the objections of both parties should be refused, and that a decree be given according to the decision of the auditor.

Lord Cowan—As I concur in thinking that, in the circumstances of this case, the auditor's report should be approved of, and the objections to it repelled, I would have abstained from any observations had it not been that I cannot acquiesce in some of the views which your Lordship has stated as to the principles on which questions of expenses like the present should be judged of under the statute and relative rules by the Election Judges.

The 41st section of the statute appears to me to be the ruling enactment, whether in the original award of expenses or in the subsequent audit of the account when costs have been given. The principle of this provision is to secure indemnity to the successful party, subject to those limitations to guard against unreasonable and lavish expenditure so specifically and carefully set forth. "All costs, charges, and expenses of and incidental to" the procedure under an election petition are to be defrayed by the parties to the petition "as the Court or Judge may determine," with the exception of the expenses to be defrayed by the Commissioners of the Treasury, as provided for by the Act.

But in giving an award or in pronouncing decree for expenses the Court or Judge is to have regard to these principles—(1) to disallow expenses caused by vexatious conduct, unfounded allegations, or unfounded objections, and (2) to discourage needless expense by throwing the burden on the parties by whom it has been caused. And in accordance with these principles, as I read the enactment, costs are not merely to be awarded but to be taxed in the manner prescribed by the regulations and as between agent and client in an ordinary action at law. There are certain steps of procedure under the statute—and that of the withdrawal of a petition is an instance—in which it is expressly enacted that costs shall be at once awarded. The more general case contemplated by the Act in which costs may be given in whole or in part is where the petition has issued in a trial before the Election Judge. I can quite understand that the Judge in awarding expenses should have regard to the general principles as to costs laid down by the 41st section. The more usual course, however, where expenses are given will be to do so in general terms, leaving it for subsequent determination how far the costs charged by the successful party is in compliance with the statutory rules. In no other way in my apprehension can those rules be duly and properly enforced. The Judge on the trial cannot be expected before awarding costs in the general case to examine the account. He may, indeed, reserve the consideration of the question of costs. But where he thinks it of importance at once to give costs at the close of the trial, as he has undoubted power to do, his general award must necessarily be subject to the principles of charge and taxation prescribed by the statute. Subject to this explanation, the 34th regulation made by the Election Judges is to be read and understood. When costs are awarded for proceedings under the act, the award is declared equivalent to a finding of expenses in the Court of Session, and the account is to be taxed by the Auditor of Court as between agent and client. That taxation must necessarily be in accordance with the statutory rules laid down by the 41st section of the statute, taken along with the ordinary regulations for taxing accounts as between agent and client in ordinary suits. At no other stage can regard be had, as provided by the statute, to the checks imposed on lavish, improper, or needless expenditure in the proceedings. I would regard it a serious misfortune to parties interested in election proceedings if, in taxing the account, the auditor is not to regulate his taxation on these principles. I cannot read the statutory provision otherwise than as not merely entitling him, but as requiring him to do so,—his audit of course being always subject, as in the ordinary case, to be brought under review of the Election Judge or of the Court on objections by either of the parties, or under any special report which the auditor may think it right to make. As to the competency of objecting to the audit, I do not think it in the least doubtful. There is not a word in the 34th regulation which can fairly be regarded as constituting him into an irresponsible and final judge in the important matter of costs. The taxation prescribed is to be as in ordinary course, and if either party consider that he has gone wrong, the opinion of the Judge or of the Court may be taken on objections when decree is asked for the taxed amount. Accordingly, both parties in this case have stated objections, and the competency of their doing so has not been made matter of dispute at the bar.

On the objections themselves, as these have been explained in the debate, I have nothing to add to the comments made by your Lordship.

Lord Benholme and Lord Neaves concurred, the latter stating that, while it was the function of the Court to decide in what branches of the case expenses were to be charged against each party, the auditor was familiar with many details as to what fees or expenses were proper, of which the Court had not the same knowledge, and that therefore, they should be chary of interfering with the auditor in the discharge of what was his proper function. A case must be conducted with a fair view towards an adversary, and the taxing officer had power to cut down the expenses accordingly. He had no doubt the auditor had discharged his duty in this case anxiously; and, on the whole, he found no ground for disturbing the report.

Agent for Major Walker—John Walker, W.S.

Agent for Sir Sydney Waterlow—T. J. Gordon, W.S.

LOCALITY OF KINROSS—QUESTION BETWEEN MR STOCK OF LATHRO AND THE COMMON AGENT.

Teind—Commonty—Decree of Valuation—Heritor Held that a heritor had failed to show that the teinds of a portion of a divided commonty were valued in a decree of valuation.

The question in this case was whether a certain share of the commonty of Kinross, allocated at a division of that commonty in 1801 to the lands of Lathro, was to be held included in a valuation of the lands of Lathro led in 1630.

It appeared that the valuation in question made no express reference to the commonty, and, further, was led in rental bolls, and included nothing for vicarage teind. It further appeared that the heritor was not in a position to produce any title of an earlier date than the year 1755; and that, although in the titles subsequent to that date the lands bore to be held with a right of pasturage in the com-

monty use and wont, there was no direct evidence that the right of pasturage existed at the date of the valuation in 1630. In these circumstances, the common agent contended that the right of pasturage in the commonty in question could not be held to have been included in the valuation of 1630, and, therefore, that that valuation could not be held to apply to the specific share of the commonty since allocated to the lands. The Lord Ordinary (MURE) gave effect to this contention, founding mainly on the absence of any mention of vicarage teind in the valuation.

His Lordship added the following note:—"In this case the valuation of the teinds preceded the division of the commonty, and it is pretty clear that the principal lands of Lathro, to which the 17 acres in question are now attached as a *surrogatum* for the right of commonty in Gallowhill, were the lands valued in the decree of valuation. In these respects, therefore, two of the requisites which are assumed in the decision in the case of *Plummer*, December 11th 1867, to be essential to entitle a party to maintain that a valuation of principal teinds includes a valuation of accessories, so as to embrace lands which were afterwards assigned to the heritor as a *surrogatum* for those accessories, have been complied with. But, in other respects, the case is, in the opinion of the Lord Ordinary, ruled by the decision in the *Locality of Orwell*, March 8th 1867, relied on by the respondent.

"(1) The earliest title produced is dated in 1755, upwards of 120 years after the valuation, There is, therefore, no direct evidence to show that, at the date of the valuation, the commonty of Gallowhill was attached to the lands of Lathro, and was not acquired subsequent to 1630. But (2) assuming that difficulty to be got over, the valuation in the present case does not, it is thought, afford any conclusive evidence that the right of commonty was included in the valuation. For there is no express valuation of vicarage teinds, which those of the commonty must have been, nor any valuation in money, from which it may be inferred that the right of pasturage in the commonty was valued. The valuation was exclusively in victual, as in the case of *Orwell*, viz., 'one chalder victual, half bear half meal;' and it is limited to the lands of Lathro, without any mention of right of commonty, or of parts and pertinents. The valuation, no doubt, bears that the lands are worth 'of yearly rent in stock and teind one chalder victual, half bear half meal.' But a valuation, though in stock and teind, when in rental bolls, does not, in the opinion of the Lord Ordinary, of itself necessarily imply a valuation of vicarage teinds, as a victual valuation is in the general case held to apply only to parsonage teinds; and the Lord Ordinary feels it the more necessary to act on this view in the present case, because the valuation shows that when vicarage teinds were valued they are expressly mentioned. Thus the lands of Claslochie are stated to be 'worth of yearly rent in stock and teind two chalders meal, and pays four pounds Scots of vicarage;' and there are other instances in this valuation (No. 202 and 314 of process) in which vicarage teinds are expressly mentioned. The *onus*, therefore, being on the objector of making out that the right of commonty was valued, the Lord Ordinary has been unable to find grounds sufficient to warrant him in giving effect to the objections, and in holding that the Common Agent was wrong in localling on the objector for the 17 acres of the common of Gallowhill, which were allotted to the lands of Lathro in 1793 as a *surrogatum* for the right of pasturage in the commonty."

The heritor reclaimed.

LEE and GLOAG for him.

GORDON, Q.C., and ADAM in answer.

Their Lordships held that the whole question in these cases is whether it is proved in point of fact that at the date of the valuation the principal lands valued had attached to them rights or interests in the commonty about which the question arises. If there was an existing interest in a commonty it is then to be presumed that the fruits of that interest went to swell the valuation, and when the commonty comes to be divided the specific share allocated in lieu of the formerly existing interest must be held a valued subject. But the nature of the valuation here, and the state of the titles of the heritors, made it impossible in this case to hold that the heritor had proved the fact upon which his case depended.

Agents for the Heritor—Murray & Hunt, W.S.

Agent for the Common Agent—William Montgomery, W.S.

WASON *v.* GOUDIE.

Relevancy—Appropriation of Debtor's Goods—Fraud.

Statements which *held* relevant to infer that by fraudulent appropriation of a debtor's goods a party had made himself liable for a debt due on a trade account.

In this case the pursuer sued the defender for a trade account of £24, 2s., being the price of goods furnished and delivered by the pursuer to Duncan M'Farlane, grocer in Calmonell. The pursuer made, *inter alia*, the following statements:—

"2. In or about the month of June 1864, the said Duncan M'Farlane, being in embarrrassed circumstances and considerably under the power of the defender, entered into certain arrangements with him, the precise nature of which is to the pursuer unknown, but, *inter alia*, to the effect that the defender should take possession of the whole stock-in-trade, shop-fittings, and effects belonging to, and pay the debts owing by him. The defender took possession of the said Duncan M'Farlane's stock, effects, and debts, and undertook and agreed to pay the debts due by the said Duncan M'Farlane, and, *inter alia*, the debt sued for. The paper, No. 26 of process, made out at the time by Mr MacLimont, Girvan, as the defender's agent, shows the state of M'Farlane's insolvency as then recognised by the defender.

"3. In or about the month of June 1864, the said Duncan M'Farlane being then in insolvent circumstances, the defender collusively, illegally, wrongfully, and fraudulently, intromitted with, took possession of, and appropriated to his own use, the whole book debts and stock-in-trade, consisting of grocery goods, shop-fittings, and others belonging to the said Duncan M'Farlane, to the value of about £600, and thereby wrongfully and illegally deprived the pursuer of the means of duly recovering payment of the account sued for from the said Duncan M'Farlane. The entries on p. 202 of the defender's book, No. 29, show that he took back into his stock goods of M'Farlane's to the value of £53, 12s. 10d., and realized on other stock sold upwards of £50 further, besides disposing of another part of M'Farlane's stock for a sum of £75, 15s. 2d."

The Sheriff-Substitute (ROBISON) found the