THE DUKE OF MONTROSE, ... APPELLANT.
SIR WILLIAM DRUMMOND STEWART, of GRANDTULLY, BARONET, . . . } RESPONDENT.

1861.
July 22*nd*.
1862.
June 3*rd*, 5*th*, *and* 13*th*.
1863.
March 27.

Superior and Vassal—Singular Successor.—Under an obligation contained in an ancient feu contract,—*Held* by the House, (affirming the decision below,) that the superior was bound to indemnify the vassal, though a singular successor, against augmentations of stipend; and this upon the principle that the superior's obligation was an essential inherent element in the feudal relation, and that by reason of its running with the land it required no special assignation.

Per the Lord Chancellor: As the feudal relation of superior and vassal exists between the parties, there is consequently a right in the vassal to enforce against the superior every obligation which by the feu contract was intended to accompany the estate of the vassal.

Per the Lord Chancellor: The superior binds himself, his heirs and successors in the superiority, to the vassal, his heirs and successors in the feu.

Per the Lord Chancellor: The obligation is part of the feudal contract, and is transmitted along with that contract.

The cases of *Maitland* v. *Horne* and *Marquis of Breadalbane* v. *Sinclair* commented on.

By feu contract, dated 1st February 1705, James, then Marquis of Montrose, in consideration of 38,372*l*. Scots, feued out to David Grahame in life-rent, and to James Grahame, his eldest son, and his heirs male, and a certain series of heirs therein named in fee, the lands and estate of Braco in Perthshire, and the teinds thereof; with respect to which teinds there was incorporated in the feu contract a peculiar stipulation, couched in the following terms:—

And further, in regard the said David Grahame has payed als great a pryce for the saids teinds, parsonage and vicarage, as for

DUKE OF MONTROSE *v.* SIR W. D. STEWART.

the stock of the said lands. Therefore the said James Marques of Montrose binds and oblidges him, his heirs and successors, to warrant the said teinds to be free, safe, and sure to the said David Graham, his heirs and successors, from all ministers' stipends, future augmentations, annuities, and other burdens imposed or to be imposed upon the saids teinds, except allenarlie the ministers' stipends and schoolmasters' fees afterment[d], presently payable furth of the saids teinds, viz.:—[Here follows an enumeration of the burdens and demands to which the teinds were then subject.] For which cause, and on the other pairt, the said David Graham binds and oblidges him, his heirs and successors, to content and pay to the said James Marquis of Montrose, his heirs and successors, the feu-duty of two hundred merks yearlie, at the terme of Whit[y], with the sum of fourty merks of liquidate exp$\tilde{s}$, in name of penalty, for each year's faillie; and also to perform, observe, and fulfill to the said noble Marques and his foresaids the haill other conditions and prestations contained in the feu reddendo.

In pursuance of this feu contract David Grahame and James Grahame were duly infeft for their respective rights of life-rent and fee in both the lands and the teinds of Braco, the instrument of seizin stating that the infeftment was "after the form and tenor of the feu contract and precept of seizin therein contained in all points."

The progress of title to the lands and teinds of Braco is fully set out in the Second Series of the Court of Session cases (*a*). It is also recited by the *Lord Ordinary* in the note to his Interlocutor quoted below (*b*).

The object of the summons was to have it found and declared that his Grace the Duke of Montrose, and his heirs, executors, and successors, were bound to warrant the teinds of Braco "to be safe and sure by " the feu contract above mentioned to Sir William " Drummond Stewart, his heirs and assignees, against " all ministers' stipends, future augmentations, annui- " ties, and other burdens imposed or to be imposed " on the said teinds after the date of the above feu

(*a*) Vol. 22, p. 755. (*b*) See *infra*, p. 501.

" contract, except such as were payable at the date " thereof, as therein specially set forth."

The defence put in on the part of his Grace insisted that the obligation in the feu contract was a personal and collateral obligation, which did not run with the land, and which had not been transmitted by special assignation, so as to sustain an action of relief by a singular successor.

The *Lord Ordinary* (*a*) on the 12th November 1857 pronounced the following Interlocutor:—

Finds that the obligation of relief against future augmentations of stipend in the feu contract has not been duly transmitted to the Pursuer. Therefore sustains the objection to the Pursuer's title, dismisses the action, and decerns. Finds the Pursuer liable in expenses, &c.

To this Interlocutor his Lordship annexed the following learned note:—

The obligation of relief in the feu contract of 1705 is clear and unequivocal in its import. By that deed the Marquis of Montrose conveyed the lands of Braco, and others, with the teinds, to David Graham, clerk of the bills, in life-rent, and James Graham, his eldest son, in fee, and became bound " to warrant the said teinds " to be free, safe, and sure to the said Mr. David Graham, and his " said son, and his foresaids, from all ministers' stipends, future " augmentations, annuities, and other burdens imposed or to be " imposed upon the said teinds, except allenarly the ministers' " stipends and schoolmasters' fees after mentioned, presently pay- " able furth of the said teinds." Thus the superior undertook an express obligation to relieve the disponees of all future augmentations of stipend which might be imposed after the date of the grant.

If any question had arisen regarding augmentations of stipend with the original parties to the feu contract, there can be no doubt this obligation would have been effectual. But assuming the obligation to be well constituted in the first instance, the point now raised is whether it has been duly transferred to the Pursuers under the titles whereby they have acquired right to the lands and teinds.

By the original feu contract and sasine thereon, in 1705, James Graham, as fiar, acquired full right to the lands and teinds, and

(*a*) Lord Mackenzie.

DUKE OF MONTROSE *v.* SIR W. D. STEWART.

was also vested with the obligation of relief against future augmentations. James Graham having contracted debts, three of his creditors led separate adjudications against him of the lands and teinds of Braco, in 1719 and 1720. To these three adjudications, Mungo Graham of Gorthy acquired right by dispositions and assignations from the creditors, upon which he obtained a charter of adjudication from the superior, and it is said was infeft thereon in 1745, though the sasine has not been produced.

In 1748 Mungo Graham conveyed the lands and teinds of Braco to Colonel afterwards General David Graham, who was the eldest lawful son of the deceased James Graham, the fiar in the original feu contract of 1705. In virtue of this conveyance General David Graham obtained a charter of resignation from the superior, under which he was infeft in 1765. Besides this title, founded on the adjudications, General David Graham, as heir to his father James Graham, obtained from the superior a precept of *clare constat*, upon which he was infeft in the lands and teinds of Braco in 1797.

So standing the titles, General Graham's testamentary trustees sold the lands and teinds of Braco to James Masterton, with entry at Martinmas 1800, and he was assigned into the unexecuted precept in the trust settlement. The assignation to the writs in the disposition to Masterton was thus expressed :—"And in order "that the said James Masterton and his foresaids may obtain "themselves infeft and seised in the said lands and others "above disponed, with the pertinents, we hereby make, con- "stitute, and ordain him and his foresaids our cessioners and "assignees, not only in and to the whole writings, rights, "titles, and securities, old as well as new, of and concerning "the said subjects, made, granted, and conceived in favour "of us, or the said David Graham, his authors and pre- "decessors, and particularly, without prejudice to the generality "foresaid, in and to the said trust disposition by the said David "Graham in favour of us and certain other trustees therein named, "with the procuratory of resignation and precept of sasine, so "far as relates to the subjects hereby disponed, and whole other "clauses therein contained, that in virtue thereof, and of the "procuratory of resignation or precept of sasine therein con- "tained, and hitherto unexecuted, the said James Masterton "and his foresaids may be infeft and seised in the subjects above "disponed."

There is an obligation by the sellers to relieve Masterton of ministers' stipend and other public burdens prior to his entry at Martinmas 1800, the purchaser being taken bound to bear these burdens in all time thereafter.

In 1843 the lands and teinds came by progress to the late George Drummond Stewart, and ultimately though a variety of singular successors to the Pursuers of this action.

None of the charters or precepts granted by the superior after the date of the feu contract in 1705 made any reference to the obligation to relieve the vassal of augmentations of stipend. What is still more important, none of the conveyances in the numerous transmissions of the property to singular successors made any specific mention of this obligation of relief; and when the lands were sold, the purchaser was taken bound to pay the minister's stipend and other public burdens from the date of his entry, without reference to any claim of relief against the superior.

The first augmentation of stipend after the date of the grant was allocated upon the teinds of Braco in 1729. Subsequent augmentations of stipend were awarded in 1792, 1806, 1826, and 1846. It does not appear whether the augmented stipends from 1729 to 1800 were paid by the proprietors of the lands without seeking relief from the superior, though this is averred by the Defender, and said to be not known to the Pursuers. On the other hand, it is admitted that from the date of Masterton's entry in 1800 to 1845, the Defender and his father paid the augmented stipends either to the proprietors of Braco or directly to the minister of the parish; but it is said this was done by them "in "ignorance of their legal rights, and without inquiry as to the "title of the proprietors of Braco to demand payment." The Pursuers in this action seek relief from the augmentations since 1845, under the obligation contained in the original feu contract.

According to the judgments of the House of Lords in the cases of *Maitland* v. *Horne*, 21st February 1842, and *Sinclair* v. *The Marquis of Breadalbane*, 14th August 1846, an obligation of relief against augmentations of stipend is not of the nature of warrandice in the proper sense of the term, but a personal obligation of relief which does not necessarily follow the title of the lands and teinds, or pass as a pertinent thereof, but must be transmitted by express title of assignation or otherwise. When the case of *Horne* was before the Court, Lord Moncreiff, with some hesitation, indicated an opinion that an obligation of this nature, though not passing simply with the lands and teinds, might be distinguished from such a right as a tack of teinds, to which the case of *Graham* v. *Don* related to the effect of holding it to pass as a title deed by a general clause of assignation of the writs and evidents. Lord Cottenham, however, rejected that distinction, and adopted the decision of *Graham* v. *Don*, as showing that, even with a very broad clause of assignation to writs and evidents, such an obligation does not pass by the title to the lands. And the question was put by his Lordship,—"If it requires a "*particular* assignation, what evidence have we of any such "assignation?" From this it may be inferred that a general assignation to writs and evidents was not considered the proper form for transmitting such a right. Accordingly, in the case of *Sinclair* v. *The Marquis of Breadalbane*, Lord Moncrieff concurred

DUKE OF MONTROSE v. SIR W. D. STEWART.

with Lord Wood as to the true import of the judgment of the House of Lords in the case of *Horne*, and expressed a decided opinion (6 D., p. 393) that an obligation for relief of augmentations was a right which required "to be taken up and transmitted as among heirs by general service or express *assignation*, "and which cannot pass to singular successors without *such* "*express assignation*." This view was confirmed by Lord Campbell, who observed (5 Bell's App. 37) in the case of *Maitland* v. *Horne*,—"This House held that an obligation by a disponer of "lands to relieve the disponee of all future augmentations of "stipend does not, without a *special assignation*, pass to singular "successors. Here no such *special assignation* is alleged or "proved. That decision has been complained of, but it is binding "on this House as well as on the Courts below."

In *Spottiswoode* v. *Seymer*, 2nd March 1853, the Lord President said—"It appears to me that these two decisions in the House "of Lords establish that there must be some *direct express trans*-"*mission of the right* to the party who founds upon it. Lord "Moncreiff says it may be transmitted by service or by assig-"nation." Lord Fullerton in the same case remarked:—"I "see no objection to an obligation of this kind, peculiar as it is, "being carried by *express assignation*, and that was the ex-"pressed opinion of Lord Cottenham in the case of *Maitland* v. "*Horne*. I may also add, that I see no extrinsic objection to "such a personal obligation, partaking, as it does, of many "elements of a real character, being taken up by *service*." These opinions, it is thought, afford no countenance to the notion that a general assignation of writs and evidents in a disposition of the lands and teinds would be the proper form of transmitting such a right; and it seems impossible to reconcile that doctrine with the established principle that an assignation to writs does not operate as a conveyance of rights, and can only be used to support what is actually conveyed, according to the decision in *Graham* v. *Don*, 15th December 1814, and *Hamilton* v. *Montgomerie*, 28th January 1834.—See also Lord Ivory's opinion in the case of *Trinity Hospital*, 18th June 1851.

In support of his case the Pursuer mainly relies on the decision in *Lennox* v. *Hamilton*, 14th July 1843, 5 D., 1357. There it was assumed that all the conveyances contained an assignation to the writs and evidents of the lands and teinds, "with "the whole clauses of warrandice and other clauses therein "contained:" and it seems to have been the opinion of the Judges that the assignation was in terms sufficiently broad to constitute a *special* assignation to the obligation of relief. Though that case related to a clause of a somewhat special nature, Lord Moncreiff thought it proceeded on far too narrow a construction of the judgment of the House of Lords in the case of *Horne* (6 D., 393), and the authority of the decision

appears to be materially shaken by the opinions expressed by the House of Lords in the case of *Sinclair*, as well as by the Judges of this Court in subsequent cases.

Besides, in the present case, the Pursuer is not in a position to found on an unbroken series of conveyances, all containing an assignation to the writs and evidents of the lands and teinds, "with the whole clauses of warrandice, and other clauses therein "contained." No doubt such an assignation occurs in several transmissions of the property, but there are other important links in the progress where it is wholly awanting.

General David Graham, the eldest son of James Graham, the fiar in the original feu contract, it has been explained, made up two titles to the lands and teinds of Braco. 1st, as heir to his father, he obtained a precept of *clare constat*; and, 2nd, as a singular successor, he acquired right by progress to the three adjudications which were led against his father's estate by creditors. In this discussion, the first of these titles may be entirely thrown out of view; because, according to the decision in *Sinclair's* case, the precept of *clare constat* could transmit nothing but the feudal estate which belonged to James Graham, and did not carry the obligation of relief. The second title of General Graham as a singular successor seems equally defective. The adjudications appear to have been led against James Graham, as lawfully charged to enter heir in special to David Graham, his father, upon the erroneous supposition that the lands and teinds sought to be adjudged belonged to the father, and "would pertain to the said James Graham, now of "Braco, his son, if he were entered heir in special to him," whereas David Graham was a mere life-renter, whose right ceased with his life, while James Graham stood as the absolute fiar under the investiture. Whether these adjudications were properly deduced, so as to attach the lands and teinds of Braco, may admit of question; but even in the most favourable view, it is thought they could carry nothing more than the lands and teinds expressly adjudged, and the writs and evidents, so far as necessary to support the title to the subjects so adjudged. Then Mungo Graham of Gorthy obtained from the creditors separate dispositions and assignations, under which they conveyed to him the lands and teinds of Braco, as adjudged, with the debts and decrees of adjudication, but nothing more. These dispositions do not even contain a general assignation to writs and evidents according to the style commonly used in a conveyance to a purchaser, the assignation of writs and evidents being limited to the decrees of adjudication and grounds and warrants thereof, so that the obligation of relief against augmentations was never validly transmitted to Mungo Graham, who granted the disposition to General David Graham in 1748. If this view be correct, it is unnecessary to consider the subsequent

DUKE OF MONTROSE v. SIR W. D. STEWART.

transmissions. For although Mungo Graham, in his disposition to General David Graham, assigned the writs and evidents and all clauses of warrandice and other clauses therein contained, he could not convey to another a right which he had never acquired.

As to the subsequent titles it may be observed, that when General Graham's trustees sold the lands and teinds of Braco to Mr. Masterton in 1800, they granted a disposition to him with an assignation to writs and evidents; but the clause was qualified in such a manner as to show that it was intended only to enable the disponees to complete their title "to the lands and others "above disponed."

Moreover, the disposition and deed of entail by George Drummond in 1847, which is also an essential link in the progress, does not contain an assignation "to the writs and evidents and "all obligations of warrandice and other clauses therein con- "tained." For after conveying the lands and teinds, the deed merely assigns all and sundry contracts, dispositions, and other writs and evidents "of and concerning the lands and other "heritages before disponed." On comparing the cases, it will be found that this clause, though hardly so broad, bears a striking resemblance to the clause which occurred in *Graham* v. *Don*, where it was found that the assignation to the writs did not carry a tack of teinds, and could only be used to support the rights actually conveyed.

On these grounds the Lord Ordinary thinks the Pursuer has failed to connect himself with the obligation of relief in the feu contract, and consequently has no title to insist in the claim made by him in this action.

Against this Interlocutor Sir William Drummond Stewart reclaimed to the Inner House, First Division, who ordered printed cases, and appointed them to be laid before the whole Court for their written opinions "on the question whether the *Lord Ordinary's* "Interlocutor should be adhered to."

On the 15th February 1860, the First Division having obtained the opinions of the Judges of the Second Division and of the *Lords Ordinary*, they, in conformity with the sentiment of the majority, decided as follows:—

Recal the Interlocutor submitted to review: Find that the Defender (the Duke of Montrose), as superior of the lands and teinds libelled is liable under the obligation libelled to free and relieve the Pursuer as vassal in the lands libelled of all stipend and augmentations of stipend imposed or to be imposed on the

teinds of the land libelled subsequent to the date of the feu contract: Repel the defences, and so far decern: Find the Defender liable in expenses, &c.

The Duke appealed to the House of Lords; Mr. *Rolt* and Mr. *Clarke* appearing for his Grace.

The *Solicitor-General* (*a*), Mr. *Moir*, and Mr. *Mure* were of Counsel for the Respondent.

After an argument on both sides distinguished by extraordinary research and erudition, the Law Peers delivered the following opinions, which embrace a full consideration of all that was deemed material.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

The Appellant is the superior in a feu contract under which the Respondent is the vassal.

The question raised is, whether the Respondent is entitled to the benefit of an obligation of relief against augmentation of stipends contained in the original feu contract.

The Appellant is not only superior, but also the representative of the superior who granted the original obligation, and it is admitted in the cause that the Appellant is liable if the Respondent be *in right* of the obligation, and the sole question, therefore, is, whether the obligation accompanies the feu on its transmission from vassal to vassal, without the necessity of obtaining a special assignation from the representatives of the original grantee.

As the feudal relation of superior and vassal still exists between the Appellant and Respondent, there is privity of estate between them, and consequently a right in the vassal to enforce against the superior every obligation which by the terms of the feu contract entered into the relation as thereby constituted, and which from its nature was intended to accompany the estate of the vassal.

(*a*) Sir Roundell Palmer. (*b*) Lord Westbury.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chancellor's opinion.

Now the obligation in question, so far as the terms in which it is expressed are material, is plainly intended to enure for the benefit of all persons entitled under the feu contract, that is, of all succeeding vassals.

The superior binds himself, his heirs and successors in the superiority, to the vassal, his heirs and successors in the feu.

And the nature of the obligation is such as was plainly intended to accompany and follow the feu in its transmissions, for it is an engagement which none but the actual vassal can claim the benefit of, whenever the event occurs which gives rise to a demand against the superior under the obligation.

The obligation of the superior is for himself, his heirs and successors, that the teinds, parsonage, and vicarage, disponed by him to the vassal, his heirs and successors, shall be free from all ministers' stipends, future augmentations, annuities, and other burdens to be imposed upon the said teinds, except only such as were then subsisting and presently payable.

The proposition of the Appellant is, that this engagement is personal to the grantee, and stops, unless specially assigned, with him and his representatives: but where the original grantee or any succeeding vassal has disponed the feu, he ceases at once to have any interest in the obligation of the superior. What then becomes of the obligation? Does it remain with the grantee or his representatives, who have no longer any interest in it or right to enforce it, or does it, in conformity with the terms of the obligation and the spirit and intent of the contract, accompany the feu into the hands of the succeeding vassal?

The obligation relates directly to the subject of the feu contract, and to the enjoyment of it by the vassal, and it is therefore, from the very nature of the engagement, an integral part of the contract, in consi-

deration and return for which, as part of the superior's grant and engagement, the feu duties and other prestations are rendered by the vassal.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chancellor's opinion.

It is no answer to say that the liability of the superior under such an obligation may exceed the whole value of the feu duties. This may show that the contract of the superior was originally improvident, but does not affect the legal construction or validity of the obligation.

In principle, therefore, it appears to me to be clear that the obligation in question is part of the feudal contract, and is transmitted along with that contract.

But little difficulty could have been felt on this point if it had not been supposed in the Court below that the decisions of this House in the cases of *Maitland* v. *Horne* (*a*) and *Breadalbane* v. *Sinclair* (*b*), and the judgment of the late Lord *Cottenham*, were in favour of the Appellant.

In my opinion those cases have no application to the present, for in them there was no privity of estate between the contending parties, who did not stand in the mutual relation of superior and vassal.

I must therefore move your Lordships that the decision in the Court below be affirmed.

Lord CRANWORTH:

Lord Cranworth's opinion.

The object of this suit was to make the Appellant liable to the Respondent in respect of certain augmentations of ministers' stipends, which have been duly made, whereby the teinds of Braco have been heavily charged beyond the charges which subsisted at the date of the feu contract of 1705.

It is clear on all the authorities that the benefit of the obligation entered into by the Marquis of Montrose in 1705, whereby he bound himself and his heirs to warrant the teinds free from all future aug-

(*a*) 1 Bell, App. Cas. 1. (*b*) 5 Bell, App. Cas. 353.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Cranworth's opinion.

mentations, has not been duly assigned to the Respondent, so as to enable him to sustain an action for relief against the Appellant as the personal representative of the Marquis. But the question is, whether as superior the Duke is not liable without any special assignation of writs. The *Lord Ordinary* held that he is not. And the question having been argued before all the Judges, six of them, including the *Lord Ordinary*, adhered to his opinion, and were for affirming his Interlocutor, and seven were opposed to it; so that there were seven in favour of the liability of the Appellant, and six against it. The result was that the Appellant was declared to be liable. He has appealed to your Lordships, and this House has now to decide in this closely balanced state of the authorities.

The *Lord Ordinary* and the Judges who concurred with him came to a decision adverse to the Pursuer, who is now the Respondent, on the ground that the obligation in question, though entered into in the original feu contract by the superior with the person who was thereby constituted his vassal, was not a condition of the feu right inseparable from the feudal relation of superior and vassal, but a mere collateral engagement entered into by the superior with his vassal when he created the feu right, binding only him and his personal representatives.

The seven Judges who formed the majority were of opinion that the obligation in question was validly made a part of the feu contract, so that every succeeding vassal had a right to claim the benefit of it against the superior for the time being, in the same way as every successive superior has a right to insist against every succeeding vassal on the payment of the feu duty.

Which of these views was right? My impression was that the *Lord Ordinary* was right. Certain

DUKE OF MONTROSE v. SIR W. D. STEWART

Lord Cranworth's opinion.

definite duties attach to the superior, whoever he may be, arising, not from special contract, but from the nature of the feudal relation. The superior, as is pointed out by the *Lord President* (*a*), is bound to infeft and to enter the vassal, and to renew the right of every successive vassal according to his right, whether claiming by descent or as a singular successor. On the other hand, certain well-known obligations attach without being expressly mentioned, on the vassal; and, on the principle "cujus est dare ejus est disponere," the person feuing his land may stipulate for special payments, prestations, and duties to be rendered and performed by the vassal, as the condition of his holding the *dominium utile* of the land. But I have discovered no authority for saying that he can annex to the *dominium directum* which he retains an onerous obligation, such as that now under consideration, so as to make it attach on the superiority. Before feuing the lands the owner has *plenum dominium*. He may divest himself of this full right by feuing on terms which he may make the condition on the performance of which the right of the fiar shall depend. No one who afterwards succeeds to him in so much of his original *plenum dominium* as he has not parted with can claim any interest in the land, except the rights reserved expressly or impliedly in the original feu grant. But what he succeeds to must, I should have thought, be the *plenum dominium*, diminished only to the extent of the grant. I should not have thought that in such a case it was competent to the grantor by covenant with the grantee to burden the interest which he retains so as to affect his singular successors in the superiority.

My opinion, therefore, would have been in favour of this Appeal. But as I know that my noble friend

(*a*) 22 Sec. Ser. 788.

DUKE OF MONTROSE v. SIR W. D. STEWART.

near me concurs with the *Lord Chancellor*, I shall not trouble your Lordships with any further observations.

Lord Cranworth's opinion.

The case is one of great nicety, and though I have shortly stated the grounds on which I thought the minority of the Judges below were right, I readily defer to the opinions of the majority, and of my noble friends who heard the case argued at your Lordships' bar.

I will merely add that the two cases cited in argument, and which were decided in your Lordships' House, have little bearing on the question. Neither of them were cases between vassal and superior. *Maitland* v. *Horne* (*a*) merely decided that where a vendor had entered into a covenant with a purchaser, similar to that now in question, a singular successor of the purchaser had no right of action against the representative of the covenantor unless the right to the covenant had been specially assigned to him. In the other case of *Breadalbane* v. *Sinclair* (*b*) there was, as in this case, a feu contract; but the action was raised, not against the superior for the time being, but against the personal representative of the original grantor who had entered into the obligation. The benefit of the obligation had not been duly transmitted, and the principle established in the preceding case therefore prevailed.

These cases are clearly inapplicable to that now before the House.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

This is a case confessedly of great difficulty as well as of importance. Where so many learned Judges, necessarily more conversant with the law to be administered than I can pretend to be, are so closely divided in their opinions, I may well hesitate to express any confidence in the conclusion at which I have

(*a*) 1 Bell, App. Cas. 1. (*b*) 5 Bell, App. Cas. 353.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

arrived; but I have not made up my mind upon the subject without giving the most careful and attentive consideration to the whole case.

The solution of the question turns entirely upon the point whether the obligation to relieve the teinds from augmentations of the minister's stipend is a mere personal obligation, or whether it enters into and forms part of the feu contract. If the obligation is merely personal, it is conceded that a special assignation of the right to it was necessary, and all the Judges agree that the Pursuer cannot found his title upon any such assignation. On the other hand, if by the feu contract the obligation entered into the constitution of the feu, and so became a part of the newly constituted relation of superior and vassal, it would be inherently transmissible by the mere continuance of that relation. The Appellant, however, contends that the right to enforce this particular obligation does not run with the estate of teind to the vassal. That it was at the utmost one of the *accidentaïia fendi* spoken of by Erskine (*a*), which the lord could not annex to the feu so as to prejudice his successor, or at all events not without its finding its way into the feudal investiture. But what reason is there for saying that the lord in the original creation of this feu could be restrained from granting the *dominium utile*, and reserving the *dominium directum*, with certain obligations and conditions attached to it at his free will and pleasure? He was the absolute owner of the subject. His singular successors could of course have no reason to complain, because they would take care to ascertain the burdens or obligations belonging to the superiority before they purchased. His heirs would receive the superiority from him with the conditions upon which he permitted it to descend to

(*a*) Book 2. tit. 3. s. 11.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

them, as he might, if he pleased, have aliened it altogether from them. If the obligation was made part of the feu in its original creation, then, as, according to Craig, quoted by Erskine (*a*), "all clauses in the original charter are in the judgment of law implied in charters by progress if there be no express alteration," it was continued by the several charters of confirmation of the superior and by the precept of *clare constat* by which the feudal estate was transmitted to Colonel David Graham. The difficulty in the way of construing this obligation to be more than a personal obligation to relieve from augmentation was strongly urged, by comparing it with the clause of warrandice, confessedly a mere personal contract, binding only upon representatives. And it was asked what difference can be suggested between a warranty of title generally and a warranty against a specific claim being made upon a part of the subject-matter of the grant? The answer is that the two things are entirely different, and therefore incapable of comparison. In the words of Lord *Cottenham*, in the case of *Maitland* v. *Horne* (*b*), "the nature of such a contract is a very different thing indeed from what is ordinarily understood by the term 'warrandice' or 'warranty,' according to the term used in the English law." "The teinds of a parish are subject to the liability to be diminished in the hands of the individual by being taken for the purpose of adding to the stipend of the minister. But the title to the teinds is not affected by the augmentation." It is not therefore by comparing the obligation in question with the contract of warrandice, but by examining it in itself, that its real character can be ascertained.

It is contained in the grant by which the feudal relation in the teinds was originally created, and the

(*a*) Book 2. tit. 3. s. 20. (*b*) 1 Bell, App. Cas. 63.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

terms on which they were to be held were permanently arranged. The vassal had agreed to purchase, not the teinds simply, but the teinds subject only to the existing burdens, and free from any future augmentation of them. The exoneration of the teinds from all additional burdens was to be the condition and quality of the subject as between the lord and the vassal. This could only be effected by such an obligation as that into which the lord entered. He could not expressly exempt the teinds from liability to augmentation of stipend, because the liability is imposed by law, and the minister could not be prevented, by such a stipulation between the parties from having recourse to the teinds for satisfaction of his stipend. The only mode in which he could give the vassal the benefit for which he contracted was by annexing an obligation to the teinds which would accompany them for all future time, and afford them a permanent protection against diminution. And that this intention might be more clearly shown, the reason for the obligation is stated to be "in regard that Mr. David Grahame had paid as great a price for the teinds, parsonage, and vicarage as for the stock of the lands;" in other words, that he had paid an ample consideration for the purchase of the teinds free from any additional burdens which might be afterwards imposed. Taking the whole of the feu contract respecting the teinds together, it is substantially a grant of an interest in unencumbered teinds, conceived in the terms of an obligation to relieve from future incumbrances. In this view the obligation is not collateral, but an express condition of the feudal grant transmissible as an essential part of it to the successive vassals. The question is not raised on behalf of a singular successor. If it had been, it would have been necessary to consider how far the case was decided by the two cases

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

of *Maitland* v. *Horne* (*a*) and *Marquis of Breadalbane* v. *Sinclair* (*b*). The former of these was not a case where the obligation to relieve the teinds from future burdens was contained in the original feudal grant, but it was a sale and disposition of lands with the teinds made by a vassal with an obligation to relieve his disponee from future augmentations. The superior had nothing to do with this obligation, and it in no way entered into the relation between him and his vassal. There was nothing remaining in the disponer in respect of the teinds to which the obligation could be annexed. It was, to use the words of Lord *Cottenham*, "a contract perfectly collateral to the subject-matter of the sale." It was therefore necessarily a mere personal obligation, not transmissible to singular successors in any other manner than by a special assignation, not by virtue of a general assignation to writs, which never operates in itself as a transmission of rights, but merely for the defence of rights actually transmitted. In the case of *Breadalbane* v. *Sinclair* the obligation to relieve from augmentation was contained in the original feu charter granted by Lord Breadalbane to James Sinclair, and Lord Breadalbane was a Defender in the action brought for the relief stipulated for by the obligation. But Lord Breadalbane had alienated the superiority, and Sir Robert Anstruther, who had become the superior, was dismissed from the action at an early stage of the proceeding, upon his motion to that effect, and without any opposition on the part of the Pursuer. The action, therefore, became virtually a claim by a singular successor of the original grantee in his mere character of heritable proprietor of the lands, without proof of any special assignation, upon an obligation, which having been disannexed from the superiority had become per-

(*a*) 1 Bell, App. Cas. 1. (*b*) 5 Bell, App. Cas. 353.

Lord Chelmsford's opinion.

sonal as to the party by whom it was originally entered into. These cases, therefore, do not appear to touch the question of an obligation entering into the original constitution of the feudal relation, and affecting the condition of the subject of the feu charter or contract.

Two cases decided in the Court of Session, and relied upon in argument, bear strongly upon the present question. In *Wilson* v. *Agnew* (*a*), "the superior in a feu contract agreed with his vassal that the teinds due out of the lands feued should be taxed at a certain sum besides feu duty, and bound himself to free the vassal of all teind and public burden payable forth of the lands in all time coming." The estate of the superior was subsequently taken up in virtue of an onerous and mutual entail by the heir, who was the lineal representative of the granter of the obligation, and who took up his estate, including the superiority, and he was held liable to fulfil the obligation as inherent in the feu contract. Lord *Balgray* said, "The Defender, Colonel Agnew, represents the original party to the contract, who was proprietor in fee simple of the estate. The superiority of the land for which the feu duty and teind exemption duty were paid is part and parcel of the entailed estate. By taking up the estate the Defender has right to these annual presentations from the Pursuer, and has received them; but no heir of entail can take up a part of that estate as superior, and yet attempt to shake himself loose from the obligations incumbent on him as superior towards his vassal." The case of *Lennox* v. *Hamilton* (*b*) is of even closer application. There, by the original feu charter, made in 1737, and granting lands and teinds, the superior bound himself to warrant the feu right from "all future augmentations of

(*a*) 9 Sessions Cases, 357. (*b*) 5 Sec. Ser. 1357.

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

ministers' stipends that might affect the teinds above disponed." A charter of confirmation was granted by the superior in 1778 to a disponee of the original vassal, which declared this general confirmation to be as valid and effectual to all intents and purposes as if the said dispositions and instruments of sasine before mentioned had been herein-before verbatim insert. In this charter the superior's obligation to relieve the vassal from augmentations of stipend was omitted, and the vassal was held bound to relieve the superior from all ministers' stipend. A subsequent charter, to the same effect, was granted in 1815, and with the same omission, and the vassal was held bound to the same extent as with respect to the charter of 1778. In 1798 the lands and teinds came by progress through a variety of singular successors, none of whom entered with the superior to the Pursuer's ancestor, and ultimately by succession to the Pursuer himself. None of the conveyances in the course of the progress contained a specific mention of the obligations to relieve against augmentation, but all of them contained an assignation to the writs and evidents of the lands, with the whole clauses of warrandice, and other clauses therein contained. The Pursuer, who was a singular successor in the feu, brought an action of relief against the superior, founded upon the obligations in the original charter, and it was held that he was entitled to recover. One of the grounds for sustaining his right was that the obligation sued upon formed part of the original feu charter, and that it could not be held to be discharged by its having been omitted in the subsequent charters by progress granted by the superior. Lord *Fullerton* said, "The superior feued out the lands, and made the obligation to relieve from augmentation a part of his obligation as superior, so that when the vassal

DUKE OF MONTROSE v. SIR W. D. STEWART.

Lord Chelmsford's opinion.

came to sell he must be held to have substituted the purchaser for himself in that original contract, and thus brought every subsequent acquirer in direct connexion with the superior in relation to the obligation of relief. There is good ground for holding that such an obligation would go with the lands, and that the purchaser would be entitled to insist that the superior should respect it in any new charter." These cases seem to me to furnish ground for the distinction upon which this case may be decided. When an absolute disposition of teinds is made with an obligation to relieve from burdens, this must necessarily be collateral, and therefore personal, because there is no subsisting relation in the teinds between the parties; but where the superiority is reserved, and the *dominium utile* only transferred, the obligation, originating with and being annexed to the feudal relation at the time of its creation, enters into and forms part of its original constitution, and so passes to each vassal as an intrinsic condition of the subject. After careful consideration I have arrived at the same conclusion with my noble and learned friend on the woolsack, that this is a case in which the obligation in question is one of the legal conditions of the feudal grant, and that the Interlocutor of the Court of Session is therefore right, and ought to be affirmed.

Interlocutors affirmed, and Appeal dismissed, with Costs.

LOCH & MACLAURIN—CONNELL & HOPE.