would appear that during this period the inhabitants of both houses had given up the use of the east-end entry, probably from its having been devoted to purposes inconsistent with its use as a passage. The defender's predecessors got their own access by the passage through their own house; and it is not difficult to suppose that the predecessors of the pursuers obtained a participation in this privilege just through that neighbourly tolerance by which a man's neighbour, as well as himself, gets the benefit of a short cut and the avoidance of the necessity of going round the corner. And there then follows that most important fact, that for about thirty-two years posterior to 1828 the occupants of the pursuers' house had no other passage to the back ground than that very east-end entry, which *prima facie* is that which was given to them by the deed of 1794. They say, indeed, that this was all the result of forcible extrusion, but it may be as fairly represented to have been the result of a full conviction that no other right legally belonged to them but by the east-end entry. The property passed through various owners in this period. Russell sold it to William Johnston in 1836; Johnston to Alexander Eddie in 1845; Eddie in 1847 to John Sutherland, from whom the pursuers purchased it in 1859. In the three first mentioned transmissions the house is conveyed with "the privilege of the *present* entry to the said backhouse," which could mean nothing else at these different periods than the entry at the east-end of the defender's house. No attempt was made to set up a different servitude till the pursuers, immediately after their acquisition of the property, raised the present action, on 16th April 1860. On a view of the whole evidence, it seems to me that the only sound conclusion at which to arrive is that of the Sheriff-Principal,—that the pursuers have failed to bring sufficient legal evidence of the constitution of the alleged servitude.

On the assumption of this view being correct, it is unnecessary to consider the second question raised in the case, viz., whether the servitude was renounced, for there can be no renunciation of a non-existent servitude. I have formed hypothetically an opinion, but I say no more than that, on this point, I should find great difficulty in coming to any different conclusion from that of the Lord Ordinary. The practical result of my opinion is an adherence to the Lord Ordinary's interlocutor, so far as it assoilzies the defender, although on a different ground from that relied on by his Lordship.

LORD PRESIDENT concurred with the majority.

Agents for Advocators—Neilson & Cowan, W.S.

Agents for Respondent—Wilson, Burn & Gloag, W.S.

Wednesday, February 24.

MILLER *v.* HENDERSON.

Assessment—General Police Act—Burgh having a Police Act—Jurisdiction. Circumstances in which the Commissioners of Supply of a county were held not entitled to levy police rates on a burgh, the burgh being a burgh having a Police Act.

The exclusive jurisdiction conferred on Sheriffs by the General Police Act, is limited to assessments under the Act.

By the Act 7 and 8 Vict. c. 52, intituled "An Act to explain and amend the Acts incorporating the British Society for extending the fisheries, and improving the sea-coasts of the kingdom; for enlarging and improving the harbour of Pulteneytown, in the county of Caithness, and for lighting, cleansing and improving the said town, and better supplying the same with water," Commissioners were appointed for carrying into execution the said Act, so far as regarded the purposes of cleansing, lighting, watching, and improving the town of Pulteneytown, and entered upon the execution of their duties under the Act. Subject to certain modifications introduced by the Act 20 and 21 Vict. c. 93, the Commissioners continue in the due exercise and discharge of the powers and duties conferred and imposed on them by the said Act, 7 and 8 Vict. c. 52. By the 250th section of the said Act, 7 and 8 Vict. c. 52, it is enacted that "it shall be lawful for the said Commissioners from time to time to agree with the Commissioners of Supply for the county of Caithness, acting under an Act passed in the Session of Parliament held in the second and third years of the reign of Her Majesty Queen Victoria, intituled an Act to amend the mode of assessing the Rogue Money in Scotland, and to extend the purposes of such assessment for the appointment of such number of constables by the said Commissioners of Supply, or by them and the Commissioners hereby appointed, jointly, as may be necessary for the proper protection of the inhabitants and property within the limits of this Act; and, failing such agreement, it shall be lawful for the Commissioners under this Act to appoint such constables and other officers, and to allow them such salaries or wages as they shall think proper; and it shall be lawful for the Commissioners from time to time to remove any such constables or officers as they shall think fit; and, in the event of the salaries or wages of such constables and officers under this Act being paid by the Commissioners, it shall not be lawful for the Commissioners of Supply to assess, for the purposes of the said last mentioned Act, any lands, houses, or heritages within the limits of this Act." The Pulteneytown Commissioners and the Commissioners of Supply for the county of Caithness having failed to agree for the appointment of constables, the former body, in terms of said 250th section, appointed in the year 1845, and have ever since maintained, such constables, allowing them certain salaries or wages.

In July 1868 Mr Henderson, Treasurer to the Commissioners of Supply for the county of Caithness, and collector of the assessments levied under the Act 20 and 21 Vict. c. 72 (General Police Act), issued a certificate including the Pulteneytown Improvement Commissioners as liable for police assessments, and a warrant thereon was granted by the Sheriff. The Pulteneytown Commissioners brought this suspension, contending that Pulteneytown was a town which had a Police Act, viz., 7 and 8 Vict. c. 52, and was in the sense of the Act 20 and 21 Vict. c. 72, a "burgh" within said county, and that it was *ultra vires* of the Commissioners of Supply to impose the said assessment.

The respondents contended that Pulteneytown was part of the county of Caithness, and was not a burgh within the county. They pleaded—"(1) The subject of this action being a dispute between the complainer and the Commissioners of Supply, relative to the police assessment leviable under the Act 20 and 21 Vict. c. 72, the Sheriff of Caithness is the only competent judge in the cause, and this application to the Supreme Court should be dismissed. (2) The lands and heritages in Pulteneytown, belonging to the Pulteneytown Im-

provement Commissioners, upon which the assessment complained of has been imposed, being part of the county of Caithness, the Commissioners of Supply of that county are under the statute entitled and bound to assess said subjects for the maintenance of the police force of said county."

The Lord Ordinary (BARCAPLE) sustained the reasons of suspension, adding this note:—"The exclusive and final jurisdiction given to the Sheriff by the General Police Act, 20 and 21 Vict. c. 72, sect. 33, is only in regard to disputes relating to assessments under that Act. The sole question in the present case is, whether the Commissioners of Supply had power by that Act to make any assessment at all within Pulteneytown. This is quite different from a dispute relating to an assessment admittedly made under the Act, where the question is as to amount, regularity of procedure, or some similar matter. The Lord Ordinary has no hesitation in repelling the objection to the jurisdiction.

"The power of the Commissioners of Supply to assess for police purposes is limited by section 29 of the General Police Act to lands and heritages within the county. By the interpretation clause, sect. 78, the word 'county' includes all burghs and places within the county, not being a burgh or town which has a Police Act, or an establishment of police under the provisions of the Act 3 and 4 Will. IV, c. 46, or 13 and 14 Vict., c. 33. The word 'burgh' is interpreted to mean a royal or parliamentary or other burgh or town which has a Police Act, or an establishment of police under either of the last mentioned Acts. Pulteneytown has not come under either of these Acts, and the question is, whether it is a town which has a Police Act? If it is, then it is not, in the sense of the statute, part of the county of Caithness, within which alone the Commissioners of Supply have power to assess."

"The Lord Ordinary thinks that the local Act founded upon by the complainer must be held to be a Police Act. It makes provisions in regard to other matters, but by sect. 250 it gives power to the Pulteneytown Commissioners to appoint constables for the protection of the inhabitants and property within the limits of the Act, with the necessary powers of control and dismissal. By sect. 251 they have power to provide watchhouses and lock-up houses. The Act creates a number of police offences, for which it enacts penalties. It also gives the Commissioners power for lighting, cleansing, improving, and bringing water into the town. And they are empowered to levy rates for carrying all the purposes of the Act into effect. These are generally the powers which are to be found in the Police Act of a town which, not being a burgh, has not a magistracy of its own. The criminal jurisdiction in reference to police offences is necessarily vested in the Sheriff and Justices of the Peace.

"By section 250 the Pulteneytown Commissioners are empowered to agree with the Commissioners of Supply for the appointment of such number of constables as may be necessary for the proper protection of the inhabitants and property within the limits of the Act. The section proceeds,—'failing such agreement, it shall be lawful for the Commissioners under this Act to appoint such constables and others officers, and to allow them such salaries or wages as they shall think proper.' There is no ground on which it can be alleged that this material provision of the statute has been in any way repealed or set aside. As admittedly no agreement has been entered into by the Pulteneytown Commissioners with the Commissioners of Supply, the former are empowered by their Act to appoint and pay 'such constables,'—that is, referring to the immediately preceding context, such number of constables—as may be necessary for the proper protection of the inhabitants and property. The respondent founds upon the circumstance that the Commissioners of Supply are described in the clause in question as acting under the Act 2d and 3d Vict. c. 65, the first statute by which they were empowered to assess for the establishment of the county constabulary. But it is unnecessary to consider whether the clause would not authorise an agreement with the same body of Commissioners of Supply now acting as to police assessments under the enlarged and improved provisions of the present Police Act. Whether such an agreement would be lawful or not, none has been come to, and in that state of matters the Pulteneytown Commissioners have undoubtedly power to appoint and pay a police force for the town.

"The 250th section concludes with a provision that, in the event of the salaries of the constables being paid by the Pulteneytown Commissioners, it shall not be lawful for the Commissioners of Supply to assess for the purpose of the Act 2d and 3d Vict. c. 65, that is for police purposes, within Pulteneytown. The respondent founds on this as showing that Pulteneytown was not treated as having a Police Act, on the ground that otherwise such a provision would have been altogether unnecessary, inasmuch as by section 3 of 2d and 3d Vict. c. 65, the Commissioners of Supply were not entitled to assess within any town having a Police Act. It was quite natural that a special provision on the subject should be inserted in the local Act for the greater security of the inhabitants, and any argument founded on that fact does not appear to be of much force. But the Lord Ordinary does not think that it was an inappropriate or altogether unnecessary provision; looking to the enactment as to an agrement being entered into between the Pulteneytown Commissioners and the Commissioners of Supply for the appointment of constables, who were to be appointed either by the Commissioners of Supply or by both sets of Commissioners jointly under such an agreement, the Commissioners of Supply might have had power to assess if they were to pay the constables, but it was specially provided that in any case, whether there should be an agreement or not, they should not have power to assess if the Pulteneytown Commissioners paid the constables.

"The case of the *British Fisheries Society* v. *Henderson*, 4 Macph. 492, does not seem to throw any light on this question."

The Commissioners of Supply reclaimed.

MILLAR and J. MARSHALL for reclaimers.

GORDON and BLACK for respondent.

At advising—

LORD PRESIDENT—It is very probable that the arrangements for the preservation of the peace in Pulteneytown are not satisfactory, but we have no jurisdiction to consider that. The single question is, whether the Commissioners of Supply for the county of Caithness are entitled in virtue of an Act of Parliament to impose a police assessment on the inhabitants of Pulteneytown?

The Act on which they found as their authority is the General Police Act, 20 and 21 Vict., establishing the county constabulary; but to understand the present position of matters, two other statutes must

be attended to. The first is the Local Act of 7 and 8 Vict. c. 52, and the second is the statute then in operation regulating the police force. Now, the Act 7 and 8 Vict. c. 52, has provisions as to all those things which form the subject-matter of a Burgh Police Act. I cannot find that any of these things are omitted. There are provisions for cleansing and lighting the town, provisions imposing penalties for various police offences, and for securing the purity of the water, and for various other sanitary purposes. In short, with the exception of the appointment of constables, which is provided for by the 250th section, this looks like a complete Burgh Police Act, just like others which we are in the habit of seeing. But undoubtedly there is a peculiarity as to the constitution of the police force, for the 250th section provides that it shall be lawful—(*reads* section). Here an alternative arrangement is permitted. Either there is to be an agreement between the Commissioners of Police and the Commissioners of Supply for the county for the appointment and payment of constables, or, if there is no such agreement, then the Police Commissioners themselves are authorised to appoint constables, and in fact we see that the latter alternative was adopted. From the time this Act passed the Commissioners of Police have always appointed and paid the constables of Pulteneytown. So that, under this Act, as thus carried into execution, it seems that the Commissioners of Pulteneytown are in the same position as the Police Commissioners of any other town where there are no magistrates. Then comes the third Act, 2 and 3 Vict. c. 65. Section 3 of that Act provides that the Commissioners of Supply "shall not be entitled, for the purposes of this Act, to assess any lands, houses, or other heritages situated within the boundaries of any royal burgh, or to assess any lands, houses, or other heritages situated within the boundaries of any burgh or town which either has a Police Act, or which has taken the benefit of an Act passed in the 3d and 4th year of the reign of his late Majesty King William IV, intituled an Act to enable burghs in Scotland to establish a general system of police." It is clear that if there had been no proviso at the end of section 250 of the Local Act, to the effect that the Commissioners were not to assess any lands and heritages in Pulteneytown unless they pay the constables, the very same result would have been operated by the 3d section of the public Act. I think the argument founded on the presence of that part of the 250th section is not well founded, for, though unnecessary, it was a very natural provision. To remove any doubt, it was very expedient to insert this provision, that if the county did not pay for the constables, they were not to assess for their payment. So stands the matter till 1844, when the local statute was passed. But the existing Act regulating the county constabulary forms the immediate title of the respondents to lay on the assessment complained of. The question is, whether Pulteneytown is excepted from its operation? That depends on clauses 54 and 78. Section 54 provides that, on the appointment of constables under this Act in any county, the power to appoint and pay, and to make assessments for paying, any constables, under the provisions of any Act (except as regards any burgh within such county), other than this Act, shall cease and determine. The effect of this is, that the whole limits of the county are to be brought under this Act. No other is to be used as either setting up a constabulary or assessing for the expense, except this. From the operation of this clause is excepted any burgh within the county. What is a burgh within the county? We find that from the interpretation clause, by which the word "burgh" is interpreted to mean a royal or Parliamentary burgh, or a burgh or town which has a Police Act, or an establishment of police under 3 and 4 Will. IV. c. 46, or 13 and 14 Vict. c. 33. Now, is Pulteneytown a town which has a Police Act? I think Pulteneytown has a Police Act, for I cannot understand a term more expressive of the Act 7 and 8 Vict. than "Police Act." It is a Police Act to all effects, and especially as carried into execution, for not only are all the other purposes provided for, but the very appointment and payment of constables is vested in the Police Commissioners of Pulteneytown. Therefore, the argument in favour of this assessment cannot be sustained.

But there is another point raised which is of rather a peculiar nature, and which I have reserved to the end, because it is better understood after we know the merits. It is said, Suppose that the Commissioners of Supply have erred, this Court has no jurisdiction to deal with the matter. That depends on the 33d section of the Act 20 and 21 Vict. c. 72, which provides that any dispute which may arise between the Commissioners of Supply of any county and any person or persons acting under them, on the one part, and any person holding himself aggrieved on the other, relating to any assessment of rogue money, or any police assessment under this Act, which it may be competent or convenient to try and determine in the Sheriff Small Debt Court, shall be determined in a summary manner by the Sheriff of the sheriffdom in which such dispute shall arise, or of the sheriffdom the Commissioners of Supply of which have laid on such assessment, and such Sheriff shall, on a written petition being presented to him by either of the said parties, appoint them to appear before him, and shall then investigate the matter in dispute in such way as he shall think proper, and decide the same summarily, and such decision shall be final, and shall not be liable to appeal, or to suspension, advocation, or reduction, or any other form of review. It is under the first part of the section that the plea is taken, and the question is, whether the dispute between the Commissioners of Supply of the county of Caithness and the Commissioners of Police of Pulteneytown is a dispute of the kind contemplated by this section? I think it is not. The question is, whether the assessment is an assessment under the Police Act 20 and 21 Vict.; or, in other words, whether the Commissioners of Supply are not going out of their county, assessing lands and heritages beyond the limits of their county? For while this Act defines "burgh," it also defines "county," and "county" is to embrace all burghs not having a Police Act, but does not embrace towns having a Police Act. Therefore, for the purposes of this Act, Pulteneytown is not within the limits of the county, so that the excess of power committed by the Commissioners of Supply is not different in kind from what it would have been if they had proposed to assess a house in the city of Edinburgh. The latter case would of course be less susceptible of argument, but in kind it is not different, and therefore the reason why the objection to jurisdiction cannot be sustained is, that this is not an assessment under this statute, and therefore not prohibited by the operation of the statute. I therefore come to the conclusion that the Lord Ordinary is right.

The other Judges concurred.
Agent for Complainer—D. Curror, S.S.C.
Agent for Respondent—G. L. Sinclair, W.S.

Wednesday, February 24.

SECOND DIVISION.

MINISTER OF KILMORACK *v.* CHISHOLM BATTEN.

Teinds—Final Locality—Valuation of Teinds—Decree of Valuation—Reservation of Locality as an interim *Rule of Payment—Minister's Stipend.* A heritor who was localled for a certain amount of stipend in a final locality afterwards led a valuation of his teinds, and ultimately obtained a decree reducing the locality. The decree of valuation contained an express reservation of the force of the locality as an *interim* rule of payment, and no new locality has been made up. *Held* that the minister was entitled to his stipend, in virtue of the reservation in the decree of reduction, according to the old locality.

By the final locality of the parish of Kilmorack. the defender, Mr Chisholm Batten, was localled upon for a certain amount of stipend. Having thereafter led a valuation by which his teind was fixed at a less sum than that localled, he brought a reduction of the locality. This reduction contained no conclusion for having a new locality made up, and decree of reduction was accordingly granted, reserving the force of the locality as an *interim* rule of payment till a new locality should be obtained. No new locality has yet been obtained, and, in these circumstances, the minister now sues Mr Chisholm Batten for his stipend according to the old locality.

In defence, it was pleaded (1) that the action was incompetent, because, if the decree of locality was good, it authorised a direct charge upon letters of horning; (2) that the action was bad upon the merits, in respect it sought to make the heritor liable in more than the amount of his teind as fixed by the valuation, which was not a result within the powers of the Court, notwithstanding of the reservation in the decree of reduction, which the defender pleaded was *ultra vires* and incompetent.

The Lord Ordinary (ORMIDALE) held the action incompetent, adopting the defender's plea to that effect. The following is the Lord Ordinary's interlocutor:—"*Edinburgh, 24th November* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Sustains the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses; allows them to lodge an account thereof, and remits it when lodged to the auditor to tax and report.

"*Note*—It was not disputed that the pursuer could have proceeded at once to enforce payment of the sums of money he now sues for, by diligence under the decree of modification and locality already held by him; and it was conceded by the pursuer that it would be incompetent for a party holding an ordinary decree of this Court for a debt to institute a second action in order to obtain another decree for the same debt. It appears to the Lord Ordinary that it is also incompetent for the pursuer to seek by the present action to obtain a decree for payment of sums of money which have been already constituted in his favour, although not at his instance, by a decree of the proper Court, in virtue of which diligence is just as available to him as it would be by the decree he has concluded for in this action.

"Letters of horning at the instance of ministers holding decrees of locality and modification, are by the Act 1633, cap. 8, authorised to be issued, under which a charge of payment within ten days may be given; and, by Act of Sederunt, 22d June 1687, it is declared that 'where a decree of locality is obtained by a minister for his stipend, any succeeding minister needs not obtain a decree conform thereupon, but upon a bill given in by him to the Clerk of the Bills in the ordinary way, and production of his presentation, collation, and institution, with the decree of locality obtained by his predecessor, letters of horning may be direct against those liable in payment of his stipend, notwithstanding any form, custom, or practice to the contrary.' There can be no doubt, therefore, that the pursuer might, without the necessity of any action such as the present, have proceeded with diligence on the existing decree of locality to enforce payment of the sums in question, and why he did not do so does not appear, and has not been explained.

"The only ground on which the pursuer supported the present action was, that under a decree of modification and locality, differing, as he said, in this respect from an ordinary decree of the Court of Session, diligence would be incompetent at the instance of his assignee or other representative, as found in the old case of *Livingstone*, 17th December 1612, Mor. 10,320; but to this it seems sufficient to answer that the present action is not at the instance of an assignee or other representative. Besides, the case of *Livingstone* having occurred prior to the Act of Parliament and Act of Sederunt above referred to, cannot be treated as of authority in the present discussion, the more especially when the provisions of the Personal Diligence Act, 1 and 2 Vict. c. 114, are kept in view. By section first of that Act provision is made for decrees in the Court of Session, Teind Court, and Court of Justiciary, containing warrants to arrest and poind; and by section seventh provision is made for any person acquiring right to such decrees either by 'assignation, confirmation, or other legal evidence of such acquired right,' to have diligence at his instance, in virtue of them, to the same effect as the original creditor therein.

"The Lord Ordinary, for the reasons now adverted to, has been unable to see any sufficient ground for sustaining the present action. He thinks that to have done so would be acting contrary to the obvious policy of the enactments bearing on the matter, and be productive of unnecessary litigation and expense. In the present instance, the pursuer, through his counsel, stated, in answer to an inquiry by the Lord Ordinary, that he not only did not depart from, but insisted in his conclusion for expenses against the defenders; and this just shows that the defenders have a material interest in resisting the action, and maintaining that it should be dismissed."

The pursuer reclaimed.

The Court recalled the Lord Ordinary's interlocutor, sustained the competency of the action, and continued the cause to be heard on its merits.

CLARK and WATSON for pursuer.

LEE and MACKAY for defender.

After argument upon the merits, the Court held that the heritor having taken his decree of reduction subject to the reservation contained in it, that reservation must receive effect; that, in virtue of the reservation, the old locality subsisted as an *interim*