unvalued teinds, and whether these fall under the same principles with reference to the point of surrender as do valued teinds. I see nothing against the high authority which that part of the judgment has, but of course the condition of the argument before your Lordships' House was substantially the same as that before the Second Division, which is thus stated by the Lord Justice-Clerk—"At the hearing before us the defender conceded that if he was wrong as to the valued teinds he could not succeed as to the unvalued teinds." In these circumstances I confine my observations to the earlier portion of the Lord Ordinary's judgment. The soundness of this was seriously contested at the bar of this House. After repeated study I record my respectful adherence to Lord Sands' views, accompanied as the expression of these has been by an historical and legal survey which appears to me to be of great value. I should humbly venture to sum up my own labours on the topic in the Lord Ordinary's language—"The result of my examination of the authorities is that for the past 120 years it has been assumed that a heritor must pay the stipend localled upon him under a final decree of locality unless he surrenders his teinds; that a system of procedure has been based upon this assumption, and that this assumption has been recognised by statute, by judicial dicta, and by all legal commentators during that period." In these circumstances a further elaboration on my part would be superfluous. I confine myself to a separate indication of my view on one or two particular points.

As to the *Lamington* case, it was decided in 1798. It has been often and always consistently followed. But I appreciate to the full the argument that that part of the judgment which bears upon the issue in the present appeal cannot be said to have been essential to the decision, and might therefore be eliminated as a precedent and treated as an *obiter dictum* which must go by the board if unsound. The final judgment in the *Lamington* case was in these terms—"Find that victual stipend may be allocated upon heritors whose teinds are valued in money, the value of the money being in the present or any similar case computed at a medium of the fiars prices for the county which have been struck for the last seven years preceding the interlocutor of augmentation agreeably to the rule followed in the case of the process of sale (*Sir Alexander Ramsay against Mr Maule of Panmure* on the 14th May 1794), and with this explanation, that as the stock cannot be encroached upon it shall be optional to any heritor, instead of delivering and paying the quantity of victual and money stipend thus laid upon him, at any time to give up and pay in all time thereafter to the minister the whole of his valued teinds, according as the same shall have been ascer-

tained by his decree of valuation." It must not be forgotten that this judgment was pronounced after repeated and apparently protracted and very learned argument. As the report bears, a certain conclusion on the merits was formed, "but as the Judges were much divided in opinion it was agreed that the parties should be allowed to bring the case again before the Court." This occurred on 6th July 1796. Thereafter a second reclaiming petition was framed and answers to it were lodged. The final special interlocutor was dated 24th January 1798. While it is accordingly true that the "explanation" contained in the interlocutor was unessential to the particular merits of the case, no one can fail to see that that "explanation" was well considered, was pronounced in the interests of both parties, and also in the interest of a general settlement of what might otherwise be not infrequent trouble; and for 120 years it has stood and has been followed without challenge. Not only so, but the entire teind practice of Scotland has proceeded upon the footing of adopting the "explanation" as the rule of law.

I dissent from the view that the "explanation" although supported by time and practice was in itself either unreasonable or unsound. The rule, in my humble opinion, was quite a good and reasonable rule. The Lord Ordinary shows why, and I agree with him. I will venture to add only this—The modification of stipend in victual was the adoption of a measure which when the standard of living became high in the dear year raised the stipendiary minister's allowance, whereas in the cheap and moderate year the money equivalent of the stipend proportionately fell. All that is perfectly intelligible. But it followed that the titular proprietor might find in the dear year that the victual stipend reckoned in money on the high prices swallowed up the whole of the free teind, or again the proprietor might even have to pay more than the whole of the teind which he possessed as stated in the money valuation. What was to be done in these circumstances? Plainly it was a case for accommodation. The law was that the minister's rights were definitely settled by his decreet of modification. The assumption of the law, however, always was (first) that the titular proprietor when the stipend did not reach the whole of the teind kept the balance of the teind for himself. This credit balance was his own property. When prices from exceptional causes put him in the position of being only able to answer the minister's demands by paying more than the teind, it followed that the result was that instead of there being a credit balance which he could keep for himself there was a debit balance against him of an amount which had to be paid to the minister so as to satisfy the decreet of modification. Historical causes and changed seasons produced uncertainty to both parties. It seemed as much against principle that the proprietor should have to pay more than his whole teind as it was that the minister should ever have less than his whole modified stipend. A practical escape from the difficulty was found by permitting the proprietor, the owner of the teinds, to surrender them to the minister once for all, and being freed from the possible liability for a debit balance in certain years to give up the credit balance in the other years.

That was all that the "explanation" came to. A settlement was eminently desirable in the interests of both parties, and the law interposed to give to the proprietor the means of ending the uncertainty if he so chose, and that by assigning over or surrendering the teind. Who shall say that this was unreasonable or contrary to principle? On the other hand, if according to the argument for the appellant the proprietor were at liberty not to assign for good, not to surrender the teind, but simply in any year when the sum due to the minister would produce a debit balance to the landlord to be free from paying that debit balance and leave the minister to suffer a shortage, but with the right of the proprietor unimpaired to keep the balance for himself in those years when it was in his favour, then how could that be reckoned reasonable or in accordance with principle and fair dealing any more than the system of surrender which was adopted? Instead of it being so, it would have seemed not to be a principle at all, but rather a device for weighting the scales of justice against the minister. The principle so settled was not in truth a principle of law at all. It was a rule of practice. But when the practice was followed, and was repeatedly recognised as a rule of liability on the one hand and of correlative right on the other, then the rule of practice became the law of the land; and I see nothing whatsoever to prevent this, looking to the protracted lapse of time and to the continuity and consistency with which the practice has been maintained. As to unsoundness, there was nothing inherently unsound about it.

But there is more than practice to fortify the creation of this rule of law. The right which it embodies has been recognised by the Legislature. In the Act 48 Geo. III—that is to say, twenty years after the decision of the *Lamington* case—the matter was in my opinion put beyond the region of doubt. The statute was very important, covering as it did not only the processes of modification but those of augmentation and all conversion of money stipends in grain or victual. The provisions of the statute indicate that its framers were minutely acquainted with the details of the somewhat recondite topic, and suggest the very opposite of ignorance of the true rights of parties to the transaction of modification of stipend out of teind. By section 14 of this Act it was "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." Of course this was not a right which had been conferred by the statute itself. But it was a right and no other which, as Parliament appears to have recognised, arose out of, *inter alia*, the *Lamington* case and the

"explanation" already referred to. It is to be further observed that the section provides in my opinion a complete and emphatic negation of the idea of recognising in the landlord an optional right of non-payment of a sum in excess of his teind. The right which is mentioned is a right to "surrender his valued teind." That teind is a piece of heritable property by the law of Scotland, and its surrender should mean under the statute nothing but a complete transfer of the teind. The language employed by the Legislature is inconsistent with the mere privilege of occasional non-payment of a balance.

As to the text-books, I think the whole point is with convenience and precision stated by Mr Duncan, of whom I would venture to remark that Mr Duncan is an author to whose labours and lucidity sufficient justice has not heretofore been done, and he is furthermore, in my view, an author of the highest authority. "When," says the learned writer (Parochial and Ecclesiastical Law, the 2nd edition, that of 1869), "the titular or heritor has been, or fears that he may be, called on to contribute, in payment of the minister's stipend, an amount of victual which, when converted into its corresponding value at the fiars rates, will exceed the amount of his teind as valued, he may assign, or as it is technically called 'surrender,' his teinds to the minister. Surrenders of teinds are said to have been introduced into practice in the case of *Lamington* in 1798. They are expressly recognised by the Act 48 Geo. III, cap. 138, sec. 14, and the Act of Sederunt 20th June 1838, and are in general use A surrender of teinds by the heritor operates as a conveyance thereof to the minister, and relieves the heritor from payment of the stipend proposed to be localled on him, and from the expenses incurred after the date of the surrender in the depending or any subsequent process of locality."

This appears to me to be a statement of the position which is in all points correct. It may be further mentioned that the form or style given as in use for a minute of surrender is in exact accord with that position and shows the full scope of the transaction. It bears—"The said A B hereby surrenders the teinds of his said lands, and protests that neither he nor his successors therein shall be liable for any augmentation of stipend or for any expense which may be incurred in the present or in any future process of locality, or otherwise in all time hereafter, in respect of the said lands and others."

Of the cases cited (the last of which—*Davidson* v. *Stuart*, 1919 S.C.—contains an important pronouncement and ruling by Lord Anderson) I content myself with citing the judgment of Lord President Inglis in the *Earl of Minto* v. *Pennell*—"The first time that the right of a 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." His Lordship then quotes the judgment, and there follow these passages—"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 teinds 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 on it again."

There was no new law in this statement, but there was a summing up, and that by the highest authority, of what had been the acknowledged law in Scotland for a century. The argument of the appellant appears to me to question the whole of that law, and to be beating the air.

LORD SUMNER—It is clear that both before the Lord Ordinary in teind causes and before the Court of Teinds in Scotland itself this case was covered by binding authority. The *Lamington* case cannot be construed as being subject to a reservation that without surrendering the whole right to teinds the heritor can still escape payment of more than their annual value if the stipend as localled exceeds that value in the year in question. I might perhaps have done best to say that I adopted the conclusions of both Courts below, and considered that whatever powers of reviewing the *Lamington* judgment your Lordships may now have so long after it was pronounced, it would not be proper to exercise them in a case where the law has so long been treated as settled, and rights of property and emoluments of ministers of religion have so often been adjusted upon that footing. In view, however, of the importance of the subject and the great learning with which the arguments have been supported on both sides, I think that I ought not to shirk an attempt to present my conclusion in my own way, small as the weight attaching to it must be.

It was conceded before the Court of Session that the appellant could not succeed in respect of his unvalued teinds if he failed where they have been valued, and by agreement between counsel at your Lordship's Bar any difficulty arising from the appellant's inability to surrender the whole teinds, owing to the particular state of his title in respect of some of them was consensually removed. The matter may therefore be discussed as if all the teinds in question were those which appear to have been valued pursuant to decrees of valuation of 1756, 1777, and 1819. After sundry prior augmentations the stipend of the minister of Minto was again augmented by a decreet

of modification and augmentation of 8th February 1907 and the stipend thus settled was localled by a decreet of locality bearing date 18th June 1908.

By a decree of valuation in regular form the Court pronounces that the rent, stock, and teinds of the lands in question are of the constant yearly value of so much, and that such and such a sum is the constant and fixed yearly duty and the just, constant, and true value of the teinds, parsonage and vicarage, of the said lands and pertinents to be paid in all time coming. Whatever may be the deductions to be drawn from these decrees, there can be no doubt that the measure of constancy thus introduced as between titular and heritor has been of permanent advantage to both. The minister, however, is in a different position. For the definition to be given to his general right to a competent stipend he has to look to a decreet of modification from the Court of Teinds. When obtained this is his title, and under it he can enforce his right against any owner of teinds or intromitter with them. The teinds of his parish as a whole constitute the fund to which he has to look; with the localling of his stipend he is not immediately concerned. It has long been the practice in granting successive augmentations of stipend to express the augmentation in terms of victual according to the Scotch measures—lippies, pecks, firlots, bolls, and chalders—and by section 9 of the Teinds Act 1808 all decrees of modification pronounced thereafter must convert money stipend into victual stipend upon an average of the fiars prices applicable for the previous seven years. The actual stipend as decreed thus becomes convertible into money from time to time according to a fixed scale, based upon an average of seven years, and when localled it is distributable among those liable to pay it upon no other basis.

The primitive simplicity of teinds is thus departed from in two ways. When the titular drew his teinds and severed with his own hands the *ipsa corpora*, which were his, from the residue, which were the stock of the heritor or his tacksmen, the fruits of the teindable land then and there became divided into teinds and stock, and whatever else might happen, no question of encroaching upon stock could arise. Valuation altered this. When under a decreet of valuation the teinds fell to be taken to be of a constant yearly value of so much money, it is obvious that in a given year the teinds so fixed might differ materially from the actual value in that year of one-tenth part of the fruits of the teindable land independently of valuation. The residue left after the teinds were satisfied and constituting the heritor's stock might or might not be encroached upon in actual fact, but this difference would be the inevitable effect of substituting a permanent annual value for a value annually fixed or a proportion annually ascertained.

When the Court of Teinds came to modify a stipend, where the teindable lands had been valued, it had to work upon this system of valuation, and taking account of the aggregate value of the teinds, assuming for convenience all teinds to have been valued and none to have been surrendered, it had to proceed to modify a competence for the minister within it. In granting an augmentation the like regard had to be had to the free teinds. No doubt unless the stipend was fixed so as to absorb the whole of the teinds as valued, encroachment on the stock would be a theoretical possibility only, but whenever the whole teinds were devoted to stipend, then in any one year the stipend might encroach on the stock, just as I have pointed out the mere valuing of the teinds at a constant value might in a real sense encroach on the stock. It has not, however, I think, been suggested that, if a stipend had been modified in money at the full amount of the valuation of the aggregate teinds, the minister could be required to be satisfied in a bad year with less than would be payable to him in a good year.

It is an established proposition that the Court of Teinds cannot encroach upon the stock whether it modifies stipend in money or in victual. This rule takes effect when the Court pronounces a decreet of modification, for then it has regard to and is restricted by the valued total of the teinds. It is quite another thing, however, to say that the Court having given the minister his title by a valid decreet, and made an end of the matter for the statutory period which must elapse between one modification and another, his rights under it can afterwards be diminished by the accidental unfruitfulness or the casual rise of prices of particular seasons. The Court cannot be said to have disregarded the rule or exceeded its powers by pronouncing a decree which was valid and regular at its date, merely because future events, which were beyond the ken of man, have not been allowed for in the decree sufficiently or at all.

When the second departure from primitive simplicity, namely, the reference to the fiars prices over an average of seven years, became obligatory, there was introduced a further and graver risk, that in a given year the amount of the minister's stipend might by no means square with the integrity of the heritor's stock, whether regarded as a tenth of the fruits or as a residue over and above the valued teinds. It is the introduction of this further mode of valuing victual stipend which has in fact led to the present difficulty. That such a thing might happen must have been apparent to those who established the rule, and there is no dispute of fact or error of calculation alleged here. The appellant must therefore show that the rule which requires conversion of victual stipend into money on a seven years' average of fiars prices either is subject to an unexpressed exception which covers the event that has happened, or is one which does not apply, except subject to a reservation against encroachment upon the heritor's stock. To say that the seven years' average was introduced subject to the proviso that it should apply only in so far as the resulting sum did not exceed the actual teinds of the year, is only another way of putting the

same contention. This modern method of arriving at the money value of the victual stipend forming part or the whole of the minister's competence, after being laid down in the *Lamington* case, was given statutory authority by 48 Geo. III, cap. 138, sec. 9. Whatever powers of review your Lordships may have as regards that case, your powers as regards the statute only extend to its interpretation, nor can any practice in regard to the wording of decrees of modification and locality, however inveterate, affect the meaning.

The defender makes the following submission as to this statute:—"It is alleged . . . that the liability of the landowner has been increased by implication in consequence of a modern statutory provision"—*videlicet* the Teinds Act 1808. "It is submitted that no such result can follow from the mere introduction of machinery, and that such an alteration of the law, imposing such a burden on a heritor, would have required express enactment." I cannot understand this. As it seems to me, it is the supposed proviso limiting the operation of this machinery to cases where, after applying the average of the fiars prices, the result does not exceed the total amount of the teinds for the year, which stands in need of being expressly enacted, nor do I see why a heritor, as distinguished from other bearers of statutory burdens, is entitled to an explicit form of language to which others cannot lay claim. As for dismissing the prescriptions of an Act of Parliament as "the mere introduction of machinery," it is a device for which there is certainly some precedent but in my opinion no justification. Statutory "machinery" affects the rights of those who fall within the Act as effectually as statutory principles do, and the whole matter is one of construction. Two other sections of the Teinds Act 1808 are material, sections 11 and 14. By the former it is made incompetent for the Court of Session, in modifying a stipend thereafter, to authorise the minister to receive the same in kind, and it can only "decree the value thereof to be paid . . . in money according to the fiars prices of the kind or description of grain or victual into which the same shall have been modified . . . for that crop or year for which such stipend . . . shall be payable." By the latter the heritor's right to surrender his valued teind, in place of subjecting his lands to the amount of the stipend localled upon them, is saved.

All these sections were obviously framed in view of the controversy which, so far as the Courts were concerned, was brought to an end by the judgment in the *Lamington* case. Section 14 is in itself a sufficient answer to the contention that the conclusion arrived at in the *Lamington* case was quasi-legislative or quasi-administrative, and was not such as at the present time should be recognised as falling within the competence of a judicial tribunal. The existence of the right is now recognised by statute, and the expression of this recognition strongly negatives the implication of any other recourse where the heritor objects to subjecting his lands to the amount of stipend localled upon them, upon the ground, for example, that under the circumstances of the time this is equivalent to an encroachment upon his stock. I think that the effect of the legislation is to enact in express and explicit terms that when an augmentation of stipend was decreed to the minister of Minto in 1907, his right and the heritor's obligations thenceforward should be measured in reference to the average of the fiars prices and at the sum for the year 1917 for which the pursuer now contends.

It is quite true that the Act in terms only prescribes the mode in which the Court is to express a total augmented stipend, and the mode in which effect is to be given to that decreet in following years, while the time-honoured form of the decreet at least makes reference to teinds by name as a source from which it is to be satisfied. Do these words really affect the matter? I cannot think that they do. The contention founded on them represents rather the defender's gloss upon the words than the words themselves, for payment "out of the first and readiest of the teinds" may be, and I think is, different from payment "only out of teinds." Beyond a doubt the minister cannot get more than the amount of stipend arrived at by measuring victual by the seven years' average of the corresponding fiars prices. He at any rate cannot say that in a given year the average works out adversely to his interest, and that the mere machinery of the Act should not prejudice his right to his total stipend in victual or its equivalent for the time being. If in the minister's case the statutory provision is binding and regulative, it must be the same for the heritor in the absence of express words to a contrary effect. The words of the decree indicate a right of recourse to the first teinds available; they cannot prevail against the statute to limit the decree when for the year in question sufficient teinds are not available. It seems to me that under the present system the money stipend, apart from the mode of calculating it, is deemed to be a burden on and within the value of the teinds and not a burden on stock, whether it always is so in a financial sense or not. If the heritor has other funds apart from stock, he can satisfy his share of the stipend out of them without encroaching on stock, nor is he compellable to resort to stock for the purpose if he has nothing else but stock, he must resort to stock or make default. The result to him is much the same, but the theory is still sufficiently satisfied, for the money calculation is only a monetary substitute for the teindable fruits. As a matter of personal opinion I prefer not to rely on the view suggested by the Lord Ordinary as the explanation of the reasoning in the *Lamington* case, because I think that it is contrary to the nature of something which grows out of the fruits of a particular year to measure it in a particular year by reference to fluctuations arising in other years. Nor is it altogether satisfactory to say that the existence of the right to surrender has the result that if the heritor pays more than the value of the teind in pursuance of decreets of modification and

locality, he does so at his own hand because he thinks it better not to surrender, and that therefore there is no encroaching on stock by the law. It is true that surrender has been regarded as an alternative and optional way of implementing the decree of locality, but I think the difficulty must still be faced that the heritor's election not to surrender, which he has a right to make, may involve him, as part of the legal obligation then incumbent on him under the decree of locality, in an encroachment on stock *de facto* for the benefit of a stipend localled on his teinds. I prefer to put the matter as I have stated it above, much fortified by the judgment of Lord Sands. As he says, "The teind was a share in the produce of the soil, the value of which fluctuated annually. There were two elements of uncertainty, the crop for the year and the prices for the year. A valuation in victual eliminated the former; a valuation in money eliminated both." I think that the disadvantage attendant on this elimination is inevitable. It sacrifices the severance of teind and stock then and there for the year and for the year only, and substitutes a notional, or at least an economic, severance for the physical one, by resorting to valuations which are neither made *ad hoc* on the value of the *ipsa corpora* as they lie, nor are based on current values which do not go beyond the economic situation for the time being.

I think the appeal should be dismissed.

LORD WRENBURY—I concur.

Their Lordships ordered that the interlocutors appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellant—Dean of Faculty (Constable, K.C.)—Macphail, K.C.—J. S. C. Reid. Agents—Tods, Murray, & Jamieson, W.S., Edinburgh—John Kennedy & Company, Westminster.

Counsel for Respondents—Mackay, K.C. —Maconochie—Pitman. Agents—Menzies & Thomson, W.S., Edinburgh—Archibald Hope & Spens, Westminster.

Monday, December 12.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

STEWART MACKENZIE *v.* FRASER-MACKENZIE.

(In the Court of Session, July 17, 1920, S.C. 764, 58 S.L.R. 7.)

Heraldry—Arms—Differencing—Quartering—Supporters—Title to Sue.

In a petition for reduction of an interlocutor of the Lord Lyon giving the respondent the right to use and bear the arms of Mackenzie quartered with the arms of Fraser and Falconer, and certain supporters, *held* (*aff.* the judgment of the Second Division) that the arms of the respondent were sufficiently differenced from the Mackenzie arms by the quartering with them of the arms of Fraser and Falconer as to exclude any right on the part of the petitioner to challenge the respondent's use thereof; that whether they were correctly differenced or not, the decree of 1817 which granted the arms from which those of the respondent were deduced was protected by prescription and must stand; and that as the petitioner had himself no right to these arms, which had been granted by the Lord Lyon in his ministerial capacity, he had no title to sue. *Held further*, that there being no exclusive right of property in particular supporters the respondent had not infringed any right of the petitioner in regard thereto, and appeal *dismissed.*

The case is reported *ante ut supra.*

The petitioner appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—The present appeal is against an interlocutor of the Second Division affirming an interlocutor of the Lord Lyon of 21st October 1918 whereby he dismissed a petition at the instance of the appellant craving that a grant of ensigns armorial in favour of the respondent, dated 7th February 1908, should be reduced or set aside, or at least should be altered by a disallowance of the supporters authorised thereby. It may be a matter for regret that the opinion of this House should be asked on such a question. There seems however no doubt as to the competency of the appeal. The Court of the Lyon is an inferior court, and from inferior courts there lies an appeal to the Court of Session, and final interlocutors of the Court of Session in civil matters are appealable to your Lordships' House.

It will be convenient to set forth as briefly as may be the facts which give rise to the controversy.

The ancient family of Mackenzie of Kintail was advanced to an earldom in the person of Colin, who was created Earl of Seaforth in 1623 with remainder to his heirs-male. The arms of the Seaforths were admittedly described as follows:—"Azure a deer's head cabossed *or;* crest, a mountain in flames proper; supporters two savages wreathed about the head and middle with laurel, with clubs erect in their hands and fire issuing out of the top of them, all proper; and for motto *Luceo non uro.*" The fifth Earl was attainted in 1715 and the attainder was never removed. In 1797 Francis who but for the attainder would have been the ninth Earl was created Baron Seaforth with the remainder to heirs-male of his body. His sons all died *sine prole* in his lifetime and on his death the barony became extinct. He left an eldest daughter Mary, on whom he entailed his estates. She was twice married, first to Admiral Hood, by whom she had no issue, and second to James Alexander Stewart. The petitioner is the grandson of James Alexander Stewart, who has, as did his father, assumed the name of Mackenzie. Francis, Lord Seaforth, in the entail above mentioned, inserted a clause