[*27th March*, 1846.]

The RIGHT HONOURABLE JOHN ALEXANDER EARL OF HOPETOUN, and others, heritors of the Parish of Kirkliston, *Appellants.*

WILLIAM RAMSAY RAMSAY, Esq., of Barnton, and SIR JAMES GIBSON CRAIG, of Riccarton, Bart., *Respondents.*

Res Judicata.—Locality.—Common Agent.—A decree, in a process of augmentation and locality of stipend, whereby the lands of individual heritors were declared not to be liable, in payment of stipend, as being held *cum decimis inclusis*, which had been consented to by the common agent, was *found* to be binding upon the general body of heritors, though the consent was not given with their express authority.

IN a process of augmentation, modification, and locality of the teinds of the parish of Kirkliston, to which both appellants and respondents had been co-defenders, the respondents gave in minutes claiming exemption from payment of stipend in respect of certain lands, on the authority of a report of sub-commissioners in 1629, exempting the lands from valuation, because of the titles, (which, however, were not produced with the report,) and surrendering the teinds of other lands. These minutes were, on the 4th of February, 1831, allowed to be seen by the common agent, who thereafter circulated an interim scheme of the proven rental among the heritors, wherein he did not comprehend the lands of the respondents, but stated that he was satisfied the claim of exemption was well founded, and that he was ready to consent to its being sustained. The Lord Ordinary found that the teinds of the parish amounted to the sum in the scheme of the proven rental, and on the 2nd of July, 1831, pronounced an interlocutor, which as to each of

the respondents was *mutatis mutandis* in these terms:—"Of "consent sustains the claim of *decimæ inclusæ* in regard to the "lands of Hallyards, and ordains the common agent to answer "this minute *quoad ultra*, betwixt and next calling."

Five years afterwards, while as yet no final decree of locality had been pronounced, the common agent insisted upon the respondents producing their rights to their teinds, in consequence of his having accidentally seen titles upon the Record, which gave him reason to think that the respondents were not entitled to the exemption which had been allowed. And upon their refusing to produce their titles, an action was brought by the common agent, in the name of the appellants, for reducing the interlocutors which have been mentioned. The first ground of reduction, which was followed by others on the merits of the claim to exemption from payment of stipend, but which, in the view taken of the case by the House, it will not be necessary to notice, was in these terms:—"*Primo*. The said interlocutors "bear to have been pronounced of consent, but no consent "on the part of the pursuers was given to either of these "interlocutors."

The respondents answered this ground of reduction by a plea of *res judicata*.

The Lord Ordinary (*Murray*) repelled this plea and decerned in the reduction, and subjoined to his interlocutor a note which, in regard to this plea, was in these terms:—"It would "be going further than the Court has done in any former case, to "exclude an action for reducing an interlocutor pronounced of "consent of a common agent in a locality, where no extract "has been made."

The respondents reclaimed to the Court, which, on the 2nd March, 1841, recalled the interlocutor of the Lord Ordinary, "sustained the plea of *res judicata*, and repelled the reasons of "reduction."

EARL OF HOPETOUN *v.* RAMSAY.—27th March, 1846.

The appeal was against this interlocutor.

Mr. Turner, *Mr. H. J. Robertson*, and *Mr. Anderson*, for the Appellants.—A judicial consent in order to be binding must be given by a party having authority to that extent, but a common agent has no such authority. The very history and nature of his office exclude the idea. Formerly the titular prepared the locality, and each heritor had to attend to his own interest in regard to the proportions, according to which an augmentation of stipend was to be allocated. The conflicting views entertained by the different heritors necessarily occasioned great delay, and expense, and much hardship to individual heritors, as each was liable for the whole augmentation, so long as a scheme of locality was not prepared. To remedy this the office of common agent was created; the duty of this officer being to collect together the titles of the different heritors, and after seeing them, to prepare a state of the order and proportions in which the augmentation should be allocated, according to the information which the titles afforded. In all this his office is simply official, more resembling that of an officer of Court than of an agent strictly so called. His duty is to assist the Court in a matter where there must necessarily be a number of conflicting liabilities, by preparing a view of those liabilities, and, at the same time, protecting the parties *inter se*, from any excess of liability being imposed upon them; but it was never intended that he should have power, nor was it ever supposed that he had power, to bind each heritor as his agent, strictly so called. It could hardly be so, for he is not appointed even by the body of heritors, and still less by the individual heritor whose interests may be the peculiar subject of inquiry. All the power the heritors have in the matter is to meet for the purpose of suggesting a person to be appointed by the Lord Ordinary. In this the voice of the majority prevails, and it may so happen, as to the individual heritor, that the person appointed, was not only

not suggested or appointed by him, but was appointed against his vote and wishes. No practical inconvenience can arise to him from this, so long as the common agent is looked upon as an officer bound to protect the heritor's interest, but not empowered to sacrifice or give them away gratuitously or otherwise. Because each heritor, notwithstanding the appointment of the common agent, protects his individual interests by his own individual private agent, who watches the proceedings of the common agent, and by the forms of the Court has an opportunity afforded him of objecting to them, where he sees cause, which of itself refutes the notion of the common agent being the agent of each heritor, entitled to bind him by his acts.

[*Lord Cottenham.*—Who is it that conducts the cause—that represents the heritors in the conduct of the augmentation and locality to its conclusion?]

The common agent. In the present instance, if the common agent had insisted upon production of the respondents' titles, and, after seeing them, had, in the scheme of the proven rental, intimated his opinion of the respondents' liability, or freedom from liability, he would have acted within the scope of his duty; but in dispensing with that production he was wanting in the performance of his duty, and in consenting to the interlocutors in question he altogether exceeded its bounds. Instead of protecting the interests of the general body of heritors, he, by consenting to the exemption from liability claimed by the respondents, made a sacrifice of their interests; for, in proportion to the exemption given by the respondents, he necessarily imposed a corresponding liability upon the other heritors.

If the common agent had confined himself to his duty it would have been open to the appellants, either to have assented or to have dissented, by objecting either to the scheme of the proven rental or to the scheme of locality; but by consenting to the interlocutor of exemption, he put it beyond their power to help themselves. It is not pretended that he gave the consent by

any authority from the general body of heritors; the consent was his own original act, the first intimation of which to the heritors, was in the perusal of the interlocutors themselves, and, therefore, the heritors had, at no time, that opportunity of protecting themselves against an excess of liability being thrown upon them, which the whole frame of the process of locality is intended to afford them.

The doctrine of *res judicata* is rested upon this, either that the judge has actually decided the matter in dispute, or that the parties have agreed to take from him a decree, as if he had done so. Both these elements are awanting here. The judge never had the matter even presented to him for his opinion, and the parties did not agree to accept the decision which was given; the common agent had power to present the matter in a shape proper for adjudication, and to take the opinion of the judge upon it, but he had no power to compound or compromise, and still less gratuitously to abandon, the rights of the heritors. Having no power to consent to the interlocutors, no consent was, in fact, given, and they are, in every view, open to reduction.

Mr. Solicitor-General and *Mr. Mure* were heard for the Respondents.

LORD BROUGHAM.—My Lords, in this case we have the unanimous judgment of the learned Judges in the Court below, who appear to have paid very great attention to the case, and to have had no doubt whatever upon it, the only appearance of doubt being in the early part of the Lord Justice Clerk's judgment, as reported in 3rd *Bell and Murray*, where he says that he had the gravest doubts from the beginning. But it turns out that what he means and expresses in courteous language towards the learned Lord Ordinary, whose judgment he is about to reverse, is that he had from the beginning, the gravest doubts of the

soundness of the Lord Ordinary's interlocutor; and he afterwards goes on to show that he has no doubt whatever, (however courtesy towards the Lord Ordinary might have induced him to express a doubt,) that the Lord Ordinary had miscarried in the decision at which he had arrived. The Lord Ordinary does not appear to have given the usual attention which that learned and excellent Judge gives to cases which come before him; it is a very perfunctory judgment, in a single sentence dealing with the question; the other Judges, the Lord Justice Clerk and Lord Moncrieff, appear to have given great attention to it, and to have had no doubt; and it is very remarkable, as we are now on a point of practice, namely, as to the functions and constitution of the office of common agent, (and upon the power of the common agent to bind the party proceeds their Lordships' opinion,) it is a very remarkable circumstance in the first place, if the argument can hold good, which has been powerfully urged before us to-day and yesterday, as to the want of power in the common agent to bind the party by consent, that those learned Judges should have taken it for granted the other way; and it is equally extraordinary, that if this was the real point in the case, and in reality the only point in the case, it was never made in the Court below. The learned counsel, Mr. Mure, who was in the case in the Court below, has stated, what appears to be borne out by the tenor of the report, that it was not made there, though, I will not say it was not mentioned, it might have been parenthetically mentioned, and according to one of the reports, the Lord Justice Clerk might have alluded to that parenthetical mention of it, but beyond all doubt, it was not the point in the cause; it was not the matter relied upon by the party whom Mr. Turner and Mr. Robertson represent, whereon they were contented to rest their case below.

Under these circumstances, I feel no hesitation in expressing my concurrence in the judgment of the Court below; and

EARL OF HOPETOUN *v.* RAMSAY.—27th March, 1846.

am prepared to move your Lordships to affirm that judgment, with costs.

My Lords, the summons sets forth that there was no consent given by the party in the cause. Now, in my humble judgment, it would have been very competent, certainly, in my humble judgment, it would have been almost necessary for the party dealing with a decree, which on the face of it purports to be a decree by consent, to have said that there was no consent by the party, and to traverse the authority of the common agent to adhibit that consent so as to bind the parties, considering that they were dealing with a record, and seeking upon that ground, to reduce the summons; that would have been the fit course to have taken; and why? because, my Lords, it was fit to give the other party an opportunity, by knowing what the ground of contention against him was, to be able to meet that contention. How do I know that he might not have distinctly proved that, in point of fact, there was positive and distinct authority? How do I know but that other matters might have been brought forward, which, at all events, might have cut out of the cause that contention? that was not done, however; all that has been done is to rely on the argument of the want of authority of the common agent, against which I have come to the opinion of the Court below, and consider that there is no ground whatever for the appeal.

As to the authority of *Lord Stair*, I have looked into it, but I do not think it is possible to say that it is law to the extent to which it is pushed, because, says Lord Stair himself, *reipublicæ tandem interest ut sit finis litium.* A very, very, lengthened *tandem* indeed it would be, if it were that length; it might well be said to be too long, if the *finis litium* were only to be after you have waited 150 years, and no new matter had come *ad novitiam.* I never heard, by the way of *res noviter veniens ad notitiam,* ever being pretended to be urged as an argument against a decree, even when a new point of law has been urged, or a new fact not

known nor heard of before; that is done on pleadings, but never on argument at the close of the proceedings; if it were so, as has been argued, there would be an end of all finality of decrees; and why should there not be an end at once of all prescription, even that *longissimi temporis*, because some new point of law has arisen, or some new fact not formerly known has occurred? Looking to *Lord Stair*, there are other passages which seem very much the reverse of, and inconsistent with, that doctrine; but I observe that *Lord Stair* is at this time in that state of the law and jurisprudence, when he denies the right of appeal to Parliament: he gives seven or eight different reasons why there can be no appeal to Parliament; and he instances the claim of right to an estate, and says that no man could say so absurd a thing as that there should be an appeal on account of misdirection, but only on the ground of exceeding the jurisdiction—that then only Parliament might interpose; and he gives as one reason, that the Court of Session had the power of reponing, as already stated; therefore, when there was an appeal to Parliament, perhaps decrees might have been of a less final nature, in his apprehension, than they must be held to be now; however, we are not called on to deal with that question here, and I should be sorry to hear that made a practical question; we are not called on to dispose of it now, it is not raised before us, suffice it to say, that on the ground of the consent, which has not been shown to have not been given, which, on the contrary, is admitted to have been given, by the party who at all events represents the heritors, where nothing to the contrary is done, (and nothing here was done to the contrary,) and his authority must be taken to be sufficient to that extent, I am of opinion that the Court below has come to the right decision, and humbly move your Lordships, without arguing it at greater length, that this appeal be dismissed, with costs.

LORD COTTENHAM.—My Lords, on this first point I am of

EARL OF HOPETOUN *v.* RAMSAY.—27th March, 1846.

opinion that the interlocutor ought clearly to be affirmed. The first ground stated in the summons raises the question which has been argued at the bar. It seeks to reduce certain interlocutors of July 1831, and alleges this as the ground, "That the "said interlocutors bear to have been pronounced of consent, "but no consent on the part of the pursuers was given to either "of those interlocutors."

Now it is argued at the bar, and admitted on both sides, that the course of proceeding with regard to that interlocutor of 1831, was, that the common agent being appointed, and having done that which he thought right and necessary for informing himself of the rights of the several parties, consented to this interlocutor being made. "The Lord Ordi-"nary, by consent, sustains the claim of *decimæ inclusæ*," as regards certain lands; that is the nature of the interlocutor now sought to be reduced, and the question raised is on the ground that it is stated to be drawn up by consent, whereas the pursuers never did consent. The fact turns out that the common agent who acted did consent—there is no mistake of the officer—there is no false statement of a consent never given, but the case argued at the bar is, that the consent was given by the common agent, who, it is alleged, had no authority to give it.

Now, my Lords, I am of opinion that the counsel for the appellant have entirely failed in establishing that proposition. I asked the learned counsel who it was that represented the party in the conduct of the cause, not in examining the locality, not for the purpose of ascertaining in what shares the burden ought to be borne, but who represented the parties in the conduct of the cause, and the answer was, the common agent, as I knew beforehand it must be. That is, the common agent represents the parties, unless the interests are split. Here then, the body of heritors continue to be represented by the common agent; a question arises between that body and certain individuals possessing certain lands, but, as far as the heritors were concerned,

the common agent continues to represent them, and of necessity representing them, is armed with all the authority which any other agent has who represents parties in a cause in the course of litigation, and the consent is given by that individual. The appellant has entirely failed to show, by authority, that the common agent had not that power; the learned Judges below have not even suggested a doubt that he had it; and it appeared to be matter of some doubt or question at the bar, whether the question really was raised below. It would have been better for the appellant's argument, that it had not been raised there, because then the attention of the Judges would not have been called to it. But if it was raised, the learned Judges thought so little of it, that they took no notice of it in their judgments; and I think the course taken by the learned Judges upon that point is very strong proof that it is the ordinary practice of the Court of Session, the well-known and recognised practice, that the common agent, for all purposes, represents those who are litigant, and whose cause he is conducting.

On the merits, therefore, if the record is sufficient to raise that question, I have no doubt of the appellant having entirely failed in the grounds on which he sought to reduce the interlocutor. But I quite concur in what is thrown out by the noble and learned Lord who first spoke, that this record is very ill adapted to raise that question at all. I give no opinion on that, it is a question not brought regularly before us; but if it be the course of pleading in Scotland, it is, in my opinion, a very imperfect mode of pleading, if, when you seek to set aside a record on some matter *dehors* the record, not apparent on the face of it, something quite independent of the record, you are not to allege what that matter is, but simply to allege that the pursuers did not consent, and then to support that by going into the legality of the conduct, and the character of the individual, which, if the case was intended to rest on that, ought to be very clearly stated, in order that the other party might have

the opportunity of meeting it. Here there is a mere allegation against what is on the face of the record. I do not know whether that is the practice in Scotland. But certainly that mode of proceeding would not be permitted in this country. It is quite sufficient to dispose of the present case, to show that if it had been properly alleged in the summons, still there is no case made to support it.

LORD CAMPBELL.—My Lords, I am of opinion that this interlocutor ought to be affirmed, and I offer my opinion, not without some confidence, for I have now to deal with a branch of law with which my mind was earliest imbued. In my early days I heard a great deal about augmentations and localities, and interim localities, and common agents, and I was very early initiated into the functions of the common agent.

My Lords, the question you have to determine is really a very short one. This is an action to reduce, it may be considered (throwing aside the embarrassing circumstances) an action to reduce the interlocutor of 1831, upon the ground that it professed to be pronounced by consent, and that there was no consent. That raises the short issue; was there consent or was there not consent? If there was consent it is allowed that the interlocutor is binding; if it was without any consent, then it ought to be reduced. I will suppose now that the vice is sufficiently pointed out by the summons, although I feel very much the weight of what has been pointed out by my noble and learned friend who has preceded me, but I will suppose that the vice of the want of consent is sufficiently alleged. Well, then, was there consent or not? *De facto* there was the consent of the gentleman who acted as common agent, and it is not alleged that he did not act with perfect honour and integrity. That raises the question, whether his consent was a nullity. Mr. Robertson very logically and very ably argued, that if this consent was a nullity, then there was no consent, and he makes

out the allegation of the summons. But, my Lords, when I consider what the functions of the common agent are, according to my preconceived notions, and which are completely corroborated by the answer which Mr. Robertson gave very candidly, though with some little reluctance, and which is completely confirmed by the Acts of *Sederunt*, and by the practice which clearly prevails in Scotland, I have no doubt whatever, that the common agent had the power *bona fide* to give this consent. Now for the purpose of facilitating a locality which I know is a most difficult, and harassing, and thorny proceeding, instead of there being all the agents of all the heritors, great and small, wearing caps and bonnets, meeting together and preparing a scheme, there is this common agent employed. Well then, my Lords, this common agent in all matters in which the heritors have a common interest, is the agent of each heritor; they may supersede his authority, but till it is superseded, he is to do the best he can for the body of the heritors: he is to investigate the preliminary questions, which must be settled before the scheme of locality is prepared, and in these preliminary investigations, he is to do the best he can for the body of the heritors; subsequently, when a question emerges, in which a particular heritor has an interest, distinct and opposed to that of the body of heritors, he does not represent that heritor, but he represents the body of the heritors against that heritor. But then it appears quite clear now, that if any litigation arises between the body of the heritors and a particular heritor, he conducts that without any fresh retainer or mandate, because it was within the original scope of his authority, when he was appointed common agent; so, my Lords, he has clearly authority to give this consent, he acting *bona fide*. It is said he ought to have gone round and asked all the heritors on this question of *decimæ inclusæ*; very little benefit would have arisen from any such proceeding. But they employed him, and gave him his authority to act. If he had acted fraudulently, or with gross negligence,

EARL OF HOPETOUN *v.* RAMSAY.—27th March, 1846.

although such an interlocutor as this had been pronounced by consent, it might be reduced—but it would be reduced, not on the ground of being without consent, but on the ground that the consent had been given fraudently or with gross negligence; no such case, however, is suggested. For these reasons, I think that the issue joined of consent or no consent, is clearly against the pursuer; that there was consent; that, therefore, he has failed in his allegation, that the interlocutor was properly pronounced, and that it ought to be affirmed, with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNEL, Agents.