

Argued for the respondent — The arbitrator had applied his mind to the question of expenses, and had not acted harshly. It was a matter of discretion, and where the arbitrator had considered the point and had exercised his discretion reasonably the Court would not interfere—*Farne Coal Company v. Murphy, cit., per Lord Salvesen*. The offer could have been put in a formal tender, but that not having been done the respondent was entitled to consider it as withdrawn, and in any event by the ordinary rules of tender he could not be found liable in expenses for failure to accept such an informal offer. *Farne Coal Company v. Murphy* was distinguishable, as there the sum offered was higher than the sum ultimately awarded.

LORD JUSTICE-CLERK—In this case, before arbitration proceedings were initiated, the employers offered to pay the workman 15s. a-week on the footing of partial incapacity. He rejected that offer on two grounds. In the first place he said that for part of the time in question he was totally incapacitated, and secondly, for the remainder of the time during which he was partially incapacitated he maintained that 15s. a week was too little and that he should get 20s. After having heard evidence on the matter the arbitrator came to be of opinion that the man was not totally incapacitated during any part of the period, and also that on the provisions of the statute it was not permissible for him to award more than 15s., having regard to the man's wages before the accident and the income he was earning in his disabled condition.

The obvious result of these considerations would seem to be that the employers should have been found entitled to expenses. The arbitrator, however, refused to give them expenses, and his only reason for so refusing was that there was no formal tender in the Court. In my judgment that is not enough. What the Lord President said in the case of *Mikuta v. William Baird & Company*, 1916 S.C. 194, applies here in terms. As regards a tender, in workmen's compensation cases you do not apply the strict rules of practice which would be applied in an ordinary action, the reason being that there is not a litigation in the ordinary sense. I think it is a pity that here the offer was not in terms repeated upon the pleadings, but in my judgment that is not enough to deprive the employers of their expenses. The offer was made and was never withdrawn, and was formally repeated in the course of the proceedings, and it is not suggested that the employers ever contended that he should get less than 15s. The arbitrator just awarded what the workman would have got before the proceedings were instituted. I do not know—it is not necessary to express any opinion upon it—what the result would have been in an ordinary litigation if a tender of an amount greater than or equal to the sum ultimately awarded had been made extrajudicially before the proceedings began; but in this case where the obvious purpose of the statute, so far as possible, is to promote settlements without

proceedings before the arbiter, it seems to me that it is in the interest of all parties, where a distinct offer is made before the proceedings are initiated and no more is given as the result of the proceedings, that the party who has made the offer should be found entitled to expenses.

Accordingly in this case I think the arbitrator has gone wrong in allowing his judgment to be influenced by the fact that the tender which was made before the proceedings were begun was not repeated on the record. In my view the employers should have been awarded their expenses. They had made a full tender of the sum ultimately awarded before the proceedings began; the workman's claim has failed. The whole expense of the proceedings was simply thrown away. I think, therefore, that we should answer the first question in the negative and the second question in the affirmative.

LORD DUNDAS—I am of the same opinion. I think we are bound to answer these questions in the way your Lordship proposes.

LORD ORMDALE—I concur.

LORD SALVESEN did not hear the case.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the Appellants—T. G. Robertson—Gillies. Agents—W. & J. Burness, W.S.

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Tuesday, July 19.

FIRST DIVISION.

MACONOCHIE WELWOOD'S
TRUSTEES v. MUNGALL AND
ANOTHER.

*Superior and Vassal — Feu-Contract —
Teinds — Clause of Relief from Teind
Duties and Stipend—Future Augmentations
of Stipend—Usage.*

The proprietor of an estate disposed parts of it to A and B by feu-contracts entered into in 1737 and 1738 respectively. The feu-contract in favour of A contained a conveyance of teinds and an obligation by the superior to free and relieve the vassal "from payment of all feu and teind dutys, minister stipend, schoolmaster fees payable forth of y^e said lands in time coming." In the feu-contract in favour of B there was no conveyance of teinds, but there was a clause binding the superior to free and relieve the vassal from "payment of all feu and teinds dutys, ministers' and schoolmasters' stipends payable forth of the saids lands in all time coming." At the dates of the deeds the teinds of the lands feued had not been valued, and they were not subsequently valued.

No augmentation of stipend had been made between the date of the institution of the Court of Teinds (1707) and the dates of the contracts, but subsequently several augmentations were granted. Up till about 1864 the estate as a whole was localled upon direct for stipend, and the stipend and augmentations were paid by the superior, but in a process of augmentation in 1863 the vassals were for the first time entered in the State of Teinds and localled upon direct for their shares of stipend. Thereafter the vassals paid their shares of stipend direct and claimed relief from the superior, who repudiated liability. *Held* that the obligations of relief of stipend interpreted by usage covered augmentations of stipend granted subsequent to the dates of the feu-contracts.

John Allan Maconochie Welwood of Garvoek, Fifeshire, and Charles Cornelius Maconochie of Avontoun, West Lothian, the trustees acting under a trust-disposition and conveyance by the said John Allan Maconochie Welwood in favour of himself and others dated 1st January 1903, *first parties*, William Mungall of Transy, Transy House, Dunfermline, *second party*, and Mrs Agnes Maria Mary Clarke or Beveridge and others, trustees acting under the trust-disposition and settlement of the late Charles Hill Beveridge of Bonnytoun, dated 22nd September 1917, *third parties*, brought a Special Case for the opinion and judgment of the Court as to the liability of the first parties to relieve the second and third parties of augmentations of stipend.

The first parties were the trustees of John Allan Maconochie Welwood, heritable proprietor of the lands of Garvoek, and the direct representative of Henry Wellwood in the superiority of certain subjects which formed parts of the lands of Garvoek, one of which he had disposed by feu-contract between himself and Alexander Williamson, tenant in Pitreavie, and his wife, dated 30th May 1737, and the other by feu-contract between himself and George Davidson dated 9th and 11th December 1738. The second party was the proprietor of the *dominium utile* of the subjects disposed by the first feu-contract, and the third parties were the proprietors of the *dominium utile* of the subjects disposed by the second feu-contract.

In the feu-contract of 1737 the subjects were disposed "together with the teinds of the heall lands @ disposed and pertinents of the same," and the deed contained the following clauses—"And in regard the s^d lands @ feud are valued in the cess books in cumulo w^t ye s^d Henry Wellwood's other lands of Garvoek therefor its hereby declard and ye s^d Alexr. Williamson his s^d spouse and son by y^r acceptation hereof agree that the valued rent of ye s^d lands and oyr^s @ feud shall be holden and estimat to be twenty pounds Scots yearly in all time coming And ye s^d Alexr. Williamson his s^d spouse and son and his fors^{ds} also relieving ye s^d Henry Wellwood and his fors^{ds} of all cesses and oyr publick burdens due and payable forth of ye s^d lands @ disposed after

yes^d term of Martinmas 1738 and y^t in proportion to the said twenty pound valued rent For all other burdens exaction question demand or secular service which may be any ways askt or required forth of ye s^d lands teinds and oyr^s w^t ye pertinents @ wrin in feu ferm or any part y^of in time coming And which charter of feu ferm shall bear and contain this clause of warrandice following And now as if ye s^d charter and infetment were already made and perfected and then as now the s^d Henry Wellwood hereby binds and obliges him and his fors^{ds} (under ye burden of payment of yes^d five hundred merks resting of yes^d entry) to warrant ye same infetment with this present disposition lands teinds and oyr^s for^sd w^t ye pertinents to be good valid and sufficient free safe and sure to the s^d Alexr. Williamson his s^d spouse son and his fors^{ds} from all perils burdens dangers evictions and inconveniencys qts^{or} at all hands contrair and ag^t all deadly as law will And also to free and relieve yes^d Alexr. Williamson his s^d spouse son and his fors^{ds} of and from payment of all feu and teind dutys minister stipend schoolmaster fees payable forth of ye s^d lands in time coming And upon the other part the s^d Alexander Williamson and his s^d spouse w^t one consent hereby bind and oblige y^m conjunctly and seallie y^r heirs exors and successors qts^{or} . . . to make payment and relieve ye s^d Henry Wellwood and his fors^{ds} of all cesses and other publick burdens due and payable for or forth of ye s^d lands teinds and others fors^d after ye s^d term of Martinmas 1738 & y^t in proportion to yes^d twenty pound Scots valued rent."

The feu-contract of 1738, in which there was no conveyance of teinds, contained the following clauses—"To be holden of the said Henry Wellwood and his foresaids in feu ferm fee and heritage for ever for yearly payment of . . . and for payment of cess and other publick burdens corresponding to the sum of thirty four pound ten shilling Scots money which is hereby agreed to be the valued rent of the saids heall lands above disposed . . . and for that effect the said Henry Wellwood binds and obliges him and his foresaids to make grant subscribe and deliver to the said George Davidson and his foresaids a valid and formal feu-charter of the said lands to be holden in feu ferm for payment of the feu-duty above specified with and under the conditions and qualications above exprest which are hereby ordained to be insert in the said feu-charter . . . and furdur the said Henry Wellwood binds and obliges him and his foresaids to warrant the foresaids lands with this present feu-contract and infetment to follow hereon to be free safe and sure to the said George Davidson and his foresaids from all perils burdens dangers incumbrances and inconveniences whatsoever at all hands and against all deadly as law will and to free and relieve the said George Davidson and his foresaids of and from the payment of all feu and teind dutys minister's and schoolmaster's stipends payable forth of the saids lands in all time coming For which causes and on the other

part the said George Davidson binds and obliges him his heirs executors and successors whatsoever to . . . free and relieve the superior of the cess and other publick burdens corresponding to the foresaid sum of thirty-four pound ten shilling Scots which is hereby agreed to be the valued rent of the saids lands above disposed."

The consideration for each feu consisted of a grassum and an annual feu-duty.

The Case set forth—"The teinds of the lands contained in the said feu-contracts had not at the date thereof been valued, nor has any valuation of the said teinds since been made. The parish of Dunfermline, within which the said lands of Garvock lie, is a collegiate charge. From the recital in the proceedings raised in 1748, hereinafter referred to, it appears that by decret of modification and locality obtained before the Commissioners of Modification of Stipends and Valuation of Teinds upon 11th January 1650 at the instance of the then second minister of the said parish, his stipend was modified at two chalders of victual, half bear, half oats, and 800 merks of money. From the recital in the proceedings raised in 1763, hereinafter referred to, it appears that by decret of modification and locality obtained before the said Commissioners upon 28th March 1683 at the instance of the first minister of the said parish, his stipend was modified at 54 bolls bear, 78 bolls white oats, and £100 Scots, with 100 merks Scots for communion elements. The said decreets of 1650 and 1683 cannot be traced, and the whole information which the parties have been able to obtain regarding the early history of the teinds of the said parish is contained in the recitals from the processes of 1748 and 1763. The parties are agreed that the above stipends were those in existence at the respective dates of the said feu-contracts.

"Subsequent to the institution of the Court of Teinds in 1707 no application for augmentation of stipend was made by either minister of the said parish until in 1748 the second minister raised an action of augmentation, modification, and locality, upon the ground that there was upwards of £500 sterling of free teind after deducting the stipend payable to the first minister, and that the decret of 1650 had never received its full effect because 50 merks had been deducted from the stipend therein allocated to him and paid to the minister of Carnock. He accordingly craved that his full stipend should be made up to him, and that a further augmentation should be granted to him. By decret of modification and locality dated 28th February 1753 the Lords added, eiked, and augmented to the second minister his full stipend under the said decret of 11th January 1650, and granted him a further augmentation of 100 merks Scots and one chaldar of meal, making all 900 merks Scots, 1 chaldar bear, 1 chaldar oats, and 1 chaldar meal. The said locality was approved and made final on 28th February 1753.

"In 1763 an action of augmentation, modification, and locality was instituted by the first minister of the said parish for the

purpose of having the stipend allocated to him by the said decret of 28th March 1683 augmented. So far as can be ascertained no locality was made up in this process and no augmentation was granted; the process is asleep at the present time. Thereafter a further process of augmentation, modification, and locality was instituted by the first minister on or about 15th February 1764, in which a decret was pronounced on 10th February 1768, which proceeded on the narrative that the stipend then paid to the first minister under the said decret of 28th March 1683 amounted to 54 bolls bear, 78 bolls wheat oats, £100 Scots, £40 Scots for house-mail, and 100 merks for communion elements. Under the said decret the stipend of the first minister was modified at 2 chalders bear, 2 chalders meal, and £600 Scots for stipend, with 100 merks for communion elements. Following upon the said decret a locality was made up which was reduced, but the Lords subsequently approved of a rectified locality given in by the Marquis of Tweeddale. A considerable part of the said process is lost, but that the said first minister's stipend remained practically as fixed by the said decret of 10th February 1768 appears from the recital in a subsequent process raised in 1793 in which the first minister's stipend is stated to be £600 Scots, 32 bolls meal, 32 bolls bear, £40 for house-mail.

"Since these dates several processes of augmentation, modification, and locality have been instituted by both ministers of the said parish, and augmentations have been granted, a detailed specification of which is unnecessary for the purposes of the present case.

"Up till about the year 1864 the lands of Garvock as a whole (including the portions thereof disposed by the said feu-contracts) were localled upon direct for stipend, and the stipend and augmentations thereof were paid by the superior. *There is no evidence to show whether or not he claimed or recovered any proportion from the vassals.* [The sentence in italics was deleted during the hearing of the case.] In the course of proceedings for augmentation instituted in 1860, in which interim decree was pronounced in 1863, and final decree on 24th February 1882, the vassals were for the first time entered in the state of teinds and localled upon direct for their share of stipend as has been the case in subsequent localities. The rectified state of teinds, prepared in 1880, contains the following statement:—*Heritable Rights.*—'39. Thomas Spowart, Esq., formerly Mr Wellwood, for lands which belonged to Mr Clark extending to 32'41 acres of the wood and wards of Garvock. When these lands were feued the superior bound and obliged himself and his heirs and successors to free and relieve his vassal and his heirs and successors of all stipend and other burdens in all time coming. Since then the superior has been in use to relieve the vassal from payment not only of the stipend but of all augmentations imposed thereon. . . . 40. William Beveridge of Bonnington, writer, Dunfermline, for lands extending

to 41.88 acres of the woods and wards of Garvoek (article 34) above. These lands were acquired from the superior in manner similar to those referred to in the preceding article and for reasons therein stated the superior Mr Wellwood was in state of teinds 177 of process there stated for this article. . . The lands referred to in the above-recited articles 39 and 40 include the lands contained in the said feu-contracts.

"Since 1863 the vassals have had to pay their share of the stipend direct. They thereupon made a claim against the superior for relief and pleaded the obligation in their favour in the feu-contracts. The superior repudiated liability, but the vassals deducted the stipend from their feu-duty each year before payment for the period between 1864 and 1876 so far as the second party is concerned, and for the period between 1864 and 1881 so far as the third parties are concerned, the question of liability remaining an open one between the parties. Since these periods the superior has refused to accept anything less than full payment of the feu-duty, and the vassals have retained the amount of their feu-duty.

"The first parties admit that in respect of the terms of the said feu-contracts they are under obligation to relieve the second and third parties of all payments made by them respectively of old stipend, but the whole parties interested are now desirous to have settled the various questions as to their respective rights under the said feu-contracts, and in particular as to whether the first parties and their successors are bound to relieve the second and third parties in all time coming of all payments in respect of augmentations of stipend.

"The first parties contend (1) that upon a sound construction of the said feu-contracts the obligation therein imposed upon the superior was to relieve the vassals of stipend as it existed at the date of the original grant, and did not extend to augmentations of stipend granted thereafter; (2) that in any event the obligation of relief did not extend to any augmentation granted subsequently to that of 28th February 1753 in the case of the second minister and to that of 10th February 1768 in the case of the first minister, in respect that according to the settled practice of the Teind Court at the date of the contracts and for more than forty years thereafter only one application for augmentation to that Court could be entertained, or could have been within the reasonable contemplation of the parties, and that the decision of the House of Lords nearly fifty years later, which sustained the competency of further augmentations, created a new liability by supervening law which was not covered by the obligation of relief; and (3) that accordingly the first parties are not bound to repay to the second party or the third parties augmentations of stipend, or at any rate the augmentations in excess of those which were granted in 1753 and 1768 paid by them or their predecessors, nor are they liable to relieve them or their successors of future augmentations.

"The second party contends (1) that the

obligation contained in the said feu-contract dated 30th May 1737 to free and relieve him and his predecessors of and from payment of, *inter alia*, all teind duties and minister's stipend payable forth of the said lands in all time coming is an inherent condition of the feu and transmitted to him from the original vassals without special assignation thereof; (2) that the said obligation applies not only to stipend exigible at the date of entry under the said feu-contract but to stipends and augmentations thereof thereafter, and that these and future augmentations were not and will not be liabilities created by supervening law; and (3) that accordingly the second party is entitled to repayment from the first parties of any stipend or augmentations thereof which he may have paid in respect of his said property.

"The third parties contend (1) that by its terms the said obligation of relief in the said feu-contract of 1738 applied not only to such stipend as was exigible at the time, but that it also applied to any augmentation thereof; and (2) that accordingly they were entitled to have repaid to them not only any stipend paid by them but also any augmentation of stipend they may have paid."

The questions of law were—"1. Does the obligation of relief of stipend contained in the said feu-contract to Alexander Williamson and his foresaids extend to (a) the augmentations of stipend granted in 1753 and 1768, and (b) subsequent augmentations? 2. Does the obligation of relief of stipend contained in the said feu-contract to George Davidson and his foresaids extend to (a) the augmentations of stipend granted in 1753 and 1768, and (b) subsequent augmentations?"

Argued for the first parties—In neither feu-contract was the obligation of relief such as to cover future augmentations of stipend. Augmentations could be granted again and again—*Wemyss v. Macqueen*, 1808, 5 Pat. App. 210; Morrison "Stipends," App. 6; Connell on Tithes, App. 120, p. 313—but future augmentations were not covered by a clause of relief unless it expressly said so—Bankton's Inst., ii, 3, 121; More's Notes to Stair, i, 93, Note M; Ersk. Inst., ii, 3, 39; Connell on Tithes, vol. ii, p. 104; Duff Feudal Conveyancing, p. 89; *Plenderleath v. Tweeddale*, 1800, M. 16,639, F.C. January 31, 1800; *Alexander v. Dundas*, F.C., June 9, 1812; *Hopetoun v. Copland*, F.C., December 8, 1819; *Hamilton v. Calder*, F.C., June 13, 1823; *Hope v. Speares*, 1837, 15 S. 1288; *Scott v. Edmund*, 1850, 12 D. 1077; *Stevenson v. Speir's Trustees*, 1858, 20 D. 651. Here the feu-contracts contained no such express obligation. The meaning of the clauses of relief in the earlier contract was that the superior was to relieve the vassal of obligations and burdens, including payments out of teinds, affecting the rest of the estate, but to which the vassal might be subjected in respect of his ownership of a part, while the vassal was to relieve the superior of burdens affecting the part disposed. The later feu-contract was to be regarded in a similar light. The rule as to

future augmentations had since 1832 been modified in some cases so as to allow implication or usage to extend the meaning of clauses of relief, but in this case there was no room for implication and there was no evidence of usage. The rule applied whether there had been a conveyance of teinds or not, though it was stronger in the former case, and had been upheld even where there was usage to the contrary—*Alexander v. Dundas, supra*; More's Notes, *supra*. *Hopetoun v. Jardine, F.C.*, July 3, 1811, which might be regarded as unfavourable to the first parties, had been overruled in *Hopetoun v. Copland, supra*. *Low v. Bethune, F.C.*, January 31, 1821, and *Cuninghame v. Cuthbertson, 1828, Sh. Teind Cases, 175, 4 Fac. Dec. 415*, were decided on specialities, and in *Wilson v. Agnew, 1831, 9 S. 357*, the obligation was of the nature of an insurance against all payments exigible from teinds—*The Governors of Heriot's Hospital v. M'Donald, 1830, 4 W. & S. 98*, was decided on usage. Obligations of relief from statutory burdens had been similarly interpreted—*Scott v. Edmund, supra*—but the rule was more rigid in the case of payments out of teinds. The decision in the *North British Railway Company v. Magistrates of Edinburgh, 1920 S.C. 409, 57 S.L.R. 344*, was not therefore applicable. *Stevenson v. Speirs' Trustees, 1858, 20 D. 651*, and *Campbell's Trustees v. Dingwall, 1865, 4 Macph. 50*, were decided on usage. In the former the teinds were not conveyed, and in the latter the decision was founded on other clauses of the deed. In *Pagan v. Macrae, 1860, 22 D. 808*, augmentations of stipend were not in question, there was no conveyance of teinds, and the teinds were valued. In *Preston v. Magistrates of Edinburgh, 1870, 8 Macph. 502*, there was no stipend exigible at the time of the contract. (2) There was no evidence of usage. The mere fact that the superior had paid the augmentations was not enough. It happened long ago, and there was no evidence as to whether or not the superior had recovered the payments from the vassals. It required very strong evidence of usage to upset the legal presumption. (3) In any event the obligation of relief did not cover more than one augmentation. From 1707 until 1779 it was the established rule that only one augmentation of stipend could be granted—Connell on Tithes, i. 391, 399, 402, ii. 108; Buchanan, Teinds, p. 225; *Milligan v. Heritors of Kirkden, 1779, M. 14,816, revd.*, 2 Pat. App. 621; *Mitchell v. Heritors of Tingwall, 1786, M. 14,817, revd.*, 3 Pat. App. 140; *Wemyss v. Macqueen, supra*. This must have been in the minds of the parties at the dates of the feu-contracts. The further augmentations were in the same position as new burdens imposed by statute which were not covered by an obligation of relief—*Dunbar's Trustees v. British Fisheries Society, 1878, 5 R. 350, 15 S.L.R. 227, 5 R. (H.L.) 222, 15 S.L.R. 772*.

Argued for the second parties—An obligation to relieve from all teind duties and minister's stipend in time coming covered future augmentations of stipend. Teind duties meant all claims for stipend, and

included augmentations of stipend—*Pagan v. Macrae, supra, per Lord Kinloch* at p. 820, Lord Ardmillan at p. 822, Lord Curriehill at p. 825, and Lord Deas at p. 828; *Reid's Trustees v. Sutherland, 1881, 8 R. 512, 18 S.L.R. 326*. The vassal was in no worse position where there was a conveyance of teinds. The obligation in favour of a vassal to whom the teinds were conveyed could only mean that he was to be relieved of all claims for teinds. Usage was not necessary to establish the right to relief. *Campbell's Trustees v. Dingwall, supra*, was decided on the assumption that the teinds were conveyed, and weight was given to the terms of the obligation apart from usage. Where there was usage it was clear from the authorities that the obligation covered future augmentations—*Campbell's Trustees v. Dingwall; Stevenson v. Speirs' Trustees, supra; Pagan v. Macrae, supra*. (2) Here there was a clear case of usage. The fact was before the Court that the superior had paid the augmentations during a long period. There could be no speculation as to whether or not he had recovered the payments from the vassal—*Blythe's Trustees v. Milne, 1905, 7 F. 799, per Lord Kinloch* at p. 808, 42 S.L.R. 676. (Lord Skerrington referred to the Court of Session Act 1868, section 63.) (3) There was no definite rule as to the number of augmentations which might be granted. (The Court intimated that it was not necessary to hear counsel on this point.)

Argued for the third parties—The case was ruled by the decision in *Pagan v. Macrae*. The meaning of teind duties and stipend was not limited to valued teinds, but included every duty exigible for teinds. This view of the meaning was also taken in *Low v. Bethune*, and *Campbell's Trustees v. Dingwall*. But the third parties did not require to rely on *Pagan v. Macrae*. Where there was no conveyance of teinds and the superior was titular, there was a presumption that he was liable for augmentations of stipend, which were payable out of teinds. Otherwise the vassal's burden would be increased by augmentations of stipend. Further, the clause in its natural meaning covered augmentations. All stipend included augmentations, and the words "in time coming" pointed to their inclusion—*Duff's Feudal Conveyancing, p. 89; Low v. Bethune, Cuninghame v. Cuthbertson, Preston v. Magistrates of Edinburgh*. In *Hope v. Speares* the teinds had been virtually conveyed though not expressly. Further, the obligation here was more than merely warrandice of the subjects. It was an undertaking to indemnify against something in addition. On the question of usage the third parties adopted the argument of the second party.

At advising—

LORD PRESIDENT—In Williamson's feu-contract the lands are disposed together with the teinds thereof. In Davidson's feu-contract the lands alone are disposed. But in each there is a relief clause in practically identical terms against "payment of all feu and teind duties, minister's stipend (and

schoolmaster's fees) payable furth of the said lands in time coming." The question is whether these clauses or either of them include relief against augmentations of stipend granted after the date of the contracts of which they form part.

From, at any rate, the later part of the 18th century it has been recognised as a sound rule of construction that a clause of warrandice or relief in a disposition of lands against teinds, or teinds and stipend, or stipend, does not cover future augmentations, unless such wider meaning is put into it by the general conditions and context of the deed, or where it is legitimate to refer to parties' user as explaining it, by such user. The rule is roundly stated in the opinion of the consulted Judges in *Hope v. Speares*, (1837) 15 S. 1288, at p. 1292. The principle upon which it was formulated is that of following out to its logical consequences the peculiarly intimate relation which exists in the law of Scotland between the support of the minister and the fruits of the lands. The support of the minister is a burden on that portion of the fruits which constitutes the estate of teinds. It is therefore *debitum fructuum*. The fruits are necessarily in the hands of the disponee of the lands themselves; and accordingly if the parties intend to make a divorce to any extent—a *fortiori* if they propose to make the divorce complete—between this liability and the enjoyment of the fruits to which it attaches, they must use express words, or words carrying with them a clear implication, in order to achieve their purpose. The frequent reiteration in the decided cases of the importance of the natural connection between the *dominium utile* of the lands and liability for the support of the minister is an echo of the principle just stated—see, for example, *Alexander v. Dundas* (9th June 1812, F.C.); *Hopetown's Trustees v. Coplands*, 8th December 1819, F.C.

The rule against extending obligations of relief from public burdens to such as may be imposed as the result of a change in the state of the law—*Dunbar's Trustees v. British Fisheries Society* (1878), 5 R. (H.L.) 221—though it is referred to by Sir John Connell in this connection (Connell on Tithes, vol. ii, p. 103)—has no application to warrandice or relief against teinds or stipend. It rests on a different principle, namely, that contracts in the absence of expressions clearly establishing a wider contemplation refer to rights and obligations which the parties do (or can) know about, not to those about which they neither do (nor can) know anything. Augmentations of stipend on the other hand are contingencies as easily foreseen under parochial law as increases in the rate of assessment under a taxing statute in force at the date of the deed.

When augmentations are expressly mentioned in the warrandice or relief there is of course no difficulty; but, though not uncommon, this is very far from being universal.

An implication which may or may not be clear and therefore decisive in itself—

pointing to their inclusion—may be raised by any feature of the deed which provides evidence of intention to that effect. Thus, if no stipend has been actually localised on the lands at the date of the disposition, an intention to include any future modification of stipend in a clause of warrandice or relief against teinds or stipend is strongly pointed to—see *Cuninghame v. Cuthbertson*, 27th January 1829, F.C., Shaw's Teind Cases, 175. Again, in *Stevenson v. Speirs' Trustees* ((1858) 20 D. 651) the fact that the consideration paid by the disponee was explained in the deed itself to be equivalent (or more than equivalent) to the full agricultural value of the lands, and therefore represented stock, teinds, and all, was a material aid in the construction of a clause relieving the disponee of all teind without express mention of either stipend or augmentation as covering future augmentations.

In framing clauses of this sort our conveyancers of former times gave the rein to an apparently insatiable passion for infinite variety, and the results produced by this foible make it difficult to hold the line between differences and distinctions. But since the decision of *Cuninghame v. Cuthbertson* it has been possible to recognise at least one category of cases in which there is a clear implication of intention to include augmentations in a clause of warrandice or relief, those, namely, in which the teinds are not conveyed to the disponee of the lands and do not belong to him, and in which the disponent grants warrandice or relief against teinds or teinds and stipend. It will be remembered that in Davidson's feu-contract the lands alone are disposed, and it is not said that Davidson had any right to the teinds, while the relief is against "feu and teind duties and stipend." The materiality of the difference between "teinds" and "teind duties" is considered in the sequel. But assuming for a moment that the difference is not material it will be seen that Williamson's feu-contract does not, while Davidson's feu-contract does, fall into the category just defined. In *Cuninghame v. Cuthbertson* the teinds did not belong to the disponee, not being conveyed to him with the lands, and the relief was against "teinds or stipend." All the earlier authorities were reviewed and the relief was held to apply to augmentations as well as stipend. Mr Duff in his work on Feudal Conveyancing, (1838) p. 89, treats this judgment as having established the category referred to. The reasons which support this view are these—(a) the surplus of the teinds remaining after paying stipend belong to the titular, whether he be the grantor of the deed or some other (not the disponee); (b) the warrandice or relief against teinds necessarily covers the whole of that surplus; and (c) future augmentations merely transfer part of the surplus from the titular to the minister, leaving the effect of the warrandice or relief unimpaired and unaffected. The decision in the older case of *Alexander v. Dundas*, if not expressly overruled by *Cuninghame v. Cuthbertson*, cannot stand along with it. But it is worth

while to observe in passing that both in the rubric of the report of *Alexander v. Dundas* and in the argument for the reclaimer "teind duties" and "teinds" are used as interchangeable terms. The statement in Connell on Tithes (vol. ii, p. 114) to the effect that the import of the judgment in *Cuninghame v. Cuthbertson* was that wherever there is a special obligation to relieve from teinds and stipend these words must be taken in what he calls their literal sense so as to throw the burden of subsequent augmentations on heirs or singular successors of the grantor, is much too broad, and is in my opinion neither warranted by the decision itself nor supported by the cases which have followed upon it.

The authority of *Cuninghame v. Cuthbertson* as applying to cases belonging to the category above described was recognised and followed in *Stevenson v. Speirs' Trustees*, where the relief was against teinds, and in *Preston v. Magistrates of Edinburgh*, (1870) 8 Macph. 502, where the relief was against teinds and stipend. In the case of *Wilson v. Agnew*, (1831) 9 S. 357, a superior who owned the teinds and did not dispoise them with the lands, but undertook in consideration of a specially taxed duty or payment to relieve the vassal of all teinds, was held to have taken on himself the burden of both stipend and augmentation although the deed mentioned neither expressly. The case may be referred to the same category but it had obvious specialities of its own. It was described in the opinion of the Judges as a case in which the superior for a special consideration became insurer against all exaction of any kind out of the teinds. The case of *Hope v. Speares*, notwithstanding the clear statement of general principle in the opinion of the consulted Judges, is more difficult to place, but if the construction of the deed favoured by the Judges of the Division, namely, that the lands in that case were dispoised with the teinds, be correct, it falls outside the category under discussion.

There is, however, the other question—What are "teind duties"? The clause of relief in both feu-contracts is against "all feu and teind duties, minister's stipend," and so on. The feu-duties are of course those payable to the grantor's superior, which being *debita fundi* might be enforced by a poinding of the ground. "Teind duties" is the historical and proper designation of the commutation of teinds which in the case of teinds as yet unvalued was fixed by the Act 1633, cap. 15, confirming an Act of the Commission of Teinds dated 23rd March 1631, at one-fifth of the present rent, and in the case of teinds valued under the Act 1633, cap. 19, was fixed at one-fifth of the constant rent. The teind commutation money which every heiritor thus became entitled to tender was called teind duty, and such is the primary and proper meaning of the expression. Accordingly in stating the general rule as to the exclusion of augmentations from obligations to relieve from stipend, Lord Robertson, in *Scott v. Edmund*, (1850) 12 D. 1077, at p. 1085, used the expression "teind duties" as a synonym for teinds.

Unfortunately it is the fact that this expression was also sometimes used to designate an annual reddendo payable in respect of the infeudation of the estate of teinds by the Crown or by a titular. And it is remarkable that in the review of the older cases in *Cuninghame v. Cuthbertson* several of them were put out of the reckoning—the relief being expressed to be against "teind duties" or against "teind duties and stipend"—on the ground that the teind duties referred to were quite different things from teinds. With regard to some or all of the cases thus put aside, it may have been possible to affirm that the teind duties were in the nature of reddendo. I have not been able to verify this, but I can imagine no other reason—whether it was well or ill-founded in all of them—for so treating those cases, because teind duties in the sense of commuted teinds are nothing but teinds so far as liability and relief are concerned. It was the double meaning of the expression "teind duty" round which the whole controversy centred in the important case of *Pagan v. MacRae*, (1860) 22 D. 806. The superior was himself a titular and dispoised the lands without the teinds, binding himself to relieve the vassal of "all feu and teind duties." He sued the vassal for arrears of teinds and contended that the case was prevented from falling within the category recognised and established by the decision of *Cuninghame v. Cuthbertson*, because the relief intended was not against teinds but only against the reddendo payable by himself to the Crown. He was unsuccessful notwithstanding a certain colour given to the argument by the collocation of feu-duty with teind duty, and the expression "teind duties" in the relief clause was held to have its historical and proper meaning. In the present case we have no information as to the state of the superior's title to the teinds. There was a formidable dissent from the opinion of the majority in *Pagan v. MacRae*, but I feel no hesitation in following the decision and in adopting the construction of "teind duties" which was so clearly and authoritatively expounded in that case by Lord Curriehill in particular—see pp. 825, 826.

My opinion accordingly is that the question put to us with reference to Davidson's feu-contract should be answered in the affirmative. If the expression "teind duties" were held to import any possible doubt into the matter the user of the parties from 1753 to 1864 (since which date they have been at arm's length) would, as in the case of *Pagan v. MacRae*, fortify and confirm the conclusion at which I have arrived independently of it.

The case of Williamson's feu-contract presents more difficulty. The lands being conveyed along with the teinds thereof, the considerations on which I have been able to reach a conclusion with regard to Davidson's contract fail to apply. For if the dispoinee of lands is also dispoinee of the teinds he becomes as it were his own titular, and the warrandice or relief against teinds becomes unintelligible and futile in so far as the teinds are payable to himself, and

can only apply to such part of them as is appropriated to the support of the minister. As explained at the outset of this opinion, so close was the connection held to be between the burden of stipend and the ownership of the lands that the relief from teinds, or teinds and stipend, or stipend, in a disposition of lands with the teinds thereof, was construed (in the absence of evidence of wider intention) to extend only to such part of the teinds as was appropriated to the support of the minister at the date of the deed. The rule is clearly stated in Mr Duff's Feudal Conveyancing (1838) at p. 89. There are many illustrations of this. Thus, in *Plenderleath v. Earl of Tweeddale*, (1800) M. 16,639, the warrandice was against all duty and service (other than such as formed the considerations for the grant) except the then localised stipend, but the ground of judgment was quite general and affirmed the broad principle. In *Hopetoun's Trustees v. Coplands* (overruling *Lord Hopetoun v. Jardine*, 3rd July 1811, F.C.) the teinds were warranted free of all burdens, distress, and what not—without special mention of either stipend or augmentation—and the judgment was that augmentations after the date of the deed were not covered by the warrandice. In *Hamilton v. Calder*, 13th June 1823, F.C., the clause was of similar comprehensiveness—though also without special mention of stipend or augmentation—and the judgment was to the same effect. The case of *Eliot v. Marquis of Lothian*, (1824) 3 S. 348, belongs to the same class, but it had special features.

The case of *Campbell's Trustees v. Dingwall* ((1865) 4 Macph. 50) was founded on at the debate as throwing doubt on the rule illustrated by the decisions just cited. It is true that in that case, while the teinds were disposed along with the lands and relief was given against both stipend and "teind duties"—these by the way were held to be just teinds—augmentations after the date of the deed were determined to be included in the relief. But while the deed purported to convey the teinds, it did not warrant title to them, and it appeared to be more than doubtful if the grantor had any right in them to convey. The deed contained other evidence of intention that the lands were to be free of exactions of any sort apart from the consideration for the grant. The force attaching to the conveyance of the teinds was thus greatly weakened, if not destroyed; and, valuable as are the opinions delivered in it, the case is in any view rendered, by the peculiar ambiguity of its circumstances, so special as to make it, in my opinion, impossible to regard it as unsettling the general rule in any way, or to use it as a precedent for the construction of Williamson's feu-contract.

Apart from the terms of the relief clause, and the circumstance that the lands are disposed with the teinds thereof, there is nothing in Williamson's contract to throw light on the intention of parties. Unless, therefore, it be legitimate to derive such intention from the user of the parties, I should feel myself bound to hold that augmentations after the date of the grant

were not included in the relief. The facts with regard to user are, however, very impressive. In addition to what we are told in paragraphs 9 and 10 of the Special Case, we were informed that the number of augmentations granted since the date of the deed are no less than four; and when it was pointed out to the parties that the second sentence in paragraph 9 was not a proper or competent statement in a special case (*Lawson's Trustees v. Lawson*, (1883) 10 R. 1278; *Blyth's Trustees v. Milne* (1905) 7 F. 799, per Lord Kinnear, at p. 808) they consented to its deletion. The net result is that for 111 years—from 1753 to 1864—the parties dealt with the matter as if the relief did apply to augmentations. Since that date they have stood on the defensive, the superior refusing relief, the vassal refusing payment of feu-duty.

There are many cases in which, for the solution of questions not dissimilar to that which is raised here, aid has been sought from the parties' user. *Bruce-Carstairs v. Greig* ((1773) M. 2333) is an instance of this in former practice, and since the decision in the House of Lords of *Heriot's Hospital v. Macdonald* ((1830) 4 W. & S. 98) evidence of user has over and over again been received as confirming what appeared to be the correct construction of the deed on its own terms, or as turning the balance in a case of real ambiguity. But, so far as I am aware, this is the first case—at any rate in this particular branch of the law—in which the Court has been asked to resort to user in order to upset the effect of an established rule of construction resting on logical grounds when there is nothing in the deed itself to militate against or to qualify the application of that rule. The present case is not one to which the doctrine of *contemporanea expositio* of ancient documents properly applies. For the question is not as to the identity of the subject of the contract, but as to the meaning of its terms, and the proper ground of resort to *contemporanea expositio* in such a case is that in process of time the meaning of the terms used has become blunted, or has been lost altogether. This, as I understand it, is the effect of Lord Watson's well-known dictum in *Clyde Navigation Trustees v. Laird* ((1883) 8 A.C. 658), and the law has been similarly explained quite recently in the Privy Council by Lord Atkinson—*Watcham v. East Africa Protectorate*, [1919] A.C. p. 533, at pp. 537, 538. It is not, I confess, as plain to me as I should like that user should be allowed to establish the meaning of a relief clause, such as that contained in Williamson's feu-contract, for it received its *contemporanea expositio* judicially in the Courts of the country between the latter end of the eighteenth century and the middle of the nineteenth. Resort to user presupposes what is called ambiguity in the meaning of the deed. And the question is whether the existence of an established and logical rule of construction applicable to the clause in question does not exclude ambiguity in this sense. The answer appears to be that most if not all of such rules are made for cases in which the words

employed can, without torture of themselves and without violence to the rest of the deed, be made reasonably susceptible of more meanings than one, and that where this is the case the rule of judicial interpretation may be no more than presumptive in its application, and may yield to evidence of contrary user. This view was adopted in less favourable circumstances than those which are presented by the present case in *Jopp's Trustees v. Edmund* ((1888) 15 R. 271) and in the recent case of *North British Railway Company v. Magistrates of Edinburgh* (1920 S.C. 409) for the solution of a similar problem in a different but analogous branch of law, where the established and logical rule concerned was that applicable to clauses of relief against public burdens. I think the *ratio decidendi* of those cases—important and relevant authorities as they are—is binding upon me as regards the legitimacy of resort to user in the circumstances of the present case. And I therefore think that the question in regard to Williamson's feu-contract should, like that with reference to Davidson's, be answered in the affirmative.

LORD MACKENZIE—The two feu-contracts in question contain obligations of relief by the superior from payment of all teind-duty and minister's stipend. The terms used are, upon the authorities, flexible in their meaning and may be interpreted by usage. The distinction between the two feu-contracts is, that in the one granted in 1737 there is a conveyance of teinds, in the other granted in 1738 there is not. In view of the usage it is not necessary to express an opinion whether the case of *Campbell's Trustees v. Dingwall*, 1865, 4 Macph. 50, would be sufficient to entitle the vassal to prevail as regards the 1737 feu, or whether the case of *Pagan v. MacRae*, 1860, 22 D. 806, would entitle the vassal to prevail as regards the 1738 feu. The import of what Sir John Connell calls the very solemn judgment in *Cuninghame v. Cuthbertson*, 27th January 1829, F.C., Shaw's Teind Cases 175, Connell on Tithes, vol. ii, p. 112, finally negated the contention put forward down to that date by superiors that a seller or disponent of lands was not liable for augmentation of stipend unless augmentations were specially mentioned and provided for.

The judgment of Lord Wynford in *Heriot's Hospital v. M'Donald*, Shaw's Teind Cases 156, 4 W. & S. 98, quoted by Lord Curriehill in *Stevenson v. Spiers' Trustees*, 1858, 20 D. 651, at p. 657, is to the following effect:—"Old instruments may be expounded by contemporaneous and continued usage. There can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made and have since continued to act." The House of Lords took the same view as the Court of Session, that the superior was liable to free the vassal of payment of stipend. The report in Shaw's Teind Cases bears that "the Court in pronouncing judgment was mainly influenced by the practice which they considered as

showing the true nature of the contract." The same principle has been applied in other cases. It is only necessary to mention *Jopp's Trustees v. Edmund*, 1888, 15 R. 271, Lord Rutherford Clark at p. 282; and *North British Railway Company v. Magistrates of Edinburgh*, 1920 S.C. 409.

The actings of the parties in the present case show that the superior's obligation was not limited to stipend at the date of the original grant but extended to augmentation of stipend granted thereafter. The Special Case as now stated contains this admission—"Up till about the year 1864 the lands of Garvoek as a whole (including the portions thereof disposed by the said feu-contracts) were called upon direct for stipend, and the stipend and augmentations thereof were paid by the superior." There is nothing to qualify this, for the succeeding sentence in the case as originally stated has been withdrawn.

Augmentations were granted in 1753, 1768, 1793, and 1806. There were localities in which the superior had opportunities for rectification. The superior did not take advantage of them but continued to pay.

Since 1864 the parties have been at arm's length. In 1863 the vassals were for the first time entered in the state of teinds and localised upon direct for their share of stipend, as has been the case in subsequent localities. The vassals deducted the stipend from their feu-duty. The superior has refused to accept anything less than full payment of the feu-duty, and the vassals have retained the amount of their feu-duty.

The usage shows that for more than 120 years no question was raised as to the construction of the feu-contracts, and that the superior acted upon a construction of the feu-contracts which is in accordance with the present contention of the vassals. The usage for that period shows that the clauses of relief were interpreted as an insurance by the superior that the vassal should enjoy the subject of the grant teind free. This was the meaning the parties themselves for that long period attached to the expression "teind duties and minister's stipend." There is no decision in the books which makes it impossible to construe the feu-contracts taken as a whole in this sense. As pointed out in *Pagan*, 1860, 22 D. 806, at p. 824, where there was no conveyance of the teinds, these words are capable of receiving that construction. So too in *Campbell's Trustees v. Dingwall*, 1865, 4 Macph. 50, which was a case in which the deed bore to convey the teinds. The question put by Lord Curriehill at p. 55 is as to the meaning in a deed of 1780 of an obligation to relieve of teind duty in all time coming—"I think that it imported an obligation to relieve the vassal—who as owner of the *dominium utile* would be the intruder with the teinds of the lands—of all claims by any party whatever in respect of these teinds. As such intruder he would be directly liable in payment of teind duties, first to the minister under such decrees of augmentation as might from time to time be pronounced, and *quoad ultra* to the titular. These teind duties would amount

to the sum in the decree of valuation if the same were valued, and if not to the fifth part of the rent, and I consider this as an obligation to relieve the vassal of all payment on account of . . . augmentations. As matters stood at the date of the deed the surplus of the teind duties beyond the stipend then payable to the minister was payable to the titular, and any subsequent augmentation would be just a transference of so much from the titular to the minister, and although the *quota* of the teind duties payable by the vassal to each of these different parties would be varied, the total amount payable by him to both of them would remain the same, and the amount of the teind duties of which the superior would be bound to relieve him would also of course remain the same."

This puts the matter not upon the vassal having a conveyance of the teind but on the fact that as vassal he is an intromitter. It is to be observed that when a superior conveys the teinds with relief, that covers the existing stipend which is payable out of the teind. It is no more illogical to hold that future augmented stipends also fall under the relief. There is no reason to doubt that the consideration given by the vassal was at the time considered adequate by the superior in exchange for the obligation of relief as interpreted by him. The fact that the parties have been in dispute since 1863 does not take off the effect of the prior actings which are explanatory of the meaning of the feu-contracts.

It was maintained that there was a rule of practice in the Teind Court at the date of the grants against more than one augmentation which was altered by a judgment of the House of Lords so as to have the effect of supervening legislation. In my opinion this contention is untenable.

The questions of law ought in my opinion to be answered in the affirmative.

LORD SKERRINGTON—I agree with Lord Mackenzie.

LORD CULLEN—The obligation of relief undertaken by the superior in the first of the feu rights here in question is "to free and relieve the said Alexander Williamson, his said spouse, son, and his foresaids of and from payment of all feu and teind duties, minister's stipend, schoolmaster's fees payable forth of the said lands in time coming." The obligation in the second feu right is "to free and relieve the said George Davidson and his foresaids of and from the payment of all feu and teind duties, minister's and schoolmaster's stipends, payable forth of the said lands in all time coming." The vassal is in each case taken bound to free and relieve the superior for the future of cess and public burdens. "Public burdens" in this latter obligation are exclusive of "minister's stipend," according to what may be the true content of these words as used in the superior's obligation of relief.

As a minister's stipend payable out of the teinds is not of permanently fixed amount, so long as there is a margin of surplus or free teind, but is always susceptible of being augmented in amount in order that it may

represent a competent stipend for the time, and as this quality of a stipend must be taken as having been within the contemplation of the parties to the two feu rights, the superior's obligation to relieve the vassals of minister's stipend in time coming, projecting itself as it does into an indefinite future, extends, according to the natural sense of the words, to the stipend as its amount may come to be fixed from time to time in the future. It is, however, settled by a series of decisions that an obligation to relieve of "minister's stipend" in the future, taken by itself, falls to be regarded as ruling out of the contemplation of parties this conspicuous quality in a stipend of being augmentable, so as to limit the obligation to the amount of the stipend prevailing at the time when the obligation is undertaken. While this is so the question always is and must be one of arriving at the true intention of the parties to the particular instrument which may be under consideration, and it is competent to show from the context of the deed, or from the explanatory actings of parties under it, or from both, that the words "minister's stipend" in an obligation of indefinite duration have been used in their natural sense—that is to say, as applying to the stipend as it may stand in amount from time to time. It was, indeed, argued in the present case that the element of the actings of parties, or usage, cannot competently be looked to in order to construe such an obligation, in respect, it was said, that the words of it, as construed by the said decisions, are unambiguous to exclude future augmentations. There are two answers to this. The first is that the words, taken in their natural sense, extend to augmented stipend, for the reasons which I have stated, so that the meaning impressed on them by the said course of decision cannot be more than a presumptive one. I may refer in this connection to the recent decision of this Division in the case of *The North British Railway Company v. The Magistrates of Edinburgh*, 1920 S.C. 409. The second is that in various cases of this class the Court has taken account of and proceeded on the usage under the contract. I may instance the cases of *Heriot's Hospital v. Macdonald* (1830) 4 W. & S. 98), *Pagan v. MacRae* (1860) 22 D. 806), and *Campbell's Trustees v. Dingwall*, (1865) 4 Macph. 50.

The usage here appealed to by the feuars appears to me to be convincing. It begins in 1753, when the second minister of the parish of Dunfermline obtained an augmentation, and it extends to 1863, since which period the superior and vassals have been in dispute. Between 1753 and 1863 there occurred several augmentations. During this period of 100 years the superior was entered in the successive localities in respect of the whole lands of Garvock, including the ground embraced in the two feus, and he paid the whole stipend as thus augmented from time to time. Now on the view of the true meaning of the two feu rights of 1737 and 1738, presented by the first party to this case, this was wrong. On that view the feuars, who were liable to be called on as intromitters to pay stipend to the mini-

ster, were also ultimately bound to bear the burden of it themselves, as between them and the superior, in so far as it exceeded the amount of the stipend at the dates of the feu grants. It was not as if the superior was bound to be localled on and to pay the stipend in the first instance and then to seek reimbursement from his vassals. It was open to him to have the vassals entered in the successive states of teind and localities in respect of the portions of the lands of Garvock comprised in their respective feus. Nevertheless he refrained from taking this course, acquiesced in his being himself entered in the states of teinds and localities for his whole lands of Garvock, and regularly paid the full amounts of the augmented stipends. This, as it seems to me, can bear only one interpretation, to wit, that during the foresaid period of 100 years the obligation to relieve the vassals of minister's stipend in time coming was understood and accepted in its natural sense as extending to the whole stipend as its amount might be augmented from time to time. In a rectified locality of 1882, made up for an augmented stipend modified, as it appears, about 1863, there occur the entries of the vassals in respect of their respective feus which are quoted in article 9 of the Special Case, which entries were accompanied by a reference to the obligations of relief in question. We have no information as to the origin of these entries. In respect of them the vassals were localled on; the matter at once fell into dispute; the vassals, being localled on, paid stipend to the minister, but they pled the obligation of relief *quoad* the superior, and on his repudiating liability they deducted the amounts of stipend paid by them between 1864 and 1886 and between 1864 and 1881 respectively, and since 1886 and 1881 respectively they have retained their feu-duties, inasmuch as the superior has since these dates refused to accept less than the full amounts thereof. It is remarkable that so long a period should have elapsed since the dispute arose without its being brought to an issue. The actings during that period appear to me to be neutral in character in their bearing on the construction of the contracts. But the actings during the preceding period of 100 years are, according to my judgment, relevant and sufficient to impress on the obligations of relief the construction for which the second and third parties contend.

If the view above expressed is right it is not essential to deal with a topic which bulked largely in the discussion, namely, as to the meaning to be ascribed to the expression "teind duties" which occurs in both of the obligations of relief, but I may state my impressions on the matter. The collocation of "feu and teind duties" conveys a suggestion that by "teind duties" was meant a reddendo payable by the granter of the feu rights to the over-superior in respect of the teinds. As to the fact of such a reddendo being payable we have no information, inasmuch as the Special Case is silent both as to the granter of the two feu rights owning the teinds and as to the terms of any title on which he held them. It appears to me,

however, that on the meaning of the expression "teind duties" we are bound to follow the authority of the case of *Pagan v. MacRae*, at least so far as the second feu right, that to George Davidson, is concerned. In *Pagan* the grant did not include the teinds of the lands. The superior bound himself to relieve the vassal "of all cess, feu and teind duties, minister's and schoolmaster's stipend," &c. The terms of that obligation do not seem to me to be materially distinguishable from the terms of the obligations here in question. The meaning of the expression "teind duties" was the subject of very full argument and consideration. The majority of the whole Court were of opinion that it could not be limited to a reddendo payable to the over-superior, but was "applicable generally to whatever is paid in name of teind," to quote the words of Lord Kinloch. It is true that in *Pagan* the question was not one as to liability for augmentation of stipend, but arose out of a claim by the superior, granter of the obligation of relief, for the surplus teind as titular; which claim was negatived, the words "teind duties" being construed as including claims for surplus teind by the titular. But as the stipend and surplus teind together exhaust the whole teind, it appears to me that where there is an obligation to relieve both of stipend and surplus teind the obligation cannot logically be construed as not extending to relief of augmentations of stipend, seeing that the effect of an augmentation is merely to transfer so much of the existing surplus teind to the minister, and that the burden of the obligation of relief is not thereby altered. The case of *Pagan* accordingly is substantially, although not in terms, an authority for the construction of the Davidson feu right maintained by the third parties.

In the case of the other feu right here under consideration the grant purports to include the teinds. A conveyance of the teinds is sometimes a material factor in cases of this class. As stipend is payable out of the teind the burden of payment naturally goes with the teind. But the parties to this feu right clearly contracted on a different footing, so far at least as regards the stipend payable at its date. Although the teinds bear to be disposed to the feuar, the superior by the obligation in question undertook at least to relieve him of the burden of that amount of stipend. There would therefore have been nothing illogical or unnatural in his agreeing also to relieve him of augmentations of it notwithstanding the conveyance of the teinds. The grassum paid and the feu-duty stipulated for must have been accepted as adequate consideration to cover relief of the then present stipend, and may have been equally accepted as adequate to cover relief of augmentations. But undoubtedly the words "minister's stipend" taken by themselves are by authority ruled as insufficient to cover augmentations. This naked rule, however, applies whether the obligation occurs in a deed which conveys the teind or in one which does not. Where resort is made to a context in order to construe the words "minister's stipend" in the

wider sense the fact of the teinds being or not being conveyed may make a difference. Thus in the case of the Williamson feu right it is less easy than in the case of the Davidson feu right to apply to the words "teind duties" the view taken of the meaning of these words by the majority of the whole Court in *Pagan*. For as the feuar here became by the grant owner and titular of the teinds conveyed to him, it was inappropriate that the superior should relieve him of claims for surplus teind. We do not, it is true, learn anything about the right or title of the superior to the teinds, and it is abstractly possible that, as was suggested in course of the argument, a relief against claims for surplus teind was inserted in the deed *ob majorem cautelam*. But as the case affords no foundation in fact for this suggestion I think one must construe the obligation of relief in view of the fact that the deed expressly bears to convey the teinds. And on this footing I feel great difficulty in attaching to the words "teind duties" the meaning attached to them in *Pagan*, where the teinds were not conveyed. But this difficulty regarding the words "teind duties" as occurring in the Williamson feu right does not displace the effect of the usage thereunder in demonstrating, in my opinion, that the words "minister's stipend" were used in the sense of including augmentations.

I concur in the judgment which your Lordships propose.

The Court answered the questions of law in the affirmative.

Counsel for the First Parties—Fraser, K.C.—Maconochie. Agents—Pearson, Robertson, & Maconochie, W.S.

Counsel for the Second Party—Brown, K.C.—Scott. Agent—H. Bower, S.S.C.

Counsel for the Third Parties—Mackay, K.C.—Hunter. Agent—Henry Smith, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

SINCLAIR v. RANKIN.

Parent and Child—Illegitimate Child—Filiation—Intercourse with Defender and with Another Man about Time of Conception.

In an action of filiation and aliment the evidence showed that the pursuer had connection with the defender and also with another man about the time of conception, and that her usual monthly period occurred between the two dates of connection. *Held (dub. Lord Dundas)* that the pursuer had proved the paternity of the child against the man with whom she had had connection after menstruation, and decree granted accordingly.

Butter v. M'Laren (1909 S.C. 786, 46 S.L.R. 625) distinguished.

Lily Sinclair, 62 Hazelbank Terrace, Edinburgh, *pursuer*, raised an action of affiliation and aliment in the Sheriff Court at Edinburgh against James Ewing Rankin, stockbroker's clerk, 10 Lochrin Buildings, Edinburgh, *defender*.

The pursuer averred that during three days from 17th November 1916 she stayed at an hotel with a soldier in the Canadian Army, with whom she had carnal connection, which did not result in pregnancy; that after her return home menstruation took place in ordinary course and lasted from 1st to 6th December; that the defender, who had been in the army since June 1915, and to whom the pursuer was engaged to be married, came while on leave to the pursuer's parents' house on 7th December 1916 and remained there until the 14th December; and that on the occasion of this visit sexual intercourse took place between her and the defender in her parents' house, resulting in her pregnancy and the birth of an illegitimate female child on 4th September 1917. The defender denied the paternity, averring that he broke off his engagement to the pursuer when he became aware of the fact that the pursuer had had intimate relations with another man.

On 9th June 1920 the Sheriff-Substitute (GUY), after a proof (the import of which sufficiently appears from their Lordships' opinions *infra*), granted decree as craved.

On 24th November 1920 the Sheriff (CROLE), on appeal, recalled his Substitute's interlocutor and assoilzied the defender.

The pursuer appealed to the Second Division of the Court of Session. The arguments appear sufficiently from the judgments.

At advising—

LORD JUSTICE-CLERK—In this case the Sheriff-Substitute granted decree in favour of the pursuer while the Sheriff assoilzied the defender. I have found some of the points we have to determine attended with considerable difficulty, but I have ultimately come to be of opinion that we should restore the judgment of the Sheriff-Substitute.

The pursuer admits that she slept two nights with a Canadian soldier called Baxter in Cupar on 17th and 18th November 1916. But she maintains that from 1st to 6th December 1916 she had her usual monthly period, and that therefore what took place at Cupar cannot account for her pregnancy. The defender contends that it has not been proved that menstruation took place early in December. I cannot agree with the defender as to this. I accept the view that the pursuer is not a satisfactory or reliable witness. But the Sheriff-Substitute, who saw the witnesses, found that the occurrence of menstruation had been proved by the evidence of the pursuer and her mother. The pursuer was a woman of about twenty-six at the time in question, and therefore of experience in the matter in so far as a non-medical woman can be. In my opinion we ought not to accept the view that she was mistaken in such a matter, and that there was not menstruation but hæmorrhage as distinguished therefrom.