

[7th August 1833.]

No. 36. The DUKE of ROXBURGHE and CURATORS, Appellants.
—*Solicitor General (Campbell) — Dr. Lushington.*

WILLIAM KERR, Respondent.—*Lord Advocate (Jeffrey)*
—*Murray.*

Warrandice—Teinds—Entail.—A titular and patron possessing under an unrecorded entail sold teinds, and bound himself and his heirs and successors to warrant them from all future augmentations—Held (affirming the judgment of the Court of Session), that the purchaser's successor was entitled, without discussing the heirs of line of the seller, to go against the heir of entail for relief of all augmentations subsequent to the sale.

1ST DIVISION. BY disposition dated the 11th August 1740 John
Lord Moncreiff. Duke of Roxburghe, patron and titular of the parish of Roxburgh, sold the teinds, great and small, of the lands of Sunlaws for 80*l.* 16*s.* Scots (being at the rate of six years' purchase,) to Christian Kerr of Chatto (the proprietrix of the lands), and to her heirs and assignees whatsoever, under the burden of the stipend then allocated on the same and payable to the minister of Roxburgh; but his Grace bound himself, "his heirs and "successors," to warrant the said teinds from any "future augmentations."

The estates, as well as the patronage and titularity,

were possessed under an entail executed in 1684, but which was not recorded in the register of tailzies till 1804. His Grace purchased lands in 1740, and entailed them in terms of the deed of 1648. He was succeeded by his son Robert, who renewed the entail in 1747. The present Duke made up titles under the entails of 1740 and 1747, which were also recorded in 1804.

Several augmentations since the date of the disposition were awarded to the minister of Roxburgh; in particular in 1800 an augmentation was laid on the lands of Simlaws to the extent of “ B. 5. 2. 2¼ meal,” and in 1809 the same allocation was continued,—the interlocutor of the Court reserving a claim of relief against “ the representatives of John Duke of Roxburghe.” This augmentation was paid by the Duke in possession of the Roxburghe estates till 1820, when it was discontinued by the father of the present appellant. Robert Kerr, who was vested in the right of Christian Kerr, presented in a process of locality a claim for relief against the appellant as the representative of the granter; and Lord Moncreiff, on the 13th of November 1830, pronounced this interlocutor:—“ The Lord
 “ Ordinary having considered the closed record on the
 “ claim of Robert Kerr, esq., of Chatto, against the
 “ tutors of the Duke of Roxburghe, and heard parties
 “ procurators thereon, Finds that the obligation of war-
 “ randice against all augmentations of stipend contained
 “ in the disposition of teinds produced was not an obliga-
 “ tion granted under any of the provisions of the statute
 “ in the process of sale, but a voluntary and apparently
 “ gratuitous undertaking by John Duke of Roxburghe,
 “ the granter thereof, for himself and his heirs and

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“ successors generally: Finds that the said obligation
 “ is not so constituted as to be attached as a real bur-
 “ den to the patronage or titularity of this parish, or
 “ to the teinds of the Duke’s own lands, or any other
 “ part of the entailed estate of Roxburghe; and that
 “ although, in consequence of the Roxburghe entail not
 “ having been recorded till 1804, any debt or obliga-
 “ tion contracted by the heir in possession may be
 “ eventually effectual to the creditor against the estate
 “ or the heirs of entail, any such obligation laid gene-
 “ rally on the heirs and successors of the granter can
 “ only operate as an ordinary personal obligation sub-
 “ ject to the general rules of discussion among heirs of
 “ various orders. And in respect that it clearly appears
 “ that there are other parties who represent universally
 “ the granter of the said obligation, and who, for any
 “ thing yet seen, the Lord Ordinary thinks ought to
 “ be first discussed according to the general rules of law:
 “ Finds that there are no termini habiles, or sufficient
 “ grounds in this process of locality for appointing that
 “ part of the stipend which, according to the ordinary
 “ rules of allocation, ought to be laid on the teinds of
 “ the claimant’s lands as held by him by heritable right,
 “ to be allocated on the teinds of any lands of the en-
 “ tailed estate of Roxburghe within the parish held
 “ necessarily by an equally available heritable title:
 “ Therefore finds that it is unnecessary and inexpedient
 “ to pronounce any judgment on the import and effect
 “ of the clause of warrandice in other respects; but
 “ repels the claim of Mr. Kerr in this process, reserving
 “ to him his claim of relief generally against all the
 “ representatives of the said John Duke of Roxburghe,
 “ and to them their answers thereto, and their rights of

“ relief among one another, as accords: Remits to the
 “ clerk to adjust the locality on the principles of this
 “ interlocutor: Finds no expenses due to either party.

“ *Note.*—Two things are to be observed in this case:
 “ 1. That the question could only have arisen on the
 “ supposition of the Duke of Roxburghe having no
 “ teinds in his hands as titular of this parish other than
 “ the teinds of his own lands possessed as heir of entail;
 “ and therefore that the real question in this process of
 “ locality is, whether the stipend otherwise allocable on
 “ Mr. Kerr’s lands shall be permanently imposed on
 “ lands of the estate of Roxburghe: 2. That it is im-
 “ possible in this process to determine conclusively
 “ even the question of primary responsibility or dis-
 “ cussion among the several heirs of the granter of the
 “ obligation; because, as the general representatives of
 “ the late John Duke of Roxburghe are not and cannot
 “ be parties in this process, the point cannot be effec-
 “ tually determined in their absence.”

The appellants reclaimed; and the Court pro-
 nounced this judgment, on 18th January 1831:—
 “ Alter the interlocutor of the Lord Ordinary reclaimed
 “ against, and find that under the obligation of the
 “ warrandice in question the claimant is not bound to
 “ discuss the heirs of line or the heirs whatsoever of
 “ John Duke of Roxburghe, the granter of the obli-
 “ gation, but is entitled to make his claim effectual at
 “ once against the present Duke of Roxburghe as the
 “ heir of entail; and with this finding remit to the Lord
 “ Ordinary to hear parties on the import and effect of
 “ the obligation in question, and to do farther in the
 “ cause as to his Lordship shall seem just; and find
 “ no expenses due.”

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The case returned to the Lord Ordinary, who pronounced the following interlocutor: — “ Sustains the
 “ claim of relief made by Mr. Kerr of Chatto, and
 “ remits to the clerk to rectify the locality accordingly :
 “ Finds the claimant entitled to the expenses incurred
 “ by him in making up the record, in so far as relates
 “ to the obligation of relief and the construction there-
 “ of, but excluding such part of the expenses as may
 “ have been incurred by the question of representa-
 “ tion,” &c.

Against this interlocutor, to which the Court adhered, the present appeal was brought.

Appellants.—The obligation of warrandice, being entirely of a general and personal nature, cannot be enforced against the appellant, the heir of entail, until the granter’s heirs of line have been discussed. It is incompetent, in the present process of locality, to depart from the course of procedure adopted in the previous localities of 1800 and 1809, by which the teinds of the respondent’s lands have been localled upon for their proper share of augmentation according to the ordinary rules of allocation, leaving him to seek in due and competent form any relief to which he may be entitled against the representatives of John Duke of Roxburghe.*

Respondent.—According to the established principles of teind law and the general character of the transaction, the respondent is entitled to relief in a process of locality from the party who has succeeded to the right of

* Erskine, b. 2. tit. 10. s. 38, and b. 4. tit. 40. sec. 24 ; b. 2. tit. 3. sec. 28 ; b. 3. tit. 5. sec. 17 ; b. 3. tit. 8. sec. 52.

patronage, in virtue of which character as patron the teinds originally belonged to the Roxburghe family. The appellant has succeeded to the right of patronage which gave the former Duke the titularity of the teinds; hence he is in the enjoyment of the subject or estate which gave the Duke the right to sell; and further, he has succeeded to that estate upon the right to which the necessity of selling in certain circumstances is laid. He enjoys, or at least might still enjoy, the price paid for the teinds, since it was due to the successors of the right of patronage.

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LORD CHANCELLOR.—My Lords, I shall crave your Lordships leave to have a little further time to look into one or two points, there having in this case been a difference of opinion among the learned Judges; the majority of the Court not agreeing with the very learned Lord Ordinary, and those learned Judges not concurring among themselves. It is impossible altogether to reconcile this judgment with the case of *Hamilton v. Nisbett*. I say nothing of *Hamilton v. Colebrook*; but decided by a variety of high authorities in the law, and particularly in the teind law, and decided recently, it appears extremely difficult to get over, though undoubtedly there is one difference between that case and this. I should wish, upon these grounds, to move your Lordships to postpone the judgment in this case.

His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this

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House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of two hundred and fifty-five pounds seventeen shillings and sixpence for his costs in respect of the said appeal.

RICHARDSON and CONNELL—A. and R. MUNDELL,
Solicitors.