that Mr Dunn sent a Mr Jamieson to see what was wrong; Finds that the defender and Mr Jamieson tried several experiments to remedy the defect, but without success; Finds that the defender nevertheless did not then offer to return the machine, but continued to use it; Finds that, shortly after, in course of use, the connecting rod of the machine broke; Finds that the defender, nevertheless, did not then offer to return the machine, but had the rod repaired by a neighbouring smith, at his own expense, and without reference either to Mr Dunn or the pursuers; Finds that the said rod is now one and a-half inches too short; Finds that thereafter the defender continued to use the machine, and finished the corn-cutting, to the extent of upwards of thirty acres, without offering to return the machine; Finds that thereafter, on 25th September, the pursuers wrote for payment: Finds that the defenfender replied to their demand on the 28th, and then for the first time intimated his dissatisfaction with the machine, and that he would return it; Finds that the pursuers refused to take back the machine; Finds that the machine still remains in the defender's possession; Finds that the defender has failed to prove the special bargain founded on in his minute of defence, under which he claims right to return the machine without any payment; and finds that he was not entitled to return it as on the 28th September 1869; Therefore, sustains the appeal; recals the interlocutor appealed against; repels the defences; and decerns in favour of the pursuers for the sum of £26 as libelled, with legal interest thereon from the date of citation in this action; finds the pursuers entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report."

In a Note appended to this judgment the Sheriff, *inter alia*, makes the following remarks;—"But, assuming that the defender is right in saying—what the Sheriff understands to be the import of the minute of defence, viz., that the machine was on trial for the season, and to be returned by the defender without payment if not satisfied with it—the Sheriff still thinks the defender on the facts proved must fail in his defence.

"If the failure of the machine to cut the three inches which it left uncut was the ground of his dissatisfaction, the defender was bound at once to have ceased to use the machine, and to have returned it when the attempts to remedy the defect proved unavailing. If, again, he meant to return it because of the fracture of the connecting-rod, he ought not to have had that repaired and thereafter continued the use of the machine, but should have returned it at once. And, finally, if after his crops were all cut he had reason to be dissatisfied, he was bound at once to have said so to the pursuers, and was not entitled to wait until pressed for payment before intimating his intention to return it, and without assigning any cause."

The defender appealed to the Second Division of the Court of Session.

Authority cited, *Pearce* v. *Irons*, Feb. 25, 1869, 7 Macph. 571.

The Court were of opinion that, as the defender had not ordered the machine, or entered into an ordinary contract of sale, but merely accepted it when sent, under conditions, he was entitled to reject it even so late as he did, these conditions not having been fulfilled: Therefore sustained the appeal, altered the judgment appealed against, and assoilzied the defender, with expenses in both Courts.

Counsel for Pursuers—Shand and Macintosh. Agent—Alexander Sholts Douglas, W.S.

Counsel for Defender—Balfour. Agents—Muir & Fleming, S.S.C.

Wednesday, October 16.

SECOND DIVISION.

[Lord Gifford, Ordinary.

LORD PROVOST AND MAGISTRATES OF EDINBURGH *v.* THE COMMON AGENT.

Teinds—Locality—Liability—Valuation—Proof.

Circumstances in which—an interim scheme of locality being objected to on the ground that, although the teinds of certain lands were *ex facie* not exhausted, they were really so,—the Court repelled the objection. An averment being made at the Bar that the rental of the lands had decreased since the last valuation, the Court allowed a proof.

This was a question which arose between the Lord Provost and Magistrates of Edinburgh, and the Common Agent in the process of locality of the stipend of the parish of St Cuthberts. In the interim scheme of locality the objectors were, *inter alia*, localled on for old stipend as follows. For lands of Lochbank and others, 18 b. 1 f. 2 p. 0 l. of meal. For lands of Bruntsfield Links and the Meadows, 79 b. 0 f. 2 p. 2¼ l.

Against this the Lord Provost and Magistrates of Edinburgh lodged objections in the following terms:—"In localling the augmentation the case is dealt with as if the 18 b. 1 f. 2 p. 0 l. of barley was payable for Lochbank alone, whereas a considerable portion is in point of fact payable and paid for Bruntsfield Links and Meadows, being the lands referred to under the words 'and others.' The consequence of this error is that the lands of Bruntsfield Links and Meadows (the free teind of which is exhausted by the interim locality) is localled upon for a larger share of the augmentation than they ought to have been, the whole old stipend actually paid by them not having been taken into account. According to the locality of the augmentation granted in 1805, the allocation on the City of Edinburgh therefore stood thus—

	Barley.			
	B.	F.	P.	L.
On Lochbank, .	8	0	0	0
On the City's other lands, there called 'The Lands belonging to Town of Edinburgh, 3 b. 1 f. 2 p. 0 l. × 7 b. 0 f. 0 p. 0 l.	10	1	2	0
In all	18	1	2	0

"Now these 'other lands,' though not named, must have been Bruntsfield Links and the Meadows, because, with the exception of the lands of Drumdryan and Broughton, which had been previously feued out and built upon, and which were then, and still continue to be, separately localled upon in name of the city and its feuars, the city had no other lands in the parish. But this matter is put beyond all doubt by the interim schemes of locality made up in the last process of locality, and by the receipts granted by the ministers for their stipends. In the interim locality the allocation is as follows:

Bruntsfield Links, Meadows, and Lochbank belonging to the City of Edinburgh old stipend, 18 b. 1 f. 2 p. 0 l. barley, and in the rectified locality approved of as a second interim locality on 13th July 1849, the entry is as follows: 'The City of Edinburgh for Bruntsfield Links, Meadows, and Lochbank, held to be exhausted by old stipend, 18 b. 1 f. 2 p. 0 l. barley.' In accordance with this the receipts granted by the ministers' stipends all bear expressly that this old stipend was paid for Bruntsfield Links and Meadows, as well as for Lochbank. A series of the receipts selected quinquenially over a period of forty years is herewith produced, all the intervening receipts being in similar terms. The old stipend is in the very same terms entered in the city's books—thus showing that it was both paid and received on the footing that it was the stipend of the *whole* lands (see excerpts from books herewith produced). It is scarcely necessary to notice that the 13 qrs. 3 b. 0 p. 0 d. 1$\frac{2}{10}$ qrts. barley imperial measure specified in the receipts and books is the exact equivalent of the 18 b. 1 f. 2 p. 0 l. old measure. The objectors therefore submit it to be manifest that the old stipend of their lands stand thus:—

	Barley.			
	B.	F.	P.	L.
Lochbank, per locality of 1805, . .	8	0	0	0
Bruntsfield Links and Meadows, per do.	10	1	2	0
	Meal.			
Do. do. per locality of 1819-64,	79	0	2	2$\frac{1}{4}$

and they crave that the scheme of locality in the present process be rectified accordingly."

The Common Agent stated that, "In the process of locality of the stipend modified in 1821, the present objectors appeared and objected to Bruntsfield Links, and the Meadows, and the lands of Lochbank, being localled on for stipend, on the ground that they were not teindable subjects, and never were so. A record was made up between the objectors and Mr Learmonth of Dean, an heritor in the parish. On 12th May 1858 the Lord Ordinary pronounced an interlocutor in which he, *inter alia*, found 'that the lands of Bruntsfield Links and the Meadows, belonging to the City of Edinburgh are teindable; that the rental thereof has been judicially admitted to be £409 per annum, and that one fifth part of such admitted rental falls to be taken as teind. Finds that the old stipend localled in 1805 appears to have been, and ought now to be, held as being payable out of the teinds of certain lands known as the lands of Lochbank and others belonging to the City of Edinburgh;' and with these findings he remitted the process to the clerk, to frame a correct scheme of locality in accordance therewith. This interlocutor, in so far as regards these findings, was adhered to by the Inner House, First Division, on 1st June 1859. A scheme of locality was accordingly framed by the clerk in accordance with these findings, which was thereafter approved final. In this final locality, as previously stated, no part of the said old stipend of 18 b. 1 f. 2 p. 0 l., is localled on Bruntsfield Links or the Meadows.

The Lord Ordinary pronounced the following interlocutor, with subjoined note:—

"*Edinburgh, 11th June* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the Record closed on 8th December last in the question between the Lord Provost and Magistrates of Edinburgh, objectors, and the Common Agent, respondent, and whole process, in so far as relative to said Closed Record; repels the objections stated on said Record for the Lord Provost and Magistrates of Edinburgh, and decerns; finds the Lord Provost and Magistrates of Edinburgh, objectors, liable in expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report.

"*Note.*—By the interim scheme of locality, objected to by the Lord Provost and Magistrates of Edinburgh, it is proposed to allocate upon the city for their lands of the Meadows and Bruntsfield Links, a part of the augmentation, namely, 3 b. 0 f. 1 p. 1 l. of meal, and 3 b. 0 f. 1 p. 1 l. of barley, and this additional locality will exhaust the teinds of these lands, at least this was assumed by both parties. No part of the augmentation is proposed to be laid upon any other of the lands of the city, excepting as to part of the lands of Broughton and Drumdryan, as to which no question arises under the present record.

"The objection raised in the present record is, that no part of the augmentation should be laid upon the teinds of the Meadows and Bruntsfield Links, in respect that, although *ex facie* of the old locality the teinds of these lands are not exhausted, they are in reality exhausted by being localled on under another name, viz., 'The Lands of Lochbank and others,' which have always paid under the old locality 18 b. 1 f. 2 p. 0 l. of barley. The contention is, that the expression 'and others,' added to the lands of Lochbank, means really the Meadows and Bruntsfield Links; that the allocation on Lochbank is only 8 bolls of barley, and that the remaining 10 b. 1 f. 2 p. 0 1 are really laid upon the Meadows and Bruntsfield Links, thus exhausting the teinds of these lands.

"The Lord Ordinary has serious doubts whether the objections for the city are well or relevantly stated. The city has no heritable right to the teinds of the lands of Meadows or Bruntsfield Links, and the teinds of these lands are unvalued. The teinds of the lands of Lochbank stand in the same position, and the only relevant objection which the city could maintain would be that the teinds of the whole lands taken together were more than exhausted by the allocation in the proposed locality; that is, that the whole lands taken together are proposed to be localled upon to a greater extent than one-fifth of the teindable rental. But this is not alleged, and, as the Lord Ordinary understands, it is not meant to be alleged, the objections for the city being based not on an inquiry into what the true free teind of the lands really is, but on an investigation as to the mode in which the lands were separated and dealt with in old localities. The city attempts to show that besides the 79 b. 0 f. 2 p. 2$\frac{1}{4}$ l. which are rightly enough laid upon the teinds of Meadows and Bruntsfield Links, these teinds are really localled upon for a farther quantity of 10 b. 1 f. 2 p. 0 l.

"The Lord Ordinary has carefully looked into the old localities, and the documents relative thereto, so far as the same are accessible, and he has come to be of opinion that the city's objections are ill-founded, and that no part of the 18 b. 1 f. 2 p. 0 l. of old stipend is really applicable to the teinds of the Meadows and Bruntsfield Links. But he is farther of opinion that, even were it otherwise, the question is excluded by the judgments in this locality, or in that immediately pre-

ceding, first, by the Lord Ordinary on 12th May 1858, and second, by the Inner House on 1st June 1859.

"Both the pleas of the Common Agent in the present Record seem therefore well founded, and the Lord Ordinary on both grounds has repelled the objections for the city.

"(1) The first plea in order, though last stated, is that of *res judicata.*

"It is quite fixed that a question, whether of law or fact, decided *in foro contentioso* and *causa cognita* in one locality, is binding on all concerned in subsequent localities of the same parish. See *Blantyre* v. *Earl of Wemyss*, May 22, 1838, 16 S. 1009, and the recent case of *Graham Bonar* v. *The Lord Advocate*, Nov. 3, 1870, 9 M. 58. Even admissions by a Common Agent in one locality have been held binding on the heritors in future localities, at least where they effected the interests of parties who had both right and interest at the time to dispute them; *Earl of Hopeton* v. *Ramsay*, H. L., May 22, 1846, 5 Bell's App. 69; *Duke of Buccleuch* v. *Common Agent, Inveresk*, Nov. 10, 1868, 7 M. 95. Now, in the locality of St Cuthbert's it was finally decided, both by the Lord Ordinary and the Court, 'that the lands of Bruntsfield Links and the Meadows, belonging to the City of Edinburgh, are teindable; that the rental thereof has been judicially admitted to be £409 per annum, and that one-fifth of such admitted rental falls to be taken as teind: Finds that the old stipend localled in 1805 appears to have been, and ought now to be, held as being payable out of the teinds of certain lands known as the lands of Lochbank and others, belonging to the City of Edinburgh.' This was in substance a finding that no part of the old stipend localled in 1805, which was just the 18 b. 1 f. 2 p. 0 l., was applicable to Bruntsfield Links and the Meadows, for these last were found teindable for the first time in 1858, and directed to be localled upon to the extent of a fifth of £409. In 1858 the city strenuously contended that the Meadows and Bruntsfield Links were not teindable, and had never paid teind at all. The expression 'and others' is fully accounted for, for it is undeniable that in 1805 the city had many lands subject to teinds which do not appear by their specific names. It seems to the Lord Ordinary to be too late now to maintain that the Meadows and Bruntsfield Links had all along, at least from 1805, paid teind along with Lochbank.

"(2) But, in point of fact, the 18 b. 1 f. 2 p. 0 l. of barley laid upon 'Lockbank and others' is traced and accounted for without any part thereof being localled on the Meadows and Bruntsfield Links.

"So far back as 1708 there was laid on the lands of Lochbank 5 bolls of bere and 3 bolls of bere. These lands then belonged to Hepburn and Anderson's heirs, but that they were parts of the lands of Lochbank, afterwards the city's, is clear from the disposition to the city in 1716, No. 457 of process, and from other evidence. This accounts for the eight bolls barley which is laid upon the lands of Lochbank in 1805. Barley seems to have been taken as interchangeable with or equivalent to bere, as appears from comparing various entries in the old localities. Again, in the same locality of 1708, there is laid on the lands of Newhaven (and Newhaven is evidently a large district comprehending Trinity and Warriston) 'formerly pertaining to the heirs of Mr James Pillans,' 3 b. 1 f. 2 p. bere. In the rental of 1803 there appears lands belonging to the City of Edinburgh, localled upon for 3 b. 1 f. 2 p. barley, and, assuming barley and bere to be interchangeable, there are no other lands excepting those formerly of James Pillans' heirs to which this precise allocation is applicable. Then, in the locality of 1805 there appears lands belonging to the City of Edinburgh.

	B.	F.	P.	L.	
Old Stipend, . .	3	1	2	0	
Barley—augmentation then first laid on, .	7	0	0	0	barley
In all,	10	1	2	0	do.
Add—Lochbank,	8	0	0	0	do.
making the whole Stipend,	18	1	2	0	do.

"But this is just the old allocation now in dispute, and it seems quite plain that no part of it is laid upon the Meadows or Bruntsfield Links. There are other items of evidence pointing to the same result, but it is unnecessary to go into further detail."

The objectors reclaimed, and argued that the teinds of the Meadows and Bruntsfield Links were really exhausted by being localled on under the name of "The Lands of Lochbank and others;" and pleaded that the proceedings which took place in the former process of locality did not constitute *res judicata*, as regarded the question at issue—(1) because the present question was not raised, far less discussed and determined, in the last process of locality; and (2) because the respondent in this process did not represent, officially or otherwise, either of the parties to the former proceedings. It was further averred at the bar that the rental of the lands had decreased since the last valuation.

It was pleaded for the Common Agent—(1) that the objections ought to be repelled, in respect that it was not the fact that any part of the old stipend of 18 b. 1 f. 2 p. was payable or paid for Bruntsfield Links and the Meadows. (2) That it was *res judicata* that the lands of Bruntsfield Links and the Meadows paid no part of the said old stipend; *Learmonth* v. *City of Edinburgh*, Dec. 3, 1857, 20 D. 190; and June 1, 1859, 21 D. 890.

At advising—

LORD JUSTICE-CLERK—I am of opinion that we should adhere to the interlocutor of the Lord Ordinary and repel the objections.

But another point has been added to the record, with which of course the Lord Ordinary has not dealt. That point is, that the rental of Bruntsfield Links and the Meadows has decreased since the old valuation. In regard to that I am of opinion that we should allow the objectors a proof of the present value of Bruntsfield Links and the Meadows.

LORD COWAN—I concur with your Lordship in approving of the interlocutor of the Lord Ordinary and repelling the objections. I also think that the proper course is that proposed by your Lordship, viz., that the present value of the subjects should be ascertained.

LORD BENHOLME concurred.

LORD NEAVES concurred—and said that the whole matter was inexplicable, without knowing the present rent of the lands.

The Court repelled the objections, adhered to the Lord Ordinary's interlocutor, and allowed the objectors a proof of their averment as to the rental of Bruntsfield Links and the Meadows.

Counsel for the Lord Provost and Magistrates of Edinburgh — Watson and M'Laren. Agents—Miller, Allardice, & Robson, W.S.

Counsel for the Common Agent—Adam and Gloag. Agent—William Montgomery, W.S.

Wednesday, October 16.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

LORD ADVOCATE *v.* MARCHIONESS OF LANSDOWNE.

Succession—Annualrent—Inventory-duty.

> A, who possessed estates as heiress of entail, was authorised by the Court, under the Montgomery Act, to execute a bond of annualrent on security of these estates, corresponding to the sum expended by her in permanent improvements. It being afterwards found that the entails under which A held the estates were defective, she executed a new entail, in which she provided that, unless she specially bequeathed the bond of annualrent, the same should accrue to the heirs of entail, and the lands should be freed and relieved therefrom in all time coming. A died, and B succeeded as institute under this deed of entail, and paid the whole succession-duty due in respect of the lands. *Held* that B was not liable to pay inventory-duty on the sum in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, as part of the succession of A, deceased.

This was an action at the instance of the Lord Advocate, on behalf of Her Majesty, against the Marchioness of Lansdowne, for payment of inventory-duty on a bond of annualrent, to which the defender had succeeded on the death of Baroness Keith. The following were the circumstances which gave rise to the action:—

In 1851 Baroness Keith, who then possessed estates in Perthshire and Kinross as heiress of entail, was authorised by the Court, under the Montgomery Act, to execute a bond of annualrent, on the security of the entailed estates, by which she bound and obliged herself "and the heirs of entail in their order successively succeeding to me in the foresaid entailed lands and estates . . . under and by virtue of the foresaid several deeds of entail, to make payment to myself, the said Margaret Mercer Elphinstone, Baroness Keith and Nairne, Countess de Flahault, and my heirs, executors, and assignees." of an annualrent of £485, 15s. 6d., or such other annualrent or interest during her life as should correspond to the sum of £9715, 10s. 9d., being three-fourths of the sums expended by her on improvements on the said estates. It was afterwards discovered that the entails under which the Baroness Keith held were defective as strict entails; and she thereupon, upon the narrative that such was the case, executed a new entail in 1866 in favour of herself and a certain series of heirs. The deed contained the following clause:—"And I hereby declare that in case I shall not during my lifetime, nor by any *mortis causa* deed or settlement, specially dispone or convey the whole or any part or portion of the foresaid two annualrents, then the whole, or such part or portion thereof as may not have been so disponed and conveyed by me, shall accrue to the institute or heir of entail succeeding under this present deed of entail, and the lands and others above disponed shall be freed and relieved from the same in all time coming." The deed also contained a power to alter or revoke, but the Baroness never altered the deed or made any bequest of the bond of annualrent. The Marchioness of Lansdowne, who succeeded to the estates as the institute in the above deed of entail, paid the whole succession-duty due in respect of these lands. Thereafter, and in addition, the Crown claimed inventory-duty from her on the bond of annualrent, under the Act 23 and 24 Vict. c. 80, as money secured upon heritage belonging to the deceased Baroness Keith, and to which the Marchioness had succeeded.

The Lord Ordinary pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—finds, in answer to the question submitted for the decision of the Court in the Special Case, that the Marchioness of Lansdowne is liable to pay inventory-duty on the sum in the bond of annualrent, under the statute 23 and 24 Vict. c. 80, as part of the succession of the Baroness Keith, deceased.

"*Note.*—By the statute referred to it is enacted that the money secured on heritage shall be liable in inventory-duty as if it had been personal or moveable estate.

"That the bond of annualrent in question was in itself of the nature and in the form of an heritable security is indisputable. But the defender contends that, as the entailed landed estate over which the bond bears to be heritably secured turned out not to be entailed at all, but held in fee-simple by the Baroness Keith, and as she was then also the creditor in the bond—or, in other words, as the Baroness was thus at one and the same time in right of the bond and unfettered proprietrix of the lands over which the sum in the bond was heritably secured—the latter became extinguished *confusione*. It appears to the Lord Ordinary that this contention of the defender is not well founded.

"As a general principle of law, it is no doubt true that when the same person comes to be both debtor and creditor in an obligation, it is to be held as extinguished *confusione*. But it is equally clear, on the authorities which will be afterwards referred to, that this principle is subject to modification and exception according to the circumstances in which it arises.

"When the bond of annualrent in question was constituted by the Baroness Keith, she was the heiress in possession of what are referred to in the Special Case as certain entailed lands. But whether these lands were held under the fetters of a strict entail or not, it is at least certain that, by the title to them, they were destined, as stated in article 4 of the Special Case, to the Baroness and her husband, 'and longest liver of us two, in conjunct fee and liferent, and to the heirs-male of our present marriage, and to the heirs-male of their bodies, whom failing, to the heirs-female of our present marriage, the eldest heir-female succeeding without division,' and so on, according to a certain order of succession. Now, whether the lands and estate so destined were strictly entailed or not, it is indisputable that, so long as the destination referred to remained unaltered, they would