Counsel for the Defenders and Reclaimers —Guthrie, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Pursuers and Respondents—Morison, K.C.—Jameson. Agents—Kirk Mackie & Elliot, S.S.C.

Thursday, December 20.

FIRST DIVISION.

[Lord Dundas, Ordinary.

GLASGOW CORPORATION *v.* WOOD (COLLECTOR FOR THE PARISH OF GLASGOW).

Poor—Poor Rates—Telephone Undertaking —Deductions from Annual Value—Repairs on Switchboards, on Subscribers' Instruments, and on Roofs to which Telephone Fixtures Attached—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 37.

The owners of a telephone undertaking are entitled under section 37 of the Poor Law (Scotland) Act 1845 to have deducted from its annual value, as appearing in the valuation roll, prior to assessment for poor law purposes, the probable annual average cost of (1) repairs on switchboards, and (2) repairs on roofs belonging to third parties used for telephone fixtures, but only so far as the repairs on such roofs have been rendered necessary by the renewal of such fixtures, but (*dub.* Lord Pearson and *rev.* Lord Ordinary Dundas) the owners are not entitled to a deduction for (3) repairs on the instruments in the subscribers' premises, such instruments not being part of the heritable subject assessed.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 37, enacts—"In estimating the annual value of lands and heritages, the same shall be taken to be the rent at which one year with another such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state. . . ."

On 8th February 1904 the Corporation of the City of Glasgow brought a note of suspension and interdict against William James Wood, collector of assessments for the parish of Glasgow, in which they craved suspension of a threatened charge to make payment of certain assessments levied upon them in respect of their telephone undertaking within that parish.

In virtue of section 37 of 8 and 9 Vict. c. 83, the complainers claimed a deduction of at least 70 per cent. from the annual value of the subjects in determining the amount on which they were liable to pay assessments. The Parish Council had refused to allow a larger deduction than 20 per cent.

On 23rd February the note was passed without caution, and on 15th March 1904 the Lord Ordinary (Low) closed the record, and before answer remitted to J. H. Buchanan, C.A., Edinburgh, to report as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the subjects assessed in their actual state, and the rates, taxes, and public burdens payable in respect thereof and upon any other matter which either party might consider material to the question at issue.

On 5th April 1905 Mr Buchanan reported—". . . (1st) That the probable annual average cost of the repairs, insurance, and other expenses necessary to maintain the complainers' subjects assessed in their actual state, amounts to £1656, 3s. 10d., and that the rates, taxes, and public burdens payable in respect of the same amount to £244, 1s. 4d., making together a total deduction of £1900, 5s. 2d. applicable to the whole subjects assessed in the several assessable areas in which they are situated. (2nd) That the actual value at which the subjects assessed, of which the complainers are owners, appear in the valuation rolls for the year 1903-04 of the various assessable areas in which said undertaking is situated, is £5202, 12s., that the value at which the portion of said undertaking within the parish of Glasgow (for which the respondent is collector) appears in the valuation roll for 1903-04 for said parish, is £3472, and that the proportion of the total deductions as above of £1900, 5s. 2d., applicable to said value of £3472, is £1267, 5s., said deductions representing 36½ per cent. of the respective annual values as above."

In his note the reporter, *inter alia*, stated —". . . In the statements as lodged by the complainers the expenditure for the year ending 31st May 1903, on which their claim is based, is stated as follows:—

"1. Repairs—			
On Underground Cables -	£462	1	1
On Overhead Wires, &c. -	1027	7	3
On Subscribers' Instruments	1187	2	0
On Switchboards - - -	932	4	7
On Tools - - - - -	104	1	6
On premises (occupied by complainers as tenants) -	22	16	5
On Roofs - - - - -	636	1	11
	£4371	14	9
"2. Insurance - - - -	149	3	9
	£4520	18	6
"3. Owners' Rates - - -	244	1	4
	£4764	19	10

"The total deduction of £1900, 5s. 2d., as brought out by the reporter in the first head of the preceding report, is made up as follows:—

"1. Repairs—			
Underground - - - -	£436	16	1
Overhead - - - - -	1002	17	0
Tools - - - - - -	104	1	6
Roofs - - - - - -	112	9	3
	£1656	3	10
"2. Owners' Rates - - -	244	1	4
	£1900	5	2

"The reporter has, in reaching the above results, eliminated all items which in his

view are inapplicable to the subjects assessed. For this reason he has excluded the expenditure on fire insurance premiums. . . . In their observations on the draft report the complainers brought forward a new claim for deduction, amounting to £172, in respect of Employers' Liability and Third Party Insurance. The reporter has not considered it necessary to deal with the question raised by the respondent of the competency of making such a claim at this stage of the proceedings, as he does not include it in the total deductions as before stated. . . ."

The complainers lodged objections to the disallowance by the reporter of the following items—

"1. Repairs to subscribers' instruments in respect of which no allowance is made, these repairs representing a sum of - - - - - £1187 2 0

"2. Maintenance of and repairs to switchboards at Exchanges, these Exchanges being rented subjects in respect of which no deduction is allowed, these repairs amounting to - - - - 932 4 7

"3. Insurances in respect of which no allowance is made, and which, exclusive of premiums paid to cover employers' liability and third party risks and revenue insurance, amounted to - - 149 3 9

"*Note.*—the other items of insurance which were not claimed as a deduction under the expenditure stated on record, amounted to an additional expenditure of £267 for the year 1902-1903, made up as follows:—

Employers' Liability, £112 0 0
Third Party Insurance, - - - 60 0 0
Revenue Insurance - 95 0 0

"4. Maintenance of roofs for overhead wires, poles, &c., upon which the Corporation expended - - - £636 1 11
but in respect of which the reporter has allowed only - 112 9 3
the sum disallowed—and the Corporation contend wrongly so—being thus - - - £523 12 8

These principal items disallowed thus represent a total of -£2792 3 0"

The respondent lodged answers, *inter alia*—

"1. Repairs to subscribers' instruments.

"2. Maintenance of and repairs to switchboards at Exchanges.

"Subscribers' instruments and switch boards, while they are no doubt necessary for the carrying on of the complainers' business, are not lands and heritages within the meaning of the Poor Law Act, and do not and could not form any part of the subject assessed. The reporter has therefore, the respondent submits rightly, not allowed any deduction in respect of expenditure on either of these two heads.

"3. Maintenance of roofs for overhead wires, &c.

"The sum allowed by the reporter under this head includes all sums expended by the complainers for repairs upon their own property forming part of the subject assessed, and the respondent submits that nothing more can properly be allowed.

"The complainers do not themselves own the roofs in respect of the maintenance of which they claim deduction. They have, however, obtained permission from the owners of these roofs to erect poles thereon for the support of their wires, and have undertaken in return either to maintain the whole roof or to restore any damage done by themselves. The cost of implementing these obligations represents the rent which the complainers pay for the right to use the roofs in question, and the fact that the complainers find it convenient or judicious in the interests of their trade or business to undertake obligations of this kind cannot, the respondent contends, convert repairs on the property of third parties into repairs on the subject assessed, or in any way affect the amount of the statutory deduction for repairs. The claim which the complainers make for a deduction in respect of expenditure due to such obligations has therefore, the respondent submits, been properly disallowed by the reporter.

"4. Insurance.

(*a*) Fire Insurance.

The fire insurance premiums, in respect of which deduction is claimed by the complainers, are paid for the insurance of switchboards and other appliances belonging to the complainers and contained in the premises rented by them for the purpose of carrying on their business. The subjects so insured are not lands and heritages and do not form part of the subject assessed, and it is on that ground that the reporter has, and the respondent submits rightly, not allowed the deduction of the premiums in question.

(*b*) Employers' Liability Insurance.

(*c*) Third Party Insurance.

The complainers do not on record claim any deduction upon these heads, and the respondent submits that they are therefore not entitled to do so now. But assuming that the complainers are in a position to make such a claim, the respondent submits that it is clear these insurances have no relation to the insurance referred to in the statute, which is the insurance of the physical subjects assessed against loss by fire. For these reasons the respondent maintains that the deduction now claimed has been properly disallowed by the reporter."

On 20th July 1905 the Lord Ordinary (DUNDAS) in the procedure roll, in respect it was necessary that certain facts still at issue between the parties should be ascertained before further consideration of the report, of new remitted to Mr Buchanan to

report in regard to all outstanding questions of fact between the parties which might be brought before him.

In a second report Mr Buchanan stated that, with the view of ascertaining what the subjects assessed consisted of, and whether they included (*a*) switchboards, (*b*) subscribers' instruments, and (*c*) the right to use roofs belonging to third parties for the support of poles and wires, he had communicated with the Assessor of the City of Glasgow and had received the following reply:—

"*Glasgow Corporation Telephone*, 1903-4.

"Dear Sir,—I am favoured with yours of 15th inst., and have to say in reply that the annual value of £3420, the sum appearing in the valuation roll for Glasgow Parish, represents the annual value of the wires and all machinery necessary for carrying on the undertaking.—Yours truly, JAMES HENRY, *Assessor*."

In answer to a further communication from the reporter asking him to specify what was included under "all machinery necessary for carrying on the undertaking," the Assessor had written.

"*Glasgow Corporation Telephones.*

"Dear Sir,—Referring to yours of yesterday, the annual value of the above subjects for the year 1903-4 was based on the mileage principle, that being the principle on which the telephones have been valued since the first valuation of telephones was made in this city. The mileage for the above year was 2974 miles at 23s. per mile, giving an annual value of £3420. This rate per mile was agreed upon by the Assessor and the Corporation Telephone Department, and includes the wires and apparatus necessary to convey messages by the subscribers. No part of the system was valued separately.—Yours truly, JAMES HENRY."

The reporter further stated that in fixing what deductions were allowable he had excluded all items of expenditure which in his view were not applicable to the subjects assessed, including expenditure on (1) instruments in subscribers' premises, (2) switchboards, and (3) repairs to third parties' roofs. "All or any of these items," he added, "might be held to be covered by the definition provided in the Assessor's letters above quoted, but notwithstanding the terms of said letters these subjects seem to me not to form heritage available for assessment within the meaning of the Act. . . . It may be stated that the premises occupied by the Exchanges where the switchboards are situated are in every case rented by the Telephone Undertaking. . . . In reaching the sum of £112, 9s. 3d. allowed by me as a deduction in respect of roofs, I endeavoured as nearly as possible to restrict the expenditure allowed to the items incurred in connection with the repair of the subjects—standards and stays—actually belonging to the complainers."

On 8th March 1906 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Finds that the respondent is bound to make, and that the complainers are entitled to, deductions from the amount of the assessment appearing in the valuation roll of the parish of Glasgow, applicable to the complainers' telephone undertaking, for the purpose of the assessment complained of, in respect of the following matters, viz.—(1) Repairs on underground cables, on overhead wires, &c., on switchboards, on tools, on poles, standards, or fixtures upon roofs of buildings, and also repairs on those roofs rendered necessary by the renewing or repairing of such poles, standards, or fixtures; (2) insurance against loss by fire; and (3) owners' rates: With these findings appoints the cause to be enrolled for further procedure; and reserves all questions of expenses: Grants leave to reclaim."

[Counsel for the complainers stated that the words "subscribers' instruments" had been omitted *per incuriam* from the list of items enumerated under the first head of the interlocutor.]

Opinion.—"The complainers, the Corporation of Glasgow, are owners of the telephone undertaking in that city. The undertaking is situated in several parishes. The suspension craved is of certain assessments levied upon the complainers by the collector of poor rates in one of these parishes, and of threatened charges to follow thereon. The complainers say that the assessments are illegal, because the Parish Council have failed to make proper deductions in terms of section 37 of the Poor Law (Scotland) Act 1845 . . . [*His Lordship read the section quoted supra*]. . . .

"It is, I think, now quite settled law that the duty laid by the Act of 1845 upon parochial boards of ascertaining the rent of lands and heritages has, since the passing of the Lands Valuation (Scotland) Act 1854, been transferred to the assessors under that Act; that accordingly the duty of the parochial board and its officers, under the law introduced in 1854, is to take the estimate of the annual value of lands and heritages as it appears in the valuation roll of the year, and to make, from that gross rental, the deductions specified in the section above quoted; and that in the consideration of cases like the present this Court has no concern with the amount entered in the valuation roll, and no jurisdiction as to the modes or principles by which it may have been arrived at (*Magistrates of Glasgow* v. *Hall*, 14 R. 319; *Pumpherston Oil Company*, 3 F. 1099). There has been great delay in procedure in the present case, of which no explanation was given to me . . . [*His Lordship, after dealing with the procedure in the case, continued*—] . . .

"(1) The first point which was argued relates to the complainers' demand for deductions in respect of repairs on 'subscribers' instruments' and on 'switchboards.' It appears that the parties were at issue as to whether or not these subjects were in fact included in the valuation made by the assessor. The reporter undertook to ascertain from that gentleman 'of what the subjects assessed consist.' On 18th December 1905 the assessor wrote that 'the sum appearing in the valuation roll for Glasgow parish represents the annual value

of the wires and all machinery necessary for carrying on the undertaking.' In reply to a request for more specific information the assessor on 20th December 1905 wrote to the reporter a letter in which, after explaining the principle upon which the assessment was based—a matter with which I have here no concern—he stated that it 'included the wires and apparatus necessary to convey messages by the subscribers. No part of the system was valued separately.' I think that, although these explanations are not very clear, I must conclude that the instruments in the subscribers' premises and the switchboards were within the purview of the assessor's valuation. But the respondent's counsel urged that if that were the case it involved a palpable error on the part of the assessor; that the subjects in question were in themselves mere pieces of moveable property; that they could not, upon any feasible basis, be included in a valuation of lands and heritages, and that therefore no deduction ought to be allowed in the present question in respect of their repair. The complainers' counsel on the other hand argued that these subjects though not in themselves of a heritable nature are physically attached to and form integral parts of the complex heritage of which this undertaking consists; that their repair is absolutely necessary to maintain that heritage; that a deduction in respect of such repair ought to be allowed, and that the result of the respondent's view, if pressed to its logical conclusion, would, looking to the actual nature of this undertaking, lead to its total—or at all events substantial—exemption from valuation as a heritable property. If it were demonstrable that the instruments and the switchboards, having regard to their place in relation to the various parts of the undertaking, could upon no reasonable basis be properly included to any extent or effect in a valuation of this complex heritable property, I apprehend that it would, or might be, my duty to refuse to sanction any deduction in respect of their repair, even though the assessor had (as I think is the case) included them in the ambit of his assessment, and although that assessment must admittedly be left to stand upon the valuation roll for the year in question. But I do not consider that these views are by any means plain to demonstration. If posts and wires are, as I am bound to assume, and do assume, lands and heritages, it would not seem to be a great stretch to include as such the wires to their ultimate extent and their terminals. It would not, however, in my judgment, be convenient or proper that I should express any positive views as to what ought, or ought not, to be included in the assessment of an undertaking of this character. To do so might be difficult, and would not, I think, be *hujus loci*. The undertaking is one of a very peculiar character. I observe that in the valuation roll the subject of assessment is described as 'telephone wires and apparatus.' It appears that in an interesting and instructive case in England the question was raised and argued whether or not such subjects were rateable at all. It was decided that they were, upon the ground that the matter involved was not one of a mere easement, but of a permanent and exclusive occupation of land (*Lancashire Telephone Company*, 13 Q.B.D. 700, 14 Q.B.D. 267). It is, I think, sufficient to say that I am not at all satisfied, upon the somewhat imperfect information before me, that repairs of these instruments and switchboards are not repairs necessary to maintain the lands and heritages of which this undertaking consists, in their actual state. I may refer, as applicable to this case, to the opinion of Lord Kinnear in *Pumpherston Oil Company*, 3 F. 1099, where his Lordship says (p. 1107)—'The greater part of the value of this complex heritage is due to the inclusion of machinery and plant which would not be considered as land and would not be valued at all but for the operation of a somewhat artificial rule of positive law.' See also *Glasgow Gas Light Company*, 1 Macph. 727, especially *per* Lord Jerviswoode, p. 730, and Lord President, p. 733, top. For the reasons which I have stated I think that the complainers are entitled to deductions in respect of repairs on subscribers' instruments and on switchboards respectively.

"2. The next deduction claimed is in respect of repairs on roofs. . . . The reporter, quite rightly as I think, has declined to sanction this deduction to the full extent claimed, and only regards it as admissible to a limited extent. Indeed, the complainer's counsel frankly conceded that he could not ask deduction in respect of wayleave paid by them to the owner of a roof. But he pressed his claim in respect of expenditure on necessary repairs of the poles and roofs. I think that a deduction ought to be allowed so far as regards the repairs of poles, standards, or fixtures upon roofs of buildings, and also repairs on those roofs rendered necessary by the renewing or repairing of such poles, standards, or fixtures.

"3. Parties were agreed that if my opinion in regard to the instruments and switchboards above dealt with was in favour of the complainers, as it is, a further deduction must be allowed in respect of their insurance against loss by fire. The complainers' counsel departed from his claim for deductions in regard to Employers' Liability insurance, third party insurance, and revenue insurance. . . .

"I have now dealt with the various points upon which I heard argument. I shall pronounce findings in accordance with the views which I have expressed. I do not attempt to state the figures in which these views will result. The parties informed me that when the legal questions at issue were decided, they would be able without difficulty to adjust the necessary figures."

The respondent reclaimed against his Lordship's interlocutor in so far as it found repairs (1) on switchboards, (2) on subscribers' instruments, and (3) on roofs, deductible.

Argued for reclaimer—Switchboards and subscribers' instruments not being "lands

and heritages" repairs thereon were not deductible. In many cases the instruments were privately owned—it was a mere accident that in the present instance they were owned by the company. They could, however, be removed by the company at any time. Neither the instruments nor the switchboards were in the company's premises; the former were in the subscribers' houses and the latter in hired buildings. They were really tenant's fittings, and in the same position as gas meters. They ought not to be taken into account—*Glasgow Gas-Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727; *Falkirk Joint Stock Gas Company, Limited*, May 11, 1864, 4 Macph. 1133; *Thompson* v. *Assessor for Renfrewshire*, January 25, 1883, 10 R. 500, 20 S.L.R. 322; *Gosnell* v. *Assessor for Edinburgh*, February 24, 1883, 10 R. 665, 20 S.L.R. 431; *Coltness Iron Company, Limited* v. *Assessor for Linlithgowshire*, March 1, 1882, 10 R. 21, 19 S.L.R. 566; *Marr Typefounding Company, Limited* v. *Assessor for Edinburgh*, February 9, 1884, 11 R. 563, 21 S.L.R. 396. *Esto* that they were a necessary part of the undertaking they were not "lands and heritages," and that was the subject assessable. The rolling stock of a railway was not assessable, and the subjects in question were in the same position. As to repairs on roofs the reporter had rightly limited the deductions to repairs on standards and stays. Assuming that the apparatus attached to roofs was assessable—*Lancashire Telephone Company* v. *Overseers of Manchester*, L.R. 13 Q.B.D. 700, *aff.* 14 Q.B.D. 267—necessary repairs alone were deductible—*Pumpherston Oil Company, Limited* v. *Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830. This was not a case of valuing a commercial undertaking like a railway or a gaswork. Railways were dealt with separately under section 21 of the Act, and gasworks were now valued on a revenue basis—*Assessor for Falkirk* v. *Falkirk Gas Company, Limited*, February 24, 1883, 10 R. 651, 20 S.L.R. 427; *Kirkcaldy Gas-Light Company, Limited* v. *Assessor for Kirkcaldy*, January 14, 1905, 7 F. 430, 42 S.L.R. 510; *Oakbank Oil Company, Limited* v. *Assessor for Midlothian*, March 15, 1902, 4 F. 520, 39 S.L.R. 581. What was to be valued here was not the undertaking but lands and heritages—*Cowan & Sons, Limited* v. *Assessor for Midlothian*, May 25, 1894, 21 R. 812, 31 S.L.R. 733; *Corporation of Glasgow* v. *M'Ewan*, November 23, 1899, 2 F. (H.L.) 25, 37 S.L.R. 620, *per* Lord Macnaghten. The case of *Burghead Harbour* (*cit. infra*) relied on by the respondent was inapplicable, for the harbour was itself a heritage. Cranes, however, used on a harbour, not being part of the heritage, were not assessable, and so neither were the subjects now in question. Reference was also made to *Young & Sons* v. *Assessor for Peebles*, February 15, 1899, 1 F. 579, 36 S.L.R. 597.

Argued for respondent—The subjects in question were all essential parts of the undertaking, and whether they were entered in the valuation roll or not was immaterial, for under the Act all expenses necessary to maintain the subjects in their actual state were deductible. The deductions allowed were for repairs necessary to maintain the subjects in a "lettable" condition. It was immaterial whether the repairs were made on the heritable subject or not—*Pumpherston Oil Co.* (*cit. sup.*), *per* Lord Kinnear; *Burghhead Harbour Co., Limited* v. *George*, June 27, 1906, 8 F. 982, 43 S.L.R. 754, *per* Lord Stormonth Darling. The switchboards were really part of the line along which the message travelled. Repairs on roofs were also necessary, otherwise the undertaking could not be worked. The subscribers' instruments were the property of the company, and were a necessary part of the undertaking.

At advising—

LORD M'LAREN—This is a suspension at the instance of the Corporation of Glasgow, as owners of a telephone undertaking in the city, to test the legality of the assessment made on the city for relief of the poor. There is no question as to the amount of the gross assessment, but the complainers say, that in applying the provisions of the 37th section of the Poor Law (Scotland) Act 1845, the collector has not made a sufficient deduction in respect of "the probable annual average cost of the repairs, insurance, and other expenses, if any," necessary to maintain the telephone undertaking in its "actual state."

The Lord Ordinary, in conformity with the practice in such cases, made a remit to an expert, and after hearing parties on his report made a further remit. All the questions on which the parties were at issue are examined and disposed of in a considered opinion which is now before us in connection with his Lordship's interlocutor of 8th March 1906 now under review. It is satisfactory to know that the parties, each representing public interests, have accepted his Lordship's decision on the greater number of the points in dispute. But we were invited to dispose of three questions, as to which the parties are not in agreement. These are — (1) Repairs on switchboards; (2) repairs on roofs to which telephone poles or standards are affixed so far as "rendered necessary by the renewing or repairing of such poles," &c.; (3) repairs on subscribers' instruments.

1. The switchboards in question are the switchboards at the principal and branch stations of the undertaking to which large numbers of wires converge. Every time that two persons are put into communication, their respective wires must be connected at one of those switchboards, and when the conversation is ended the wires must be disconnected at the same switchboard. From this it follows that without a system or systems of switchboards for turning on or off the electric current as required, there could be no telephonic communication at all, and the switchboards are just as much a part of the assessable subject as the wires or cables which they bring into connection. Again, if the telephone undertaking is to be any use to the subscribers it is evident that the switchboards must be maintained in their actual

state—that is, in such a condition that by a movement of the operator two given wires may be connected or disconnected; and accordingly the expense of so maintaining them is by the Poor Law Act a proper deduction from the gross assessable rental. On this point I agree with the Lord Ordinary.

2. The telephone system, as we see, consists partly of underground conductors or cables and partly of overhead wires, the latter being affixed to the roofs or chimney-heads of houses with the consent of the owners. The collector does not now dispute that repairs on poles, standards, or fixtures upon roofs of buildings are a proper subject of deduction, but he takes exception to the interlocutor under review in so far as it allows a deduction in any case for repairs to the roof itself.

It was stated in the argument addressed to us that in a large number of cases the "wayleave," as it is termed, or permission to affix the telephone poles to roofs, is granted in consideration of the telephone authority undertaking to keep the roof in repair. Now, according to the decision in the *Lancashire Telephone Company*, 13 Q.B. Div. 700, 14 Q.B. Div. 267, which has been accepted as settling the liability of telephone undertakings to assessment for poor rates, the ruling principle is that the telephone wires or conductors are affixed to the soil by means of the poles and brackets which give them support, and are thus a species of real or heritable estate. This principle would (in the application of the 37th section of our Act) exclude repairs to the roof which are executed by the telephone undertakers as matter of contract, but would, as it appears to me, include such repairs to the roof as are incidental to the renewing of the poles, standards, or other fixtures which carry the wires. It is evidently impossible to remove an old pole or standard from its attachment to a roof, and to fit in a new one, without doing some damage to the roof, and the reinstatment of the damaged part of the roof is just as clearly a part of the operation by which the heritable subject of the telephone system is maintained in its actual state. But this is the only kind of repair to the roof which the Lord Ordinary has allowed. On referring to the passages in the reporter's notes it will be seen that the reporter has disallowed roof repairs to the amount of £523, 12s. 8d., and has only allowed them to the extent of £112, 9s. 3d., a very small sum for the area of the Glasgow Telephone undertaking. I have therefore no doubt as to the soundness of his Lordship's decision on this point.

3. As to repairs on subscribers' instruments, the Lord Ordinary has made no allowance. Counsel for the Corporation suggested that the point had been inadvertently omitted; while on the other side it was said that his Lordship meant to negative the claim. My opinion is that "subscribers' instruments" are not part of the heritable subject. I understand that these instruments are provided by the telephone undertaking, and of course they are attached in some way to the wire terminals. But if a subscriber discontinues his subscription I have no doubt that the telephone authority is entitled to take away the instrument, and in the ordinary course of business the instrument would be taken away and fitted up elsewhere. I think therefore that these instruments must be regarded as removeable fixtures, or as they are sometimes called, non-fixtures, and not part of the complex heritable subject of the telephone. I do not think that this opinion is displaced by the consideration that these instruments are connected with the system by wires within the house which the telephone authority is not entitled to remove, or may not consider to be worth the trouble of removing. The instrument is a thing distinct from the wires; its attachment is of the slightest and of the same character as the attachment of gas brackets and electric lamp fittings, which are moveable property and removeable in a question between landlord and tenant.

As the interlocutor does not state the sums to be allowed for deduction from the assessment, the case must go back to the Lord Ordinary, but I understood counsel to say that if we decided the questions of principle brought before us, the parties would in all probability settle the sums to be allowed without further legal procedure.

LORD KINNEAR—I concur.

LORD PEARSON—I have had an opportunity of seeing Lord M'Laren's opinion; and while I am not prepared to dissent from any part of it, I think it right to express my doubt on a single point, namely, the disallowance of the repairs on the so-called subscribers' instruments. I am not satisfied of the validity of the distinction between these and the switchboards, as forming part of the lands and heritages. On the question whether they are heritable by annexation, I find it difficult to discover any real distinction between them, and though the attempt to ascertain whether the assessor included them in his valuation has failed, I should have thought that they might well be regarded as being within his description of the subject valued, namely, "telephone wires and apparatus." However, the matter is not one of strict law, but of somewhat artificial rules expressed in artificial and almost figurative language. While I have some difficulty on this point, I am prepared to concur in the judgment proposed.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

"Find that (1) switchboards, (2) repairs on poles and standards and on roofs, so far as incidental to the reinstatement and renewal of said poles and standards, are proper subjects of deduction from the gross assessable rental, but that subscribers' instruments are not part of the heritable subjects and no deductions fall to be made in respect of them: *Quoad ultra*

affirm said interlocutor: Find neither party entitled to expenses in the Inner House, and with these findings remit to the Lord Ordinary to proceed."

Counsel for Complainers and Respondents—Solicitor-General (Ure, K.C.)—Constable. Agents—Simpson & Marwick, W.S.

Counsel for Respondent and Reclaimer—Scott Dickson, K.C.—Orr Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, December 20.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

NEILSON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Passenger Alighting when Train not at Platform—Invitation to Alight—Relevancy.

A passenger in getting out of a train which had overshot the platform, fell and was injured. The accident happened about six p.m. on a September evening, and there was no averment that there was not daylight. In an action against the company the pursuer, *inter alia*, averred that the train ran past the platform unknown to her, that on the train reaching the station a porter called out its name, and that on the train coming to a complete standstill she proceeded to get out. There was no averment that when she proceeded to alight she did not know that the train was not at the platform.

Held that the pursuer's averment that the train ran past the platform unknown to her might be construed to mean that when she proceeded to alight she thought the train was opposite the platform, and did not know that it was not, and that the action therefore was relevant, but on that averment only.

Janet Kennedy or Neilson, wife of Thomas Neilson, 115 Great Western Road, Camlachie, Glasgow, raised an action against the North British Railway Company to recover £500 in name of damages for personal injuries. The pursuer was a passenger on the defenders' railway from Milnathort to Cupar, Fife, on 22nd September 1906, and met with an accident when getting out of the train at Cupar Station. She averred—"(Cond. 3) The train from Ladybank Junction, by which the pursuer travelled to Cupar, was timed to leave Ladybank at 5·38 afternoon, but it ran considerably behind the scheduled time. When approaching Cupar Station the train was running at a very high rate of speed, and it ran past the station platform, unknown to the pursuer. (Cond. 4) On the train reaching Cupar Station a porter in the defenders' service shouted out the name 'Cupar' several times, and thus invited passengers for Cupar to alight. After the train had been brought to a complete standstill the pursuer proceeded to get out of the carriage in which she had travelled from Ladybank Junction. She opened the carriage door, stepped on to the footboard, and held by the handrail alongside the carriage door as she stood on the footboard, while another passenger handed her out her bag from the carriage. The pursuer then proceeded to alight, but in consequence of the train having overshot the platform as before mentioned she fell a distance of about four feet on to the ground. (Cond. 5) By the said occurrence the pursuer sustained serious injuries to her person. . . . (Cond. 6) The foresaid injuries to the pursuer were caused through the fault and negligence of the defenders, or of their servants, for whom they are responsible. In particular (1) the driver of the engine of said train by which pursuer travelled from Ladybank Junction to Cupar was at fault in respect he failed to pull up the train—and particularly the carriage thereof in which pursuer travelled—opposite the platform at Cupar Station, and culpably and negligently drove beyond the platform the part of the train in which pursuer travelled; (2) the porter who on the foresaid occasion shouted out 'Cupar' several times on the arrival of the train there, was at fault in thus inviting the pursuer and other passengers for Cupar to alight from the train while said carriage or part of the train was not opposite the platform, and no proper landing stage or means had been provided for the pursuer alighting with safety; and (3) the stationmaster and other servants of the defenders at Cupar Station were also in fault in respect they failed to give warning to the pursuer as it was their duty to do, that she was not to alight while said carriage or part of the train was not opposite the platform."

The defenders pleaded that the action was irrelevant.

On 4th December 1906 the Lord Ordinary (MACKENZIE) approved of this issue—"Whether on or about 22nd September 1906, and at or near the Railway Station, Cupar, Fife, the pursuer sustained personal injuries through the fault of the defenders, to her loss, injury, and damage."

"*Opinion.*—I am of opinion that this case should not be withheld from a jury. In the case of *Muirhead* v. *North British Railway*, 11 R. 1043; *Siner* v. *Great Western Railway*, L.R. 3 Exch. 150, L.R. 4 Exch. 117; and *Cockle* v. *London & South-Eastern Railway*, L.R. 5 C.P 457, there was nothing of the nature of an invitation to alight. In *Whittaker's* case, L.R. 5 C.P. 464, note, there was, Bovill (C.J.) observing that it was a question for the jury whether the calling out of the name of a station amounts to an invitation to alight—see *M'Aulay* v. *Glasgow & South-Western Railway*, 23 R. 845; *Foy* v. *London, Brighton, & South Coast Railway*, 18 C.B.N.S. 225. No doubt in *Whittaker's* case it was dusk and in *Cockle's* case it was dark. In the present case there is no averment it was not daylight. Nor is there any averment that the place was not reasonably safe for passengers to alight.