but the grazing rent would fall under the hypothec. It appears to the Sheriff-substitute that the landlord is not bound to be satisfied with this sub-letting of the lands by the defender, and that he is entitled to insist on having the farm fully stocked with cattle belonging to the tenant himself, and which would thus be directly available for satisfying the landlord's claims.—(See the case of *Mackye* v. *Nabony*, 4th December 1780, Mor. Dic., p. 6214.)

"The defender at the debate referred to his household furniture and farm implements as constituting a fund of security for the landlord's rent. But there is no sufficient authority for this doctrine. Mr Hunter, in his work on Leases, shows by an elaborate analysis of decided cases, that 'it must still be deemed an open question whether the hypothec extends over the implements of husbandry or furniture in agricultural subjects.'—(Vol. ii., p. 348.)"

The Sheriff (HUNTER) altered *in hoc statu*, and remitted to Mr Wilson to inspect and report. The reporter stated that the farm was capable of sustaining from 100 to 120 head of cattle, and that there were upon it 82 head of cattle and 100 sheep, besides 10 horses; but it was admitted by the defender that only three cows, one calf, and two horses belonged to him.

The Sheriff-substitute, on advising the case of new with the report, repeated his judgment.

The Sheriff adhered, and pronounced the following interlocutor:—

"The Sheriff having advised the reclaiming petition for the defender, with the answers thereto for the pursuer, and the report by Mr Wilson, and having resumed consideration of the whole process, in respect of the reasons stated in the note hereto annexed, Affirms the interlocutor appealed against, and dismisses the appeal.

"ROBERT HUNTER."

"*Note.*—The Sheriff sees no reason for disturbing the interlocutor of the Sheriff-substitute.

"The report of Mr Wilson is full and precise, and there is nothing objectionable in the mode in which the inspection was conducted.

"The competency of a remit and report in a case like the present is undoubted; for it is not of a character to entitle a party to demand a proof. The case might have been decided on the admissions by the defender emerging *ex lege* from the tenor of the record. So the Sheriff-substitute soundly deemed; but the Sheriff thought it would be advisable to have, in addition, the state of the farm and stocking ascertained by the inspection of a man of skill; and his report has confirmed the facts, and the results which the record contains."

The defender suspended.

The Lord Ordinary (KINLOCH) refused the suspension except in so far as the decerniture against the defender to cultivate his farm according to the rules of good husbandry, holding that no case of that sort had been made out against the defender.

The defender reclaimed; but to-day the Court adhered, finding neither party entitled to expenses in the Outer-House, and modifying the expenses against the defender since the date of the Lord Ordinary's interlocutor.

Agent for Suspender—John Walls, S.S.C.

Agents for Respondent—C. & A. S. Douglas, W.S.

Wednesday, December 11.

CAMPBELL, PETITIONER.

Declinator—Petition. Declinator by the Junior Lord Ordinary, on the ground that he was one of the petitioner's curators, and that the petition was presented with his concurrence, *sustained*, and remit made to the next Junior Lord Ordinary to deal with the petition.

This was a petition brought by a minor for authority to record an entail. It was entered before the Junior Lord Ordinary (MURE). His Lordship, however, stood in the relation of curator to the petitioner under his father's trust-deed, and the petition was presented with his concurrence. He in consequence proponed a declinator. His Lordship having reported the matter to the Court, their Lordships, after consultation, sustained the declinator, and remitted to the Junior Lord Ordinary (BARCAPLE) to deal with the petition. The following is the interlocutor of the Court:—

"*Edin.*, 11*th Dec.* 1867.—The Lords sustain the declinature of Lord Mure, Junior Lord Ordinary, to pronounce an order in this cause, by reason of his being a party named in the settlements of the estate, and remits the petition to the next Junior Lord Ordinary.

(Signed) "GEORGE PATTON, *I.P.D.*"

Counsel for Petitioner—Mr William Ivory.

Agents—Maclachlan, Ivory, & Rodger, W.S.

Wednesday, December 11.

LOCALITY OF SELKIRK.

(*Ante*, vol. iii, p. 327.)

Teind—Decree of Valuation—Division—Share of Commonty—Part and Pertinent—Accessory. Circumstances in which *held* that a share of a commonty allocated after a valuation of lands to which it attached, was included in the valuation as a part and pertinent of, or as accessory to these lands.

Observed, that there is a presumption in favour of such inclusion when two things concur, (1) the division of the commonty subsequent to the valuation, (2) identification between the principal lands in the valuation, and the lands in the division.

This was a petition which arose upon certain objections stated by Mr Plummer of Sunderland Hall to the Rectified Scheme of Locality of the parish of Selkirk; and the question in substance was, whether Mr Plummer was liable to be localled upon for stipend, upon the footing that the share of the commonty of Selkirk was an unvalued subject?

It appeared from the titles (1) that the teinds of the lands of Sunderland Hall were valued in 1636; and (2) that in 1681 there was allocated to these said lands a specific share of the commonty of Selkirk in lieu of certain rights, either of servitude or common property, which the said lands formerly possessed over that commonty. In these circumstances, it was maintained by Mr Plummer that the rights of commonty attached to the lands in 1681 must be presumed to have been attached to them in 1636; that, being so attached to the lands in 1636, the said rights of commonty must have been included as pertinents in the valua-

tion then led; and that, being so included, the valuation must now apply to the specific share of the commonty, which was substituted for the said rights of commonty by the division in 1681. It was, on the other hand, maintained by the common agent that there was no evidence, and no presumption that the rights of commonty existing in 1681 existed in 1636, and that, even if they had, the same were not teindable subjects so as to be included in a valuation of teinds.

The Lord Ordinary (BARCAPLE) sustained the objection, holding that the share of the commonty in question was included in the valuation of 1636.

The Common Agent reclaimed.

COOK and HALL for him.

SOLICITOR-GENERAL and WEBSTER in answer.

After hearing parties, the Court ordered written argument, the point involved being an important one in teind law.

At advising,

LORD BENHOLME—This case arose upon objections stated by Mr Plummer, an heritor in the parish of Selkirk, to a rectified scheme of locality prepared by the common agent, who is the respondent here, by which an additional allocation was made on Mr Plummer, in respect, in the first place, of a pendicle called Blackmiddings; and secondly, in respect of a portion of a common called the Commonty of Selkirk, which had been adjudged to him in a division of that commonty, on the footing that that part of the commonty was not included in a valuation of his lands of Sunderland and Sunderland Hall, led in 1636. The first part of the case we decided some time ago in favour of Mr Plummer, holding that that pendicle was included in the valuation of the lands of Middlestead. But there was an important question that entered into the decision of the second branch of the case,—a question which is one of considerable nicety as well as interest,—namely, in regard to the share of the commonty which had been appropriated to the lands of Sunderland and Sunderland Hall in the division of the commonty. The principle or presumption which it was essential for the objector Mr Plummer to establish, was this,—that where a valuation has been made of principal lands, which at the time had accessory rights over a common, and where a division of the commonty subsequently takes place, it is to be presumed, in favourable circumstances (for the circumstances may be very various), that the share of the commonty which subsequently falls in property to the heritor is to be held identical with, or considered to come in place of, and as a *surrogatum* for, the accessory rights over the common which the principal lands enjoyed *pro indiviso* at the time of the valuation. The effect of this presumption is, that the valuation of the principal lands is to be held as including a valuation of their accessory, and so to embrace the portion that comes to the heritor in property as a *surrogatum*. This is a principle, or rather a presumption, which may be contended for in a great variety of circumstances; and it rather occurs to me that when we ordered the minutes of debate, it was to bring out whether such a principle or presumption could be adopted where there was nothing to interfere with it. It is quite plain to my mind that, in order to adopt such a principle or presumption, certain conditions or postulates are necessary. I may mention two of these. In the first place, I think the valuation must precede in date the division; because, if the valuation takes place subsequent to the time when the right *pro indiviso* has assumed a definite and local character of property, defined in point of limits, it is not so easy to suppose that the heritor who is in possession of such a definite piece of ground, even though it may have come to him as a *surrogatum* for a *pro indiviso* right, will lead a valuation without mentioning, or at least taking some notice of that *surrogatum*. And when, besides that, the share of the commonty has not retained its character of mere part and pertinent in the feudal titles of the party, but has actually assumed that of a separate and independent subject, such a condition of matters appears to me altogether to overthrow the presumption in question, because the heritor is then called upon to state distinctly in his valuation the piece of property which now figures in his titles as a separate and independent subject. That subject never can be held to pass as an unnamed pertinent of another property which has assumed in the titles an independent character of its own.

There is a second postulate which I think is required; and that is a reasonable identification of the principal lands named in the valuation with the principal lands to which, in the division, the *surrogatum* is appropriated; for if you cannot identify, in some reasonable way, the lands at the one time with the lands at the other, it will be very difficult indeed to identify the accessories of the lands at the one time with the *surrogatum* appropriated to the lands at the other. In short, if there is any doubt that the two are exactly the same set of principal lands, there will be great difficulty indeed in identifying the accessories, and in holding that the valuation of the principal lands includes, as a pertinent, the lands that constitute the *surrogatum*. I have mentioned these two conditions as necessary, because I think the case of *Philiphaugh*, which we decided in this same locality, and about which a great deal was said at the Bar, stands distinguished from, if not contrasted with, the present case in these two particulars. In the case of *Philiphaugh*, which I have looked to very minutely, 2 Macph. 1312, the valuation was of a very late date—1811, I think—whilst the division was long previous. There was great doubt in that case whether the lands of Philiphaugh, Harehead, and Mauldieshaugh, which alone were valued in 1811, could be identified with the old barony, or even with the new barony, the pertinents of which were represented as a *surrogatum* by the share of the commonty; and in that case of *Philiphaugh*, the slice of the commonty, which had formed the *surrogatum*, had, in the titles of the party, assumed a separate and distinct character and name. In these two respects, I think the case of *Philiphaugh* stands distinguished from the present. I might read some of the opinions of the judges to verify my observations, but I think it will be necessary only, in regard to the second of these conditions, to refer to what is said by the Lord President (then Lord Justice-Clerk). There was no identification between the principal lands to which the share of the commonty was attached *pro indiviso* and the principal lands which were valued; consequently, the part and pertinent of the one could not be identified as part and pertinent of the other; and as Philiphaugh, Harehead, and Mauldieshaugh were alone stated in the valuation, and no barony was valued, the conclusion seemed to be inevitable that you could not suppose this separate subject, contained in the heritor's titles, to have been valued as a mere part and pertinent of the lands valued. I have mentioned this case of *Philiphaugh* parti-

cularly, because I think the present case has been brought before us here mainly in consequence of some misunderstanding of the decision which we gave in that case of *Philiphaugh*. There we found that Sir John Murray was not entitled to say that his valuation included, as part and pertinent of his three portions of land expressly named, lands which were in his own titles separately and expressly conveyed. In the present case the valuation preceded the division; and also, as far as I can see, there is a reasonable identification of the principal lands contained in the valuation with the principal lands in the division. Sunderland Hall and Sunderland are the principal subjects in the one as well as in the other. Nor do I see that, in the titles to these subjects which have been laid before us, there is any material variation since the commencement of the series. At the time of the valuation they were held upon titles which seem to have been carried down with a very slight and merely temporary variation to the present time. Consequently, all that this objector has held under the name of Sunderland and Sunderland Hall, he and his authors have held under the same titles at and since the date of the valuation. There is another circumstance by which this case is marked which must be looked upon as favourable for the application of the presumption; and that is, that there is a valuation of vicarage teinds. Vicarage teinds, to a very considerable amount, have been valued, both in regard to Sunderland and Sunderland Hall. In reference to the subsequent division, which has been much commented on in the minutes of debate, several questions are raised as to the nature of the accessory right which was attached to these lands over the common. The division took place, not under the statute, but under a submission before the statute for dividing commonties had been passed. But we may suppose that the principles of division therein adopted were not altogether alien to those that are now adopted in following out the statute. I have looked into the report of the division as attentively as I could, but I do not think it is necessary to arrive at any distinct conclusion as to whether there was a right of common property, or a right of pasturage or servitude, attached to these lands of Sunderland and Sunderland Hall. I may have an impression as to this question, but I think it is unnecessary to take up your Lordships' time by stating what that impression is, because it appears to me that the presumption for which the objector pleads in this case is equally applicable, whichever of these two views you adopt—whether you consider it as having been common property or pasturage. Nay, I rather think that the circumstance I have now mentioned, that there is a very considerable portion of vicarage teinds valued in regard to both these lands, is at least as favourable to the application of the presumption in the case of pasturage as it would be in that of common property. The truth is, that the foundation of this presumption is the rule of the statute as to valuation. One-fifth of the rent is held as parsonage teinds. Now, when you take the rent of the lands—what the tenant pays—you must suppose that he pays for all the rights that he enjoys as accessories of his farm, and, in particular, that he pays for such rights as those of common property or pasturage. If he pays in money, there is a strong presumption that that money payment represents the value of his whole farm, including the right of pasturage which is inseparably connected with it. If he pays in grain, —or rather, if the parsonage teinds are valued in grain—the presumption may not be so strong, because grain is not what he ever could derive from his right over the common; and there may be some doubt whether the presumption would be applicable in such a case as that. I mention this difference between such a case and the present, in order to intimate that I think the present a very favourable case, because it is not grain alone that constitutes here the value of the teind. There is a vicarage teind valued in money; and it occurs to me that that vicarage teind must have been derived from the value of the produce of the live stock on the whole farm, including the stock that was grazed on the common as well as the stock of the principal farm. Such a question occurred in the case of *Orwell*; it did not, however, come to a decision, because it was mooted in such a shape that the Court did not think they could decide it in that case,—(*Locality of Orwell*, 8th March 1866, Macph. vol. iv, p. 554.) The heritor there pleaded that the valuation of his principal lands included the valuation of the share of a commonty that he had got on a division. His valuation was of parsonage teind only, and only in grain; there was no valuation of vicarage teinds. Your Lordship will see at once that both these circumstances were not so favourable for the presumption in question as the circumstances of the present case; because, as there was no valuation of vicarage teinds at all, and as the valuation of the parsonage teind was not in money but in grain,—there was a strong suggestion that this value in grain could not represent or include the value of the pasturage, or the right over the common, which never could yield grain. In the present case, there is a considerable portion of vicarage teinds attached both to Sunderland and Sunderland Hall, and it does occur to me that that is just a case in which the Court may well adopt the presumption that this money vicarage teind represents the vicarage teind, not only of the principal lands, but also of that accessory which was fitted to yield vicarage teinds. In these circumstances, I must say that I think this is as favourable a case for the adoption of the principle as can well occur. It is for your Lordships to say whether we are now to take that step, which certainly will be an important one, for perhaps this is the first case in which it has been taken in terms. I must add, there are additional circumstances in this case, arising from the possession of the teinds, which are very favourable to the adoption of the presumption. The possession which has been had by the heritor in reference to his titular, as well as his exemption from allocation beyond the valued teind that he has enjoyed down to the present time, are entirely in his favour. The Duke of Roxburghe, who seems to have looked after his interest as titular very narrowly on the occasion of the division, granted a tack of teinds to the proprietor of these lands in 1709. It was a very long tack, and embraced the whole of his teinds in the parish. But the remarkable thing is, that in one part of the narrative there is a statement of the valuation of 1636, in which he mentioned all the teinds belonging to Middlestead, Sunderland Hall, and Sunderland, and makes the sum of them to be exactly the amount of the teind set forth in the valuation. Now, this is a tack plainly intended to embrace the whole of the teinds of this heritor within the parish; and, on payment of the tack-duty stipulated by the tack, he has enjoyed his teinds ever since the date of the tack.

That surely is a very strong circumstance. I rather think we ordered this present depending process to be intimated to the Duke of Roxburghe, in order that he might, if he thought proper, appear to see that his interests were not compromised. But his Grace did not choose to appear, and I think that must have arisen from a conviction that the valuation upon which the heritor here founds, really comprehended the whole of his teinds in the parish.

There has never been an allocation upon the objector's lands beyond the amount of the valued teind; and I may say that, down to the present locality, no such attempt has been made. Nay, the opinion of the respondent, who is common agent in the locality, was entirely in favour of the objector at first, and he proposed a locality by which no additional stipend was allocated on Mr Plummer. But when our decision as to *Philiphaugh*, in the same locality, was pronounced, the respondent seems to have thought that we went on a principle that might carry him out in making an additional allocation upon Mr Plummer. I have therefore been at some pains to distinguish the two cases, in order to satisfy the parties that we are not inconsistent in the course that I now propose to your Lordships to adopt, viz., that we should sustain the objection of Mr Plummer in this case by adhering to the interlocutor of the Lord Ordinary as well on this branch of it as on the other.

Lord Justice-Clerk.—That is the opinion of the Court, we shall adhere to the part of the interlocutor which was not adhered to in the previous judgment of the Court on 20th March.

Agents for Objector—Hughes & Mylne, W.S.

Agent for Common Agent—James Macknight, W.S.

Thursday, December 12.

SCOTTISH NORTH-EASTERN RAILWAY CO. *v.* INSPECTOR OF POOR OF ST VIGEANS.

Poor—Assessment—6 *Will. IV., c.* 32—6 *Will. IV., c.* 34. Circumstances in which *held* that, under the statutes libelled on, a railway company was exempt from liability for poor's-rates.

This was a suspension in which the question was, as to a right of exemption claimed by the Scottish North-Eastern Railway Company from poor's assessment, in respect of certain exempting clauses in their Acts. The clauses mainly relied upon were the 23d section of the Act 6 Will. IV., c. 32, and the 32d section of the Act 6 Will. IV., c. 34. By section 23 of cap. 32, it was enacted, "That the rights and titles to be granted in manner above-mentioned to the said company to the lands and heritages therein described shall not in any measure affect or diminish the right of the superiority of the same, but, notwithstanding the said conveyances, the rights of superiority shall remain as before, entire in the persons granting such conveyances; and the lands and heritages so conveyed to the said company shall not be liable for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands or heritages." By section 32, cap. 34, it is enacted, "That the lands or heritages to be acquired for the purposes of this Act shall not be liable in payment of land-tax, or any feu-duties, casualties of superiority, cess, stipends, schoolmaster's salary, or other public or parochial burdens, unless it be so stipulated in the conveyance thereof to the said company, but the same shall be paid by the original proprietors of such lands or heritages, except in case the said company shall purchase and acquire the whole lands or heritages belonging to any person within the said parishes, in which case the said burdens shall be paid by the said company for the whole of such lands or heritages which may be so acquired as aforesaid."

The Court had formerly decided, in an action at the instance of the Inspector of Coupar-Angus, that the claim of exemption was well-founded; but the present case was designed to bring up the merits of the Coupar-Angus case with a view to appeal, and also to enable the respondents to state certain additional pleas, to the effect (1) that the exemption only applied to the assessment attaching to *ownership*, and (2) that there were certain portions of the railway company's line in the parish of St Vigeans which were not under the exempting clauses.

The Lord Ordinary suspended *simpliciter*, holding that there was no distinction between this case and that of Coupar-Angus, and that the respondent had not condescended upon the portion of the line excepted from the exemption.

His Lordship pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the proceedings: Finds that the suspenders, the Scottish North-Eastern Railway Company, are not due to the respondent, the Collector of Poor's-rates for the parish of St Vigeans, the sum of assessment for which warrant has been granted: Suspends *simpliciter* the warrants and proceedings complained of Declares the interdict already granted perpetual, and decerns: Finds the respondent liable to the suspenders in the expenses of process: Allows an account thereof to be lodged, and remits to the auditor to tax the same, and to report.

"W. Penney."

"*Note.*—The present case must be ruled by the decision of the Court in the case of the *Scottish North-Eastern Railway Company* v. *Gardiner*, 29th January 1864, 2 M., 537. The Collector of Poor's-rates for the parish of St Vigeans has avowedly disregarded that decision, and assessed the Railway Company without giving effect, in any respect, to the exemptions sanctioned by the judgment. The sum insisted for, and for enforcement of which poindings were executed of the Company's carriages and locomotives, is clearly not due to the whole extent. The Lord Ordinary would have been well pleased had he been enabled in the course of the process to fix the sum (within that demanded) truly due by the Company, and he gave the Collector an opportunity of showing the limitation produced by the application of the decided case. The Collector has been unable to do so, from causes alleged by him to be beyond his control. The Lord Ordinary has therefore felt that he had no alternative but to grant suspension of the warrant and interdict against the prosecution of the poinding.

"W. P."

The Collector reclaimed.

Lord Advocate and Thoms for him.

Clark and Webster in answer.

The Court to-day adhered, except as to the last point, upon which they held that it was incumbent on the Railway Company to furnish information,