

[15th July 1837.]

Lady SCOTT, and Sir WALTER SCOTT of Abbotsford, Bart., her Husband, Appellants.—*Lord Advocate (Jeffrey)*—*Rutherford*.

JOHN KERR, Common Agent in the Locality of Balingry, and the Rev. JAMES GREIG, Minister of the Parish, Respondents.

*Teinds—Valuation.*—Held (affirming the judgment of the Court of Session) that certain lands in the parish of Balingry, called Mains of Inchgall, which were valued in 1629, did not comprehend two other parcels of land under that denomination.

1ST DIVISION.

Lord Newton.

THE question in this case arose in a process of augmentation, modification, and locality, raised by the respondent, as minister of the parish of Balingry, and in which Mr. Kerr was appointed common agent, as to the extent of the lands of the appellants, included in an old valuation made in 1629; in which year the teind of certain lands in that parish were valued, and amongst the rest the lands of Ladath (which were separately valued at 260 merks), and certain lands therein denominated the Mains of Inchgall at 1,300 merks.

The appellants alleged that at the date of that decree all the lands now belonging to them in this parish, except Ladath, belonged to Andrew Wardlaw of Torry, and consisted of what was then called Inchgall, and is now called Lochore. That the estate was then described as consisting of certain dominical lands called Inchgall,

and some portions of it were called the Flockhouse and Bowhouse of Inchgall: That the Mains of Inchgall mentioned in the decree of valuation included all these lands of Inchgall, and that no mention was made in the title deeds at that time of any separate part of the lands being known by the name of the Mains of Inchgall, and that that name was applicable to all the different portions of the lands: That in particular, the lands denominated the Mains of Inchgall, in the decree of valuation, included those parts of the estate now generally known by the name of Chapel Farm and Hynd's Farm: That the lands now called Chapel Farm and Hynd's Farm had not at that time, nor indeed until recently, received separate names, and they had never received separate names in the titles; and they were vested in Mr. Wardlaw only as part of Inchgall, and under that general name.

The evidence produced consisted of the title deeds of the estate at the time, in which the name of the Mains of Inchgall was not applied to any portion of the lands to the exclusion of others, and in which the lands of Chapel Farm and Hynd's Farm were not named, but were included under the general appellation of the lands of Inchgall. In a charter of resignation under the great seal, dated 1st August 1605, in favour of Andrew Wardlaw junior (which was the oldest title extant), the lands were thus described, " totas et integras  
 " prædictas terras et baroniam de Wester Lochreshyre,  
 " viz. totas et integras terras dominicales vocat. terras  
 " de Inchgall, cum maneriei loco, domibus, edificiis, et  
 " hortis earundem, terras nuncupat. the Flockhouse et  
 " Bowhouse de Inchgall, cum castro, turre, et fortalicio  
 " earund., advocacione, donatione, et jure patronatus

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“ capellæ et capellanariæ de Inchgall, montes vocat.  
“ Bannertie Hills, cum advocacione, donatione, et jure  
“ patronatus rectoriæ et vicariæ de Ballingry.”

The appellants also produced a retour in 1627 (being two years before the date of the decree) in favour of Andrew Wardlaw of Torry, “ hæres masculus magistri  
“ Patricii Wardlaw de Torrie, patris, in terris et  
“ baronia de Lochoreshyre Wester, alias nuncupatis  
“ Inchgall, terris nuncupatis Flockhouse et Bowhouse  
“ de Inchgall, cum lacu de Inchgall, et jure patronatus  
“ capellæ de Inchgall, terris lie Milntown de Inchgall,  
“ cum molendino.”

The respondents alleged that there was no evidence of the fact that in 1629 the whole lands (excepting Ladath) belonged to Wardlaw of Torry. They admitted that the descriptions of the estate, as given in the title deeds previous to the valuation in 1629, were accurately copied from the charter and retour referred to; that the names Chapel Farm and Hynd’s Farm were not to be found in any of the titles of the estate, and that the description in the decree of valuation, including, as alleged by the appellants, the whole lands described in their titles, and now belonging to them (except Ladath, which was separately valued) was, “ the landis  
“ of Maynes of Inchgaw, pertaining to  
“ in stock and teind one thousand three hundred  
“ merks.”

Lord Newton, on the 22d June 1827, pronounced this interlocutor: “ Finds, that the objectors have pro-  
“ duced no sufficient evidence to show that the lands of  
“ Balleid and Bowhouse of Inchgall are a part of the  
“ Mains of Inchgall, and as such comprehended in the  
“ valuation of 1629: appoints the objectors to con-

“ descend on the rental of the said lands of Balleid and  
 “ Bowhouse of Inchgall; and reserves consideration of  
 “ the second objection, regarding the lands termed  
 “ Chapel Farm and Hynd’s Farm, until the extent and  
 “ situation of Balleid and Bowhouse are ascertained.

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“ *Note.*—The only title produced, which is prior to  
 “ the decree of valuation, does not mention the Mains  
 “ of Inchgall, but it specifies, besides the dominical  
 “ lands of Inchgall, with the manor-place, &c. (a de-  
 “ scription which, if it does not coincide with, is at least  
 “ as broad and extensive as that of mains), the separate  
 “ lands of Flockhouse and Bowhouse of Inchgall. The  
 “ Mains of Inchgall are, however, specified in a charter  
 “ of 1642, which, as it mentions separately the lands of  
 “ Flockhouse and Bowhouse, renders it extremely pro-  
 “ bable that the mains correspond exactly to the  
 “ dominical lands as described in the older titles.

“ The lands of Flockhouse are said to be included  
 “ in the half of Lochore, which belongs to Sir Michael  
 “ Malcolm; but the half now belonging to the objectors  
 “ is described in the disposition 1699 as the Mains of  
 “ Inchgall, and the lands of Balleid and Bowhouse of  
 “ Inchgall, still showing that the mains and these other  
 “ lands are separate and distinct subjects. The name  
 “ of Ballood or Balleid is said to appear for the first  
 “ time in this deed; but from the way in which it is  
 “ coupled with Bowhouse, it is much more probable  
 “ that the lands which had got this name were formerly  
 “ included under Bowhouse, than that they had formed  
 “ part of the mains.

“ The evidence offered, arising from a comparison of  
 “ the rentals and valuations of other lands contained in  
 “ the old decree, leads to no consistent result, and is at

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“ best extremely fallacious; nor could any proof as to  
 “ the belief or conjecture of individuals presently alive  
 “ have the smallest weight in opposition to that arising  
 “ from the old titles.”

The appellants submitted this interlocutor to the review of their Lordships of the First Division; and their Lordships on the 27th November 1827, “ in  
 “ respect the record had not been closed, and that  
 “ additional averments are made by the appellants,  
 “ recalled the interlocutor of Lord Newton reclaimed  
 “ against; and remitted to his Lordship to receive the  
 “ parties other productions and averments.”

Lord Moncreiff, who had succeeded Lord Newton as Ordinary in the cause, on the 12th January 1830, pronounced the following interlocutor:—“ Finds, that the  
 “ teinds of the lands of Bowhouse of Inchgall and  
 “ Balleid of Inchgall, the property of Mrs. Scott the  
 “ objector, must be held to be included in the valuation  
 “ by the sub-commissioners, of date the 22d December  
 “ 1629, under the denomination of the Mains of Inch-  
 “ gall: Therefore sustains the objection made to the  
 “ locality on this ground, and remits to the clerk to  
 “ make up a rectified scheme of locality accordingly.

“ *Note.*—The Lord Ordinary is of opinion, 1. That,  
 “ from the terms of the report of the sub-commissioners,  
 “ it must be presumed to have been a valuation of the  
 “ teinds of all the lands in the parish of Ballingry; and  
 “ that, unless it were clearly shown that the particular  
 “ lands in question were not valued, they must be con-  
 “ sidered as included: 2. That the very large propor-  
 “ tions of valuation which the article of the report  
 “ under the name of Mains of Inchgall bears to the  
 “ valuation of the whole lands valued, proves that that

“ article must have included an extensive estate, and  
 “ could not relate merely to the home farm : 3. That,  
 “ on a fair construction of the title deeds, the Flock-  
 “ house and Bowhouse of Inchgall and Balleid may  
 “ be considered as parts and parcels of the lands gene-  
 “ rally described as the Mains of Inchgall, but sepa-  
 “ rately : 4. That these lands of Bowhouse and Balleid  
 “ must be presumed to have been included under that  
 “ general description in the report of the valuation,  
 “ taken in connexion with the said titles, unless the  
 “ contrary be expressly proved.

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“ The extracts from the presbytery record in 1636  
 “ and 1649, now produced, appear to establish that the  
 “ lands of Lohead were in the parish of Ballingry in  
 “ 1629 ; but it does not necessarily follow that they  
 “ were not valued, as they may have been included  
 “ under some other denomination, though the con-  
 “ nexion cannot now be traced by the parties in this  
 “ discussion ; and as they were probably annexed to  
 “ Auchtertool soon after 1649, and never paid stipend  
 “ to Ballingry, there are no facts sufficient to infer  
 “ the contrary. But, even though it were clear that  
 “ they had been omitted, this would by no means  
 “ establish that the valuation was not meant, as it bears,  
 “ to be a valuation of the whole lands in the parish, or  
 “ that it did not include the lands here in question.”

The respondents reclaimed on the 16th day of No-  
 vember 1830. Their Lordships of the First Division,  
 pronounced the following interlocutor:—“ Find, that  
 “ the teinds of the lands of Bowhouse of Inchgall, and  
 “ Balleid of Inchgall, the property of Mrs. Scott the  
 “ objector, are not included in the valuation by the sub-  
 “ commissioners, of date the 22d December 1629,

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“ under the denomination of the Mains of Inchgall ;  
 “ therefore repel the objections for the said Mrs. Scott  
 “ and her husband, in so far as respects the said lands,  
 “ but find no expenses due, and decern ; and remit to  
 “ Lord Moncreiff, Ordinary, to proceed farther in the  
 “ locality.”

Though the valuation book itself has been lost, an original extract under the hand of the clerk of the sub-commissioners is in existence, and in the following terms :—“ The court and meeting of the sub-commis-  
 “ sioners of the presbyterie of Kirkaldy, halden in the  
 “ tolbooth of the burgh thereof, the twentie-twa  
 “ day of December 1629 yeirs, be Michael Fiar of that  
 “ ilk, conveiner, David Brown of Finmonth, James  
 “ Colville of Balbeddie, William Durie of Wester  
 “ Newton, and Robert Thalland of Grangemyre.

“ The whilk day, anent the terms assignit to ane  
 “ noble and potent earle, John Earle of Rothes, Lord  
 “ Leslie, &c., and to Mr. David Anderson, minister at  
 “ the kirk of Balingrie, titulars and tacksmen respective  
 “ of the teynds of the lands lying within the parish of  
 “ Balingrie, and to either of them for their interest, as  
 “ titulars and tacksmen of the teynds of the said lands  
 “ respective, or as having any other right, interest, and  
 “ title thereto, and to the hail heritors of the lands  
 “ within the said parish, to heir and see ane interlocutor  
 “ pronouncit anent the true worth, rental, and valua-  
 “ tion of the samen lands, in stock and teynds, parson-  
 “ age, and vicarage, conform to the probation led and  
 “ deducit at the instance of the heritors after nominate,  
 “ at certain other dyets preceding : compeared the  
 “ heritors after specifyed, be themselves, and their prõrs  
 “ respective, to the effect above specifyed : comperit

“ likewise the said noble earl, and before the pronoun-  
 “ cing of said interlocutor, producit certain witnesses  
 “ for furder probation and clearing of the said valuation ;  
 “ wha being received, admitted, solemnlie sworn and  
 “ purged of partial counsel, and all parties having in-  
 “ terest to object in the said valuation being also lawfully  
 “ summoned to this day, and nane compirand to mak  
 “ oppositioun, being oftymes callit, lawful time of day  
 “ bidden, and the saides sub-commissioners having dili-  
 “ gently considered and examined the depositions of the  
 “ witnesses in this contraire probatioun, and being  
 “ thereby ryply advysit, finds, be the depositions of  
 “ these witnesses, wha gave the best and clearest cause  
 “ of their knowledge, that the lands after mentioned,  
 “ lyand within the said paroch of Ballingrie, are worth  
 “ yeirly, in constant rent, stock, and teynd, parsonage  
 “ and vicarage, the silver and victual duties after  
 “ specifit, viz. the lands of Blaircousnie, pertaining to  
 “ Mr. Alexander Colvill, three hundred and fiftie  
 “ merks, monie of this realme ; the lands called the  
 “ Mylne-lands, pertaining to the said Mr. Alexander  
 “ Colville, fyve bolls victual, twa part meal, third part  
 “ beare ; the lands of Ladath, pertaining to John  
 “ Mitchell twa hundred and threescore merks, monie  
 “ foresaid ; the lands of Ballingrie, pertaining to John  
 “ Gray, three hundred and fyftie merks ; the lands of  
 “ Navitie, pertaining to James Robertson, twa hundred  
 “ merks ; the lands of Corshill, pertaining to John Pud-  
 “ zell, twa hundred merks ; the lands of Balbegie, per-  
 “ taining to Robert Meldrum, fourscore pounds ; the  
 “ lands of Clun and Contill, pertaining to John Beatson  
 “ twa hundred and threescore merks ; the lands called  
 “ the Temple Lands, pertaining to John Pudzell,

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“ thretty-five merks; the lands callit the Mylnetown,  
 “ pertaining to John Paterson, fyftie merks; the north  
 “ half of the lands of Spittal, pertaining to Sir George  
 “ Boswell, furtie pounds; the lands of Lumphinnance,  
 “ pertaining to Patrick Halket, and William Halket  
 “ his son, one thousand merks; the lands called Little  
 “ Cairtmore, pertaining to Andrew Wardlaw, fourscore  
 “ pounds; the Maince of Inchgall, pertaining to  
 “ thretten hundred merks; and therefore  
 “ the said sub-commissioners approve and allow the  
 “ valuation of the said lands and teynd. Whereupon  
 “ David Bennet, prõr fiscal of said court, asked act of  
 “ curt and instruments. Extracted out of the curt  
 “ books of the valuation of the presbyterie of Kirkaldie,  
 “ by me, Mr. David Kingorne, clerk of Dysart, and  
 “ clerk to the said sub-commissioners, under my sub-  
 “ scription-manual.

(Signed) “ D. KINGORNE.”

Against the above judgment the appellants brought this appeal.

*Appellants.*—The valuation 1629 must be considered, at this distance of time, to have included the whole lands in the parish of Ballingry.

If valuations are to be considered merely with reference to the interest, which, in recent times, has arisen to landed proprietors to maintain and support old valuations, owing to the great increase in the value of lands since the date of such valuations, it may be very true that it may be reasonable to require the most precise evidence, even at the most remote distance of time, that each spot of ground, or each parcel of lands of each

estate, was actually valued. But that is a very fallacious view to apply to such old valuations as that now founded upon by the appellants. At the date of the original valuations, the object in view was to ascertain the rights of the titulars and of the church, and to preserve those rights against the risk of subsequent decrease in the value of lands. Another object was, by ascertaining the value of the teinds, to prevent the vexation arising from the teinds being paid in kind. Certain commissioners were appointed in 1627, and various submissions, as they were termed, were entered into, by which the lords of erection and landholders, the bishops and clergy, the royal burghs, and the tacksmen of teinds, entered into a variety of arrangements with, or bestowed certain powers upon, the Crown, for the purpose of attaining and forwarding the various objects already mentioned. All the proceedings under these commissions for valuations of teinds were subsequently ratified and confirmed by acts of parliament in the year 1633.

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In valuations made prior to the year 1633, it is to be kept in view, that it was not the landholders who were carrying through the valuations, but that the proceedings were adopted and carried on against them as defenders, at the instance of public officers, specially intrusted with the duty of the valuations of the different parishes, and of making the valuations as complete as possible. Therefore, when it is proved that the commissioners did take up the case of a whole parish, —and summoned the heritors of a particular parish to have their teinds valued, there is no presumption that the procedure as to that parish would be incomplete or partial. It is true, that there are many parishes throughout Scotland, and in each presbytery, which

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the sub-commissioners never took up at all; and there are many parishes in which it would appear that they had merely taken up the case of individual heritors, and had not attempted a general valuation of the parish. But wherever they did institute proceedings for the valuation of the whole parish, summoning the whole heritors, there is no ground for supposing that any portion of the lands in the parish would be omitted, especially if the whole proceedings import that the commissioners had carried through and completed the valuation of the whole parish. Their duty was to prevent individual heritors evading the inquiry intended to benefit the titular and the church, by ascertaining the value of the teinds payable by the several heritors; and, as the proceeding was not one adopted by the individual heritors for their own benefit, but carried through against them, the presumption certainly is in favour of the valuation including the whole parish, when the proceedings profess to be adopted against the whole heritors.<sup>1</sup>

With reference to these considerations it is impossible to regard in any other light the valuation in question than a valuation of the whole parish, that is to say, of all the lands understood to lie within the parish; and there is no doubt that the lands of Balleid and Bowhouse of Inchgall were always within the parish.

No counsel appeared for the respondents.

LORD DENMAN.—With your Lordships permission I will move that judgment may be now given in a case

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<sup>1</sup> Sir John Connell's Treatise on Teinds, book iii. edit. 1830.

in which Lady Jane Jobson or Scott of Abbotsford is the appellant, and John Kerr, writer to the signet, and the Reverend James Greig are respondents.

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This is a case of an appeal against a judgment given by the Court of Session some years since, which was heard in this House so long ago as April 1834. The case underwent very great discussion in the Court below, and the first Lord Ordinary who pronounced an interlocutor in the case entertained one view of it; the second judge to whom it was referred, Lord Moncreiff, entertained a different view; and, afterwards, the Court of Session before whom it was brought, thought that Lord Moncreiff had not come to a right decision. Against their judgment the appellant appealed to this House, and the case was therefore argued before your Lordships. The question was, whether some particular premises were exonerated from the payment of teinds by reason of a valuation made in the year 1629, and the question turned altogether upon this, whether the particular property of which the appellants were owners was included in that valuation. They said that it was included under the name of the Mains of Inchgall, and that the whole parish was valued at that time, and that the Mains of Inchgall included this particular property, and in fact made an end of tithes upon that property. The question was, whether it could be satisfactorily made out that such valuation had taken place, including the lands belonging to these appellants.

Now, my Lords, by way of apology for the delay that has taken place, probably I ought to state that I certainly had in the first instance a strong opinion that my Lord Moncreiff was right in the interlocutor

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which he gave, and that the Lords of Session had not come to so satisfactory a conclusion as the previous decision, but I certainly felt a very great reluctance in my position to recommend to your Lordships to reverse what had been done by the Court of Session without the very fullest consideration, and more particularly so, because the appellants appeared by their very able counsel the Lord Advocate, now Lord Jeffrey, and the respondent, the minister of the parish, did not appear by any counsel. Therefore I heard it argued only on one side, and I certainly felt very great difficulty in giving way to my first impression that that side had the right of the case, appearing under such favourable circumstances. Accordingly, I had frequent consultations with my noble and learned friend Lord Brougham, and the parties being desirous that upon our view of the case the judgment should turn, after consideration we have come to the judgment that we think it right to advise your Lordships that the order of the Court of Session should be affirmed.

I have stated generally that the question was, whether a particular portion of land called Bowhouse of Inchgall was included in the valuation which made an end of tithes, under the name of the Mains of Inchgall. It appears that there was a valuation of lands in the parish of Ballingry, which certainly would well bear the construction of a valuation of all the lands, and that would be the most natural construction to put upon it; but, however, this valuation afterwards proceeded to confine itself to particular lands, among which the Mains of Inchgall was particularly mentioned.

Now, we find that the word "Mains" probably means the home farm that is appendant to the mansion

house of the property, and is a well known and distinct name of itself; that is, that it is a description under which such a farm may properly come. The strong argument in favour of the appellants, independently of the description of the lands to be valued, was the large proportion which those lands bore to the whole quantity that was valued, for the whole quantity was little more than four thousand marks, and the Mains of Inchgall amounted to as much as thirteen hundred marks; but, however, upon consideration, that does not appear to be a very decisive circumstance, because it is impossible to say to what extent Inchgall may have gone at that particular period, or what proportion it might form of the whole value.

My Lords, the question is, whether the lands of Bowhouse and Balleid are part of the Mains of Inchgall; and there are certainly strong observations to be made on either side of the case, and ingenious arguments to be raised; but, upon the whole, it seems impossible to say that they can reasonably be included within the description of the Mains of Inchgall, because it appears that in the earlier charters they are both described,—both Bowhouse and Flockhouse are described—as being in Inchgall. But, certainly, in the very same charter in which they are so described, the property of Inchgall is by that name specifically mentioned, and therefore it is quite clear that those have been considered in the ancient charters as distinct lands; which would make it, without strong evidence, a very violent presumption to include them under the name of Inchgall, that name appearing alone; and still more when the name of Inchgall is qualified by the description of the particular property which is called the Mains of Inchgall.

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Now, my Lords, without troubling your Lordships by going more fully into the particulars of the case, that is a general statement of it. There has been no claim for a very great length of time, indeed for two hundred years, which ought, undoubtedly, in all doubtful cases to go a great way. But considering that the burden of proof ought to lie upon those who claim an exemption from tithes, and that this exemption appears within the four corners of the valuation in question, and that valuation does not impose upon us by fair reasoning the construction for which the appellant contends, it appears to be best to advise your Lordships that this order of the Court of Session should be affirmed; and therefore I humbly move, upon this view of the case, upon which I do not more particularly trouble your Lordships, that the terms not being sufficient necessarily to introduce this particular part of the property into that to which the valuation extended, the property must be considered as not proved to fall within that valuation.

Considering the great doubts that have existed in this case both in the Court of Session and here, it appears to me that it would be most proper that the judgment should be affirmed without costs; and therefore I take the liberty of moving that this judgment be affirmed, without costs.

LORD BROUGHAM.—My Lords, I should have been very sorry indeed if this case had not been finally disposed of this session, under the circumstances to which my noble and learned friend has adverted. The view I take of this case is substantially the same as that taken by my noble and learned friend. It is this, that though at first I had more than doubts upon the subject of this

interlocutor, and though at first I was disposed to consider these lands of Flockhouse and Bowhouse as parcel of the Mains of Inchgall, and as coming within the description of the Mains of Inchgall, yet, upon that further consideration of this matter to which my noble and learned friend has adverted, the conclusion to which I have come is that these lands were not so included. It is a question of fact, were these lands parcel or no parcel of the Mains of Inchgall? The Court below has by a very great majority come upon that question of fact to one decision. Can we say, under the circumstances of the case, and adverting to all that appeared on that side of the judgment below, to which my noble and learned friend has now adverted, that they have come to a wrong conclusion? I am not prepared to say that they have come to a wrong conclusion, and therefore I am not prepared to advise your Lordships to reverse their judgment. I therefore, my Lords, entirely agree with my noble and learned friend in recommending that this interlocutor should be affirmed. I also think it should be without costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the interlocutor, so far as therein complained of, be and the same is hereby affirmed.

RICHARDSON and CONNELL—A. M'CRAE, Solicitors.