fore I am for decerning against him for payment of the legal interest of that sum. But farther, the second conclusion of the summons demands payment of £1 per annum during the time that this road is kept in an unfenced state. The road being now in the hands of the trustees, we may suppose it either has now been or will be duly fenced. The defender admits that if anything is due by him under this conclusion, the amount claimed is not unreasonable, and accordingly I am for decerning against the defender for this also.

The other judges concurred.

Expenses were given to the pursuer since 12th December last, at which date she was found entitled to the previous expenses of the cause.

Agent for Pursuer—W. N. Fraser, S.S.C.

Agent for Defender—J. C. Baxter, S.S.C.

Wednesday, December 11.

SECOND DIVISION.

M'DOUGALL *v.* BUCHANAN.

Landlord and Tenant—Obligation to Stock adequately —Obligation to cultivate according to rules of good husbandry—Sublet—Landlord's hypothec. Held, (1) that a tenant is bound to stock his farm adequately, and to cultivate according to the rules of good husbandry, (2) that the stock must be the property of the tenant himself, as otherwise the landlord has no security that he can make his hypothec available.

This is a suspension of a decree of the Sheriff-court of Dumbartonshire pronounced in an action in which Mr Buchanan of Auchentorlie was pursuer, and his tenant in the farm of Dunerbuck was defender. The object of the action was to compel the tenant to stock his farm properly, and to cultivate according to the rules of good husbandry, and was based on the allegation that the pursuer had on his farm only three cows and one calf belonging to hmself.

The following were the conclusions of the action raised in the inferior court:—"Therefore the defender, who is tenant under the pursuer on a lease for fourteen years from the separation of the crop of 1854 as to the arable land, and from the term of Whitsunday 1855, as to the houses and grass, of the farm of Dunerbuck, as formerly possessed by John Paterson junior, and of the upper pasture parks of Auchentorlie, immediately above the arable land behind the farm-steading, being the upper part of Auchentorlie farm, formerly possessed by John Paterson senior, both situated in the parish of West Kilpatrick and county of Dumbarton, in virtue of missive letters of set between the said defender and pursuer's factor, dated 5th October 1854, and who has only three cows and a calf, his own property, on said farm, which is an inadequate stock for a farm of the extent of Dunerbuck and the other lands foresaid, or, at least, has not a sufficient stock, his own property, on said farm and lands—ought to be decerned and ordained instantly to stock and plenish the said farm and lands to an adequate extent, as also to cultivate the same according to the rules of good husbandry, as practised in the best cultivated districts of Scotland, and to labour and manure, so as not to run out or impoverish the same, and to perform the whole conditions and provisions incumbent on him in these respects, under the said missive letters of set, or at common law or otherwise."

The farm was a grass one. The defender did not say he had more stocking than was alleged by the pursuer, but maintained that there was enough plenishing on the farm otherwise to meet the landlord's hypothec.

The Sheriff-substitute (STEELE) repelled the defences. His Lordship pronounced the following interlocutor:—

"The Sheriff-substitute having heard parties' procurators *viva voce*, and resumed consideration of the process: Finds that the defender is tenant under the pursuer of the farm of Dunerbuck, and certain other lands, in virtue of missive letters of lease between the defender and the pursuer's factor, dated 5th October 1854, and produced in process: Finds that the object of this action is to have the defender decerned to stock and plenish the said farm and lands to an adequate extent, and also to cultivate the same according to the rules of good husbandry, and to perform the whole conditions incumbent on him under the said missive letters of lease? Finds, for the reasons set forth in the annexed note, that the defences stated to this action by the defender are insufficient and untenable, and therefore repels the same, and decerns and ordains the defender, at the sight of Mr James Wilson, factor for Lord Blantyre, instantly to stock and plenish the said farm and lands to an adequate extent, and also to cultivate the same according to the rules of good husbandry, and in terms of the conclusions of the summons: Finds the defender liable in expenses, appoints an account thereof to be given in, and remits to the auditor to tax the same and to report, and decerns.

"W. C. STEELE."

"*Note.*—In the minute of defence upon which the record was closed, the defender states, as a preliminary defence, that the summons is irrelevant and incompetent; but he does not explain upon what grounds. At the debate, however, he maintained that the summons ought to have distinguished the portions of the farm that are arable from those that are grazing or pastural, and specified also the extent of each. But it is obvious that to do this would in many cases be difficult, if not impracticable, and no adequate benefit, as it would seem, would result from it. But, in addition, it may be stated that, so far as has been ascertained, the summons in this case has been framed according to the style uniformly used in practice, and which is given in the style-books generally consulted.

"The defender also maintained that the summons ought to have concluded for the removing of the tenant from the farm, in the event of his failing to stock. But this is a mistake. In the case of *Horn* v. *Maclean*, 19th January 1830, it was decided that where the action is not founded on the Act of Sederunt, or on a conventional irritancy, the Sheriff has no power to decern the tenant to remove; but he may ordain the tenant to stock his farm where the action, as in the present instance, concludes simply for stocking.

"As regards the merits, it will be observed that the defender, in his minute of defence, does not deny the averment in the summons, that there is upon this farm only three cows and a calf *belonging to himself*. The defender's practice appears to be to let out the lands to other parties for grazing, and thus, though there is a sufficiency of cattle upon the farm, these do not belong to the defender, and do not therefore form any security to the landlord for the rent. Indeed, it would seem that nothing

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-