which has led the Legislature to confer special powers on the complainers to keep up a constabulary of their own within certain limits, may be such as not, even in equity, to lead to the conclusion that they ought in consequence to be exempted from the more general county assessment.

The suspenders reclaimed; but the Court to-day, without calling for a reply, adhered.

DEWAR *v.* PEARSON AND JACKSON.

Proof—Reference to Oath—Competency—16 *Vict. c.* 20. Held that where defenders were examined by a pursuer as witnesses on one branch of a case, another branch of it was afterwards competently referred to their oath, notwithstanding the terms of section 5 of 16 Vict., cap. 20.

Counsel for Advocator—Mr Gordon and Mr Scott. Agent—Mr David Crawford, S.S.C.

Counsel for Respondent—Mr Patton and Mr Thoms. Agent— Mr W. Officer, S.S.C.

This was an action by a clerk for payment of a sum of £445, 5s. 8d. in name of salary or wages due to him from 1852 to 1860. The defenders pleaded prescription. The Sheriff sustained this plea in so far as regarded the period anterior to June 1858, and found that this part of the claim could only be proved by writ or oath. In regard to the other portion the pursuer was allowed a proof *pro ut de jure*. In the course of the proof *pro ut de jure* the defenders were examined as witnesses. The pursuer thereafter referred the constitution and resting-owing of the claim sued for prior to June 1858 to the oath of the defenders. Under this reference the defenders were examined, and the Sheriff held the oaths affirmative.

Mr Pearson advocated and pleaded that the reference to oath was incompetent. He founded on 16 Vict., cap. 20, sec. 5, which provides that "it shall not be competent to any party who has called and examined the opposite party as a witness, thereafter to refer the cause, or any part of it, to his oath:" and founded on the case of Renny *v.* Will, July 18, 1863 (not reported, but mentioned in Dickson on Evidence, second edition, note to section 1711).

The Court refused to give effect to this plea, and remitted to the Sheriff *simpliciter*.

The LORD PRESIDENT thought the object of the statute was to prevent a person being subjected to a re-examination in regard to the same matter; and that it provides that one cannot refer to a person's oath what he has been previously examined about as a witness in the case. The prohibition may even extend to anything which he might competently have been examined about when he was in the witness-box. But what was referred here was a matter as to which the defenders were not and could not be examined as witnesses.

Lord CURRIEHILL thought the words of the statute were certainly in favour of the advocator, but the construction he put on them was so unreasonable that it could not be adopted. It was, however, with the greatest difficulty that he concurred.

Lord DEAS thought the words of the statute might be literally in the advocator's favour, but that they were not so according to any reasonable construction. A cause may embrace half-a-dozen different things, and it never could be meant to exclude reference on a part of the cause on which a party had not been examined.

Lord ARDMILLAN concurred.

SECOND DIVISION.

TAYLOR *v.* MITCHELL.

Bill—Suspension—Partner. Suspension of a charge on a bill on the grounds—(1) that it was granted for the charger's accommodation; (2) that it was granted by one partner to another, for the purpose of raising money for the business of the copartnery; and (3) that the charger had agreed not to use diligence on the bill—*refused*.

Counsel for Suspender—Mr J. C. Smith. Agent—Mr W. Spink, S.S.C.

Counsel for Respondent—The Solicitor-General and Mr Millar. Agent—Mr John Henry, S.S.C.

This is a suspension of a charge upon a bill. In the year 1862 the suspender became a partner with the respondent in an iron foundry business, but having nothing to put into the capital of the business, and it being necessary to raise money for the company's concerns, he accepted a bill for £717, 10s., which was drawn upon him by the respondent, as the share of the stock which he contributed to the company. Part of the bill was paid by the suspender, and the charge was made for payment of the unpaid balance. The grounds of suspension maintained were—(1) That, assuming the suspender to be due a balance on the bill, he was not liable to diligence therefor, in respect that the bill was an accommodation one, which was truly accepted for the benefit of the respondent; (2) that a member of a joint adventure or partnership concern is not entitled to use summary diligence against a co-partner for any balance of copartnery funds while the state of the affairs of the concern is not ascertained, according to the rights of parties; and (3) that the diligence was contrary to the agreement of parties, by which the complainer was to liquidate his obligation only as he was able. The Lord Ordinary on the Bills passed the note, and liberated the suspender from prison, giving effect to his plea, that the understanding between him and the respondent was that he was only to be called upon to pay as he got up his money to do so, and also to the plea founded on the yet unascertained rights of parties. To-day the Court recalled this interlocutor, and remitted to the Lord Ordinary to refuse the note. The Court were of opinion that the first defence, which could only be proved by the writ or oath of the respondents was not only not so proved, but was disproved by the writ of the suspender himself. The second defence was inapplicable to the facts of the case, the charge being for a remainder of debt, for the one-third of the property acquired by the suspender in 1862 for the company concern; and as to the third defence, there was no evidence of any such agreement as was alleged by the suspender.

Wednesday, Feb. 28.

COURT OF TEINDS.

COWAN *v.* COOK AND OTHERS.

Teinds—Valuation—Approbation—Dereliction. Circumstances in which held that an heritor's right to obtain approbation of a sub-valuation of teinds made in 1862 had not been lost by dereliction.

Counsel for Pursuer—Mr Clark and Mr Shand. Agent—Mr James Dalgleish, W.S.

Counsel for Defender—Mr Cook. Agents—Messrs W. & J. Cooke, W.S.

This is an action of approbation of a sub-valuation of the teinds of the lands of Boghall at the instance of William Cowan, Esq., of Linburn, against Mr Cook, the minister, and Lord Hopetoun, the patron and the titular of the teinds of the parish of Bathgate. The sub-valuation was made in the year 1629, when the teinds were valued at 440 merks, or £24, 8s. 10d., being one-fifth part of 2200 merks, or £122, 4s. 5d. The action was opposed by the minister, who pleaded that Mr Cowan was not now entitled to obtain the approbation of the valuation by reason of dereliction of the right so conferred on him. The Court to-day repelled this plea and pronounced decree of approbation as concluded for. The judgment of the Court was delivered by

The LORD PRESIDENT, who said—The length of time which has elapsed since 1629 is clearly no objection to the approval of this valuation. There is no prescription in regard to such a matter. It is

not stated that there is any irregularity apparent *ex facie* of the valuation, but it appears that an augmentation was awarded to the minister of Bathgate in the year 1793, and a locality was fixed consequent thereon early in the year 1800, and as no step has been taken since then to obtain an approval of the valuation, this action is now met by a plea of dereliction. That is a well-known plea which has been sustained in many cases. The question is, whether it is applicable to the circumstances of the present case. The stipend, which was modified in 1793, consisted partly of money and partly of victual. Since that time there have been a great many years during which payments have been made by the heritor of the lands in question in excess of that required by the sub-valuation; and the inference deduced is that the heritor must be held to have relinquished his right. It is not very easy to see on what principles the previous cases have proceeded. It is sometimes stated that the ground of the plea is that the heritor supposes that there is a defect in his decree, and therefore has abstained from asking its approval. In some cases again, it is said that the decree had not been used because it was not for the interest of the heritor to do so. On the part of the heritor it is argued that a person is not to be presumed as intending to abandon a right which he has acquired, but it may be apparent that at all events he has intended not to insist on it. The question is—Do the circumstances of this case justify us in holding that the heritor relinquished his right? The cases where overpayments have been made are much more numerous than those where they have not. Sometimes the overpayments were very small, and sometimes they were considerable. In the first year after 1799 the overpayment was very considerable. But there are also circumstances favourable to the heritor. It does not appear that prior to 1793 there was any overpayment. Then the years 1799 and 1800 are well known to have been years of great scarcity, and therefore exceptional. Again from 1805 to 1818 the heritor in possession of the lands was a pupil, and although I do not say that the years of pupilarity are to be deducted as in prescription, the fact is a circumstance in the case of some importance. Then from 1821 downwards there seem to have been 20 years of overpayment, and only 10 of under-payment, but the average sum overpaid is only £1, 7s. a year. It appears to me therefore that in the circumstances of this case the heritor cannot be held to have relinquished his right. He could not seemingly have raised the question without litigation, which was expensive, and not very desirable in such a matter. It is therefore reasonable to suppose that he waited until now when there has been a new augmentation, and a new locality, and therefore an increase of the interest he had to have the valuation approved of.

The pursuer asked for expenses, but his motion was refused, the difficulty having been caused by his own delay.

FIRST DIVISION.

PET.—THE LORD ADVOCATE.

Nobile officium. An *interim* appointment made to the office of Lyon King-at-Arms on the application of the Lord Advocate.

Counsel for Petitioner — Mr H. J. Moncreiff. Agent—Mr Andrew Murray, W.S.

This was an application by the Lord Advocate for the appointment *ad interim* of a person to discharge the duties of Lyon King-at-Arms for Scotland, now vacant by the death of the Earl of Kinnoul. The Court appointed Mr George Burnett, advocate, the Lord Lyon's depute, to act as Lord Lyon *ad interim*.

SECOND DIVISION.

MACALISTER *v.* MACALISTER.

Reparation— Warrandice—Eviction—Lease. A person having granted a sub-lease with absolute warrandice which was found by the Court to be *ultra vires* of the granter, and the lands having been evicted from the granter, held that the latter had a relevant claim of damage against the granter's representatives founded on the warrandice.

Counsel for Macalister's Trustees—Mr Gifford and Mr J. G. Smith. Agent—Mr Andrew Macintosh, S.S.C.

Counsel for Archibald's Representatives—Mr Millar. Agents—Messrs Adam & Sang, S.S.C.

The trustees of the deceased Alexander Macalister of Strathaird, in accordance with instructions in his trust-settlement, executed in 1834 a deed of lease by which they let "to Jessy Macalister," his daughter, and Duncan Macalister, her husband, "and the longest liver of them, whom failing to their son Norman Macalister, and his heirs and assignees, the farm and lands of Glasnakill, as presently possessed by the said Duncan Macalister, and that for the space of 28 years, from and after the term of Whitsunday 1832," as to the houses and grass, and the separation of the crop as to the arable ground. The rent payable was £10 per annum.

On 12th December 1842 Duncan Macalister (his wife being dead) executed a deed of subtack in favour of his son, Archibald Macalister, by which he let to the said Archibald Macalister and his heirs "all and whole the farm and lands of Glasnakill, as presently possessed by the said Duncan Macalister, and that for all the days, years, and space of twenty-eight years, being the remaining years still to run of the tack of the said subjects aftermentioned, under which the said Duncan Macalister holds and possesses the same, from and after the said Archibald Macalister's entry to the premises, which is hereby declared to have commenced at the term of Whitsunday last 1842 as to the houses, grass, and pasturage, and at the separation of the crop of that year from the ground as to the arable ground." After the death of Duncan Macalister in 1854 his son, Norman Macalister, in whose favour, failing his father and mother, Strathaird's trustees had executed the original lease, took proceedings against his brother Archibald, for the purpose of having it found that this subtack was *ultra vires* of their father, who had only, as he contended, a liferent interest in the lease. It was maintained, on the other hand, that the words "whom failing," in the lease, left in the person of Duncan Macalister an unqualified right of tenancy in the first instance, and that Norman Macalister, who was only introduced failing his father and mother, was either a mere conditional institute, who only took if his father and mother had not taken, or a substitute who succeeded only if the right was not disponed away by the primary holder. After a long litigation, the Second Division, on 22d February 1859, held that the subtack was *ultra vires* of Duncan Macalister, so far as extending beyond his own lifetime, and so brought to a period the right of sub-tenancy in Archibald Macalister (21 D. 560).

The representatives of Archibald now insist against the representatives of Duncan, his father, for payment of the loss and damage incurred through this eviction of the subjects—holding an obligation of warrandice for the full space of twenty-eight years to have been incurred by Duncan as granter of the subtack.

The Lord Ordinary (Kinloch), held that the subtack contained a proper obligation of warrandice for the whole space of twenty-eight years for which the right bears to be granted, and that there is a relevant claim of damage under the obligation,