

Thursday, Nov. 19.

FIRST DIVISION.

[Lord Shand.

DUKE OF HAMILTON AND OTHERS *v.* COMMON AGENT IN LOCALITY OF LINLITHGOW.

Teinds—Locality—Final Scheme—Act of Sederunt of 12th Nov. 1825.

In a process of locality, after an interim scheme had been approved of, a number of alterations became necessary in the preparation of a final scheme, owing to deaths of heritors and changes of proprietors. The common agent accordingly prepared a rectified state of teinds, and an opportunity having been given to the heritors to see this state, he asked a remit in the usual terms to the clerk to prepare a rectified scheme. The motion was opposed on the ground that it was contrary to the provisions of the Act of Sederunt of 12th November 1825. *Held* that the course followed by the common agent was competent and expedient, although not in strict conformity with the provisions of the Act of Sederunt.

The reclaimers in this case were heritors in the parish of Linlithgow, and they came forward to oppose a motion by the Common Agent for a remit to the clerk to prepare a rectified scheme of locality. The Lord Ordinary (SHAND) pronounced the following interlocutor:—

“19th June 1874.—The Lord Ordinary having heard counsel for the Common Agent in support of the motion made by him for a remit to the clerk to prepare a rectified scheme of locality, in terms of the rectified state of the teinds, No. 69 of process, and for the Duke of Hamilton, and Earl of Rosebery, and others, in opposition—Grants the motion, and finds the objectors liable in expenses of the discussion, and modifies the same to five guineas.

“*Note.*—Since the interim scheme was approved of, a considerable number of alterations have become necessary in the preparation of a final scheme, owing to the deaths of heritors, and other changes in regard to the properties liable for teind, and also in consequence of information obtained by the common agent, from inquiries and through communications from different heritors. The common agent thus found it necessary, in accordance with the practice which has long prevailed in such cases, to prepare a rectified state of the teinds, and an opportunity having been given to the heritors to see this state, the common agent now asks for a remit in the usual terms to the clerk to prepare a rectified scheme. Certain of the heritors object to this remit as a proceeding not authorised by the Act of Sederunt of 1825, and contend that the rectified state must be laid aside, and that the only changes which can now be made in the preparation of a final scheme must be after objections have been lodged in process by such of the heritors as desire any change to be made on the interim scheme as a final scheme, and at the expense of these heritors. This contention, if given effect to, would cause a great increase in the amount of judicial procedure, already often more than enough in processes of locality, and would deprive the heritors of the great advantage of having the services of the common agent, with whom they

may communicate without being obliged to lodge formal objections in process, and who, at a moderate expense to all concerned, in the first instance considers and deals with such information or objections as may be laid before him. The objectors' contention, that the heritors have no opportunity for making such communications with the common agent after the interim scheme has been allowed to be seen as a final scheme (a step which has been always taken immediately after the interim scheme has been approved of as a rule for interim payment) does not appear to be warranted by anything in the Act of Sederunt, and is certainly against the usage which has always prevailed.

“Should the objectors be able to show that any special part of the expense of preparation of the final scheme should be borne by particular heritors who have been in fault, it will be open to them to do so when the time arrives for apportioning of that expense. In the meantime, the objectors ought to bear the expense of the second discussion with the common agent which they have raised on this motion.

“It seems to be unfortunate that since the Act of Sederunt of 1825 the old practice of at once allowing the interim scheme to be seen and objected to as a final scheme has been invariably followed; for that Act seems to have contemplated the preparation of a separate state and scheme of a final locality,—not necessarily a copy of the interim scheme—to be distributed among the agents for the heritors. But looking to the practice which has been followed, by which the heritors at this stage, and after such an order having been pronounced, have been in use to communicate with the common agent in regard to any alteration they desire in the scheme, and as the common agent, after investigation and inquiry, and to some extent in consequence of communications from different heritors, has made the alterations he has thought necessary to do justice to the heritors in the preparation of a rectified state of teinds, the Lord Ordinary cannot give effect to the objections urged against the remit now made. If these objections were sustained it would have the effect of causing a great number of objections to be lodged in process, at a considerable expense to the heritors, and would result in the same rectification of the scheme which takes place under the present system, and if any alteration is to be made in the system which has been so long pursued, these should only be after due notice given by Act of Sederunt, or otherwise, for the guidance of the profession, and particularly by gentlemen acting as common agents.”

The heritors reclaimed.

At advising—

LORD PRESIDENT—This is just like any other locality, and there is a very good account of it on pp. 20 and 21. The common agent says:—

“After the original state of the teinds in this parish was lodged in process, and the interim scheme of locality, following thereon, had been prepared by the clerk of teinds and approved of by the Lord Ordinary as an interim rule of payment of the pursuer's stipend until a final scheme of locality should be established, his Lordship pronounced an interlocutor allowing the latter to be seen and objected to as a final scheme by all concerned. The common agent thereupon distributed copies of the said scheme among the heritors,

and, at the same time, sent to each of them a letter in the following terms:—

"Sir,—I beg to send you annexed scheme of locality of the stipend of the minister of the parish of Linlithgow, which has been approved of by the Lord Ordinary as an interim rule of payment of the augmented stipend, and has been allowed to be seen and objected to as a final locality.

"You are requested to examine the scheme, and to lodge any objections you may have thereto on or before the 20th day of July next. If no objections be lodged, I will proceed without delay to take the necessary steps to have the interim scheme declared final.—I am," &c.

Now I should imagine that so far nothing irregular was done either by the Lord Ordinary or by the common agent, but the latter goes on to say:—

"The common agent at the same time sent to each heritor in the parish a memorandum which he had prepared as to a decret of valuation of certain lands in the parish, dated 3d February 1714. By this decret the lands belonging to thirty-eight different proprietors were valued, and as there were several portions of the valuation which did not appear to be claimed by any heritor, either in the current or in any of the recent processes of locality of the parish, he considered it well to call the attention of the heritors, and more especially of the smaller ones, to the valuation.

"No formal objections (with the exception of those for Mr Milroy, to be afterwards adverted to) have been lodged in process, but the common agent has had a good deal of communication with several of the heritors as to the amount of the teind of the lands belonging to them, and as to the stipend payable therefrom. In several cases it has appeared to him that the statement originally made upon these points requires to be altered, and in the subjoined state he has given effect to the views of these heritors, so far as it appeared to him that they were in the right.

"The common agent has also ascertained that various changes have occurred in ownership since the date of the interim scheme, and in the subjoined state he has also given effect to them. . . .

"In consequence of claims which have been advanced by various heritors that the teinds of the lands belonging to them are valued by the said decree of valuation of 3d February 1714, and of some of the remaining heritors having maintained that they are entered in the interim scheme of locality as liable for the stipend of various parcels of land, which do not now, and never did, belong to them, the common agent has had occasion to make a most careful and exhaustive examination of all the previous processes of augmentation and locality of this parish, and he has found that in some of the older processes the authors of some of the present heritors were entered as having their lands included in the said decree, while in later processes this has apparently been lost sight of, and the proprietors of the lands in question entered as if the teinds of their lands were unvalued. The common agent has accordingly drawn the attention of these heritors to this point, and has requested them to send their title-deeds to him for examination, if it appears to them that the teinds of their lands are included in this valuation. Several of the heritors have not, however, done so."

Now it may be that what the common agent did was not in strict conformity with the Act of Sederunt, but still it is impossible to read his statement and not see that he is only doing his duty in trying to simplify these proceedings as much as possible, and the only way he could do so was by preparing this document and giving effect to the heritors' corrections. Surely when the common agent has made all these painful investigations, reaching back to all the earlier processes of locality, it is desirable that the scheme should be put in a shape conform to the result of these investigations, and then let everyone who has an interest object afterwards. If the delay and neglect of these heritors has caused the necessity of a rectified scheme of locality, the Lord Ordinary will lay the expense of that on them, but I cannot see what interest the reclaimers have to object to this interlocutor. It may be that the strict terms of the Act of Sederunt have not been followed, but I am certainly not disposed to interfere with a well-established practice, even though it be not in strict conformity with an Act of Sederunt.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutors reclaimed against; find the Common Agent (respondent) entitled to additional expenses; allow an account thereof to be given in, and remit to the Auditor to tax the same and to report."

Counsel for Reclaimers—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Common Agent—Solicitor-General (Watson) and Mackintosh. Agent—D. L. Shand, W.S.

Monday, November 23.

SECOND DIVISION.

SPECIAL CASE—WALKER AND OTHERS (GILES' TRUSTEES).

Tutor incertus dari non potest.

A father appointed certain trustees by name, and the settlement contained a clause as follows:—"I hereby nominate and appoint my said trustees, named, or to be named or assumed, tutors and curators of such children as may be alive at my death." The trustees accepted office, and on the death of one of their number assumed two new trustees. *Held* that the original trustees alone were entitled to act as tutors and curators.

Mr James Giles, R.S.A., residing in Aberdeen, died on 6th October 1870, survived by his second wife, by one child of his first marriage, who attained majority, and by two children of his second marriage, both in pupilarity. Mr Giles left a trust-disposition and settlement, by which he conveyed his whole estates, heritable and moveable, to the trustees therein named. The settlements contained the following clause:—"I hereby nominate and appoint my said trustees, named or to be named, or assumed, and the survivors and survivor of them, tutors and curators, or tutor and curator, of such children of my present marriage as may be alive at the time of my death." The trust-estate is of the value of between £11,000 and £12,000. The trustees accepted office, and on the death of one of their number the survivors assumed two new trustees. A question arose as to whether the assumed trustees were, as such, tutors