until the arbiters should have made their report. I agree, that, if the interlocutors made in 1859 had been in the terms in which the Lord Ordinary has made it, there might have been some grounds for the apprehension, because the Lord Ordinary's decision goes upon the ground, that the finding by the arbiters was a condition precedent to the recovery of anything. But the Court did not adopt that view of the Lord Ordinary, but simply said, in this second suit, in which you have put your right against the landlord upon the ground that there is no agreement whatever to make a reference—upon that ground we differ from you entirely, and therefore assoilzie the defender. It appears to me, that the apprehension expressed by the appellants is an unnecessary one. At the same time I perfectly agree with what has been said, that there can be no difficulty in assisting the parties by putting in such a declaration as shall prevent the possibility of the question being hereafter raised.

LORD KINGSDOWN.—My Lords, I quite agree in the order proposed by the LORD CHANCELLOR, and I agree also that the costs should be paid by the appellants.

Interlocutor affirmed, with a declaration, that any remaining question in the conclusions of the summons in the first action shall not be prejudiced; and the appellants to pay the costs of both appeals.

For Appellants, Grahame, Weems, Grahame, and Wardlaw, Solicitors, Westminster.—*For Respondent*, Loch and Maclaurin, Solicitors, Westminster.

MARCH 27, 1863.

His Grace the DUKE OF MONTROSE, *Appellant*, *v.* SIR W. D. STEWART and Another, *Respondents*.

Superior and Vassal—Feu Contract—Teinds—Clause of Relief—Assignation—*In a feu contract granted in* 1705, *the granter "binds and obliges him and his foresaids to warrant the said teinds, parsonage, and vicarage to be free, safe and sure" to the grantee "from all ministers' stipends, future augmentations, annuities, and other burdens imposed, or to be imposed, on said teinds."*

HELD (affirming judgment), *In an action brought by a singular successor of the vassal against the superior for the purpose of enforcing the obligation, that it was a condition of the feu rights inseparable from the relation of superior and vassal; and that it was transmitted with the lands without being specially assigned.*[1]

This action was brought by Sir William Drummond Stewart, with consent of Mr. Kellie M'Callum, for the purpose of enforcing against the defender, the Duke of Montrose, an obligation of relief against augmentations of stipend, contained in a feu contract granted by the Marquis of Montrose on 1st January 1705. The obligation was expressed as follows:—"And further, in regard the said Mr. David Graham has payed as great a pryce for the saids teinds, parsonage and vicarage, as for the stock of the said lands, therefore the said James, Marquess of Montrose, binds and obliges him and his foresaids to warrant the said teinds, parsonage and vicarage, hereby disponed to be free, safe, and sure, to the said Mr. David Graham and his said son, and his foresaids, from all ministers' stipends, future augmentations, annuities, and other burdens imposed or to be imposed upon the said teinds."

The defender did not dispute, that the obligation was aptly expressed to form a claim for relief against augmentations if the question had arisen with the original parties to it, or if it had been properly transmitted to the pursuers; but he maintained, that it had not been so under the titles by which they acquired the lands. The titles were as follow:—By feu contract, dated 1st February 1705, James, Marquis of Montrose, feued the lands of Braco to David Graham, in liferent, and to James Graham, his son, and a certain series of heirs therein mentioned, in fee; whom failing, to the said David Graham, his heirs and assignees whomsoever. The feu contract contained the clause of relief above quoted.

In virtue of the feu contract David Graham and James Graham were infeft, for their respective rights of liferent and fee, on 23d May 1705.

James Graham having contracted debt, several of his creditors, after the death of his father, David Graham, obtained decree of adjudication against the lands of Braco, viz. Thomas Andrew

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[1] See previous report 22 D. 755; 32 Sc. Jur. 308. S. C. 4 Macq. Ap. 499: 1 Macph. H. L. 25: 35 Sc. Jur. 420.

on 10th June 1719, Sir George Dunbar on 13th January 1720, and John Sinclair on 17th February, 1720.

The titles were further traced down to 1853, when the lands were disentailed and acquired by Sir W. D. Stewart and the other pursuer M'Cullum by purchase.

The Court of Session held, that the obligation was a condition of the feu rights inseparable from the relation of superior and vassal, and transmitted with the lands without being specially assigned.

The Duke of Montrose appealed, maintaining in his *printed case*, that the judgment of the Court of Session should be reversed, for these reasons:—1. Because the respondents had no title or right to insist for implement of the obligation of relief contained in the feu contract of 1705. 2. That obligation was a personal and collateral one which did not run with the lands, but required to be transmitted by special assignation. 3. It had not been transmitted to or acquired by the respondents, or either of them. 4. In any view, the appellant was not liable beyond the value of the superiority.

The respondents in their *printed case* supported the judgment on the following grounds:—1. The superior and vassal in a feu right remain reciprocally bound, during the subsistence of the right, to implement to one another the obligations incumbent upon the superior and vassal respectively, in the original charter or feu contract constitutive of the feu, in so far as these obligations affect the subject of the feu, and are of a continuous and permanent character. 2. The superior and vassal in a charter by progress, renewing the grant in the original charter or contract, are understood to adopt, as the contract betwixt them, the original charter or contract constitutive of the right, with all its conditions and provisions, in so far as not expressly discharged or modified in some renewal of the right. 3. The right to enforce, and the liability to fulfil, *inter se*, the rights and obligations competent to, or incumbent upon, the superior and vassal in a feu right, in terms of the original contract, pass and become competent to, or incumbent upon, the superior and vassal in any charter by progress, by the mere renewal of the right, without any special assignation or other transmission of such rights and obligations. 4. The feu right, constituted by the contract of 1705, betwixt James, Marquis of Montrose, and David and James Graham, being a grant by the Marquis, as superior, to the Messrs. Graham, as vassals, of certain lands, with the teinds thereof, for the full value of the said lands and teinds, the obligation undertaken by the superior "to warrant the said teinds, parsonage and vicarage, above disponed, to be free, safe, and sure to the said Mr. David Graham and his said son, and his foresaids, from all ministers' stipends, future augmentations, annuities, and other burdens, imposed or to be imposed upon the said teinds," is an obligation immediately affecting the subject of the right—of a continuous and permanent character—and so transmissible, as betwixt superior and vassal, by a renewal of the feu right, without any special assignation of the said obligation. 5. Assuming such an assignation to be necessary to confer a title upon the respondents to enforce the obligation, the continuous and unbroken series of assignations to writs, and whole clauses thereof, from James Graham and intervening vassals to the respondents, would be sufficient to confer such a title. 6. The feu duty stipulated in the original feu contract and successive renewals of the right, being payable for a grant, *inter alia*, of the teinds of the lands included in the contract, unburdened with augmentations, the appellant is not entitled, on the one hand, to exact the full feu duty, and to repudiate, on the other, the obligation to free the teinds of all augmentations of stipend. 7. The appellant, and his immediate predecessor, having paid the augmented stipend effeiring to the lands embraced in the feu contract, and now belonging to the respondent, Mr. M'Cullum, from 1800 until 1847, must be held to have adopted and undertaken, *rebus ipsis et factis*, the obligation to pay such augmented stipend expressly undertaken by their predecessor, James, Marquis of Montrose, the superior in the original feu contract of 1705.

Rolt Q.C., and *Shand*, for the appellant.—It is not disputed, that in this case the deed of 1705 contained a proper obligation by the appellant's ancestor to relieve the other party to that deed against augmentations, but the obligation has not been transmitted to the respondent. It is not an obligation which runs with the lands, being collateral to the subject matter of the sale, according to the definition of Lord Cottenham in *Maitland* v. *Horne*, 1 Bell's Ap. 1; *Breadalbane* v. *Sinclair*, 5 Bell's Ap. 353. Such an obligation, therefore, does not pass by a general clause of assignation of the writs—Menzies' Convey. 616; Ersk. 2, 3, 31. The general clause does not carry a tack of teinds—*Grahame* v. *Don*, 15th Dec. 1814, F.C. Nor does it carry a right of warrandice in case of eviction—*Hamilton* v. *Montgomery*, 12 S. 349. In *Maitland* v. *Horne*, it was also held, that a special assignation is required to carry an obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend: *per* LORD CAMPBELL in *Breadalbane* v. *Sinclair*, 5 Bell's App. 376. So in *Spottiswoode* v. *Seymer*, 15 D. 458, it was held, that where the obligation of relief had been granted, and the disponee executed a procuratory of resignation in favour of his son, who was infeft on a charter of resignation, the obligation was not transmitted. It is said, that the case of *Lennox* v. *Hamilton*, 5 D. 1357, shews the contrary; but that case proceeded on an erroneous view of the case of *Maitland* v. *Horne*, as has been pointed out in later cases. If, therefore, a special assignation was

necessary to transmit the obligation of relief contained in the deed of 1705, no such special assignation is to be found in the titles of the respondent. It is said, that the adjudication by Thomas Andrew in 1715 contained the obligation; but that adjudication was directed only against the heir of the previous vassal, and could not carry the estate in question; but even if it did, it carried only the lands, and not a collateral obligation. Even assuming the obligation passed to General Graeme, it was not transmitted to his successor, Masterton, for the disposition of 1801 passes merely the lands, and not any additional or collateral right held therewith. In other steps in the title, the words "and the whole clauses" are sometimes added to the general clause of assignation of writs, but those words do not extend the operation of the general clause, and do not amount to a special assignation. But it is said, that though the obligation may not have been specially assigned, yet the charters and deeds of renewal ratify and acknowledge the obligation as subsisting. The language of the deed is, however, mere recital, and it is too vague to warrant such a conclusion. Then it is said, that the obligation forms a condition of the feu, and so runs with it. The obligation attached only on the granter, who would have remained liable even after transferring the superiority. But it is not a real burden on the lands; it is a mere contract of indemnity against the payment of an indefinite sum of money, which cannot be made a real burden on land—*Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 311. If it were not so, every obligation undertaken by the granter in a feu contract would transmit against his singular successors. The result, therefore, is, that the obligation was a mere personal obligation in the granter, and forms no part of the feudal estate, and is not carried by a conveyance of the lands. Nor do the charters by progress imply any renewal of the obligation between the respective lord and vassal who succeed—*M'Leod* v. *Ross*, 2 Paton App. 430; *Grahame* v. *Hamilton*, 4 D. 432; *Thriepland* v. *Rutherfurd*, 10 D. 1063.

The Solicitor General (Sir R. Palmer), and *Mure*, for the respondents.—The obligation of relief in this contract was intended by the parties to the deed of 1705 to be permanent, and to run with the feu; and it is a condition of the feu contract subsisting in whosesoever hands the estate is found. The feu charter or contract is the proper test of the conditions, and each renewal of the investiture implies the continuance of the conditions in the original disposition or contract—Craig, 2, 12, 8; Ersk. 2, 3, 20. Such is still the law—*Threipland* v. *Rutherfurd*, 10 D. 1063; *Graham* v. *Duke of Hamilton*. Therefore, on each renewal of the investiture, the parties adopt the original contract unless they specially provide otherwise. The obligation here is available to no one else but the vassal. There is no reason for holding, that this particular condition has been discharged. In a similar case it was held to exist by reason of the privity of estate—*Lennox* v. *Hamilton*, 5 D. 1357. In *Maitland* v. *Horne*, 1 Bell's App. 1, there was no relation between superior and vassal, which makes all the difference; and so in *Breadalbane* v. *Sinclair*, 5 Bell's App. 353; *Spottiswoode* v. *Seymer*, 15 D. 458. An obligation to renounce the casualties of the superiority was held to be real, and to run with the lands, and that is analogous to the present case—*Nasmith* v. *Story*, M. 5723; 10,276. So in a case like the present—*Wilson* v. *Agnew*, 9 S. 357. If the obligation is binding on the superior, then it is necessarily available to and enforceable by the vassal, for it was a mutual contract. But even if a title by assignation is necessary, then that title exists in the respondent. Such an obligation passes in a general clause of assignation of writs, which conveys all writs necessary to maintain the right conveyed by the dispositive clause. This is implied in the cases of *Hamilton* v. *Montgomery*, 12 S. 349; *Graham* v. *Don*, 15th December 1814, F.C.; *Renton* v. *Anstruther*, 2 Bell's App. 214.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the appellant is the superior in a feu contract, under which the respondent is the vassal. The question raised is, whether the respondent is entitled to the benefit of an obligation of relief against augmentation of stipend contained in the original feu contract. The appellant is not only superior, but also the representative of the superior who granted the original obligation, and it is admitted in the cause, that the appellant is liable if the respondent be in right of the obligation. The sole question, therefore, is, whether the obligation accompanies the feu on its transmission from vassal to vassal, without the necessity of obtaining a special assignation from the representatives of the original grantee.

As the feudal relation of superior and vassal still exists between the appellant and the respondent, there is privity of estate between them, and consequently a right in the vassal to enforce against the superior every obligation which, by the terms of the feu contract, entered into the relation as thereby constituted, and which from its nature was intended to accompany the estate of the vassal.

Now the obligation in question, so far as the terms in which it is expressed are material, is plainly intended to endure for the benefit of all persons entitled under the feu contract, that is, of all succeeding vassals. The superior binds himself, his heirs and successors, in the superiority to the vassal, his heirs and successors in the feu. And the nature of the obligation is such as was plainly intended to accompany and follow the feu in its transmissions, for it is an engage-

ment which none but the actual vassal can claim the benefit of, whenever the event occurs which gives rise to a demand against the superior under the obligation.

The obligation of the superior is for himself, his heirs and successors; that the teinds, parsonage and vicarage, disponed by him to the vassal, his heirs and successors, shall be free from all ministers' stipends, future augmentations, annuities, and other burdens to be imposed upon the said teinds except only such as were then subsisting, and presently payable.

The proposition of the appellant is, that this engagement is personal to the grantee, and stops unless specially assigned, with him and his representatives, but where the original grantee or any succeeding vassal has disponed the feu, he ceases at once to have any interest in the obligation of the superior. What, then, becomes of the obligation? Does it remain with the grantee or his representatives, who have no longer any interest in it, or right to enforce it? or does it, in conformity with the terms of the obligation and the spirit and interest of the contract, accompany the feu into the hands of the succeeding vassal?

The obligation relates directly to the subject of the feu contract and to the enjoyment of it by the vassal, and it is therefore, from the very nature of the engagement, an integral part of the contract, in consideration and return for which, as part of the superior's grant and engagement, the feu duties and other prestations are rendered by the vassal.

It is no answer to say, that the liability of the superior under such an obligation may exceed the whole value of the feu duties. This may shew, that the contract of the superior was originally improvident, but does not affect the legal construction or validity of the obligation.

In principle, therefore, it appears to me to be clear, that the obligation in question is part of the feudal contract, and is transmitted along with that contract.

But little difficulty could have been felt on this point, if it had not been supposed in the Court below, that the decisions of this House in the cases of *Maitland* v. *Horne* and *Breadalbane* v. *Sinclair*, and the judgment of the late Lord Cottenham, were in favour of the appellant. In my opinion those cases have no application to the present, for in them there was no privity of estate between the contending parties, who did not stand in the mutual relation of superior and vassal.

I must, therefore, move your Lordships, that the decision in the Court below be affirmed.

LORD CRANWORTH.—The object of this suit was to make the appellant liable to the respondent in respect of certain augmentations of ministers' stipends which have been duly made, whereby the teinds of Braco have been heavily charged beyond the charges which subsisted at the date of the feu contract of 1705.

It is clear on all the authorities, that the benefit of the obligation entered into by the Marquis of Montrose in 1705, whereby he bound himself and his heirs to warrant the teinds free from all future augmentations, has not been duly assigned to the respondent so as to enable him to sustain an action for relief against the appellant as the personal representative of the Marquis. But the question is, whether, as superior, the Duke is not liable without any special assignation of writs. The Lord Ordinary held, that he is not. And the question having been argued before all the Judges, six of them, including the Lord Ordinary, adhered to his opinion and were for affirming his interlocutor, and seven were opposed to it, so that there were seven in favour of the liability of the appellant, and six against it. The result was, that the appellant was declared to be liable. He has appealed to your Lordships, and this House has now to decide in this closely balanced state of the authorities.

The Lord Ordinary and the Judges who concurred with him came to a decision adverse to the pursuer, who is now the respondent, on the ground, that the obligation in question, though entered into in the original feu contract by the superior with the person who was thereby constituted his vassal, was not a condition of the feu right inseparable from the feudal relation of superior and vassal, but a mere collateral engagement entered into by the superior with his vassal when he created the feu right binding only him and his personal representatives.

The seven Judges who formed the majority were of opinion that the obligation in question was validly made a part of the feu contract, so that every succeeding vassal had a right to claim the benefit of it against the superior for the time being in the same way as every successive superior has a right to insist against every succeeding vassal for the payment of the feu duty. Which of these views was right? My impression was, that the Lord Ordinary was right. Certain definite duties attach to the superior, whoever he may be, arising not from special contract, but from the nature of the feudal relation. The superior (as is pointed out by the Lord President) is bound to infeft and to enter the vassal, and to renew the right of every successive vassal according to his right, whether claiming by descent or as a singular successor. On the other hand, certain well known obligations attach, without being expressly mentioned, on the vassal; and on the principle "*cujus est dare ejus est disponere*," the person feuing his land may stipulate for special payments, prestations, and duties to be rendered and performed by the vassal, as the condition of his holding the *dominium utile* of the land. But I have no authority for saying, that he can annex to the *dominium directum*, which he retains, an onerous obligation such as that now under consideration, so as to make it attach on the superiority. Before feuing the lands,

the owner has *plenum dominium*. He may divest himself of this full right by feuing on terms which he may make the condition, on the performance of which the right of the feuar shall depend. No one, who afterwards succeeds to him in so much of his original *plenum dominium* as he has not parted with, can claim any interest in the land except the rights reserved expressly or impliedly in the original feu grant. But what he succeeds to must, I should have thought, be the *plenum dominium* diminished only to the extent of the grant. I should not have thought, that in such a case it was competent to the granter, by covenant with the grantee, to burden the interest which he retains so as to affect his singular successors in the superiority.

My opinion, therefore, would have been in favour of this appeal. But as I know, that my noble friend near me concurs with the LORD CHANCELLOR, I shall not trouble your Lordships with any further observations. The case is one of great nicety, and though I have shortly stated the grounds on which I thought the minority of the Judges below were right, I readily defer to the opinions of the majority, and of my noble and learned friends who heard the case argued at your Lordships' bar.

I will merely add, that the two cases cited in argument, and which were decided in your Lordships' House, have little or rather no bearing on the question. Neither of them were cases between vassal and superior. *Maitland* v. *Horne* merely decided that, where a vendor had entered into a covenant with a purchaser similar to that now in question, a singular successor of the purchaser had no right of action against the representative of the covenantor, unless the right to the covenant had been specially assigned to him. In the other case of *Breadalbane* v. *Sinclair* there was, as in this case, a feu contract, but the action was raised, not against the superior for the time being, but against the personal representative of the original granter, who had entered into the obligation. The benefit of the obligation had not been duly transmitted, and the principle established in the preceding case therefore prevailed. These cases are clearly inapplicable to that now before the House.

LORD WENSLEYDALE.—My Lords, in this case I heard the argument in 1861, but I was unfortunately prevented from hearing the argument that took place last session, and I shall therefore give no opinion upon it.

LORD CHELMSFORD.—My Lords, this is a case confessedly of great difficulty, as well as of importance. Where so many learned Judges, necessarily more conversant with the law to be administered than I can pretend to be, are so closely divided in their opinions, I may well hesitate to express any confidence in the conclusion at which I have arrived, but I have not made up my mind on the subject without giving the most careful and attentive consideration to the whole case.

The solution of the question entirely turns upon the point, whether the obligation to relieve the teinds from augmentations of the ministers' stipend is a mere personal obligation, or whether it enters or forms part of the feu contract. If the obligation is merely personal, it is conceded, that a special assignation of the right to it was necessary, and all the Judges agree, that the pursuer cannot found his title upon any such assignation. On the other hand, if, by the feu contract, the obligation entered into the constitution of the feu, and so became a part of the newly constituted relation of superior and vassal, it would be inherently transmissible by the mere continuance of that relation.

The appellant, however, contends, that the right to enforce this particular obligation does not run with the estate of teind to the vassal,—that it was at the utmost one of the *accidentalia feudi*, spoken of by Erskine, 2, 3, 11, which the lord could not annex to the feu so as to prejudice his successor, or at all events, not without its finding its way into the feudal investiture.

But what reason is there for saying that the lord, in the original creation of this feu, could be restrained from granting the *dominium utile*, and reserving the *dominium directum*, with certain obligations and conditions attached to it, at his free will and pleasure? He was the absolute owner of the subject. His singular successors could, of course, have no reason to complain, because they would take care to ascertain the burdens or obligations belonging to the superiority before they purchased. His heirs would receive the superiority from him with the conditions upon which he permitted it to descend to them, as he might, if he pleased, have alienated it altogether from them. If the obligation was made part of the feu, in its original creation, then, as according to Craig, quoted by Erskine, 2, 3, 20, "all clauses in the original charter are, in the judgment of law, implied in charters by progress, if there be no express alteration," it was continued by the several charters of confirmation of the superior, and by the precept of *clare constat*, by which the feudal estate was transmitted to Colonel David Graham.

The difficulty in the way of construing this obligation to be more than a personal obligation to relieve from augmentation, was strongly urged by comparing it with the clause of warrandice, confessedly a mere personal contract, binding only upon representatives. And it was asked, what difference can be suggested between a warranty of title generally and a warranty against a specific claim being made upon a part of the subject matter of the grant? The answer is, that the two things are entirely different, and therefore incapable of comparison. In the words of Lord Cottenham in the case of *Maitland* v. *Horne*, 1 Bell's App. 63, "The nature of such a con-

tract is a very different thing indeed from what is ordinarily understood by the term warrandice or warranty, according to the term used in the English law. The teinds of a parish are subject to the liability to be diminished in the hands of the individual, by being taken for the purpose of adding to the stipend of the minister. But the title of the teinds is not affected by the augmentation."

It is not therefore by comparing the obligation in question with the contract of warrandice, but by examining it in itself, that its real character can be ascertained. It is contained in the grant by which the feudal relation to the teinds was originally created, and the terms on which they were to be held were permanently arranged. The vassal had agreed to purchase, not the teinds simply, but the teinds subject only to the existing burdens, and free from any future augmentations of them. The exoneration of the teinds from all additional burdens was to be the condition and quality of the subject as between the lord and the vassal. This could only be effected by such an obligation as that into which the lord entered. He could not expressly exempt the teinds from liability to augmentation of stipend, because the liability is imposed by law, and the minister could not be prevented by such a stipulation between the parties from having recourse to the teinds for satisfaction of his stipend. The only mode in which he could give the vassal the benefit for which he contracted was, by annexing an obligation to the teinds, which would accompany them for all future time, and afford them a permanent protection against diminution. And, that this intention might be more clearly shewn, the reason for the obligation is stated to be in regard that Mr. David Grahame had paid as great a price for the teinds, parsonage, and vicarage as for the stock of the lands—in other words, that he had paid an ample consideration for the purchase of the teinds, free from any additional burdens which might be afterwards imposed.

Taking the whole of the feu contract respecting the teinds together, it is substantially a grant of an interest in unincumbered teinds conceived in the terms of an obligation, and is not collateral, but an express condition of the feudal grant transmissible as an essential part of it to the successive vassals.

The question is not raised on behalf of a singular successor. If it had been, it would have been necessary to consider how far the case was decided by the two cases of *Maitland* v. *Horne*, and the *Marquis of Breadalbane* v. *Sinclair*. The former of these was not a case where the obligation to relieve the teinds from future burdens was contained in the original feudal grant, but it was a sale and disposition of lands with the teinds, made by a vassal, with an obligation to relieve his disponee from future augmentations. The superior had nothing to do with this obligation, and it in no way entered into the relation between him and his vassal. There was nothing remaining in the disponer, in respect of the teinds, to which the obligation could be annexed. It was, to use the words of Lord Cottenham, "a contract perfectly collateral to the subject matter of the sale." It was therefore necessarily a mere personal obligation not transmissible to singular successors in any other manner than by a special assignation not by virtue of a general assignation to writs, which never operates in itself as a transmission of rights, but merely for the defence of right actually transmitted.

In the case of *Breadalbane* v. *Sinclair* the obligation to relieve from augmentation was contained in the original feu charter granted by Lord Breadalbane to James Sinclair; and Lord Breadalbane was a defender in the action brought for the relief stipulated for by the obligation. But Lord Breadalbane had alienated the superiority, and Sir Ralph Anstruther, who had become the superior, was dismissed from the action at an early stage of the proceeding, upon his motion to that effect, and without any opposition on the part of the pursuer. The action, therefore, became virtually a claim by a singular successor of the original grantee, in his mere character of heritable proprietor of the lands, without proof of any special assignation, upon an obligation which, having been disannexed from the superiority, had become personal as to the party by whom it was originally entered into.

These cases, therefore, do not appear to touch the question of an obligation entering into the original constitution of the feudal relation, and affecting the condition of the subject of the feu charter or contract.

Two cases decided in the Court of Session, and relied upon in argument, bear strongly upon the present question. In *Wilson* v. *Agnew*, 9 S. 357, "the superior in a feu contract agreed with his vassal, that the teinds due out of the lands feued should be taxed at a certain sum besides feu duty, and bound himself to free the vassal of all teind and public burdens payable furth of the lands in all time coming." The estate of the superior was subsequently taken up, in virtue of an onerous and mutual entail by the heir, who was the lineal representative of the granter of the obligation, and who took up his estate, including the superiority. And he was held liable to fulfil the obligation as inherent in the feu contract. Lord Balgray said—"The defender, Colonel Agnew, represents the original party to the contract, who was proprietor in fee simple of the estate. The superiority of the land for which the feu duty and teind exemption duty were paid is part and parcel of the entailed estate. By taking up the estate, the defender has right to these annual prestations from the pursuer, and has received them. But no heir of

entail can take up a part of that estate as superior, and yet attempt to shake himself loose from the obligations incumbent on him as superior towards his vassal."

The case of *Lennox* v. *Hamilton* is of even closer application. There by the original feu charter made in 1737, and granting lands and teinds, the superior bound himself to warrant the feu right from "all future augmentations of ministers' stipends that might affect the teinds above disponed." A charter of confirmation was granted by the superior in 1778 to a disponee of the original vassal, which declared this general confirmation to be as valid and effectual to all intents and purposes as if the said dispositions and instruments of sasine before mentioned had been hereinbefore *verbatim* inserted. In this charter the superior's obligation to relieve the vassal from augmentations of stipend was omitted, and the vassal was held bound to relieve the superior from all ministers' stipend. A subsequent charter to the same effect was granted in 1815, and with the same omission. And the vassal was held bound to the same extent as with respect to the charter 1778. In 1798 the lands and teinds came by progress through a variety of singular successors, none of whom entered with the superior, to the pursuer's ancestor, and ultimately, by succession, to the pursuer himself. None of the conveyances in the course of the progress contained a specific mention of the obligations to relieve against augmentation, but all of them contained an assignation to the writs and evidents of the lands, with the whole clauses of warrandice, and other clauses therein contained. The pursuer, who was a singular successor in the feu, brought an action of relief against the superior, founded upon the obligations in the original charter, and it was held, that he was entitled to recover. One of the grounds for sustaining his right was, that the obligation sued upon formed part of the original feu charter, and that it could not be held to be discharged by its having been omitted in the subsequent charters by progress granted by the superior. Lord Fullerton said, "The superior feued out the lands, and made the obligation to relieve from augmentations a part of his obligation as superior. So that, when the vassal came to sell, he must be held to have substituted the purchaser for himself in that original contract, and thus brought every subsequent acquirer in direct connexion with the superior in relation to the obligation of relief. There is good ground for holding, that such an obligation would go with the lands, and that the purchaser would be entitled to insist, that the superior should repeat it in any new charter."

These cases seem to me to furnish ground for the distinction upon which this case may be decided. When an absolute disposition of teinds is made with an obligation to relieve from burdens, this must necessarily be collateral, and therefore personal, because there is no subsisting relation in the teinds between the parties. But where the superiority is reserved, and the *dominium utile* only transferred, the obligation originating with and being annexed to the feudal relation at the time of its creation, enters into and forms part of its original constitution, and so passes to each vassal as an intrinsic condition of the subject.

After careful consideration, I have arrived at the same conclusion with my noble and learned friend on the woolsack, that this is a case in which the obligation in question is one of the legal conditions of the feudal grant, and that the interlocutor of the Court of Session is therefore right, and ought to be affirmed.

Interlocutors affirmed with costs.

For Appellant, Loch and Maclaurin, Solicitors, Westminster.—*For Respondents*, Connell and Hope, Solicitors, Westminster.

MARCH 27, 1863.

The EARL OF FIFE, *Appellant*, *v.* The Honourable GEORGE SKENE DUFF, *Respondent.*

Entail—Registration—Statute 1685, c. 21—Sale—*X purchased lands, and, while holding them on a personal title, executed in* 1721 *a deed of entail, containing, with power to revoke, the usual clauses of an entail, excepting procuratory of resignation, precept of sasine, and obligation to infeft. Thereafter he made his right to the lands real, by titles containing no reference to the deed of* 1721. *He died leaving issue, two daughters, in a litigation between whom, it was determined by the Court, in* 1725, *that the deed of* 1721 *had not been revoked. The daughters thereafter made up titles, and were infeft in the lands as heiresses portioners; and in* 1728 *they disponed the lands, in implement of the deed of* 1721, *to the oldest daughter of the entailer, as heiress of entail, and to the substitute heirs mentioned in the deed. The deed of* 1728 *contained*