Thursday, February 6.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ROBERTSON *v.* MACKNIGHT.

Teinds—Augmentation—Over-allocation—Relief.

In a process of locality the teinds of certain lands were localled on for a larger sum than they would have been if the decree of valuation by which they had been previously valued had been produced. In a subsequent augmentation the Court *held* that the proportion of the augmented stipend to be localled on the said teinds must be such as, taken along with the old stipend payable out of them, did not exceed the fair proportion corresponding to the amount of valued teind.

This was a question between Miss Margaret Turnbull Robertson of Dalladies, and David Flett, writer in Edinburgh, her *curator bonis*, and Mr Macknight, W.S., the Common-Agent in the locality of Fettercairn. Miss Robertson was heritable proprietor of the lands and teinds of Dalladies, in the parish of Fettercairn, and county of Kincardine. The teinds of said lands were valued, by decree of valuation dated 4th July 1810, at two firlots one peck two lippies and two-fifths of a lippy oatmeal, three pecks and four-fifths of a lippy bear, with £16, 16s. 11$\frac{1}{12}$d. money sterling. In the two processes of locality of stipend which immediately preceded the one in which this question arose, more than the just proportion of the respective augmentations of stipend was laid upon the teinds of Dalladies. The condescenders therefore craved that the teinds of said lands should be so localled on as that the whole stipend payable from said teinds for the future should be in the proportion which said teinds bore to the teinds of the other heritors in the said parish who had heritable rights to their teinds; and that such amount of augmentation, and no more, should be laid upon said teinds of Dalladies as would, when added to the old stipend, make the whole stipend payable therefrom amount to the said proportion.

The Common-Agent admitted the accuracy of the facts stated by the condescenders, but contended, that as the previous localities were now final, the stipend thereby localled upon the lands of Dalladies must continue to be paid, irrespective of the augmentation in course of being localled, until the said localities were set aside by an action of reduction at the instance of the objectors.

The Lord Ordinary pronounced the following interlocutor and subjoined Note:—

"*Edinburgh, 11th December* 1872.—The Lord Ordinary having heard parties' procurators on the closed record between Miss Robertson and her *curator bonis* and the Common-Agent, and having considered the closed record, writs founded on, and whole process,—Finds that in localling the augmentation recently awarded effect must be given to the decree of valuation produced and founded on by the objectors: Finds that the old localities, which are final and unreduced, cannot be interfered with or altered in the present process until and unless the said final localities are reduced and set aside; but finds that, in localling the augmentation, regard must be had not only to the decree of valuation, but to the amount of old stipend localled on the objector's teinds; and finds that the proportion of the augmented stipend to be localled on the objector's teinds must be such as, taken along with the old stipend payable by her, does not exceed the fair proportion corresponding to the amount of her valued teind, and so as to give the objector relief against any over-allocation, so far as can be done without interfering with the final localities; and to this effect sustains the objection of Miss Margaret Turnbull Robertson and her curator, and decerns: Finds the Common-Agent liable in expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

"*Note.*—This is a curious question, and does not seem to be decided in any recorded case. At least, the Lord Ordinary has not been referred to any decision, or even to any dictum or authority whatever.

"In the absence of authority, the Lord Ordinary thinks himself entitled to proceed on equitable principle, and to give the objector the relief she seeks, if it can be done without transgressing any fixed rule.

"The objector's teinds are valued. In the former localities, however, she or her predecessors did not produce the decree of valuation, and the consequence was that her teinds were localled on for a larger sum than they would have been if she had produced her decree of valuation.

"The localities became final, and the objector has paid under them without complaint, and she is still willing to do so. She explains that it is not worth her while to reduce them. The expense would exceed the benefit which she would obtain.

"Then comes the augmentation. And in the new locality the objector produces her valuation, and says, 'I pay too much already under the old locality; take that into view, and lay so much less augmentation upon me.' This can be done easily, and at once; and, without disturbing the old and final locality, the objector can obtain relief in localling the augmented stipend.

"There is strong equity in this; and, in the absence of any fixed rule to the contrary, the Lord Ordinary gives effect to the equitable plea. He understands there is no contrary practice; for although it is not uncommon to strike the free teind by deducting the old stipend, and allocate proportionally, this is done when no such specialty arises as in the present case. It is equally easy to take the gross teind and allocate proportionally thereon, and then make the old stipend part of the allocation. This would equitably provide for variations on the rental where teinds are unvalued and struck at one-fifth of the rent."

The Common-Agent reclaimed.

At advising—

Lord President—There are certain findings in the interlocutor of the Lord Ordinary which it is impossible to dispute. He finds, in the first place, that "in localling the augmentation recently awarded effect must be given to the decree of valuation produced and founded on by the objector;" and further, "that the old localities which are final and unreduced cannot be interfered with or altered in the present process until and unless the said final localities are reduced and set aside." Now, by final locality is meant decree of locality, and I agree with the Lord Ordinary in this latter finding, but I go farther than he does, for I doubt whether in the circumstances it would be possible to set aside these decrees by a reduction, and we must

proceed on the assumption that they are unreducible. Proceeding then on this assumption, the question is, whether in adjusting the locality of augmentation Miss Robertson may not be dealt with so as to give her relief against injury sustained in previous localities?—whether, since she pays too much of the old stipend she may be allowed to pay proportionally less of the new stipend. The proposal is equitable, and if there is no technical difficulty I am disposed to acceed to it. In doing so an injury is in a certain sense done to the benefice, for if the relief craved were not given, the benefice would reap the benefit of the overcharge in the previous localities. But, on the other hand, if we do not acceed to this proposal Miss Robertson might in the end have to pay to the minister something more than the whole teinds of her lands, and I do not think that any one could be heard in support of that result, for it would come to this, that on account of a mistake the benefice would get more than the whole teinds.

Thus, I think, the only question is between Miss Robertson and the other heritors; and although I was startled by the novelty of the proposal submitted to us, I do not see any objection to it in point of principle. It is a remedy which falls within the working out of a process of locality—which is the counterpart of a multiplepoinding—and in such a process I do not think that it is unfair to take into consideration the present liabilities of parties.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Objectors—Adam. Agent—James Allan, S.S.C.

Counsel for Common-Agent—Hall. Agent—James Macknight, W.S.

Thursday, February 27.

SECOND DIVISION.

A *v.* B.

Divorce—Domicile—Jurisdiction.

Where a defender in an action for divorce admitted having been born in Scotland in 1836, having resided there until 1860, having then gone to London, married, and resided there until 1870, when he went to India, from which he returned in 1871, since which time he resided in Scotland until the date of the action, and where the adultery was committed in Scotland—*held* that a plea of no jurisdiction, in respect defender was a domiciled Englishman, advanced for the first time on a reclaiming note, was inadmissible.

The summons in this suit, at the instance of A against her husband, concluded for divorce on the ground of adultery. The pursuer stated that she and the defender were married in England on 7th September 1865; that the defender was born in Edinburgh, and was about thirty-six years of age at the time of the action; that up to the year 1860 he had lived entirely in Scotland; that in 1860 he went to London, and remained there until 1870, when he went to India, from which he returned in 1871; and that, since that time, he had resided in Edinburgh. She also stated that on March 1872 the defender was convicted in the Sheriff Court of Edinburgh, and was sentenced to sixty days' imprisonment in the Calton Jail there, and he was undergoing sentence at the time the action was raised. The defender denied that he had resided in Edinburgh since July 1871. *Quoad ultra* he admitted the pursuer's statements as abovementioned, with the explanation that the defender returned from India shortly after going there, and that he sometime afterwards visited Scotland, which he did for the purpose of starting a company to run the Kirkcaldy and London Steamboats, and that he afterwards returned to London to attend business in connection with the said company, but subsequently returned to Scotland.

The adultery was alleged to have been committed in Edinburgh during 1872. The defender denied the alleged adultery, but took no other plea on record. On 17th July 1872 the Lord Ordinary found the adultery proved, and granted decree of divorce. The defender reclaimed, and abandoned the case on its merits, and for the first time advanced the plea that he was a domiciled Englishman, and the marriage having been entered into in England, the Courts of Scotland had no jurisdiction, it resting with the pursuer to prove the Scottish domicile. Authorities cited, *Ranger* v. *Churchill*, 15th Jan. 1860, 2 D. 307; *Jack* v. *Jack*, 24 D. 467; *Oldaker*, 12, S. 468; *Pitt*, 4 Macq. 627; *Warrender*, 2 S. & M. 192; Fraser's Per. and Dom. Relations, 746; Erskine, 1, p. 42 (Nicolson's edition).

At advising—

Lord Benholme—I find quite enough on record to satisfy me of the domicile being in Scotland.

Lord Cowan—I think it is too late after the record has been closed, the proof closed, and judgment delivered, to advance this plea. I am not prepared to admit it as relevant, even if true. A Scottish domicile is admitted on record, and I hold it indispensable to exclude our jurisdiction that the defender should on record have pleaded his English domicile. I do not feel called on to admit any alteration on the record, so as to raise a new issue.

Lord Neaves—I scarcely think we are entitled to go back where a defender alleges facts such as here, inferring a Scottish domicile.

Lord Justice Clerk—Even now we have no definite statement from the defender. The record amounts to an admission of Scottish domicile, and of our jurisdiction.

The Court adhered.

Counsel for Pursuer—Mackintosh. Agents—M'Kenzie & Black, W.S.

Counsel for Defender—Mair. Agent—Wm. Officer, S.S.C.

Thursday, February 27.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

COCHRANE *v.* JACKSON.

Stipend—Reference to Oath—Prescription.

Where a claim for arrears of stipend was referred to oath, terms of answer by deponent