redemption, the terms of payment thereof being always first come and byegone." These are the usual words of style in a summons of poinding, and the letters are in similar terms. It is therefore clear that at the time these Styles were written that was the recognised form in practice. On looking into M'Glashan's Sheriff Court Practice (p. 136, ed. 1854; p. 135, ed. 1868) I find it laid down that such is the practice, and reference is there made to the case of *Kennedy* v. *Buik*, Feb. 17, 1852, 14 D. 513. And on looking at that case I find there were then no less than nine conclusions of reduction; these came eventually to be reduced to one, as to the question of competency; and the form of summons there contained the words I have read from the Styles. I am therefore of opinion that the proceedings here have been conform to practice.

On the point also as to the composition I concur with your Lordship.

Lord Shand—I have come to the conclusion that there are not sufficient grounds for disturbing the judgments of the Sheriff and the Sheriff-Substitute.

If the case had been persisted in as one of diligence for the principal sum in this bond, or had not practically been treated as a diligence for securing interest only, I think we could not have sustained the judgment, for a poinding of the ground for a real burden, of which the term of payment is indefinite and may be perhaps not for many years, or ultimately not at all, is not a proper diligence. Such a case is different from one where interest is payable in any event, and stipulated to be paid at definite terms. But I think that in this case the petitioner made it clear from the first that he intended the diligence to apply to interest alone, and on that footing it was treated by the Sheriffs. That being so, the interlocutors of the Sheriff-Substitute authorising payment, certainly of the first and second half-years' interest, were entirely unobjectionable; and I may say generally as to a number of the objections argued there, that I am not disposed to receive them with favour, because I think there was a considerable amount of acquiescence on the part of the defender in these proceedings in matters on which he now seeks to raise objections. I think it is extremely hard in a litigation of this sort, and after parties have taken up a particular attitude before the Sheriff, that one of them should be allowed in this Court to turn round and take exception to all that has occurred, and with perhaps very serious consequences. The same thing seems to run through the whole of these proceedings. I cannot better illustrate it than by adverting to what occurred when the third payment of interest was asked. There might have been a grave objection to such a demand, but the way in which it was treated was this:—A minute was lodged for the petitioner stating that interest for this period was due, and the amount of it; and the defender admitted that it was so due, for his answer to that part of the minute is simply, "believed to be true." In addition to this, in these same answers he does not object to the proceedings *in toto*, but merely says that a less sum than is demanded is due. Now, I hold that in respect of his condescendence he is not now entitled to raise the objection, and so far as the third payment of interest is concerned I wish to rest my judgment on that ground alone.

An objection was taken to the mode in which the poinding was carried out. If the attitude here assumed by the appellant had been maintained before the Sheriff, and persisted in, I think the poinding might have been open to considerable objections. I should be sorry to sanction any such slumping of articles together as that which seems to have taken place here. But the objection taken in the Court below was merely that the officer should not get his fees, and not that the poinding should be cut down entirely. I do not think the latter objection can now be raised.

On the point as to the composition, it is a very trifling sum, and I should not be disposed to differ from the opinion which your Lordships have expressed.

On the whole matter, I am not satisfied, on the argument for the appellant, that enough has been said to entitle us to disturb the judgments here appealed from.

The Court refused the appeal.

Counsel for Appellant (Defender)—Kinnear—M'Kie. Agents—Drummond & Reid, W.S.

Counsel for Respondent (Pursuer)—Mackintosh—Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, November 26.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

THE MAGISTRATES AND TOWN COUNCIL OF FORTROSE *v.* MACLENNAN

Church—Manse—Repairing Church—Union of Parishes.

The kirks of C. and R., both in the parish of R., were united by decree of the Commissioners of Teinds in 1670, and the minister of R. appointed to serve the cure in both kirks on alternate Sundays, and the parishioners of R. declared free of the support of the kirk of C., which was the ancient cathedral kirk of the diocese, *et e contra*. Thereafter, it having become necessary to build a new kirk at R., an assessment was laid upon the heritors of the parish of R., with the exception of those within the district lying around and attached to the kirk of C. In 1873 a district nearly coinciding with the said district was erected into the *quoad sacra* parish of F., and a separate kirk built therein. Further repairs having become necessary and been executed upon the kirk and manse and offices of R., for which the heritors within the district of C. and F. denied liability—*held* they were still bound, along with the whole heritors of R., for the repairs and maintenance of the manse and offices, though not of the kirk of R.

Act 7 and 8 Vict. c. 44, sec. 8—Liability quoad civilia *of Heritors of* Quoad sacra *Parish.*

Held that disjunction and erection into a *quoad sacra* parish does not free the owners of lands and heritages so disjoined from their

original liability *quoad civilia* as for repairs on the manse and offices of the original parish.

This was a note of suspension presented on 29th March 1878 by the Magistrates and Town Council of the royal burgh of Fortrose, and others, proprietors within the burgh, to the Lord Ordinary on the Bills, of a charge against them at the instance of James Maclennan, Sheriff-Clerk-Depute, Dingwall, for payment of the proportional parts assessed by him upon them of the expense of executing certain repairs and improvements on the church, manse, and buildings connected therewith, in the parish of Rosemarkie. The Sheriff-Substitute of Ross, Cromarty, and Sutherland, by decree and warrant dated 3d December 1875, 4th January 1876, 23d October, 7th November, and 12th December 1877, and extracted 8th March 1878, pronounced on the petition of Roderick Grogan Mackenzie, Esquire, of Flowerburn, in said county, a heritor of said parish of Rosemarkie, found that the expenses of executing the said repairs and improvements amounted to the sum of £826, 14s. 11d.; decerned against the heritors of the said parish of Rosemarkie jointly for payment of that sum; remitted to James Maclennan, Sheriff-Clerk-Depute, Dingwall, to prepare a scheme of division of the same among the heritors, according to their respective real rents, as these appeared in the valuation rolls of the county of Ross and the burghs of Fortrose and Rosemarkie in force at the date of citation to said process; and decerned and ordained the said heritors jointly to make payment of the said whole expenses, and severally and individually of the sums of assessments effeiring to their rentals as stated in said scheme of division, at the rate of 2s. 2¼d. per pound; and appointed the said James Maclennan to collect and receive payment thereof. The complainers were not parties to the said proceedings. The complainers refused to make payment, and brought a suspension of the charge, on the ground (1) that they were not heritors within the parish of Rosemarkie, their lands being situated in the ancient parish of Chanonry, and that in respect of a decree of the Commissioners of Teinds in 1670, by which Chanonry and Rosemarkie were united, the parishioners of each parish were exempted from the burden of supporting the church or any of the ecclesiastical buildings of the other parish; and (2) that the said assessment, being made according to the real rents of the heritors instead of according to the valued rents, was improperly made and unjust. The respondent maintained that there never having been two separate parishes of Chanonry (Fortrose) and Rosemarkie, the complainers, heritors within the parish of Rosemarkie, were liable for the assessment in question; that the kirk of Chanonry was never a proper parish church, but was the cathedral church of the diocese of Ross, and was united with the kirk of Rosemarkie solely to the effect of enabling the minister of Rosemarkie to officiate on alternate Sundays at the two kirks; that the decree of 1670 had never been acted upon to the effect of exempting the complainers from their proper parochial burdens as heritors of Rosemarkie; that the parish being partly burghal and partly landward, the assessment fell to be imposed in respect of the real rent; that they were at least liable for the expenses other than the portion thereof incurred in repairing the church; and that in any view the present suspension was incompetent, being excluded by the provisions of the Ecclesiastical Buildings (Scotland) Act 1868, (31 and 32 Vict. c. 96), sec. 14.

The Lord Ordinary on the Bills (ADAM) on 22d May 1878 passed the note of suspension, and a proof before answer was afterwards allowed, after which the Lord Ordinary (CURRIEHILL) on 14th October 1879 found that the complainers had failed to prove the existence in 1670 of a separate parish of Chanonry, but that the term "parishioners of Rosemarkie" in the decree of that date included all parishioners of that parish except those residing or owning lands and heritages within a district immediately adjoining the old kirk of Chanonry and including the old burgh of Fortrose, of the extent of which in 1670 there was no evidence, but that in 1822, when a new church was erected at Rosemarkie, the heritors of that parish agreed "that the district delineated within red lines on the plan should be held to be the district exempted by the said decree of 1670 from the support of the kirk of Rosemarkie: Finds (6) that the lands of the complainers all lie within the said district, and that from 1670 to the present time no assessment in connection with the church of Rosemarkie has been exacted from the burgh of Fortrose, or from the proprietors of the subjects now belonging to the complainers, in respect of any lands within said district: Finds (7) that for the purposes of this action the exemption in the decree of 1670 must be held to extend to and include all the complainers in respect of lands and heritages belonging to them within the limits of said district: Therefore finds (8) that the complainers are entitled to have the charge for the present assessment, in so far as the same is imposed in respect of repairs upon the church of Rosemarkie, suspended; and before further answer as to the remainder of the assessment, appoints the cause to be enrolled, that parties may be further heard on the points specified in the latter part of the note appended hereto."

The nature of the proof and of the arguments adduced by the parties sufficiently appears from the elaborate note to his interlocutor, in which the Lord Ordinary said—. . . . "The first and most important question is, Was there ever a parish of Chanonrie (or Fortrose) distinct from the parish of Rosemarkie? The complainers consider the decree of the Commissioners of Teinds of 2d February 1670 to be conclusive in favour of their contention that the parishes were distinct. The decree was pronounced in a proceeding at the instance of 'the Bishop of Ross against the parishioners of Rosemarkie.' After opposition by these parishioners, 'the Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks, Sunday, day about. The Lords, of consent of the Bp. of Rosse, declaires the parishionairs of Rosemarkie frie of the support of the kirk of Chanonrie, *et e contra*." The complainers found upon the use of the word '*parishionairs*' in this decree as establishing conclusively the fact that prior to the date of the decree there were two distinct parishes, and that this was a union of parishes as well as kirks. It appears to me that the language of the decree is not inconsistent with the plea of the respondent that there never was a separate parish of

Chanonrie, and that the kirk of Chanonrie was within the parish of Rosemarkie, and was merely united with the kirk of Rosemarkie to the effect of placing both congregations under the same pastoral superintendence. It is therefore necessary to investigate the previous history of this district in order to arrive at the sound construction of the decree.

"The burghs of Rosemarkie and Fortrose are situated about a mile apart, near the shore of the Moray Firth. They are both of ancient erection, but they were united by royal charter of King James II. in 1444, under the common name of Fortross or Fortrose, which charter was confirmed by King James VI. in 1592, and again in 1612. The town of Fortrose proper was frequently termed the town of Chanonrie, in respect that within its bounds were situated the cathedral church of the bishopric of Ross, the bishop's palace, and the official residences and gardens of the canons and other cathedral clergy. There was a separate church at Rosemarkie. The bishops appear to have personally served the cure of the cathedral church, and to have served Rosemarkie by means of a vicar. Such, at least, I take to be the meaning of the following passage in the *Origines Parochiales Scotiae* (vol. ii. part 2, p. 587)—a work to which both parties refer in their minute of admissions as being of reliable 'authority:'—'At the Reformation the vicarage of Rosmarky, as given up by Alexander Pedder, procurator for George Dunbar, parson of Kilmowr and vicar of Rosmarky, was stated at £20, quhen all teindis and small offrandis was in use of payment; but the vicar had received nothing for three years. About 1569 William Hay, reader at Chanonrie, had for his stipend 40 marks, and about 1571 he had 50 marks. In 1570 James Buschart as reader had £20. In 1574 the minister at Chanonrie or Rosmarkny and Cromartie had a stipend of £118, 10s. 8⅓d., and the reader had £20, the kirk lands, and other perquisites. In 1576 Alexander, Bishop of Ross, *minister at Chanonrie and Rosmarkny*, had for his living two-thirds of his bishoprick, and the reader had £20, the *vicar's manse* at Rosemarkny, the kirk land, and other perquisites.' Now, I think that this shows that upwards of three centuries ago, and probably much earlier, the cure of both the cathedral kirk and Rosemarkie kirk was served by the bishop, who, however, had a vicar or substitute at Rosemarkie; and I cannot help thinking that the union of the kirks in 1670 was intended by the bishop to have the effect of virtually restoring the old state of matters, so that he and the minister of Rosemarkie should serve the cure at the two churches 'day about.'

"But be that as it may, we find in the *Origines Parochiales* (vol. ii. part 2, p. 574) another most important notice of Chanonrie kirk. It appears that in 1572 the king granted to Lord Ruthven 'the haill leid quhairwith the cathedrall kirk of Ros wes theikit, alsweill principal kirk as queir and ilis thairof, ellis tyrvit, tane of and disponit vpoun as to be intromettit with, and in place unhandillit,' formerly belonging to the bishop and canons, and now in the king's hands 'throw being of the cathedrall kirk na paroch kirk, bot ane monasterie to sustene ydill belleis,' and through the forfeiture of the bishop for treason and lesemajesty. Now, without attaching too much importance to such a grant made during the king's pupillarity, and to that particular grantee, I think there is a fair presumption from the language of the charter (unless contradicted by the language of other authentic documents) that Chanonrie had previously been, not a parish kirk, but simply the cathedral kirk of the diocese. And that such was during the century which ensued the general understanding appears from the following important documents:—

"In the Scots Acts, vol. 5, appendix, page 597, under the year 1639 (immediately after the temporary suppression of Episcopacy), there is the following entry:—'Anent the supplica'ne presented be the Provost and Bailzies of the Chanonrie of Ros, upon supplic'ne from the Assemblie, craving the said kirk to be erected into ane parrochin. The L. Commiss^{rs} G. and Lorde of Articles thinks expedient that the same be recommendit to the L. Commiss^{rs} & G. to be represented to his ma^{tie} as proceeding from the Assemblie, bot no act nor record in Parliament to be maid heirupon.' It seems to be clear, therefore, that at all events so late as 1639 the Chanonrie of Ross, *i.e.*, the burgh of Fortrose proper, had not become a parish, and that the cathedral was not a parish church. Nothing appears to have been done with reference to this petition of the Provost and Bailies; but a few years afterwards we find a memorandum for the Earl of Seaforth 'anent the plantation of Chanonrie kirk out of James Levingtoun's gifts of bishopricks, and out of the 30 Act 15th, Novr. 1641, anent plantation of kirks.'

"Then in 1647 the Provost and Bailies 'of the toune of Chanonrie of Ross, for themselves, and in name and behalfe of the whole inhabitants within the said toune,' summoned the titular of the 'teinds, rents, and deuties of the bishoprick of Ros' to compear before the Commissioners of Parliament for Plantation of Kirks, 'to heir and see the kirk of the said Canonrie of Ros erectit in ane paroch kirk be itselfe, and ane competent and legall provision grantit for serving the cure thereat.' And still later (in 1649) the inhabitants of the Chanonrie of Ross (Scots Acts, vol. 6, part 2, p. 703) 'Do most humblie represent that our kirk, sometime called the Cathedral Kirk of Ross, lyeth desolate and destitute of a publick ministrie, to the great griefe and hurt of our saules, ever since the last happie reforma^{ne}, and that for want of ane competent provisioun and maintenances. Therefore, seeing it belongs to the power and aut^{ie} of Parliament to help and redresse such ane evill, and seeing many kirks in the kingdome, especiallie these which are of the same qualitie and conditione w^{h} ours, have beene prowydit if the bishops' rents, and or Kirk hath most near relation thereto, being always served personallie be the pretendit bishops in a particular congregation, w^{t}out any other pvisione, and or bishoprick rents ar exacted strictly, and employed to secular uses, whill as our kirk wanteth all maintenance, our humble supplica^{ns} is that yor Lo. would tak our case to hart, and by your power and aut^{ie} inacte and declare our kirk to be ane particular parishe kirke, that according to the lawe and customes of the kingdome we may seek for ane provision, and more especiallie that yor Lords, in such manner as in wisdome and righteousness it shall seem fittest unto you, would prowyde for us ane competent mantenance out of the foresaid bishop rents, whereunto his ma^{tie} at his last being in

Scotland did condiscende, and would have accomplished it if the matter had not been miscarried.' The petition, which is signed by the Provost and several of the inhabitants 'of the Chanonrie of Rosse,' concludes with a prayer thus—'May it pleis yor Lo. to recommend yr said kirk of Chanrie seriouslie to yr Commissioners for Plaintatione of Kirkis to be provydit out of the Bishope's rents of Ros and frie teynds of the parochin of Chanrie,' *i.e.*, as I read the words, out of the free teinds of the chanonrie if and when erected into a parish 'be itself.' The Parliament on same day (2d March 1649) seriously recommended 'the plantaone of the kirk of the Chanonrie of Ross to the Commission for Plantaone of Kirkis, with the provisioun thairof. To be taken in consideration be thame amangist the first of thair actings at thair dounsitting.'

"Nothing, however, appears to have been done in the matter by the Commissioners of Teinds during the Usurpation, and after the restoration and the revival of Episcopacy the Bishop of Ross again became the minister of the cathedral church of Chanonrie, while the cure of Rosemarkie was served by a proper parish minister. The cathedral had been injured by a fire in 1662, and in 1670 was in a very dilapidated condition, and it was obviously for that reason that in the decree of the Commissioners of Teinds in that year uniting the two 'kirks' the parishioners of Rosemarkie were exempted from the support of the cathedral, *et e contra*.

"It humbly appears to me to be difficult to read these documents without arriving at the conclusion that in and prior to 1670 there never was a parish of Chanonrie separate and distinct from Rosemarkie. And this view is confirmed by the fact that in none of the title-deeds produced and founded on by the parties is there any reference to a parish of Chanonrie. I should have expected that if there had been such a parish the lands within it would have been so described, but no such titles have been produced, and not until after 1670 is there any reference in any title to a 'parish of Chanonrie.' On the other hand, there are titles of various portions of ground lying unquestionably within the boundaries assigned by the complainers to the parish of Chanonry, in which prior to 1670 the lands are described as lying within the parish of Rosemarkie, *e.g.*, the fifth part of Broomhill, 'in the parish of Rosemarkie,' and 'by and beside ye burgh of Chanonry on ye north pairt yeof, within ye parochine of Rosemarkie,' of which there is the superiority title in 1665, and the *dominium utile* title in 1663. Numerous excerpts from Thomson's Retours between 1604 and 1699 have been printed, in which several parcels of land are described as '*in Canonea Rossensi*,' and '*infra Cannaniam Rossensem*,' and '*Cannonia*,' said by the complainers to mean 'parish of Chanonrie.' There is not only nothing in any of the entries to support this conjecture of the complainers, but 'Cannonia Rossensis' in the language of these Retours is plainly used to designate the old burgh of Fortrose as distinguished from the burgh of Rosemarkie. Thus, some lands are described as '*infra bondas Cononiæ Rossensis et burgagie de Rosemarkie*.' In 1655 Sir George Mackenzie of Tarbet is retoured as heir to his father in '6 pekes of land within the Chanonry of Ross and burgh of Rosemarkie, E. 4/ 2d for ilk peke; the fifth part of the lands of Broomhill, in the parish of Rosemarkie.' And in 1693 three ladies of the name of Mackenzie are served heiresses portioners to their father in 'pecia seu particata terra olim vestae nunc aedificatae mansionis rectoris de Cullicuddini infra canoniam Rossenseni nunc burgum de Fortrose appellatum.'

"As tending to support the same view, reference may be made to the localities of the stipend of Rosemarkie. The oldest extant decree of locality is dated in 1716, and the parish is therein called simply Rosemarkie, and not 'the united parishes of Chanonry and Rosemarkie.' By that decree an augmentation of one chalder was given to the minister, and an earlier locality by the Commissioner of Teinds 'of the stipend of the parish of Rosemarkie,' dated 20th July 1665, is narrated, which fixed the stipend at that date to be 8 chalders, allocated upon, *inter alia*, the teinds of Chanonrie and Rosemarkie, and of Easter and Wester Radderies, admittedly within the limits of the complainers' alleged old parish of Chanonrie. The presumption, however, clearly is that the lands upon the teinds of which the stipend of Rosemarkie was allocated in 1665 were all within that parish. In the locality part of the stipend is allocated upon 'the tack-duty of the Dean's quarter of the teinds of Chanonrie and Rosemarkie,' and also upon the 'Chanter's quarter' and the 'Treasurer's quarter' teinds, and the complainers maintain that 'these teinds of Chanonrie and Rosemarkie' were the teinds of separate parishes bearing these names; but the complainers are in error, because these teinds were the teinds of certain lands called 'Chanonrie and Rosemarkie,' as appears from a retour of John Murray in 1669, as heir of his great-grandmother Marion Sandilands, in various subjects, and, *inter alia*, in '*terris de Chanonry et Rosemarkie cum maneriei loco et molendino de Rosemarky*.'

"On the whole, therefore, on this branch of the case I am of opinion that the complainers have failed to establish the existence of a separate parish of Chanonrie prior to 1670. They have not attempted to say that since that date there has been any disjunction or erection of such a parish, but they refer to sundry title-deeds between 1690 and the present time, in which lands lying both within and without the boundaries of the alleged parish of Chanonrie are described as within '*parochias de Chanonrie et Rosemarkie*,' or the parish of Chanonry and Rosemarkie. But I need hardly say that such words occurring in titles granted recently after 1670 must be held as referring to the union by the decree of that year, and must be interpreted according to the true meaning of the decree.

"The next question is—What is the legal effect of the decree of 1670? and with that question is closely involved this other, viz.—What effect has been given to the decree in actual practice? I can see no anomaly in the union of two kirks (only one of which is a true parish church), to the effect of making both available to the whole parish and placing them under one pastoral superintendence. It cannot now be ascertained whether during the twenty years which elapsed between the date of the decree and the final suppression of Episcopacy the

decree was implemented by the minister of Rosemarkie conducting divine service in each of the united kirks on alternate Sundays. I am inclined to think that during these twenty years the duties were divided by the bishop and the minister of Rosemarkie officiating alternately in each church. In 1692, however, the cure of the united kirks was served by Mr David Angus. In that year Robert Innes, late Provost of Fortrose, mortified certain subjects 'for the help and support of his poor anes and indigent persons within the said town of Chanonrie, now called the burgh of Fortross (distinct from the old town and burgh of Rosemarkie), to be distributed by the magistrates @ and after named of the said burgh of Fortrose and their successors, distinct from those of Rosemarkie; and failling of magistrates, to the minister, present and to come, serving the cuir at the united kirks of Chanonrie and Rosemarkie,' and also for the 'help and maintenance of the schoolmaster, present and to come, serving at the school of Chanonrie,' the subjects being conveyed to 'Donald Davidson and David MacCulloch, present baillies of the sd burgh of Fortrose, and their successors in office; and failling of them, as sd is, to Master David Angus, present minister serving the cuir at Chanonrie and Rosemarkie kirks now united, and his successors in place and office and eldership off the session off Chanonrie only, present and to come.' I may remark in passing that the complainers found upon this deed and upon various minutes of kirk-session of late date as showing that there existed separate and distinct kirk-sessions, and therefore two separate and distinct parishes. But, in the first place, I do not think that the language of the deed implies that there were separate magistracies for the burghs of Chanonrie and Rosemarkie. The trustees of the mortification were to be such of the bailies of the united burgh as might belong to Fortrose or Chanonrie proper, to the exclusion of those belonging to Rosemarkie; and failing such (as might happen if all the bailies should be elected from Rosemarkie), the minister of the united kirks and those of his elders who belonged to the proper Chanonrie congregation. And, in the next place, I can see no reason for holding that the congregation of Chanonrie might not have had a kirk-session before the union in 1670, and retained that body as separate and distinct from Rosemarkie session after the union.

"But however that may be, it is not unlikely that soon after this the minister of Rosemarkie, probably owing to the ruinous condition of Chanonry kirk, became somewhat irregular in his attendance at the latter kirk. Indeed, if the statements in the documents now to be noticed are to be believed, he had entirely discontinued his ministrations. In 1695 the inhabitants of the burgh of Fortross craved that a part of the rents of the bishoprick of Ross 'may be allocated not only for repairing the kirk, but likwayes for a maintenance to a minister in tyme to come, read and remitted to ye committee for security of ye kingdom' (Scots Acts, App. vol. ix. p. 119). The Act of Parliament which followed upon and approved of the report of the committee recommending a grant, narrates at full length the petition of the 'Magistrates and Council of the burgh of Fortross for themselves and in name and behalf of the community and poor inhabitants of the said burgh' (Scots Acts, vol. ix. 481, 1695). In the petition it is stated 'that their burgh being the centrical place of the dyocess of Ross, and always had been the constant abode and residence of the bishops thereof, who, by themselves or other ministers in their names, served the cure of the church of the said burgh, but now, since this happy revolution and abolishing of Episcopacy, their church was still vacant, and there being no other fund for maintenance of the parsons serving the cure but the rents of the bishoprick, there having been no part thereof dedicated for a stipend and maintenance to a minister that might serve them in place of late bishops, and the same depending upon the patrimony of the bishoprick and the rents thereof now pertaining to his Majesty, and wholly uplifted by his Majesty's collectors, they could get no minister of the gospel to preach to them for want of a stipend, although they had several times applyed for one, but they were as sheep almost lost, and going astray for want of a sheepherd, and wandering here and there seeking the Word, but could not find it, these several years bypast, and it being most just and reasonable that a part of the bishops' rents should be dedicated to a minister that should preach the gospel to them, whose souls were famishing for want of the Word, they could not doubt but his Grace and Honourable Estates of Parliament, out of justice, Christian charity, and pity to them as their Christian brethren, and members of one and the same body, the Church, whose head is Christ alone, would provide that they may be served with the means of the gospel to their edification in the faith and eternal salvation of their pretious and immortal souls through the merits of their blessed Redeemer; and likewise their church, which was the cathedral of the diocess, and a great ffabrick, is so ruinous and demolished that they durst not enter thereto and keep the ordinance therein without the hazard of their lives, that some portion of these rents or vacant stipends within the said diocess must be allowed for repairing thereof, and these several years bygone they durst not enter within the rooffe thereof as is notourly known.' No grant, however, was made to the people of Chanonrie (or Fortrose), and I think it is of importance to notice that although they were well aware of the union of the kirks, they also must have known that the union exempted the heritors of Rosemarkie proper from any obligation to repair or rebuild the cathedral kirk which might have attached to them but for the exemption in the decree. And accordingly the magistrates of the burgh of Fortrose, from time to time during the earlier years of the eighteenth century, provided for the inhabitants of the burgh temporary accommodation for religious ordinances in various parts of the municipal buildings. Thus in 1720, 'taking to their consideration that ye kirk of this place is now ruinous, and in danger of falling, so as ye same, especially in the winter time, cannot be made use of for holding divine service yrein, and that ye place now made use of for ye Council House of this burgh wt. very little pains and expense will be a sufficient place, and capacious enough for containing the inhabitants of ye burgh, Have therefore appropriat the same for hereafter (until a more convenient place be had) to serve as ye place of meeting for divine

service in this burgh, and empower the haill inhabitants to remove their seat from the kirk, and wt. ye right and notice of ye magistrates.' And again in 1723, at a meeting of the town council of Fortrose, the magistrates and council, 'taking to yr consideration the ruinous state of ye kirk, and ye insufficiency of ye same for having divine service administrate yrin, as also ye upper Tolbooth of this place being now sclated is a fit and convenient place for yat end, do yrfor appoint and appropriat the said upper Tolbooth for ye place of preaching and administering divine service in this toun, and for that end ordain all ye inhabitants to furnish, erect, and provide themselves in seats in ye said place at ye sight and direction of ye magistrates and councill, for qch end they appoint this day eight days for dividing and giving out ye house to ye inhabitants.' The magistrates of Fortrose thus clearly recognised the duty incumbent on them of supplying a suitable place of worship for the inhabitants, and to that extent, and so far as they were concerned, the decree of 1670 was fully acted upon. And this leads me to remark that I cannot but think that in point of fact the minister of Rosemarkie must have continued to supply divine ordinances on stated days, and that the piteous language of the petition to Parliament in 1694 was prompted (1) by the desire to relieve the burgh of the burden of repairing the kirk; and (2) by a feeling of wounded pride in being placed under the same pastoral superintendence as the rival though twin burgh of Rosemarkie.

"Whether or not the heritors of Rosemarkie proper had lost sight of the decree between 1730 and 1820 is not very clear. During that period various repairs on the church and manse of Rosemarkie were executed, and the expense was defrayed by an assessment upon the heritors according te their valued rent as appearing in the cess-book of Ross-shire. Several of the lands assessed lay within the bounds assigned by the complainers to the alleged old parish of Chanonrie, but none of the lands now belonging to the complainers were so assessed, and for the obvious reason that none of them were entered in the cess-book of the county. The fact, however, that no attempt was made to impose any part of the assessment upon the 'burgh of Fortrose' as a community would point to this, that the heritors were aware that whatever may have been the extent of the district exempted by the decree of 1670, the burgh was certainly included within the exemption.

"In 1820, however, a new church was erected in Rosemarkie, the assessment being imposed upon all the heritors in the whole parish according to their real rents; among the heritors assessed were sundry 'minor heritors,' as they are called, in the old burgh of Fortrose—in other words, proprietors of tenements and small subjects within the burgh—upon each of which the proportion of the assessment was comparatively small. These 'minor heritors' objected to be assessed as upon real rent, and maintained that the assessment could only legally be imposed upon the valued rent, and in the course of the discussion the old decree of 1670 came to the knowledge of the parties after having been lost sight of for a long time. The 'minor heritors' then claimed entire exemption, the opinion of Sir John Connell was taken, and the result was that the landward heritors conceded that a certain portion of the land within the parish was entitled to exemption from assessment. The idea then was that the decree of 1670 had effected an union of parishes, not, as I think, a mere union of kirks, and the question was, what were the boundaries of the two parishes? That a certain portion of the district was exempted from assessment was undoubted; the difficulty was to decide which portion was exempted. I confess that had the question now occurred for the first time I should have been inclined to limit the exempted district to the bounds of the old burgh of Fortrose proper. But in my opinion the area of exemption was in 1820 fixed by the parties interested, and has ever since, until the present question arose, been held to have been so fixed. That area includes all the subjects now belonging to the complainers, and is surrounded on the plan with a red line. The original boundaries of the exempted area were in 1820, and are now, merely matters for conjecture, but I think that after these were deliberately fixed by the main body of heritors in 1820, nearly sixty years ago, it is too late now for these heritors now to attempt to curtail these limits by a process which must be as conjectural as that of 1820. I therefore think that the complainers are entitled to prevail in so far as they seek relief from the assessment for the repair of the church.

"The claim for relief as to the churchyard wall, manse, and offices stands in a different position. As regards the churchyard wall, I think it would be important to know whether as matter of fact there is a churchyard annexed to the old kirk of Chanonrie, and used and kept in order by the inhabitants of that burgh. If there be such a cemetery, then much might be said in support of the claim for exemption, in respect both of kirk and kirkyard wall.

"But as regards the assessment for manse and offices the case appears to me to be a very much more difficult one. I think it is impossible to extend the exemption to such buildings. From and after 1670 the whole parish was placed under the pastoral superintendence of one and the same minister; only one manse with offices therefore was required, and the burden of supplying these falls, in my opinion, upon the whole parishioners, *i.e.*, heritors. It is true that hitherto the expenses have been borne by the larger heritors in proportion to their valued rents, and thus no part was thrown upon the complainers or their ancestors, who had no valued rent. But as the burden is one legally effeiring to all owners of land in the parish, according to the real rents, there is a *prima facie* liability attaching to the complainers. As regards those of them whose properties are within the burgh, it may be that not they as individuals, but the burgh as a community, is the proper party to be assessed, as was held in the case of *Lockhart* v. *Magistrates of Lanark*, 10 Sh. 243. That, however, is a matter which will admit of easy adjustment after that which appears to me to be the real difficulty in the case is settled.

"It appears that in 1873 a district nearly, though not altogether, coinciding with the alleged old parish of Chanonrie was erected by the Teind Court into the church and parish of Fortrose *quoad sacra;* and the question thus arises purely for decision, viz., Whether the proprietors of

lands within such a *quoad sacra* parish are liable for the maintenance and support of the manse and offices of the parish from which their district has been disjoined? In the recent *Jedburgh* case (*D. of Roxburghe*, 3 R. 728, H. of L. 4 Ret. 76) an analogous question regarding the church of the old parish was expressly left open, and before deciding it I should like to be favoured with a fuller argument than that which was submitted towards the close of last session, and which was directed mainly to the existence or non-existence of two ancient parishes."

Thereafter on 29th December 1879 the Lord Ordinary pronounced an interlocutor finding the complainers as heritors of lands originally in the parish of Rosemarkie, though now disjoined and erected into the church and parish of Fortrose *quoad sacra*, liable *pro rata*, along with the other heritors of Rosemarkie, for the expense of repairing the manse and offices, and garden wall connected therewith, of Rosemarkie.

He added this note:—"The question which in the interlocutor of 14th October last was reserved for consideration is the important one, Whether, where lands have been disjoined from one or more parishes and erected into a *quoad sacra* parish under the Act 7 and 8 Vict. c. 44, their owners remain liable for the parochial burdens of the original parish or parishes, such as building and repairing the manse, manse offices, garden and churchyard wall, to which but for the disjunction and erection they would unquestionably have been liable? In the *Jedburgh* case (the *Duke of Roxburghe*, 3 R. 728, and 4 R. (H. of L.) 76) the question of the liability of the heritors of lands so disjoined for building, maintaining, and repairing the church of the orginal parish was reserved; but opinions in favour of the continuing liability of the heritors were indicated by more than one Judge, and were decidedly expressed by Lord Deas, who entered very fully into the whole question.

"The case of *Drummond*, M. 7920, which at first sight appears to be an authority the other way so far as regards the maintenance of the church by the heritors of lands annexed to another parish *quoad sacra*, was, I think, very satisfactorily shown by Lord Deas to have been an entirely exceptional case (as regards the church), and to have been decided on the very peculiar circumstances which there occurred. But although the heritors of the disjoined lands were there found liable to repair the church of the parish to which these had been annexed, and to be free from the repairs of the church to the parish to which they had originally belonged, the Court expressly declared that these heritors must remain liable for all other parochial burdens in their original parish. The final interlocutor of the Court was:— 'The Lords find that the heritors of lands annexed *quoad sacra* are liable in their proportion of upholding the fabrics of the kirks to which they are annexed, and in no other parochial burdens: Find that they are not liable to contribute for upholding the fabric of the parish kirks from which they were disjoined, but that they remain liable in all other parochial burdens in these parishes.'

"This decision is entirely in accordance with the judgment in the earlier case of *Park*, M. 8503, which is referred to by Erskine (ii. sec. 64) as an authority on this branch of the law. Speaking of annexations *quoad sacra* which were in use to be made by the Teind Court long before the Act of 1844, he says—'Such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish, and therefore they remain burdened with the payment of the stipend to that church from which the inhabitants were disjoined, and it was adjudged that the owners of those lands did not by the annexation become liable in any part of the expense necessary for upholding the manse or even the church of the parish to which they are annexed, and which the inhabitants constantly resorted to for divine services, but that they continue even in that respect to be accounted part of the old parish.'

"Now, such being the law prior to the passing of the Act 7 and 8 Vict. c. 44, the question arises, whether that statute has made any change upon the liabilities of the heritors of lands disjoined and erected into a parish *quoad sacra?* I confess that I am unable to discover in the statute any indication that any such change was intended. On the contrary, I think it was intended that the rights and liabilities of the heritors of the lands disjoined and erected should remain unaffected by the disjunction and erection *quoad sacra*. It is quite clear that the burden of maintaining the manse, &c., is not *inter sacra*, but *inter civilia*, quite as much so as the payment of stipend, which in all such cases continues to be paid by the heritors of the lands disjoined *quoad sacra* to the minister of the parish from which they have been so disjoined. It is true that before the lands can be disjoined and erected *quoad sacra*, the statute requires a church to be erected or provided for the district, and provision to be made for a sufficient stipend to the clergyman and for a suitable manse, or for an addition to the stipend in lieu thereof, and for the maintenance of the fabric of the various buildings. The stipend, however, is not payable out of the teinds, and the church and manse are not to be provided at the expense of the heritors of the disjoined and erected lands. All these things are to be done or provided by the parties promoting the disjunction and erection, not one of whom may be the owner of any of the disjoined lands—nay more, the 8th section of the statute expressly provides that the proceedings may take place without any concurrence of the heritors, and the result of sustaining the present contention of the complainers as to their non-liability for parochial burdens in the original parish would simply be to exempt them from all the parochial burdens in connection with that parish, without imposing upon them any corresponding burden in the newly erected parish. In short, they would, without any equivalent on their part, be entirely exempted from a parochial burden which attaches to every other owner of land in Scotland. I cannot think that that result was contemplated by the Legislature; and, so far as I can see, there is nothing in the language of the statute to give any countenance to the contentions of the complainers—indeed, it is, in my opinion, impossible to read the whole statute without observing the marked contrast which is exhibited between the 8th and 14th sections on the one hand, which deal with 'disjunctions' and erections *quoad sacra*, and the 4th and 15th sections, on the other hand, which deal with disjunctions and erections *quoad omnia*. In the

latter the heritors of the disjoined lands are assumed or declared to be liable to provide and maintain the churches and manses of the new parish; in the former it is assumed that they are not liable in any such burdens, and the inference to my mind is clear that in the latter case they still remain liable for the parochial burdens of the original parish.

"If I am right in these views, it follows that the complainers are not entitled to be relieved of the assessments for repairing the manse, manse offices, and garden wall of Rosemarkie." . . .

And on 22d May 1880 an interlocutor was pronounced suspending the decree and charges complained of, and otherwise disposing of the case.

The respondent reclaimed, and argued as before, citing in addition to those quoted by the Lord Ordinary the following authorities—Forbes on Tithes, p. 415; Connell on Parishes, p. 19; Act 1639; Scots Acts, vol. v., p. 597; Act 1572, c. 54; Ersk. Inst. ii. 10, 63. The complainers maintained in addition to their former argument that it was immaterial whether there was originally a separate parish of Chanonrie or not, for the decree of 1670 recognised the cathedral kirk of Chanonrie and the district attached thereto as practically equivalent to a separate parish, and quoted the account of the decree given in Connell on Tithes, ii., p. 191.

At advising—

Lord President—In this case the Lord Ordinary has held that the heritors of Chanonry are not liable for repairs on the church of Rosemarkie, but that the assessment complained of must stand as to the other ecclesiastical buildings; and his judgment will be affirmed. The ground upon which the complainers claim exemption from the ordinary liability of heritors as respects the church is, that when the two parishes of Rosemarkie and Chanonry were united in the year 1670 by decree of the Commissioners of Teinds, it was provided in the decree that the heritors in the Rosemarkie district of the parish should maintain the church of Rosemarkie, and that the heritors in the district of Chanonry should maintain the church which then existed there. Now, that assumes that there was a union of parishes effected by the decree of the Commissioners of Teinds in 1670, and in that respect I think the complainers are not well founded in their contention, and that the Lord Ordinary has rightly held that there were not two parishes existing prior to that decree which were united by virtue of it. The burgh of Rosemarkie is a very ancient burgh. We have the authority of Bishop Leslie for saying that Rosemarkie is the oldest town in what he calls "the province of Ross;" and we see from a charter, of which we have a translation, in 1455, that Rosemarkie must have been a royal burgh so far back as the 13th century, because it is stated in that charter, which is by James II., that it had been erected into a burgh by King Alexander. Which of the Alexanders is meant we cannot of course ascertain, but even supposing it to be the last (Alexander III.), it must have been as early as the 13th century, for he died in 1285. But by the charter of King James II. in 1455, Chanonry, as it was then called, was erected into a burgh and united with Rosemarkie, and from that date downward there has been but one burgh—the burgh of Rosemarkie and Chanonry—or, as they are called in combination, the burgh of Fortrose. Now, it would certainly be something very singular if at that early period there had been two parishes within so small a burgh as the burgh of Fortrose. The ordinary case is that a burgh forms a parish of itself, although it very often combines a landward district with it in one parish. But the notion of a small royal burgh at such an early date having within itself two parishes is a novelty altogether. But it is needless to pursue this part of the case further, because it seems to me that the whole evidence of the case is against the notion that there ever was a separate parish of Fortrose or Chanonry. The Lord Ordinary has gone over very fully the evidence which leads to that result, and I do not repeat it.

But although there were not two parishes anterior to 1670, there is no doubt there was some kind of union effected by the operation of that decree, and it is quite necessary that we should understand if possible what the Commissioners of Teinds intended to do, both as regards the matter of the union and also as regards the arrangement for the maintenance of the two churches with which they were dealing. We have an extract decree, which is extracted from the minute-book of the Teind Commissioners, under date 2d February 1670; and all that we learn from that is that the Bishop of Ross pursued a summons against the parishioners of Rosemarkie, and that the object of that summons was to procure a union of the kirks of Chanonry and Rosemarkie; and that decree, which appears to have been pronounced according to the minute, was this:—"The Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday about." And then follows this further declaration:—"The Lords, of consent of the Bp. of Rosse, declaires the parishionairs of Rosemarkie frie of the support of the kirk of Chanonrie, *et e contra.*" Now, there were two churches in existence at that time. There was a church in Rosemarkie, which was the parish church of the whole parish of Rosemarkie including Chanonry; but then in Chanonry there was another church, which was the cathedral church of the diocese of Ross, and in which, of course, the bishop was specially interested. These are the two kirks that are united, and with reference to which it is ordered that the minister of Rosemarkie is to conduct service at each of these churches "Sunday about"—*i.e.*, the service at one church one Sunday, and the service at the other on the next. And with reference to that also it is declared that the "parishioners of Rosemarkie are to be free of the support of the kirk of Chanonry, *et e contra.*" Now, that is undoubtedly a very ambiguous sentence, and at first sight it is not very easy to give it any meaning but this, that the parishioners of Rosemarkie, by which we must understand the parishioners of the whole parish of Rosemarkie, including the parishioners in the district of Chanonry, are to be free of the support of the kirk of Chanonry. That would not be very new, because that was the state of matters at that date. No parishioners could be liable for a cathedral church supported out of the revenues of the bishop or of the chapter, and therefore that was conferring no favour. But then follows "*et e contra,*" which would seem

to mean that the persons who are liable for the support of the kirk of Chanonry shall not be liable for the support of the kirk of Rosemarkie. But who was liable for the kirk of chanonry? The bishop or the chapter—not the parishioners; and therefore the conclusion would be that there are no parishioners freed from the obligations which then lay upon them of supporting the parish church of Rosemarkie, but only that the parishioners were not to support the cathedral church, and the bishop and chapter were not to support the parish church. That is one reading, and it is a reading which at first sight commended itself to me as not improbable.

But I see very well that the words are susceptible of another meaning; and looking to what the Commissioners were doing — uniting the churches in one parish, but at the same time dealing with that parish as consisting of two districts—it may very well have been the intention of the Commissioners to say that although we thus make a parish to have two churches, the district in which the one church is situated shall support that church, and the old parish church of Rosemarkie shall be supported by those who are not of the Chanonry district but in Rosemarkie. That is the other reading. And between these two readings I think it is not very easy to decide unless we can get light elsewhere.

But there is some light thrown upon this by an ancient MS., if we are entitled to take that MS. as good evidence in a question of this kind. It is light so important as to be, in my mind, perfectly conclusive if we are entitled to take it. But it is quite proper to make sure that in referring to the MS., which is printed by Sir John Connell in the appendix of his book on Tithes, we are appealing to an authentic historical document, and therefore we must see what is the account which the learned writer gives of the MS., which he uses very freely in the course of his work. In his preface, after mentioning a number of other MSS., he says—"The only other MS. of which it is necessary to give any account consists of papers (to some of which I have already alluded) collected by the late Lord Swinton when Solicitor of Tithes, and most obligingly communicated to me by his Lordship's son, Mr Archibald Swinton, one of the clerks to the Signet. This book contains many valuable writings said to have been copied from old manuscripts, some of which must themselves have been taken at one time or other from the Sederunt Books B and C. There are also several of the papers in this collection which are duplicates of the manuscript in the Advocates' Library. But there is one of them which is to be found nowhere else, and is much deserving of regard. It is entitled 'An abbreviate of what is remarkable in the decreets pronounced by the Lords of Plantation of Kirks and Valuation of Teinds from 1661 till November 1673, extracted from the records of that Court,' and is said to be taken 'from a MS. collection of R. Mill's, in the hands of Mr Charles Hamilton Gordon, 1758.'"

Now, Sir John Connell goes on to say further that "it appears from the preface to Mr Forbes' statement that he had in his possession a copy of this paper, and a number of decisions which he quotes are evidently taken from it." What he means there obviously is that Mr Forbes had in his possession the MS. collection of R. Mill, and that that MS. collection was in the hands of Mr Forbes, the author of the preface, that makes it very nearly contemporary with the decree with which we are dealing, for Mr Forbes' work was published in 1705, and it must have been the result of continued study for a number of years. So that Mr Forbes' work may very well be said to be contemporary or almost contemporary with that decree of 1670. But the reference in Mr Forbes' preface to this MS. is certainly not very distinct, although, upon the whole, I am disposed to agree with Sir John Connell that he probably was dealing with the very same MS. that we are now considering. He says—"I was put to more trouble in perfecting this work through the loss of the Commission-Registers, but yet dare say that few material occurrences before that judicature have escaped my observation. For I had an abstract of all that passed till November 1673. And any decreet of moment since that time hath been friendly communicated to me by the parties or their doers." Now, this MS. terminates in November 1673, and is an abbreviate, or, as Mr Forbes calls it, "an abstract" of all that passed in the Commission Court. So that it is fair to conclude, as Sir John Connell does, that he had access to this very MS., and used it as an authentic historical document; and this is confirmed by what Sir John Connell further says, that it appears in the body of his work that he must have taken a number of the cases that he comments on from that MS., because they are not to be found elsewhere.

That being the state of matters, I am disposed to think that we may very fairly hold it to be an authentic account of what passed in the Commission of Teinds from 1661—*i.e.*, from the Restoration down to the end of 1673; and if that be so, that we may take it as an account of the proceedings of the Commission of Teinds which we find under date 2d February 1670, being the same date with the extract from the minute-book that we have in process. Now, the account which the writer of that MS. gives of the case of Rosemarkie is this—"John Bishop of Ross pursues a summons bearing that Chanery being a burgh royal and the bishop's seat, where there was considerable resort of noblemen and gentlemen, and the conveniency of a kirk, yet the same was not erected into a parochial church, and that the kirk of Rosemarkie was near and might be united and annexed to the said kirk of Chanery, and a competent stipend settled to both." Then there follows an account of the proceeding, and this affords pretty distinct internal evidence that the writer of this document was really acquainted with what passed on the occasion, because there is a minuteness and precision which show that this is not an imaginary contention that is set out. The result is thus stated at the end—"The Lords united the two kirks, and appointed the minister of Rosemarkie to serve the cure of both parishes"—one Sabbath at Chanonry and the other at Rosemarkie—"and of consent of the bishop declared the heritors free of the reparation of one another's churches."

If that is an accurate account, it puts an end to all contention as to the meaning of the decree, and particularly as to "*et e contra.*" It means simply, that although there was no separate parish of Chanonry, yet in uniting the two kirks the Commissioners dealt with the church of Cha-

nonry as a cathedral church, and as having a district surrounding it, appropriated to it as it were before this decree was pronounced, the inhabitants of that district resorting to the cathedral church as their only church; and the result to which they came was that they united the churches—made them both churches of the same parish of Rosemarkie—but provided that the heritors of the two districts should be separately liable each for the support of their own church—*i.e.*, the heritors of the district of Chanonry for the support of the cathedral church, which had fallen into disrepair in consequence of the position in which bishops were then placed and the loss of the capitular revenue, and that the other church should be supported by the heritors within the district of Rosemarkie.

Now, if this is the true construction of the decree, it seems to be conclusive of the whole matter. But there is a great deal of evidence as to what has been done in practice with reference to the church of Rosemarkie. As to the maintenance of the church of Chanonry, that is a point which does not seem ever to have been alluded to. That church became ruinous—being "a great fabric," nobody would care to support such a church as that, especially after the Revolution, when it ceased to have any reverence or sanctity attached to it as the cathedral church or seat of a bishop. But there certainly were repairs made on the church of Rosemarkie from time to time for a considerable period, and I do not think these throw much light on the matter, or help in understanding it one way or another, because the district not containing heritors who were liable to be assessed on their valued rent, the repair of the church was laid entirely on heritors of that character. Consequently the repairs on the church of Rosemarkie being laid upon the heritors in the valuation roll only, the complainers, and parties in their position, never could have been assessed, because they were not among those heritors. Therefore that cannot be taken as showing usage one way or the other.

But there is an occurrence in 1820 which has a great bearing on this question, and seems to me pretty conclusive, if any further evidence is wanted, as to what was the obligation in the decree of 1670. The church of Rosemarkie in 1820 had become irreparable, and it was necessary to build a new church. There was then an assessment laid upon the heritors of the whole parish according to their real rents, including the county heritors and the burghal heritors also, and those who were at that time the predecessors of the complainers. A dispute arose about this, and the minor heritors, as they called themselves, maintained that they should not be assessed, and in the course of this discussion the decree of 1670, which appears to have fallen aside or been forgotten for a very considerable period, was discovered or came to the knowledge of the parties somehow, and when this turned up the minor heritors availed themselves of the discovery and claimed exemption in virtue of the decree. The parties agreed to take the opinion of Sir John Connell. It is quite clear what his opinion must have been, unless he had very suddenly changed it, for in his work on Parishes he deals with the case of Rosemarkie, and he says that the effect of the decree of 1670 was just what is expressed in the ancient MS. already referred to. And therefore we may fairly conclude that the advice they received was that the heritors in the district of Chanonry were not bound to contribute to the church of Rosemarkie. Now, what did they do? They proceeded to define the district, and they drew a line between the proper parish of Rosemarkie and the district of Chanonry—burghal district—which certainly goes beyond the proper limits of the burgh so far as we can see. But it seems to have been done after full consideration and inquiry—done by the whole heritors, the whole parties assessed—as an arrangement for the distribution of this liability. The heritors of the burghal district were exempted upon that, and exempted after full consideration, and apparently after an arrangement had been made which was intended to operate in all time coming. I think it would be a very extraordinary thing to allow the heritors of Rosemarkie, as I call them by way of distinction, to go back upon this, unless they could show very plainly that that arrangement proceeded upon some misconception of the decree of 1670. But so far from that being the case, it appears to me that the arrangement which they then made was quite in accordance with what we have ascertained to be the true meaning of that decree. Therefore, without going further, I come without any hesitation to the same conclusion as the Lord Ordinary, that the complainers are entitled to be exempt from the assessment for the repairs of the church; but with his Lordship I am also very clearly of opinion that it cannot go further than that, because it is the church, and nothing but the church, which is dealt with in the decree. Of the two churches, I should rather say one is to be supported by the heritors of the burgh or by the parishioners of the burgh and the burghal district, the other by the heritors of the Rosemarkie district; as to the manse and other ecclesiastical buildings of Rosemarkie, I do not see how they can be exempt from them, because there never was imposed on them any corresponding obligation to maintain a manse and buildings at Chanonry. The two things—the obligation to uphold Chanonry church and the exemption from upholding Rosemarkie church—were intended to be equivalents. Therefore on the whole matter I am of the same opinion as the Lord Ordinary.

Lord Deas and Lord Mure concurred.

Lord Shand—I entirely concur in what your Lordship has said, and it is unnecessary for me to say anything after the full and instructive opinion given by your Lordship. I shall only add that it appears to me that the elements which ought to weigh, and which in my mind do weigh, as decisive, are not so much what was done in 1820, or subsequent to 1820, as the contemporaneous writings of about 1670 which have been laid before us. I felt that there was a great deal of force in the argument that the actings of 1820 and subsequently could scarcely throw much light on the proceedings of two centuries before. In 1820 the parties were just thrown back upon the legal question of what was the effect of the decree in 1670. I think the Lord Ordinary has arrived at a sound conclusion upon the effect of the decree as we have it printed, even if we had not the light of the MS. quoted by Sir John Connell. But while I think that is so, there can be no

doubt that the MS. is conclusive on the subject; and I agree with your Lordship in thinking that that document is entitled to weight.

The Court adhered.

Counsel for Complainers — Kinnear — Low. Agents—Macandrew & Wright, W.S.

Counsel for Respondent — Asher — J. P. B. Robertson. Agents—Mackenzie & Black, W.S.

Friday, December 3.

SECOND DIVISION.

[Lord Adam, Ordinary

M'GAAN *v.* M'GAAN.

Husband and Wife—Separation.

Where a woman proved on the part of her husband continuous intoxication followed by threats and personal violence, which caused her reasonable fear for her life, the Court *granted* decree of separation, the wife having agreed to pay her husband an alimentary annuity of £25 out of her separate estate.

Mrs M'Gaan raised an action of separation and aliment against her husband on the following grounds, as stated in her condescendence:—Almost immediately after her marriage she became aware that her husband was much addicted to drinking. In April 1877 his drinking habits had increased to such an extent that scarcely on any night did he return home sober, while his language was most violent and abusive. In the month of June he returned one day about twelve noon from his work much intoxicated, and finding his wife in bed, to which she was confined, as his violence had made her ill and nervous, ordered her to rise, threatening that in the event of her not doing so he would throw both her and the bed over the window. Afraid to live with him, she then went to reside with her sister in Ayrshire for about a month, but on her return she found no improvement in his behaviour. He still continued to come home drunk, threatened to murder her, pushed her about, pinched and squeezed her, twisted her arms, and otherwise maltreated her. In the month of March 1879 he came home one night late very drunk and very violent. He knocked over some of the furniture, threw water in his wife's face, and on his threatening to do for her she in her terror took refuge with a neighbour for the night, and when she returned next day he locked her out of the house. In the afternoon he admitted her, and on his promising amendment she was persuaded to remain with him. In June 1879 he one day came home drunk, behaved with the same violence, and by his threats compelled her again to seek shelter in the house of her nephew. In July 1879 he again compelled her to escape from his violence to some friends in Glasgow, where she remained about a month. In October he again drove her in terror from the house, to take refuge in the stair, where she remained for about an hour. There she induced one of her neighbours to accompany her back to the house in order that she might get her hat and jacket. She remained in lodgings for about a week, and only returned home on his promising that he would leave her in peace for the future. In February 1880 he was continually intoxicated, and very violent and abusive. On one occasion she locked herself into her bedroom, but he smashed the panel of the door with an axe and burst it open, threatening to do her bodily harm. On another occasion he threatened to kick her out of the house and to take her life. He seized her, twisted her arm, tearing her dress, and as she much frightened ran to the door he shut the door on her, squeezing her severely between the door and the doorpost, and injuring her severely. She shortly after managed to escape from him, and took refuge in the house of their next-door neighbour, after which the pursuer removed to a friend's house in Edinburgh, where she still remains. He lived entirely on money belonging to the wife, and though he in 1877 was earning a salary of £100 as a traveller in a wine merchant's firm in Leith he never contributed anything to her support.

The defender in defence denied the alleged threats and acts of violence, stating that it was owing to the pursuer's irritable temper that they could not live happily together.

In the proof which was taken in the case before the Lord Ordinary the pursuer's averments were substantially proved, and no attempt was made by the defender to meet those averments.

The Lord Ordinary (ADAM) assoilzied the defender from the conclusions of the action.

The pursuer reclaimed, and it was argued for her—She was entitled to decree of separation, because (1) in point of fact the alleged continuous intoxication, violence, and threats were clearly proved; and (2) in point of law it was enough to show that there had been well-founded fear produced by threats or violence used when under the influence of continuous intoxication.

Authorities — *Paterson* v. *Russell*, August 9, 1850, 7 Bell's App. 337; *Fulton* v. *Fulton*, June 28, 1880, 12 D. 1104.

It was agreed by the parties at this stage of the case that a minute of agreement should be put in process by which the defender agreed to decree of separation being pronounced against him; the wife on her part undertaking to pay her husband an annuity of £25 out of her separate estate.

At advising—

LORD JUSTICE-CLERK—(who delivered the judgment of the Court)—It is not necessary for me to go into the grounds on which we were prepared to alter the judgment of the Lord Ordinary. I think the proposed agreement is perfectly right and proper; but we must give judgment on the evidence. I am quite of opinion with the Judges in *Fulton's* case, and that of *Paterson*, that mere habits of intoxication are not good grounds for separation when taken by themselves. The decision in *Paterson's* case was to the effect that mere moral torture, but unaccompanied by such violence as rendered it impossible for the woman to live with the husband, was not sufficient to warrant separation, and the Judges in *Fulton's* case regretted they could not give effect to intoxication continuous and chronic when unaccompanied by acts of personal violence.

Where, however, on the other hand, there is