support the proposition, that where there is an unrecorded entail the same rule must apply? The question is, how far the rule is to operate in a different direction. I think, that the principle upon which the judgment was pronounced in the case of *Gordon of Park* would lead me the other way.

I was very desirous to hear the views which were entertained by my noble and learned friends, who have spoken as to the analogy between the English entails and Scottish entails, especially when unrecorded, not having a full and operative effect under the Act of 1690. And as I understood the principle of English law in that respect as regards the effect and operation of entails, the analogy does not hold in the case of an unrecorded entail, as is contended for on the part of the appellant. On these grounds I think, that the service which the appellant has obtained cannot give him a title to insist in the production of these writs and titles.

But he may have a title to insist on other grounds, and he claims to have such a title to insist. He says, that by various Statutes, the Forfeiting Act, the Attainder, the Vesting Act, the Annexing Act, the Restoring Act, all taken together, it is clear, that the intention of the Legislature was, and that the true construction of the Restoring Act was, that the estate should be restored, not merely to the Earl of Perth and his heirs and assigns simply, but to the course of succession that was pointed out by the previous settlement of the estate.

So far as the argument is rested upon the proposition, that the forfeiture could not carry more than the right which was in John Drummond, I have already disposed of it. But as regards a right under the Statutes to get the estate upon the footing, that the grant to Lord Perth was not in terms within the power of the Crown, that is quite a different contention from the other. And I think it may be contended, that irrespectively of the question of the service carrying the *hæreditas jacens* of James Drummond, the fact of his having established his propinquity and his interest would give him a title to insist in reference to this view of the case. There are many instances in which the existence of the interest gives a title to insist, if it be so that the true construction of the Acts of Parliament is that the estate should have been given to Lord Perth, and to the heirs male in conformity with the original investiture, or if Lord Perth should have so made up his titles. But, in the first place, we must construe the Act of Parliament, and if the Act does not bear that construction, and if that is not the true meaning of the grant of the Crown, then I think it will require some other power to get rid of that Act of Parliament, and to get at this result. Now I have no doubt at all, seeing that the forfeiture was complete and vested all right to this estate in the Crown, that the Crown by the Restoring Act had a right to restore it to whomsoever the Act directed it to be restored to. And I have as little doubt as to the construction of that Act—that the authority given to the Crown was a direction to restore it at once to the person who should be found out to be the next heir male, (for there was a doubt who was the then next heir male,) and to his assigns in fee simple.

On these grounds I think the judgment of the Court below was correct, and that this appeal ought to be dismissed with costs.

LORD CAIRNS.—My Lords, every question which arises in this case has been so fully exhausted by the opinions delivered by my noble and learned friends, that I do not propose to do anything more than to say, that I concur in the judgment proposed.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, J. & J. Turnbull, W.S.; Connell and Hope, Westminster.—*Respondents' Agents,* Dundas and Wilson, C.S.; Travers Smith and De Gex, London; Loch and Maclaurin, Westminster.

JUNE 22, 1871.

REV. W. PAUL, D.D., *Appellant,* v. JAMES DYCE NICOL, and Others, *Respondents.*

Teinds—Valuation—Old Decreet—Parcel or no Parcel—Moss Lands—*In a process of augmentation of stipend by the minister, the* onus *is upon him to prove, that there are unvalued teinds out of which the augmentation may be paid. Where, therefore, P., the minister, alleged, that a certain moss was not included in a valuation of* 1682, *such moss being then a pertinent of other lands, which alone were valued, and failed to prove this:—*

HELD (affirming judgment), *That the decreet must be taken to have included the moss in question.*[1]

[1] See previous report 7 Macph. 967: 39 Sc. Jur. 417: 41 Sc. Jur. 628. S. C. 9 Macph. H. L. 121: 43 Sc. Jur. 428. See also *ante*, p. 1458.

The pursuer appealed against the interlocutors and stated in his *printed case* the following reasons for reversing the interlocutors:—1. Because it is *res judicata* that the valuation of 1682 was confined to the special subjects enumerated in a rental produced by the pursuer, as these were possessed by the tenants named in the decree. 2. Because it is *res judicata* that, of the subjects so enumerated, Barclayhill, Calsayend, and Meddens were not valued for teind, in respect the Commissioners refused to include them in the valuation on the ground, that they yielded only a moss rent. 3. Because the *onus* rested upon, and has not been discharged by, the respondents of proving, that the portions of land which are brought into question in this appeal formed part of the subjects valued by the decree of 1682. 4. Because had the *onus* rested primarily upon the appellant, he has adduced evidence sufficient to discharge it, or at least to shift it on the respondents. 5. Because the appellant has proved by the best attainable evidence, viz. a plan of the lands and barony drawn in 1783, by order and in conformity with the instructions of the then proprietors, what was the position, extent, and boundaries of the valued subjects. 6. Because Calsayend, which was excluded from the valuation of 1682 on the ground, that it yielded only a moss rent, must be held to be co-extensive with the Moss of Calsayend, and cannot be limited to the arable farm which is shewn on the map of 1783, and which had been formed out of a small portion of the said moss. 7. Because it plainly results from the proceedings of the Commissioners in the valuation and from the terms of the decree, that the moss lands included within the precincts of the barony were not intended to be and were not valued for teind. 8. Because the respondents have failed to prove, that Redmyre was, in 1682, part of the lands of Badentoy possessed by James Mowat, and the appellant has shewn, by the plan of 1783, that it lay beyond the limits of Badentoy,—distinct from that subject, and other valued subjects, and because it is therefore unvalued for teind. 9. Because Bishopston belonged to the class of unvalued moss lands, having been, in 1682, described as a bruntland on the Hairmoss, and because neither it nor the said Hairmoss was referred to or included in the summons or decree of valuation. 10. Because the respondents have failed to prove, that it formed part of the valued farms of Badentoy or Cookstoune possessed by the Mowats, and the appellant has adduced sufficient evidence to determine its position, extent, and boundaries in 1783, and to shew, that it lay beyond the ancient limits of Badentoy and Cookstoune, and was separated from them by a broad and deep moss, and because it is unvalued for teind. 11. Because the respondents have failed to prove, that the other moss lands above referred to, which are delineated on the plan of 1783, were pertinents of the valued farms, or were possessed by the tenants of those farms, at the date of the valuation, for the purpose of pasturage or otherwise, and because these moss lands are thus inferentially, and by positive statement on the face of the decree, unvalued for teind. 12. Because the appellant is entitled, as against all the respondents, to the whole expenses incurred by him during, and in consequence of, his litigation with them in the Court of Session, and because the appellant is not liable in any expenses to the respondents.

The respondents in their *printed case* stated the following reasons for affirming the interlocutors:—1. Because the appellant has not proved, that the lands of Calsayend, mentioned in the decree of 1682, comprehended any other or greater area of ground than that marked "Causeyend" on the plan of 1783, and in particular because he has not proved, that the said lands of Calsayend comprehended the lands specified in his petition of appeal. 2. Because it is established by the evidence, that the said "lands of Calsayend" did not comprehend any other or greater area than that marked with the name "Causeyend" on the plan of 1783. 3. Because the appellant has not established, that Bishopstown, Redmyre, and the other lands mentioned in his petition of appeal were not valued by the decree of 1682. 4. Because the said decree is not limited to arable lands, but includes the whole lands enumerated in the rental, with their pendicles and pertinents, except the lands of Barclayhill, Calsayend, and Meddens. 5. Because it is proved by the evidence, that the Hairmoss, Bishopstown, Redmyre, and the other lands in question, were comprehended within the decree of valuation of 1682. 6. Because the interlocutor of 4th February 1870 bears to have been and was in fact pronounced of consent, and *separatim*, because that interlocutor was not submitted to review of the Inner House. 7. Because the judgments of the Court below in so far as complained of, are well founded both in fact and in law.

The previous appeal is reported, *ante*, p. 1458; L. R. 1 Sc. Ap. 127: 5 Macph. H. L. 62.

Sir R. Palmer Q.C., and *Anderson* Q.C., for the appellant.

The *Lord Advocate* (Young), and *Forbes*, for the respondent.

The LORD CHANCELLOR, after fully stating the facts and contentions, said, he agreed with the judgment of the Lord Justice Clerk in the Court below, and that, the burden of proof in this case falling on the appellant, he had failed to establish his case.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend, upon this short ground, that the *onus* of proving, that there were unvalued teinds in the parish lay upon the appellant, the minister, and that he has failed to give sufficient proof upon this subject.

Now that the burden of affirmative proof properly lay upon him appears to me to be clear from the nature of the proceeding and also from the interlocutors which have been pronounced. The

proceeding is a process of augmentation and modification, and the Court of Teinds, by an interlocutor of the 1st of July 1863, augmented and modified the stipend, but they at the same time declared, "that this modification and the settlement of any locality thereof shall depend upon its being shewn to the Lord Ordinary, that there exists a fund for the purpose." Now it is quite clear, that the minister could not have the benefit of the augmentation unless he proved affirmatively, that there was a fund out of which it could be obtained. In the 10th and 11th condescendence of his revised objections (I will leave the 14th out of the question) he states, that there were certain lands (naming them) which were unvalued. This is denied by the heritors; and they at the same time contend, that he is estopped from averring that there were any unvalued lands in consequence of the decree of valuation of 1682.

The Court of Teinds, by the interlocutors of 1865, "Find, that the teinds of the lands of Barclayhill, Causeyend, and Meddens mentioned in the decree are not valued by the decree: Find, that the terms of the said decree are not such as to exclude a proof on inquiry before answer, that the teinds of the parcels of lands mentioned in the 11th article of the condescendence or any of them are unvalued." And they remit to the Lord Ordinary to direct such inquiry as may be rendered necessary by this interlocutor.

Now this interlocutor of the Court of Teinds was affirmed by this House, and when the case was remitted to the Lord Ordinary to direct such inquiry as might be rendered necessary by it, the question was, What was the proof and inquiry which was to be made? It was whether or not it was the fact, that the teinds of the parcels of land mentioned in the 11th condescendence are unvalued. Upon whom lay the affirmative of that? Upon the person who avers it. It was not for the heritors to prove, that these lands had been valued, but it was for the minister to prove distinctly under this interlocutor that the lands were unvalued. And that appears to have been the construction put upon this interlocutor, both by the Lord Ordinary and by the Court of Teinds afterwards upon the interlocutor which is appealed from, because they find distinctly, "that the objector has failed to prove that any part of the lands of Cookstown or of the barony of Portlethen, other than the lands of Meddens, Barclayhill, and Calsayend remain unvalued. Both the Lord Ordinary and the Court of Teinds have put the same construction upon the interlocutor which I have put, namely, that the proof lay upon the minister, and that he has failed to give such proof. I entirely agree with my noble and learned friend, that the proof has failed, and that being so, I think it unnecessary to travel again over the same ground. I agree with him entirely in thinking that this interlocutor ought to be affirmed.

LORD COLONSAY concurred.

Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, G. M. Paul, W.S.; Martin and Leslie, Westminster.—*Respondents' Agents*, Hill, Reid, and Drummond, W.S.; William Robertson, Westminster.

JUNE 22, 1871.

THE CITY OF GLASGOW UNION RAILWAY CO., *Appellants*, *v.* THE CALEDONIAN RAILWAY CO., *Respondents*.

Railway—Superfluous Lands—Forfeiture if not sold within time limited—8 and 9 Vict. c. 19, § 120—*In* 1851 *the T. Railway Co. bought by private contract certain lands for making mineral depots, the lands not being within the limits of deviation of their special Act. Afterwards the company sold them by private contract in* 1865 *to another company, having, in the mean time, never used them for purposes connected with the railway.*

HELD (affirming judgment), *That the lands having been purchased for extraordinary purposes under the Railway Clauses Act*, § 38, *were not superfluous lands within the Lands Clauses Act*, 8 *and* 9 *Vict. c.* 19, § 120, *which had become forfeited to the adjoining owner, by reason of not having been sold within ten years.*[1]

This was an appeal from a decision of the Second Division. The action was raised by the Caledonian Railway Co., for the price of certain lands bought by the City of Glasgow Union Railway Co., and the objection raised by the defenders was, that the title was invalid, inasmuch

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[1] See previous report 7 Macph. 1072: 41 Sc. Jur. 541. S. C. L. R. 2 Sc. Ap. 160; 9 Macph. H. L. 115; 43 Sc. Jur. 429.