[22*nd April*, 1844.]

THE RIGHT HON. CHARLES LORD BLANTYRE, *Appellant.*

THE RIGHT HON. THE EARL OF WEMYSS AND MARCH, and THE HON. CAPT. KEITH, *Respondents.*

Res Judicata.—A judgment upon a question raised, but not material or necessary for the decision of the issue between the parties, will not form *res judicata.*

Res Judicata.—*Teinds.*—*Locality.*—*Semble.*—That a judgment in one process of locality upon a point in issue between the parties will form *res judicata* in a subsequent locality.

IN the year 1650 the minister of Haddington obtained an augmentation of his stipend. The stipend, as so augmented, was levied from time to time by the successive incumbents of the parish, without its having been localled on the heritors.

Betwixt the year 1650 and the year 1710 the parish of Gladsmuir was erected and part of the lands of the parish of Haddington were disjoined from that parish and annexed to Gladsmuir.

In the year 1710 the then incumbent of the parish of Haddington, experiencing difficulty in obtaining payment of his stipend, brought a process for having it localled, and for having the stipend withdrawn by the annexation of part of the lands to Gladsmuir localled upon the other teinds of the parish of Haddington. In that action appearance was made for the proprietors of Bearford, and Easter and Wester Monkrigg, the predecessors of the respondents.

On the 8th February, 1710, the minister obtained a decree of locality, which set forth that certain specified heritors objected to the scheme of locality that they had heritable rights to their teinds, and that they could not, therefore, be obliged to pay beyond what they had been in use to pay since the decree of

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augmentation, so long as there were free teinds within the parish, which they alleged there were; that the Lord Ordinary, " before answer as to the manner of localling, allowed a conjunct " probation for proving the value of the free teind," that " there- " after the procurator for Hepburn of Munkrigg craved absol- " vitor, in respect his lands were kirk-lands, feued out *cum* " *decimis inclusis* before the act of annexation, as appeared by " the writs produced, and that they were never in use of paying " any part of the stipend; which being likewayes considered by " the Lord Ordinar, he, in respect of the writs produced, and " that they were never in use of payment, fand that the lands " of Munkrigg could not be liable in any part of the stipend. " Thereafter the pror. for Hepburn of Bearfoord alleadged that " the lands of Bearfoord, Easter Munkriggs, and Cotwaills, " being kirk-lands fewed out *cum decimis inclusis* before the act " of annexation, could not be liable to any part of the stipend: " whereunto Mr. Alexander Hay, advocat, answered, that Bear- " foord and his predecessors have allwayes been in use of paying " of a part of the stipend since the year 1650, and how farr " soever his rights might free him from any furder payment, yett " he ought still to continue to pay as formerly: Whereunto " Bearfoord's pror. answered, that at the time the use of pay- " ment was first introduced, the lands were in a liferentrixe's " hands, and they have not as yett been fourty in use of pay- " ment without interruption, by minorities, soe that the said " lands ought not only to be exeemed from paytt. of any part of " the augmentation, but lykewayes from payment of what was " wrongously imposed upon them formerly, and he had raised " a reduction and declarator of exemption, which he then re- " peated: Whereunto the said Mr. Alexr. Hay, as pror. afore- " said, dupleyed, thatt thirteen years possession by a minister " prescrived a right to the subject possesst, and Bearfoord could " not refuse but he had paid much more than thirteen years " without interruption by minorities or otherwayes: which being

" in like manner considered by the said Lord Ordinar, he, in " respect of Bearfoord's use of payment ordained him to con- " tinue to pay the same quantity of the stipend formerly paid by " him and his predecessors, and in respect of the writts produced " assoilzied him from all furder payment of stypend."

The decree further set forth that Hepburn had presented a petition against an interlocutor, ordaining him to continue the same payment which his predecessors had been in use to make, and that " thereafter upon the 24th day of November, " 1708 years, the said action and cause being again called, and " parties compearing as above, the purs.'s prors. craved that the " Lord Fountainhall's report might be read, and that the Lords " would determine the point y^e^by remitted to them, viz., whether " that part of the stipend as yet unallocat, should be in the " first place allocat upon the teinds of other men's lands, which " was in the hands of titulars or their tacksmen, or upon the " teinds of the paroch in generall. Whereupon the pror. for " the toun of Haddingtoun, Alderston, Sir Robert Sinclair, and " others alleadged, that the stipend ought, in the first place, to " be allocat upon the free teind of the paroch before any part of " the teinds belonging heretably to the heretors of the lands " could be burdened; and as that was most agreeable to law, " soe it was to their Lordships' daily practice in the like cases. " Whereupon the pror. for the Lord Blantyre, &c., alleadged " that the stipend as yett unallocate ought to be allocat upon " the teinds of the haill paroch equally, notwithstanding of the " rights produced for thir reasons,—*first*, no teind could be " exeemed from payment of a minister's stipend, nor could any " right exeem the land of a paroch till the minister had been " sufficiently provided, except such lands as were fewed out by " kirkmen, *cum decimis inclusis quæ nunquam a stipite antea* " *separatæ fuerunt*, which could not be pretended in that case; " on the contrair, the rights produced were not heritable rights, " but only flows from a tacksman, as was evident from Sir

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"Robert Sinclair and the Laird of Colstoun's productions; so "that these heretors, who possessed the teinds of their own "lands, be virtue of rights flowing from a tacksman, could be in "no better case than others who possessed teinds be virtue of a "standing tack. Whereunto it was answred by Mr. Alex. Hay, "advocat, that he opponed the rights produced, which was char- "ters and infeftments of the teinds; and albeit that heretable "rights to the teinds could not exeem the proprietors from aug- "mentation of stipends, where there were no other teinds in the "paroch besides; yett wherever there was free teind, the samen "ought to be exhausted before the teind heritably conveyed to the "heretor could be burdened. Whereupon, Sir Francis Grant, "advocat, as pror. for Hepburn of Bearfoord, repeated the peti- "tion, and craved that his lands might be wholly exeemed from "payment of any part of the stipend, in respect he holds his "lands *cum decimis inclusis* as appeared from the writs produced. "Whereunto the prors. for the other heretors answered ought to "be repelled; *Primo*, because the rights produced were not such "as could exeem the land from teind; for albeit the rights to the "lands of Bearfoord bear *cum decimis inclusis*, yett it did not "bear the words *nunquam antea separabantur*, from which it "appeared that they had been formerly *separatæ;* and being "once formerly separate, they ought to remain separate, soe as "to be subject to the payment of stipend; and the rights pro- "duced to the teinds of his other lands did bear only *cum* "*decimis in garbalibus*, which could noe manner of way be in- "terpreted to be other than ane heritable right to the teind "sheaves which had been formerly in use to be drawen; but, to "put the matter beyond all question, as the rights produced did "not bear the ordinar clauses anent *decimæ inclusæ*, soe they "could not doe it, because, by a channon of the Latheron "Councill, kirkmen were expressly prohibited to feu out lands "*cum decimis inclusis*, and the erection of the Abbacy of New- "bottle, of which thir teinds was a part, was not till after the

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" Latheron Councill. But farder the Laird of Bearfoord and his " predecessors had been in use of payment of a part of the " stipend past prescription. Whereupon Bearfoord's pror. " replied, that the rights produced clearly instructed his lands " to be kirk lands, fewed out by kirkmen, *cum decimis inclusis*, " which was all was necessary for him to instruct, and albeit, " they wanted these words of style, *quæ numquam antea separa-* " *bantur*, that could never annul the right, the word *inclusis* " comprehending all. And for the history of the erection of the " Abbey of Newbottle, whether it was befor or after the Lathe- " ron Councill was a matter Bearfoord neither knew nor was " obliged to know; and for the use of payment, the samen was " introduced when the lands was life-rented, and it was known " to the Lords how long they continued in that state. Where- " unto the prors. for the heretors duplyed, that whatever state " the lands was in when the burden was imposed, yett since the " liferentrix died, the ministers had been in possession upwards " of thirteen years, which prescrived a right to them: which " being considered by the said Lords, they refused the desire of " Bearfoord's bill, and adhered to the Lord Fountainhall's inter- " locutor, finding that Bearfoord ought to continue to pay the " proportion of stipend formerly in use to be payed by him, and " exeeming his lands from all furder payment, and fand that " the teinds in the hands of titulars or tacksmen, or other men's " lands ought to have been, in the first place, allocat, notwith- " standing of the currency of the tacks, and remitted to the Lord " Fountainhall to prepare the locallity accordingly."

In the year 1822, the first and second ministers of Haddington, which is a collegiate charge, respectively brought actions of augmentation, modification, and locality. In these actions decrees of augmentation were given, and a scheme of locality was ordered to be prepared. In the course of framing the scheme, the common agent gave effect to a claim of exemption set up by the respondents upon a clause "*cum decimis inclusis*" contained

in their charters. The other heritors objected to this claim that the clause did not support it, inasmuch as the words "*et nunquam antea separatis*" were awanting. The respondents, in answer, relied upon the decree of 1710 as *res judicata*, that the lands were to continue their former use of payment, but were "exeemed from all further payment."

The Lord Ordinary (*Cunninghame*) on the 16th January, 1838, sustained the claim of exemption by an interlocutor in these terms:—"The Lord Ordinary having considered the "revised objections and answers, and whole process, and having "particularly examined the proceedings in the process of locality "relative to this parish, which terminated in a decreet of "locality, pronounced on the 8th February, 1710, excerpts "from which have been lately produced: Finds, that the said "former process of locality commenced in the year 1707, and "that appearance was made therein for the predecesors of the "whole parties, both objectors and respondents in whose behalf "pleas are stated in the present process: Finds, that the record "of the former process affords clear evidence that the judgment "pronounced in the said process, exempting the lands of the "present respondents from allocation, as held *cum decimis inclusis*, were neither pronounced *in absence* nor *per incuriam*, "but on a deliberate discussion and consideration of the law as "then understood: Finds that the objectors, as representing or "standing in the place of heritors who were parties to the said "former locality, cannot be allowed, more especially after the "judgments in the said process have been acquiesced in and "acted on for above 120 years, to call in question the said judgments, or to maintain that the respondents' titles are not "sufficient to exempt them from stipend, on the ground that a "different view of the law applicable to such titles has been "taken by the Court in cases of comparatively recent date, "occurring in other parishes; Therefore, of new repels the objections stated for Lord Blantyre and others, finds the respondents

" entitled to expences, and remits the account thereof, when " lodged, to the auditor, to tax and report."

' *Note.*—The proceedings in the former locality, when ' minutely examined, appear sufficient to obviate the objections ' in the present case, and demonstrate that these objections are ' not tenable either in fact or in law. Indeed, it is thought that, ' if the present objections were sustained, the decision would be ' not a little dangerous in point of precedent.

' So far as the Lord Ordinary can trace the parties, every ' property for the owner of which appearance is made in the ' present process, was represented in the locality of 1707-10, and ' their attention was particularly called to the very question now ' proposed to be revived. Here the excerpts from the old record ' (printed since the case was last before the Court in May, 1836) ' deserve to be particularly examined.

' These excerpts show that the whole titles of the respondents' ' predeccessors, from 1567 to 1686, were produced. It is also ' established that, on 17th February, 1708, Lord Fountainhall ' pronounced an interlocutor as to the lands of Hepburn of ' Wester Monkrigg (predecessor of Captain Keith), finding, " that the said lands, *in respect of the writs produced*, and that " they were never in use of payment, could not be liable in any " part of the stipend.'

' That judgment was not brought under review, for a reason ' which is perfectly obvious from the record. The excerpts, after ' setting forth the preceding interlocutor as to Wester Monkrigg, ' proceeded to narrate the judgment of the Lord Ordinary as to ' the lands of Bearford and Easter Monkrigg, then belonging to ' Robert Hepburn (the predecessor of Lord Wemyss). His ' pleas are first set forth, and then the Lord Ordinary (Foun- ' tainhall), ' in respect of Bearford's *use of payment*, ordained him " to continue to pay the same quantity of stipend formerly paid " by him and his predecessor; and, *in respect of the writs pro-*

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" *duced*, assoilzied him from all furder payment of stipend.' ' This interlocutor, *having been fully brought under review of the* ' *Court*, it was unnecessary for the heritors to contest the decision ' as to *Wester* Monkrigg, till the fate of Hepburn of Bearford's ' plea was ascertained. Accordingly, the excerpts show that ' Bearford's plea was as fully, or, at least, as clearly stated to the ' Court in 1708, as it could be at the present day. Bearford ' reclaimed against the Lord Ordinary's interlocutor; and the ' Court, on 2nd June, 1708, ordered the petition to be seen ' and answered in eight days, and declared ' They would hear " parties *on the said cause*, and the Lord Fountainhall's report " the same day.' Accordingly, the excerpts show that appear- ' ance was made for Lord Blantyre; and that he urged, at ' length, the very plea on the merits now indicated by the ' objectors—viz., that the clause in the respondents' titles wanted ' the words '*nunquam antea separatis.*' The plea was probably ' elaborately argued *viva voce*, as the first counsel at the bar of ' that day seem to have been employed for the parties. Never- ' theless, the Lords adhered to the Lord Ordinary's interlocutor; ' and, that being the judgment of the whole Court as to Bearford, ' any separate argument to the Inner House, in the case of ' Monkrigg, was unnecessary.

' It is on reference to these proceedings that the Lord Ordi- ' nary is of opinion here, that there is no room for holding that ' the decree in favour of the respondents' predecessors, was a ' decree in absence. It was manifestly a decree *in foro con-* ' *tentiosissimo*, as to Bearford; and latterly the judgment of ' the Lord Ordinary, as to Monkrigg, was *purposely* allowed to ' become final, because the opinion of the Court on Bearford's ' title, in the same parish, was decisive of Monkrigg's case.

' This brings the question here to the point raised by the ' objectors, who argue that no judgment, in one locality, can ' ever form *res judicata*, as to the augmentation to be provided ' for in a *subsequent* locality; or to any effect beyond the alloca-

'tion which may be the subject of discussion when the argument 'took place. But the Lord Ordinary can find no authority for 'that proposition, which he has always understood to be quite 'adverse to the understanding of the country and of practitioners. 'A great many questions of warrandice as to stipends and aug-'mentations, have been tried during the last thirty years, in 'processes of *locality*. See, in particular, the case of the Earl 'of Hopetoun *v.* Jardine, 3rd July, 1811; Trustees of Lord 'Hopetoun *v.* Copeland, 8th December, 1819; case of Major 'M'Donald, Powderhall, *v.* Heriot's Hospital; and various other 'cases, reported in Shaw's *Teind Cases*, pp. 134-268. Besides, 'nearly the whole questions as to claims for exemption on '*decimæ inclusæ* titles, have all been tried in localities. See 'a great variety of these cases (all tried in localities), enume-'rated in the last edition of Sir John Connell's work on teinds, 'vol. ii., pp. 24-37, &c. Indeed, the very case of Ochterlony, 'in which President Blair so fully explained his views on this 'obscure subject, occurred in the locality of Carmyllie. But, 'according to the argument of the objectors, the decision of that 'case and all other contested questions of title or warrandice, if 'decided in localities, will not form *res judicata* in any future 'locality of the same parish, *quoad* subsequent augmentations, if 'any succeeding heritor choose to renew the litigation.

'The Lord Ordinary thinks that this doctrine would be alike 'oppressive to heritors, and contrary to all the authority and 'legal analogies applicable to the question. After the Union, 'the Commission of Teinds had all the permanency and juris-'diction of a court of law in teind matters; and, if parties once 'join issue there, and have the legal construction and effect of 'their titles, as rendering their estates subject to, or exempt 'from, teinds, determined *in foro* in a locality, it would be both 'unnecessary and vexatious to allow either these parties them-'selves, or their heirs and successors, to renew the very same 'argument as to the same estate in any future process, whether

'it be locality or declarator. Indeed, it is thought that a locality 'is the most fit and appropriate process for ascertaining finally 'and permanently the nature of a title, as comprehending or 'excluding a *decimæ inclusæ* right.

'It may be added, that the plea of *res judicata*, founded on 'a judgment in a previous locality, appears to have been one 'of the pleas sustained in the reduction, Lawson *v.* Lindsay, 'Shaw's *Teind Cases*, 3rd July, 1822. There, no doubt the 'title of exemption libelled on appears to have been such as 'would have been sufficient to exempt Lawson's lands, even 'according to the law of *decimæ inclusæ*, as latterly understood. 'But here it deserves particular notice, that Bearford's right to 'exemption, in 1708, was pronounced, not simply in a process of 'locality, but *in a reduction* which he raised expressly to try his 'right; so that, if the judgment in such a process was not suffi-'cient finally to ascertain his right, it is not very easy to see 'how it could ever be determined.'

The Court (1st division) on the 22nd of May, 1838, adhered by a majority to the Lord Ordinary's interlocutor.

The appeal was against these interlocutors.

Mr. Kelly and Mr. J. G. Bell, for the Appellants.—In every new process of augmentation, the localling of the augmentation as between the heritors is according to the existing titles, which must be produced, without reference to any prior augmentation or locality. Here no titles are produced, but the respondents rest their claim of exemption from liability upon the decree of 1710, which was pronounced in a distinct and independent process. The questions between the parties therefore are,—1st, whether in any case a decree pronounced in one process of locality can form *res judicata* in another process in regard to the same parish; and 2nd, assuming this question to be decided in the affirmative, then whether in this case the decree of 1710 can form *res judicata*.

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I. The Commission of Teinds as originally constituted was not intended to determine any question of legal right, but merely to perform the ministerial duty of seeing that proper provision was made out of the teinds of each parish for the maintenance of its minister. Accordingly the Commissioners were selected, not from the legal profession, but from each of the different estates of the realm. When in later times the powers of the Commission were transferred to the Judges of the Court of Session, no alteration was made in the nature of its jurisdiction; accordingly all the machinery by which the powers of the Commission were carried out were kept separate and distinct from those by which the Court of Session carried out its ordinary jurisdiction; no doubt the Commissioners in localling stipends have occasionally determined incidental questions of legal right, but they have done so only so far as was necessary to explicate their admitted jurisdiction. This is an exercise of jurisdiction competent to every Court, *Ersk.* i., 28, but it will not confer the power to adjudicate upon such questions when original and primary, and it was never so considered in regard to the Commission. Monymusk *v.* Pitfoddels, *Mor.* 15644 and 15718.

Further, *res judicata* can be founded only upon pleadings properly framed for trying the particular question; but the process of locality either in the frame of its summons or in the form of its procedure, is no way adapted for the trial of questions of right as between the heritors. The summons is at the instance of the minister against the heritors, not between the heritors as pursuers and defenders; it is confined to the particular augmentation sought to be localled, and does not give any intimation or even suggestion to the body of heritors of any claim or right to be set up by any particular heritor. And even if the heritors should in the subsequent procedure obtain intimation of the claim or right set up, it may in that particular locality be as to them altogether an abstract question in which they have no interest, although in a subsequent locality of a further aug-

mentation it may have changed its character and become a question which the heritors have a material interest to discuss. The former was the case in the present instance, for by the decree of 1710 the augmentation was localled upon the free teinds, so that the predecessors of the appellant had no interest to discuss the claim of exemption set up by the predecessors of the respondents. It is attempted to be maintained, but cannot be seriously argued, that a reduction and declarator was conjoined with the locality, and so it is called in the decree; but on examination of the summons it turns out to be a simple reduction without a single conclusion for declarator of exemption.

II. The decree of 1710 cannot form *res judicata*. 1. Because the Court had no jurisdiction over the question now mooted, even if it had been properly raised; their jurisdiction was confined to ascertaining whether a proper defence had been set up to the particular augmentation then in hand, and could not extend to any future augmentation. 2. Because the question of exemption, though raised by the respondents' predecessors, was not decided *in foro contentioso*. Two claims of exemption were set up, 1st, from the payments which had been in use to be made subsequent to 1650; and 2nd, from liability for any further portion of the augmentation. The first only of these questions was contested, and it was decided against the party. With regard to the second, the titles produced in support of it, whether sufficient to sustain an exemption from ultimate liability, were unquestionably sufficient to sustain the claim of exemption from immediate liability. They showed an undoubted heritable right to the teinds, and as there were free teinds in the hands of the titular sufficient to pay the augmentation, which were liable primarily to those in the hands of the heritor, the other heritors had no interest to contest the question of ultimate liability after the free teinds should have been exhausted; and the decree by its terms shows that they did not contest that question. In

short, the proceeding was confined to liability for the previous use of payments, and nothing was done as to further future payments.

[*Lord Chancellor.*—The decree distinctly assoilzies from all further payment; that was a judgment upon the title.]

Yes, as to the then existing augmentation, which was all that was before the Court; beyond that the judgment was extra-judicial.

[*Lord Chancellor.*—It seems extraordinary that in every successive locality the same question must be decided over and over again.]

All the heritors may not on each occasion be before the Court, but the party may obtain a general and permanent exemption by process of declarator, to which all the heritors must be summoned.

[*Lord Campbell.*—Is there any instance of a declarator of exemption?]

We are not aware that there is; but in no other case than the present has a judgment in a prior locality been held to be *res judicata*. All the authorities negative such a plea, and in some of them, after the point had been deliberately raised and argued,—Auchterlonie *v.* Carmylie, 15 *F. C.* 659; Dickson *v.* Biggar, *Shaw's Teind Cases*, p. 174; Smith *v.* Hunter, *Ibid.*, p. 48; College of Glasgow *v.* Menteith, 17 *F. C.*, 372; Anstruther *v.* Lockhart, *Sh. T. C.*, p. 133; Leslie *v.* Heritors of Rayne, *Mor.* vo. 'Stipend,' App. No. 2; Wemyss *v.* Heritors of Newburn, *Mor. Teind*, App. No. 7; Hay, 15 *F. C.* 564; Hamilton *v.* Paterson, 1 *D.* and *B.*, 453; Maxwell *v.* Jardine, *Sh. T. C.*, p. 143. In some of these cases, on reference to the pleadings, it will be found that the Court, after having in one locality determined the claim upon the titles, has in a subsequent locality again examined the titles, disregarding their previous judgment as having already settled the question; and in the case of Leslie *v.* Rayne, the point of *res judicata* was expressly taken and repelled.

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Moreover, at the period of the decree of 1710, and for a long time subsequent, it was a generally received opinion that a second augmentation could not be granted by the Commission, so that the Commissioners could have had in view to decide only what should affect the particular augmentation before them, and the heritors being by the decision freed from liability in regard to it, could not contemplate the necessity of contesting claims of exemption with a view to a subsequent augmentation, which in the then existing notion could never arise.

Lord Advocate and Mr. Anderson, for Respondents.—I. A claim for general exemption from payment of stipend is never tried in any other way than in a process of locality. Though the Commission in its original constitution, not being then composed of lawyers, would not try such questions even when occurring incidentally in a process of locality, as is shown by the case of Monymusk relied on by the appellant, which in this respect proves too much for him; yet ever since the powers of the Commission were transferred to the Court of Session, questions of exemption have constantly been tried in processes of locality. There is nothing in the constitution of the Court as it now exists, or in the form of the particular process, to prevent such .questions being properly entertained and determined. All the heritors are summoned for their interest, and they have an obvious interest in any condition of the teinds to support their own claims for exemption or otherwise, and to dispute those set up by others.

II. The claim of exemption was expressly set up, and was contested by the other heritors and for an obvious reason; although there were free teinds, it had not, at the date of the interlocutor sustaining the claim, been ascertained whether these free teinds would be sufficient to defray the augmentation, and on the supposition that they would prove insufficient, the heritors had a clear interest to maintain the liability of the claimant to

contribute to the deficiency. Being so set up and contested, the claim was disposed of upon the grounds upon which it was set up, by absolvitor from all further payment "in respect of the "writs produced."

[*Lord Chancellor*.—Was not the continuance of the payments that had been made up to that time all that was material in the process?]

It might not, for there had to be an allocation of the stipend which had been carried away by the minister of the newly-erected parish of Gladsmuir, the effect of which might be to draw from the claimant a greater payment than he had been in use to make. Not only does the decree in terms dispose of the claim upon the shape of the title, but the case of Dempster *v.* Arnott, 2 *Connell*, 380, shows that the judgment was considered by the profession soon afterwards as a leading authority on the effect of such a title.

No authority has been produced to show that a decree in one locality will not form *res judicata* in another; such a decision is not given in any of the cases relied on; in some of them the question did not even arise, and in others it arises only inferentially, from a comparison of the pleadings with the decrees. But in the present case the decree was not in a locality alone, but in a reduction conjoined with it; it is difficult to conceive therefore in what case *res judicata* can receive effect if not in such a one.

[*Lord Chancellor*.—The Court found that there was another fund for payment. No party, therefore, had an interest to complain; there could not, therefore, have been an appeal for instance.]

The effect being prospective, the parties had an interest and could have appealed.

[*Lord Cottenham*.—The case never arose which made it necessary for the Court to consider the liability.]

[*Lord Chancellor*.—If it had been known beforehand that

there was the other fund, would the Court have required to decide the question of liability?]

No, it would not; but nevertheless it did decide the question after it had been fully raised.

[*Lord Chancellor.*—Who were the parties interested to appeal the point decided as to the application of the other teinds?]

The parties having these teinds; but until it was known that they would acquiesce, the heritors, having heritable rights, had an interest to dispute the claim of exemption.

[*Lord Chancellor.*—The claim was supposed to be material, but turned out not to be so; it formed therefore no part of the final judgment—there could not be an appeal.

Lord Brougham.—The Court of Appeal would not have decided it one way or the other—they would have said they had nothing to do with it.]

If the judgment had been against the claim, the party would have had a clear right to appeal, and at the time it was pronounced the other heritors had a clear right to contest it, though in the result it turned out to be otherwise.

[*Lord Cottenham.*—Suppose the opinion on the right had been the other way, would not the ultimate judgment have been the same as it was?]

Yes.

[*Lord Cottenham.*—Then the judgment on the right was *obiter*.

LORD CHANCELLOR.—My Lords, the view which I take of the question in this case does not appear to have occurred to the Court below. There is no doubt the Court had jurisdiction to decide the question for the determination of the case before them. The right to decide the question, when necessary, was incidental to the jurisdiction; but in this case it turned out not to be necessary, and the opinion of the Court expressed with regard to it, in the progress of the cause, cannot conclude the

parties, as it formed no part of the final decision, or of the grounds on which that decision proceeded. It is true they found that the appellant was bound to pay according to the rate at which he had previously paid, but not any further. They so found, with a view to the ultimate decision of the cause; but in the result it appears to have been unnecessary for the decision, which proceeded on totally different grounds, and the finding, therefore, became wholly immaterial.

I am of opinion, therefore, that this cannot be considered *res judicata*, and that the judgment must be reversed.

LORD BROUGHAM.—My Lords, I had not the advantage of hearing the arguments for the appellant, and consequently if I had been disposed to affirm the judgment I should not have taken any part in the decision of the appeal. But as, after having heard the counsel for the respondents, I entirely agree with the appellant, that is to say, as my opinion is entirely against the ground of the decision, and against the decision itself, I entirely agree with the noble and learned Lord on the Woolsack, who has stated his opinion, that this is not such a decision of the Court in the suit of 1710 as can be termed a *res judicata;* and for the reason given by my noble and learned friend, that this was a matter which, though at that period of the case might have worn the appearance of being in point, and material, yet, as when the rest of the case came to be considered, and the ultimate decision came to be given, it turned out to be beside the point, and immaterial, the interlocutor must be reversed.

It has been said that there could have been no appeal from it. Nor could there have been; for there could be no appeal from an immaterial judgment at the conclusion of the cause, for the party prosecuting must have an interest, and no person could be affected or injured by an immaterial judgment. But I doubt whether, at that intermediate period of the cause, in 1710, the appeal could have been prosecuted to any effectual purpose, because

it would be open to the objection, that when it came to be ultimately disposed of, this would be found immaterial. However, it is sufficient to show, as my noble and learned friend has satisfactorily shown, that this was not a judgment that was material in that suit, and was not a decision given on a matter that was really materially raised before the Court.

It is said at the bar that we are not to take into consideration circumstances that afterwards occurred. That is not the point. There was no change of circumstances, there was no new facts; the only circumstance that afterwards occurred was, that the case went on to its natural termination, and that then the judgment, on this point, turned out to be perfectly immaterial. That being the case, it becomes unnecessary to dispose of the second point, which cannot be said properly to arise in this case. In fact, we are not called upon to do so, but if your Lordships look to the interlocutor of the Court of Session, it appears that the learned Judges had not taken that view of it at all.

LORD COTTENHAM.—My Lords, I do not find, as far as I can collect from what passed in the Court below, that this view of the case was considered in the Court of Session. The question argued was, whether what took place in the proceedings in the year 1710 precludes the parties from raising the question as to the liability of these lands. It is said that the Court then decided that they were not liable beyond what they had been accustomed to pay, and that the matter which was in question in those proceedings was not the actual augmentation of the minister's stipend; that that had been decreed many years before, namely, in 1650, but the minister said, "It is now ne-"cessary that I should have decided in what proportions the "several lands are liable to pay me;" and in the meantime a portion of the parish having been separated, it became necessary to indemnify the minister against the loss he had sustained by

losing so much of his stipend as was derived from these lands. Then the owner of the lands says, "I am not bound to pay any "part of the stipend, because I am entitled to the tithes of my "lands in the right of inheritance." But the answer to that was, "You have paid for such a length of time;" whether that was a sufficient ground or not is quite immaterial, "and you "must continue to pay the same proportion as you have paid, "but there is no question whether you are liable to pay any-"thing beyond what you before paid." If there had been a question before the Court, and calling for a decision as to a payment beyond what had been before paid, no doubt that question being raised, any decision upon it would have been *res judicata*; but it turned out that nothing more was done than I have stated, there being a fund of unappropriated teinds which would indemnify the minister the moment he suffered by a part of the original lands having been separated from the parish. What was the result of the cause? The result of the cause was, that the owner of the land failed, so far as he contended that he ought not to have paid anything, and the minister never had occasion to raise the question whether he was liable to pay more, because he was satisfied with the ultimate arrangements adopted of throwing the loss he had sustained upon these unappropriated teinds.

Now the whole difficulty has arisen from the Court deciding by anticipation a point which, if the cause had taken another course, would never have been raised at all. If before deciding whether it was necessary to order the sums payable out of these lands, they had taken the course of deciding that these unappropriated teinds were the proper fund to make good the Minister's loss, it would never have been necessary to consider what lands were liable to pay the additional sum, because no additional sum would have had to be paid at all. The interlocutor declares that they were not liable to pay beyond the sums then fixed, anticipating a case which never arose. A decision was expressed

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which assumes the form of an interlocutor, which becomes in the result immaterial. How can that be considered a judgment? It was no part of the judgment,—it was an opinion expressed by anticipation, which became perfectly immaterial. That interlocutor can never preclude the parties here from the right of proceeding, in order to raise again the question, whether these lands are or are not protected by the title set up.

LORD CAMPBELL.—My Lords, I should entertain little doubt, in a case of this sort, that the plea of *res judicata* would be competent, if the Court of Session, being competent to determine the liability of lands to contribute to the minister's stipend, had at once properly determined the question. That question arising, and being regularly decided, I should think would render unnecessary further adjudication between the same parties: those who were privy to that decision would be bound by what had been decided, and we would have to declare that we found the matter to have been decided. But then in all those cases where *res judicata* is set up as precluding any further inquiry, it must appear that the former judgment was regular, and that the same question properly arose, and was properly decided between the same parties, or parties between whom and the existing litigants, there was a privity. Now, in this case, as soon as I had ascertained, by looking into the proceedings which took place at the commencement of the eighteenth century, that they related to the question whether the lands were liable to pay exactly the same sum to the minister, whether there existed any ulterior liabilities or not, I certainly made up my mind that the question of ulterior liability did not arise, and was not judicially determined. The substantial question there was, as it turned out, whether Bearford should continue to pay what it had paid in the year 1650, when the augmentation was granted, and the time when this suit of locality was commenced, in consequence of part of the lands of Haddington being transferred to Glaids-

muir. The owner of Bearford said, "No, if this payment has "been without any legal obligation, now there is to be a new "locality, it shall pay nothing." The owners of the other lands said, "Bearford has paid from 1650 downwards, and Bearford "ought to continue to pay what it has before paid;" and it was determined that Bearford should continue to pay what it had before paid. In that case the heritors gained all they asked; they were not aggrieved: the suit was determined in their favour. The owner of Bearford appealed from the judgment of the Lord Ordinary to the Inner House, and the decision was against him in the Inner House. If it had been against him before the Lord Ordinary, then if there had been to have been any appeal, it would have been by him on account of the decree deciding his liability to contribute what he had paid from 1650. But there was no occasion for the heritors to contribute, because, without throwing any additional burden on them or Bearford, the minister's stipend was completely satisfied. The question of ulterior liability did not arise: it was purely an extra judicial opinion with respect to the ulterior liability. That ulterior liability was not judicially decided, and it still remains an open question. How it may be decided it is impossible for us to anticipate. All we say is, that it has not yet been decided, and that that is a question which must now be inquired into, and that the cause must be remitted for that purpose, and of course the interlocutor must be reversed.

Lord Brougham.—The order will be a reversal of the interlocutor on the plea of *res judicata* and *quoad ultra*, remit the cause.

Lord Advocate.—Would your Lordships say that this judgment should apply to the case of the parties who have not appealed?

Lord Brougham.—We can say nothing upon that.

Mr. Kelly.—That is not before the Court.

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Lord Campbell.—That would be extra judicial.

Lord Brougham.—No, no, we cannot do that: if we did, we should be just following the course adopted by the Court below, in 1710.

Interlocutors reversed as to plea of res judicata, *and* quoad ultra *remitted.*

Ordered and Adjudged,—That the interlocutors of the Lord Ordinary and the interlocutor of the Lords of Session of the First Division complained of in the said appeal, so far as they or any of them have the effect of finding that the decreet of locality pronounced on the 8th of February, 1710, or any of the judgments or interlocutors pronounced in the process of locality commenced in the year 1707, constituted *res judicata* as against the appellant in this appeal, and in so far as they find the appellant liable in expences, be and the same are hereby reversed. And it is further ordered, that the said respondents do pay, or cause to be paid to the said appellant the costs of the proceedings incurred by him in the said cause in the Court of Session, so far as relates to the discussion of the said plea of *res judicata*. And it is also further ordered, that *quoad ultra* the cause be remitted to the said first division of the Court of Session in Scotland, to do therein as shall be just.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, Agents.