ment, such as divestiture by bankruptcy, or the like, has always been held indispensable. The poorest man in the country is entitled to be admitted to the Court without let or hindrance. By the institution of the Poor's-roll, there are established facilities for the case of the very poorest being heard and decided. If nothing had appeared in the present case except that four common working men were pursuing an action for enforcement of a public right of way, being an action which the law holds them entitled to pursue, the Court, I may venture to say, would not have listened to any proposal to have them ordained to find caution for expenses, as a condition of the action proceeding.

The peculiarity of the case is, that it has been clearly proved that the pursuers are not spontaneously pursuing this action on their own resources, but have been set forward by others, who remain in the background. And some of these are persons who were engaged in previous proceedings of the same kind, and who, being then foiled in their purpose, were desirous to have the proceedings which they themselves could not now raise, instituted in the name of new ostensible pursuers. The parties have been selected as pursuers for the express reason that they are so poor that they cannot be made worse than they are by any judgment against them for expenses, because such expenses they have no means to pay. William Jenkins, the only one of whom it is quite certain that he continues a pursuer, is not indeed a pauper in the strict legal sense, but he is only one shade above, having at the utmost nothing more than suffices for the sustenance of himself and his wife. It is proved that the action is carried on, not by any funds of the pursuers (for they have none), but by subscriptions derived from various parties desirous of maintaining the suit. What these parties substantially do is, to carry on the action in the name of the pursuers, with no liability (as is supposed) for expenses on their own part; and with the consequence to the defenders of being obliged to lay out large sums in litigation, without the prospect, if they are successful, of recovering any part of them from the nominal pursuers. The plan of so carrying on this action involves a state of things, as regards the defenders, than which nothing can be more unjust or unfair. I think the case loudly calls for such remedy as the Court can apply. There is great reason to doubt whether any other remedy be competent, during the progress of the suit, than that of ordaining the pursuers to find security for costs; and this remedy I think as fully competent as it is equitable and appropriate. If the more substantial parties who are lurking behind the pursuers are sincere in their desire to have the question brought to issue, and have a good opinion of the case, they, or one or more of them, will come forward and become security for the expenses. If they do not so come forward, the fact will form the strongest justification of the order now proposed to be made.

Agents for Pursuers—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Defenders—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, March 20.

SECOND DIVISION.

WALKER *v.* WATERLOW.

Expenses—Auditor's Report—Election Petition. Circumstances in which the Court refused to interfere with the auditor's taxation of the expenses of an election petition.

On the withdrawal of the petition in this case, Lord Cowan, the election judge, on the 22d January, found the petitioner liable in expenses, and remitted to the auditor to tax as between agent and client, in terms of the 34th section of the statute. The account amounted to £383, 4s. 1d., and included, besides the fees of county and London agent, fees to four counsel and fees to a junior counsel for preparing memorials for English counsel, precognoscing, &c. The account was first taxed as between party and party, with the view of ascertaining the amount in which Major Walker was liable to Sir Sydney Waterlow. In this taxation the auditor disallowed £199, 3s. 11d., reducing the account as a charge against the petitioner from £383, 4s. 1d. to £184, 0s. 2d. The account was afterwards taxed as between agent and client, with the view of ascertaining the amount which Sir Sydney Waterlow had to pay to his own agent. Many charges that were disallowed in the first taxation were admitted in the second. Sir Sydney Waterlow now said, that in respect of the provision of the statute providing that the expenses should be taxed as between agent and client, everything that formed a good charge against him by his own agent was a good charge against his opponent. He also said, in a note of objections to the auditor's report, that notwithstanding the terms of the remit, the auditor had not taxed the account as between agent and client, "but had proceeded upon a totally different principle fixed by himself."

The auditor further allowed certain charges which were objected to by Major Walker. Both parties lodged objections.

GORDON, Q.C. and JOHNSTONE for petitioner.

CLARK, GIFFORD, and M'KIE for respondent.

The Court adhered to the auditor's taxation.

The LORD JUSTICE-CLERK referred at considerable length to the points of law in the case. In the course of his remarks he alluded to the fact that the respondent had not only four counsel but nine gentlemen to aid him in his proceedings in the county, some of them committee men, who employed themselves in calling the people together. In the matter of appointing agents, was it to be said that an agent should have power to appoint sub-agents as he might choose to parcel out the county of Dumfries, and then to saddle his opponents with the costs? He thought there was no good ground for such a course. In so far as related to the expenses incurred, he was unable to put his hand upon anything in which the respondent had not been properly restricted by the auditor. In regard to the appearance of the respondent before Lord Cowan with four counsel, to get a matter dismissed which the other party wished dismissed, there was an account incurred of £184, which seemed to be tolerably ample. Then it was plain that the third counsel was not employed for the purpose of a third counsel in an ordinary case. The writing of the memorials, the precognitions, &c., was the function which he had performed. On the whole, his Lordship was of opinion that

the objections of both parties should be refused, and that a decree be given according to the decision of the auditor.

LORD COWAN—As I concur in thinking that, in the circumstances of this case, the auditor's report should be approved of, and the objections to it repelled, I would have abstained from any observations had it not been that I cannot acquiesce in some of the views which your Lordship has stated as to the principles on which questions of expenses like the present should be judged of under the statute and relative rules by the Election Judges.

The 41st section of the statute appears to me to be the ruling enactment, whether in the original award of expenses or in the subsequent audit of the account when costs have been given. The principle of this provision is to secure indemnity to the successful party, subject to those limitations to guard against unreasonable and lavish expenditure so specifically and carefully set forth. "All costs, charges, and expenses of and incidental to" the procedure under an election petition are to be defrayed by the parties to the petition "as the Court or Judge may determine," with the exception of the expenses to be defrayed by the Commissioners of the Treasury, as provided for by the Act.

But in giving an award or in pronouncing decree for expenses the Court or Judge is to have regard to these principles—(1) to disallow expenses caused by vexatious conduct, unfounded allegations, or unfounded objections, and (2) to discourage needless expense by throwing the burden on the parties by whom it has been caused. And in accordance with these principles, as I read the enactment, costs are not merely to be awarded but to be taxed in the manner prescribed by the regulations and as between agent and client in an ordinary action at law. There are certain steps of procedure under the statute—and that of the withdrawal of a petition is an instance—in which it is expressly enacted that costs shall be at once awarded. The more general case contemplated by the Act in which costs may be given in whole or in part is where the petition has issued in a trial before the Election Judge. I can quite understand that the Judge in awarding expenses should have regard to the general principles as to costs laid down by the 41st section. The more usual course, however, where expenses are given will be to do so in general terms, leaving it for subsequent determination how far the costs charged by the successful party is in compliance with the statutory rules. In no other way in my apprehension can those rules be duly and properly enforced. The Judge on the trial cannot be expected before awarding costs in the general case to examine the account. He may, indeed, reserve the consideration of the question of costs. But where he thinks it of importance at once to give costs at the close of the trial, as he has undoubted power to do, his general award must necessarily be subject to the principles of charge and taxation prescribed by the statute. Subject to this explanation, the 34th regulation made by the Election Judges is to be read and understood. When costs are awarded for proceedings under the act, the award is declared equivalent to a finding of expenses in the Court of Session, and the account is to be taxed by the Auditor of Court as between agent and client. That taxation must necessarily be in accordance with the statutory rules laid down by the 41st section of the statute, taken along with the ordinary regulations for taxing accounts as between agent and client in ordinary suits. At no other stage can regard be had, as provided by the statute, to the checks imposed on lavish, improper, or needless expenditure in the proceedings. I would regard it a serious misfortune to parties interested in election proceedings if, in taxing the account, the auditor is not to regulate his taxation on these principles. I cannot read the statutory provision otherwise than as not merely entitling him, but as requiring him to do so,—his audit of course being always subject, as in the ordinary case, to be brought under review of the Election Judge or of the Court on objections by either of the parties, or under any special report which the auditor may think it right to make. As to the competency of objecting to the audit, I do not think it in the least doubtful. There is not a word in the 34th regulation which can fairly be regarded as constituting him into an irresponsible and final judge in the important matter of costs. The taxation prescribed is to be as in ordinary course, and if either party consider that he has gone wrong, the opinion of the Judge or of the Court may be taken on objections when decree is asked for the taxed amount. Accordingly, both parties in this case have stated objections, and the competency of their doing so has not been made matter of dispute at the bar.

On the objections themselves, as these have been explained in the debate, I have nothing to add to the comments made by your Lordship.

LORD BENHOLME and LORD NEAVES concurred, the latter stating that, while it was the function of the Court to decide in what branches of the case expenses were to be charged against each party, the auditor was familiar with many details as to what fees or expenses were proper, of which the Court had not the same knowledge, and that therefore, they should be chary of interfering with the auditor in the discharge of what was his proper function. A case must be conducted with a fair view towards an adversary, and the taxing officer had power to cut down the expenses accordingly. He had no doubt the auditor had discharged his duty in this case anxiously; and, on the whole, he found no ground for disturbing the report.

Agent for Major Walker—John Walker, W.S.

Agent for Sir Sydney Waterlow—T. J. Gordon, W.S.

LOCALITY OF KINROSS—QUESTION BETWEEN MR STOCK OF LATHRO AND THE COMMON AGENT.

Teind—Commonty—Decree of Valuation—Heritor Held that a heritor had failed to show that the teinds of a portion of a divided commonty were valued in a decree of valuation.

The question in this case was whether a certain share of the commonty of Kinross, allocated at a division of that commonty in 1801 to the lands of Lathro, was to be held included in a valuation of the lands of Lathro led in 1630.

It appeared that the valuation in question made no express reference to the commonty, and, further, was led in rental bolls, and included nothing for vicarage teind. It further appeared that the heritor was not in a position to produce any title of an earlier date than the year 1755; and that, although in the titles subsequent to that date the lands bore to be held with a right of pasturage in the com-