

LORD GUTHRIE—I agree. The Sheriff-Substitute holds that there can be no liability in the case of a dog injured by a vehicle on the roadway unless the driver deliberately ran the dog down. The Solicitor-General did not maintain that proposition, but said that while in the case of a dog which was on the road for the purpose of passage that law would not be sound, yet it was sound in a case where, as here, the dog was on the road for another purpose altogether. As I read the record of the pursuer he makes no averment excluding the case in which the Solicitor-General admits there would be liability.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted to him to allow a proof.

Counsel for the Pursuer (Appellant)—Horne, K.C.—Scott. Agent—T. E. Gilbert Taylor, Solicitor.

Counsel for the Defenders (Respondents)—Solicitor-General (Morison, K.C.)—W. J. Robertson. Agents—Macpherson & Mackay, W.S.

Friday, November 3.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

LANARKSHIRE COUNTY COUNCIL v. MILLER.

Local Government—Rates—Assessment—County Council—Mails and Duties—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 105—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42—Liability for County Rates of Heritable Creditor not Entered in either Assessment Roll or Valuation Roll, but Ingathering the Rents.

The Local Government (Scotland) Act 1889, sec. 105, enacts—"The expression 'owner' has the same meaning as the expression 'proprietor' has in the Valuation Acts." The Valuation of Lands (Scotland) Act 1854, sec. 42, enacts that "the term 'proprietor' shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages." In an action by a county council to recover the rates payable in respect of certain properties for two bygone years, held that a creditor of the owner of the properties, though he had ingathered the rents under a decree of mails and duties, was not liable for the rates, as his name did not appear as owner or proprietor in either the valuation roll or in the assessment roll, and case dismissed.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 105, and the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42, are quoted *supra* in rubric.

In November 1914 the County Council of the County of Lanark, *pursuers*, brought an action against Peter Lindsay Miller, writer, Glasgow, *defender*, to recover £79, 14s. 8d., being the rates payable in respect of certain lands and heritages at Omoa Square in the parish of Shotts and county of Lanark for the years 1911-12, 1912-13.

The following *narrative* is taken from the opinion of the Lord Justice-Clerk:—"In this case the County Council of the County of Lanark sue the defender for the rates payable by the owner or proprietor of certain houses for the year 1911-12, and for the rates payable by the owner or proprietor and by the occupier for certain houses for the year 1912-13. John Agnew was owner and proprietor of these houses for the years in question, but the defender, it is averred, was heritable creditor in possession of the houses from October 1910 till after 15th May 1913 under a decree of mails and duties, and actually received the rents for the period from 15th May 1911 to 15th May 1913. Mr Agnew was entered as owner or proprietor both on the valuation rolls and the assessment rolls for the period in question, the defender's name never appearing on any of the rolls. The returns from which the entries in the valuation roll were made, 'in which John Agnew was erroneously entered as proprietor,' it is averred were made by the defender's firm. It is not averred that in making the returns the firm was acting as agents for the defender and not as agents for John Agnew, or that the returns were not honestly made. There are no provisions in the Act of 1889 or in any of the statutes therein referred to for making up an assessment roll, but it is plain from sections 64 and 65 of the 1889 Act that it was the duty of the pursuers to make up such a roll, and they have accordingly always done so on the basis of the valuation roll, and on these rolls Agnew's name always appeared as owner or proprietor, and the defender's name never appeared. The pursuers took out summary warrants against Agnew for the rates in question, and in his sequestration they lodged a claim therefor. He had, however, no estate, and therefore nothing was recovered by the pursuers. The valuation rolls and the assessment rolls for the two years 1911-12 and 1912-13 standing as I have said, the pursuers now aver that on 28th July 1914, without any alteration on any of the rolls, they issued demand notes to the defender for the rates for these two years, and the defender not having paid the rates the present action has been brought to enforce payment."

The defender pleaded, *inter alia*—" (1) The action is incompetent. (2) The action is irrelevant."

On 6th February 1915 the Sheriff-Substitute (A. S. D. THOMSON) sustained the first plea-in-law for the defender.

Note.—"I had an interesting and able argument upon the closed record, but having consulted all the authorities cited at the debate I feel unable to resist the authority of or to distinguish this case from the case of the *County Council of Argyll v. Walker*, 1909 S.C. 127, 46 S.L.R. 107. . . .

"There remains therefore in this case only the fact (and I assume it to be the fact) that the heritable creditor collected the rents for these two years. Is this sufficient to make him liable for the assessments? In the *Argyll County Council* case such was the fact. The heritable creditor had collected the rents due at Whitsunday 1907, but was held not to have rendered himself liable thereby for the assessments for the year from Whitsunday 1906 to Whitsunday 1907. Standing that decision I am bound to follow it in this Court."

The pursuers appealed to the Sheriff (GARDNER MILLER), who on 10th June 1915 adhered.

Note.—" . . . There is the case of *Argyll County Council v. Walker*, which the appellants' agent admitted told rather against his claim. He attempted to distinguish the two cases on the ground that the proprietor there was rightly on the valuation roll as owner in respect that the decree of maills and duties had only been obtained after the roll was made up, whereas in the present case the defender had obtained decree previous to the making up of the roll, and that it was through an error, induced by the representations of his own agents, that he was not entered on the roll for these two years as proprietor. But then the case of the *County Council of Argyll* lays it down that even for the period for which the bondholder was entitled under his decree of maills and duties to recover the rents he was not liable in payment of the rates, and accordingly I think that case rules the present one. The appellants' agent contended that certain observations of the Lord President were *obiter dicta* and were not necessary for the decision of the case. He contended that by the Local Government Act of 1889 the rates were laid on the lands and heritages in the county. That must be held as meaning that anyone who entered into beneficial possession of the lands took them subject to the burden of the payment of the rates. He further referred to the former case of the *Liquidators of the City of Glasgow Bank v. Nicholson's Trustees*, 9 R. 689, 19 S.L.R. 461, where Lord President Inglis held that a bondholder who entered into possession by a decree of maills and duties came into the position of the debtor and took his estate just upon the same terms as the debtor himself held it in respect of the sum advanced, and among other things he took it under the obligation to provide out of the rents for the payment of all proper burdens which fell to be discharged out of the rents. He therefore maintained that the public burdens were more than a mere personal debt of the proprietor, and that they attached to the lands whether one could call them a *debitum fundi* or not. Now it is not for this Court to canvass the judgment of the Supreme Court. It seems to me that the views of the Lord President were not mere *obiter dicta*, and even if they were a sheriff would be bound to give them the highest consideration and effect, and that is especially the case with regard to a judgment which was afterwards referred to with approval by the same Division of the Court

in the case of *Campbell v. Edinburgh Parish Council*, 1911 S.C. 280, 48 S.L.R. 193. If that is so, then the rates of these two years were the personal debts of the proprietor, who had been entered upon the valuation roll and to whom the notices of assessment were sent. Accordingly I agree with the learned Sheriff-Substitute that the case of the *County Council of Argyll* rules the present one, and that the action must be dismissed as irrelevant. . . ."

The pursuers appealed, and argued—The true owner was not to escape merely because he failed to supply information to the assessor. The defender was the true owner here in the sense of the definitions of the Acts—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 105; Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42; the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 4 (22). The fact that the defender was heritable creditor under a decree of maills and duties which he had obtained clearly pointed to him being the person entitled to receive the rents. Although Agnew's name did appear in the assessment roll for the year in question, the fact remained that the defender was the person in actual possession—"the proprietor," and while under sections 30 and 34 of the Lands Valuation Act 1854 (*cit.*) an error in value could not be corrected, that did not hinder an error in assessment being rectified by the Court—*Sharp v. Latheron Parochial Board*, 1883, 10 R. 1163, 20 S.L.R. 771; *British Linen Bank v. Assessor of Aberdeen*, 1906, 8 F. 508, 43 S.L.R. 442; *Magistrates of Glasgow v. Hall*, 1889, 14 R. 319, 24 S.L.R. 241. The decree of maills and duties constituted the holder proprietor, though it might be a redeemable proprietorship—*Macrae v. Leith*, 1913 S.C. 901, *per* Lord President Dunedin at p. 904, 50 S.L.R. 406. Admitting that the defender's right of appeal was interfered with, the pursuers offered to give him an appeal, and no prejudice was suffered by the defender accordingly. It was not a condition-precedent that before the defender could be assessed by the pursuers his name must appear in the assessment roll. The doctrine of election did not apply here. The mere taking of a summary warrant was not equivalent to a decree—*Blacks v. Girdwood*, 1885, 13 R. 243, 33 S.L.R. 161; *Meier & Company v. Küchenmeister*, 1881, 8 R. 642, 18 S.L.R. 431. In view of the cases the pursuers were now entitled to go against the defender. It would be, if necessary, competent to sue reduction of an entry in the valuation roll—*Abercromby v. Badenoch*, 1909, 2 S.L.T. 114; *Moss's Empires v. Assessor for Glasgow*, 1916 S.C. 366, 53 S.L.R. 298. The case of *Argyll County Council v. Walker*, 1909 S.C. 107, 46 S.L.R. 107, on which the Sheriff had decided against the pursuers, did not rule this case, but was distinguishable.

Argued for defender—Under sections 37 and 40 of the Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83) a duty was placed on a local authority (now the assessor) to make up a roll for assessment purposes. That roll, the valuation roll, was the sole basis on which public assessments were leviable—*Pumphreston*

Oil Company, Limited v. Wilson, 1901, 3 F. 1099, 38 S.L.R. 830. Furthermore, the valuation roll was final in regard to the persons named in it—*Bell v. Thomson*, 1868, 6 Macph. 64, 5 S.L.R. 68; *Ferguson v. M'Erven*, 1852, 14 D. 457; *Argyll County Council v. Walker (cit.)*. This latter case ruled the present one. There could never be a relation of debtor and creditor in respect of a man not entered in the valuation roll. Section 27 (3) of the Local Government (Scotland) Act 1889 (*cit.*) declared that the annual value as shown in the valuation roll was to be the basis of assessment. The pursuers had a remedy, but they had failed to use it timeously, *i.e.*, they could have asked the assessor to correct the roll, and even appealed therefor to the Valuation Committee. They had not done this, and could not do it now. The claim of the pursuers resolves itself into that for an irrecoverable debt. The Burgh Police (Scotland) Act 1892 (*cit.*), sec. 351, provided a time limit, which the pursuers had neglected. The defender could not be said to be in possession of the rents. These did not as a matter of law become vested in him till he had intimated his decree to the tenants, and this he never had done—*Glasgow Friendly Society v. Bruce*, 1916 S.C. 267, 53 S.L.R. 190.

LORD JUSTICE-CLERK—[*After the narrative, supra*—The pursuers are a statutory body having only the powers which the statute creating them conferred upon them. They are to budget year by year for their revenue and expenditure, and levy year by year the necessary rates, giving the alleged ratepayer an appeal in each year in terms of the statute and of their regulations. I can find no warrant for saying that in 1914 they were entitled to charge A for rates due for the years 1911-12 and 1912-13, when A's name did not appear on any roll for either of these years (either valuation or assessment) relating to the property in question, either as owner or proprietor, and when B's name has appeared as owner or proprietor in all of said rolls. In these circumstances the pursuers' claim must in my opinion fail. I do not think the demand notes sent to the defender complied with the statutory requirements, and that in certain not unimportant particulars.

I cannot regard the attempt which the pursuers made to give the defender an appeal in 1914 as either in itself according to law or as equivalent to the appeal he would have had if demand notes had been duly sent to him in 1911 and 1912.

The pursuers assume that the name of the true proprietor or owner cannot be put on the valuation roll or assessment roll if someone else is actually drawing the rents. This seems to me an entirely unwarranted assumption.

The views expressed in the cases of *Bell v. Thomson*, 6 Macph. 64, and *Ferguson*, 14 D. 457, in my opinion support what I have above expressed. The case of *Argyll County Council v. Walker*, 1909 S.C. 107, referred to by the Sheriff and Sheriff-Substitute, is not inconsistent with anything I have said, but I am not satisfied that it is such an authoritative determination of the point

now in controversy as they seem to think it. It rather appears to me to have decided a point which does not here arise, and to have proceeded on considerations which we have not now to deal with. I do not think there is any material difference between liability for the owner's and the occupier's rates requiring separate consideration or argument.

I am therefore for refusing the appeal and dismissing the action.

LORD DUNDAS—I am of the same opinion. I agree with the result arrived at by the learned Sheriffs, but I should prefer to rest my judgment upon somewhat different grounds. I am not satisfied that the decision in the case of *Argyll County Council* is an authority here in point, or at least completely in point. The facts there were not the same. The pursuers' averment, which upon relevancy we must assume to be accurate, is a much wider and more comprehensive one than was warranted by the facts in the *Argyll* case. But apart from that authority I think the pursuers' case fails. In the first place, I do not agree with their contention that the defender was, if their averments are true, necessarily the person whose name should have appeared on the assessment roll as "owner" of the property, and that "John Agnew was erroneously entered as proprietor" in the returns furnished to the pursuers by the defender's firm. The statutory definitions of the word "owner" are quoted by the learned Sheriff in his note. While these "apply to" or "include" persons in actual possession of or entitled to receive the rents of lands, they are obviously not so limited or restricted in their meaning. Now Agnew was the real owner of the lands; his name was returned as owner by the firm who acted as his agents, and was entered as such by the pursuers on their assessment roll; they issued demand notes to him as owner for the rates in question, and followed these up by obtaining summary warrants to poind his goods—although these were not executed—and by claiming, although fruitlessly, in his sequestration. Agnew took no appeal against the entry of his name as owner. In these circumstances I do not see how he could have resisted liability for payment of the rates to the pursuers if he had had money wherewith to satisfy their demands. Assuming therefore that the pursuers might, if so advised, have placed the defender's name on the roll as owner, their argument that he was the person, and the only person, whose name could rightly have been so entered seems to me to fail. In the second place, there appears to me to be a further and conclusive obstacle in the way of the pursuers' success. It was not until after the expiry of the years in respect of which the rates now sued for effereed that any demand was made by the pursuers against the present defender. It was only on 28th July 1914 that certain demand notes were issued to him. I do not pause to deal with the criticisms forcibly urged by the defender's counsel in regard to the form of these docu-

ments, both as to what they express and what they omit, and their non-compliance with statutory requirements. The real point goes deeper. The pursuers' demand against the defender came, in my judgment, too late. I do not think it was competent for them, after the expiry of the years in question, to seek to assess a person whose name did not during those years appear on the assessment roll. If the pursuers' contention were to be affirmed there would seem to be no limit in point of time short of the period (40 years) of the long prescription by which such a demand as is here made would be excluded. I am not aware that the point now raised has ever been expressly decided. The case of *Bell v. Thomson*, however, seems to me to throw light upon it. A passage in Lord Neaves' opinion (at p. 70) is particularly valuable. He says that "an assessment roll has at least a certain degree of finality. If a man's name has been omitted in one year, posterior commissioners could not call on him in a subsequent year for bygone assessments." These words are directly in point, and whether or not they were *obiter dicta* they appear to me to be sound sense, and I agree with them. If this view be correct it is fatal to the pursuers' case. I do not overlook their argument that the error, if such it was, in the assessment roll was due to information (erroneous, as they assert) furnished by the defender himself. The argument seems to me to be devoid of substance. There is no room in this case for any suggestion, and none was made, of anything like fraud or deliberate misrepresentation, and, what is more material, the returns were not sent in by the defender but by his firm, acting apparently in their capacity as agents of Agnew, the proprietor of the lands.

For the reasons thus shortly stated I think the pursuers' case fails, and I am for dismissing the appeal and affirming the interlocutors appealed against. Other topics were discussed during the argument at our bar—some raising questions of general, others of particular, application—in regard to which I find it unnecessary, and do not desire, to offer any opinion.

LORD SALVESEN—This is an action for the recovery of rates levied by the pursuers for the years from 15th May 1911 to 15th May 1913, on certain lands and heritages in the county of Lanark. During these two years Mr John Agnew was the owner, and Messrs Boyds, Miller, & Thomson, writers, Glasgow, were his agents. The usual returns for the valuation rolls were sent to Mr Agnew, and were filled up by his agents, and in these Mr Agnew was entered as proprietor. The defender, who is a partner of this firm, held a bond and disposition in security over the lands in question, and had taken a decree of mails and duties on 11th October 1910. There is a dispute between the parties as to whether the defender ever intimated the decree to the tenants, and instructed them to pay their rents to him; but as this discussion has been taken on the relevancy, it must be

assumed meanwhile that the defender was entitled to receive the rents and profits of the lands in question, and was in actual receipt thereof (as the pursuers aver) during the two years in question.

The assessment roll made up by the pursuers on the basis of the valuation roll entered John Agnew as the owner of the subjects in question, and on his failing to meet the rates which were leviable for these two years the pursuers took out summary warrants to poind and sell his effects. These warrants were not put in force, but on 26th August 1912 the pursuers lodged a claim in his sequestration for the rates applicable to the year 1911-12, but were told that there were no funds. In 1914 the pursuers discovered the facts relating to the defender's bond and disposition in security and the decree of mails and duties above referred to, and in July 1914 they sent him demand-notes for payment of the rates in question. The demand-notes themselves are undated, and were apparently copies of the demand-notes which had been issued to other persons who were liable for rates for the years in question. Some correspondence followed; and the defender was invited, if he objected to pay, to make representations to a so-called appeal committee of the County Council on a day which they fixed—7th October 1914—but he declined to avail himself of this invitation. The present action was accordingly brought.

The case is laid upon the footing that the defender was owner of the lands in question during the two years to which the rates apply, and that the firm of which he is a partner had erroneously represented that John Agnew was the owner; and further, that the defender cannot take advantage of the error which, however innocently, was induced by the returns made by his firm. By section 105 of the Local Government (Scotland) Act 1889 "the expression 'owner' has the same meaning as the expression 'proprietor' has in the Valuation Acts;" and on turning to section 42 of the Valuation Act of 1854 one finds the provision that "the word 'proprietor' shall apply to liferenters . . . wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages." Founding on this definition, and applying it to the averments made against the defender, the pursuers argued that the defender, and he alone, fell to be entered in the valuation rolls of 1911-12 and 1912-13 as the owner of the heritable subjects.

I assume that the defender might have been placed on the valuation roll for these two years if the pursuers had thought fit to do so, and if their averments are well founded. It does not, however, follow that the actual owner might not also lawfully have been selected by the pursuers and entered in the roll as such. In point of fact he was entered, and no objection was taken to the entry. *Prima facie* therefore he became liable for the rates; and I think it would have been difficult for him to have successfully maintained in an action of suspension of the summary warrants based on this entry, and repeated in the assessment

roll (had these warrants been put in force), that he was not liable, and that the defender's name ought to be entered instead. If he had objected timeously, he could have appealed to the Valuation Committee to have the entry corrected, but he did not avail himself of his remedy. If therefore Mr Agnew had been able to pay the rates in question I cannot conceive that he could have escaped. He was the true owner, and his agents had returned him as such, and whatever relief he might have had against the defender, in a question with the pursuers his liability for the rates would appear to have been firmly established. An owner who has been content to let a heritable creditor take decree of maills and duties against him may still have other funds from which to meet assessments; and even if he is sequestrated the rates form a preferable charge on any assets in the sequestration. It is the unusual circumstance of the owner of property of considerable annual value not having enough assets in his sequestration to meet rates due in respect of his lands that has led to the present proceedings.

If I am right so far, the foundation of the pursuers' claim fails, for it proceeds on the footing that the person in actual receipt of the rents and profits of lands, and he alone, can be put on the valuation roll as the owner. The definition on which the pursuers found does not support this contention, but seems to me to exclude it.

Even if it were not so, it does not follow that the pursuers are entitled to succeed. The provisions as to rating are contained in sections 27 and 62 to 65 of the 1889 Act. They are to the effect that the consolidated rates shall be imposed upon lands and heritages according to the annual value thereof as appearing in the valuation roll; that the rates are to be equally divided between owners and occupiers, subject to certain qualifications; and that a demand-note shall be made to the persons liable, stating the amount to be paid, and the manner and time of appealing against paying such amount. No express provision is made for making up an assessment roll; but section 64 provides for ratepayers inspecting the assessment roll; and section 65 enacts that production of the assessment roll shall alone, and without any other evidence whatsoever, be received as *prima facie* evidence of the making and validity of the rates therein mentioned. It is therefore clearly enough implied that an assessment roll must be made up; and we were informed that the practice has been to use the valuation roll as the basis, subject to the correction of any errors that may have been discovered in the names of the persons liable before the assessment roll has been made up.

Section 27 (3) provides that the rates shall be imposed "upon lands and heritages according to the annual value thereof as appearing on the valuation roll, but subject always to the provisions of the Public Health (Scotland) Act 1867 in regard to all assessments leviable under that Act." This assessment forms only a small part of the

rates now sought to be recovered; but so far as the Public Health rate is concerned it would seem to take one back to section 40 of the Poor Law Act of 1845 (8 and 9 Vict. cap. 83). That Act provided for parochial boards making up a roll of ratepayers, and of the sums to be levied from each, and provides that "the roll so made up shall be the rule for levying the assessment for the year or half-year then next ensuing." There is a proviso that if any errors shall have been found to exist in the sum or sums to be levied by way of assessment, or any omissions or surcharges in respect of the persons liable to pay the same, the parochial boards may cause such error, omission, or surcharge to be corrected at their next or any subsequent meeting after such error, omission, or surcharge has been discovered; and a further proviso as to the remedy of persons aggrieved by the assessments. This further proviso refers back to the remedy by law competent to a person who considers himself aggrieved by the assessment, as such remedy existed at the date of the passing of the Act.

Owing to there being no express provisions as to the mode of making up the assessment roll under the 1889 Act, or as to the correction of that roll; and to the fact that no reference is made back to earlier legislation, except in so far as the Public Health Act is concerned, it is by no means clear to what extent the earlier legislation applicable to other rates falls to be implied. The Act of 1889 seems to have assumed that the manner of making up the assessment rolls, and the validity to be attached to them, were well known; and indeed from the fact that no question has arisen since 1889 it may be taken for granted that county councils have agreed as to how the Act is to be carried out in this respect, and that practical difficulties have not occurred. If this be so, then it must at least be implied that the assessment roll, which is the subject of the express provision that I have mentioned in the 1889 Act, must be the rule for levying the assessment—to use the language of section 40 of the 1845 Act. Subsection 5 of section 62 of the 1889 Act provides that "the whole powers and rights of issuing summary warrants and proceedings, and all remedies and provisions enacted for recovery of the land and assessed taxes, or either of them, and other public taxes, shall be applicable to the rates authorised to be imposed by the county council of any county, and sheriffs [&c.] may, on the application of the county clerk or collector, grant warrant for the recovery of such rates and expenses in the like form and under the like penalties as are provided in regard to such land and assessed taxes, and other public taxes. Provided, nevertheless, that it shall be competent to the council to prosecute for and recover such rates by action in the Sheriff Small-Debt Court or in any other Court as the case may be."

From the above provisions I think the following propositions may be legitimately deduced, so far as not expressed—(1st) that the assessment roll must be made up

on the basis of the valuation roll, and contain only the entries appearing in that roll, so far as the lands and heritages are concerned and their respective values; (2nd) that the persons to be entered as liable for the rates are the persons appearing as owners and occupiers in the valuation roll, subject to any errors and possible omissions with regard to these which may have been discovered before the assessment roll was laid out for inspection, or that may be made in consequence of appeals taken at the time; (3rd) that the assessment roll as finally made up forms the rule for assessing the persons therein entered; (4th) that summary warrants may be issued for the recovery of the rates at the instance of the county council against any person who *ex facie* of the roll appears liable for them, or if this is not thought expedient, that the rates may be recovered by action; (5th) that it is a condition of a valid warrant or a successful action that the name of the person against whom the warrant is taken out or action is brought must be on the assessment roll; (6th) that the warrant cannot be taken out or actions successfully pursued against persons who are not on the assessment roll.

These propositions appear to me to be supported by the decisions in the cases of *Ferguson v. M'Ewen* and *Bell v. Thomson*. In the former case it was held that where a mercantile firm had been entered in the assessment roll as chargeable with a certain sum as poor-rates it was illegal for the collector to enter the two partners of the firm as in default each of one-half of the sum charged against the firm. The ground of judgment was that the roll of assessment is the only rule under the Statute 8 and 9 Victoria, chapter 83, for the levy of the assessment, and that the collector in proceeding against the parties liable was not entitled to depart from the actual terms of that roll. In the latter case a person who had paid assessments for four years to the Police Commissioners of a burgh, brought an action against the collector of police rates in which he claimed repetition of the amounts paid in respect that the property was not within the burgh as had been erroneously believed. He was held not entitled to succeed, and Lord Neaves in his judgment put the very case that we have here. He says, 6 Macph., at p. 70—"An assessment roll has at least a certain degree of finality. If a man's name has been omitted in one year, posterior commissioners could not call on him in a subsequent year for bygone assessments. Again, the pursuer by being assessed for the burgh escaped the county assessment, of which exemption he proposes still to enjoy the benefit. Then it is clear that if he had come forward in time, within the year, matters might have been rectified, so as to lay the burden upon the proper parties."

These decisions seem to afford the reason why there is no recorded instance of any local authority suing successfully after an interval of time to recover assessments said to be due from a person who was not on the

assessment roll for the year to which the assessment applied. If the pursuers' contention were well founded there would be no limit in time to such a claim except the long prescription. The pursuers indeed sought to escape this inference by saying that the action must be brought within a reasonable time, but that time would obviously depend upon when the error was discovered, which might not be for many years. The whole theory of local taxation in Scotland proceeds on the footing that the rates leviable fall to be collected to meet the expenses of the particular year in which they are due, and in so far as they may be deficient for that purpose the deficiency must be met out of the rates of the succeeding year. The body of ratepayers changes from year to year, and it is for them that the county council act in imposing the rates necessary for each year's disbursements. If a mistake is made, either by omitting lands and heritages from the roll which ought to have been entered (a mistake which the pursuers admit would be irremediable), or by entering some person from whom the rates cannot be recovered when another person might have been entered who would have been able to pay, the body of ratepayers must just suffer. The levying of the rates does not depend upon common law considerations but on the rules prescribed by statute, and I cannot find anything in the 1889 Act which places the pursuers in a more favourable position than that of the collector in the case of *Ferguson v. M'Ewen*. I am therefore of opinion that the action falls to be dismissed.

LORD GUTHRIE—A great many difficult topics have been discussed which are in my opinion unnecessary for the decision of this case. I am content to deal only with three points made by the respondent—1. That Agnew was properly entered on the statutory assessment-roll, the appellants being entitled to enter either Agnew or the respondent. 2. That even if his name could not, in the circumstances admitted or offered to be proved, be properly so entered the appellants have lost all right to rate the respondent for the rates in question. Either of these two views would end the matter, because they warrant the respondent's plea of incompetency. But there is another view which at all events warrants the respondent's plea of irrelevancy, namely, 3. That in any view, even if the appellants could still rate the respondent, the proceedings they have taken for that purpose are disconform to the statute, as appears from the demand notes. If this last point be sound, whatever proceedings the appellants might still take—supposing they are entitled still to rate the respondent—the respondent would be entitled to succeed in the present proceedings. On the first point the sheriffs seem to assume, as the appellants' argument did, that although Agnew had the title to the lands, and retained the radical right in them, he could not be an "owner" or "proprietor" liable to be rated under the statutes in question if a heritable creditor

were in possession, or at all events if that heritable creditor were in actual receipt of the rents.

That assumption seems to me unfounded. The question turns on whether the words "include" and "apply to," in the interpretation clause of the different Acts, are words of extension or of exhaustive definition. Do they exclude the "proprietor" in the popular and also in the technical sense of that word, or, including him, do they enable the rating authority in suitable circumstances to enter, instead of him, one of the classes of persons enumerated in the particular interpretation clause? In this case the words in my opinion are words of extension. No special reason has been suggested to the contrary, and there is no context pointing to another conclusion. The rule, with its exception, is stated by Lord Watson in the case of *Dilworth*, [1899] A.C. 99. It appears to me that the present case falls under the general rule and not under the exception which, as Lord Watson explains, may be raised by the context. If it does, is there any ground for saying that the authority's right to rate the person in feft in the property is ousted where a heritable creditor is in possession and in receipt of the rents? The statute does not say so, and I see no reason for so deciding. Indeed I think there are cases where the authority's interests would be seriously prejudiced if we decided, as we are asked to do, that in no circumstances can a rating authority enter an owner and enforce payment from him if at the time there is a heritable creditor in possession and either entitled to receive or in actual receipt of the rents.

But even if that is not so, then arises the second point. On that point I agree with your Lordships in thinking that the rating authority did not observe timeously the statutory procedure, or any part of it, in relation to the respondent. The appellant's argument is inconsistent both with the letter and the spirit of the statutes, and their offer to provide equivalents for the rights of which their procedure has deprived the defenders even if adequate, which it is not, seems to me outwith their statutory powers.

But suppose this is not so, I think the defenders are right in saying that the procedure which the appellants have professed to go through was inept, as appears from the terms of the demand notes contained in the print.

The Court refused the appeal, sustained the first and second pleas-in-law for the defender, and dismissed the action.

Counsel for Pursuers (Appellants) — Wilson, K.C. — C. H. Brown. Agents — Ross Smith & Dykes, S.S.C.

Counsel for Defender (Respondent) — Fraser — W. T. Watson. Agent — Andrew Urquhart, S.S.C.

Thursday, October 26.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Alloa.

GALPERN v. THOMPSON.

Process—Appeal from Sheriff—Reponing—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), Schedule I, Rule 56.

In an action of damages for slander in a sheriff court the Sheriff-Substitute granted decree in favour of the pursuer. The defender appealed to the Sheriff, who appointed parties to be heard on the appeal at the next sittings. The sittings were fixed for 8th September, and notice of this was given on the 1st to the local agents, but the defender's principal agent, who resided in Glasgow, had gone on holiday on that day. The Sheriff-Clerk refused to continue the appeal, and at the sittings the local agent explained the circumstances but did not argue the case. The pursuer appeared, and, in respect of no appearance for the defender, the Sheriff refused the appeal and adhered to the Sheriff-Substitute's interlocutor. The defender appealed to the Court of Session, and moved in the Single Bills to be reponed. The Court refused the motion. The pursuer then moved that the appeal be refused. The Court *allowed* the appeal to be heard on the merits, on condition that the defender paid to the pursuer the expenses incurred by him since the date of the Sheriff-Substitute's interlocutor.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), enacts, Schedule I, Rule 56—" . . . Where in a defended action either party fails to appear by himself or his agent at any diet . . . the Sheriff may grant decree as craved or of absolver, or may dismiss the action, with expenses, but the Sheriff may upon cause shown prorogate the time for lodging any production or pleading. . . ."

Morris Galpern, cabinetmaker, Glasgow, *pursuer*, brought an action in the Sheriff Court at Alloa against John Thompson, furniture dealer, Alloa, *defender*, concluding for decree for £150 damages for slander.

On 14th August 1916 the Sheriff-Substitute (MOFFATT) pronounced an interlocutor granting decree against the defender for £10. Against that interlocutor the defender appealed to the Sheriff (LEES), who on 26th August 1916 appointed the parties to be heard on the appeal at the next sittings.

On 8th September 1916 the Sheriff pronounced the following interlocutor:—"The Sheriff, in respect of no appearance at today's sittings by the appellant personally or by his agents in support of his appeal, Refuses the same; and on the motion of the respondent's agent adheres to the interlocutor of the Sheriff-Substitute of 14th August complained of."

The defender appealed to the Court of Session, and moved in the Single Bills to be