sometimes. Whereupon Mr Helme said, 'Then we're to get none but a little of the small wood.' I said, 'Just that. Isn't it best for bobbins?' After that conversation, I considered I was entitled to retain half of the bobbin wood of that wood to my own purposes, as I only told him I had sold him *some* of that wood. I did not say anything exactly about keeping to myself the whole half of the bobbin wood."

The Steward-Substitute (Dunbar) found that the pursuers had not proved the contract averred by them, and therefore assoilzied the defender. The Steward (Hector) adhered.

The pursuers advocated.

BURNET (with him GIFFORD) was heard for the advocators.

THOMSON (with him SOLICITOR-GENERAL) for the respondent.

The Court unanimously recalled the interlocutors advocated, and found the defender liable in damages for breach of contract (which they assessed at £100) and expenses.

LORD PRESIDENT—The contract, which the defender alleges on record was made, is one of a very extraordinary kind, such as I don't remember to have ever heard of being made in any branch of trade. It is one most unfavourable to the purchaser, and it is highly improbable that any manufacturer, who requires at the beginning of every season to make provision for the supply of his raw material, would enter into such a bargain. But no doubt such a contract is legal, and if made it may be enforced. If, however, the defender, on the occasion in question, meant to make such a bargain, he should have done so in very distinct terms. He should have had it reduced to writing, or, if not, he should have made his meaning quite clear to the party with whom he was transacting. If he did not do so, I think the other party could not be bound. But what is the evidence? I hold that, in regard to what was actually said on the occasion, the pursuer, William Helme, and the defender are at one, and I consider it therefore altogether unnecessary to look at the rest of the evidence in the case. The defender says he sold some of the wood, and that he reserved "mast wood, truss wood, and staves," but he does not say he reserved any bobbin wood. He thus expressed himself so as to lead Mr Helme to suppose that he was to get the whole bobbin wood as in former years. No doubt the defender goes on to say that he understood that, as he had only sold *some* of the wood, he was entitled to retain the *half* of it; but contracts are not made by mental reservations of that kind, but by express words. I hold, therefore, that the pursuers have proved the contract as alleged by them, and as there is no question that that contract has not been fulfilled by the defender, that he is liable in damages. These damages I propose to assess at the sum of £100.

The other judges concurred.

Agent for Advocators—W. S. Stuart, S.S.C.

Agent for Respondent—Hugh Milroy, S.S.C.

Friday, December 6.

SECOND DIVISION.

FOGO *v.* COLQUHOUN.

Teind—Sub-Valuation—Approbation—Dereliction—Reduction. Circumstances in which, *held* that the benefit of a sub-valuation had been lost by dereliction, and decree of approbation of said sub-valuation set aside.

This was an action brought by the Rev. John Lawrie Fogo, minister of the parish of Row, against Sir James Colquhoun of Luss, Baronet, for the purpose of setting aside a decree of approbation, dated in 1637, whereby the High Court approved of a sub-valuation, dated in 1629, of certain lands in the said parish belonging to the defender. The ground of reduction was, that the decree of approbation was in absence, and that the sub-valuation which it professed to approve had been derelinquished by the defender and his predecessors.

The facts of the case were these:—In 1629 the teinds of the lands in question—being the lands of Blairnairn and Kilbride—were valued at a certain amount by the Sub-Commissioner of the Presbytery of Dumbarton. At that time these lands formed part of the parish of Cardross; but in or about 1843 the parish of Row was erected, and the said lands were, amongst others, annexed to it *quoad omnia*. At and prior to the date of this erection the whole valued amount of the teinds of the said lands, as contained in the report of the Sub-Commissioners, was allocated and paid as stipend to the minister of Cardross, and subsequent to the erection they continued to be so paid; but the proprietors of the lands paid in addition, from that time downwards, a considerable amount of teind and stipend to the minister of Row. This they did without protest or objection, and in terms of two decrees of augmentation and locality, the one in or about 1748, and the other in or about 1803. The result was that between the two parishes a sum largely in excess of the sub-valuation was paid by the proprietors; and the question now was, whether, in the circumstances, this amounted to dereliction of the sub-valuation?

The main ground of defence was, that the payments to the minister of Cardross were not to be regarded as payments out of the teinds at all, but were perquisites founded on use and wont, and therefore not to be taken into account in a question of dereliction.

The Lord Ordinary (BARCAPLE), after a report by the clerk of teinds, and other inquiry, found for the pursuer, holding that there had been constantly and continuously, from 1643 downwards, payments in excess of the sub-valuation, and that there was no specialty in the case to prevent this from operating dereliction.

The defender reclaimed; but to-day the Court adhered, and on the same grounds.

SOLICITOR-GENERAL (MILLAR) and BALFOUR for him.

WATSON and MACDONALD in answer.

The Court ordered written argument.

At advising—

LORD COWAN—Upon advising the argument addressed to the Court on the reclaiming note, it was considered advisable that there should be full explanation of the special circumstances of the case, and, in particular, of the procedure that had occurred in the localities of the parish of Row in 1748 and 1803. With a view to such explanation, the minutes of debate were ordered, which are now to be advised.

The action is at the instance of the minister of the parish of Row, and concludes for reduction of a decree of approbation obtained in a process instituted for that purpose by the defender and others, of date 23d May 1838,—whereby the valuation of the stock and teind of certain lands now be-

longing to the defender, reported by the Sub-Commissioners of the Presbytery of Dumbarton in 1630, was ratified and approved of. To this action it was objected *in limine* that the decree was *in foro*, and not open to be challenged as a decree in absence; but this plea was overruled by the Lord Ordinary on 12th December 1862, and his interlocutor became final. The only question, therefore is, whether the pursuer has stated and established sufficient ground for having the decree set aside and reduced?

The objection taken by the minister to the approbation of the sub-valuation is, that the benefit of it has been lost by dereliction, that is, by payments of stipend by the heritors out of the teinds of the lands under decrees of locality to an amount exceeding the valuation of them contained in the sub-report. There can be no doubt of the relevancy of this plea. It has been sustained by repeated decisions of the Court in cases where the payments in excess by the heritors have been much less than the sums allocated upon the teinds, and paid by the heritors to the successive ministers of this parish. The Lord Ordinary has therefore justly observed that in the ordinary case the facts, so far as regards the extent of the over-payments, are such as not to leave room for reasonable doubt.

The peculiarity which distinguishes the case is, that the lands were originally within the parish of Cardross, and were so at the time of the valuation by the Sub-Commissioners in 1630. The parish of Row was erected in 1643, and the defender's lands were, along with lands disunited from the parish of Roseneath, included in and annexed to Row parish. The decree of erection is not extant, but it is not now disputed in this argument that it was an erection *quoad omnia.*

It is matter of dispute between the parties whether the erection was or was not conditional, *i.e.*, accompanied by an express provision that the stipend payable out of the teinds of the lands so annexed to Row, which had been paid to the minister of Cardross, was reserved to the minister of that parish. This is the pursuer's averment, and while, in the absence of the decree, the defender does not admit that the erection was expressly qualified by that provision, he does not dispute that from 1643 till now the stipend payable to Cardross prior to that date has continued to be paid, and that it is now payable, to the minister of that parish, although the lands have for two centuries been locally annexed to the parish of Row.

The stipend thus paid to the minister of Cardross by the heritors of those lands has been paid under decrees of locality applicable to that parish, and amounts, for the three Kilbrides, 9 bolls of meal and £6 Scots money, and for the lands of Blairnairn, 6 bolls of oatmeal and £3 Scots money. As these quantities of victual and sums amount precisely to the valuation attached to the teinds of the lands in the report of the Sub-Commissioners,—there is no room for the plea of dereliction, taking into view only the stipend paid from the teinds to the minister of Cardross. The plea rests entirely upon the payments made out of the teinds to the minister of Row under the localities of 1748 and 1803.

In the locality of 1748 the teinds were for the first time made liable for stipend to the minister of Row. Much discussion appears to have taken place with regard to this allocation of the teinds to meet the augmentation then awarded by the Court. And it issued in a judgment, finding "that the lands in the parish of Row that were formerly disjoined from Cardross (*i.e.*, the Kilbrides and Blairnairn) *are to be subject to a part of the stipend of Row* proportionally with the lands formerly disjoined from the parish of Roseneath." In conformity with this interlocutor, the teinds of these lands were localled upon to the effect set forth in the report of the teind-clerk. And in the subsequent locality, 1803, the teinds were in like manner localled on proportionally, as will be seen from the same report. The result is that, credit being given to the heritor for his payment of stipend out of the teinds to the minister of Cardross, his proportion of the augmentation under the two localities was, as regards the three Kilbrides, fixed at 4 bolls and 1 firlot meal and £13, 9s. 10d. Scots; and as regards Blairnairn, 5 bolls 1 firlot and 3 pecks, and £6, 10s. of Scots money. The sums so allocated on the heritor in respect of the teinds of these lands in 1748 and 1803 have continued from these years respectively to be paid to the minister of Row as stipend. And these payments, amounting together to 9 bolls 2 firlots and 3 pecks of meal, and £19, 19s. 10d. of money Scots, made in addition to the stipend paid to the minister of Cardross under his locality, are the foundation of the dereliction pleaded by the minister.

Had it appeared, as contended for by the heritor, that the stipend paid to Cardross was not out of teinds, but was to be considered as a mere use and wont payment, the origin of which could not be traced, and the amount of which did not fall to be taken into view, and had not, in fact, been so, when the teinds of the lands came to be localled on in Row, —the minister's plea of dereliction could not have been supported on the ground of over-payments under the localities of 1748 and 1803, for those payments do not exceed the valued teind. But when it is found that the stipend payable to the Cardross minister is stated *in computo* for the ascertainment of the free teinds, in respect of which the heritor was to be localled on in Row, it is manifest that the payments out of the teinds by the heritors must be viewed in quite a different light. An amount exceeding that stated in the sub-valuation, to the extent of sums payable to and drawn by the minister of Row, having been paid for upwards of a century, the inference is that the heritor has allowed his teinds to be allocated on the footing that the valuation by the Sub-Commissioners could not be of avail to him, or that he had voluntarily abandoned it. The over-payments made out of the teinds create a presumption to that effect which cannot be redargued.

The most recent decision pronounced on this question was in the locality of *Bathgate*, 28th Feb. 1866. Much discussion as to the nature and effect of dereliction occurred in that case; and the authorities were brought fully before the Court in minutes of debate. The circumstances in which the plea was urged were peculiar, the over-payments having been small and not continuous, inasmuch as there were years when there were under-payments (part of the stipend being payable in victual), from the conversion at the fiars' prices for the year causing a fluctuation in the money payments. From 1821 downwards there had been twenty years of over-payment, and ten years of under-payment. The average of over-payments was £1, 7s. yearly only, while prior to 1821 there were peculiarities attending the over-payments. On the whole, the Court unanimously held that the

sub-valuation had not been lost by dereliction. The Lord President (M'Neill) delivered the judgment of the Court, and in the course of his opinion stated that it was not very easy to see on what principle the previous cases had proceeded; that it was sometimes stated that the ground of the plea was that the heritor had supposed there was a defect in his decree, and therefore had abstained from asking its approval; while in other cases, again, it was said that the decree had not been used, because it was not for the interest of the heritor to do so; and referring to the argument urged by the heritor, just as it is here urged by the defender—that a person is not to be presumed as intending to abandon a right which he has acquired, his Lordship added, that while this might be so "it may be apparent that, at all events, he has intended not to insist on it."—(*Cowan* v. *Cooke and Others*, 1 Law Reporter, 192.)

I do not know that any better exposition of the state of the law, as fixed by the decisions, can be given; and applying these views to the circumstances of the present case, it is manifest that, when the teinds of these annexed lands were declared assessable for stipend to the minister of Row in 1748, it was quite competent for the heritor to have objected to any allocation out of the teinds beyond the amount of the sub-valuation. When the state by the clerk came before the Court, charging his teinds with a proportional allocation with the other free-teinds of the parish, all that the heritor had to do was to found on his valuation, if he intended to found on it, and to object to any allocation beyond the amount paid out of his teinds to the minister of Cardross. The teinds could not be at once valued and unvalued; and the heritor was clearly as much entitled to found on his valuation, after the annexation of the lands to Row, as he would have been, had the lands remained united to Cardross. He did not do so. The same course was followed by him in the next locality of 1803. No other inference can be drawn in this state of the facts, consistently with the principles that have guided the Court in this class of cases, than that the heritor has relinquished his right.

The view of the heritor is, that the payment to the minister of Cardross is a use and wont payment, which is a permanent burden on him; that it must be paid by him irrespective of the valued teinds; and that the minister of Row can draw stipend out of the teinds to the full extent of the valuation. But this view is not consistent with the proceedings in the processes of locality in either of the two parishes. The payment to the minister of Cardross is expressly in name of stipend, and, as such, has been paid from the date of the valuation under decrees of locality. The payments made in Row, again, under the localities 1748 and 1803, have been calculated upon the heritor's assessable free-teind, after deduction of the stipend payable out of the teinds of the lands to Cardross. The reports by the clerk show that the stipend payable in Cardross was taken into computation in fixing the amount of the heritor's free-teinds payable in Row. So that the inference is irresistible that the payments to the minister of Row were submitted to by the heritor notwithstanding the sub-valuation, which, if founded on, would have freed him from all such liability.

The principle acted on by the Lords Commissioners at that early period, when lands were disunited from one parish and annexed to another, with regard to the stipend payable at the time out of the teinds of the lands, was not uniform. For, while in 1631 a regulation was passed to the effect that lands disjoined from one parish and annexed to another should remain, as to the burden of stipend, in the same situation as before,—a decision or resolution was come to, on 20th Feb. 1643, that "where a part of land is disunite from one parish and annexed to another, the teinds whereof were affected with the payment of the minister's stipend, that part of the minister's stipend shall accresce to the minister of that kirk where the teinds shall be annexed; and that, in supplement thereof, the minister of the other kirk shall have as much out of the readiest tithes of his own parish as shall make up that which he wants."—*Connell on Parishes*, pp. 33 to 60. At the date of this resolution or decision the process for the erection of the parish of Row was in dependence. The summons of disjunction and annexation was brought on the 4th January 1643, and, on 3d February 1643, certain of the Lords were appointed a committee to meet the parties and report. Thereafter the procedure took place which terminated in the erection of Row as a separate parish,—the minister of Cardross protesting that he should not be prejudged of his then present stipend. The fair inference to which the whole procedure leads is, that the decree of erection was qualified to the effect of preserving the right of Cardross to the stipend payable to him under his decree of locality. And the fact that such payment has ever since been continued to be made appears all but conclusive. Notwithstanding the rule on which the Lords Commissioners had resolved to act where *part* of lands burdened with stipend were separated from one parish and added to another—for the resolution of 1643 only applies to that case—they must have acted on the principle resolved on in 1631 in reference to this parish, where not a part, but the whole of the several lands burdened specifically with stipend, were to be disunited from the one parish and annexed to the other. And even if a wider interpretation were put on the resolution of 1643, it might well be considered that the disjunction from Cardross and the erection of Row into a separate parish, first declared by the Court only two days afterwards, and adhered to on 2d July 1643, should not be affected by it, seeing that all the arrangements by the parties had apparently been made, while the resolution or decision of 1631 stood unqualified.

Nor does it appear that this conclusion is at all affected by the decision in the case of *St Cuthbert's* parish in 1802. The only questions of general interest there decided related to the application of the plea of prescription to the claims of a minister for stipend out of the teinds of his parish, and this paramount claim to his own parochial teinds out of lands which have been annexed *quoad omnia*, notwithstanding of payments of stipend that have previously been made to the minister of the old parish. But in the case of *Abbotshall*, which greatly more resembles the present, it was expressly found, on 22d November 1815, "that it is to be presumed, the decree of disjunction being lost, that it was a condition of the transaction, that the minister of the parent parish was in all time coming to draw that part of his stipend out of the teinds of the new parish."

For these reasons, I hold it established that all the payments out of the teinds of the lands in question, whether to the minister of Cardross or to the minister of Row, must be taken into view in determining whether there have been over-pay-

ments beyond the amount in the sub-valuation of 1636 to such extent as to support the plea of dereliction; and, being of that opinion, I think, on the grounds I have explained, the Lord Ordinary has arrived at a just conclusion in setting aside the decreet of approbation of the sub-valuation obtained by the defender in 1838.

The other Judges concurred.

Agents for Pursuer—W. H. & W. J. Sands, W.S.
Agents for Defender—Tawse & Bonar, W.S.

Saturday, December 7.

FIRST DIVISION.

ROBERTSON *v.* MURPHY AND OTHERS.

Proof—Proof before Answer—Consent—Remit—Construction of Remit—Competency of Parole Proof. In an action by a father, alleging that advances which he had made to his son were made on the footing of forming debts against the son, to be repaid to him, the Lord Ordinary, "before answer, and of consent," remitted to an accountant to inquire into the grounds of action and defence, with power to take probation thereanent. *Held* that the defender was not excluded by the terms of the remit from objecting before the accountant to the competency of parole proof proposed to be led by the pursuer in support of his averment of the non-gratuitous nature of the advances. *Opinions* as to the meaning of "proof before answer."

This was an action at the instance of Arthur John Robertson, late of Inshes, against Michael Murphy and Charles Henry James, official assignees on the estate of the pursuer's son, Arthur Masterton Robertson, and against certain creditors' assignees on said estate. It appeared that the pursuer had been proprietor of the entailed estate of Inshes. The estate was heavily burdened, and was sold at the instance of creditors. Previous to the sale of the estate, the pursuer's son, Arthur Masterton Robertson, who was next heir of tailzie, entered the army, and various advances were made to him by his father and by his grandmother for purchase of his commission and outfit, and to enable him to purchase promotion. The son became insolvent, and the defenders were appointed official and creditors' assignees on his estate. The assignees raised an action against the father for payment of an annuity which it was alleged he had undertaken to pay to his son. The father raised this counter-action for repayment of the money advanced by him to his son, and for relief of certain pecuniary obligations undertaken by him on his son's account. In his condescendence he alleged, with reference to the advances made to his son, that "it was understood and agreed that the money which might be advanced to him, or on his account, by the pursuer, for the forwarding of his views, and to supply what he required, was to form a debt, which he was to be bound to repay. That arrangement was rendered necessary by the circumstances of the pursuer, and especially by a reasonable consideration for the interests of his other children, for whom he could not adequately provide out of the entailed estate." After narrating certain advances, the pursuer stated:—"Many other sums were advanced to the said Arthur Masterton Robertson, or upon his account, by the pursuer. All the advances so made by the pursuer were made upon the understanding and agreement libelled in the preceding article of this condescendence."

On 10th January 1866 the Lord Ordinary (Barcaple) pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, before answer, and of consent—remits the cause to Mr William Wood, chartered accountant in Edinburgh, to inquire into and report upon the matters set forth as the pursuer's grounds of action, and also as to the matters set forth in the defences thereto, with power to him to take probation thereanent: Grants commission to Mr Wood to examine witnesses and havers, and receive their exhibits, as also diligence, at both parties' instance, against witnesses and havers: Mr Wood's report to be lodged *quam primum*."

On 15th July 1857, the accountant presented an interim report in the following terms:—"The accountant begs respectfully to report that considerable progress has been made under the foregoing remit, a number of documents having been produced before him, and he having drafted a report, but a question has arisen—namely, whether it is competent to lead parole evidence? on which the parties are desirous of having the Lord Ordinary's decision. In this case the parties are at variance as to the important fact, whether the advances by the pursuer, A. J. Robertson, Esq., Inshes, to or for his eldest son, were gratuitous, or intended to be kept up as debts?—the pursuer averring in his record that it was his intention that his son should repay the advances, the defenders that they were intended to be gifts. As regards the documents produced by the pursuer, the defenders have, with very few exceptions, agreed to receive them as genuine and authentic. But they are not of a very formal character, and the pursuer moves to be allowed an opportunity of leading parole proof in support of the averments contained in his record. To this the defenders object that it is incompetent. But as it may have an important bearing on the case, and the question is one of law, the accountant begs respectfully to report it to the Lord Ordinary."

Thereafter, on 16th November 1867, the Lord Ordinary pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators on the interim report by the accountant, No. 8 of process, and considered the same: Finds, that by the terms of the interlocutor of 10th January 1866, which proceeded of consent of parties, all probation to be taken by the accountant under that interlocutor is before answer: Finds that, under the remit in said interlocutor the accountant is authorised to receive parole proof offered by either party in support of their averments on the record, and instructs him accordingly."

The defenders reclaimed, and asked the Court to recal the foresaid interlocutor; to find that by the terms of the interlocutor of 10th January 1866, remitting to the accountant to inquire into and report upon the matters set forth as the pursuer's grounds of action, with power to him to take probation thereanent, the accountant has only power to take such probation as is competent in support of the pursuer's averments; to find that it is not competent to the pursuer to lead parole proof in support of his averment, that "it was understood and agreed that the money which might be advanced to him (his son Captain A. M. Robertson, the insolvent) or on his account by the pursuer for the forwarding of his views, and to supply what he required, was to form a debt which he was to be bound to repay,"