Against these judgments Mr. Stirling appealed; but the House of Lords ordered and adjudged that the interlocutors complained of be affirmed. July 2. 1823.

Appellant's Authorities.—(2.)—Burns, Feb. 17. 1779, (8852); Adam, July 4. 1809, (F. C.)

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 22.*)

EARL of SEAFIELD and CURATOR, Appellants.—*Gifford—Corbet—Mackenzie.* No. 66.

Sir GEORGE ABERCROMBY, Respondent.—*Connell—Hope.*

Teinds—Allocation—Relief—Stat. 1690, *c.* 23.—The patron of a parish having acquired a tack of all the teinds of the parish, which was subsequently prorogated; and having assigned part of the teinds so held by him to a third party, who was to bear the burden of future augmentations, &c. according to an equal proportion with the rest of the teinds of the parish; and thereafter the patron having acquired right by the statute 1690, c. 23, to the teinds of the parish not heritably disponed, and an augmentation having been subsequently granted to the minister—Held, (remitting with special findings to the Court of Session,) That, in a question with the patron and cedent, the assignee was only liable to be allocated in proportion to the other teinds of the parish, and that the patron could not insist on the teinds so assigned by him being entirely allocated primo loco.

IN 1604 Patrick Darg, parson of the united parishes of Fordyce and Cullen in the county of Aberdeen, with consent of the bishop of the diocese of the synod of Aberdeen, and of Sir Walter Ogilvie of Findlater, the patron of the parishes, let the whole teinds thereof to James Ogilvie, eldest son of Sir Walter, for 38 years, at a certain rent. The tack stated, that he had done so 'for ane certain soume 'of money in name of grassum, payd to me be James Ogilvie, 'eldest lawfull son of the said Sir Walter, and be utheris in his 'name, quhairof I hold me weill contented, satisfeit, and plea-'santlie payit; and thairfor, for me, my airis, executors, assig-'nais, and successors, exoneris, quyt claims, and discharges the 'said James, his airis, executors, and assignais thereof, for now 'and ever renunceand the exception of not numerat money, and 'all utheris quilk may be proponed in the contrar; as also, for 'the .... utilitie and weill of the kirk and successoris thairof, 'ministers at Fordyce and Cullen, speciallie for the augmentation 'of the sum of five hundreth merkis, usual money of this realm, July 16. 1823.

TEIND COURT. Lords Reston and Cringletie.

July 16. 1823.

'to be paid yearly to the saidis ministeris, in manner following, 'mair nor wes containat in the assedation set of auld.' The reddendo of the tack was in these terms: 'Payand therefor yearly the 'said James Ogilvie, his heirs-male and assignees foresaid, to 'me and my successors, our factors and chamberlaines, or uthers 'haveand our power, all and haill the sum of three hundreth 'merkis, usual money of Scotland, as the auld dutie and teind-'silver payit of before for the teind-sheaves and viccarage of the 'said parochin of Fordyce, with the pendicles foresaid, together 'with the sum of five hundreth merkis, money foresaid, in aug-'mentation of the rental of the said teind-sheaves and teind viccar-'age, mair nor wes contained in the assedation set of auld, ex-'tending in the hail to the sum of aucht hundreth merkis, to be 'payed in manner and at the termes following.'

Patrick Darg having thereafter, in 1618, obtained an augmentation of stipend, the tack which he had granted to James (now Sir James) Ogilvie was prorogated from the expiry of the original term for 203 years—that is, till 1845. In 1656, Sir James Ogilvie (who was now Earl of Findlater) executed an assignation of the tack and decreet of prorogation, so far as they included the teinds of Birkenbog, situated within the united parishes, in favour of John Abercromby of Farskan, during the whole period of the tack so prorogated. The terms of the assignation were thus expressed:—'And now for certain sums of money, causes 'onerous, others gratitudes and good deeds payed, done, and per-'formed to me be Mr. John Abercromby of Farskan, my cousin, 'whereof I hold me well pleased, and exoners and discharges him 'of the samen for ever: Wit ye me, as having the only undoubted 'right of the parsonage teinds of the lands under written, by virtue 'of the rights and titles above mentioned, to have made, consti-'tuted and ordained, and be the tenor hereof make, constitute, 'and ordain the said Mr. John Abercromby, his heirs and dona-'tors whatsoever, my very lawful, undoubted, and irrevocable 'cessioners and assignees, in the maist ample form of assignation 'and disposition, in and to the fore-named tack of the teind-sheaves 'of the lands under written, and decreet of prorogation above 'mentioned and following thereupon, in so far as the samen may 'be extended, and doth concern the teind-sheaves and right of the 'teinds of the lands of the barony of Galdcross, comprehending 'the towns and lands of the mains of Birkenbog &c., as the 'samen is occupied and possessed by the tenants and possessors 'thereof, lying within the park of Galdcross, parochin of For-'dyce, and sheriffdom of Banff, and that for all the days, years, 'and space contained in the foresaid tack and decreet of proro-

July 16. 1823.

'gation above mentioned.' There was then subjoined a conveyance of the power of collecting the teinds of the lands above named, of using inhibition, and maintaining actions of spulzie, and of granting tacks of 'the samen teynd-sheaves of the 'said lands, or any part thereof, long or short, to set and dispone 'to whatsomever person or persons he shall think expedient, and 'generally all and sundry other things to do, use, and exerce 'anent the premises, sicklike and as freely in all respects, as I 'might have done myself before the making hereof, paying for 'the said teynd-sheaves of the lands above specified, the said Mr. 'John Abercromby and his foresaids, to me, my heirs and successors, or to the minister of Fordyce for the time, for my relief, 'the present teind-silver payable by Mr. Alexander Abercromby 'of Birkenbog, heritor of the said lands, and the tenants and 'possessors thereof, extending to the sum of yearly, 'as the proportional part of the minister of Fordyce his present 'modified stipend, and that all for either tack-duty, due service, 'or further burden, may be imposed or asked furth of the said 'teind-sheaves: And sicklike the said Mr. John Abercromby and 'his foresaids relieved me and my foresaids of all stents, taxations, impositions, and annuities quilk shall happen to be imposed 'or already imposed upon the said teinds in time coming during 'this present right, and that according to an equal proportion 'with the rest of the teinds of the said parochin of Fordyce: 'Likeas I, by thir presents, declare this present assignation and 'disposition of the teind-sheaves of the lands above specified to 'be as valid and sufficient a title and right, in whatsomever respect, as if the same had been made and granted by way of 'tack and assedation during the haill years and space contained 'in the rights and the titles made and granted to me thereupon; 'and shall warrant and defend this present right and assignation 'to the said Mr. John Abercromby and his foresaids from my 'own fact and deeds allenarlie, to wit—that I have not done, nor 'shall not do any thing which may be hurtfull or prejudicial 'hereunto in any sort; and further, I bind and oblige me and 'my foresaids to make the foresaid tack and decreet of prorogation above mentioned furthcoming to the said Mr. John Abercromby and his foresaids, whenever he shall have adoe therewith, 'either for pursuit or defence of any action competent thereby, 'or at least shall produce and exhibit before any Ordinar Judge, 'to the effect the samen may be transumed, and the transumpts 'thereof delivered to the said Mr. John Abercromby and his 'foresaids upon their own proper charges and expences.'

Thereafter, in 1665, John Abercromby, the assignee, con-

July 16. 1823.

veyed the teinds which had been so assigned to him to Sir Alexander Abercromby, proprietor of the lands of Birkenbog, in liferent, and to his son Alexander in fee. To these lands of Birkenbog, and also to the teinds which had been so assigned, the respondent, Sir George Abercromby, subsequently acquired right.

By virtue of the statute 1690, c. 23, the Earl of Findlater, as patron, obtained an heritable right to those teinds of the parish which were not heritably disponed, 'with the burden always of 'the minister's stipend, tacks and prorogations already granted of 'the said teinds, and of such augmentations of stipends, future 'prorogations, and erections of new kirks, as shall be found just 'and expedient.'

Thereafter the Earl of Seafield succeeded to the estates of the Earl of Findlater, and to the original tack and decreet of prorogation; and being patron of the parish, and the clergyman having obtained two augmentations in 1796 and 1812, a question arose as to the mode in which this new burden should be imposed on the teinds held by the respective parties. On the part of the Earl of Seafield it was maintained, that as he had an heritable right to his teinds in virtue of the statute 1690, c. 23, and as Sir George Abercromby held his only as tacksman, both the tack-duty and the teinds so held by him must be allocated before those which the Earl heritably possessed. On the other hand, Sir George Abercromby contended, that such a right under the statute 1690, acquired subsequent to the assignation of the tack in 1656, was under the burden of that tack, and could not have the effect to discharge the clause of warrandice; and the stipulation that the supervenient burdens were to be borne by the assignees under the tack, 'according to an equal proportion with the 'rest of the teinds of the said parochin.' Lord Reston, on the 28th November 1815, in respect 'that Sir George Abercromby 'possesses his teinds under an assignation to a tack in 1656, 'which makes the assignee liable in augmentation in proportion 'to the other teinds of the parish, and that the Earl has right to 'the teinds of his lands under the act 1690, c. 23, which re-'serves tacks previously granted, found that, during the subsist-'ence of the tack, the Earl and Sir George fall to be allocated 'on inter se pari passu.' The Earl of Seafield having represented against this interlocutor, Lord Cringletie, on 25th February 1817, found, 'That the order of allocating stipends, as laid 'down by all authorities, is, that the free teinds in the hands of 'the titular, and, of course, the teinds of such heritors as have no 'right to them, being in that situation, are first liable. 2d, That

'where there are tacks of teinds, the tack-duty payable to the titular or patron is next liable. 3d, That the teinds themselves under that lease, as being held by a temporary right only, are liable tertio loco; and, last of all, the teinds of heritors, including those of the titular or patron, who have heritable permanent rights to their tithes; therefore alters the interlocutor complained of, so far as to find, that the teinds of Sir George Abercromby's lands, to which he has right only by a lease, which lasts no longer than the year 1845, are liable to be exhausted before any part of the teinds of the lands pertaining to the Earl of Seafield, the patron, can be localled upon; but in respect that the said Earl obtained right to his teinds in virtue only of the act 1690, c. 23, though they appear now to have been inserted in a charter from the Crown in 1750, with an infeftment thereon, and by the said statute his Lordship is expressly burdened with then existing tacks, or prorogations of tacks; as also, that by the assignation to Sir George Abercromby's author in 1656, the assignee is declared to be liable for augmentation only in proportion to the other teinds of the parish; finds, that Sir George Abercromby is entitled to relief from the said Earl of such part of the minister's stipend as he shall pay yearly, over and above what has been paid by him in time past, under the former locality, during the currency of the said tack, in terms of the case of Edzell, 9th December 1713.'

'NOTE.—The Lord Ordinary considers that the principle assumed in his interlocutor arises out of the temporary nature of a tack. A locality is permanent, and consequently must be made on principles which will apply to it during its existence. But in 1845, after the lease expires, the principle that Sir George Abercromby's land must be allocated on along with the Earl of Seafield's will cease; and therefore his teinds must now be localled upon, affording him relief in the manner set down in the foregoing interlocutor. In this way, Sir George gets the same relief afforded him by Lord Reston's interlocutor during the currency of the lease, which is all he is entitled to; and afterwards the locality remains on its true principles; because, after 1845, Sir George's teinds will be free teinds. Were it possible for the Earl of Seafield to refuse to give this deduction, it appears to the Lord Ordinary that Sir George would, in that case, be entitled to a prorogation of his tack, provided his teinds be not exhausted, as the statutes authorize this Court to take the teinds under lease for stipend to the minister; but if this be done, these statutes also infer that a prorogation of the lease should be given.'

July 16. 1823.

Against this interlocutor the Earl of Seafield again represented; and in appointing the representation to be answered, Lord Cringletie issued this note:—

'The Lord Ordinary wishes the respondent to attend to this 'circumstance: In 1656, when the Earl of Findlater assigned the 'tack of teinds to John Abercromby, in so far as regarded the 'lands of Birkenbog, the Earl was tacksman only of the whole 'teinds of the parish; and, of course, he stipulated that the 'teinds of Birkenbog should bear an equal part of the burden of 'future augmentations proportionally along with the other teinds 'of the parish. This stipulation is only what would have been 'enforced by law, if none such had been expressed; because the 'whole other teinds having been in pari casu with those of Birken-'bog, all held by tack, all would have been equally liable to aug-'mented stipend. But the difficulty is, did that stipulation, 'which inerat de jure imply a warrandice, that if the Earl 'ever acquired an heritable right to these teinds, he was not to 'claim the benefit arising by law out of such right? For, unless 'this warrandice shall be implied, it seems difficult to say, that, 'having acquired an heritable right, his Lordship is not to have 'the advantage of it. Suppose the Earl had sold the patronage 'to another prior to the act 1690, would that other have been 'bound to relieve Sir George Abercromby? He would have got, 'as the Earl did, the teinds under the burden of the tack; but 'does the tack infer that the teinds were not to be burdened to a 'greater extent than the tack-duty, unless a similar burden was 'imposed on the teinds held by heritable rights, either in the per-'son of the patron, in virtue of the act 1690, or by purchases from 'him, under the authority of the act?' Upon advising the representation with answers, his Lordship pronounced this interlocutor: 'The Lord Ordinary having again advised this repre-'sentation with answers, in respect that the predecessor of the 'representer acquired, qua patron of the parish of Fordyce, the 'titularity of the teinds thereof, in virtue of acts of Parliament, 'is of opinion that he incurred no liability from the warrandice 'given from fact and deed in the assignation to the respondent's 'predecessor, granted by James Earl of Findlater, of the tack of 'teinds in his Lordship's favour, in so far as the same related to 'the teinds of the lands of Birkenbog, belonging to the respond-'ent's predecessor; and therefore recalls the interlocutor com-'plained of, in so far as it finds that the representer must relieve 'the respondent of the proportion of stipend allocated on his 'lands during the currency of the said tack; but, quoad ultra, 'adheres to that interlocutor.'

Sir George Abercromby then reclaimed to the Court; and on the 9th December 1818 their Lordships 'altered the interlocutors of Lord Cringletie complained of, and affirmed that of 'Lord Reston, of date the 28th November 1815, finding that, 'during the subsistence of the tack to which Sir George Abercromby, the petitioner, has right by assignation, the petitioner 'and the respondent fall to be allocated upon inter se, pari passu.' The Earl of Seafield having brought this judgment under review, their Lordships, on the 16th of June 1819, 'recalled the interlocutor complained of, and found in terms of Lord Cringletie's 'interlocutor in the cause, of date the 25th day of February '1817, in all respects, and decerned accordingly.'* July 16. 1823.

The Earl of Seafield then appealed against the judgments thus finding him liable in relief to Sir George Abercromby, on the ground,—

1. That it is a rule of the law of Scotland, that teinds to which the heritors of the lands from which the teinds arise have either no right at all, or a right by tack only, are liable to allocation before those held by heritable right: that it made no difference on this rule that the teinds heritably possessed had been acquired by virtue of the statute 1690, and not by ordinary titles, because the right bestowed by that statute proceeded on an onerous consideration, viz. the loss of the patronage; and that although there was a provision that this right should be under the burden of tacks, yet this was not intended to alter the ordinary rules of allocation, but merely to declare that the tacks should stand good against the new titular.

2. That there was nothing in the assignation of the lease to entitle Sir George Abercromby to relief, seeing that such an assignation of part of the teinds could not prevent the Earl of Findlater (by whom it was granted, and who had right to the other teinds as tacksman) from acquiring a higher right to these teinds, and so obtaining a privilege in a question of allocation: And,—

3. That, at the very utmost, the Earl of Seafield was not liable in a total relief, but only for such part as Sir George Abercromby was bound to pay of the augmented stipend over and above his tack-duty, in proportion with that falling on the other teinds of the parish.

On the other hand, it was maintained by Sir George,—

1. That, prior to 1690, the predecessors of the respective parties stood in the situation of joint tacksmen of the whole teinds of the parish—those of Sir George having right to the teinds of Birkenbog, while those of the Earl of Seafield possessed the remaining

* Not reported.

July 16. 1823.

teinds of the parish:—that by the assignation it was expressly stipulated that the predecessor of the Earl should not do 'any 'thing which may be hurtful and prejudicial hereunto in any sort; 'and that the assignee should only suffer the burden of future 'impositions upon the teinds, according to an equal proportion 'with the rest of the teinds of the said parochin of Fordyce:' that, therefore, if, prior to the statute 1690, a stipend had been modified and localled, the allocation must have been made rateably upon the joint tacksmen, and consequently neither the Earl of Findlater nor his representatives could, consistently with that assignation, acquire any right by which the assignee would be placed in a worse situation than he formerly was under his assignation, which limited his obligation to the payment of the rent therein stipulated: And,—

2. That the statute expressly burdened the heritable right thereby bestowed with all the tacks then in existence, and consequently with all the stipulations and clauses in these tacks; so that (independently of the circumstance of the Earl of Seafield's representing the granter of the assignation) he could only avail himself of the heritable right bestowed by the statute, subject to the burden there mentioned.

The House of Lords found, 'That the teinds of the whole 'parish of Fordyce appear to have been comprised in the tack 'dated 9th August 1604, subject to the tack-duty, in the name 'of teind-silver, reserved by the said tack; and that such tack 'was, by the decreet of the Commissioners of Parliament of the '19th June 1618, prorogated in favour of James, then Earl of 'Findlater, (then claiming the benefit of the said tack of 1604,) 'for the space of 203 years after the expiring of the said tack, 'which prorogation will not expire till the year 1845; and that, 'at the date of the assignation of the 14th June 1656, the said 'James Earl of Findlater was entitled, under the said decreet of 'prorogation, to all the teinds of the said parish for and during 'all the time expressed in the said decreet of prorogation, and 'that no title could be gained to the teinds of any part of the said 'parish, but subject to the said prorogation of the said tack, un-'less with the concurrence of the said James Earl of Findlater, 'or of those claiming under him: And the Lords further find, 'that, according to the terms of the said assignation of the 19th of 'June 1656, the respondent Sir George Abercromby, claiming 'under the said assignation, was, as between him and the appel-'lant claiming under the said James Earl of Findlater, liable to 'be charged for further augmentation of the minister's stipend 'in respect of the teinds comprised in the said assignation of 1656, 'over and above what had been before paid by him under the

'terms of the said assignation, in proportion to the other teinds of the said parish, but not in any greater proportion; and that the appellant, claiming under the said James Earl of Findlater, who was entitled under the said tack and prorogation, and was also patron of the said parish, is bound, under the terms of the said assignation of 1656, to relieve the respondent of such part of the minister's stipend as he shall pay yearly during the continuance of the said tack, over and above an equal portion with the rest of the teinds of the said parish comprised in the said tack and prorogation of tack, the said tack and prorogation of tack being, as between the appellant and respondent, to be deemed to have continued until the expiration of the said term of 203 years with respect to all the teinds of the said parish, in regard that during the said term no title to the said teinds could have been obtained by any person, except subject to the said tack and prorogation of tack, without the act and concurrence of the said James Earl of Findlater, or of those claiming under him; and therefore, if any title to any of such teinds has been obtained, discharged from the said tack and prorogation of tack, the same must have been obtained by the act of the said James Earl of Findlater, or of those claiming under him: And it is ordered, that with these findings the cause be remitted back to the Court of Session, to do therein as shall be consistent with these findings, and as shall be just.'

July 16. 1823.

Appellants' Authorities.—2. Ersk. 10. 51. and 52; 2. Connell, 233. 238, and Cases there quoted; 3. Stair, 2. 2.

Respondent's Authorities.—Arbuthnot, Dec. 2. 1698, (7751); Forbes, Dec. 9. 1713; Dunbar, Jan. 17. 1750, (15863); 2. Connell, 238.

J. CHALMER,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 24.)

THOMAS DUNLOP DOUGLAS, Esq. Appellant.—*Skene.* No. 67.
Sir JAMES COLQUHOUN, Respondent.—*Forsyth.*

Freehold Qualification—Member of Parliament—Retour.—Held, (affirming the judgment of the Court of Session,) That a retour of feu-lands bearing the old extent to be £4: 3: 4, and the new extent and feu-duties to be £4. 5s., was not sufficient to establish that the lands were a forty shilling land of old extent.

THE appellant Thomas Dunlop Douglas, having claimed to be enrolled in the roll of freeholders of the county of Dumbarton, produced in support of his claim,—1. A charter of resignation

July 16. 1823.

2D DIVISION.