

Friday, February 5.

MINISTER OF RESCOBIE *v.* CARNEGIE.

*Teinds—Parish—Valuation—Homologation—Prescription—Reduction—Locality.* Circumstances in which held that lands which were described in the feudal titles as in the parish of A, although in some of the earlier titles as in the parish of R, were yet legally in the latter parish. Teinds of lands described in the decree of valuation as in one parish, although in point of fact in another parish, held validly valued, the ministers of both parishes being parties to the valuation, and the proof and grand decerniture not specifying any parish. A decree of valuation having for more than forty years been acted upon in the localities of the parishes of R and A on the footing that certain lands were in the latter parish, although truly in the former, held that the minister of R was not excluded by prescription or homologation from claiming the valued teind of the lands which had been allocated and drawn by the minister of A under final localities; and that it was not necessary for that purpose that the minister of R should reduce these localities. *Opinion*, that the heritor in the depending locality of A could have the previous final localities of that parish opened up to get relief from the allocation upon the teind to which the minister of R had now been found entitled.

The contention of the minister against the heritor, Mr Carnegie of Turin, was, that certain lands called Over Turin, belonging to Mr Carnegie, were situated in the parish of Rescobie, and that the teinds of the lands were not valued. The heritor contended that the lands were situated in the adjoining parish of Aberlemno, and that the teinds were valued by decree of valuation obtained by his predecessor in 1757. Mr Carnegie has also lands called Nether Turin, which are admittedly in the parish of Aberlemno. Besides Over and Nether Turin, Mr Carnegie is proprietor of various other lands, some of which are in the one parish and some in the other. In 1757, when the decree of valuation was obtained, Mr Carnegie's predecessor was proprietor of lands in both parishes (including those now belonging to Mr Carnegie), besides certain other lands in the neighbouring parish of Guthrie, which were all contained in that decree, the lands of Over Turin being described as in the parish of Aberlemno. The description was in accordance with the titles (including Crown Charters) since 1704; and the lands have been so described in all the subsequent titles down to the present time. The ministers of the three parishes were called, and appeared as parties to the valuation. In the final localities of the stipends of the parishes of Rescobie and Aberlemno, the decree of valuation was given effect to, the teinds of Over Turin having been localled upon and exhausted for the stipend of Aberlemno, on the footing that the teinds were valued by the decree of 1757, while in the localities of Rescobie the teinds of Mr Carnegie's lands in that parish were localled upon and exhausted as valued by that decree, the valued teind of Over Turin not being localled upon, as not being in Rescobie. In 1865, the minister of Rescobie having obtained an augmentation of his stipend to the extent of 5 chalders, then for the first time maintained that the teinds of Over Turin were in his parish and were not

valued. These lands, if liable at all for his stipend, were the only source from which the augmentation could be realised. If the teind was unvalued there would be available for the Rescobie stipend about £170 per annum, but if valued, there would only be about £10 per annum. The minister contended that the lands being in the parish of Rescobie, were not valued by the decree of 1757, which only valued lands of Over Turin described as situated in the parish of Aberlemno, and that therefore the teinds as unvalued fell to be localled for his stipend. The heritor, on the other hand, contended (1) that the lands, being in Aberlemno, were validly valued by the decree of 1757. (2) That, even although the lands were in the parish of Rescobie, the lands were *de facto* valued by the decree, and that the misdescription of the parish was immaterial, especially as the minister for the time did not object. (3) That the decree of valuation, and the final localities proceeding upon the valuation, were protected by prescription and homologation. (4) That in any view the minister must first reduce the decree of valuation and the final localities of Aberlemno before being entitled to the teind of Over Turin, whether valued or unvalued. And (5) that the minister could not maintain the present question without calling the minister of Aberlemno.

Upon proof led as to the parish of the lands, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

“*Edinburgh, 18th July 1868*—The Lord Ordinary having heard counsel for the parties, and considered the closed record in the question between the minister and Mr Watson Carnegie, proof, productions, and whole process, repels the pleas against the competency of the minister's objections founded on the subsisting localities in the parish of Aberlemno, and on the decree of valuation of Mr Watson Carnegie's lands: Finds that Mr Watson Carnegie's lands of Over Turin, now consisting of West Mains of Turin, part of North Mains of Turin, South Mains of Turin, also Nether Muir, part of Cotton of Turin, and wards of Turin, as these several tenements are now possessed, are situated in the parish of Rescobie, and that the teinds thereof fall to be localled on for stipend in this parish; Finds that the teinds of said lands are validly and effectually valued by said decree of valuation dated 27th July 1757, as the teinds of the lands of Over Turin; and finds the respondent liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

“*Note*—1. The Lord Ordinary has felt great difficulty on the preliminary point, as to whether the minister can maintain his objections without bringing a reduction of the subsisting locality of Aberlemno, or in some other way bringing the minister and heritors of that parish into the field. He does not doubt that the question is quite open, the qualification in the interlocutor granting the augmentation being merely intended, as he understands, to prevent Mr Watson Carnegie's contention that the lands are in Aberlemno being held to have been prejudged by the court. There does not seem to be any authority upon the point. In the case of *Smith v. Hunter, Shaw, Teinds, 49*, the minister of Eyemouth brought a reduction against the minister and heritors of Swinton, for the purpose of reclaiming a chalders of victual teind which had long been allocated to the minister of the latter parish. There, however, it appears that the allocation of stipend for the minister of Swinton had been for some reason intentionally laid upon lands

in Eyemouth. The minister of Eyemouth had thereafter got an allocation out of the chalders in question, on which the minister of Swinton brought a reduction, in which he was successful. There was thus a judgment on the point to which both ministers were parties, which accordingly the minister of Eyemouth required to set aside. The Lord Ordinary does not think that this very special case throws light upon the question as to the necessity or competency of a reduction by the minister of one parish of the locality in another, in which the teinds of lands in his parish have been localled upon in the belief that they were situated there. In *Martin v. Napier*, Shaw, Teinds, 63, the common agent in Carluke appeared in the locality of Carstairs to maintain such an objection. The Lord Ordinary has looked into the proceedings, and finds that the objections were lodged jointly for the heritor and the common agent of Carluke, the former being the leading objector. Beyond the fact that, in these circumstances, the common agent was heard to maintain his objections, which were unsuccessful, the case affords no assistance in determining the present point.

"The Lord Ordinary does not think that the mere circumstance that lands situated in one parish have been localled upon in another, can deprive the minister of the latter of his right to have the whole teinds of his parish held liable to be localled on for his stipend, unless he shall bring a reduction against the minister and heritors of the other parish. But the present case has undoubtedly gone a good deal further. The lands in question were localled upon in Aberlemno in 1822, and the valued teinds were exhausted in the last locality in that parish, following on an augmentation granted in 1861. For a long period they have been described in the respondent's titles as lying in Aberlemno. On these grounds, the Lord Ordinary has difficulty in holding that the present question can be tried without calling the minister and heritors of Aberlemno. But his impression is that such a point has been in practice remitted to proof, and decided in the locality in which it arises. A heritor cannot, by allowing, or it may be procuring, a part of his estate to be localled upon in a wrong parish, deprive the minister within whose parish it lies of his right to the teinds. It may be a different question what right that may give the minister of the other parish as against the heritor. There are use and wont payments of stipend, which may have thus arisen, and which are held not to affect the right of the minister in whose parish the lands lie to have the whole teinds of his parish liable for his stipend. The Lord Ordinary therefore repels the objection.

"2. The main question on the merits is—Whether the lands of Over Turin are situated in Rescobie or Aberlemno? A very extensive proof has been led on this point.

"The case of the respondent is founded mainly upon the description of the lands in his titles from 1704 downwards. A disposition of that year contains the lands of both Over and Nether Turins, described as lying in the parish of Aberlemno. It also contains the Milntown of Rescobie, and other lands belonging to the respondent's predecessor, described as lying in Rescobie. There is no question that Nether Turin is in Aberlemno. With some exceptions, to be immediately noticed, this has been the general tenor of the titles on this point from that time downwards. It has been already seen that in the two last localities in Aber-

lemno the teinds of Over Turin have been localled upon there. In 1757 the ancestor of the respondent brought a valuation of the teinds of his lands in the parishes of Aberlemno, Rescobie, and Guthrie. For reasons to be afterwards stated, the Lord Ordinary does not think that it can be held that Over Turin was valued expressly as lying in Aberlemno. But the lands were described in the summons of valuation in the same terms as in the titles, and the scheme of valuation sets forth the land in each parish separately, Over Turin being included among the lands in Aberlemno. Upon the whole, the valuation is an important admixture of evidence in support of the respondent's case. A few years after, in 1786, Over Turin appears to have been omitted from the locality of Rescobie, probably in consequence of a certificate by the teind clerk that the lands of Milntown of Rescobie and others were valued by the decree of valuation of 1757, and that these were the whole lands belonging to the respondent's ancestor, lying in Rescobie, which were valued. The Lord Ordinary will afterwards have occasion to consider whether this was not an erroneous construction of the valuation. It is clear that this is a strong body of evidence for the proposition that Over Turin is situated in Aberlemno.

"The case of the minister is rested, in the first place, upon a great variety of documentary evidence, commencing in the end of the seventeenth century, and coming down to the present day, going to show that Over Turin, or the tenements of which it consists, have been all along, and in every respect, dealt with and recognised as part of the parish of Rescobie, and the persons residing on the lands treated as parishioners. The Lord Ordinary thinks that the minister is entirely successful on this part of his case, and it is strongly confirmed by the parole evidence which he has produced. Except for the description in the titles since 1704, including the terms of the valuation, and the way in which the teinds have been dealt with in the localities of Rescobie since 1786, and in the localities of Aberlemno since 1822 at least, the Lord Ordinary thinks that the proof that Over Turin, consisting of the subjects set forth by the minister on record, is situated in Rescobie, is quite conclusive. Indeed this part of the case is hardly controverted.

"It thus becomes necessary to look narrowly to the entire progress of titles, so far as they have been recovered. The earliest title throwing light upon the point is a Crown charter in 1613. Over Turin is there distinctly described as lying in the parish of Rescobie. In the titles in 1648 and 1666 to the teinds of Over Turin, the heritable right to which has not been transmitted to the respondent, the lands are described as in Rescobie. An instrument of resignation in favour of Sir Andrew Fletcher contains the lands of Over Turin, described merely as lying in the sheriffdom of Forfar, and also the teinds of Nether Turin, and of some other subjects described as lying in the parish of Aberlemno. This difference in the mode of describing the lands and the teinds occurs in subsequent titles. A sasine in 1638 contains both Over and Nether Turin, with the teinds, described as lying in the parish of Rescobie. This is clearly a mistake; Nether Turin being undoubtedly in Aberlemno. In a crown charter in 1648, Over and Nether Turin are described merely as in the county of Forfar, and the teinds of Nether Turin as in the parish of Aberlemno. In 1666 Over Turin is described as in the parish of Rescobie.

Thus, up to this time, with the exception of the erroneous description in 1638, which places both Over and Nether Turin in Rescobie, when the parish is mentioned, Over Turin is described as in Rescobie, and Nether Turin in Aberlemno. Sometimes both are merely described as lying in the county of Forfar. The teinds of Nether Turin, which have been transmitted with the lands, are always described as in Aberlemno.

“But in 1704, in a disposition to the ancestor of the respondent, who acquired the property, both Over and Nether Turin are, for the first time, described as in Aberlemno. This seems to have been clearly a mistake, and the Lord Ordinary is disposed to trace it to a misconception of the description in some of the prior titles, as in the Crown charter of 1648, where Over and Nether Turin are only described as lying in the county, but there follows the description of the teinds of Nether Turin, concluding ‘*jacen infra parochiam de Aberlemno.*’ This may have been supposed to apply to the whole subjects. It is remarkable that in the following year, in a summons of transumpt proceeding on this disposition, the respondent’s ancestor departed from the description in the deed, and set forth that the sellers had disposed to him Over and Nether Turin, and other subjects there specified, lying within the parishes of Rescobie and Aberlemno. That this was not an intentional variance is made more probable by the fact that in a deed of entail by the same party, in 1722, he again describes Over and Nether Turin as lying within the parishes of Aberlemno and Rescobie. In a Crown charter in 1744, proceeding on the disposition of 1704, the erroneous description in that deed, placing both sets of lands in Aberlemno, is repeated; but in 1750 they are again described, in general terms, as in both parishes. In 1781 Alexander Watson disposed both sets of lands, described as in Aberlemno, to himself and his son. But in a Crown charter following on that disposition, the name of the parish is left blank throughout the deed, possibly indicating that the authorities in Exchequer declined to adopt what they held to be an erroneous description. From that time, however, both sets of lands have been invariably described as lying in Aberlemno.

“Over Turin was included in a locality of Rescobie in 1727. The name occurs twice in the proceedings, both times in conjunction with Milnton of Rescobie. In the decree it is converted into Overtoun, ‘By Turine (*i.e.* the proprietor) out of Overtoun and Milnton of Rascoy.’ This is obviously a clerical error. As already noticed, Over Turin was excluded in the next locality in 1786.

“Upon the whole matter, the Lord Ordinary thinks it is proved that Over Turin is in Rescobie, and that the doubt and obscurity in which the point has been involved arises from an error which has crept into the titles. That cannot affect the right of the minister to have the teinds allocated for his stipend.

“The parole evidence makes it clear that the particular tenements condescended on by the minister are comprehended in Over Turin, except that a portion of North Mains is in Aberlemno, and is, therefore, part of the respondent’s other lands in that parish.

“3. The minister maintains that, Over Turin being held to lie in Rescobie, it is not valued, being described in the decree of valuation as in Aberlemno. The Lord Ordinary cannot adopt that view. The ministers of Rescobie, Aberlemno and Guthrie

were all called to and appeared in the valuation, and also the titulars of the three parishes. The Lord Ordinary has been referred to an unreported case (*Locality of Kilmalie*, 23d December 1826), where the First Division, recalling an interlocutor of Lord Medwyn, found that there was no effectual decree of valuation of certain lands, which it was admitted lay within the parish of Kilmalie—they having been valued as in Kilmanivaig. The Lord Ordinary has examined the extract-decree of valuation in that case, and he thinks there is a material difference between it and the one now in question. The valuation was at the instance of the Duke of Gordon, of his lands in several parishes. The grand decerniture of the Court found and declared the value of the teinds of the lands expressly described as lying in each respective parish. There was thus ground for holding that the description of each parcel of lands, as lying within a certain parish, was made a substantive part of the decerniture. It is different in the present case. The lands are libelled in the summons by the descriptions then prevailing in the titles. In the scheme of valuation they were set down under separate heads, as being in each of the three parishes. Over Turin being entered as in Aberlemno, and its value separately stated at £225, 6s. 8d. Scots, 28 bolls bear, and 52 bolls meal. But in the grand decerniture no parishes are mentioned at all, though the lands are grouped into three sets, corresponding to the division of them in the scheme—the sum total of the value of each set being stated as in the scheme, but not the separate value of each subject.

“Where a valuation has been regularly carried through in presence of the titular and minister, and the Court has, from whatever cause, refrained from valuing the lands as lying in particular parishes, the Lord Ordinary thinks it would be adopting a very strict and technical principle to hold it invalid, because it appears that in the course of the proceedings a particular subject has been assigned to a wrong parish. In the absence of positive authority for such a course he does not think himself warranted in adopting it.”

Both parties reclaimed.

WATSON and GLOAG for Minister.

CLARK and NEVAY for Mr Carnegie.

The Court adhered, holding that it was still competent for Mr Carnegie to set aside the first localities of Aberlemno, so as to withdraw from the minister of that parish the valued teind of Over Turin, now appropriated for the stipend of Rescobie, and thus escape double payment of the same teind.

Agents for Minister—W. H. & J. Sands, W.S.

Agents for Mr Carnegie—Scott, Moncrieff & Dalgety, W.S.

Friday, February 5.

SPECIAL CASE FOR EXECUTORS OF GENERAL SIR THOMAS MONTEATH DOUGLAS AND OTHERS, FOR OPINION OF COURT.

*Special Case—Construction of Testamentary Writings—Conditio si sine liberis—Legacies—Demonstrative and Taxative—Residuary Bequest. Held,* in a Special Case stated for the opinion of the Court, under 31 & 32 Vict. c. 100, § 63, as to the construction of the testamentary writings of Sir T. M. D., (1) that a legacy of £842 bequeathed to his younger daughter for her own use, and a legacy of £12,000 bequeathed to