

[31st March 1835.]

Mrs. ANN HAMILTON, Widow of Alexander Gray,
Appellant.—*J. A. Murray.*

ALEXANDER Duke of HAMILTON, Respondent.
Lushington — Keay.

Teinds — Entail — Warrandice. An excambion was made under the statute 10 Geo. 3. c. 51. between the proprietor of an entailed estate and another proprietor, by which it was declared that all lands given by the entailed proprietor should be held of him for delivery of a certain quantity of meal and payment of a sum of money, “in feu of all feu and teind duties;” and the entailed proprietor was titular of the parish, but he did not transact in that character. Held (affirming the judgment of the Court of Session) That under the circumstances the other party was not entitled to insist that the meal and money so payable should be allocated primo loco as free teinds in the titular’s hands.

BY the statute 10 Geo. 3. cap. 51. ss. 32 and 33 (1770), on the preamble that, “whereas it may frequently happen that the enclosing of lands in Scotland may be retarded or prevented, or at least rendered inconvenient, by heirs of entail not having it in their power to exchange small parcels of the lands of their entailed estates for other lands convenient for the entailed estate, and more conducive to the improvement of the country in general: for remedy whereof be it enacted by the authority aforesaid, that it shall and may be lawful for proprietors of entailed estates to excamb, or make exchanges of land, with all and

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“ every person or persons for the conveniency and ad-
 “ vantage of the said estates and for the improvement
 “ of the country where such estates are situated, by
 “ enclosing or otherwise ; provided that not more than
 “ thirty acres of arable land, nor more than 100 acres
 “ of lands consisting of hills or other grounds incapable
 “ or improper by their nature for culture by the plough,
 “ of such entailed estates lying together in one place or
 “ plot shall be given in exchange, and that an equivalent
 “ in land contiguous to the entailed estate with which
 “ the exchange is to be made shall be received in place
 “ of the land given in exchange.” It is then provided
 that for the purpose of ascertaining and adjusting the
 value of the lands proposed to be exchanged, an appli-
 cation shall be made by the proprietor of the entailed
 estate to the sheriff of the county within which the estate
 is situated, “ who thereupon shall appoint two or more
 “ skilful persons to inspect and adjust the value of the
 “ lands proposed to be excambed or exchanged ; and
 “ upon such persons settling the marches of the lands
 “ proposed to be exchanged, and reporting upon oath
 “ that the exchange will be just and equal,” the sheriff
 is “ required to authorize the exchange to be made by
 “ a contract of excambion, and which being executed
 “ and recorded in the sheriff books within three months
 “ after the execution thereof, the same shall be effec-
 “ tual to all intents and purposes, and the land given in
 “ exchange to the entailed estate shall be held to be a
 “ part thereof, and shall be subject to all the prohi-
 “ bitory, irritant, and resolute clauses of the entail,
 “ in the same manner as if it had been originally a part
 “ of the estate, and the lands given from the entailed
 “ estate shall from thenceforth be held as out of the

“ entail and be liberated from all the prohibitory, irri-
 “ tant, and resolute clauses thereof.”

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Douglas Duke of Hamilton, the heir in possession of the entailed estates of Hamilton, being desirous to exchange the lands of Bothwell Park, forming part of the entailed estate, for certain lands in the haugh of Hamilton which then belonged to William Hamilton upholsterer in Edinburgh, arrangements were made between them for accomplishing this object. The lands of Bothwell Park are situated within the parish of Bothwell, while those of the haugh of Hamilton lie within the parish of Hamilton. At this time no stipend had been allocated to the minister of Bothwell on the teinds of the lands of Bothwell Park; but stipend had been allocated to the minister of Hamilton out of the teinds of the lands situated in the haugh of Hamilton. This stipend amounted to one boll six pecks and one lippie of meal, and 1*l.* 1*l.* 11*d.* sterling of money teind; the feu duty was 5*s.* 3¼*d.* sterling.

In prosecution of their object, the Duke and Mr. Hamilton presented in 1791 a petition to the sheriff of Lanarkshire, setting forth “ that the petitioner William
 “ Hamilton is proprietor of some grounds in the haugh
 “ of Hamilton, lying very commodious to and nearly
 “ adjoining to the policy and pleasure ground at the
 “ palace of Hamilton belonging to the said Duke, and
 “ which grounds his Grace was desirous to get right to
 “ by excambion, in terms of the late act of parliament
 “ relative to entails, in order that he might enclose the
 “ same within his policy, and plant or otherwise improve
 “ them; and, in exchange for the grounds thus desired,
 “ his Grace was willing to give off to the petitioner
 “ William Hamilton as much of the lands of Bothwell

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“ Park, lying in the parish of Bothwell and shire of
 “ Lanark, as should be of equal value to the lands to
 “ be got from him; and which lands of Bothwell Park
 “ are part of his Grace’s entailed estate, presently
 “ rented by tenants under his Grace, and in no shape
 “ connected with any mansion-house, policy, or pleasure
 “ ground of said estate: that the petitioner William
 “ Hamilton was equally desirous such an excambion
 “ should take place, and therefore it was proposed that,
 “ in terms of the act of parliament anno 1770, con-
 “ cerning lands under entail, and authorizing an ex-
 “ change or excambion of certain parcels of land
 “ situated in the manner that these above mentioned
 “ are, there should be given off to the said William
 “ Hamilton and his heirs such part of the said lands of
 “ Bothwell Park, under thirty acres, as should be
 “ found equivalent in value to the grounds in the haugh
 “ of Hamilton belonging to him, presently held by him
 “ under the said Duke, and to be conveyed to his Grace
 “ and his heirs of entail in excambion for part of the
 “ foresaid lands of Bothwell Park.” They therefore
 prayed the sheriff “ to take the proper steps for ascer-
 “ taining and adjusting the value of the lands proposed to
 “ be exchanged; settling the quality and marches thereof;
 “ authorizing the exchange, and doing every thing neces-
 “ sary for carrying the intention of the parties, peti-
 “ tioners, into execution, as the aforesaid act directed.”

The sheriff made a remit in terms of the act of parliament to persons of skill, who reported, “ that the
 “ lands lying in the haugh of Hamilton, belonging
 “ to the said William Hamilton, and proposed to be
 “ given off to the said Duke of Hamilton, lie very
 “ commodious to, and part of them within and others

“ nearly adjoining to the policy and pleasure ground
 “ at the palace of Hamilton belonging to the said
 “ Duke ;” “ and that the part of the lands of Both-
 “ well Park, lying in the parish of Bothwell and sheriff-
 “ dom of Lanark foresaid, proposed to be given off
 “ to the said William Hamilton in exchange for the
 “ foresaid lands in the haugh of Hamilton, are not
 “ connected with any mansion-house, policy, or pleasure
 “ ground belonging to his Grace, but lie distinct there-
 “ from.” After describing the several lands they farther
 reported, “ that the said respective lands above specified
 “ are of equal value, and the proposed excambion for
 “ the accommodation and benefit of the said Duke,
 “ and equally beneficial and commodious for the said
 “ William Hamilton ; declaring, that as the ground pro-
 “ posed to be got by the said Duke stands burdened
 “ with 5s. 3¼d. sterling of feu duty, payable to his
 “ Grace and his heirs of entail, and one boll six pecks
 “ one lippie of meal teind, and 1l. 11s. 11d. sterling of
 “ money teind, payable to the minister of Hamilton,
 “ the foresaid part of the lands of Bothwell Park pro-
 “ posed to be given in exchange to the said William
 “ Hamilton fall to stand burdened with the like feu
 “ and teind duties, payable to his Grace and his heirs
 “ of entail, in full of all feu and teind duties that can be
 “ asked and required furth of the said part of the lands
 “ of Bothwell Park ; and each party paying land tax
 “ and other public burdens effeiring to the valuation
 “ of 40l. 9s. 10d. as the proportion of valuation cor-
 “ responding to the foresaid lands in the haugh of
 “ Hamilton, belonging to the said William Hamil-
 “ ton.” After they had made oath to the truth of this
 report, the sheriff pronounced this judgment : —

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“ In respect it appeared by the said report that
 “ the grounds proposed to be exchanged, as bounded
 “ and described in the report, are of just and equal
 “ value, therefore the sheriff authorized the same
 “ to be made by a contract of excambion; which after
 “ being executed and recorded within three months
 “ after the execution thereof, in terms of the act of
 “ parliament referred to in the petition, the same shall
 “ be effectual to all intents and purposes, as directed
 “ by the said act, and decerned accordingly.”

A contract in these terms was executed on the 30th of October and recorded on the following day.¹ In particular, his Grace disposed to Hamilton the lands of Bothwell Park, “ to be holden, the said lands, by the
 “ said William Hamilton and his foresaids immediately
 “ of and under the said Douglas Duke of Hamilton
 “ and Brandon and his foresaids in feu farm, fee, and
 “ heritage for ever, for the yearly payment by the said
 “ William Hamilton and his foresaids to the said noble
 “ Duke and his foresaids of the sum of 5s. 3¼*d.* sterling
 “ in name of feu duty, and delivery yearly of one boll
 “ six pecks and one lippie of oatmeal, and payment of
 “ 1*l.* 11*s.* 11*d.* sterling yearly, for victual and money
 “ teind of the said lands; and that in full of all feu and
 “ teind duties that can be asked and required furth of
 “ the said lands in time coming;” “ and the heirs of the
 “ said William Hamilton doubling the foresaid feu duty
 “ of 5s. 3¼*d.* sterling the first year of their entry to the
 “ foresaid lands, as use is of feu farm; and that for all

¹ Similar applications and contracts were made at a later period in reference to certain other portions of the land, but it is unnecessary to notice them more particularly.

“ other burden, exaction, question, demand, or secular
 “ service which can be asked or required furth of the
 “ said teinds and others, by the said Duke or his fore-
 “ saids in all time coming.” Both parties bound them-
 selves “ reciprocally, and their foresaids, to warrand
 “ and maintain the specific subjects alternately disponed
 “ by them in manner above expressed, to be good and
 “ sufficient to the party receiver and his above named,
 “ at all hands and against all deadly, as law will; and
 “ also to acquit and disburden the same of all feu,
 “ blench, and tythe duties, supplies, or other public or
 “ real burdens with which they shall be affected at
 “ the term of Martinmas 1790, being the period of
 “ time from which their respective entries did com-
 “ mence.”

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The Duke was titular of the parish of Bothwell, but neither in the application to the sheriff nor in the contract of excambion was he alluded to in this character.

The minister of Bothwell having instituted a process of augmentation of stipend, modification, and locality, and an augmentation having been awarded, and the appellant Mrs. Ann Hamilton (who had succeeded to Mr. Hamilton) having been called as one of the heritors, she maintained inter alia that, in virtue of the contract of excambion, the stipend effeiring to the property received by Mr. Hamilton from the Duke, ought to be allocated upon his Grace, he being bound to relieve the lands of all stipend payable from the same; or at all events, that the meal and money teind, payable by the contract to his Grace in name of teind duty, being free teind payable to the titular, fell to be allocated upon for stipend primo loco.

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This was disputed by the Duke, who maintained that the meal and money teind payable to him out of the lands of Bothwell Park were not in respect of any conveyance of the teinds by him as titular to Mr. Hamilton, but merely to equalize the exchange, seeing that a corresponding burden then existed over the lands which had been disposed to him.

Lord Newton on the 7th of July 1828 pronounced this interlocutor:—“ Finds, that the burden upon
 “ Mrs. Hamilton, in name of teind duty by the contract
 “ of excambion between her and the Duke, being free
 “ teind exigible by the titular, falls to be allocated for
 “ stipend primo loco. Quoad ultra, finds, that Mrs. Ha-
 “ milton, having an heritable right to the teinds of the
 “ lands excambed to her, must be allocated on for sti-
 “ pend pari passu with other heritors in the same situa-
 “ tion: Repels the claim of relief by Mrs. Hamilton
 “ against the Duke, of augmentations that may fall upon
 “ her.” The Duke having reclaimed, praying the
 Court to “ find that the annual burdens or teind duties
 “ in the several contracts of excambion are not to be
 “ considered as free teind, and to be allocated upon for
 “ stipend primo loco, but must be paid by Mrs. Hamil-
 “ ton to the Duke of Hamilton as his exclusive property,
 “ without any respect to the allocation of stipend,”
 their Lordships, on the 8th of July 1828, pronounced
 this judgment:—“ Find that the annual burdens or
 “ teind duties in the several contracts of excambion are
 “ not to be considered as free teind and to be allocated
 “ upon for stipend primo loco, but must be paid by
 “ Mrs. Hamilton to the Duke of Hamilton as his ex-
 “ clusive property, without any respect to the allocation
 “ of stipend: Recall the Lord Ordinary’s interlocutor,

“ so far as inconsistent with this finding, and remit
 “ the cause back to his Lordship to proceed with the
 “ same.”¹

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After certain farther proceedings unnecessary to be noticed—

Mrs. Hamilton appealed.

Appellant. — It is admitted by the respondent that he is titular of the parish of Bothwell, and the established rule of allocation, as stated by Mr. Erskine,² is that “ where the tithes of a parish have not been affected
 “ with any grant in favour of a layman, these ought, in
 “ the first place, to be applied to the maintenance of the
 “ minister, to which all tithes were originally destined.
 “ In default of these, the tithes which are yet in the
 “ hands of the lay titular fall, in the second place, to
 “ be allocated; for, as the titular of a benefice who
 “ himself cannot serve the cure is bound to employ a
 “ person who can, the burden of the stipend ought to
 “ fall on such titular, as long as he has a sufficient fund
 “ in his own hands, rather than upon those to whom he
 “ has granted leases or heritable rights of the tithes;
 “ and if the titular does not draw the tithe in kind but
 “ receives a tack duty, such tack duty is burdened,
 “ since that is the benefit arising to the titular from his
 “ right. These two kinds are usually called free tithes.”
 It is immaterial whether the duty be payable as tack or as feu duty.³ But in the present case the lands were

¹ S. D. Teind Cases, 171.

² 2 Erskine, 10, 51.

³ Statute 1587, c. 59; Forbes on Tythes, part 2, c. 6.; Mackenzie's Observations on the Act 1587; Duke of Douglas v. Elliot, 1 Feb. 1738, (Mor. 15,657); Lord Dundas v. Balfour, 17 Nov. 1802, (Mor. 15,709).

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granted by the Duke, who was then titular, to be holden of him for payment of the sums there mentioned “in full of all feu and teind duties that can be asked and required furth of the said lands in time coming;” it is clear therefore that these must be allocated primo loco and before imposing any stipend on the heirs of the lands.

Although the judgment of the Court does not set forth the ground on which their Lordships differed from Lord Newton, yet it was understood to be that the feu and teind duty had been imposed as a burden on Bothwell park to equalize the exchange, and that unless the teind duty were payable to the Duke without reference to any allocation of stipend the exchange could not be considered equal. But this view of the question originates in a fallacy. Perfect equality could only be preserved by regarding the teind duties as free teind. If the whole duties were allocated, then there would be perfect equality on either side; if only part were allocated, the remaining part would be payable to the Duke until it came to be exhausted by new allocations. But according to the judgment of the Court below, the appellant is bound to pay the whole teind duty to the Duke, while at the same time she is ordained to pay the same amount to the minister of Bothwell, so that she has been subjected in twice the amount of the burden. There is thus a plain inequality created by the judgment which it was the very object of the Court below to prevent.

Respondent. — In entering into the contract of exchange, the Duke of Hamilton did so exclusively in the character of proprietor or heir in possession of the

entailed lands, and not at all as titular of the teinds; accordingly there is no conveyance either in feu or in lease of the teinds themselves, and consequently there could be no tack duty, or feu duty payable in respect of the teinds. The appellant is thus attempting to apply the rule of law regarding the allocation of free teind primo loco, to a case where there is no room for its application.

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In the report by the valutors to the sheriff they state that the respective lands are of equal value, but that as those proposed to be given to the Duke by Mr. Hamilton were burdened with feu and stipend, they suggested that those of Bothwell Park should “stand burdened with the like feu and teind duties,” so as to equalize the burdens subject to this provision, “each party paying the stipend which may affect the lands reciprocally got in exchange.” In truth the burden is not teind duty at all, but is an annual duty payable to the Duke for the ground he gave to Mr. Hamilton in exchange. Besides, even if it were regarded as teind duty, it is teind duty of the parish of Hamilton, and not of the parish of Bothwell, and therefore can in no point of view be available to the minister of Bothwell.

LORD BROUGHAM:— My Lords, in the case of Hamilton v. Hamilton I do not feel it necessary to go at length into the particulars, and therefore shall not do so at this late hour of the day, as I fully concur in the judgment which has been pronounced by the Court below. I would move your Lordships that it be affirmed, but without costs.

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The House of Lords accordingly ordered and adjudged,
“ That the said petition and appeal be, and is hereby dis-
“ missed this House, and that the interlocutors, so far as
“ therein complained of, be, and the same are hereby
“ affirmed.”

S. B. JACKSON—RICHARDSON and CONNELL,—
Solicitors.