CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1842.

[*7th May*, 1840, and 21*st Feb.* 1842.]

The Right Honourable James Viscount Maitland and Others, Trustees of the late John Marquis of Breadalbane, Appellants.

William Horne, Esq. of Scouthill, Advocate, Respondent.

Assignation — Parts and Pertinents. — An obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend, in order to be effectual to singular successors in the lands, must be specially assigned, and will not be vested in them as a part and pertinent, nor by virtue of a general assignation to writs, &c.

Warrandice. — An obligation by a disponer of lands to warrant the disponee against future augmentations of stipend, does not come within the warrandice of the title to the lands; but is an obligation collateral to, and irrespective of, the title.

THIS case regarded the right of the respondent to be relieved by the appellants, of augmentations of stipend drawn from three parcels of land possessed by him, viz. Sybsterwick, Wedderclett,

and Hausters, and depended upon the terms of the title, under which the respondent had acquired these lands.

On the 28th day of December, 1675, John Campbell of Glenorchy, and Francis Sinclair of Stircock, entered into a contract of wadset, whereby, on the narrative that as Sinclair had lent to Campbell 20,245 merks, 4s. 4d. Scots, therefore Campbell, with consent of the Earl of Caithness, "sold, annaillied, wadsett, "impignoratt, and disponed, and by the tenor hereof, all w^t^ one "consent and assent, as said is, sell, annailie, wadsett, impig-"norat, and dispone, to the said Francis Sinclair of Stircock, "in liferent, during all the days of his lifetime, and to the said "Patrick Sinclair, his son, and the heirs-male lawfully to be "procreat of his body; w^h^ failing, to the s^d^ Patrick Sinclair, his "other nearest heirs and assignees, in fee, heretably, redeemably "always, and under reversion to the said John Campbell of "Glenorchy, and w^t^ and under the other provisions and condi-"tions after spect, conceived in favours of the s^d^ Francis Sinclair, "in manner after exprest, All and Haill the lands of Subster-"Wick, Wedderclett, and Hauster, w^t^ all and sundry houses, "biggings, yards, and orchyeards, mosses, muirs, meadows, pas-"turages, grassings, sheilings, parks, woods, inclosures, ports, "havens, creiks, harbors, fishings, and fish-boats, annexis, con-"nexis, dependencies, tenants, tenandries, service of free tenants, "parts, pendicles, and pertinents of the samen haill lands, all "presently occupied and possess'd by the persons after-named."

After the description of the lands, the contract contained an obligation to infeft, a procuratory of resignation, and a clause of warrandice, which in part was expressed as follows: — "Whilks "infeftments above written, shall bear and contain the warran-"dice following, likeas now as if the said infeftments were "already past and expede, and then, as now, the said John "Campbell of Glenorchy faithfully binds and oblidges him, his "heirs and successors, to warrand, acquit, and defend the land,

" teynds, and others above-written, w^t y^e pertinents, according
" as the samen are hereby disponed and wadset, in manner
" above-mentioned, w^t this present disposition, and rights thereof,
" and infeftments to follow hereupon, to be free, safe, and sure,
" to the s^d Francis Sinclair, and his said son, and his foresaids,
" from all and sundry wards, reliefs, non entries, marriages,
" ladies terces, conjunct fees, liferents, annualrents, prior aliena-
" tions, dispositions, and wadsets, privat and public seasines,
" tacks, assedations, long or short escheits, forfaltures, bastardies,
" recognitions, disclamations, purprestures, inhibitions, interdic-
" tions, evictions, apprysings, adjudications, reductions, impro-
" bations, bygone rents, taxations, and impositions, tack-duties,
" teynd-duties, great and small, parsonage and vicarage, or of
" whatsomever denomination the same be of, w^t the annuities of
" teynds, bishop's quarters, ministers' stipend, reader's and
" schoolmaster's stipends, and augmentations thereof, and gene-
" rally from all other perils, dangers, and inconveniences w^tsom-
" ever, as well not named as named, bygone, present, and to
" come, whereby the said Francis Sinclair and his said son or
" his fors^ds, may be any ways troubled, hindred, or impeded in
" the peaceable possession of the lands, teynds, and others above
" written, with their pertinents; or in uplifting the maills, farms,
" profits, and duties thereof; or in selling, raising, using, or
" disponing thereupon, in all time coming, at y^r pleasure, during
" the not redemption y^rof, by virtue of the reversion after spect,
" at all hands whatsomever, and ag^st all deadly: Likeas, y^e said
" John Campbell of Glenurchy binds and obliges him, and his
" foresaids, to warrant and relieve the said Francis Sinclair, and
" his said son, and his foresaids, of all tack-duties, teynd-duties,
" ministers' stipends, reader's and schoolmaster's stipends, and
" augmentations thereof, and oy^r burdens w^tsomever, w^ch may be
" imposed on or creav'd furth of the saids lands or teynds at any
" time hereafter, during the not-redemption thereof, except alle-

" narly, the lien of excise, and annuity of teynds, which shall be
" due and payable furth of the lands, teinds, and oyrs above
" written, furth and frae the term of Whitsunday last, and in
" time coming, during the said not-redemption; and also ex-
" cepting such cess taxations, and oyr public burdens which shall
" happen to be imposed upon the said lands by ye Parliament,
" or any Convention of Estates, which the said Francis Sinclair,
" and his said son, and the sds lands and teynds are to pay and
" bear the burden of, furth and frae the said term of Whitsun-
" day last bypast, and in time coming, during the not-redemp-
" tion of the samen lands and teinds;—which assignation and
" right of yc foresaids teynds, the said John Campbell of Glen-
" orchy binds and obliges him, and his foresaids, to warrand to
" be good, valid, and sufficient to the sd Francis Sinclair, and
" his said son, and his foresaids, at all hands whatsomever, and
" against all deadly; and if at any time during the said not-re-
" demption, the tacks and oyr rights of the teynds of the lands
" and others foresaids, now standing in the person of the said
" John Campbell, shall expire, the said John Campbell binds
" and obliges him, and his foresaids, to procure the same re-
" new'd from time to time, during ye sd not-redemption, and to
" transmit the right thereof in favours of the said Francis Sin-
" clair, and his said son, and his foresaids, wtout paying any
" entrie, tack-dutie, or other duty or gratuity yrfor: And sicklike,
" the said John Campbell, wt consent foresaid of the said noble
" Earl, and his said lady, and they all with one consent and
" assent, have, during the sd not-redemption, assigned, trans-
" ferred, and dispon'd, and by ye tenor hereof transfer, assign,
" and dispone, to the sd Francis Sinclair, and his said son, and
" his foresaids, all and sundry dispositions, contracts, charters,
" infeftments, pro'ries, and instruments of resignation, precepts,
" and instruments of sasine, and other rights and securities,
" already made and granted to the said John Campbell, or any

" of his authors, or which he shall hereafter acquire, or to the " said noble Earl, and his said lady, of and concerning the lands, " teynds, and others, a'written w^t^ the pertinents."

Infeftment passed upon this wadset, in favour of Francis and Patrick Sinclair.

On the 16th June, 1706, John Lord Glenorchy, the son of John Campbell of Glenorchy, who, after 1675, had become Earl of Breadalbane, and Francis Sinclair, entered into an agreement by minute, for the purchase by Sinclair of the reversion of the above wadset.

On the 28th of March, 1715, Lord Glenorchy and Francis Sinclair executed a contract, which, after describing Lord Glenorchy as " heritable proprietor of the lands and others under- " written, and as having right, by disposition and assignation " from an Noble and potent Earl, John Earl of Breadalbane " and Holland, &c. his father," and reciting the wadset of 1675, proceeded thus:

" And now, seeing the said Francis Sinclair, now of Stir- " cock, has at and for the making hereof advanced, paid, and " delivered to the said John Lord Glenorchy the sum of eight " thousand, eight hundred merks Scots money, as the agreed " price and adequate value of the reversion of the lands and " teinds above specified, with the pertinents contained in the " said wadset, which sum, with the foresaid sum of twenty thou- " sand, two hundred and forty-five merks, four shillings, four " pennies Scots, for which the same were wadset, and the fore- " said sum of four hundred merks expended for passing infeft- " ment thereon, with the annualrents thereof, from the said term " of Candlemas, 1676 years, extends to the full value, worth, " and price of the heritable and irredeemable right and property " of the said haill lands, teinds, and others above-mentioned, " wherewith the said John Lord Glenorchy holds himself well " content and satisfied, and renounces hereby all objections and " exceptions of the law proponable on the contrary for ever:

" Therefore, the said John Lord Glenorchy, as having the good " and undoubted right to the reversion contained in the said " contract of wadset, and to the irredeemable right and property " of the lands, teinds, and others thereby wadset, for himself, " his heirs and successors whatsomever, by thir presents, not " only renounces and discharges all right of reversion, redemp- " tion, or regress whatsomever competent to him or his foresaids, " any manner of way, by the foresaid right or otherways, of the " lands, teinds, and others contained in the said wadset, and " exoners and discharges the said Francis Sinclair, his heirs and " successors, and all others the heirs and representatives of the " said deceased Francis and Pat. Sinclairs thereof, and of all " obligements and conditions of reversion granted by them, or " any of them, anent the redemption of the said lands and teinds; " and in like manner of the sum of thirty-one pounds, twelve " shillings Scots money, of yearly duty, payable by the foresaid " wadset right to the said John Earl of Breadalbane, and now " to the said John Lord Glenorchy, as deriving right from him, " and that as well of all years and terms bygone, as in all time " coming, and of all action, instance, pursuit, and execution, " competent, or that may be any ways competent, to the said Earl, " or to the said John Lord Glenorchy, any manner of way, for " or upon the said reversion, or for the said superplus yearly " rent and duty of thirty-one pounds, twelve shillings Scots, and " binds and obliges him, his heirs and successors foresaid, to " warrant the foresaid renunciation and discharge of the said " reversion and superplus rent and duty at all hands, and against " all deadly: Excepting from the warrandice of the discharge " of the superplus duty all former partial receipts and payments " thereof, which, with the foresaid discharge, are nowise to infer " double payment and warrandice, but only one and single: But " also of new, for the causes foresaid, to have sold, annalzied, and " disponed, likeas the said John Lord Glenorchy, in corrobora- " tion of the foresaid contract of wadset, and but any hurt, pre-

" judice, or derogation thereto in any sort, but in farther fortifi-
" cation thereof, in so far as the same may remain and be made
" use of for farther strengthening and securing the principal
" right of the purchase now acquired by the said Francis Sinclair,
" for him, his heirs and successors foresaid, sells, analzies, and
" dispones, to and in favours of the said Francis Sinclair, his
" heirs and successors whatsomever, heritably and irredeemably,
" without any manner of redemption, regress, or reversion
" whatsoever, all and haill the lands, teinds, and others above
" and after-mentioned, with their pertinents, viz.: All and haill
" the said town and lands of Substerwick, *alias* Subbuster, the
" said town and lands of Wedderclett, and the said town and
" lands of Hauster, *alias* Hasbuster, with all and sundry houses,
" biggings, yeards, orchyeards, mosses, muirs, meadows, pastur-
" ages, grazings, sheallings, parks, woods, and inclosures, ports,
" havens, crooks, and harbours, fishings, and fish-boats, annexis,
" connexis, dependencies, tenants, tenandries, and service of free
" tenants, parts, pendicles, and universal pertinents of the same
" lands whatsomever, conform to use and wont, all lying within
" the parish of Wick, and sheriffdom of Caithness; together
" with the haill parsonage teinds and teind sheaves of the saids
" haill lands, with their pertinents; together also with all right,
" title, interest, claim of right, property, and possession, as well
" petitory as possessory, which the said John Lord Glenorchy,
" or his predecessors, cedents, or authors, had, have, or any
" ways may have, claim, or pretend to the said lands, teinds,
" and pertinents thereof, or any part of the same in time
" coming." (Here followed an obligation to give a public infeftment — Sinclair relieving Lord Glenorchy of certain ward, relief, and non-entry duties.) " And, in like manner,
" paying yearly for the teinds of the said lands of Subster-
" wick, *alias* Subbuster, and pertinents thereof, to the minister
" serving the cure at the parish of Wick, present and to come,

" of the sum of twenty nine pounds, two shillings, and eight " pennies Scots of money, and two bolls victual, and for the " teinds of the said lands of Wedderclet and Hauster, of eight " pounds, six shillings, eight pennies of money, and two bolls of " victual, to the said minister of the parish of Wick, present and " to come, and relieving the said John Lord Glenorchy and his " foresaids, at their hands thereof yearly, as the proportional " part of the stipend now agreed upon to be paid yearly to the " said minister and his successors, for the teinds of the said haill " lands hereby disponed, in all time coming, and that in part " payment to the said minister of the stipend payable by the " said John Lord Glenorchy to him and his successors out of his " lordship's interest in the said parish *pro tanto*, beginning the " first term's payment of the said money-stipend at the feast and " term of Martinmas next, 1715 years, for that year's crop, and " of the victual-stipend for the said crop betwixt Yuill and " Candlemas thereafter, and so forth yearly and termly there- " after, in all time coming, and these for all other duty, customs, " secular services, exaction, or demands, that can be anyways " asked or craved of and from the said Francis Sinclair, or his " foresaids, out of the said lands and teinds, any manner of way " in time coming."

Here followed a procuratory of resignation, which repeated the above clause in regard to the payment to the minister of Wick, " which infeftments shall bear and contain the express " clause of warrandice following, likeas now, as if the same were " already past and expede, and then as now, the said John Lord " Glenorchy, by thir presents, binds and obliges him, his heirs, " and successors, to warrant, acquit, and defend this present " right and disposition, charters, resignations, and infeftments to " follow thereupon, and haill lands and others above disponed, " with the pertinents, together with the teind sheaves and par- " sonage teind of the same haill lands, to be good, valid, and

" sufficient, free, safe, and sure to the said Francis Sinclair, and " his foresaids, heritably and irredeemably, as said is, from all " and sundry wards, reliefs, non-entries, marriages, single and " double avails thereof, escheats, liferents, forfeitures, conjunct " fees, ladies' terces, wadsets, annualrents, former alienations, " private and public infeftments, interdictions, inhibitions, " apprisings, adjudications, recognitions, disclamations, pur- " prestures, reductions of infeftments, services, retours, impro- " bations, tacks, assedations, nullities, and from all taxed ward, " marriage, fee, and non-entry duties, which may hereafter " burden and affect such of the lands and others above men- " tioned as the said John Lord Glenorchy holds taxed, ward, " or fee, (except the proportion of the taxed ward and blench- " duties, which the said Francis Sinclair is burdened with by this " present right,) and to warrant, free, and relieve the said " Francis Sinclair, and his foresaids, of and from all future " augmentations of ministers' stipends, and burden upon the " teinds of the said haill lands, whether by augmentation, new " erection of parishes, or additional stipends, and that as well of " all years and terms bygone as in all time coming, and from all " other perils, incumbrances, burdens, dangers, and grounds of " eviction whatsomever, as well not named as named, bygone, " present, or to come, which may anyways stop, hinder, or " impede the said Francis Sinclair, or his foresaids, in the " peaceable possession, bruiking and enjoying of the said haill " lands and pertinents thereof above disponed, and teinds of the " same, and intromissions with, uplifting and receiving of the " mails, rents, profits, and duties thereof, in all time coming, at " all hands, and against all deadly, and but any hurt, prejudice, " or derogation, to the absolute warrandice contained in the " wadset right above narrated. Excepting always furth and " from the said warrandice both of lands and teinds, such " incumbrances (if any be) proceeding, or that hereafter may

" proceed, upon the facts and deeds of the saids deceased Francis " and Patrick Sinclairs, or of the deceased John Sinclair, late of " Stircock, father to the said Francis Sinclair, now of Stircock, " and of the said Francis Sinclair himself, since the granting of " the said wadset right above specified, and in time coming; " excepting also from the said warrandice the foresaid contract " of wadset, granted by the said John, Earl of Breadalbane, " (therein designed John Campbell of Glenorchy,) to the said " deceased Francis Sinclair of Stircock, of the lands, teinds, and " others above disponed, and infeftments following upon the " same, in so far allenarly as the same may import or infer " double warrandice against the said Earl, or the said John " Lord Glenorchy, his son, or their foresaids: But prejudice, " nevertheless, of the real right of wadset and infeftment follow- " ing thereon, to stand and remain in full force, as a farther " security to the said Francis Sinclair and his foresaids of the " lands, teinds, and others therein contained, excepting as is " above excepted: And the said Francis Sinclair binds and " obliges him and his foresaids, by their acceptation hereof, to " free, relieve, and disburden the said John Lord Glenorchy and " his foresaids, not only of the cess, taxations, ministers' and " schoolmasters' stipends, and other public burdens, imposed " upon the said lands and teinds above disponed, and due and " payable by them by the foresaid wadset right of all years and " terms bygone, since the time of their entry to the possession " of the said lands and teinds by virtue of the foresaid wadset " right; but also of all cess, taxation, horse and foot levies, " schoolmasters' stipends, and other public burdens and imposi- " tions whatsomever, imposed or to be imposed upon the said " lands in all time coming, and in like manner of the propor- " tions of stipend money and victual above specified, now con- " ditioned and agreed upon to be paid by him and his foresaids, " by this present right, to the minister serving the cure at the

" said parish kirk of Wick and his successors, also at and from " the term of Martinmas next to come, and yearly thereafter, " and for ever in all time coming, at the terms and in manner " above mentioned." (*Here followed a discharge of the money payable under the wadset.*) " Providing always, as it is hereby " expressly provided and declared, that the foresaid discharge " shall be without hurt, prejudice, or derogation to the absolute " warrandice contained in the said wadset right, and of the " wadset right itself, in as far as it may operate to a farther " security upon the lands, teinds, and others hereby disponed " in manner before mentioned. And, farther, the said John " Lord Glenorchy has made, constituted, and ordained, and " hereby makes, constitutes, and ordains the said Francis " Sinclair and his foresaids, his cessioners and assignees, in and " to the haill mails, farms, kains, customs, and casualties, " services, profits, and duties of the saids haill lands, teinds, and " others above disponed, and pertinents of the same, and that of " and for the crop and year of God seventeen hundred and " years, and haill terms thereof, and of all years and " terms thereafter, and in time coming, and to all action, " instance, pursuit, and execution whatsomever, competent to " them thereanent; and for the said Francis Sinclair and his " foresaids their farther and better security on the lands, teinds, " and others above disponed, and pertinents of the same, the " said John Lord Glenorchy assigns, transfers, and dispones, to " and in favours of the said Francis Sinclair and his foresaids, " all and sundry services, retours, precepts, and instruments of " sasine following thereupon, dispositions, contracts, charters, " apprisings, adjudications, and grounds and warrants thereof, " procuratories and instruments of resignation, precepts and " instruments of sasine, and other writs, evidents, rights, titles, " and securities whatsomever, made and granted by whatsomever " person or persons, to and in favour of the said John Lord

" Glenorchy and his predecessors, cedents, and authors, or led, " deduced, and obtained, at their, or either of their instances, " of, upon, or concerning the lands, teinds, and others above " disponed, with their pertinents, haill heads, articles, and " clauses of the saids writs and securities, with all that has fol- " lowed, or may follow thereupon, in so far as may be extended " in manner underwritten, and also all and sundry tacks, " assedations, decreets of platt and prorogation, assignations, " translations, dispositions, valuations, and other rights of and " concerning the teind sheaves and parsonage teinds of the haill " lands, and others above disponed, either already made, past, " and granted, of and concerning the same, in favours of the said " John Lord Glenorchy, or his predecessors, cedents, and " authors, or which they shall hereafter acquire, with the burden " always of the foresaid proportion of stipend money and " victual payable to the minister serving the cure at the said " parish of Wick, present and to come; and specially but preju- " dice of the generality foresaid, in and to the rights, and " dispositions made and granted to the said John, Earl of " Breadalbane, (therein designed John Campbell of Glenorchy,) " and to his heirs and assignees, by the deceased George, Earl " of Caithness, of the lands and earldom of Caithness and " baronies therein, with the infeftments and others following " thereupon: And in like manner, in and to the foresaid right " and disposition, made and granted by the said John, Earl of " Breadalbane to the said John Lord Glenorchy, of the saids " lands and earldom of Caithness, comprehending therein the " particular lands, lordships, and baronies therein expressed, " and in and to the procuratorie of resignation therein contained, " with the instrument of resignation following, or competent to " follow thereupon, and all these writs, generally and particularly " above mentioned and assigned, in so far allenarly as concerns " or may be extended to the said Francis Sinclair and his fore-

" saids, their security on the said lands, teinds, and others " hereby conveyed, and haill parts, pendicles, privileges, and " universal pertinents thereof, in manner hereby disponed, and " no farther; the maills and duties the said John Lord Glenorchy " binds and obliges him and his foresaids to warrant to be good " and sufficient to the said Francis Sinclair and his foresaids, " from his own proper fact and deed, allenarly done, or to be " done, in prejudice hereof; and the foresaid assignation to the " writs and evidents, in so far as may be extended to the " said Francis Sinclair and his foresaids, their security on the " saids lands, teinds, and others hereby disponed, at all hands, " and against all deadly: And because the writs of the lands, " teinds, and others above mentioned, contain diverse other " lands and teinds of far greater value than what are hereby dis- " poned, whereby the writs and evidents thereof cannot be " delivered: Therefore the said John Lord Glenorchy binds " and obliges him and his foresaids, to exhibit and produce the " same writs, conform to an inventory thereof, to be subscribed " by both parties before any judge competent, to be transumed, " the charges and expenses of the transumpts to be as follows, " viz.—the one-half thereof to be on the charges and expenses " of the said John Lord Glenorchy, and the other equal half on " the charges and expenses of the said Francis Sinclair and his " foresaids, and to make the principal writs themselves furth- " coming to the said Francis Sinclair and his foresaids, when " they shall have necessarily to do therewith: And lastly, both " parties do hereby declare and acknowledge that a minute of " agreement, dated the 16th day of June, 1706 years, passed " betwixt the said John Lord Glenorchy, and the said Francis " Sinclair, now of Stircock, anent the disponing to him the said " reversion, is fulfilled and performed by them to one another " in the haill heads, articles, and obligements thereof, *hinc inde*, " by extending this contract thereupon, and by payment of the

" sum thereby agreed upon for the said reversion, and by such " other writs as are now granted by them to one another there- " anent, without any innovation or alteration, except in so far " as the same is hereby, and by these other writs of consent of " both parties, altered and innovate, and therefore do hereby " mutually discharge one another and their heirs of the same:"

These deeds embraced the whole three parcels of land; but at this point the title to Sybster-Wick became distinct from that to Wedderclett and Hausters. The title to Wedderclett and Hausters being subject to the observation that, as will appear in the subsequent statement of the title to these lands, Francis Sinclair had conveyed away the lands prior to the date of this contract of 1715. The separate titles then stood thus:

First as to Sybster-Wick. On the 5th of February 1717, Francis Sinclair disponed to John Sinclair of Barrock, " and the " heirs-male procreat, or to be procreat of his body, which " failzieing, to his other nearest heirs and assigneys whatsomever, " All and haill the town and lands of Sybster-Wick," (described as in the contract of 1715;) " together w^t^ the haill parsonage- " teinds, and teind-sheaves of the saids haill lands, with the " pertinents; together also w^t^ all right, title, interest, claim of " right, property, and possession, as well petitor as possessor, " which I, my predecessors, cedents, or authors, had, have, or " any ways may have claim or pretend to the saids lands, or any " part thereof, or teinds of the same, in all time coming. In " the w^ch^ lands, teinds, and others above disponed, I bind and " oblige me, my heirs and succ'ors, to infeft and seise the said " John Sinclair, and his foresaids, heritably and irredeemably, " as said is, to be holden from me and them of the King's " Majesty, as immediate lawful superior of the same, sicklike, " and as freely in all respects, as I, or any of my predecessors " or authors, held, hold, or any way might have holden the " same ourselves, paying therefor yearly, and freeing and re-

" lieving me." [Here followed a clause of relief in regard to the ward-relief and non-entry's duties, and the payment to the minister of Wick, in the verbatim terms of the contract of 1715.] " And I bind and oblige me, my heirs and successors, " to make, grant, and subscribe, and deliver to the said John " Sinclair, and his foresaids, all writs and securities requisite and " necessar, containing pror'ies of resigna°n, and all other clauses " needful, w^t warrandice, in manner under-written." Then followed a procuratory of resignation, embodying the clauses of relief, and a clause of warrandice, which continued thus:—" As " also, to warrand, free, and relieve the said John Sinclair and " his foresaids, of and from all future augmentations of ministers' " stipends, and other burdens on the teinds of the saids lands, " whether by augmentation or new erection of parishes, or addi- " tional stipends in all time coming, (except the proportion of " victuall and money-stipend before-mentioned, hereby agreed " upon to be payed to the minister of Wick, and his successors " in all time coming, after his entry foresaid.")

There then followed an assignation to writs and evidents in these terms:—" And for the said John Sinclair and his fore- " saids their farder and better security of the lands, teinds, and " others above disponed, and pertinents of the same, I, by these " presents, assign, transfer, and dispone, to and in favours of " him and his foresaids, all and sundry services, retours, precepts, " and instruments of sasine following thereupon, dispositions, " contracts, charters, apprisings, adjudications, and grounds and " warrants thereof, procuratories and instruments of resignation, " precepts and instruments of sasine, and all other rights, evi- " dents, writs, titles and securities whatsoever, made and granted " by whatever person or persons, to and in favours of me and " my foresaids, or led and deduced at any of their instances, of " and concerning the said lands, teinds, and others above dis- " poned, with their pertinents, haill heads, articles, clauses,

" obligements of the said writs and securities, with all that has " followed, or may follow upon all or any of them, in so far as " may be extended in manner underwritten. And also, all tacks " and assedations, decrees of platt and prorogation, assignations, " dispositions, valuations, and other rights, of and concerning " the teind-sheaves and parsonage-teinds of the said lands and " others above disponed, either already made, past, and granted, " of and concerning the samen, in favours of me, my authors and " predecessors, or which they or I shall hereafter acquire, with " the burden always of the foresaid proportion of stipend before " mentioned, both money and victual, payable to the minister " serving the cure of the said parish of Wick, and to his suc- " cessors. And specially, but prejudice of the generality " foresaid, in and to the rights and dispositions made and " granted by the deceased George Earl of Caithness, in favours " of John Earl of Breadalbane, (therein designed John Camp- " bell of Glenorchie,) of the lands and earldom of Caith- " ness: As also, in and to the rights and conveyances " made and granted to the said John Earl of Breadalbane, " (therein designed as said is,) and to his heirs and assignees, by " the deceased Sir Robert Sinclair of Longformacus, Knight; of " Mr John Bayne of Pitcarlies, apprisings and other rights upon " the estate of Caithness, whereof the lands, teinds, and others " hereby disponed, are proper parts and pertinents; and to the " saids apprisings and other rights themselves, grounds and war- " rants of the same, as also the haill other apprisings, adjudica- " tions, infeftments, and all other rights of, upon, and concerning " the saids earldom and estate of Caithness, in the person of the " said Sir Robert Sinclair and several other persons, his cedents " and authors, from whom he had right, all particularly men- " tioned and set down in two several rights and dispositions " made and granted by the said Sir Robert Sinclair to the said " Earl of Breadalbane, (therein designed as said is,) and to his

" heirs and assignees therein mentioned, both dated the
" days of and registered: And, in like manner, in
" and to the right and disposition made and granted by the said
" John Earl of Breadalbane to John Lord Glenorchie, his son, of
" the saids lands and earldom of Caithness, comprehending the
" lands, lordships, and baronies therein expressed, and particu-
" larly the lands and teinds above disponed, and in and to the
" procuratory of resignation therein contained, with the instru-
" ment of resignation following, or competent to follow upon the
" samen, dated the days of and registered;
" as also, in and to the contract of wadset, passed betwixt the
" said John Earl of Breadalbane, (therein designed as aforesaid,)
" and the deceased Francis Sinclair of Stirkoke, my grandfather,
" whereby the lands, teinds, and others above disponed, were,
" with several other lands, wadset to my said grandfather, for
" the sums therein contained, bearing date the 28th day of
" December, 1675, with the haill obligements, clause of warran-
" dice, and others therein contained, infeftments following there-
" upon, and conveyances in my favours of the same. As also in
" and to a contract of vendition passed betwixt the said John
" Lord Glenorchie and me, bearing date the 28th day of March,
" and 20th day of April, 1715 years, and registered in the General
" Register of Sasines, Reversions, and Renunciations kept at
" Edinburgh, upon the 25th day of May thereafter; whereby
" the said John Lord Glenorchie not only discharges the rever-
" sions competent to him of the lands and teinds hereby disponed,
" with several others, but also of new dispones the same in my
" favours: And in and to the procuratory of resignation, clause
" of absolute warrandice, obligement for transuming the writs
" relating to the saids lands, and haill other clauses and oblige-
" ments therein contained, conceived in my favours, with all that
" has followed, or may follow thereupon."

" And all these writs, particularly and generally above assigned,

" allenarly, in so far as may concern or be extended to the said " John Sinclair and his foresaids their security of the lands, " teinds, and others hereby conveyed, and haill parts, pendicles, " privileges, and universal pertinents thereof, hereby disponed, " and no farder: which assignation to the maills and duties I " bind and oblige me and my foresaids to be good, valid, and " sufficient to the said John Sinclair and his foresaids, from my " own proper fact and deed allenarly, done or to be done by me " in prejudice hereof: and the foresaid assignation to the rights " and evidents, so far as may be extended for a security to the " said John Sinclair and his foresaids, of the lands, teinds, and " others hereby disponed, at all hands, and against all deadly, as " law will: And I bind and oblige me, my heirs and successors, " to make such of the writs and evidents, generally and particu- " larly above assigned and transferred, as shall be in my custody " and possession, or transumpts thereof, or extracts of the same, " furthcoming to the said John Sinclair and his foresaids, when- " ever he or they shall have necessarily to do therewith, upon " their receipt and obligement to deliver the same back to me, " because they contain several other lands, and so cannot be given " up to him, or shall cause register such principal writs as I have, " or produce the same before any judge competent to be tran- " sumed, if the said John Sinclair shall think fit. The one-half " of the expenses thereof to be paid by me, and the other half by " the said John Sinclair."

John Sinclair of Barrock was succeeded in the lands and teinds of Sybsterwick by his son, Alexander Sinclair of Barrock, who, on 30th August 1744, was served nearest and lawful heir in general to him.

Alexander Sinclair, by disposition bearing date the 22d August 1769, *(the date in all the papers,)* disponed the lands of Sybsterwick to his brother, John Sinclair, who again, by disposition bearing date 17th September 1767, *(the date in all the papers,)* disponed them to Thomas Dunbar of Westfield.

MAITLAND *v.* HORNE. — 21st Feb. 1842.

In 1796, under a ranking and sale brought by the creditors of Dunbar, the lands and teinds of Sybsterwick were judicially sold to David Brodie, who, on the 22d of July, 1797, expede a charter of confirmation and sale, on which infeftment followed on 17th August thereafter.

By the decree of sale it was declared, that the "said David "Brodie and his foresaids have right to the haill writs and evi- "dents, title-deeds and securities, both old and new, of and "concerning the lands and others foresaid, purchased by him; "haill heads, clauses, tenor, and contents thereof, with all that "has followed, or is competent to follow thereupon."

On the 5th September, 1818, David Brodie conveyed the lands and teinds to trustees, with a power of sale, and assigned them "in and to the whole writs and evidents, rights, titles, and "securities of said lands and others, and tenements, made and "granted in favour of me, my predecessors and authors, and "whole clauses therein contained, with all that has followed or "may be competent to follow thereupon for ever, surrogating "and substituting them in my full right of the premises for "ever."

The trustees, by a contract of sale, of date the 21st and 23d January, 1823, and disposition following thereon of date 13th March, 1824, conveyed the lands and teinds to William Horne, the respondent, and on this disposition he was infeft on the 14th day of March, 1824.

By this contract of sale, and disposition, Horne was assigned "in and to the whole writs and evidents, rights, titles, and secu- "rities of the said lands and teinds and others, made to and in "favour of the acquirers and their authors and predecessors, and "whole clauses therein contained, with all that had followed, or "might be competent to follow thereon."

Second, in regard to the lands of Wedderclett and Hausters.

On the 18th May, 1710, Francis Sinclair, while infeft under

the wadset of 1675, and having a personal right to the reversion under the minute of agreement of 1706, for its purchase, and before the contract of sale of 1715 had been executed, disponed Wedderclett and Hausters to his brother, George Sinclair, under the burden of his own liferent, and of his debts and family provisions, by a disposition containing the following assignation:—

"And in like manner, with and under the said burdens, re-
" strictions, and reservations, I hereby assign and transfer the
" haill writs, evidents, rights, and securities, both original and
" by progress, legal and conventional, made, granted, conceived,
" or that any ways may be interpreted in favour of me, my
" authors, and predecessors, of and concerning the lands, mills,
" teinds, and others above disponed, clauses of warrandice, and
" haill other clauses, import and contents of all the said writs
" and evidents, with all that has, or is competent to follow
" thereupon."

Francis Sinclair died in 1723, leaving his estate burdened with debts and family provisions. In 1734, John Sinclair of Barrock, who was his creditor, raised and executed a summons of adjudication against George Sinclair, the brother and heir of Francis, which, on George's death, was prosecuted against Charles, the son and heir of George. On this summons John of Barrock obtained decree, as did several other creditors, in actions raised by them. In 1741, the creditors raised a process of ranking and sale in the name of John Sinclair of Barrock, which, on his death in 1743, was prosecuted by his son, Alexander Sinclair of Barrock.

On the 22d June, 1750, Alexander Sinclair expede a charter of resignation on an instrument of resignation, which set forth, that, "in virtue of, and conform to, a procuratory of resignation
" contained in a contract of sale of the lands of Sybsterwick,
" *alias* Subuster, Wedderclett, and Upper and Nether Hausters
" or Hasbusters, with the teinds thereof and pertinents after

" mentioned, between the said John Earl of Breadalbane, therein " designed Lord Glenorchy, and the deceased Francis Sinclair " of Stirkoke; whereby the said Earl sold and disponed the said " lands and teinds to the said Francis Sinclair, and to his heirs " and assignees; which contract bears date the 28th day of March, " and 20th day of April, in the year 1715, and is registered " in the books of Session the 1st day of June, 1727; which pro- " curatory of resignation, in so far as concerns the said lands of " Sybsterwick, was assigned and conveyed by the said Francis " Sinclair to the deceased John Sinclair of Barrock, by disposi- " tion dated the 15th day of February, in the year 1717, and " registered in the books of Session the 22d day of January, 1728; " and to which procuratory of resignation, Alexander Sinclair, " now of Barrock, has right as heir in general, served and re- " toured, to the said John Sinclair, his father, conform to his " service before the Baillies of the Canongate, dated the 30th " day of August, 1744, duly retoured to the Chancery; and " which procuratory of resignation, in so far as concerns the said " lands of Wedderclett, Upper and Nether Hausters or Has- " busters, was disponed by the said Francis Sinclair to George " Sinclair of Stirkoke, his brother, conform to a disposition dated " the 18th day of May, 1710; and was, with the said lands them- " selves, adjudged at the instance of the said Alexander Sinclair " of Barrock from Charles Sinclair, eldest son and apparent heir " of the said deceased George Sinclair, as lawfully charged to " enter heir to him, but who renounced, conform to a decree of " adjudication obtained before the Lords of Council and Session, " at the instance of the said Alexander Sinclair against the said " Charles Sinclair, dated the 11th day of July, in the year 1749."

Alexander was infeft upon this charter on 4th October, 1750.

On 11th March, 1786, Wedderclett and Hausters were judicially sold to Alexander Sinclair. The decree of sale declared " That the said Alexander Sinclair of Barrock shall be freed and

" relieved of all feu-duties, ministers' stipends, schoolmasters' " salaries, and other duties and burdens whatsoever, payable out " of the said lands, at and preceding said term of Whitsunday " 1786 years, and of the cess or land-tax for said haill lands, " payable at and preceding the 25th day of March said year: ". And further, that the said purchaser's entry to the said lands " shall be at the term of Whitsunday next, and that he is to " have right to the rents, maills, and duties payable to the " common debtor, or his creditors, from and after the said " term, being for crop and year 1786, and in all time coming. " And found and declared that the said Alexander Sinclair, the " purchaser of the said two lots of the before-mentioned lands, is " to take the rentals thereof, and deductions therefrom, as they " are stated in the prepared state of the process, abstract thereof, " and the act of roup; and that any other parochial assessments, " augmentations of ministers' stipends, and other annual burdens, " after Whitsunday 1786, are hereby understood and declared " to be at the risque and hazard of the said purchaser; and " that he shall not be entitled to any deduction from the respec- " tive prices offered by him, on account of any fall or decrease " of rent, since the judicial rental was taken, or for any other " cause or pretext whatever."

Alexander Sinclair thereafter obtained a charter of sale and infeftment in the lands.

On the 8th May, 1787, Alexander Sinclair conveyed the lands and teinds of Wedderclett and Hausters to trustees, by a disposition which contained the following clause: — " And moreover, " I do hereby assign, dispone, and make over to my said trustees, " or a quorum of them surviving and acting, or to the survivor, " for the uses and purposes foresaid, not only all and sundry " contracts, dispositions, charters, infeftments, procuratories and " instruments of resignation, precepts and instruments of sasine, " services, retours, and infeftments following thereon, wadset

" rights, reversions, renunciations, apprisings, adjudications, tacks " and rights of teinds, decreets of platt, prorogation, valuation, " and sale, assignations, translations, dispositions, and other con- " veyances thereof, and all other writs, rights, evidents, titles, " and securities whatsoever, made, granted, and conceived, or " which may be anyways interpreted in favours of me, my pre- " decessors and authors, of and concerning the lands, mills, " teinds, fishings, and others, particularly and generally above " disponed, with the whole clauses of warrandice, and other " clauses, tenor, and contents thereof, and all that has followed, " or may follow upon the same."

By disposition bearing date 31st December, 1803, and 4th January, 1804, the trustees of Alexander conveyed the lands and teinds of Wedderclett and the Hausters, to John Horne, the father of the respondent, the disposition containing an assignation to the whole " writs and evidents, rights, titles, and securities of " the said lands, teinds, and others, made and granted in favour " of the said Alexander Sinclair, his predecessors and authors, " and whole clauses of warrandice, and other clauses therein " contained, with all that has followed, or may be competent to " follow thereon for ever."

John Horne was infeft on this disposition, and on the 7th January, 1823, he disponed the lands and teinds to the respondent, by a deed containing this clause:—" And further, I hereby " make and constitute the said William Horne and his foresaids " my cessioners and assignees, in and to the whole writs, titles, " and securities of the said lands and others, made and granted " in favour of me or my predecessors and authors, and whole " clauses therein contained, with all that has followed, or may be " competent to follow thereon for ever."

On this disposition the respondent was infeft on the 8th April, 1823.

In March, 1828, the respondent brought an action against the

Marquis of Breadalbane, the representative of the party to the contract of sale of 1715, and Sir John Sinclair of Ulbster, as representing John Sinclair of Ulbster; and also against the trustees of Sir John, by a summons which set forth the contract of 1715, and the titles which have been detailed; and further, that in the year 1719, Lord Glenorchy conveyed to John Sinclair of Ulbster, the lands and teinds of Sybster, Wedderclett, and Hauster, which had been previously conveyed, as above narrated, to Francis Sinclair of Stirkoke; but "with and under the burden "of all bargains and sales made by our said umq[l]. father (the "Earl of Breadalbane) or us, of any part or portion of the "lands, teinds, or others particularly and generally above dis-"poned, or tacks of any of the said teinds, or oblidgements "therein contained, before the said 7th day of January, 1719 "years; which the said John Sinclair, by his acceptation hereof, "binds and obliges him, his heirs and successors whatsomever, "to ratify, approve, and implement in the haill heads, tenor, "and contents thereof, in so far as we or our said umq[l]. father "are bound thereby, or never to quarrel or impugn the same, "upon any account whatsomever, that will afford ground of "eviction, or recourse against us or our foresaids." The summons then set forth, that under this disposition, John Sinclair, and his successors or representatives, were substituted in the room of Lord Glenorchy, and his successors and representatives, in all the obligations undertaken by his Lordship, with relation to the lands, teinds, and others, anterior to the date of the said disposition in favour of John Sinclair of Ulbster; and that in particular, he and his foresaids were substituted in the room of Lord Glenorchy and his foresaids, in all the obligations of warrandice and otherwise contained in the contract of sale of 1715. THAT since the date of that contract, sundry augmentations of the stipend payable to the minister of the parish of Wick had been made; that in particular, in 1719, an augmentation to a

small extent took place, that a second augmentation was obtained in 1793, a third in 1807, and a fourth in 1823; and that, in consequence, the teinds of the respondent's lands of Sybster-wick, Wedderclett, and Hauster, had been subjected to exactions far exceeding the amount stipulated by the contract of 1715, and that the respondent and his authors had been under the necessity of paying the demands made upon them under decrees of modification, no locality of the minister's stipend having hitherto been made up, and latterly, (since 1825,) under an interim-scheme of locality.

The conclusions of the summons were, that it should be found that the Earl of Breadalbane, as representing the deceased John Earl of Breadalbane, and Lord Glenorchy; and Sir John Sinclair, as representing John Sinclair of Ulbster; and the trustees of Sir John Sinclair, or one or more of these parties, were bound and obliged "in terms of the conditions and provisions of the foresaid "contract of sale betwixt John Lord Glenorchy and Francis "Sinclair of Stirkoke, and of the said disposition in 1719, "granted by the said John Lord Glenorchy in favour of John "Sinclair of Ulbster, to free and relieve the pursuer, and his "said lands and teinds of Sybster, of all payments of stipend "beyond the said stipulated amounts of £29 : 2 : 8 Scots money, "and two bolls of victual, and the pursuer and his said lands "and teinds of Wedderclett and Hauster, of all payments of "stipend beyond the said stipulated sums of £8 : 6 : 8 Scots "money, and two bolls of victual in all time coming: And the "said defenders, or one or more of them, ought and should be "decerned and ordained to repay to the pursuer, as heritable "proprietor of the said lands and teinds, the whole sums of "money or quantities of victual which he or his authors have "advanced or paid to the said minister of the parish of Wick, "or that he may hereafter advance and pay towards the discharge "of the said four several augmentations of stipend, beyond the

" said stipulated amounts of £29 : 2 : 8 Scots money, and two
" bolls of victual for his said lands and teinds of Sybster, and of
" £8 : 6 : 8 Scots money, and two bolls of victual, for his said
" lands and teinds of Wedderclett and Hauster, as the said pay-
" ments may be instructed, fixed, and ascertained in the course
" of the process to follow hereupon, or otherways; with the
" lawful interest of these sums since the dates of the same were
" respectively paid, and in time coming till repayment."

Lord Breadalbane pleaded in defence, that he did not represent either the Earl of Breadalbane party to the contract of 1715, nor his son Lord Glenorchy. Sir John Sinclair and his trustees pleaded, That the respondent had no title to found on, or make any claim under the deed of 1719. And both sets of defenders pleaded, That the warrandice granted to Francis Sinclair, had not been transmitted to, and did not subsist in the respondent, and that even if the respondent were in right of the warrandice, it was cut off by the negative prescription.

The record having been closed upon condescendences and answers, the Lord Ordinary, on the 12th of November, 1833, pronounced the following interlocutor:—" The Lord Ordinary having
" heard parties' procurators, and thereafter considered the closed
" record and whole process; sustains the title of the pursuer: Finds
" that the defender, the Marquis of Breadalbane, is bound to relieve
" the pursuer, and his lands and teinds of Sybster, as libelled, of
" all payments of stipend beyond the amounts of L.29 : 2 : 8
" Scots money, and two bolls of victual; and also to relieve the
" pursuer, and his lands and teinds of Wedderclett and
" Hauster, as libelled, of all payment of stipend beyond the
" amounts of L.8 : 6 : 8 Scots money, and two bolls of victual, in
" all time coming; but this with exception of those portions of
" the stipend which are payable by the pursuer for his said lands
" or teinds under any augmentation of stipend, granted forty
" years before the pursuer insisted on the present claim of re-

" lief; and in respect of the pursuer's claim for relief or repay-
" ment of arrears of stipend for years bypast, and in respect of
" the liability of the defender, Sir John Sinclair, appoints the
" parties to be farther heard."

The defenders reclaimed against this interlocutor, and the respondent took the same course so far as regarded the exception contained in it. Upon the reclaiming notes for the parties being advised, the Court appointed them to state their argument in mutual cases.

Upon considering the revised cases for the parties, the Court on the 20th February, 1834, pronounced the following interlocutor: — " The Lords having advised the cause, and heard
" counsel for the parties; adhere to the interlocutor of the Lord
" Ordinary submitted to review, in so far as to find that the ob-
" ligation of warrandice in the contract of 1715, libelled upon, is
" effectual to relieve from all future augmentations of stipend;
" and that it has been duly transmitted to the pursuer: There-
" fore, and to this effect, sustain the pursuer's title, and decern;
" but before farther answer, ordain the printed papers in the
" cause to be laid before the Judges of the First Division, and
" permanent Lords Ordinary, for their opinion, whether, and to
" what extent, the plea of negative prescription is applicable to,
" and can be maintained in defence of the present action."

Before the opinion of the Judges had been obtained, the Marquis of Breadalbane died; and the appellants, as his accepting and surviving trustees, were sisted as defenders in his room. Subsequently the following opinion was given by the consulted Judges.

" In 1715, by a contract of sale, Lord Glenorchy sold to
" Francis Sinclair certain lands, with the teinds, and this con-
" tract contains a clause of warrandice, the first part of which is
" of a more general nature; but the latter part is in these
" words: — ' And to warrant, free, and relieve the said Francis
" ' Sinclair and his foresaids, of and from all augmentations of

" ' ministers' stipends, and burdens upon the teinds of the said " ' haill lands, whether by augmentations, new erections of " ' parishes, and additional stipends, and that as well of all " ' terms and years bygone as in all time coming, and from all " ' other perils, dangers, encumbrances, and grounds of eviction " ' whatsoever, as well not named as named, bygone, present or " ' to come, which may anyways stop, hinder, or impede the " ' said Francis Sinclair, or his foresaids, in the peaceable pos- " ' session, bruiking and enjoying of the said haill lands and " ' pertinents thereof above disponed, and teinds of the same, " ' and intromissions with and recovering of the rents, mails, " ' profits, and duties thereof, in all time coming, at all hands, " ' and against all deadly,' under the special exception of the " ' proportions of stipend money and victual above specified, " ' now conditioned and agreed upon to be paid by him, the " ' said Francis Sinclair, and his foresaids, by this present right, " ' to the minister serving the cure at the said parish kirk, and " ' his successors, at the terms, and in the manner above men- " ' tioned.' This contract is dated the 28th March, and 20th " April, 1715. The right to the subjects and warrandice con- " veyed by this contract, has passed through various authors " into the pursuer, Mr Horne, who now pursues the Marquis " of Breadalbane, and Sir John Sinclair, as representatives of " Lord Glenorchy, for relief, in reference to time both past and " future, from certain augmentations of stipend obtained by the " minister of the parish of Wick, within which the lands lie. " These appear to have been obtained at different dates, parti- " cularly in 1719, 1793, 1807, and 1823. It does not appear " that any locality of these augmentations has ever been approved " of; but the augmented stipend has been paid under interim " localities, and in this way a portion of stipend in each augmen- " tation has been paid out of the lands conveyed to Mr Sinclair " by Lord Glenorchy. No action upon the obligation of war- " randice and relief of stipend appears ever to have been

" brought, in consequence of any of these evictions, until the " present summons was raised in 1828. In defence against this " action, various pleas have been stated, but the only one in " reference to which the opinion of the First Division and Lords " Ordinary is now required, is that of the negative prescription, " the question being 'whether, and to what extent the plea of " ' the negative prescription is applicable to, and can be main- " ' tained in defence of the present action.'

" It appears to us, that the law applicable to this question is " to be found in the statute 1617, c. 12, which, after enacting " the positive prescription, provides, — ' And sicklike his " ' Majesty, with advice foresaid, statutes and ordains, that all " ' actions competent of the law upon heritable bonds, rever- " ' sions, contracts, or others whatsoever, either already made, " ' or to be made after the date hereof, shall be pursued within " ' the space of fourty years after the date of the same, except " ' the saids reversions be incorporate within the body of the " ' infeftments used and produced by the possessour of the saids " ' lands, for his title of the same, or registered in the Clerk of " ' Register, his books, in the which case, seeing all suspicion " ' of falsehood ceases, most justly the actions upon the saids " ' reversions ingrossed and registrated, ought to be perpetual; " ' excepting always from this present act all actions of warran- " ' dice which shall not prescribe from the date of the bond or " ' infeftment whereupon the warrandice is sought, but only " ' from the date of distresse, which shall prescribe, it not being " ' pursued within forty years as said is.'

" Under this provision, we think that when any subject is " warranted, as soon as the whole or any part of it is evicted, " and consequently an action of warrandice or relief in reference " to that total or partial eviction arises, then the negative pre- " scription begins to run against that action from the date of the " eviction or distress. The consequence, we think, is, that if " the eviction be total, the whole warrandice may be lost in forty

" years from its date. If the eviction be partial, the warran-
" dice may be lost to that extent, but no farther. We do not
" think that the whole benefit of a clause of warrandice can be
" lost by negative prescription, because a small part of the sub-
" ject warranted has been evicted, and action for that partial
" eviction has not been raised within forty years. To apply this
" to the present case: Part of the subject disponed by Lord
" Glenorchy was certain teinds, exposed, among other risks, to
" the risk of eviction by the minister for augmentation of his
" stipend; and against this Lord Glenorchy granted an obliga-
" tion of warrandice and relief. When, after the date of this
" obligation, the minister obtained an augmentation, we think
" that the obligation of warrandice and relief instantly applied,
" and that an action of warrandice and relief immediately arose.
" For as soon as the augmentation was granted, it instantly
" affected the teinds, and the minister had immediate right to
" charge any teind-holder, as intromitter with the teinds, for the
" whole amount of his augmented stipend, leaving the heritors
" to their relief against each other. Each heritor's teinds, too,
" became properly and ultimately liable for a certain proportion
" of the augmentation. Though it might take some time before
" an interim locality was settled, and a very long time before a
" final locality was settled, yet the teinds of each heritor were
" not the less on that account truly liable to the burden of the
" augmented stipend in certain proportions from the date of the
" augmentation. It seems to us clear, therefore, that as soon as
" an augmentation was granted, an action arose for relief from
" the augmentation, in terms of the obligation of warrandice,
" and consequently the negative prescription began to run
" against that action, and against the obligation of warrandice
" and relief *pro tanto*.

" We do not think that Mr Sinclair, or his successors, were
" limited to a set of actions brought from year to year, for
" relief from annual payments of augmented stipend. We

" think they were fully entitled, immediately on the granting of " each augmentation, to have brought an action for relief from " that augmentation, out and out, in all time coming; and " therefore, we think that it is against such an action that the " negative prescription came to run. Indeed, the present action " contains a conclusion of that very kind for relief from the " augmentations in all time coming.

" Neither do we think that the running of the prescription " could be delayed by an interim locality. That might bar " action of relief by the heritors *inter se*, for extra payments of " stipend, but had nothing to do with the relief from the aug- " mentation due to one heritor, not by other heritors, but by his " authors, who sold him the teinds with warrandice from aug- " mentations, for which relief action became instantly competent, " and might competently conclude for relief from the interim " locality itself, as consequent on the augmentation, against " which the warrandice was granted.

" We are of opinion, therefore, that the negative prescription " against the obligation on which this action is founded, ran " from the date of each augmentation, and in reference to that " augmentation; and therefore, that the negative prescription " affords a defence to the extent of the augmentations granted " forty years before the pursuer raised the present action of " relief, as has been found by the Lord Ordinary.

" We have only to add, that we do not think that the whole " obligation of warrandice and relief from augmentations, could " be lost by the negative prescription running after the granting " of one or more augmentations, partially affecting the teinds, " more than the whole of the warrandice of any subject is lost " by one or more evictions of parts only of it, followed by " neglect to pursue for relief thereof during forty years. We " think that what prescribes under the statute 1617 is the right " of action for any distress or loss actually incurred by eviction; " and that the prescription cannot extend farther than the evic-

" tion. The contrary rule would expose the warrandice of " great estates to be lost by the most trifling evictions of incon- " siderable parts; and we see no authority for extending the " statute to so severe an effect."

An appeal and cross appeal were taken against the interlocutors which have been detailed, which came on for hearing on 7th May, 1840, when the following procedure took place at the bar, after the counsel had been heard at considerable length, and, as is believed, the reply had been opened.

Lord Chancellor. — It is impossible to decide the points of law in this case, on account of the facts not being properly ascertained. The Judges below state them as quite clear; but it appears as to two of these estates, that the matter is quite doubtful.

Mr Walker. — (For the respondent) proposed to explain.

Lord Chancellor. — With regard to the other two estates, have you any means, from the printed papers, of shewing the House how you connect the present pursuer with these?

Mr Pemberton. — No, my Lord.

Lord Chancellor. — Then it would be useless to occupy the House any farther, because the House is not in possession of sufficient information to affirm what the Court below has done. I feel that the House is not now in possession of the documents upon which it can come to that conclusion, and therefore, the only course the House can pursue, is, to send it back to the Court of Session for that purpose.

Sir William Follet. — I apprehend the whole case is now before the House. If the other side cannot satisfy the House by the printed documents now before it, I apprehend the House need not remit it back, but may at once dispose of it. I think, from the investigation we have made, that it will be impossible for my learned friends to make out their title.

Lord Chancellor. — This House has been in the habit, and I

think it a wholesome rule, when a material point in a case appears not to have received that consideration from the Court below which it ought to have received, to give the Court below the opportunity of reconsidering that opinion, the Court below of course being apprised of the importance which this House attaches to it. I cannot discover any thing from the printed papers in this case, with respect to that which was the foundation of the title, that has in fact received any consideration at all. If the respondent feels he cannot make any thing of it, of course he will not put the other parties to the expense of farther inquiring. But I think, from what I have heard from the counsel, that is not the case.

Mr Pemberton. — My Lord, we had not the slightest doubt about the title, and it was merely because it appeared to us so clear, that it has not been put forward in so plain a manner as it otherwise might have been.

Sir William Follet. — I do not apprehend that any farther can be stated.

Lord Chancellor. — How do you account for the opinion of two of the Judges, that the pursuer had entitled himself to the benefit of the covenant.

Sir William Follet. — They had exactly the same evidence before them, as the House now has before it.

Lord Advocate. — It is mis-recited in the statement. I was not aware, till we were in consultation last night, that the property had been so mis-recited in the papers.

Mr Walker. — There is an argument before the procuratory, that will be found in the case before the Court below; and at page 48 there is this general objection, — "Because, even if in "the contract of sale of 1715, Lord Glenorchy had undertaken "an obligation of relief to the extent claimed, that obligation "has not been transmitted to the respondents." Then follows a page of argument, but not a word in the argument upon the

deed of 1710, and the effect of the procuratory; and also in the appellant's case there is a short argument, but not a word as to the effect of the procuratory.

Sir William Follet. — It is distinctly stated, as I mentioned to your Lordships before, that "the lands of Wedderclett and "Hauster were disponed by Francis Sinclair to George Sin-"clair of Stirkoke, by a disposition dated 18th May, 1710, five "years before the date of the contract libelled on, and of course "before Francis Sinclair had any right to that contract, or the "obligations which it contains, whatever they might import."

Mr Walker. — No doubt, in 1710, it appears there had been a conveyance; but that objection would not go much farther than the objection which is now insisted upon. In 1710, Francis Sinclair, as your Lordships will recollect, had not the right of property in these lands of Wedderclett and Hauster, nor even of Sybster at that period, because they were not conveyed until 1715, by the deed which contains this obligation of warrandice. We shew afterwards, as to Sybster, that in 1717 the lands are specifically conveyed, and there is an express reference made to the deed of 1715, and the obligation of warrandice therein contained, and all rights of warrandice are specifically made over. As to Wedderclett and Hauster, I admit the case is somewhat different; and although the specific objection was not pleaded and made matter of argument in the Court below, it did appear to Lord Gillies in a manner, that he thought the case perfectly clear as to Sybster, and sufficiently clear as to Wedderclett and Hauster. Now the objection made as to this ——

Lord Chancellor. — If you prefer arguing the point, I should be glad that you should have an opportunity of stating the points as they exist, but I shall understand that as precluding you from the offer I made.

Sir William Follet. — It would be better that the parties

should print any other documents they may wish to add to their case.

Lord Chancellor. — The House is under this disadvantage, that we have here two learned Judges telling us they are quite clear upon a particular point, without any means of our knowing what were the grounds of their opinion upon that point. They do not appear either in the argument or in the judgment; we have not therefore the means of ascertaining how far the opinion was accurate, when we have not the grounds upon which the opinion has been given.

Sir William Follet. — We have so often the judgments of the Scotch Judges without giving any reasons for their opinions, that if it were to be sent back on that ground, it would be a reason for sending back many other cases.

Lord Chancellor. — My notion is, that we should ask for the grounds of the opinion, because we think it is not sufficiently clear what the grounds are. I think it is not doing justice between the parties, unless we have more information of the grounds of the opinion of the Court below, than sometimes we are in the habit of receiving. Here the costs will be a matter of future consideration, because if the respondent takes this to the Court below, and if the Court below finds he has no more case to make than appears from the printed papers, that may be set right hereafter; but I cannot think it safe to affirm the judgment of the Court below, without farther information. Whether the pursuer can make out his title, will be a question. But it would also be extremely hazardous to reverse the judgment of the Court below, and so decide upon the points, without more information as to the grounds upon which their opinions were given. It appears to me, that the only way of doing justice between the parties, will be to remit to the Court of Session upon this point, to consider how far the obligation of warrandice in the contract of 1715 has been duly transmitted to the pursuer, and

to state the reasons upon which they come to any conclusion upon the subject. That leaves the question of law, which is now sufficiently open for adjudication where it is, if the plaintiff shews himself in the situation of a party entitled, he will have the benefit of it. That, of course, cannot arise, unless he can shew himself to be in that situation; but at the present moment I do not think he is.

It was then "ordered and adjudged, that the case be remitted "back to the said Second Division of the Court of Session in "Scotland, to consider and state their opinion, how far the obli-"gation of warrandice, under the contract of 1715, mentioned "in the appeals, has been duly transmitted to the pursuer; and "this House does not think fit to pronounce any judgment upon "the said appeals, until the said Second Division of the Court "of Session shall have given their opinion upon the matter here-"by referred to their consideration, according to the direction of "this order."

When the cause went back to the Court of Session, cases were ordered upon the question contained in the remit, and at advising these papers on the 12th of January, 1841, the following opinions were delivered by the judges: —

The Lord Justice Clerk. — I have again considered the objections stated on the part of the Trustees of the late Marquis of Breadalbane, to the transmission of the obligation in the contract of sale of 1715, to the present pursuer, with the remit from the House of Lords, on which this Court is called upon to state their opinions, "How far the obligation of warrandice, "under the contract 1715, mentioned in the appeals, has been "duly transmitted to the pursuer;" and I must begin by stating, that we must confine our attention to the question thus remitted, as I consider we have at present nothing whatever to do with any question as to the application of the negative prescription, of

dereliction, or of the true nature and effect of the obligation of the warrandice itself, and various other arguments introduced into the cases, as all these matters have already been decided by the judgments under appeal, and remain, accordingly, *sub judice* in the House of Lords.

The two parcels of land to which the obligation of warrandice is applicable, stand, in some respects, in different situations, though they are both included in the contract of sale between Lord Glenorchy and Francis Sinclair, 25th March, and 20th April, 1715.

The contract referring to the previous right of wadset, which Sinclair had held of the lands of Subuster, as well as of Wedderclett and Hauster, from 1675, and to the wadset sum, with the additional price thereby acknowledged to be received after renouncing all right of redemption under the wadset, conveys the absolute and irredeemable property of the lands and their teinds to Sinclair, the purchaser; and, in consideration of the price then received, stipulating for the purchaser being liable in future for certain precise payments of teinds, in regard to both parcels of land, to the minister of Wick, as being the proportions of the stipends payable by Lord Glenorchy, for and in respect of all the lands that belong to him in that parish.

But, besides the clause of absolute warrandice, securing to the purchaser the right to the lands and teinds, which is conceived in the broadest terms, this contract farther contains an additional clause, warranting and securing the said Francis Sinclair and his heirs aforesaid, namely, "his heirs and successors whatsoever, "against all future augmentations of ministers' stipend," &c. It is impossible to read this, and other clauses in this contract, without being satisfied, that, while it distinctly defined the extent of the purchaser's future liability for the certain precise payments of teind therein specified, and which are repeatedly referred to, it clearly declared, that, in virtue of his purchase, the buyer, Fran-

cis Sinclair, and his successors whatsoever, were to be relieved, in all time coming, from the payment of any augmentations of stipend which might be granted.

That the exemption was meant to be available, not only to the purchaser himself, but to all his successors whatsoever, in the lands and teinds conveyed, seems to be perfectly manifest; and, accordingly, the seller assigns bodily the whole rights, titles, and securities whatever, that he held relative to the subjects.

On the 5th of February, 1717, only two years after the date of this contract of sale, Francis Sinclair granted a disposition of the lands and teinds of Sybsterwick to John Sinclair of Barrock, in which, while the extent of the payment for the teinds to the minister of Wick is precisely the same as that which is stipulated in the contract of sale with Lord Glenorchy, and while Francis Sinclair binds himself, almost in the same words as those of the contract, to relieve from all future augmentations of stipend, he, besides assigning John Sinclair into all the writs, titles, and securities, relative to the lands and teinds, made by any person whatever, specially and directly assigns the contract of vendition "passt betwixt the said John Lord Glenorchie and "me, bearing date the twenty-eighth day of March, and twenty "day of April, Iajvi and fifteen years, and registrat in the gene-"ral register of sasines, reversions, and renunciations, kept at "Edinburgh, upon the twenty-fifth day of May thereafter, "whereby the said John Lord Glenorchie not only discharges "the reversions competent to him, of the lands and teinds here-"by disponed, with several others, but also of new dispones the "same in my favours; and in and to the procuratorie of resig-"nation, clause of absolute warrandice, obligement for the tran-"suming the writs relating to the said lands, and haill others "clauses and obligements therein contained, conceived in my "favours, with all that has followed, or may follow thereupon."

I cannot therefore doubt, that John Sinclair of Barrock thus

acquired all that belonged to Francis Sinclair, as to the lands and teinds of Subuster, under the contract of vendition of 1715; and seeing the unqualified terms of Lord Glenorchy's obligation to relieve from augmentations, it is not at all surprising that at the same time that he assigned Sinclair of Barrock into that obligation, by the express assignation of the contract of vendition containing it, in so far as concerned the lands and teinds disponed, Francis Sinclair should have supperadded his own obligation also to relieve from these augmentations. This he manifestly did, while relying on that which had been previously granted in his own favour.

Alexander Sinclair, his eldest son, was, in 1744, served heir to his father, John Sinclair of Barrock, and thereby acquired right to the unexecuted procuratory of resignation, with all the clauses of the disposition and contract 1715, by Lord Glenorchy, and also of that in Francis Sinclair's disposition of 1717, and every thing competent under it.

Alexander Sinclair afterwards disponed the same subjects to his brother John, and he again to Dunbar of Westfield, which dispositions contained assignations to all writs and evidents, as usual. The lands and teinds of Subuster were afterwards adjudged from Dunbar, and judicially sold to David Brodie, who was declared to "have right to the whole writs and evidents, "title-deeds, and securities, both old and new, of and concerning "the lands and others foresaid, purchased by him: haill heads, "clauses, tenor, and contents thereof, with all that has followed, "or is competent to follow thereupon."

Captain Brodie afterwards conveyed the same subjects, with a power of sale, to trustees, with an assignation to the whole writs, and in the most ample form, as they had been granted to his predecessors and authors, "and whole clauses therein con-"tained," &c.

These trustees again sold the subjects to the pursuer, who thus

came to be fully vested with the lands and teinds of Subuster, with an assignation "in and to the whole writs and evidents, "rights, titles and securities, of the said lands and teinds, and "others, made to and in favour of the acquirers, and their "authors and predecessors, and whole clauses therein contained, "with all that had followed, or might be competent to follow "thereon."

Under such circumstances, the question is, Whether the original obligation of relief from all augmentation of stipend granted by Lord Glenorchy, in the contract 1715, to Francis Sinclair, has not been transmitted to, and is now in the pursuer? I must own, that the impression which I first entertained, and which had originally led the Lord Ordinary, Mackenzie, expressly to sustain the pursuer's title, has not been altered on a reconsideration of the progress of titles from 1715 downwards with regard to the lands and teinds of Subuster.

The transaction completed between Lord Glenorchy and Francis Sinclair by the contract of vendition of 1715, was an onerous one in the strictest sense of the term, and full acknowledgment given of the receipt of the price originally stipulated for the wadset, and afterwards for the right of reversion. The limitation of the payment of teinds is clearly expressed, and the obligation of relief from all future augmentations of stipends, or other payment of teinds, is expressed in the clearest and most unambiguous terms. Within two years of the date of the contract of sale, the lands and teinds in question are disponed, but with an assignation, not conceived in the usual and general terms of all writs and evidents only, but in very particular terms, and expressly, into the contract of vendition of 1715, and to the clause of absolute warrandice and obligement therein contained. I think there can be no doubt, therefore, that Sinclair of Barrock, the disponee of Francis Sinclair, was thus put directly in the right of warrandice and relief that was conferred by that contract of vendition,

and that Lord Glenorchy could never have been heard in attempting to resist his enforcing the obligation against him.

The right being thus vested in the first disponee of the Barrock family, it passed by regular progress through the future assignations; and though they are not so special as the first in 1717, yet they are so conceived, as to go considerably beyond the ordinary clause of writs and evidents, as in making special reference not only to rights, titles, and securities, but "to the whole clauses "contained therein," so far as concerns the lands and teinds conveyed. This is, therefore, very little short of a special conveyance of assignation, and takes the case out of the operation of the decisions in the case of Graham *v.* Don, and Hamilton *v.* Lady Montgomerie, referred to by the defenders, where an ordinary general assignation to writs and evidents was attempted to be held sufficient to carry a right of a totally distinct and separate nature from that to which the writs and evidents assigned manifestly alone applied, namely, a long tack of teinds, when an ordinary conveyance of lands and teinds had alone been granted by the disposition in which the assignation to writs and evidents was contained.

Here the disposition or original conveyance, while it conveyed the teinds, definitely fixed the amount of the liability of payment to the minister of the parish, but declared that the lands should for ever after be relieved from all augmentations. The writ containing this obligation, with all its clauses, was assigned, and must be effectual to the assignee as one of his titles to the subject.

Those that acquired from the family of Barrock, and through whom the subjects have regularly come to the pursuer, obtained assignations nearly in similar terms, and that in favour of the pursuer, from the trustees of Captain Brodie, is ample and comprehensive, as we have seen.

It is a decided point in this litigation, that the warrandice and obligation in question has not been lost by the negative prescrip-

tion, in regard to augmentations that have been granted within forty years of the institution of this action. In whom, then, does the right exist, if it is not in the pursuer, who is now proprietor of the lands and teinds of Subuster by regular progress?

It is impossible to say that it is in the heirs of Francis Sinclair, the original purchaser, or in the family of Barrock, who disponed the whole subjects out and out; and from their disponees they have passed as clearly to the pursuer of this action.

As to the teinds of Wedderclett and Hauster, the case is somewhat different; but even with regard to the obligation regarding them, Lord Glenlee held the pursuer's title sufficient, in respect of the instrument of assignation in 1750 in favour of Alexander Sinclair.

It is said, however, that this instrument is erroneous, as the disposition therein recited of Francis Sinclair, in 1710, to George Sinclair of Stirkock, his brother, could not convey the procuratory of resignation in the contract of 1715,—and which, it is said, could not accresce to any prior right in favour of George Sinclair.

It appears that these lands of Wedderclett and Hauster had been wadset to Sinclair of Stirkock by Lord Glenorchy, as well as the other lands of Subuster,—as the contract makes express reference to it, and to a minute of agreement between the parties in 1706, and declares the right of reversion settled and discharged, and the whole matter finally concluded, both as to Wedderclett and Hauster and Subuster. The conveyance by disposition from Francis to George Sinclair, in 1710, was only of the fee of the former lands, reserving the liferent of Francis. But, however acquired, it is plain that John Sinclair of Barrock had come to adjudge the estates of George Sinclair of Stirkock, carrying off every right that he held to these lands of Wedderclett and Hauster, as well as others; and on John Sinclair's death, his son Alexander came to carry on a process

of ranking and sale, and ultimately obtained the instrument of resignation in 1750, already noticed, and a charter having followed under it, with infeftment, Alexander Sinclair of Barrock ultimately obtained a charter of sale, and he was infeft in the lands of Wedderclett and Hauster, and teinds thereof. He afterwards conveyed these lands to trustees, with an assignation in the broadest terms, "with the whole clauses of warran- "dice, and other clauses, tenor and contents thereof, and all "that has followed, or may follow upon the same."

Under the disposition from these trustees in favour of the pursuer, there is a similar assignation "of the writs and evidents "rights, titles, and securities of the said lands, teinds, and "others, made and granted in favour of the said Alexander "Sinclair, his predecessors and authors, and whole clauses of "warrandice, and other clauses therein contained, with all that "has followed, or may be competent to follow thereon, for "ever."

On the grounds I have already stated, I am also inclined to think that the right to enforce the obligation in question, regarding the lands of Wedderclett and Hauster, has been transmitted, and is now vested in the pursuer, though I admit there is certainly more room for hesitation than with regard to Subuster.

Lord Meadowbank. — In respect to the first part of my Lord Justice-Clerk's judgment I have no doubt whatever. I am of opinion that the assignation is in terms sufficiently broad to constitute a special assignation; and, in short, I entirely agree with his Lordship as to the lands of Subuster, and need not enter into the question. But I have much more doubt as to the other lands of Wedderclett and Hauster. These lands were separated altogether. I have so much doubt on this point, that I would rather hear what opinion has been formed by the rest of my brethren. I have paid every attention to what my Lord Justice-Clerk has

stated, but I think that the right of Sinclair did not accresce to these lands.

Lord Moncrieff. — The case is new to me, though some collateral matters were at one time before me. The question of negative prescription was before me, as one of the consulted Judges; but this question, as to the due transmission of the claim on the contract 1715, was not submitted to them.

This question does not seem to have been fully discussed, though pointedly stated, when the cause was formerly before the Court. It was adverted to, in general terms, by the Lord Justice-Clerk and Lord Glenlee; but the latter points at a distinction between Sybsterwick and the other lands. In the Report in the Faculty Collection, the point is scarcely mentioned in the argument for Mr Horne, and not at all in the argument for the defenders.

I think that there was ground for the remit. The point even as to Sybsterwick is not so clear to my mind as it seems to have been thought. But as to the other lands I think it more than doubtful.

1. Sybsterwick. — I think, on the whole, that the right in Lord Breadalbane's special warrandice has been effectually transmitted to Mr Horne. We must hold the obligation itself to be clear. It is in the contract of 1715, which conveys the lands and teinds of Sybsterwick to Francis Sinclair. It includes the lands and teinds of Wedderclett and Hauster. But lay that aside at present. By the disposition 1717, Francis Sinclair conveyed Sybsterwick, with the teinds, to John Sinclair of Barrock. The transmission of the special obligation of warrandice to Barrock does not depend on general clauses of writs and evidents. It is in express words assigned, as held by the contract 1715, previously executed. True, there is a qualification, "in so "far as the writs may extend to the disponee's security of the "lands and teinds conveyed, hail parts, pendicles, privileges,

" and universal pertinents thereof." I admit that it is a fair question, whether this restrains the use to be made of the writs assigned to the support of the conveyance of the heritable right to the teinds: And, to be sure, the special warrandice against augmentations of stipend is not necessary to that effect, but quite a distinct thing. But then the deed 1717, in specially assigning the contract 1715, and the procuratory, does so with all the obligements contained therein; and it cannot be doubted that the obligation of relief from augmentations was one of the privileges and pertinents of the teinds, which then stood in the person of Francis. To suppose that in specially conveying such a contract and procuratory, he did not assign the obligation distinctly expressed in both, for securing the freedom of the lands and teinds from future augmentations, would, in my apprehension, be to nullify the express assignment of the contract altogether, and to go against the plain meaning of that deed 1717. Therefore, I think it clear, that the right was effectually assigned to John Sinclair; and do not understand that the House of Lords doubted this. I should not think it at all conclusive that Francis Sinclair bound himself in a similar warrandice. That may cut both ways. He might hold the obligation for his own relief, while, without assigning it, he bound himself.

The more difficult question is, Whether the right has been transmitted from Francis, through the intermediate parties, to Mr Horne? I incline to think that it has. The title to this contract 1715 being once vested in John Sinclair by express conveyance in 1717, I think that it constituted one of the title-deeds of the lands and teinds, as they stood in him; and so that, according to the doctrine of Erskine, it must be held to have passed at least by the general clause of assignation of writs and evidents, in the subsequent dispositions. That passage, no doubt, relates generally to clauses of warrandice of the title of property of subjects conveyed. But once it is held,

that this right of relief for the protection of the lands and teinds against eviction of the fruits thereof, by augmentation of stipend to the minister, was vested in John Sinclair, it seems to follow, that the conveyance by him of the lands and teinds, (with all pertinents and privileges, as I must presume, though the deeds should have been produced,) and all the subsequent transmissions, carried that contract 1715, and all the obligations therein expressed, by virtue of that conveyance, and the general assignment of the writs and evidents for the support and protection thereof.

The case of Graham *v.* Don, Dec. 15, 1814, is the material authority against this. But I am inclined to think that there is a distinction, though I feel it to be narrower and more difficult than the pursuer argues. A tack of teinds is a separate title of property from an heritable right; and, therefore, as Lord Glenlee explained, in the case of Anstruther, it was held in Graham's case not to pass in a question of entail, by a general conveyance of writs and evidents intended for the support of a different title. I certainly hold an obligation of warrandice against future augmentations to be in itself a separate right from the right to teinds. But as, from its nature, it can only be useful to the proprietor of the lands or the teinds, I think that, when it does stand vested in the disponer of the lands and teinds at the date of a sale, it must be considered as one of the pertinents or privileges thereof, and therefore may be presumed to pass by the general assignment of writs, for the support of the whole title.

I own I should not rest much on the case of Mansfield *v.* Robertson, May 26, 1835. For, with all deference, I do not quite understand it according to the Report. An heritable right of teinds is held to be conveyed by a general assignment of writs and evidents, without one word of teinds in the disposition. That the purchaser of the lands was burdened with stipend was no reason, I should have thought, for such an inference, but rather the reverse. As proprietor of the lands without a right to teinds,

he would be properly so burdened; but why specially relieve the seller of all stipends, if neither lands nor teinds remained with him? The case of Anstruther appears to have little relation to the subject. There was a conveyance to the lands—and the only question was, if the party was *in titulo* to make the entail? The procuratory there in question was a personal title, necessary and sufficient to support the conveyance.

That the purchasers, in the present case, paid no value for the obligation of relief, is not irrelevant. It goes to the question of intention in the conveyances. But I do not think it solid. Though the sale and purchase might be made without reference to such a right of relief,—the subjects may be held to have been taken with all their qualities and adjuncts, *cum omni causa—tanquam optimum maximum.*

2. The question as to Wedderclett and Hauster appears to me to depend on principles essentially different. It is perhaps a nice matter. But I am of opinion that the pursuer has not established, that the right in the special warrandice in question as to these lands has been effectually transmitted to him.

The title stands on a disposition of these lands and teinds in 1710. That disposition, unlike that in 1717 as to Sybsterwick, neither did nor could contain any assignment of the contract 1715, or any obligation expressed in it; for the plain reason, that that contract did not exist till five years after its date.

It is here to be observed, that the title to all that was conveyed by the deed 1710 is perfectly good, requiring no aid from such an obligation. That obligation is something perfectly separate, and beyond the title to the lands and teinds; and Francis, having no such right in 1710, did not attempt to assign it. How then, is it to be held to have passed from him to George Sinclair, a person quite different from John, to whom it was assigned in 1717? The pursuer seems to make two points. He says, 1st, That there was some previous agreement in 1706, referred to

in the deed 1715; and that, in this view, the general assignment of writs must be held to carry the obligation of special warrandice. But if it be said that the obligation is transmitted by the general assignment of writs in 1710, does not the question present itself, where is the writ containing it, which was so assigned? No deed in 1706, nor any deed before the contract 1715, is produced. Then how can the Court hold, that such an extraneous obligation, to which no writ earlier than 1715 applies, actually passed by a general assignment of writs in 1710? It seems to me to be altogether impossible.

The reasoning on the instrument of resignation 1750 is still more fallacious. That instrument is *felo de se* as to this point. It bears to proceed on a procuratory of resignation contained in the contract 1715; and then proceeds, "which procuratory of "resignation, in so far as concerns the said lands of Wedder-"clett, &c., was disponed by the said Francis Sinclair to George "Sinclair his brother, conform to a disposition dated the 18th "day of May, 1710," &c. This is a contradiction in terms, which cannot make faith to any Court in the world, — a statement of a moral impossibility, — and certainly a statement of what is not true, the deed 1710 containing no disposition or assignment of any such procuratory. For it is not true, as assumed by the pursuer, that the only specialty as to Wedderclett, &c., is, that the disposition was in 1710, and before 1715. That is strong enough. But there is another specialty necessarily involved in it, viz., that the deed 1710 contains no assignment, either of the contract, or of the procuratory 1715, or of the right in question in any form. I see not, therefore, how it could pass by that title.

But, 2d, It is said that the title to it may have been acquired by George Sinclair, and so be transmitted to the pursuer, *jure accrescendi*. This is an entirely separate ground of title. If well founded, it requires no assignment of writs, either express or

implied. But there is really no room for the *jus accrescendi* in such a case. The obligation in the contract 1715 is not a separate title to the lands or to the teinds conveyed by the deed 1710. The title to these is perfectly good, and quite distinct from the personal obligation of relief from stipends. There is, therefore, nothing to which that obligation can accresce. Is is quite unnecessary in order to support the title to the lands and teinds, and it could give no support to that title. The fatal defect is, that there is no conveyance at all of any such right to George Sinclair in 1710, and, therefore, no writ or title subsequently acquired can accresce to the only right then given.

The case, in short, is, that Francis Sinclair, having himself no right of relief from augmentations, simply disponed the lands and teinds to George in 1710. He subsequently acquired an extraneous right of that kind. But he never assigned it to George, and, consequently, it never passed to the pursuer. The adjudication depending on these titles could not mend the matter: If the only warrants of it carried no right, it could not as a diligence create what did not exist. The end of this state of the titles may possibly be, either that these lands of Wedderclett, &c., were by mistake introduced into the contract 1715, or that, if it were intended to convey the obligation to the disponee, George Sinclair, that was never done. And then it is clear, that no purchaser can complain of its not being transmitted, seeing that it is certain that none of the purchasers paid any consideration in their purchases on account of it; but, on the contrary, that they purchased in the faith that the lands were to bear the burden of all future augmentations.

The Lord Justice-Clerk said, That his mind was much impressed with the view taken by Lord Moncrieff, as to the transmission of the right with regard to the teinds of Wedderclett and Hauster.

Lord Meadowbank expressed his concurrence with Lord Moncrieff.

The Lord Advocate then said, It was unfortunate that all the deeds had not been produced, because, ten to one, they would be asked for in the House of Lords.

The Lord Justice-Clerk said, He was never under the idea that they had not been produced.

The Lord Advocate said, He had a right to see the progress; and with their Lordships' permission, he would give in a minute calling on the other party to produce the whole progress.

The Lord Justice-Clerk thought that this was quite right for the Court, as well as for the parties.

Lord Moncrieff. — How can it be judged of without this, the question being the transmission from one party to another? Let the minute be given in to-day, and the interlocutor can be pronounced afterwards.

The appellants then gave in a minute calling upon the respondent to lodge in process "the whole titles of the estates of Syb-"ster; and, in particular, the following writs referred to in the "deduction of the title appended to the petition for applying the "remit of the House of Lords, viz., Disposition by Alexander "Sinclair of Barrock to John Sinclair, dated 22d August 1769, "and Disposition by John Sinclair to Thomas Dunbar of West-"field, dated 17th September, 1767; and the infeftments, if any, "on these dispositions; together with the inventories of the "title-deeds referred to in the conveyances of said estate."

Two instruments of sasine, bearing to proceed upon the dispositions specially mentioned in this minute, were produced, but did not in any way bear upon the question between the parties, and no other production was made.

On the 23d of January, 1841, the following interlocutor was pronounced, which was signed on the 29th of January.

MAITLAND *v.* HORNE. — 21st Feb. 1842.

" The Lords having advised this minute, with the extracts of " the sasines in favour of Captain Thomas Dunbar and of John " Sinclair, produced by the pursuer, Allow the same to be now " received; and farther, allow the pursuer to make production " of such other deeds as he may discover, in the view of fortify- " ing his claim in the present action."

And on the same 23d January, 1841, this other interlocutor was pronounced upon the remit from the House of Lords, and was likewise signed on the 29th January.

" The Lords having resumed consideration of the petition of " William Horne, Esq. of Scouthel, to apply the remit from the " House of Lords in the appeal of the trustees and executors of " the deceased John Marquess of Breadalbane, and in the cross- " appeal of the said William Horne, dated May 7th 1840, with " revised cases for the parties formerly ordered, and having " special regard to the terms of the foresaid remit, requiring this " Court 'to consider and state their opinion how far the obliga- " 'tion of warrandice under the contract of 1715, mentioned in " 'the appeals, has been duly transmitted to the pursuer, the " 'foresaid William Horne,' state and declare their opinion as " follows, viz. That the obligation of warrandice expressed in " said contract, of date the 28th day of March, 1715, in so far " as the same relates to the lands called Sybsterwick or Sub- " buster, and the teinds thereof; which lands and teinds, together " with the said contract, and all the obligements therein ex- " pressed, were conveyed by disposition of date the 6th day of " February, 1717, by Francis Sinclair to John Sinclair, has been " duly transmitted, by the several conveyances set forth in the " record and the revised cases for the parties, to the pursuer, the " said William Horne. But that the said obligation of warran- " dice in the said contract of 1715, in so far as the same relates, " or purports to relate, to the lands called Wedderclett and " Hauster, and the teinds thereof, which lands and teinds were,

" by the said Francis Sinclair, by a disposition bearing date the " 18th day of May, 1710, disponed to George Sinclair, has not, " by virtue of the deeds and documents founded on in this pro- " cess, been duly transmitted to the pursuer, the said William " Horne."

The case then returned to the House of Lords for argument upon this return to the remit.

Solicitor General and Walker for the appellants. — This House, on the former argument, was unable to see any transmission of the right of warrandice to the respondent, and the remit was made that he might supply this defect by new production of titles, — no production however has been made, and the case comes back, in this respect, exactly as it stood before the remit.

The title of the respondent as to Wedderclett and Hauster, is wholly without foundation, the claims as to these lands being through the deed of 1710, made at a time when the obligation of warrandice had not any existence.

The title of the respondent as to Sybster is somewhat different. In regard to this his case is, that Francis Sinclair conveyed to John Sinclair, and gave an assignation of all writs and evidents, and thereby passed to him the warrandice which he held; and that the right has in the same way passed to the respondent.

But it is quite possible that the right upon the warrandice may, in the intermediate period, have been dealt with in any supposeable way. Presumption is all against an implied conveyance, inasmuch as there were four augmentations, by each of which this right was disturbed, without the right having ever been set up by any of the parties to whom it is supposed to have been conveyed. The right was no way inherent in, or coherent with, the right to the lands or teinds, but was altogether separate and independent; its transmission must therefore be shewn by express deed. Even if it were conceded, that under the special terms of the assigna-

tion in the deed of 1717, the right was transmitted from Francis to John, where is the evidence of its future transmission in the subsequent conveyances in which these special terms do not exist.

The view taken by the Judges in the Court below was, that there is a regular express transmission by special assignation, and that a mere ordinary assignation of writs, &c. would not be sufficient; whereas, the view urged at the bar is, that such a transmission is not necessary. On examination, however, it will be seen, that the Court below has proceeded on assumption of a fact which has not any existence.

But, first, what is the nature and effects of an augmentation of stipend, and of the terms of this special warrandice in regard to it. Payment of stipend is a mere personal burden on the proprietor of the lands in respect of his possession, and an augmentation of the stipend is no more than an increase of this burden — the special warrandice of the deed of 1715 is a warranty against this increase, and has not any reference whatever to the title either of the lands or of the tithes. The warranty of title to either of these is a part of the feudal title by the law of Scotland, not requiring any express conveyance or assignment to make it effectual, but implied from the nature of the thing; and it is of this, that the authorities referred to by the respondent, *Ersk.* II. iii. 31; *Bank.* II. cxxiii. 3; and *Ross's Lectures*, are alone speaking. But the special warranty here was quite collateral to, and wholly irrespective of the title either of the land or the tithes. Though there had been an augmentation, that would not have been an eviction — the title to the tithe would have been untouched.

This special warrandice against augmentation, therefore, was no part of the title; and as covenants running with the land are not known in the law of Scotland, it could be carried only by a special assignation. This the Court below has considered necessary, and has assumed to exist.

But such an assignation is not contained even in the deed of 1717, the first step in the progress. Though this deed refers to the deed of 1715, it does not contain any recital of the special clause of warrandice; and the assignation contained in it is not special to the clause of warrandice, but is quite general, and even as such, is limited "so far as may concern or be extended to the "security of the lands, teinds, and others, and haill parts, pen-"dicles, privileges, and pertinents," and does not stop there, as read by Lord Moncrieff, but goes on, "and no farder."

[*Lord Chancellor.* — Lord Moncrieff's opinion would be consistent, if he considers this special warrandice a pertinent or privilege; but it could hardly be so — it was no way annexed to the land.]

That assignation was plainly not intended to do more than strengthen the title to the lands; for the clause is not usual, and except this special warranty, there was not any other matter to be embraced, by the exception in the words, "and no farder." But conceding that under the terms of the deed of 1717, the right was transmitted from Francis to John Sinclair, where is the evidence of its future transmission. In the subsequent conveyances, the special terms of the deed of 1717 do not occur. In the charter of resignation of 1750, and the sasines of 1767 and 1769, (the dispositions on which they proceeded never having been produced,) and even in the disposition of 1823, in favour of the respondent himself, there is no mention whatever of the special warranty, though in some there is a conveyance with "parts, pertinents, and privileges," and in others with "parts "and pertinents" only.

[*Lord Campbell.* — Admitting that there is no special assignation, then the particular words used, "parts and pertinents," or "parts, pertinents, and privileges," are immaterial.]

It would have been singular if the conveyance to the respondent had been otherwise, because the intermediate transmissions

from 1769 were under decrees of sale, where the augmentations of stipend were made deductions from the price, and any "other "augmentations were to be at the risk and hazard of the purchaser."

So far as to the fact of any special assignation existing. As to the authorities cited to shew that the right is carried without this, and by the mere conveyance of the lands, no such question either was or could be raised in Wilson *v.* Agnew. There the covenant was between superior and vassal, and it was repeated in every renewal of the investiture; and the main question was, whether the teinds formed a separate estate from the land, with which the granter of the mortification had never parted, or whether the exemption from farther payment of stipend formed part of the vassal's title to the tithe. And with regard to these cases, as to which it was said, that the objection taken here might have been, but was not raised, it does not appear from the facts, as stated, whether the objection could or not have been taken. But Graham *v.* Don, 18 *F. C.* 102, is an express authority that the assignation of writs is only for the purpose of enabling the disponee feudally to complete his title; and Hamilton *v.* Montgomerie, 12 *S.* and *D.* 349, shews, that even under the deed of 1717, the writings assigned were so assigned for the purpose only of perfecting rights created by other parts of the deed, and not for conveying other rights themselves.

Pemberton and Anderson for respondents.—When the cause was last before the House, an objection was taken in the reply, for the first time, to the title of the respondents to the obligation of warrandice; and as we did not anticipate, and were not prepared to answer the objection, and the Court below did not appear to have had the point under their consideration, the remit of 7th May, 1840, was in consequence made; and to this

question of title alone did we understand we were to address ourselves to-day.

[*Lord Chancellor.*— The House will hear the argument as if the noble Lord who formerly presided were here alone. There need not therefore be any repetition of the former argument, but counsel may confine themselves entirely to the question of title.]

The remit by this House was not for farther information on the facts, but that the Court below might state its opinion upon the title as a question of law, whether the deeds produced were sufficient to transfer the right claimed. Upon this point we admit, as to Sybster, that there is not any regular transmission of the special warrandice in the deed 1715; but we say, that we have a formal regular conveyance of the estate and titles feudally completed, and that that conveys all obligations in these titles.

The purchaser, under the deed of 1715, was not under any personal liability to pay stipend, his liability was solely in respect of his possesion of the teinds; and by the warrandice of that deed he possessed, under a contract, that he should be free from any augmentation, and should enjoy the lands, freed from any deduction from the profits beyond a fixed amount.— Whom could that contract benefit but the owner of the teinds?

Without any assignation to the special warrandice in the deed of 1715, it must, *ex necessitate*, go to the successor in the teinds. That no special assignation is necessary to carry rights inseparably annexed to the land, rests not upon principle only, but upon direct authority, *Ersk.* II. 3, 31; *Bank.* II. 123, 3; *Ross's Lec.*, vol. II., p. 311; *Bell on Titles, clause of war*, sec. 6, p. 64 and 69; Kyle *v.* Kyle, N *F. C.* 472; Wilson *v.* Agnew, 6 *F. C.* 256; 9 *S.* and *D.* 357.

As to Wedderclett and Hauster, the same principle applies, though the title is in somewhat different circumstances. The title of the respondent here is derived from the disposition of 1710,

and the objection is, that at that time the special warrandice in the deed of 1715 had not existence, and therefore he cannot have any right under it. But the disposition 1710 conveyed the teinds, and assigned to the disponee writs and evidents, and the feudal title, obtained by Francis the disponer, and completed in 1750 in the person of Alexander Sinclair by resignation, accresced to the previous disposition of 1710, and gave to the disponee the benefit of all rights which the disponer obtained by the deed of 1715, as if they had been in him at 1710; and thereby gave the disponee in the deed of 1710, and his successors, the full benefit of the special warrandice in the deed of 1715; *Ersk.* II., 7, 3; *Stair*, III., 2, 1; *Ross's Lect.*, p. 311, 316. The subsequent progress of titles does not bear any special assignation to the special warrandice in the deed of 1715, but upon the same principles that have been urged in regard to Sybster, the general assignation of writs throughout the progress, and the actual title to the lands and teinds, carried right to this special warrandice.

[*Lord Cottenham.* — The party did not convey the lands by the deed of 1715, freed from liability to augmentation, but only covenanted, that in case of augmentation, he should pay.

Lord Chancellor. — The pursuer is bound to pay, in the first instance, and the warrandice is only a covenant of insurance. The question is, Does that covenant run with the land? to use an English expression.]

The case of Wilson *v.* Agnew shews that it does; but there are many other cases in which the objection, that a special assignation is necessary to carry particular rights might have been taken, but was not, — M'Ritchie's Trustees, 14 *S.* and *D.* 578; Nisbet's Trustees *v.* Halket, *M'L. and Rob.* 53; 13 *S. and D.* 497; Cunningham *v.* Colquhoun, *Shaw's Teind Cases*, p. 175; Guthrie *v.* 1 *Bro. Supp.*, 75; Stuart *v.* Brewers in Glasgow, *Mor.* 24.

[*Lord Brougham.* — If the living were by any means put an

end to, the teinds would belong to the respondent, freed from stipend. Augmentation, therefore, cannot in any sense operate an eviction. The warranty is a mere covenant of insurance.]

LORD COTTENHAM. — My Lords, When this case was before your Lordships in the year 1840, an objection was taken, to which the attention of the House was drawn, I believe in the reply, at all events after a great deal of discussion had taken place, upon a question of some difficulty, whether the pursuer had stated and proved such a case as entitled him to call upon the defender to answer to him upon the alleged warrandice, which the original owner of the estate had entered into.

My Lords, I was very much struck with the objection which was raised, and according to my recollection, although the learned counsel had been heard when the objection was raised in the reply, yet thinking it right that they should have an opportunity, if they could, of removing that objection, I believe I put it to the learned counsel who were present, whether they had the means upon the papers then before them of removing the objection in the pursuer's title to sue the defender upon that alleged warrandice, and the learned counsel stated, that, upon the papers with which they were then furnished, they had not the means of so doing. I then stated, that, as to two of the parcels of which the estate consisted, I considered that what had been urged was quite conclusive, namely, that the pursuer, with respect to those two portions of the estate, had clearly not a right to connect himself with the warrandice, so as to sue for those portions of the estate; and I am represented to have said, which I have no doubt is quite correct, "What Sir William Follett has stated, disposes "of two of the estates, Wedderclett and Hauster, and regarding "Sybster, the pursuer must shew that he is entitled to the bene-"fit of the covenant of 1715, by being assigned into it." I then stated, that I did not see from the deeds printed, that he had

been so assigned to it. "That the pursuer himself had purchased "after many breaches of the obligation of warrandice had taken "place, by augmentations of stipend, was plain. He purchased "therefore only what remained, not the estate in its integrity. "Did he purchase what had ceased to be the property of the "apparent owner, relying on the warranty against augmenta- "tions? Did he purchase on the distinct footing of being en- "titled to this relief? If he did, it must appear in the deeds. "The sale could only be of what remained; a sale of the whole "was not consistent with the state of the case."

Under these circumstances, my Lords, entertaining and expressing a very clear opinion as to two portions of the estate, and being without any information as to the third portion of the estate, so as to see in what manner the pursuer connected himself with the relief which he sought, a remit was made to the Court of Session, and that remit was for the Court of Session "to con- "sider and state their opinion how far the obligation of war- "randice, under the contract of 1715, mentioned in the "appeals, has been duly transmitted to the pursuer."

My Lords, I am anxious to call your Lordships' attention to what took place upon that occasion, inasmuch as it appears to me, that some misapprehension has arisen in the Court below, as to the meaning of that remit. It has been supposed, that the House sent it back to the Court of Session, for the purpose of enabling the pursuer to amend his case, that is to say, to supply by evidence that which appeared to be defective in the case which he had originally brought under the consideration of the Court. That, I apprehend, would have been an exceedingly irregular proceeding, and one which it certainly was not the intention of the House to pursue in making this remit. It appeared that this objection had been altogether overlooked, not only by the Court, but in justice to the Court I must state, by the counsel for the defenders; and that the attention of all parties had been directed

to the point of the liability of the defenders, to the warrandice in question, without paying attention to the right which the pursuer might have to insist upon that warrandice, as against the defenders, if their liability existed to any person; that seemed to have been overlooked. It was for the purpose therefore of obtaining from the Court an opinion which they had not before expressed upon a question which did not seem to have been brought under their attention, as to how far the title to sue upon the warrandice had been transmitted to the pursuer, that is, according to the *allegata et probata* of the case.

When the case came before the Court of Session upon this point, the matter being sent without any distinction as to the different parcels, they having in the first instance been of opinion that the pursuer was entitled to the remedies he claimed as to all three portions of the estate, it appears to have been ultimately the unanimous opinion of all the learned Judges, (the Lord Justice-Clerk, having, in the first instance, stated a contrary opinion, but afterwards yielding to the arguments of the other Judges,) that as to those two portions of the estate upon which this House was satisfied upon the argument of the case when it was before them, there was no title whatever in the pursuer to raise the question as to the warrandice. The third remained for their consideration, and with respect to the third, the opinions of the Court of Session was, that the pursuer had succeeded in so connecting himself with the warrandice, as to entitle him to sue upon it, and that the defenders were liable upon it.

My Lords, upon that latter part of the case, therefore, it now comes under your Lordships' consideration. For though the question has again been raised at the bar, with respect to the other two portions of the estate, I have seen nothing whatever to alter the opinion which I submitted to your Lordships before, that the pursuer's case has entirely failed with respect to those two portions of the estate. That impression certainly is

strengthened by the unanimous opinion of the Court below, that that was the right construction to be put upon the transaction, with respect to those two portions of the estate.

My Lords, when the case came before the Court of Session again, upon that portion of the estate upon which they reported, that they thought the pursuer was entitled to the benefit of this warrandice, it appeared, that there had been no document whatever produced to the Court at the original hearing affecting the pursuer's title at all; and I will refer your Lordships to the statement upon the summons, that it may be seen in what way it was that the pursuer stated his case, as to the mode in which his title had been communicated to him. He stated "that the said John "Sinclair of Barrock was succeeded in the said lands and teinds "of Sybster," — that is the portion of the estate now in question, — "by his eldest son, Alexander Sinclair of Barrock, who after-"wards disponed them to his younger brother, John Sinclair of "Sybster. That the said John Sinclair of Sybster, in 1769, "disposed them with the writs and evidents, and whole tenor and "effect thereof, to Thomas Dunbar of Westfield." Through Thomas Dunbar, the pursuer claims. With respect, therefore, to the transmission of that property from Alexander to John, the statement is merely, that Alexander afterwards disponed it to his younger brother John, and that John afterwards disponed it to Dunbar. Then the transmission from Alexander to John, is merely stated as a transmission of the estate.

When the case came to be investigated in the Court of Session, up to the moment the learned Judges delivered their opinion, no document whatever had been produced. It did not appear in what manner, by what instrument, by what means, the title to the property had been transmitted from Alexander to John, or from John to Dunbar; and the opinions of the learned Judges were pronounced in the absence of any such documents. Before, however, the interlocutor was finally pronounced, it was suggested,

that the deeds themselves had not been produced, and the pursuer was undoubtedly treated with every possible indulgence, so as to give him every opportunity that he possibly could have, for making good his case, if case he had to make good; because, in that stage of the proceeding, the farther consideration was stayed in order to enable him to produce the instruments under which he claimed.

The party claimed the production particularly of a disposition by Alexander Sinclair to John Sinclair, dated the 22d of August, 1769, and a disposition by John Sinclair to Thomas Dunbar, of the 6th of December, 1768. Those two deeds, supposing that this warrandice had been properly communicated to Alexander, would have shewn the mode in which it had passed from Alexander to John Sinclair, and from John Sinclair to Dunbar. But, my Lords, those documents were not produced, and nothing was produced but an instrument of sasine, corresponding with these transactions as to the transfer of the property from one to the other, the instrument of sasine being totally silent as to this warrandice, taking no notice of it whatever, and professing to be merely a transfer of the land and teinds, with the parts, pendicles, and appurtenances to the said land whatsoever.

The question then will be, and the only question now for the consideration of your Lordships, whether, in that state of the evidence of the pursuer's title, it is possible to consider that he has made out his right, not as against the defender, to the benefit of this warrandice, which was the question discussed in the Court below, in the first instance; but the preliminary question which is to be decided, is, whether he has so connected himself with the warrandice, or contract rather, — for warrandice appears to me to be a term very inappropriately applied to the subject matter of the present discussion, — whether he has so connected himself with this contract as to entitle him to sue upon it.

My Lords, the attempt at the bar was, to shew the mere pos-

session of the lands carried with it a right to the benefit of this contract. Now if your Lordships call to mind what the nature of this contract is, and what right it is that the plaintiff claims in respect of this contract, I think your Lordships will be of opinion, that it 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. It is a sale by one party to another of the teinds or tithes of the parish; according to the law of Scotland, that being a property in individuals, but always subject to be diminished by a portion of it being assigned by the legitimate authority, to the support of the minister of the parish — not as in this country, where the minister of the parish has the whole tithes — but the tithes being in the hands of individuals subject only to have a portion of them taken by the competent authority for the purpose of increasing the stipend of the minister. What, therefore, the one purchases from the other, is the teinds of the parish; the teinds of that parish being, like all other teinds, subject to this 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; the enjoyment of them is diminished, by a part of them being taken by legitimate authority for that purpose. But there may be a perfectly good title to the teinds; the title may be free from all objection, although a large portion, or the whole, may be taken for the purpose of being added to the minister's stipend.

The nature of this contract was this, — The party selling says, I sell you the teinds of this parish; the minister's stipend is now a certain amount, and I enter into a contract with you to indemnify you in the event of the minister's stipend being increased, so that the subject matter of your purchase shall be thereby diminished. In that event, and under those circumstances, I will

then undertake to repay to you, that which you may be compelled to pay out of your teinds to the minister of the parish. What connection has that with warrandice in the ordinary sense of the term? It is a contract perfectly collateral to the subject matter of the sale. It is a contract, that, in a particular event, happening to diminish the value of the property sold, the vendor shall come in and indemnify the pursuer against the diminution of income sustained by the exercise of that legitimate authority, by which part of the income arising from the teinds may be applied to the support of the minister.

That such a contract may be the subject of assignation, and may be passed from one hand to another, is not now in dispute. The question now in discussion is, whether the mere title to the lands, the mere circumstance of proving that the individual now instituting the suit, and prosecuting this claim, is in possession of the estate, necessarily carries with it a title to sue upon this contract.

My Lords, one great difficulty in the way of the pursuer undoubtedly is, that in supporting the decision of the Court below, he necessarily must, upon this point, throw over the reasoning of all the Judges, for they, one and all, maintain the title of the pursuer, not upon the ground of his being in possession of the lands, not because he has a title to the lands out of which the teinds are to arise, but upon the ground of there being evidence of this particular contract having been assigned to the pursuer, and that he connects himself by various transfers of the property, or transfers of the contract, with the title of the individual purchaser with whom the contract was entered into.

My Lords, the authorities cited, particularly in the judgment of Lord Moncreiff, which it is quite unnecessary for me therefor[illegible] now to repeat to your Lordships, shew to demonstration, that, according to the law of Scotland, the right to the benefit

of contracts of this sort cannot be so appended to the title to the land, as to be the subject matter of a suit merely in respect of the possession of the land.

Then comes the question, If it requires a particular assignation of the benefit of this contract, what evidence have we of any such assignation? Upon this there is a total absence of all evidence. Those two deeds, if produced, might have contained evidence of such assignation, or what is much more probable from their not having been produced, they might have contained conclusive evidence that no such assignation was intended. What their contents may be we know not. They have not been produced, and if it is necessary for the pursuer to shew an assignation of this contract, he has not produced any document in which it is contained. Unless, therefore, it belongs to the land, passes with the land, and is necessarily available for the benefit of whoever may be in possession of the land, (an opinion which I apprehend your Lordships will not entertain,) then all the authorities and all the judges who have decided this case are against the title of the pursuer to the relief he prays.

My Lords, after having fully considered this case, and the reasons of the learned Judges, and the evidence adduced, I have not been able to find any evidence upon which it is possible to adjudicate in favour of the pursuer's right to sue upon this contract. The result, therefore, in my opinion is, that the pursuer has entirely failed to connect himself with this contract, and the question as to the nature of the contract, therefore, cannot arise. After the various opportunities which have been given to the pursuer to make out his case, with full notice of what was required, he has entirely failed to do so, and what I should submit to your Lordships, therefore, would be, that your Lordships should now reverse the judgment of the Court below — that instead of decreeing in favour of the pursuer, your Lordships should find that the defences are sustained. The party has instituted pro-

ceedings upon an alleged title, which title he has entirely failed to establish. I submit to your Lordships, that the judgment should be in favour of the defender in that suit, with the costs of the suit.

Mr Connell. — My Lords, is it intended to give the costs below or only the costs here?

Lord Brougham. — The costs below, the costs of the action from which we think he ought to be assoilzied, sustaining the defences.

Lord Cottenham. — Not the costs here.

Mr Connell. — There is a cross appeal of Mr Horne.

Lord Cottenham. — I am speaking of the appeal of the defender, who questions the title of the pursuer to obtain relief against the defender.

Mr Connell. — Mr Horne has brought a cross appeal here.

Lord Brougham. — There was no cross appeal originally, was there?

Mr Connell. — Yes, my Lord, there was a cross appeal by Mr Horne. The Court refused to allow him to go farther back in his claim than forty years, and he appealed upon that point.

Lord Brougham. — There was no different opinion come to in the Court below, originally, with respect to Wedderclett and Hauster, and with respect to Sibster. They found the pursuer entitled upon all three, and upon the remit, they changed their opinion as to Wedderclett and Hauster, and you appealed against that change of their opinion.

Mr Connell. — No, my Lord.

Lord Cottenham. — I am now speaking of the original appeals, the appeal which came originally before the house, upon which the remit was made. If the other noble and learned Lords concur with me in the opinion which I have found, the result will be, that the Court of Session were originally wrong as to all three. The consequence of that will be, that the pursuer came

before the Court of Session having no title; and putting ourselves in a situation to do what the Court below ought to have done, in our opinion, the pursuer having failed in making out his title, the defences have been sustained, and the pursuer will have to repay to the defender the costs of that proceeding. Of course, I do not say any thing of the costs of the appeal, because the judgment of the Court below has been altered upon that appeal, as to two portions in the first instance, and now as to the whole. I am speaking now as to the original appeal only. The result, therefore, will be to sustain that appeal without costs, reversing the judgment of the Court below, and making the pursuer pay the costs of the proceedings of the Court of Session. Do I rightly understand, that the pursuer has appealed as to the last decision of the Court of Session with respect to Wedderclett and Hauster?

Lord Brougham. — The decision upon the remit?

Mr Connell. — No, my Lord. I speak of the cross appeal.

Lord Brougham. — The Court originally, as I understand, found, and as we now think, erroneously found, for the pursuer, upon the whole three. Then the case went back, and upon the remit, the Court of Session changed its opinion so far as to agree with this house upon Wedderclett and Hauster, and to say that the pursuer had failed. Then, the Court having found against the pursuer, as to Wedderclett and Hauster, has not the pursuer brought that last finding upon the remit here by his present appeal?

Mr Connell. — There was no appeal when the case came back. It was a return of the opinions of the Judges.

Lord Brougham. — Then there is no appeal as to Wedderclett and Hauster.

Mr Connell. — No, my Lord.

Lord Brougham. — Is there a cross appeal as to what was done upon the remit?

Mr Connell. — No, there is no appeal at all, there is no judgment upon the subject. They merely pronounce an opinion in answer to the remit from this house. But Mr Horne, who failed upon one point, namely, as to going back beyond forty years, brought a cross appeal. Now, as this action has failed altogether, I submit, that Mr Horne's cross appeal ought to be dismissed with costs.

Lord Cottenham. — Do I rightly understand, that there is an appeal by the pursuer, complaining that he did not get enough in the Court of Session?

Mr Connell. — Yes, my Lord, I will read the words of the cross appeal. He appeals, "In so far as the interlocutor of "Lord Mackenzie excepts from the obligation of relief, those "portions of the stipend payable by your petitioner, under any "augmentation granted forty years before your petitioner in-"sisted in his present claim of relief, and the said interlocutors "of the Lords of the Second Division, dated" so and so, "in so "far as they sustain that exception."

Mr Spottiswoode. — That is upon the point of prescription.

Lord Cottenham. — Then I understand by that, that he claimed not only to be indemnified against the latter augmentations, but against augmentations which took place forty years before that time.

Mr Connell. — Yes, my Lord.

Lord Brougham. — He complained of the Court for not having given him enough.

Mr Connell. — Yes.

Lord Brougham. — We are of opinion, that they gave him too much. Therefore he must pay the expense of the cross appeal.

Lord Campbell. — My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friend.

Lord Brougham. — My Lords, I also entirely concur.

Lord Cottenham. — I am authorized by the Lord Chancellor

to state, that he concurs in the view I have taken of the case.

Ordered and Adjudged, That the interlocutors, in so far as complained of in the original appeal, be reversed; that the defences stating objections to the title of the respondent, in the said original appeal be sustained; and that the action to which the appeals relate be dismissed with costs.

RICHARDSON and CONNELL — SPOTTISWOODE and ROBERTSON, Agents.