appointed; and if at that meeting issues were not adjusted, the case would then be reported. What was now proposed was to compress all that into one meeting. The defenders were not prepared at present to discuss the issue proposed.

MACKENZIE and SHAND for pursuers.

YOUNG and KEIR for defenders.

LORD PRESIDENT—It seems to me that the only point for us to determine, in the first place, is the competency of this proceeding. As to the question of expediency, we shall be glad to hear parties afterwards, if it turns out that there is a difficulty in the case. As to the competency I have no doubt. The practice may have been for all that time to hold first one meeting and then another. But unless that be indispensable under the Act, it is impossible for us to hold that the course now adopted by the Lord Ordinary is incompetent; and if it be not incompetent, we must hear parties on this report. The clause contemplates this, that when the pursuer has lodged the issue he proposes, or the pursuer and defender respectively have lodged the issues they propose, there is to be a meeting with the Lord Ordinary at chamber, for adjusting the issue or issues; and when that takes place, it is contemplated, first, that the issues may then be adjusted; but if they are not adjusted, the course of the Lord Ordinary is alternative, either he may appoint a second meeting or he may report. If he appoint a second meeting, another attempt is to be made at that meeting to adjust the issues, but if that fail the Lord Ordinary is to report. But that a report is as competent at the first meeting as at the second is quite plain.

LORD CURRIEHILL took the same view. As to the practice of which the defender spoke, no doubt in all those cases the Lord Ordinary has seen cause to appoint a second meeting. Here he had not seen cause to do so, but had reported the case at once.

LORD ARDMILLAN also held that there was no incompetency in the present procedure. His recollection of the Outer-House procedure certainly was that, in the very great majority of cases, the first meeting was rather for the purpose of allowing each party to hear what the other party and the Lord Ordinary had to say than for settling the issue. But on the question of competency there was no doubt.

LORD DEAS declined.

After hearing the pursuer on the issue proposed by them, the Court were of opinion that the issue would require further consideration before final adjustment, and the case was adjourned till next week. It was held that the case was now in the Inner-House without any further report by the Lord Ordinary.

Agents for Pursuers—Mackenzie & Kermack, W.S.

Agent for Defenders—Stodart Macdonald, S.S.C.

Thursday, July 4.

MACLEAY *v.* SINCLAIR.

Teinds—Locality—Stipend—Obligation of Relief—Real Burden—Singular Successor. A minute of sale in 1740, conveyed the lands of N. free of all stipend, &c., and contained an obligation to convey the lands of K. in real warrandice. The obligation remained personal, and there was no conveyance of K. in real warrandice. Held, on objection to an interim scheme of locality, that a singular successor in the lands of K. was not bound to submit to be localled upon for the stipend effeiring to the lands of N., reserving right to proprietor of lands of N. to enforce his claim in a suitable action.

This was a question arising in the locality of Wick, between Mr Macleay of Keiss, and Mrs Sinclair of Freswick. In the interim locality Mr Macleay was localled on for stipend, not only in respect of his own lands of Keiss but also in respect of the lands of Nybster, belonging to the respondent. He claimed to have the scheme of locality rectified and to be relieved of the stipend localled on him in respect of Nybster. The respondent, on the other hand, maintained that the objector was bound to relieve her of all stipend and augmentations of stipend in respect of Nybster, in virtue of an obligation which had been recognised and acted on in all localities since 1772. This obligation is contained in a minute of sale of the lands of Nybster by Sinclair of Dunbeath to Sinclair of Freswick in 1740. By that deed the seller bound himself to deliver to the purchaser a disposition of the lands of Nybster, with the teinds, "free of all stipends, schoolmaster's fees, and other public burdens and impositions whatsoever;" and also of the lands of Keiss, "in real warrandice and security of the said lands of Nybster, teinds and pertinents thereof. No conveyance of the warrandice lands was ever executed. Keiss was acquired by Sinclair of Ulbster from Sinclair of Dunbeath, and subsequently passed into the hands of the objector's uncle. The objector is therefore only the singular successor of Sinclair of Dunbeath, who executed, as seller, the minute of sale in 1740. No constitution of the burden is alleged to exist in any of the feudal titles of either party.

The Lord Ordinary (BARCAPLE) found that the respondents had not set forth any ground sufficient in law for localling upon the objector's lands in respect of the lands of Lybster belonging to the respondent Mrs Sinclair, and remitted to the clerk to correct the interim scheme in terms of this finding.

His Lordship after stating in his note the facts of the case said:—"In these circumstances it is clear that, so far as regards the minute of sale and the titles, there not only is not and never has been any real burden imposed upon the lands of Keiss for the relief of Nybster from stipend, but the objector is not under any personal obligation, as the singular successor of Sinclair of Dunbeath, in the lands of Keiss. The Lord Ordinary does not understand that this is disputed by the respondent, who rests her case upon the plea of *res judicata* under previous localities, and a long course of payment and acquiescence. It appears to be the fact that in all the localities since the purchase of Nybster by Sinclair of Freswick, beginning with 1772, the proprietor of Keiss has been localled upon for the share of stipend effeiring to Nybster. The respondent states (Art. X.) that in the first locality there is a note signed by the minister bearing that 'the estate of Keiss is liable in the stipend and augmentation for Nybster by bargains 'twixt the late Freswick, who purchased Nybster, and the said Sir William Sinclair of Dunbeath. This principle of localling appears to have been then adopted, and to have been unchallenged ever since. But it does not appear that any question was ever raised in regard to it. In these circumstances, the Lord Ordinary does not think that the mere unchallenged adoption of this mode of localling in previous localities

can be held to constitute *res judicata* in regard to a question which was never made the subject of discussion by the parties, or express decision by the Court. Still less can it be so held, seeing that none of the localities have been approved of as final.

"It is a different question what effect is due to the long course of payment and acquiescence. In any view, the Lord Ordinary does not think that this can be founded upon as against the objector with reference to the period while Keiss belonged to the Ulbster family, before it was acquired by the objector's ancestor in 1813. In regard to the period since that time, it must be kept in view that this is not a question of prescription, and that in order to constitute the alleged obligation as incumbent upon the proprietor of Keiss, it must be shown that he took it upon him in a manner clearly importing that he intended to do so, and in the knowledge that he was under no previous obligation in the matter. But the Lord Ordinary thinks that the inference from the whole facts of the case is, that the parties were all along in error as to the existence of an obligation, and he is of opinion that in these circumstances there is nothing to bar the objector from now betaking himself to his legal rights.

"In this view of the case it is unnecessary to consider whether the Court would ever sanction such a mode of localling where the question is raised, there being no real warrandice. The case of *Dykes* v. *Marshall* is adverse to such a practice; and if it were sustained on the ground that the present proprietor of Keiss, or those whom he represents had personally adopted the obligation, it does not appear that it could be held effectual against a singular successor who should now purchase the lands with no notice of such a burden on the records."

Mrs Sinclair reclaimed.

ADAM (with him SOLICITOR-GENERAL) for reclaimer.

LORD ADVOCATE, A. R. CLARK, and NEVAY, for respondent, were not called on.

LORD PRESIDENT—The stipend payable for the lands of Nybster has in the interim locality, been laid on the lands of Keiss. Now Mr Macleay objects that, there being no obligation or other deed instructing the liability of Keiss for the Nybster stipend, the respondent must, in a question with the objector, be localled on for the whole stipend of the lands of Nybster. The justification of the mode of localling which has been going on for a long series of years, is that so far back as 1740, in a minute of sale of Nybster by Sinclair of Dunbeath, the lands were sold free of all stipend, and there was an obligation to convey the lands of Keiss in real warrandice, not only against eviction but also against being affected by any public burden beyond land-tax and cess. It is admitted, however, that the obligation in this minute of sale has continued merely personal—that is, it is a personal obligation against the granter and his successors. But it did not enter the conveyance of the lands of Nybster by Sinclair of Dunbeath to Sinclair of Freswick; and no conveyance of the lands of Keiss in real warrandice was ever made. After the lapse of a considerable number of years, and so late as 1813, the lands of Keiss came into the hands of a singular successor, the predecessor of the objector; and since 1813 they have been in the hands of singular successors, against whom, *ex facie*, this obligation has no operation at all. It is said, however, that notwithstanding this obligation remained personal, and never was made real, still the obligation may be made effectual against singular successors in the lands of Keiss, and I don't say that that is impossible. It is quite possible for a singular successor in an estate so to adopt an obligation by his predecessor as to become liable. But we have no means of judging whether that be the case here or not. We have no *termini habiles* for determining that question.

The only difficulty about adhering to the interlocutor of the Lord Ordinary is, lest it be thought that adhering to it precludes the proprietor of Nybster from instituting proceedings to make her claim effectual; and if a reservation were added to the interlocutor of the Lord Ordinary, that would remove the difficulty, for it is quite impossible in this locality to give effect to the claim of the respondent in the manner proposed. The contention is now, that the transference of the stipend from Nybster to Keiss, as a burden, shall be given effect to and made perpetual in a final scheme of locality. Nothing short of that would satisfy the reclaimer, and nothing else can here be done. The parties are engaged in converting an interim into a final scheme. I ventured to suggest in the course of the argument, what appeared to me to be a conclusive objection to that, even if the obligation on Keiss were made out to be a personal obligation. Because if you laid this burden on the lands of Keiss, out of which it is not payable, and if Keiss were sold to a *bona fide* purchaser, he might be called on to pay stipend for which he has no teind. His teinds may be already exhausted by the stipend effeiring to Keiss. The consequence would be, that the singular successor would bring a reduction, on the ground that the locality had been conducted against all rule and precedent. It is true that in some cases the lands of a party in a locality may be made to bear the share falling on the lands of a neighbour, where there is a real burden or a disposition in real warrandice, but then in that case the burden is in its nature permanent, affecting all singular successors into whose hands the lands may come.

The other judges concurred.

Agent for Reclaimer—A. J. Napier, W.S.

Agents for Respondent—Horne, Horne, & Lyell, W.S.

Thursday, July 4.

DIXON'S TRUSTEES *v.* STEWART'S TRUSTEES AND OTHERS.

Issues—Reparation—Upper and Lower Heritors. Issue adjusted in an action by a lower heritor against an upper, for alleged wrongful interference with the course of a stream. Counter issues of prescription and acquiescence disallowed, there being no foundation for them in averment.

The pursuers, trustees of the late William Dixon of Govan, proprietor of the estate of Carfin, which he purchased in 1846, brought this action against Robert Stewart of Murdostown, and the Earl of Stair, asking damages for alleged injury done to the lands of Carfin through the wrongful act of the defenders. The action was now insisted in against the trustees of the defenders, the defenders having died since the raising of the action. The ground of action was, that during the period subsequent to 1839 (the date when Mr Stewart entered on the