

termining that, that we are in the habit of remitting before answer, even as to the competency of the mode of proof. In this case no one can doubt that there are many facts very important to be known in a question whether the advances were gratuitous or not—The number of the family, their circumstances, and so on. That is an investigation in which it is next to impossible to define the boundaries beforehand; and in the course of the investigation questions may be put just on the confines; and it is to meet things of that kind that such proof is allowed. But I agree that that does not make anything competent. It is always a delicate matter for the Court, in the first instance, whether or not to allow proof before answer, and it is only done in special cases. When it is done, it is not meant to exclude all discretion on the part of the commissioner, or to hinder parties from coming to the Court with his deliverance in the course of the proof. The only objection I have to the interlocutor is, that it does not preserve that distinction. It seems to proceed on the footing that, because the proof is before answer, everything the parties propose is to be proved before the accountant. I don't think that is the meaning.

LORD ARDMILLAN—I think the question to be disposed of is the very same as that which the accountant has reported. He says [*reads from report*]. The accountant was quite right in reporting the matter. The Lord Ordinary says that by the terms of the interlocutor of 10th January [*reads interlocutor of the 16th November*]. I do not differ from the qualification put by Lord Deas, but I agree with your Lordship in the chair that the general meaning of the words "before answer" is before answer as to questions of law and relevancy. When proof is allowed before answer the party who has these points of law and relevancy may plead them afterwards, whatever be the result of the proof. But Lord Deas says truly that in some cases proof has been allowed before answer as to competency of evidence. But it must be clear that that is the sort of reservation intended. In all the cases referred to, the question was as to delivery of documents. The proving of facts and circumstances, clustering, as has been said, round the documents, is unquestionably competent to the length to which that has been carried in various cases. There was no doubt there. But here the case is different. I give no opinion as to whether parole evidence is or is not competent; but the question here is—the defender says, "I object to parole evidence here on this matter, whether the advances were gratuitous advances or loans. The answer is, "You can't object, because this is before answer, and the time for stating your objection is after all the evidence is led." I think any question the defender raises, either as to the competency of particular questions or of the line of evidence, is a plea which he is entitled to put to the accountant, to be reported by him to the Lord Ordinary. That is the proper course of proceeding. It would be very unusual to hold that the objections of the defender are absolutely excluded *hoc statu* because the proof is before answer.

The Court pronounced this interlocutor:—  
"Edinburgh, 7th December 1867.—The Lords having advised the reclaiming note for the defenders, against Lord Barcaple's interlocutor, dated 16th November 1867, and heard counsel, recal the interlocutor submitted to review: Find, that by the terms of the interlocutor of 10th January 1866, re-

mitting to the accountant to inquire and report upon the matters set forth as the pursuer's grounds of action, with power to him to take probation thereanent, the accountant is authorised to take such probation only as is competent in support of the pursuer's averments, and that the defenders are not precluded by the terms of the said remit from taking objection to the competency of any proof offered by the pursuer; and remit to the Lord Ordinary to proceed in the way he may think most expedient to determine the question or questions of competency raised before the accountant: Find the defenders entitled to expenses since the date of the interlocutor complained of, and remit the account thereof, when lodged, to the auditor to tax, and to report to the Lord Ordinary, with power to his Lordship to decern for expenses."

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Wednesday, December 11.

DONALD V. NICOL.

(*Ante*, vol. iii, p. 103.)

*Compensation—Property—Road Trustees—Interest.*

The defender, in 1853, took land from the pursuer for the formation of a new road, on an agreement to pay the compensation that might be found due by the Road Trustees. The road was constructed, but through the delay of the defender the compensation was not ascertained till 1867. In 1867 the Road Trustees took over the new road, and paid £50 to the pursuer for the ground taken. The pursuer claimed interest from the defender from 1853, and an annual sum for failure to fence the ground. Claim sustained.

The pursuer in this action was Mrs Jane Robertson or Donald, residing at Bishopston, in the parish of Banchory-Devenick, and county of Kincardine, relict of the deceased James Donald; and the defender was James Dyce Nicol, Esq. of Badentoy, M.P. The summons concluded that the defender should be ordained to make payment to the pursuer of £82, 10s., with interest from Whitsunday 1853, the time at which the defender entered upon possession of certain ground then occupied by the pursuer, for the purpose of forming a new road through the lands of Bishopston, to be used in place of another road proposed to be shut up; that the defender should be ordained duly to fence the lands of Bishopston so far as necessary by their intersection by the new road; and that he should pay £1 a-year as the expense of herding cattle on Bishopston, rendered necessary by the intersection of the lands and the defender's failure to fence them, from Whitsunday 1854 yearly until the lands were sufficiently fenced.

It appeared that the deceased Mr Donald had possessed the lands of Bishopston, adjacent to Badentoy, the property of the defender, and to Auchlunies, the property of Mr Duguid. The defender and Mr Duguid desired to have a road which ran through their estates shut up, and a new road opened through the lands of Bishopston, and they obtained the consent of Mrs Donald and her son and his tutors to this proposal, on the footing that the defender was to pay them the amount of damages that might be found due by the Commutation Road Trustees. The proposed road was

constructed, but the defender did not prosecute his application to the Road Trustees to have the old road shut up and the new road opened. The pursuer accordingly built a wall across the road. The defender caused it to be removed, and applied for an interdict. After various procedure in the interdict and in this action, the Court, on 12th December 1866, recalled an interlocutor of the Lord Ordinary, in which his Lordship had assoziled the defender on the ground that the road in question had never been adopted by the road trustees, and that the pursuer had resumed possession of the ground on which the road was formed; held that the action was well brought by the pursuer for the purpose of compelling the defender to go on to get the amount of compensation ascertained; and superseded the case till January to give the defender an opportunity of stating what he proposed to do in the way of obtaining the judgment of the Commutation Road Trustees on the amount of compensation or damages to be paid to the pursuer in respect of the land occupied by the road in question, or otherwise in respect of the said road having been made through the lands of Bishopston. In January last a minute was lodged for the defender, in consequence of which the cause was again superseded until May, before which time a meeting of the Road Trustees would be held. At a meeting of the Trustees on 30th April, a petition was presented by the defender, which, after setting forth the proceedings instituted in the Court of Session between the petitioner and Mrs Donald, and narrating the steps taken by the Trustees at their meetings on 30th April 1853, 4th October 1864, 1st May 1865, and 3d October 1865, craved that the trustees, after such procedure and inquiry as to them might seem right, would take steps for determining the amount of compensation or damages to be paid to Mrs Donald in respect of the land occupied by the new line of road between the Badentoy and Auchlunies roads, and passing partly through the lands of Bishopston belonging to her, or otherwise in respect of the said new road having been made through these lands, and thereafter to sanction and adopt the said new line of road, and to include the same in the schedule of the parish of Banchory-Devenick, through which it passes, and to provide for its repair as a portion of the recognised commutation roads; as also to grant authority to shut up the tracks or old road between the said Badentoy and Auchlunies roads. The petition was remitted to a committee. Arbiters were appointed on behalf of the Trustees and the pursuer. At a subsequent meeting of the Trustees on 1st October, the committee gave in a report, including the following revised notes by the arbiters, Mr J. F. Beattie and Mr A. Smith:—

"We have considered the representations to our proposed notes of findings, submitted of the 10th ultimo, and now find—(1) That Mrs Donald is entitled to compensation for loss of land by the road made through her lands of Bishopston, including space for a connecting road from the same to her houses, and value for manures, crops, &c., on the ground, so occupied, in the sum of £24, 10s.; (2) That Mrs Donald is entitled to compensation for the severance and opening up of the fields, &c., in the sum of £25, 10s.; in all £50, due and payable at Michaelmas, the 30th September next, to cover all claims against the Road Trustees.

"JAMES F. BEATTIE. ALEXANDER SMITH.  
Aberdeen, 6th August 1867."

"*Note.*—In respect that the road was made in 1853, we are of opinion that Mrs Donald is entitled to compensation for the occupation of the land and other damages incurred from 1853 to Michaelmas 1867, in the farther sum of £50, 12s.

"J. F. B., A. S."

"*Aberdeen, 30th September 1867.*—We adhere to the findings contained in our revised notes of date the 6th of August last, and find farther, that Mrs Donald is entitled to be paid by the Commutation Road Trustees her agent's account of expenses under the submission, as per account taxed by us of this date, to the sum of £11, 18s. 4d., and that Mr Brown is entitled to a fee of £7, 7s., as clerk under the submission, and to be allowed the amount of his outlays besides.

"JAMES F. BEATTIE. ALEXANDER SMITH."

The committee of the Road Trustees thought they had no power to deal with the matter of the arrears, but they recommended that the new road should be adopted, and that a remit should be made to the district trustees with instructions that on Mr Nicol exhibiting to them receipts for the £50 above mentioned and the expenses of the arbitration, and on their receiving from the surveyor a report that the road was in sufficient repair for the public accommodation, into which condition the petitioner should be bound to bring it if necessary, the district trustees should adopt and recognise the road as a commutation road. They recommended that the old road should be shut up and should belong to the defender so far as passing through his lands. These recommendations were adopted by the Road Trustees.

The case came again before the Court, the pursuer claiming interest on the £50 from 1853, and an annual sum for herding.

TRAYNER (WATSON with him) for pursuer.

ADAM (CLARK with him) for defender.

The defender put in a minute holding the sum claimed by the pursuer for herding to be a reasonable sum, if the Court should hold anything to be due by the defender under that conclusion of the summons.

LORD PRESIDENT—It appears that the Road Trustees have made payment to the pursuer of the £50 which has been ascertained in proper form under their Act of Parliament to be the amount of compensation due to the pursuer for the land taken and other injuries sustained by her in consequence of making the road, and the pursuer accepted that as full payment of the principal sum of compensation due to her. The Road Trustees, who have made payment, were not bound to pay until the time when the road was made over for behoof of the public; and, of course, the pursuer could not expect to get more from them than that sum in terms of the statute. But this summons included a claim beyond that. The claim against the defender was for compensation, with interest on the sum from Whitsunday 1853, and the pursuer says that she is still entitled, as against the defender, to the interest on that sum now ascertained, and I think she is so entitled. That part of the claim on the defender is previous to any claim against the Road Trustees. It is in respect of what the defender did before the trustees took over the road. The defender took the road in 1853, and kept possession of it, and would not go on with his proceedings before the Road Trustees so as to get the compensation awarded. I think he has most fairly subjected himself in payment of interest, and there-

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 himself.

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 Dumbaron, 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 pastoral, 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