[12*th May* 1837.]

ALEXANDER DUKE of HAMILTON AND BRANDON, Appellant.—*Attorney General* (*Campbell*)—*Shaw.*

JOHN MATHER and JOHN URQUHART, Respondents.—*Sir William Follett—Sandford.*

Teinds.—Held (affirming the judgment of the Court of Session) that teind duties are liable to be allocated primo loco, and that an heritor who was localled on for a sum of stipend exceeding the amount of his teind duties was not bound to pay them to the superior titular.

Expenses.—Although a party was allowed to compear as a defender in a process, yet as it was afterwards found that he could not get any decree of absolvitor under it, and his appearance had been resisted by the pursuer, held (reversing the judgment of the Court of Session) that the pursuer was not liable to pay the expenses of opposing his compearance.

2D DIVISION.

Lds. Mackenzie and Moncreiff.

THE appellant, in April 1832, brought an action in the Court of Session, as superior of the lands of Meikle Earnock and others, against the respondent Mr. Mather, as the vassal on part thereof, setting forth, " That the " said lands are held of and under the pursuer as im- " mediate lawful superior thereof, for payment and " performance inter alia of the duties and services " after specified; viz. for the said three fourths of the " said 6*s*. 8*d*. land the three fourth parts of the sum of " 3*l*. 6*s*. 8*d*. Scots money yearly, at Whitsunday and

"Martinmas, by equal portions, and that in name of "silver feu-farm duty for the said lands; as also for "payment to the pursuer, and his heirs and successors, "or, in his or their option, to the ministers of Hamilton "and their successors, the three fourth parts of 1 boll "1 firlot 1 peck and three parts of a peck oatmeal of "teind, with the ordinary met and measure of Hamil-"ton, in name of feu-farm duty for the said parsonage "teinds or teind sheaves of the said 6*s*. 8*d*. land, be-"twixt Yule and Candlemas yearly; as also paying "to the pursuer and his foresaids the three fourth part "of six hens and one capon yearly at the usual terms "of Fasten's Even and Pasch respective; and further, "leading to the palace of Hamilton yearly from the "nearest and most convenient coal-heugh the three "fourth parts of one dozen loads of coal, the pursuer "always paying for the said coals at the heugh."

Similar statements were made in regard to the other portions held by Mather, and "that the feu duties, and "kain and carriages, due out of the said several lands "amount, when converted, to the sum of 3*l*. 0*s*. 9$\frac{3}{12}$*d*. "sterling per annum, and are due from and since "the term of Martinmas 1820, and amount, as at "the term of Martinmas last, 1831, to the sum of "33*l*. 8*s*. 5$\frac{9}{12}$*d*., agreeably to state produced herewith; "and the teind duties payable out of the said lands ex-"tend to the quantity of 4 bolls 3 firlots 2 pecks and "3$\frac{9}{12}$ lippies oatmeal, Scotch measure, per annum, are "due for the last half of crop and year 1799, and since "then, and amount, as at the said term of Martinmas "last, 1831, when converted according to the fiar "prices for each year, to the sum of 179*l*. 6*s*. 9*d*. "sterling."

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His Grace accordingly concluded against Mather for these sums, with interest from the date of citation.

The question before the House related to the liability of Mather for the sum concluded for as teind duties, and there was a minor point as to expenses.

In regard to the teind duties, Mather stated that this demand, which extends backwards for a long period of years, was made for the first time during the subsistence of a very ancient investiture; that it was at variance with the whole of the past claims of the superiors and their settlements with the different vassals; and not warranted by the terms of the investiture, as they must be viewed when taken in connexion with the burdens which have been imposed upon the pursuer in the locality of the parish where the lands are situate.

The teind duties were payable either to the Duke, and his heirs and successors, "or, in their option," to the ministers of Hamilton; and during the whole period which has elapsed since the dates of the original rights they had, by the option and with the approbation of his Grace's predecessors and himself, as superiors and titulars, been paid to the latter.

He farther stated, as to the payment, that an allocation of them to the full amount was made in different successive localities during the period of the claim, in which the appellant's father, and afterwards the appellant himself, appeared as titulars and patrons; that the yearly stipend payable to the ministers of Hamilton, which now exceeds the whole teind duties in the feu rights, is of old meal stipend 5 bolls 1 firlot 2½ lippies; and of augmented stipend in barley, 3 bolls 2 pecks 1½ lippies. This stipend, he stated, was paid by his

mother Mrs. Mather, and was now payable by himself; and that no demand was ever before made for payment of the teind duties, except to the ministers of Hamilton, by the pursuer or his predecessors.

The appellant, while he admitted that the yearly stipend paid by Mather to the ministers of Hamilton was of the above amount, stated that the teind duties were not, in the first place, exhausted as free teinds, and then a proportional allocation besides made upon Mather's lands; but in framing the locality the teind duties were laid out of view altogether; and that in this way Mather was almost entirely relieved from paying stipend; and even if teind-duties could be allocated, they could be so, not to the effect of relieving any particular heritor, but so as to relieve them all proportionally. Mather, on the other hand, insisted that the teind duties had been allocated to the minister as alleged by him, and pleaded in point of law that the teind duties, being free teinds in the hands of the appellant and his predecessors the titulars, were liable to allocation for stipend primo loco; and having been so allocated upon to their full extent in the localities of Hamilton with the acquiescence of the appellant and his predecessors, no part of them was due or payable to the appellant.

At the same time that appearance was made by Mr. Mather as the defender called in the action, the other respondent, Mr. Urquhart, insisted also on being admitted as a party to the action. He stated that the whole of the lands of Meikle Earnock had been long held feu of the Duke of Hamilton, and belonged at one time to the late James Strang. In 1763 a part of these lands called Fairhill was disponed by Strang to George

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Coventry; that after the lands of Fairhill had passed through several singular successors, they were conveyed to and vested in Mr. Urquhart; that by the investiture in his favour he is taken bound in the reddendo for payment, not merely of the feu duties and teind duties appertaining to his portion of the lands of Meikle Earnock, but for payment of the whole feu duties and teind duties appertaining to these lands; and although there was reserved to him relief against the other vassals, yet, as in a question with the superior, there was no reservation; and his Grace claims and asserts the right to exact the whole reddendo of the lands from any of the vassals. He, therefore, maintained that he was entitled to sist himself as a party in the process in respect of his interest in the lands of Meikle Earnock. This was opposed by the appellant, on the grounds, 1st, that Mr. Mather alone is called as a defender in the action, and consequently the appellant was not in a situation to take any decree which could affect the interests of Mr. Urquhart; and, 2dly, that the lands the duties of which he claimed belong exclusively to Mr. Mather, so that he did not claim any thing from that portion of the lands which are the property of Mr. Urquhart.

Lord Mackenzie, on 5th March 1833, found "John "Urquhart of Fairhill entitled to appear, and give in "defences for his interest against the conclusions of the "libel as they stand."

"Note.—Though the Lord Ordinary thinks that "Mr. Urquhart is entitled to appear, he cannot see "any use for double pleadings, as every thing material "may be put into one set."

After a record was closed (and Mr. Urquhart made up a separate one from Mr. Mather) Lord Moncreiff

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pronounced this interlocutor, so far as related to the teind duties and expenses:—" Finds, that the allocation of the teinds of the defender's lands as stipend " to the minister, must be considered as an allocation " made by the pursuer and his predecessor, as titulars " of the teind duties payable forth of the said lands, " to themselves as titulars and superiors in the first " instance, such teind duties being by law primarily " liable to such allocation: Finds, therefore, that the " payment of stipend made by the defender under the " decrees of locality must be considered as payments " of the said teind duties, by consent of the pursuer, " in terms of the charters: Sustains the defences as to " these teind-duties, assoilzies the defender, and decerns: " Finds the defender John Mather entitled to expenses, subject to some small modification, and remits " the account, when lodged, to the auditor to be taxed: " Finds, that John Urquhart esq., having been found " entitled by final interlocutor of Lord Mackenzie, of " 5th March 1833, to appear for his interest in this " process, the present Lord Ordinary must so far consider him as a party in the cause; but finds, that " under the summons in this process no judgment, " either of decerniture or absolvitor, can be pronounced " directly affecting his interest: Finds, in conformity " to the note of Lord Mackenzie in pronouncing the " foresaid interlocutor of 5th March 1833, that it was " altogether unnecessary for the said John Urquhart to " give in separate pleadings in addition to those of the " said John Mather, or to insist for a separate record " being made up for his case, on which under the " summons no judgment could possibly be pronounced; " therefore finds the said John Urquhart entitled to the

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"expense of entering appearance by his minute, and "of maintaining his interest at the bar, as permitted "by the said final interlocutor of Lord Mackenzie; "but finds the said John Urquhart liable to the pur- "suer in the expense of making up the separate record "on his own account, in opposition to the express inti- "mation of opinion to the contrary by Lord Mack- "enzie, and for no useful purpose: Allows an account "of expenses in conformity to these findings to be "lodged, and appoints the cause to be thereafter "enrolled, in order that this interlocutor may be "carried into full effect, and the cause finally dis- "posed of."

"The plea of the pursuer as to the teind duties is "just an attempt to revive a question long ago settled. "The reasoning is plausible, that the teinds having "been sold, not for a price in one sum, but for a feu "duty payable annually,—to take that as the first "subject of allocation is to take back the price of the "purchase. But this is the very argument used in "the case of Sir T. Dundas v. Baikie, &c. February 13, "1793, and which appears to have been answered on "very sound principles. The fallacy is in not observ- "ing that the teind duty stipulated was taken as the "full value of the teinds at the time. If there had "been no feu, the titular, when the locality came, "must have paid all that, as being the drawn teind, to "the minister. The feu gives a right to the teinds to "the heritor valeat quantum, and the implication is "that the feu duty is the full value of that right. "Therefore on the strictest principles the titular must "exhaust that teind duty as the proper teind drawn "by himself before he can require his feuar to pay

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" any thing more from the land as teind to the minister. " It is true that the result is not the same in the case " of a proper sale of teinds under the statute; the " titular is not required to allocate the interest or value " of the price. This is explained by the authorities to " proceed on the difference between a forced sale at an " under value by the statutes and a voluntary sale or " feu, where the full value is presumed to be taken. " But at any rate the anomaly, if any, is in the latter " case; the correct principle is in the decisions in the " other case,—that of a feu of the teinds at what is pre- " sumed to be the full annual value.

" The decisions, however, are quite conclusive of the " point, and it is unnecessary to assign farther reasons " for the judgment.

" Perhaps the present Lord Ordinary does not fully " understand the grounds on which Lord Mackenzie " found Mr. Urquhart entitled to appear in the pro- " cess. Mr. Urquhart's titles certainly make him liable " to the superior for the entire feu and teind duties " stipulated with Strang, with a right of relief only " against Strang's heirs. But the summons has no rela- " tion to Urquhart, being certainly confined to the " proper proportions due by Strang's heirs for the lands " retained by them after the constitution of Coventry's " right; and though the judgment to be pronounced " under it might affect Mr. Urquhart in principle, yet " as a judgment it could never touch his rights. How- " ever it is res judicata that he had a right to appear; " but though it be so, most clear it is that the making " up of a separate record was a most unnecessary and " oppressive proceeding. It is clear, too, from Lord " Mackenzie's note, that in admitting Mr. Urquhart

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" as a party, he deprecated the idea of separate plead-" ings, and never thought of any thing more than " Mr. Urquhart appearing to attend to his interest, by " concurring in Mr. Mather's pleadings where he " thought it necessary. The Lord Ordinary thinks it " his indispensable duty to discourage such multiplica-" tion of unnecessary pleadings."

The appellant submitted this interlocutor to the review of the Second Division; but their Lordships, on the 15th December 1835, adhered.[1]

Thereafter the Lord Ordinary decerned against the appellant for 48*l.* 13*s.* 10*d.* of expenses in favour of Urquhart, and against the latter for 33*l.* 17*s.* 4*d.* in favour of the appellant.

The Duke of Hamilton appealed.

Appellant.—1. The judgments complained on proceed on a radical error, in point of fact: it is assumed that the teind duties were allocated on the process of locality to the minister of the parish, and on this assumption it is inferred that the appellant thereby exercised the option reserved to him in the feu entail. But, in the process of locality of the parish of Hamilton there is no decree allocating the duties as stipend to the ministers of the parish; they are not even noticed in that process; the respondent was merely subjected in a proportion of the stipend corresponding to the amount and value of his teinds with those of the other heritors having heritable rights to their teinds; and therefore, while the process and decree of locality sub-

[1] S. & D.,

jected the appellant, as titular and proprietor of lands in the parish, and the other heritors who had right to their teinds, in their rateable proportions of the ministers stipend, it just left the rights and interests of the appellant and respondent, as superior and vassal of the lands of Meikle Earnock, to be settled according to the covenants of their feu charters in all respects.

Under the decree of locality the ministers of Hamilton could not enforce payment against the respondent of these duties; they could only enforce payment of the share of stipend localled upon the respondent's lands in proportion with the titular and other heritors having heritable rights to their teinds. But, without going into the question whether such implied option would be relevant, it is sufficient that in point of fact there was no such allocation. If there had been such an allocation, then all the heritors, including the appellant in his character of heritor, would have had their proportional benefit of the primary allocation on these duties. But as matters presently stand, the respondent is allowed to draw the sole and exclusive benefit. He is under a double liability; he is bound to pay the teind duties to the superior and (assuming at present that they are liable to be allocated) he is bound to pay, as a party holding a heritable right to his teinds, a proportional share of the ministers stipend. If the two sums were equal in amount,—suppose each were *5l.*, then he ought to pay *10l.* yearly; but the Court of Session holds that because he pays *5l.* of teind duty he shall not also pay the *5l.* as an heritor: in other words, he is relieved altogether either from the payment of the teind duty or from the payment of his share of stipend as an heritor. Yet, because they could make

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that exaction from the respondent, it is inferred, without the vestige of evidence of the fact, that the appellant must have consented to hold the allocation made by the Court of Teinds upon the respondent as an allocation upon him by the appellant or his predecessors of their feu-farm duties.

But the appellant denies that in point of law teind duties can be regarded as free teinds, and as such liable to allocation. This question is indeed not competent to be decided by any other Court than the Commission of Teinds, and in dealing with it the Court of Session had no jurisdiction, except on the assumption that in point of fact they had been allocated. Independent however of this objection to the judgment, it is plain that in principle teind duties are truly not teinds, but the price of teinds.

2. When teinds are in the natural possession of and drawn by a titular they are free teinds, and if he let a lease of his teinds he remains proprietor; the tack-duty is his portion of the teind, and it is consequently free teind.

But when the titular, either by a voluntary sale or under the provisions of statutes, sells the teinds he loses all connexion with them; he has given them away altogether; quoad these he is no longer titular or tithe-holder; the purchaser becomes so far titular and sole tithe proprietor. The consideration is not and cannot be regarded as tithes. In ancient times teinds were sometimes feued or given out in consideration of masses to be said for the soul of the granter; these certainly could not be regarded as free teinds. So the consideration may be a piece of ground, would the crop on it be regarded as entirely free teind? Or the consideration may be government or foreign stock, would the dividends on it be dealt

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with as free teind? It is to confound two things essentially distinct to hold that the consideration given for a subject is of the same nature as the subject itself. The price of land is not like land heritable, nor is an annual price given for it in the shape of a feu duty to be treated as if it were the land itself. The land may be subject to inherent burdens, but these would not affect the price; so teinds are liable to be allocated as for stipend, but the price is confessedly not so liable. In principle there is no distinction between a price instantly paid and one payable by instalments or in yearly sums; although the subject sold be teinds, neither the price immediately paid nor payable annually is teind. The land has passed into the hands of the purchaser, and the burden must follow the subject, and not the consideration. In point of legal principle therefore the judgment cannot be supported, and it is plain from the note of the Lord Ordinary that he felt friendly to the argument on principle. Reference however was made to certain cases, but the decisions were not appealed; and if this House be satisfied that they are not correct on principle they ought not to be supported, and at all events ought not to be extended. It is remarkable that they all appear to relate to teinds in Orkney, a part of Scotland distinguished from the rest of the kingdom by the peculiarity of its heritable rights; and it is to be presumed that this circumstance must have affected the decision.

In awarding costs to the respondent, the Lord Ordinary seems to rest his interlocutor on the circumstance that the interlocutor of 5th March 1833, by which the respondent was found entitled to appear and give in defences for his interest, was allowed to become final. But this is no ground for subjecting the appellant in

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costs. The respondent's sisting himself was his own voluntary act, and only permitted by the Court after a strenuous though ineffectual opposition on the part of the appellant. But as the respondent has ultimately been found to have had no title or interest in the suit, while the appellant's opposition to his thrusting himself into it as a party was correct, so far from being entitled to any costs he ought to be found liable in the whole costs caused by his attempt to intrude himself into the process.

Respondents.—1. It was not seriously denied on the record that the teind duties were allocated in the process of locality on the respondent, and that he has uniformly paid on that footing to the minister. As the appellant was titular he had the arranging of the locality, and he cannot be allowed to plead that it was not done so according to law. Upon principle, and independent of authority, it is clear that teind duties adjusted and fixed by the vassal's charters as all that can be demanded as the teinds of the lands must be appropriated, in the first place, in payment of minister's stipend. The annual duty made exigible by the superior and titular for the teinds conveyed by him along with the lands to his vassal must necessarily be taken as the just consideration at the time of the teinds conveyed. A feu of the teinds for a separate reddendo from the lands is nothing else than a voluntary and fixed conversion or valuation of what otherwise would have been drawn as proper teind duty; and it is a point too clear and fixed to be disputed, that teind duties are the proper subject of allocation for stipend, for it would be altogether unjust to lay the burden of the stipend on the feuar, and at the same time to require him to pay over and above his teind

duties to the titular. This would just be to make the feuar twice liable for payment of his teinds.

Where the teinds have been judicially valued, and the titular's right to draw his tithe fixed at a certain annual teind duty, there is no question that such teind duties alone fall to be localled upon for stipend. But no difference whatever subsists where by contract between the titular and vassal the valuation of the tithe has been fixed by extrajudicial arrangement at a certain teind duty.

It is nothing to say, that where an action of sale is brought by the feuar, and the titular is compelled to part with his right of property in the teinds at the under price fixed by the decreets arbitral in 1633, the titular is free from the burden of stipend, which in that case falls to be borne exclusively by the feuar.

The sale to which the titular is forced to consent under the decreets arbitral is in some cases at six years and in others at nine years purchase of the teind duty, as judicially valued. The very reason for the price to be paid being fixed so low is the contingent liability of the feuar to have stipend imposed upon him to the full extent of his valued teind duty.

After such a sale the titular is no longer an intromitter with the teinds, nor has he longer any right or interest in their produce; and of course no liability in stipend can be held to attach to him upon any of the grounds from which that liability is inferred. The heritor becomes the sole proprietor, as well as the sole intromitter with the whole teinds; and the law has allowed him to acquire that right at an inadequate price, purely in consideration of the burdens then affecting or which may thereafter affect him as the sole proprietor and

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intromitter with the teinds. The relative situation and rights of the titular and heritor, where the teinds have been given out by the one and are held by the other under a feu contract for payment of an annual teind duty, are totally and in every respect dissimilar. The only analogous case is where there has been a judicial valuation of the teinds, so as to fix the teind duty, but no sale; and where of course the titular alone, and not the heritor, must pay the minister's stipend, and that out of his teind duty.

There can thus be no possible doubt on principle that teind duties exigible for teinds of lands granted in feu are liable for stipend primo loco; and the proposition has accordingly received the sanction of the clearest authority.

Erskine[1] deals with leases and heritable rights of teind as in the same situation; and although tack-duty is specifically mentioned, the principle stated and the reason given for its primary appropriation are equally applicable to feu duties.

Accordingly he says, "if the titular has specially "warranted his grant against future augmentations, or "if he has got a price for them equal to what he might "have expected, though they had not been subject to "augmentations, equity suggests that the tithes of the "titular's own lands ought in such cases to be allocated, "to the entire exemption of the tithes sold by him to "the disponee." This is supported by the case of the Duke of Douglas v. Elliot of Woollie.[2] The principle is also recognized by the act of annexation, 1587, c. 29, which provided, in reference to the case of lands

[1] 2 Ersk. 10. 51. [2] Feb. 1, 1738, Mor. 15,656.

and teinds feued out together for payment of a joint feu duty, "that the ecclesiastical person shall have action "and right to the tenth penny of liquidate maills con-"tained in the said infeftment, and the other nine parts "thereof shall pertain to our sovereign lord; and this "is to be not only of the penny maill, but of all other "duties that should be paid for teind or stock, viz. that "nine parts thereof should pertain to our sovereign "lord, and the tenth part by just estimation shall "pertain to the said ecclesiastical person." So in a case referred to in Forbes'sTreatise on Tithes,—Heritors of Tulliallan[1], the Court found that the feu-duty was liable to be allocated for the minister's stipend, reserving to the feuar, if he paid his stipend in the first instance, relief against the superior.

In more recent times the principle has been sustained by repeated decisions of the Court[2]; and Sir John Connell, in his treatise on tithes, refers to these cases as having settled the legal principle, that feu teind duties are free teinds to be allocated primo loco for stipend[3]; and in like manner Mr. More, in the edition of Lord Stair's Institution, lays down the same rule.

Now the principle was, if not directly sanctioned, yet clearly by implication, sustained by this House in the case in the locality of Bothwell, in which the present appellant was respondent and Mrs. Hamilton of Bothwell Park was appellant.[4]

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[1] Forbes on Tithes, part 2, cap. 6, Heritors of Tulliallan v. Colville, March 1684; Mackenzie's Observations on the Statute 1587.

[2] Dundas v. Baikie, 13th Feb. 1793, Dict. 14,820; Graham of Kinross, 13th Feb. 1793, Dict. 14,821; Dundas v. Balfour and others, 17th Nov. 1802, Dict. 15,709; Dundas v. Balfour and others, 25th May 1821, Shaw's Teind Cases, p. 1.

[3] Connell on Tithes, p. 252 to 263.

[4] Hamilton v. Duke of Hamilton, 31st March 1835, ante, i., p. 65.

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It is true that the decisions by which the general principle has been fixed were for the most part in processes of locality. But this can in no respect affect the principle itself, or the respective liabilities of the titular and heritor; for, holding it to be indisputable that teind duties payable by the latter are free teinds, and to be allocated primo loco, the necessary consequence of the burden of making payment of them to the minister as stipend being laid on the heritor in the locality must be to give him the right of retention, as against the titular, to the extent of the duties so paid to the minister.

Accordingly, the heritors right of retention in such a case is expressly recognised by the interlocutor in the case of Lord Dundas v. Balfour.

2. As the interlocutor of Lord Mackenzie was acquiesced in it must be held to lay down the law of the case as to the right of Mr. Urquhart to appear, and this being found it follows that the appellant should pay the expenses caused by his illegal opposition.

Lord Brougham. — When the argument in this case closed, I stated the strong inclination of my opinion in favour of the finding upon the main point in the cause by the Lord Ordinary in his interlocutor of the 12th of November 1835, and my general agreement in the views taken in the explanatory note added to that interlocutor by the learned Judge. Whatever might have been urged on this question before the decisions were pronounced, which completely dispose of it, if they are admitted to make the law upon this subject, it is now too late to raise any doubt respecting the grounds

Dundas v. Balfour and others, 25th May 1821; Shaw's Teind Cases, p. 1.

of those decisions; and I must add, that the difficulties which at first appear to encumber them lessen the more they are considered; so that there seems every reason for holding, with the Lord Ordinary, that they rest on a sound foundation. The cases referred to (Dundas v. Baikie and Graham of Kinross) were, moreover, decided by Judges, the weight of whose authority was as great as that of any who ever sat on the bench of Scotland. They were rested on previous decisions, one of which, at least, went nearly as far as those cited. They have since been followed without any deviation, both in practice and in subsequent cases; and though never directly brought into discussion here before the present time, they have more than once been cited and approved, certainly not disputed. They must, therefore, be taken to have finally established and fixed the law upon the point.

But the reason for which principally your Lordships postponed the decision of this case was, in order to examine two matters upon which grave doubt was cast:— The finding of the Lord Ordinary, (interlocutor 12th November 1833,) that the payment of stipend under the "decrees of locality must be considered as payments by consent of the pursuer," there being, it was suggested, no such decrees;—and the making the pursuer (the appellant) pay Mr. Urquhart's expenses of appearing, he, Mr. Urquhart, being decreed to pay the pursuer his expenses occasioned by the unnecessary pleading.

Upon the best attention I have been able to give to the first of these points, I see no reason to alter the interlocutor. If it is right on the other points, which must now be assumed, it will be found right also upon

this; for there must needs have been decrees of locality interim or final. Mather's case is bottomed upon this, that he paid teinds, the teind duties included, to the minister under decrees of locality, which laid upon his lands a corresponding amount of stipend. Without that fact there would be no case. It is true the Duke contended that this was not a question touching allocation of stipend, and that Mather's lands were not to be localled on beyond the proper proportion with those of other heritors having heritable rights to their teinds; and this, as the learned Lord Ordinary has observed in his note to the interlocutor of the 12th November, was the very point made in Dundas v. Baikie, and of which his lordship exposes the fallacy. But the Duke did not deny that Mather had paid stipend under the localities referred to, in amount either equal to or greater than the teind duties payable to him as titular by the charter. Now, the main point which we are now assuming to be rightly decided is, that by law teind duties were primarily liable to allocation, before any surplus teind beyond them could be affected; and as it was the duty of the titular correctly to frame the scheme of locality, (which, if he had done, those teind duties payable to himself must have been in the first instance exhausted,) we must hold that, whatever might be the form of the localities made up, the whole duties had been paid under them legally to the minister as the first portion of the teinds in any way exigible from Mather's land. It may further be observed, that the same duty of the Duke to frame the decrees of locality, to give them in, and to see them settled, made it likewise incumbent on him to know what they contained. Those decrees of locality were most probably never produced, no question having

apparently been made respecting them. But the fact that stipend, equalling or exceeding the teind duties, had been paid by Mather, was not denied; and those payments could only have been so made under decrees of locality, as stated by Mather. The decrees of locality were properly the documents of the minister, who was no party to this controversy; and unless extracts from them had been called for, or the fact of allocation been disputed, their production was an unnecessary and, to a certain degree, an expensive proceeding. The Duke's pleadings admitted that stipend had been allocated on the teinds of the lands, which was sufficient for deciding the point; always assuming, as we must now do, that the principle governing the judgment was right. After all, it may be remarked, (and this relieves me from an anxiety that I might otherwise have felt on a matter involved in some obscurity,) that the words on which this difficulty has been raised, viz. "under the decree "of locality," might have been left out of the interlocutor, because the payment of stipend would have implied the same thing. My first impression was, when the argument closed, to alter the interlocutor at all events by making this omission; but it seemed necessary to consider a little more narrowly how far I was right in supposing that these words were not necessary to support the finding; and this consideration has led me to hold that these words may well enough stand, though it has also satisfied me that the interlocutor may stand without them.

On the other point, that of the costs, no objection is made to Urquhart having to pay those occasioned by his needless pleading; but the noble appellant contends, that if Urquhart appeared, it should not have been at

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his Grace's expense, but at his own, he never having been called as a defender, and the conclusion of the summons applying to Mather alone. I own that I agree with the Lord Ordinary in questioning the propriety of the previous decision, by which Urquhart was allowed to appear at all. But though allowed, it does not follow that he ought to appear at the cost of the pursuer; indeed, the test of his right to appear at all applies à fortiori to his right to charge on the pursuer the expense of his appearance. That test seems to be this: Could a judgment obtained against Mather have included him, Urquhart? Would it have been *res judicata* against him? If it could only have been a precedent against him, and injured him in that way, then most clearly he has no more right to appear and resist it than any person, who apprehends an action may be brought against him on the same grounds with one about to be tried between mere strangers to himself, has a right to appear for the sake of preventing a decision which may eventually hurt him when his own cause comes to be tried. Now, it cannot be contended in this case that a decision against Mather would have included Urquhart. He was, as it were, interested in the question, but not in the event of the suit. Whatever that event might be, he had the full right to go into the whole question when his own case should come to be tried. However, the former Lord Ordinary having allowed him to appear, and that order being final, Lord Moncreiff held himself not only bound by it, but bound to allow Mr. Urquhart his expenses of appearing. In this I cannot agree with his Lordship; the costs were wholly within his discretion, and it appears to me clearly wrong to have allowed them. In so far, then, as the sum of 49*l.* 1*s.* 6*d.* of

expenses was allowed to Mr. Urquhart the interlocutor must be altered, and Mr. Urquhart must pay the 33*l.* 17*s.* 3*d.* expenses to the appellant as ordered by the interlocutor. With this alteration the judgment appealed from must be affirmed.

Now, with respect to the costs of the appeal, my Lords, certainly some little doubt may remain; and as the learned counsel are here, I should like to hear whether there is any reason why the noble appellant should not pay those costs.

The Attorney General.—Your Lordship will bear in mind, I do not say any thing at all about the point as to whether the teind duties are first to be charged; but there was the greatest obscurity here with regard to the allocation, which was not cleared up at all by the other side; it was not cleared up by the defender, on whom the onus lay. He did not show when this payment commenced. I threw out, it might by possibility have existed before the contract by which the teind duty was reserved, and your Lordships overruled that.

Lord Brougham.—How many years did the appellant allow to elapse before he made the demand or brought the action?

Sir William Follett.— Between forty and fifty.

Lord Brougham.—I think the interlocutors appealed from must be affirmed, with costs of the appeal, making the variation as to Mr. Urquhart's costs of appearing.

The House of Lords ordered and adjudged, That so much of the said interlocutor of the 12th of November 1835 as finds the said John Urquhart entitled to the expense of entering appearance by his minute, and of maintaining his interest at the bar, be and the same is hereby reversed: And it is further ordered, That, with this

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exception, the said interlocutor of the 12th of November 1835, and the several other interlocutors complained of in the said appeal, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

RICHARDSON and CONNEL—ALEXANDER DOBIE, Solicitors.