[HEARD 12*th March*—JUDGMENT 14*th August*, 1846.]

The MOST NOBLE JOHN, MARQUIS OF BREADALBANE, &c., *Appellant.*

TEMPLE FREDERICK SINCLAIR, ESQ. of Lybster, and his TRUSTEES, *Respondents.*

Warrandice.—Obligation.—Real and Personal.—An obligation of warrandice in a charter against augmentations of stipend although not a personal obligation which will transmit to the executors of the grantee in the charter, will not vest in a successor of the grantee because of his proprietorship of the lands, without any evidence of its transmission to him along with the lands.

IN the year 1655 the Earl of Caithness granted Sinclair a wadset for 4,400 merks over the lands of Lybster. On the 17th September, 1691, the Earl of Breadalbane, who, in right of his wife, had acquired right to the lands and to redeem this wadset, entered, with consent of his wife and of Lord Glenorchy, his eldest son, into a contract of sale with Sinclair, whereby in consideration of a further payment of money to the Earl of Breadalbane and Lord Glenorchy, as the price, taken together with the 4,400 merks, of the reversion of the wadset, the earl and Lord Glenorchy sold and disponed the lands of Lybster and the parsonage teinds thereof, to "James Sinclair and his heirs "male, whilk failing to his heirs whatsoever and their assignees, "heritably and irredeemably."

The contract contained an obligation upon the earl and his son, to infeft Sinclair in the lands, and for that purpose to grant him a charter to be holden of them as superiors for their respective interests of liferent and fee for payment of four pounds Scots of feu duty, the charter to contain a clause of warrandice,

the nature of which was declared by the following clause:—
"Which charter and infeftment shall bear and contain this
"absolute and ample clause of warrandice, following lyke as
"now as if the said charter and infeftment were already past
"and expede, and then as now, the said noble Earl, John Earl
"of Breadalbane, and John Lord Glenorchy his son, be thir
"presents, binds and obliges them, coñtly and seally, their heirs
"and successors, with consent above specified, to warrant,
"acquyte, and defend the present right and disposition, charter,
"and infeftment to follow hereupon, lands, teynds, and others
"above disponed, to be sufficient, free, safe, and sure, to the
"said James Sinclair and his foresaids, from all and sundry
"wairds, relieffs, non-entries, marriages, escheats, liferents, for-
"faulters, conjunct fees, ladies' terces, wadsets (except the right
"of wadset above narrated, granted by the said deceased George
"Earl of Caithness, to the said deceased John Sinclair,) annual-
"rents, former alienations, private and public, infeftments,
"interdictions, inhibitions, apprysements, adjudications, resigna-
"tions, disclamations, perprestures, reductions of infeftments,
"services, and retours, improbations, tacks, assedations, long or
"short, nullities, bygone stents, taxations, impositions, teynd
"duties, minister's stipends, and augmentations thereof, and
"generally from all õyr perils, burdens, dangers, incumbrances,
"and grounds of eviction whatever, as weill not named as
"named, (excepting as is above and after excepted,) qlk may
"anieways stop, trouble, or impede them in the peaceable
"possession, bruiking and enjoying of the lands, teynds, and
"others above disponed, and intromission with the mails and
"dewties qrof in tyme coming, att all hands, and against all
"deadly, as law will; excepting allways furth and frae the said
"warrandice all cess, supplies, taxations, law of excise, and
"other public burdens and impositions qtever, imposed, or to
"be imposed upon, and ych is or shall be payable furth of the
"said lands and others foresaid, with the pertinents, which the

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" said James Sinclair and his foresaids are to pay and bear the " burden of themselves furth and frae the term of Whitsunday " last, and in all tyme coming; declaring always the teynd- " duties, ministers' stipends, and augmentations yrof, are noways " understood to be comprehended in the said exception, but " the said Earle and Lord, and their foresaids, are to relieve " the said James Sinclair and his foresaids of the samine, " alsweil in all tyme coming as for byegones, in manner above " exprest."

On the same day, the 17th of September, 1691, a charter was granted by the Earl of Breadalbane and Lord Glenorchy " pro perimpletione et observatione," of the contract of sale, by which they conveyed the lands and teinds to Sinclair and the series of heirs in the contract " Cum et sub provisionibus " subtus script." This charter contained the following clause— " Et similiter *per præsentes* specialiter providetur et declaratur " quod quocunq. jure seu titulo predictus Jacobus Sinclair " suique predict fruentur et possidebunt predictas terras decimas " aliaq. supra disposit.; attamen semper tenebuntur et obliga- " buntur, sicuti per acceptationem presentis nostræ cartæ se " suosq. obligant. *terras aliaq. supra recitat.* nunc et omni " tempore futuro tenere frui et possidere modo et cum et sub " provisionibus et conditionibus inter nos *nunc* conventis " solummodo, secundum tenorem prædicti contractus alienationis " et *præsentis nostræ cartæ* desuper sequen. in omnibus punctis " et non aliter." The clause of warrandice was thus expressed:—" Et nos vero dicti Joannes Comes de Breadalbane " et Joannes Dominus de Glenorchie unanimo consensu nos " nostrosq hæredes et successores predict. *terras decimas aliaq.* " *supra mentionat.* cum pertinen. prefato Jacobo Sinclair ejusq. " antedict. in omnibus et per omnia forma pariter et effectu, ut " premissum est, secundum tenorem dictæ dispositionis seu " alienationis contractus cum reservatione et exceptione predict. " contractus impignorationis supra mentionat. et cum et sub

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" cæteris provisionibus et conditionibus inibi content. contra " omnes mortales, warrandizare et in perpetuam defendere " obligamus et astringimus." And the precept of seisin directed infeftment to be given, " secundum formam et tenorem " presentis nostræ cartæ et cum et sub conditionibus excep- " tionibus provisionibus et qualificationibus inibi content."

In the year 1719 Lord Glenorchy, as fiar of the superiority of Lybster, conveyed it to Sinclair of Ulbster, " with and under " the burden of all bargains and sales made by our said umqhl " father, (the Earl of Breadalbane), or us, of any part or portion " of the lands, teinds, and others particularly and generally " above disponed, or tacks of any of the said teinds or oblige- " ments 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 what- " somever, to ratify, approve, and implement, in the haill " heads, tenors, and contents thereof, in so far as we or our said " umquhl 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 superiority was afterwards conveyed by the Sinclairs of Ulbster to Gunn.

In 1768, Alexander Sinclair, the grandson of James Sinclair, the party to the contract of sale and grantee in the charter, made up his title as heir to his grandfather in the *dominum utile* of the lands and teinds, by precept of *clare constat* from Gun as superior. This precept contained the clause which has been quoted from the charter.

In 1774, Alexander Sinclair granted a disposition " for love, " favour and affection," to Patrick Sinclair, his eldest son, of the lands and teinds, " as the same were some time possessed " and occupied by the deceased John Sinclair of Lybster, and " his tenants, together with all right, title, or interest which I, " my authors or predecessors had, have, or anyways may have

" claim or pretend thereto, or to any part or portion thereof in " time coming: But reserving always to me, the said Alexander " Sinclair, my liferent right of the lands and others above dis- " poned, during all the days of my lifetime, &c. And more- " over, for the causes foresaid, I hereby make and constitute " the said Captain Patrick Sinclair and his above written, my " cessioners and assignees, not only in and to the rents, mails, " and duties, of the lands and others above disponed, from and " after the first term following my decease, and thereafter in " time coming; but also in and to the whole writs and evidents, " rights, titles, and securities, both old and new, made, granted, " and conceived in favours of me, my authors and predecessors, " of and concerning the lands and others above disponed, " together with all that has followed or is competent to follow " upon the same."

In 1821, the respondent obtained from Sir Ralph Anstruther, (who had now become the superior by purchase, under a judicial sale of the estate of Gunn,) a charter of confirmation and precept of *clare constat* as heir of Patrick Sinclair, his father. This charter repeated the clause contained in the original charter and in the precept of *clare constat*, to Alexander Sinclair.

In the year 1836, the respondent as " heritable proprietor " of the lands of Lybster and others, with the teinds and per- " tinents thereof," brought an action against the appellant, who was the successor of the vendor—against Sir George Sinclair, of Ulbster, the successor of the purchaser of the superiority in 1719—and also against Sir Robert Anstruther, the successor of Sir Ralph Austruther, the summons in which set forth that, since the date of the charter (1691) following upon the contract of sale, " the said lands and estate of Lybster, with the teinds " and pertinents, have been feudally vested in the pursuer and " his ancestors, under successive renewals of the said inves- " titure;" and that since the date of the contract of sale,

several augmentations of stipend had been localled upon the lands of Lybster by interim scheme, without any final scheme having ever been made up; and, in consequence, he and his authors had been under the necessity of paying this augmentation to the minister. "And although the pursuer has often "desired and required the Most Noble John Marquess of "Breadalbane, who now represents the said deceased John Earl "of Breadalbane and Holland, and the said deceased John "Lord Glenorchy, his son, and Sir George Sinclair, of Ulbster, "Bart., who now represents the said John Sinclair, of Ulbster, "and Sir Ralph Abercromby Anstruther, Bart., of Balcaskie, "the present superior of the said lands of Lybster and others, "which right of superiority he enjoys in virtue of his repre-"senting the said Sir Robert Anstruther, who acquired the same, "as aforesaid, to reimburse and repay to the pursuer the whole "sums which he and his authors have already advanced to the "minister serving the cure of the parish of Latheron on account "of said lands of Lybster and others from and since the date of "the said contract of vendition and sale, and to free and relieve "the pursuer and the said lands of Lybster and others, in time "coming, of all teind-duties, minister's stipend, and augmenta-"tions thereof, conform to the obligation of warrandice and "relief contained in the said contract of vendition and sale; "nevertheless, the said defenders refuse or delay so to do." Upon this subsumption the summons concluded, that it should be declared, that the defenders, jointly and severally, or at least one or more of them, reserving to them their respective rights of relief, were bound in terms of the obligation contained in the contract of sale of 1692, and of the dispositions, charters, rights, and infeftments, to relieve the respondent and his lands, of all teind-duties, stipends, and augmentations thereof, in all time coming, and should be decerned to repay to him what he had already paid on these accounts.

Sir Robert Anstruther pleaded that he had purchased the

superiority at a judicial sale of the estates of Gunn, who had acquired it from the Sinclairs of Ulbster; that this sale was under a decree, declaring the superiority to be free from the debts and deeds of Gunn, "or of those from whom he derived "right;" and that he, Sir Robert Anstruther, his heirs, and assignees, were "to be freed and relieved of all minister's "stipend, schoolmaster's salary, and other public burdens "due for crop and year 1792, and all preceding."

At an early stage of the proceeding the action was dismissed against Sir Robert Anstruther, upon his motion to that effect, without any opposition to this having been offered by the respondent.

Sir George Sinclair pleaded that the respondent had not established a title to make any claim under the conveyance of 1719; and if he had such title, the claim would, according to his own statement, lie against Sir Robert Anstruther, the present superior.

The appellant pleaded the following defences:—

"I. The pursuer has not produced a sufficient title to enable "him to found a claim of relief on the clauses of the contract "libelled.

"II. The defender does not represent any of the parties to "that contract, so as to be liable for their personal obligations.

"III. The pursuer and his authors having acquiesced in "various augmentations of the stipend of the minister of "Latheron, and having allowed the lands of Lybster to be "localled upon to a considerable extent, without either main- "taining the objections competent to them, or intimating the "existence of these processes, or their claim of relief to the "defenders or their authors, have lost any title which they may "otherwise have had to insist on the conclusions of the present "action.

"IV. Supposing the pursuer's title to be otherwise unexcep-

"tionable, the obligation on which he founds has been long "since extinguished by the negative prescription.

"V. At all events, the obligation has been validly transferred "from the original obligants, and imposed upon the defender, "Sir George Sinclair, by the deed of 1719 libelled."

The Lord Ordinary, (*Wood*,) after ordering cases for the parties, made avizandum to the Court, and issued, with his interlocutor, the following note:—"The Lord Ordinary has "reported this case, because the parties are at variance in "regard to what is to be held to have been settled in point "of law by the case of Maitland against Horne, as decided in "the House of Lords, (21st February, 1842, Bell's *Appeal* "*Cases*, vol. i. p. 1,) and its bearing upon the question of the "sufficiency of the pursuer's title, as endeavoured to be sup- "ported by him, and because, in the view which the Lord "Ordinary takes of that question, it would be the only one "which, were he to dispose of the case by a judgment, could "come before the Court by a reclaiming note against his inter- "locutor, so that if the Court should differ from the opinion "he had formed, the process would in ordinary course be again "remitted to him, and a delay be occasioned in the final adjudi- "cation of the case, which may be avoided by the course he "has adopted, which puts the whole cause before the Court, "whereby whatever points shall be found to require to be "determined may be at once disposed of.

"Upon the meaning and extent of the obligation contained "in the original contract of vendition (1691) of the lands and "teinds of Lybster, there can be no dispute. But it has been "contended by the defender, the Marquess of Breadalbane, "that in so far as the obligation relates to any stipend with "which the teinds in question were then burdened, or to future "augmentations, it was not imported into the charter granted in "implement of the contract, and bearing the same date with it, "the reference in the charter not applying to that portion of

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"the obligation which it therefore must now be held had been "ultimately departed from by agreement of parties. It is "thought that the charter will not bear this construction, when "the terms in which the warrandice clause in *it*, and the "reference there made to the contract of vendition, is compared "with the terms of the latter instrument. In it the obligation "or contract to free and relieve the teinds, and the purchaser "and his heirs male, whom failing, his heirs whatsomever, from "the stipend that might be payable out of the teinds, and from "future augmentations, is contained in a separate clause, but "forms part of the clause of warrandice, and is mingled with, "or added to, the proper obligation of warrandice undertaken "by the seller. And although this may not be in any degree "sufficient to alter the nature of that part of the obligation "which relates to existing stipend and future augmentations; "or to render it an obligation of warrandice in the correct legal "sense, still the mode in which it is introduced and expressed "in the contract of vendition cannot be thrown out of view in "construing the meaning of the relative clause in the charter. "On the contrary, it appears to be essential that it should be "carefully attended to, in order to arrive at a just conclusion as "to the meaning of the clause in the charter; and doing so, the "Lord Ordinary apprehends that that clause must be held to "have imported into the charter by reference the contract to "free and relieve the disponee from the burden of both the "existing stipend and future augmentation,—that it is substan-"tially the same thing as if that contract had been recited in "the charter, and that in the question of its transmission the "pursuer is entitled to the benefit of all the pleas which he "could have urged had it been recited *ad longum*.

"With regard, again, to the nature and character of the "obligation or contract, the Lord Ordinary conceives, that, in "conformity to the views upon which the case of Horne was "decided in the House of Lords, it cannot be considered

"as an obligation of warrandice, in the proper sense of that "term, and subject to the rules of transmission applicable to "warrandice. Warrandice has relation to the title of the "subject disponed, and which title is not affected by stipend or "augmentations burdening the teinds. An obligation or con- "tract to free and relieve from these burdens by the vendor "coming in to indemnify the purchaser and his heirs by repay- "ing that which he or they may be compelled to pay out of the "teinds to the minister of the parish, (which is the obligation "now in question,) has, therefore, no connection with warran- "dice in its proper sense. 'It is,' to use the words of Lord "Cottenham, when the judgment in Horne's case was pro- "nounced, 'a contract perfectly collateral to the subject-matter "'of the sale. It is a contract that, in a peculiar event happen- "'ing to diminish the value of the property sold, the vendor "'shall come in and indemnify the pursuer against the diminu- "'tion of the 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.'

"The obligation or contract, therefore, is to be viewed and "dealt with, not as one of warrandice, but as a separate per- "sonal contract superadded to it,—a contract, the obligation "undertaken by which may be passed from one hand to another, "but with which the party suing on it must show that he has "regularly connected himself. And the question here, there- "fore, comes to be,—whether the contract has been transmitted "downwards to the pursuer from James Sinclair, in whose "favour it was made by the contract of vendition 1691, and to "whom the charter, of same date, into which it was imported, "was granted.

"Upon the authority of Horne's case, the Lord Ordinary "thinks it clear, that the mere fact of the pursuer being the "proprietor of the lands and teinds of Lybster is not sufficient "to prove that he has a title to maintain the present action,

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" founded, as it is, upon the contract above referred to. It " is not a contract or covenant which runs with the lands and " teinds, or which can be so appended to the title as to be the " subject-matter of a suit merely in respect of the possession of " the lands and teinds. The pursuer may, therefore, be pro- " prietor of both without the contract having been duly trans- " mitted to him. It is consequently necessary to consider " whether, by the charter which he holds, or through the " medium of any title made up by him, and those by whom he " is connected with James Sinclair, the contract has passed to " him so as to enable him competently to sue upon it.

" It is stated by the pursuer, that the charter 1691, into " which the contract of relief was imported from the contract " of vendition, is granted to James Sinclair and his heirs-male, " whom failing, his heirs whatsoever; that the pursuer is the " heir-male of James Sinclair, possessing the estate on this title, " and representing James Sinclair in all rights vested in him by " the charter, and transmissible from him by succession; and " that the estate, with all its pertinents and relative rights, has " descended from father to son until it has reached the pursuer, " whose title is built on the foundation of the charter and con- " tract of 1691. And he maintains that, whatever might have " been the decision to be pronounced—following the precedent " in Horne's case—had he been a singular successor, he, as heir, " is in a different position, and that, holding that charter, he " is in full right of the contract in question, *that* contract having " passed or been transferred to him as such. If this plea were " well founded, the contract must, in the first instance, have " passed to Alexander Sinclair, who was the immediate heir of " James; then to Patrick Sinclair, as the heir of Alexander; " and then to the pursuer as his heir and the heir-male of " James Sinclair, and this independently altogether of the titles " by which those parties held the lands and teinds. For the " plea, as the Lord Ordinary understands it, does not rest upon

" the titles which were completed, as being themselves the " means or form by which the contract was transmitted from " heir to heir, till it finally came into the person of the pursuer, " —but goes on this view, that, in virtue of the titles, as made " up by himself and his predecessors, (one of which, it will be " observed, was a disposition by Alexander Sinclair to Patrick " Sinclair, reserving the disponer's liferent, and on which Patrick " was forthwith infeft,) he, the pursuer, is proprietor of the " lands and teinds; and that, although none of these titles may " have carried or conveyed the foresaid contract, but only the " lands and teinds, still, the pursuer being also possessed of the " character of heir, the contract passed to him as heir, and he " is, therefore, *in titulo* to sue upon it. The Lord Ordinary has " not been able to arrive at the conclusion that the pursuer's " title can be supported on this ground. He conceives that, to " the transmission of the contract, it is necessary that the pur- " suer shall connect himself with it, either by sufficient assigna- " tions, or a sufficient assignation thereof, or by showing that " some title has been made up capable of carrying and trans- " mitting it from James Sinclair down to himself. It is thought " that the pursuer has not satisfied either of these alternatives.

" The Earl of Breadalbane had conveyed the superiority of " Lybster to Sinclair of Ulbster, and it subsequently came to " be vested in Captain Gunn of Braemore;—and the first link " in the progress of transmission is a precept of *clare constat*, " (17th February, 1768,) by Captain Gunn, as superior, in " favour of Alexander Sinclair, as the heir of James Sinclair, " the disponee in Lord Breadalbane's charter, upon which " precept Alexander was infeft (13th September, 1768). The " Lord Ordinary is of opinion, that by this title the personal " contract to relieve the teinds, and James Sinclair, and his " heirs-male, whom failing, his heirs whatsoever, of stipend and " augmentations thereof, could not be carried to Alexander " Sinclair. Assuming that some form of title was necessary,

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" then—whatever may be the proper form—it is conceived that " a precept of *clare* was not an apt or appropriate one. It " could apply only to the feudal estate,—to the lands and teinds " in which James Sinclair was infeft; and a title to them having " been completed, in virtue of it, there might pass to the heir " all obligations therewith connected, which run with the lands " and teinds, such as that of warrandice; but there could not " be thereby transmitted an obligation or contract of the nature " and kind which that in question has been found to be, over " which Captain Gunn, as superior, had no power whatever. " For that purpose, it was not a *habile* form of proceeding. It " is true, that, in the precept, the original contract of vendition " and the charter 1691 are referred to; and had the precept " been granted by Lord Breadalbane, the obligor in the contract " sued on, or his representatives, there might have been room " for argument that there was a renewal of the obligation or " contract; but the communication of the contract would then " have stood upon a totally different ground from that on which " it has, in the circumstances, been rested.

" The next step in the progress of transmission is a disposi- " tion of the lands and teinds of Lybster, by Alexander Sinclair, " to Captain Patrick Sinclair, his eldest son, of 11th June, 1774, " and infeftment thereon (20th October, 1774). Now, assum- " ing that the contract for protection and relief from stipend " and augmentations had been transmitted to Alexander, was it, " by the above title, transmitted from Alexander to Captain " Patrick? It will be observed, that while Alexander, the dis- " poner, reserved his own liferent, Patrick, the disponee, was " infeft shortly after the date of the disposition. The title of " Patrick, as founded on this disposition, although he might be " heir of Alexander, was a singular title. In the disposition, " neither the contract of vendition 1691, nor the original charter, " are mentioned. It contains an assignation to the writs and evi- " dents 'of and concerning the lands and others above disponed,'

" but no express assignation to the contract of relief from stipend " and augmentations. In this state of matters,—and taking it " to be clear, that, as urged by the pursuer, it must have been " Alexander Sinclair's intention, along with the lands and teinds, " to transfer to Patrick the contract of relief,—the Lord Ordin- " ary does not see how, consistently with the decision in the " case of Horne, it can be held, that, by the disposition as " framed, and the title completed under it in the person of " Patrick, the contract was assigned or transferred to Patrick. " And if it was not, then it is unnecessary to advert particularly " to the subsequent steps in the progress of title, which consist " of the title completed by the pursuer, the whole being built " upon the title of Patrick; and it being, as it is thought, " abundantly manifest, that, if the contract had not passed to " Patrick, it could not, through the medium of the titles after- " wards made up by the pursuer, be transmitted to him.

" Upon the whole, therefore, and without entering more " fully into the question, or the arguments of the parties, which, " in reporting the case, appears to be unnecessary, the Lord " Ordinary is humbly inclined to be of opinion, that the pur- " suer has not connected himself with the contract of relief; " and in that view, the other and separate points which have " been discussed in the papers do not call for any remark.

" It may, however, be proper to advert to a plea which, in " reference to the question of title, the defender has raised upon " the form of the summons, as being so laid that the only title " on which the pursuer can be heard to insist, in the present " action, is that of heritable proprietor of the lands and teinds " of Lybster. This, it is apprehended, is too critical. The " summons expressly bears, 'that the said lands and estate of " 'Lybster, with the teinds and pertinents, have since that date,' " (that is, since 17th September, 1691,) 'been feudally vested " 'in the pursuer and his ancestors, under successive renewals " 'of the said investiture;' and this is farther explained in the

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" Record, by reference to the titles produced—(see Re-revised " Condescendence, articles 6 and 7, and the Pleas in Law)— " so that there would rather seem to be enough to admit of the " pursuer maintaining his title to insist, upon all or any of the " grounds founded on in his revised case."

The Court (16th January, 1844,) pronounced the following interlocutor :—" Repel the first, third, and fifth pleas in law for " the defender, as stated in the closed record, and also repel " the fourth plea of prescription stated by him, except in so far " as applicable to the old stipend payable by the pursuer for " his said lands and teinds, and to those portions of stipend " payable under augmentations granted forty years before the " raising of this action; and, *quoad ultra*, remit to the Lord " Ordinary to proceed in the cause accordingly."

The appeal was against this interlocutor.

Mr. Solicitor-General and *Mr. James Russell* for the Appellant. The judgment of this House in *Maitland* v. *Horne*, *ante* 1, p. 62, where the clause upon which dispute arose was one very similar in its terms to that upon which the present question has arisen, fixes definitively that the obligation which was imported into the clause of warrandice in the contract of sale 1691, was not one of warrandice, but of an entirely distinct collateral nature—an obligation which might be enforced or be extinguished without the title to the lands or the teinds having been in question—an obligation for relief or indemnification against any charge to which, from its nature, the property was by law subject, being afterwards imposed upon it, in addition to those which had already been imposed at the date of the contract.

II. This obligation being, then, no way a component or essential part of the title, but distinct and collateral, might or might not have been inserted in the charter that was to follow upon the contract. The stipulation, no doubt, was, that it

should be inserted; but it was within the power of the parties, in the preparation of the charter, to vary the original contract, which was merely preliminary to that which was to be perfected by the charter. In the charter this obligation was not inserted, either by a distinct substantive clause, or as part of the clause of warrandice. It is possible to say that there are words of reference in the charter, which may embrace it; but that is an explication which can scarcely be allowed where the contract is express in stipulating that the obligation should be articulately inserted in the charter. The plain inference from the omission of such insertion is, that the contract was intentionally departed from and varied in this respect. The charter, therefore, as the last formal deed executed, is the one which must regulate the rights of the parties, and control the contract, which was prior to it. *M'Lachlan* v. *Tait*, 2 *Sh.* 267; *Leslie* v. *Moray*, 5 *Sh.* 264.

III. But if the obligation be subsisting, there is no evidence of its transmission to the respondent, so as to give him a title to sue upon it. The judgment in *Maitland* v. *Horne* not only declared the nature of the obligation to be collateral to the sale of the lands and teinds, but that an assignation was necessary to its transmission. The precept of *clare constat*, by Gunn, in favour of Alexander Sinclair, was strictly of a feudal character. It ascertained the character of heir, and was simply a warrant for infefting the party in the lands and teinds, but it did not give an active title in regard to any other subject. *Ersk.* III. 8, 71. It could neither give title to a personal obligation, nor operate as a transference of it in any way. No doubt there is a reference in the precept to the contract of sale, in the clause which declares that the lands and teinds are to be held and enjoyed under the conditions and provisions of the contract, that would not, if the clause stopped there, operate as a transfer of this collateral obligation; but the clause goes on to specify the conditions to be those recited in the charter, which is silent

upon the subject. Gunn, the granter of the precept, had no interest in or power over this personal obligation, so as in any way to regulate its transmission, even if the precept had been an instrument which, either from its nature or terms, could have embraced it. If the precept did not transfer the obligation to Alexander Sinclair, then there was no other title to which a right in him to the obligation could be ascribed, so as to make it transmissible by him.

Accordingly, the disposition by Alexander to Patrick Sinclair in 1774, is silent as to this obligation. All that is conveyed are the lands and teinds, as described in the precept; neither the contract nor the charter are referred to. No doubt it contains an assignation to writs and evidents, but only "of and "concerning the lands and others above disponed." So that it is not a general assignation, and even if it were, it would not be sufficient for the purpose contended for *Graham* v. *Don*, 15 *Dec.* 1814, *F. C.*; *Hamilton Montgomery*, 12 *Sh.* 349; and *Maitland* v. *Horne ut supra*. The only remaining link in the title is the charter of confirmation and precept of *clare constat*, in favour of the respondent himself. This was merely a renewal of the investiture of the lands and teinds in the person of the respondent, as it had stood previously in Alexander and Patrick Sinclair.

IV. If none of these deeds have transferred the obligation, the mere character of heir, supposing the respondent to have established that in his person, will not entitle him to it. Heirship will entitle the party to all covenants running with the land; but *Maitland* v. *Horne* has established that this obligation is not of that nature. Being an independent personal obligation, it must be transferred by the forms requisite for the transmission of personal obligations. But even if heirship would transmit the obligation, it is out of the question; for the disposition by Alexander to Patrick cuts off any pretence to the character of heir to Alexander, or to those who preceded him. The respon-

dent may in fact be the heir; but he has not shown himself to be so.

Indeed, in his summons, the only character in which the respondent sets up a title, is as "heritable proprietor," "feudally "vested;" but *Maitland* v. *Horne* has already determined that the obligation is one which does not run with the land; and unless it do, the simple fact of the respondent being heritable proprietor, feudally vested in the lands, can neither create a title, nor benefit a defective one.

Mr. Crawford for the Respondent.—I. The judgment of the Court below is no way inconsistent with the judgment of this House in *Maitland* v. *Horne*, which was rested upon the specialties of that case. The obligation not only occurs in and forms part of the clause of ordinary warrandice, but is in itself essentially an obligation of warrandice, and is not susceptible of any other character. An estate in teind is not only liable to be defeated like an estate in land, from a defect of title, but it is likewise, from its very nature, subject to be defeated by augmentation of stipend, which is an eviction of the subject itself. The terms used in the first part of the clause of warrandice are appropriate for securing the purchaser against such an eviction, and is strictly of the nature of warrandice, *Stair* II. 3. 46.

With regard to the declaration at the close of the clause of warrandice, it is not any separate obligation; it merely limits and explains the exception from the warrandice which precedes it, and, in truth, is mere surplusage; it but repeats what was already expressed in the part preceding the exception; for if in that part the granter was bound to warrant against augmentations of stipend, as *ex necessitate* he could not prevent their being made, this could only mean that he was bound to relieve the grantee of them when made, and that is all that the declaration itself imports. The observation of *Lord Cottenham*, in giving judgment in *Maitland* v. *Horne*, that the contract there was

very different from what was understood by the term warrandice, was not directed to the nature of the specific clause as importing warrandice or not, but had reference to the transmissibility of the obligation, whatever its nature might be, along with the land. That the clause is one of warrandice, has been settled by various decisions in which that effect has been given to clauses of a similar nature Plenderleath *v.* Tweeddale's Representatives, *Mor.* 16639; Alexander *v.* Dundas, 9 June, 1812; Hopetoun's Trs. *v.* Copeland, 8 December, 1819.

II. The charter which was granted in implement of the contract was not granted *ex intervallo*, in which case there might, perhaps, have been room for an argument that the obligation of warrandice had been dropped in it, but professing to be made in implement of the contract, it is made upon the same day *unico contextu* with the contract. It is impossible, therefore, to contend that the clause in the charter binding the granter to warrant the lands and teinds in form and effect according to the tenor of the contract, and under the provisions and conditions contained in it, is any other than an adoption by reference of the clause in the contract. Even if this were doubtful, the charter must be read against the granter, and those who represent him. By the contract, he undertook to insert this warrandice in the charter; and, therefore, the terms he used in the charter, which were of his own choosing, must be construed as intended to fulfil this undertaking in the absence of any warrandice different from, or which can be held as superseding, that in the charter.

III. The respondent has, by the deeds which have been produced, established his right to the character of heir of the original grantee. The only effect of the disposition of 1774, which was for love, favour, and affection, was to propel the succession of the lands to the disponee during the life of the disponer, of whom the disponee was the heir; it was, in fact, another way of completing the title. In each of the precepts

of *clare constat*, which form the links of the title, express reference is made to the contract of sale as the rule and measure of enjoyment of the lands and teinds; and the disposition of 1774, though it does not refer to the contract, contains a general assignation of writs, which will embrace the contract. The respondent, therefore, having established in himself the character of heir of James Sinclair—of one of those heirs in whose favour the contract and charter were conceived—is vested in all the rights transmissible from James Sinclair by succession. This obligation of warrandice is accessory to the enjoyment of the lands, and is not of value to any one but the holder of the lands.

[*Lord Campbell.*—What do you say is the nature of this obligation? Is it real or personal?]

It is a personal one, so closely tied to the land as to go along with it.

[*Lord Campbell.*—What is there in the precept of *clare constat* that carries the right to it?]

The obligation is by the superior to the vassal and his heirs. The precept is by the superior, and declares who is the heir. An obligation upon the vassal to keep up houses, would subsist against his heir taking a precept. According to Carmichael *v.* Anstruther, an obligation by a superior will transmit against his heir, not his executor, and so the benefit of it must transmit to the heir, not the executor of the vassal.

[*Lord Cottenham.*—According to that, then, it is a covenant running with the land?]

No. It is not a real contract.

[*Lord Cottenham.*—Then it is a personal one. And can it be transmitted as this is said to have been?]

It is a personal contract inserted in the charter.

[*Lord Campbell.*—How do you get it passed from James to Alexander?]

Warrandice, unless fortified by warrandice lands, is per-

sonal, no doubt, as against the obligor, but it is real as to the succession of the obligee. It could be taken up only by general service, not by confirmation.

[*Lord Campbell.*—How then does it get to a singular successor?]

That was the question in Maitland *v.* Horne. There the party had neither title as heir, nor by assignation, and claimed merely because of his possession of the lands.

[*Lord Campbell.*—Can you take a personal obligation to A. and his heirs-male, which will entitle the heir-male to sue?]

It is an incorporeal right annexed to a real subject, as stated in *Bell's Principles;* it has *tractum futuri temporis*, and so is heritable. In Nisbet *v.* Halket, *Mc L.* & *Rob.* 52, the obligation was not treated as a personal one. In Plenderleath *v.* Tweeddale's Representatives, where the heir was pursuer, it was assumed that warrandice of teinds went to the heir; and this was also assumed in a variety of other cases.

A full argument was heard from both sides of the bar upon the question, whether the claim upon the clause in question was cut off by the negative prescription, but as the judgment passed bye that question, the argument has not been given.

LORD CAMPBELL.—My Lords, in this case this was an action of declarator, relief, and payment, brought by James Sinclair against the Marquis of Breadalbane. The pursuer, in his summons, describes himself as "heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof," and sets forth a contract of vendition and sale entered into in the year 1692, between John, Earl of Breadalbane, and James Sinclair, said to be the pursuer's ancestor, of the lands of Lybster, with the teinds and pertinents thereof, with a stipulation that the charter should contain a clause of warrandice, whereby the said earl and his heirs were to warrant the said

lands and teinds to the purchaser and his heirs and successors against (among other things) minister's stipends and augmentations thereof, and that a charter in consequence was granted by the said Earl of Breadalbane, of the said lands and teinds in implement of the said contract; that the said lands and estate of Lybster, with the teinds and pertinents, have since that date been feudally vested in the pursuer and his ancestors under successive renewals of the said investiture; that since the said contract and charter, sundry augmentations of the stipend, payable to the minister of the parish of Latheron for the said lands of Lybster have taken place, viz., in the years 1722, 1791, and 1824; that in consequence the pursuer and his authors have been under the necessity of making payment to the said ministers of Latheron of the augmented teind duties effeiring to the said lands of Lybster; and that the Marquis of Breadalbane, the defender, who now represents the said Earl of Breadalbane, has refused to relieve the pursuer from the said augmentations. The prayer of the summons is, that the defender might be decreed to repay to the pursuer, as heritable proprietor of the said lands and teinds of Lybster, the money, victual, &c., which the pursuer and his predecessors have paid in respect of the said augmentations.

The defender pleaded (among other pleas in law) that the pursuer has not produced a sufficient title to enable him to found a claim of relief.

The Lord Ordinary (Lord Wood) made avizandum of the case to the Second Division of the Court, with a note intimating his opinion that the pursuer had not sufficiently connected himself with the contract of relief.

When the case came to be decided, Lord Moncrieff agreed with the opinion of Lord Wood, but the Lord Justice Clerk, Lord Medwyn, and Lord Cockburn, being of a contrary opinion, an interlocutor was pronounced, which repelled the pela I have stated, with others, and remitted the cause to

the Lord Ordinary to proceed on a plea denying that the defender represents the party to the contract.

Against this interlocutor there is an appeal to your lordships, and I am of opinion that it ought to be reversed. But, my Lords, I by no means yield to the argument urged for the appellant at the bar, that the obligation sued upon is a mere personal contract, which, upon the death of James Sinclair, to whom it was given, went by confirmation to his executors. This might be so by the law of England, yet it seems quite clear that by the law of Scotland such an obligation does not go to executors, although it may be so far collateral as not necessarily to pass with the land or teinds to singular successors. It does not come within the definition, in any Scotch law-book of authority, of things which go to executors; there never has been an instance of executors sueing on such an obligation; and whatever difficulties have been started as to the mode of its transmission, I believe that no Scotch lawyer has ever supposed that it was part of the personal estate of the grantee.

I beg leave likewise to mention that I am not influenced by the argument that the warrandice is not introduced at length into the charter by the Earl of Breadalbane, for I think that this charter contains words expressly and specifically referring to the warrandice in the contract, which must be considered as embodying it in the charter according to the common maxim, "verba relata inesse videntur."

I arrive at the conclusion that the defender is entitled to be assoilzied, from the manner in which the pursuer has shaped his case in his summons, and the manner in which he has supported it by proof. Now, my Lords, the right in which the pursuer makes this demand, I think, is only as heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. At the time when this action was commenced, a notion seems to have prevailed in Scotland that such a warrandice against augmentation of stipend, like a warrandice of title,

passed with the land to singular successors, and upon this notion the summons seems to have been framed. There is no allegation in the summons, that the pursuer is heir of the grantee, or any statement how he is heir, or any claim in the capacity of heir. The grantee may be his ancestor, and all the averments of the summons may be true, and yet he may not represent the grantee as heir. He alleges, and he has proved that he is heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. But in the case of Maitland *v.* Horne, this House held that an obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend, does not, without a special assignation, pass to singular successors. Here no such special assignation is alleged and proved. That decision has been complained of, but it is binding on this House as well as on the Courts below, and I think it is inconsistent with the interlocutor appealed against.

But, still further, if it were thought that the pursuer's summons, aided by his condescendence, amounts to an allegation, that he claims as heir-at-law of the grantee of the obligation, I do not think that his proof is sufficient to sustain his allegation. I entirely adopt the reasoning upon this point of Lord Wood, to be found in 16 *Bell & Murray* 384, where his lordship investigates the pursuer's title as proved in a very clear and accurate manner, and shows, to my entire satisfaction, that the pursuer does not sufficiently connect himself with the contract, either as heir or as singular successor.

Taking this view of the case, I do not feel it necessary to offer any opinion upon the plea of prescription, or upon any other question which has been raised in the case.

Supposing that such obligations continue unaffected by lapse of time when they are to be enforced, the pursuer should be held to considerable strictness of allegation and of proof. Being revived after having long lain dormant, they have a tendency to produce much vexation and much litigation from

the difficulty of finding who are to sue and be sued upon them, and the remedy over, by way of indemnity, which may successively be obtained by those who are found liable.

Upon the whole I move your lordships that the interlocutor appealed against be reversed, and that the defender be assoilzied from the conclusions of the summons.

LORD CHANCELLOR.—My Lords, having had the benefit of seeing the opinion of my noble and learned friend, which he has now stated to the House, I entirely concur with him in the view he has taken of the case, and it is not necessary therefore for me to enter into it.

LORD BROUGHAM.—My Lords, I have not read the judgment of my noble and learned friend, but I recollect the case perfectly. I attended at the hearing, and it appeared to me to be a case of the greatest importance, as it respected the Scotch practice, and I certainly did incline at the time, very strongly incline, to think that the interlocutor appealed against was wrong, my mind going along with the reasoning of the learned Lord Ordinary, (Lord Wood;) that was my impression at the time, my Lords; and I recollect having so very strong an opinion on the subject, that I suggested to my noble and learned friend near me, who first spoke, who presided upon the occasion, that we might dispose of it then; but as we were to reverse the judgment of the Court below, it was deemed necessary to take a little time to consider it, as we always naturally look more minutely into a case when we differ from the learned Judges of the Court below.

My Lords, I put the question of the plea of prescription entirely out of my view; I do not at all consider that the argument upon the pleas of prescription is necessary to be disposed of, for the reasons given by my noble and learned friend, in order to arrive at the conclusion at which I have

arrived. I, therefore, entirely agreeing in the argument, and taking the same view of the result with my noble and learned friend, am of opinion with him, that we ought to reverse this judgment.

It is ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby reversed, and that the defender in the action to which the said appeal relates be assoilzied from the conclusions of the summons.

GRAHAM, MONCRIEFF and WEEMS—G. and T. W. WEBSTER, Agents.