The effect of what the Assessor has done is to leave the valuation of the portion in Drumoak at or about the overhead rate of 25s. an acre, but to reduce the rate of the portion in Peterculter proper to rather less than £1 per acre, and to make the valuation of the portion in the special district (when tested by acreage) a little over £7, 15s. an acre, the increase in the latter case being accounted for by the arbitrary value put on the buildings. The appellant maintains that this is an erroneous principle of apportionment, and that the proper principle is to treat the farm buildings as adjuncts of the land, and to ascertain the value of the portion in the special district by the overhead rate per acre.

The subjects being *bona fide* let for a yearly rent, it is obvious that there is no room for the ascertainment of value apart from the rent. Any valuation of a portion of the subjects must therefore be by way of apportioning the rent, which is necessarily a purely hypothetical proceeding where the lease itself contains no such apportionment. It is certain that the tenant would not have given so much rent if there had been no buildings, but how much less he would have given (or, in other words, how much he put on the buildings) is pure speculation.

I am of opinion that the proper principle is that for which the appellant contends, and which the Assessor himself seems to have followed when the only apportionment required was one between the two parishes. If it could be said that the farm-buildings were of exceptional value and unsuited to the farm, the case might be different, but where, as here, the buildings must be presumed to be ordinary and suitable, it seems to me that they ought to be regarded as a mere adjunct of the land, and that there is no more reason for attempting to put a separate value upon them than for putting a higher value on particular fields because they happen to consist of better land than others. The whole farm is truly one subject. Nor do I think that it makes any difference that the necessity for apportionment is caused by the creation of a special water and drainage district.

I am confirmed in this view by the case of *Henderson*, 11 Macph. 985, where the Appeal Court overruled a proposal of the Assessor to value the dwelling-house and offices of a farm apart from the land. The farm in that case was all in one parish, but there was a higher classification for dwelling-houses than for agricultural subjects as regards poor-rates, and therefore the proprietor (who was also occupier) conceived that he had an interest to dispute the breaking up of the value. The ground of decision was applicable to the present case, viz., that the house was a "necessary adjunct" of the farm.

I am therefore of opinion that the valuation within the Culter Special District should be altered to £11, 9s. 6d., a corresponding increase being made in the valuation within the parish of Peterculter proper.

LORD KYLLACHY concurred.

The following was the interlocutor:—

"We are of opinion that the determination of the Valuation Committee is wrong, and that the apportionment should be made on the principle contended for by the appellant."

Counsel for the Appellant—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Respondent—W. Brown. Agents—Macpherson & Mackay, W.S.

COURT OF SESSION.

Friday, February 26.

OUTER HOUSE.

[Lord Kincairney.

LEE *v.* DUNCAN SMITH & MACLAREN.

Process—Summons—Protestation.

On the expiry of the two sederunt-days after the *inducice* on a summons the defender entered a protestation, which remained in the minute-book for nine clear days, and on the tenth was given out for extract. The pursuer lodged the summons with the clerk to the process on the ninth day, and it appeared in the calling-list on the tenth. Defences were lodged with the plea of no process and no issue. *Held* that the action was competent, as the summons was called before the protestation was actually extracted.

Observations (*per* Lord Kincairney) on the history of protestations and the procedure therein.

This was an action of accounting at the instance of J. B. W. Lee, S.S.C., Edinburgh, directed against Messrs Duncan Smith & Maclaren, S.S.C., Edinburgh. The facts in the case (so far as necessary for the present report) are fully stated in the opinion of the Lord Ordinary.

The defenders pleaded, *inter alia*, (1) No process and no issue.

On 26th February 1897 the Lord Ordinary repelled the defenders' first plea-in-law and continued the cause.

Opinion.—"The defenders have maintained that this action should be dismissed *de plano* because of the pursuer's delay in calling the summons and because of the defenders' protestation in the minute-book. The summons was served on 19th October, and the *inducice* expired on Monday the 26th. The 22nd section of the Court of Session Act authorises a defender to proceed by protestation after the expiry of two sederunt days thereafter, and accordingly the defenders had their protestation entered in the minute-book on 30th October. It is required by practice that the protestation shall remain in the minute-book for nine free days before the defender can take

any further action. These days elapsed on Tuesday, 10th November, and on that day the protestation was 'given out to be extracted.' But on Monday, 9th November, the summons was lodged with the clerk to the process, and on Tuesday, the 10th, appeared in the calling-list; and the defenders maintain that that was an incompetent step, and that the process had fallen. The defenders averred that the warrant to extract the protestation was granted before the summons was called. But that is not admitted, and the defenders urge that it is not material.

"It will be observed that the defenders took out protestation and obtained a warrant for extract on the earliest possible dates. They allowed the pursuer no delay which they could avoid. The plea is extremely technical, and required to be very clearly established. The action may be well founded on the merits, or it may be plainly irrelevant. I have not given that any consideration, but of course I am reluctant to throw it out on a mere technicality; and the defenders have not satisfied me that I am bound to do so.

"There is considerable obscurity about the law and practice about protestations. They depend in part on custom and in part on statute.

"The defenders referred to the 30th section of the Act of Sederunt, 11th July 1828. It is not of much consequence. It of course assumes a settled practice and requires the keeper of the minute-book to score (as it is called) a protestation 'on production to him (before a warrant is issued for extract of the protestation) of a certificate from a depute-clerk of court or his assistant that a summons has been duly lodged with him for calling.'

"The 23rd section of the Court of Session Act 1850 is of more importance. It provides that where protestation is put up in the minute-book of the Court of Session 'and warrant is issued for extract thereof' . . . 'such extract shall contain a decerniture for £3, 3s. of protestation money as expenses: Provided always that a pursuer may be reponed against a protestation for not calling at any time not later than ten days after the same has been given out for extract, whether extract shall have been issued or not, by lodging with the clerk, in order to calling, his summons' along with the receipt of the agent of the defender for the sum of £3, 3s.

"Section 22 of the Court of Session Act 1868 does little but sanction and continue the former procedure.

"These are all the statutory regulations which were referred to, and it is to be observed that none of them state what is to be the effect of putting up protestation, or state, unless inferentially, that the right to call the summons shall be lost by a warrant to extract or by an extract. There may be some earlier Act of Sederunt regulating this matter, but it was not referred to. So far as I know the penalty which I am called on to enforce is not provided by statute.

"Looking back to the origin of this procedure I find that it is of very old standing indeed. It is a remedy against the annoyance and inconvenience to a defender of being liable to be called at any time within a year and day to answer in Court to an action which has been served on him, and, as may be supposed, such a remedy was allowed from very early times. It is said by Erskine (iv. 1, 7) to have been established by custom. It is treated of expressly in Balfour's Practices, p. 296, c. 10 and 13, and at some length by Lord Stair (iv. 1-6), who mentions two remedies which were open to a defender—he might appear at the second diet and protest that he should not be called on to appear again unless he was cited of new; but his more complete remedy was to bring a counter action calling on the pursuer to proceed under certification that if he did not he should not be heard thereafter in that action.

"I do not know by what steps this somewhat onerous judicial procedure was modified into our present practice. It remains, however, still, as formerly, judicial procedure. The authority of the Court through the medium of a Clerk of Court is required for the admission of a protestation into the minute-book of the Court of Session, and the extract of it contains a decerniture for expenses.

"The present procedure is explained in Beveridge's Forms of Process, i. 270; Lord Ivory's Practice, i. 188; Shand's Practice, i. 277; and Mackay's Manual, 215. Beveridge explains that the period during which the protestation must be in the minute-book was settled by practice, and that it was allowed in order to secure that a pursuer should be certiorated that a protestation had been lodged against him. Lord Ivory seems to have been of opinion that, after warrant for extract had been issued, extract might be prevented by the pursuer producing his summons and paying expenses. But in the case of *Graham* v. *Boosie*, March 9, 1831, 9 S. 566, it seems to have been held by the majority of the Court that, after a warrant for extract had been given out, it did not signify whether extract had been actually issued or not, and that is the view of the law on which the 23rd section of the Act of 1850 seems to proceed. Mr Mackay says that after extract, if there has been no reponing within the ten days, the instance is at an end. Although I find no express statutory provision that the instance in an action may be destroyed through protestation, yet, of course, it is or was familiar enough in practice that that consequence happened after extract of protestation. There are not many examples reported, but I may refer to *Sceales* v. *The Commercial Bank*, February 4, 1839, 1 D. 465, where protestation was extracted for behoof of certain of the defenders which was held to destroy the instance against these defenders while leaving the instance against the other defenders unaffected, and the result was that the pursuer was compelled to raise a supplementary summons against the former defenders.

"No case has been quoted to me in which the instance in a summons has been held

to have fallen through protestation where the protestation has not been extracted. But looking to the case of *Graham* v. *Boosie*, and the terms of the 23rd section of the Act of 1850, I have little doubt that that might happen. But in considering the meagre authorities on the subject and the object of the procedure, I am not satisfied that it is imperative to inflict the penalty in every case in which it might competently be inflicted. I think there is room for excuse and for judicial discretion, and in this particular case I doubt whether any previous practice or authority would warrant the dismissal of the action, and I think that I am not bound to dismiss it.

"Protestation is put up not to destroy a pursuer's action but to force it on. So long as it is in the minute-book it is a continuous demand on the pursuer to lodge his summons for calling, and if the pursuer calls the summons, that is in compliance with the defender's demand. A great deal is said by the writers on this point about scoring the protestation. So far as I can learn, that so-called scoring is effected by a marking on the entry in the minute-book that a certificate of the production of the summons with a view to calling has been exhibited, and the consequence of such a marking is that the keeper of the minute-book will not, after having made that entry, give warrant for extracting the protestation. But I find no ground for holding that the mere entry of a protestation will, while unscored, prevent the calling of a summons. The defenders could not object to it since it is just what they profess to desire. However, no doubt after the nine days have run, the position is different to this extent—that the defenders can manage to extract from the pursuer £3, 3s. of expenses. But it is to be noticed that scoring of the protestation is to be effected by the certificate that a summons has been lodged for calling. Now, in this case that summons was actually lodged for calling on the Monday, and it was from inadvertence, through ignorance, that this was not intimated to the keeper of the minute-book on the Monday (if that can be done on a Monday) or at the latest early on Tuesday morning. If that had been done, then the warrant to extract would not have been issued. In fact the summons was lodged with the Clerk of Court within the days allowed.

"The protestation was in substance satisfied. The default was not in failure to lodge the summons, but only in failure to intimate to the keeper of the minute-book that it had been lodged, and I doubt whether, after that, a warrant to extract would be effectual.

"There was nothing but a blunder—no culpable delay—and I have been referred to no authority or precedent for dismissing an action in such circumstances."

Counsel for the Pursuer—A. M. Anderson. Agent—Party.

Counsel for the Defenders—Kemp. Agent—Party.

Tuesday, March 16.

SECOND DIVISION.

[Lord Low, Ordinary.

MALCOLM *v.* DUNCAN.

Reparation — Wrongous Apprehension — Apprehension without Warrant.

A woman who was innocently in possession of stolen property was apprehended without a warrant by a police officer, who had been sent to her house to make inquiries, and taken by him to the police office, where after examination she was discharged. She afterwards brought an action against the police officer for wrongous apprehension.

Averments which *held* (*rev.* judgment of Lord Low) irrelevant to entitle the pursuer to an issue.

Reparation — Slander — Police Officer's Privilege.

A woman who was innocently in possession of stolen property was apprehended without a warrant by a police officer, who along with another had been sent to her house to make inquiries. In an action of slander raised by her against the police officer, the pursuer averred that the defender on the way to the police office repeatedly stated in a loud voice, in the hearing of the other police officer and of the pursuer's two sons, and of persons passing in the street, that the pursuer was the resetter and her son the thief of the stolen property.

Held (*rev.* judgment of Lord Low) that the pursuer was not entitled to an issue.

Mrs Teresa Kussick or Malcolm, wife of and residing with James Malcolm, cabman, 10 Brown Square, Edinburgh, with consent of her husband raised an action for £500 damages against William Duncan, a detective officer in the Edinburgh Police.

The pursuer averred—"(Cond. 2) About ten o'clock on the night of 18th December 1896 the pursuer's son John Malcolm, a boy aged twelve, found in Guthrie Street, Edinburgh, among some refuse, a number of clinical thermometers. Several of them had been broken, but there remained ten whole ones. These he picked up and carried home. On the way home he gave one to a girl, Emily Sutherland, who also resides at said No. 10 Brown Square, and after he got home he handed the remaining nine to the pursuer, who showed them to her husband. The pursuer and her husband did not know what the articles were or whether they were of any value, but it was arranged that the pursuer's husband should on the following day take them to Mr Hume, instrument maker in Lothian Street—the said James Malcolm's stance being in College Street adjoining — to ascertain whether they were of any value. It was the intention of the pursuer and her husband, if the found property were of any