ent as it is with the statutes and decrees-arbitral, which could be suggested in the practice of the Sub-Commission. It was in a measure forced upon the High Commission, who had no public officer like the procurator-fiscal of the Sub-Commissioners, to come in place of the parties interested in the teinds, who might prove negligent or recusant in appearing before them, or in leading their respective proofs.

Before the High Commission, if the titular, who in the valuation of drawn teind had the sole direct proof, was refractory and would not go on, the Court had no other remedy but to allow the heritor to exclude him by a certification, and then to lay before the Court the only other evidence which could be given on the subject, by proving the rent of the stock. The Court were obliged to resort to this irregular mode of valuation, unfavourable as it must be to the titular, in *pœnam* of his default, and in order to prevent a complete obstruction of their functions.

But the Sub-Commission lay bound under no such embarrassment. They were perfectly independent of the parties interested; and through their procurator-fiscal were empowered to expiscate all the matters necessary to comply with the injunctions of the statute as to valuations. When that officer's powers were called into action (as they were in the present instance) by the absence of the parties interested, he was entitled to take the place both of the titular and of the heritors. He was held entitled to represent both, and to carry on the valuation independently of both. The idea, that in such a case the procurator-fiscal, as representing the heritor, could take certification against himself for default as representing the titular, and, by so doing, entitle himself to deviate from the statutory rules of valuation, is simply absurd.

Another and a later cause for adopting this anomalous mode of valuation, was the *impossibility* which occasionally occurred of ascertaining the value of the teind in either of the modes prescribed by the statute. This occurred where, although the teind had been drawn, no proof could be led of its amount. In such cases the Court were forced to resort to the rent of the stock alone. The leading case in which this anomalous course was followed is the case of *Gordon* v. *Dunbar*, 17th November 1744. The report of this case, given by Lord Elchies, shows the difficulty the Court felt in adopting the anomalous rule, even when it seemed impossible from circumstances, to follow either of the statutory modes. And the subsequent cases ascertain the determination of the Court never to adopt it unless in cases of proved necessity. The case of *Sommerville* v. *Earl of Lauderdale*, 4th August 1773 (M.D., 15,764), shows the hesitation of the Court in adopting this anomalous rule, even when the only alternative was to lead a proof of what stock and teind *were worth*. For in that case, whilst the titular had led an insufficient proof of his drawn teind, the heritors' proof was equally rejected, because it was "confined to the stock, distinct from the teind, whereas it should have extended to both."

In reference to the reports of the Sub-Commissioners, it cannot be affirmed that there is any case in which, where the point has been raised, the High Commission have ever approved a report setting forth merely the rent of the stock *bye the teind*.

The penal certification against the titular which was introduced by the High Commission into its own practice, of which the earliest instance occurs in 1634, can never be held applicable to a report of the Sub-Commissioners in 1630. It may well be doubted whether, under any circumstances, the Sub-Commissioners could be justified in acting upon such a penal certification. But what is still more conclusive is, that there is nothing in their report to indicate that the titular had been at all in default. The report, in so far as it relates to the two parishes of Urwall and Kinross, embraces the proceedings of but a single day. No diet of proof is said to have been given, or, as it is expressed, no term was assigned to any one, except to the procurator-fiscal. He adduced the whole of the witnesses that were examined. And therefore the idea of a certification against the heritor is out of the question.

As to this second reason for admitting the anomalous mode of valuation—viz., the impossibility of following out either of the two statutory modes—it may be plausibly argued that, had a case of such impossibility occurred and been duly set forth in the report of the Sub-Commissioners, the High Court, had they thought the proof sufficient, might have acted upon such a case of necessity, in approving of the Sub-Commissioners' report, upon the same principle which induced them to admit this anomaly into their own practice. But here, again, the conclusive fact is, that no such case of impossibility is hinted at in the report under consideration.

I am therefore of opinion that the defenders' fifth plea in law ought to be sustained, and the defenders assoilzied from the conclusions of the summons.

I agree with my brother Lord Curriehill in thinking that the circumstance that the minister was not made a party to the sub-valuation is insufficient to invalidate the report.

The Lord Justice-Clerk, Lords Deas, Ardmillan, and Barcaple concurred with Lord Curriehill.

The Lord President, Lords Cowan and Neaves, concurred with Lord Benholme.

In accordance with the opinion of the majority of the Court, decree of approbation was pronounced.

Agents for Pursuers — Leburn, Henderson, & Wilson, W.S.

Agent for Defenders—John Rutherford, W.S.

COURT OF SESSION.

Friday, June 21.

FIRST DIVISION.

RATTRAY *v.* TAYPORT PATENT SLIP COMPANY AND ANOTHER.

(*Ante*, vol. iii, p. 150.)

Jury Trial — Servitude — Reparation — Compromise. Circumstances in which the Court gave effect to an arrangement between parties as to one branch of the case, and applied the verdict of a jury on the other branches, so far as consistent with the terms of the arrangement.

These were conjoined processes of suspension and interdict, and declarator and damages, at the instance of Mrs Susanna Rattray, proprietor of certain property in Tayport, against the Tayport Patent Slip Company and Robert Derrick, contractor, Leuchars. The conclusions of the action of declarator related (1) to a footpath claimed by the pursuer along the north bank of the Tay in a certain line; (2) an alleged servitude of bleaching and pasturing; (3)

the summons also concluded to have the ground over which the alleged servitude extended restored to its condition as before the operations of the defenders; and (4) for damages. After the record was closed, the defenders agreed to allow a footpath, and accordingly a remit was made on that point to Mr Wylie, C.E., who reported, and upon whose reports the Court finally proceeded. Issues were then sent to a jury putting the questions whether the pursuer had right to the servitude claimed, and whether the defenders, in the year 1864, had wrongfully interfered with the pursuer's alleged right, and whether they and their contractor, Derrick, had culpably and recklessly blasted rock near the pursuer's property in Tayport, to her loss, injury, and damage.

The jury found for the pursuer on the first issue as to the servitude, assessing the damage at £15 if the interference be continued, and 5s. if the servitude be restored. On the second issue, they found for the pursuer, as against the contractor, and assessed the damage at £20.

On the motion to apply the verdict, various discussions took place, and remits were again made to Mr Wylie.

YOUNG, A. R. CLARK, and GIFFORD for pursuer.

DEAN OF FACULTY (MONCREIFF), N. C. CAMPBELL, and WATSON for defenders.

The LORD PRESIDENT said that the Court were now in a position to dispose finally of the case. The first matter was as to the road claimed by the pursuer, and that formed the subject of the first set of conclusions of the summons of declarator; but, after the record was closed, a minute was lodged for the defenders, to the effect that, with the view of avoiding further litigation as to the road, they were ready to agree that a right of footpath, as in the first conclusion, should be adjusted by the Court. To this the pursuer assented. On this minute and answers a remit was made to Mr Wylie, C.E., how this line should run. He had embodied his opinion in a report which was not quite satisfactory to the pursuer, who accordingly lodged a note of objections. Another remit was made to Mr Wylie, who prepared another report, in which he explained how he thought the footpath should run, and what protection was necessary for those using it. As to the maintenance of the fences, he concluded by saying that he thought the Company should be bound to maintain all the fencing referred to in his report—the gravelling in the slip, and the gangway; but, in respect the public were put in as good a position in regard to the remaining portions of the road as they were before the alteration was made, he did not think the Company could be held liable in their maintenance. There had been no objections to this report, and it seemed to be a very complete and satisfactory disposal of the question as to the road. The result seemed to be, that the arrangement between the parties must be given effect to, and that there should be one road, to be made and completed in terms of Mr Wylie's report. By this arrangement, the pursuer had finally excluded herself from demanding removal of the slip. It was impossible that this road could be executed and maintained without the continuance of the slip; and, therefore, it might be assumed that, whatever remedy the pursuer might otherwise be entitled to as regards the servitude of bleaching, she could not have the slip removed. But, as to the second conclusion of the action, there was the verdict of the jury to deal with, and that must receive effect so far as consistent with the compromise between the parties. Now, as to the important part of the verdict as to the servitude, there was an alternative presented. The jury seemed to have been instructed, or to have supposed, that there was in this summons an alternative conclusion for damages for the loss of this servitude; but this did not seem to be the case. The summons demanded restoration, but the conclusion for damages was not for damages for loss of servitude, but in respect of the operations of the defenders. And the pursuer repudiated the notion of being satisfied with £15, and abandoning her servitude; and, accordingly, in the notice of motion of 18th January last, it was seen what she demanded, and that was complete restoration of the ground, and total removal of the works. For the reasons already stated, that demand could not be complied with to the full extent; but in so far as it could, consistently with the works of the defenders being allowed to remain, judgment ought to be pronounced for the pursuer. He recommended, therefore, as to the second branch of the case, that the ground, so far as not occupied by the works, should be declared, in terms of the verdict, to be subject to the servitude claimed by the pursuer. As to what remained of the case, the verdict against Derrick would be applied, and that would enable the Court to dispose of the whole conclusions of the summons.

The other Judges concurred; and judgment was pronounced accordingly.

Agent for Pursuer—L. Macara, W.S.

Agents for Defenders—J. M. & J. Balfour, W.S.

Friday, June 21.

HAY *v.* NORTH BRITISH RAILWAY COMPANY.

(*Ante* Vol. iii., p. 364.)

Jury Trial—New Trial—Reparation—culpa—*Collision—Malicious Act.* Motion for new trial, on the ground that the verdict was against the evidence, refused. Observations (per Lord President) on defence that the collision was owing to the malicious act of some person or persons unknown.

Athole James Hay, partner of the firm of Bell, Rannie & Co., wine merchants, Leith, sued the North British Railway Company for damages on account of injury sustained by him, on 29th April 1866, in consequence of the train by which he was travelling from Edinburgh to Newcastle coming into collision, a few miles south of Berwick-on-Tweed, with an empty mineral waggon upon the line. The real defenders were the North-Eastern Railway Company, upon whose line the accident happened.

The ground of defence, on the part of the Railway Company, was that the collision in question had not been occasioned, either directly or indirectly, by their fault, or the fault of any one for whom they were responsible. They alleged that the waggon which caused the accident had been removed from the siding in which it had been placed by their servants on the day previous to the accident, intentionally and maliciously, by some person or persons unknown, for whose acts they were not responsible.

The case was tried in April last, before Lord Kinloch and a jury, and a verdict was returned for the pursuer, with £500 damages.

GIFFORD for the defenders moved for a rule on the pursuer to show cause why the verdict should not be set aside (1), because it was contrary to evi-