Wednesday, July 16.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

ROBERTSON *v.* ROSS AND DOUGLAS.

Lawburrows, Contravention of—Lord Advocate—Summons—Agent—Expenses.

In an action of contravention of lawburrows, where the pursuer's agent had inserted the name of the Lord Advocate in the summons as a joint pursuer without his consent; *held* that the action was incompetent, and the agent personally liable to the defenders for expenses.

This was an action for contravention of lawburrows, the summons in which bore to be at the instance of two private parties and the Lord Advocate. The action went on until the closing of the record upon this footing, but it was then admitted by the private pursuers that the authority of the Lord Advocate had not been obtained for inserting his name as a pursuer; and on the dependence of the action being intimated to him, he declined to give his name to it. The action, being in these circumstances incompetent, was dismissed, and the defenders moved that the pursuers' agent, as well as the pursuers themselves, should be found liable in expenses, on the ground that he was responsible for the insertion of the Lord Advocate's name in the summons.

The Lord Ordinary pronounced the following interlocutor.—

"*Edinburgh, 22d March* 1873.—The Lord Ordinary having heard counsel, and considered the closed record, in respect that the Lord Advocate has not granted his concurrence to the summons, dismisses the action, and decerns: Refuses the motion of the defenders, that the pursuers' agent should be found liable to them in the expenses of process: Finds the pursuers, Elizabeth Wilson or Robinson and John Ivinson Robinson, liable in expenses to the defenders, of which allows accounts to be given in, and remits the same, when lodged, to the auditor to tax and report."

The pursuers reclaimed.

At advising—

LORD PRESIDENT—This is an action of declarator of contravention of lawburrows, and it is raised at the instance of Elizabeth Wilson or Robertson and her husband for his interest, "and the Right Honourable George Young, Our Advocate for Our interest," and the petitory conclusion of the summons is that "the defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, to make payment of the sum of 400 merks Scots, or £22 10s. sterling . . . one-half thereof to Us, and the other half to the pursuers, the said Elizabeth Wilson or Robertson, now Robinson, and John Ivinson Robinson." Now, it is needless to say that the action could have been raised in no other form in order to be an effectual declarator of contravention of lawburrows. One-half of the penalty goes to the Crown, and the other half to the informer, but the whole sum must be sued for. It now appears that the Lord Advocate gave no authority to institute this summons in his name. A good deal has been said in the argument before us as to his not giving his concurrence. But this is not a case in which his mere concurrence would be of any avail. He must be a joint-pursuer, and he gave no authority to raise this action in his name. After the summons had been executed, it was called in Court as at the instance of Mrs Robertson and others, and in order to justify the use of the word "others," the Lord Advocate must be a pursuer as well as Mrs Robertson and her husband. The summons was therefore called as at the instance of all the pursuers. Now, I need hardly say that this was altogether wrong, and that the agent who libelled this summons, and procured it to be executed and called without being duly authorised, was acting improperly. It would have been a more serious matter had the pursuers maintained that they had authority from the Lord Advocate, when in truth they had not. But I am happy to think that they did not do so; for it appears from the first interlocutor pronounced by the Lord Ordinary after closing the record that the pursuers' counsel admitted that the authority of the Lord Advocate had not been obtained. The Lord Advocate having declined to adopt the action or to appear as a pursuer, the Lord Ordinary has dismissed the action, and found the private pursuers liable in expenses to the defender. That is undoubtedly right, as far as it goes; and there is now no appearance by the pursuers in support of their reclaiming note. But the defenders, on 22d March, moved the Lord Ordinary to find the pursuers' agent also liable to them in expenses, and they now ask an alteration on the interlocutor to that effect. I am of opinion that their motion ought to be granted. I think that the pursuers' agent, by his misconduct (for I cannot call it anything less than misconduct), has been the cause of the defenders incurring expense, and that being so, there can be no doubt, both on principle and authority, that he must be liable to them in costs.

I have spoken of the agent's misconduct, for I think it amounted to that; but I am of opinion that he acted more from rashness or heedlessness than from intentional misconduct, and I am therefore not prepared to suggest to your Lordships that any censure should follow on our judgment. But I have no doubt as to the agent's liability for the expenses of process.

The Court pronounced the following interlocutor;—

"Recall the said interlocutor of the Lord Ordinary in so far as it refuses the motion of the defenders—that the pursuers' agent should be found liable to the defenders in the expenses of process: Find the pursuers' agent, Mr J. M. Macqueen, S.S.C., liable to the defenders in the expenses of process moved for before the Lord Ordinary, and also in the additional expenses since the date of the Lord Ordinary's interlocutor; *quoad ultra*, in respect of no appearance for the pursuers, adhere to the interlocutor, and refuse the reclaiming-note, and find the pursuers, Elizabeth Wilson or Robertson and her husband John Ivinson Robinson, liable in additional expenses: and remit to the Auditor to tax the account or accounts of the expenses now found due, and to report."

Counsel for the Pursuers—Scott. Agent—J. M. Macqueen, S.S.C.

Counsel for the Defenders—Thoms and Guthrie. Agents—David Forsyth, S.S.C., and Lindsay Mackersey, W.S.

B., clerk.

Thursday, July 17.

FIRST DIVISION.

[Lord Shand, Ordinary.

SIR JAMES FERGUSSON OF KILKERRAN, BARONET, PETITIONER.

Improvement of Land Act 1864, 27 and 28 *Vict. cap.* 114.

This was a petition by Sir James Fergusson, for authority to proceed with an application under the Improvement of Land Act 1864. The petitioner is heir of entail in possession of the lands of Kilkerran and others. By section 18 of the Act it is provided that the Improvement Commissioners shall not "make any provisional or other order, sanctioning the improvement of any land, in the case of which the landowner or the husband of the landowner shall be the father of the person or persons entitled, either at law or in equity, to any estate in such land, or any part thereof, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance, and such person or persons, or any of them, shall be an infant or infants, or a minor or minors, unless or until such an order (of sanction) as hereinbefore mentioned shall be made by such Court (the English or Irish Court of Chancery, or the Court of Session) as aforesaid." The Improvement Commissioner's Inspector, Mr A. Jardine, having reported that the proposed improvements, consisting of drainage, building of workmen's cottages and farm steadings, and planting for shelter, would in his opinion add to the permanent yearly value of the estate an amount exceeding that of the yearly amount proposed to be charged thereon in respect of the improvements applied for, the petition came before the Lord Ordinary (Shand,) who made a remit to Mr H. B. Dewar, S.S.C., who reported in favour of granting the application. The Lord Ordinary thereupon reported the matter to the First Division, who granted the prayer of the petition.

Petitioner's Counsel—Marshall. Agents—J. & T. Anderson, W.S.

ROBERT VANS AGNEW, PETITIONER.

This was a petition of a precisely similar nature to the above, for authority to subscribe for shares in the Wigtownshire Railway Company. The procedure was the same, and the Court granted the application.

Counsel—Campion.
Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 18.

FIRST DIVISION.

[Lords Gifford and Mackenzie.

FOGO *v.* COLQUHOUN.

Teind—Surrender—Over-payment—Prescription.

An heritor holding certain lands in a parish the teinds of which had been valued,—*held* no entitled, by a surrender of his teinds, to free himself of the obligation to continue certain overpayments which had been in use to be made to the minister during the period of prescription.

This was a case which arose in connection with the locality of the parish of Row. Sir James Colquhoun, Baronet of Luss, sought to surrender his teinds. The minister objected.

The following interlocutors were pronounced:—

"*Edinburgh, 4th July* 1871.—The Lord Ordinary having heard parties' procurators, and having considered the condescendence and surrender for Sir James Colquhoun of Luss, Bart., and the answers thereto for the Reverend John Lawrie Fogo, minister of Row, Nos. 65 and 66 of process, with the old localities and proceedings—Finds that for a period greatly exceeding forty years the condescender, the said Sir James Colquhoun, and his predecessors and authors, have, under final decrees of locality, paid to the successive ministers of the parish of Row amounts of stipend considerably exceeding the amount of the value of the teinds contained in the decrees of valuation held by the said Sir James Colquhoun and his predecessors and authors, and now proposed to be surrendered: Finds, in point of law, that the minister of Row, for himself, and his successors in office, has by such prescriptive over-payments acquired a right to insist that said payments shall be continued, notwithstanding the decrees of valuation: Finds that the said Sir James Colquhoun is not entitled by surrendering his teinds to free himself from the obligation to continue to make the over-payments in the same way as has been done during the prescriptive period, and decerns: And before further answer, appoints the cause to be enrolled, with the view of ascertaining the precise amount of the prescriptive over-payments, reserving meantime all questions of expenses.

"*Note.*—It was quite fairly and candidly admitted by the counsel for Sir James Colquhoun that his object in insisting in a surrender in terms of his condescendence and surrender, No. 65 of process, was to free himself in future from all over-payments of stipend, and that notwithstanding that such over-payments had been made under final decrees of locality for a period greatly exceeding forty years.

"It was not disputed that such over-payments had been made for more than forty years, although their precise amount was disputed, and thus the question of law was fairly raised, Whether Sir James Colquhoun, by now surrendering the exact amount of his valuations, can now get rid of such over-payments in all time coming.

"There was a subordinate question, Whether, even supposing that the over-payments are still to continue, Sir James Colquhoun may still, notwithstanding, surrender his valued teind, subject to the continuance of the over-payments. This question, however, is of little importance, being rather a question of form than of substance, and at most only affecting Sir James' liability for a share of the expenses of future localities.

"The Lord Ordinary is of opinion that, by reason of the prescriptive over-payments under final decrees of locality, the minister has acquired a right thereto, and that the heritor is not entitled to shake himself free of his liability by surrendering the mere amount of his valued teind. The Lord Ordinary has thought it better to decide this important point of law by substantive findings, rather than by sustaining the surrender under a