as that part of his Lordship's interlocutor was assailed, I am for refusing the reclaiming note. If the Lord Ordinary were to give an exorbitant award, which of course I do not anticipate, there might be a reclaiming note against the amount actually given. But, in my judgment, the Lord Ordinary has adopted quite the proper course in making the finding, leaving the actual amount to be determined by him when he has heard the parties more fully on the facts than he did at the time when he pronounced the interlocutor.

[*His Lordship then dealt with a question which is not reported.*]

The result is that, in my judgment, we should refuse the reclaiming note as I think the Lord Ordinary was right as to the expenses of the bail bond.

LORD SALVESEN—The merits of this dispute are not before us, because parties have acquiesced in the respective awards which the Lord Ordinary has given them. I would only say that while the sums awarded at first sight seem small in proportion to the value salved, it must not be left out of view that in the course of the salvage, as appears from the Lord Ordinary's opinion, a very large amount of damage was done to the salved vessel through the fault of one or more of the salving ships. That circumstance, no doubt, very largely diminished the award to which these ships would otherwise have been found entitled. The only questions before us are relatively small questions, both of them perhaps raising questions of principle. Mr Carmont contended, and I think rightly, that the expenses of the bail bonds cannot be awarded as proper expenses of process. That was decided by us in the *Ellerman Lines*. But the Lord Ordinary has not dealt with these expenses as expenses of process. He has found the pursuers liable in these expenses in so far as they exceeded the amount required to secure a reasonable security by way of bail bond, and he has continued the cause in order that he himself may fix what the proper charge should be. And as he has been guided by the English Courts as to the principles upon which the excess will be determined, so, I have no doubt, he will derive assistance from the rules that prevail there as regards the rate which may be allowed. I say no more because the matter is open for decision by the Lord Ordinary, to whom the case must go back, for the reclaimers did not wait until the Lord Ordinary had an opportunity of fixing the amount which would fall to be awarded under his last finding.

[*His Lordship then dealt with a matter which is not reported.*]

I am accordingly of opinion with your Lordship that we should refuse this reclaiming note.

LORD ORMIDALE concurred.

LORD DUNDAS was absent.

The Court refused the reclaiming note.

Counsel for the Pursuers and Reclaimers — Hon. W. Watson, K.C. — Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defenders and Respondents — C. H. Brown, K.C. — Normand. Agents—Boyd, Jameson, & Young, W.S.

Saturday, December 10.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

DANTE *v.* WALKER AND OTHERS.

Valuation — Valuation Roll — Finality — Failure to Appeal to Valuation Committee against Entry in Roll — Refreshment Stances in Public Park—Seasonal Let—Liability for Rates and Taxes—Action of Declarator and Interdict—Competency—Absence of Averments as to Inapplicability of Assessing Statutes—Relevancy —Valuation of Lands (Scotland) Amendment Act 1879 (42 *and* 43 *Vict. cap.* 42), *sec.* 6.

A town council leased to a restaurateur three refreshment stances in a public park. By the lease the lessee was permitted for five seasons extending over five years to erect kiosks for the sale of refreshments during certain permitted hours throughout the summer season of each year, but was bound to remove the kiosks at the termination of the lease. The lessee, having been entered in the valuation roll as tenant and occupier of the stances, appealed to the Valuation Committee, but only on the ground that the valuation was excessive. His appeal having been dismissed, he subsequently brought an action for declarator that he was not "tenant" or "occupier" of the stances in the sense and for the purposes of the Valuation of Lands (Scotland) Acts, and not liable to be rated or assessed in respect of the stances, and for interdict against the defenders proceeding to recover from him any rates or assessments in respect thereof. The Court (*diss.* Lord Salvesen) *dismissed* the action as incompetent and irrelevant on the grounds (1) that the pursuer had not appealed to the Valuation Committee of the burgh against his entry in the valuation roll, or given any reason for his failure to avail himself of the statutory appeal which was open to him; (2) that he had been properly entered in the roll seeing that he was tenant of the subjects under a lease, though for less than a year; and (3) that he had not averred on record anything against his liability under the Burgh Police Act and the Poor Law Act for the taxes complained of, or that these Acts, under which his liability to be rated was determined, were inapplicable.

The Valuation of Lands (Scotland) Amendment Act 1879 (42 and 43 Vict. cap. 42), sec. 6, enacts—"It shall be lawful for any person interested to complain to the commissioners of supply of any county or to the

magistrates of any burgh under the Valuation of Lands (Scotland) Acts, to the effect that any particular set forth in any entry in the valuation roll for such county or burgh, as the case may be, other than the yearly rent or value of the lands and heritages to which such entry refers, has been set forth erroneously therein; and such complaint shall be made and disposed of in the same manner and subject to the same conditions and provisions (except in regard to the right of requiring a case to be stated) in and under which complaints that such yearly rent or value has been stated by the assessor in such valuation roll at other than the just and true amount thereof may be made and disposed of."

Alfred Dante, restaurateur, 85 George Street, Ayr, *pursuer*, brought an action against Alexander Walker, Assessor of the Royal Burgh of Ayr, the Provost, Magistrates, and Councillors of the Royal Burgh of Ayr, Thomas Lindsay Robb, Town Chamberlain, Ayr, Collector of the burgh general and other assessments of the Royal Burgh of Ayr, and the Parish Council of Ayr and Robert Pyper, Collector of the said Parish Council, *defenders*, for declarator "that the pursuer was not 'tenant' or 'occupier' in the sense and for the purposes of the Valuation of Lands (Scotland) Acts of the stances Nos. 2, 3, and 6 on the Low Green of the Royal Burgh of Ayr, let to him by the defenders the Provost, Magistrates, and Councillors of the said Royal Burgh, by lease dated 15th April and 4th May 1920, and was not liable to be rated or assessed in respect of the said three stances as tenant or occupier thereof," and for interdict against the defenders the said Provost, Magistrates, and Councillors of the Royal Burgh of Ayr, Thomas Lindsay Robb, Collector of the burgh general and other assessments, the said Parish Council of Ayr, and Robert Pyper, Collector of said Parish Council, from proceeding against the pursuer by summary warrant or otherwise for recovery of any rates or assessments leviable in respect of said three stances.

The pursuer's averments were as follows:—"(Cond. 1) On 8th March 1920 the Provost, Magistrates, and Councillors of the Royal Burgh of Ayr, exposed to lease by public roup six stances on the Low Green of Ayr shown on the plan endorsed and signed as relative to the articles and conditions of set, and marked Nos. I, II, III, IV, V, and VI respectively on said plan. The pursuer Alfred Dante attended the roup, and after competition he was preferred as tenant of stances Nos. II, III, and VI at the respective seasonal rents of £305, £169, and £270 sterling. (Cond. 2) Thereafter on 15th April and 4th May 1920 a lease of the said three stances was entered into by and between the Provost, Magistrates, and Councillors of the Royal Burgh of Ayr—'the first party'—as proprietors, and the pursuer—'the second party'—as seasonal tenant, *inter alia* in the following terms:—'(*First*) The first party in consideration of the rent . . . after specified, hereby lets to the second party . . . the refreshment stances . . . Nos. II, III, and VI . . . and that for the period of five seasons from and after the 5th day of April 1920 . . . (*Second*) The period of let each season will be from the Monday preceding the April holiday to the Saturday succeeding the October holiday, both days inclusive, on which last-mentioned day the second party shall be bound to remove from the several stances hereby let. On the expiry of the week following the October holiday in the year 1924 the second party will remove from the said stances without any warning or process of law to that effect. The let shall not be held to be renewed by tacit relocation after season 1924. (*Third*) The second party will not sell anything on the Low Green or on the stances on Sundays, nor on other days except between the hours permitted by statute, bye-laws, or regulations, and subject to the terms of article fourth hereof he shall within ten minutes after the permitted hour each evening remove his whole effects from the stances and Low Green, and shall leave the same clean and vacant until seven o'clock next morning. (*Fourth*) In the event of the second party erecting on said stances, or any of them, buildings of the nature of a kiosk suitable for remaining there during the whole season in any one year, he will be entitled to sell articles thereat on each day in the week including Sundays during the permitted hours as mentioned in the preceding article. Any such buildings proposed to be erected will be subject to the approval of the first party, and must not exceed 12 feet square. Plans and elevations of any proposed buildings must be submitted to and approved by the first party before erection. Such buildings must be carefully closed up each evening on the expiry of the permitted hours and not opened until seven o'clock the following morning. All such buildings must be removed within one week after the close of each season. (*Fifth*) The second party must conform to all the burgh bye-laws and obey the directions of the police. The stances must be kept clean and tidy to the satisfaction of the Surveyor of the Burgh, and no glass, paper, or rubbish shall be left scattered about the Low Green or foreshore. (*Sixth*) In the event of . . . the second party . . . contravening any of the conditions hereof, or being convicted of any crime, offence, or contravention under common law or statute or bye-laws in force or hereafter to be made, it shall be in the option of the first party either to enforce the let or to declare the same at an end . . . No process of law shall be required for such termination, and the second party shall have no claim against the first party in respect thereof . . . (*Seventh*) The said Alfred Dante binds and obliges himself . . . to pay to the first party the sum of £744 sterling in the name of rent for each season during the currency hereof, payable in advance on or before the first day of January in each year, with interest at the rate of six per centum on each season's rent from the first day of January till payment.' A copy of the lease is produced, referred to, and founded on. The pursuer has all along possessed the said three stances on the

terms and conditions of the said lease. The permitted hour each evening was 12 p.m. (Cond. 3) The stances let are situated on a public park known as the Low Green, Ayr, which adjoins the promenade and sea front. The stances are constructed of cement concrete on the top of 6 or 8 inches of stone bottoming. They are each 12 feet square and 6 inches in thickness, embedded in the ground to the extent of three inches, and for the remaining 3 inches are above the level of the ground. The pursuer uses these stances for the storage, display and retail of refreshments. *Quoad ultra* the answers for the defenders Alex. Walker and others and the Parish Council of Ayr, so far as not coinciding with the pursuer's averments, are denied. (Cond. 4) On each of the stances let to the pursuer he has at his own expenses erected in weather boarding and glass a kiosk. These buildings are not embedded in the cement concrete but are set on the top of it. They are held down by runners bolted to the cement. Each kiosk is 12 feet square. The height of each is 7 feet, 9 inches to the eaves and 14 feet to the ridge. These stances the pursuer erected and holds under the conditions set forth in the said lease. (Cond. 5) On or about 25th August 1920 the defender Alexander Walker, the assessor of the royal burgh of Ayr, served on the pursuer a notice of a valuation of subjects in the burgh of Ayr, being the said stances, II, III, and VI, of which the pursuer was said to be 'tenant and occupier,' and which he valued at a yearly rent or value of £305, £169, and £270 sterling respectively. The pursuer was not then and has never been tenant or occupier of the said three stances for the purpose of the Valuation of Lands (Scotland) Act. (Cond. 6) The pursuer appealed against his proposed entry in the valuation roll in terms of the said notice to the Valuation Committee of the royal burgh of Ayr but his appeal was refused by the committee. The Valuation Appeal Court are in use to regard their jurisdiction as extending only to appeals from Valuation Committees or questions of yearly value. The pursuer is threatened with proceedings for recovery of rates and taxes in respect of the said entry, and the present action is therefore necessary. With reference to the answers, it is admitted that the Valuation Committee determined that the valuation was correct, and that for a number of years the pursuer had rented one or more of said stances and was entered in the valuation roll as tenant thereof, and duly paid assessments. *Quoad ultra* the notice of appeal, the case for the opinion of the Judges under the Valuation of Lands (Scotland) Acts, and any previous agreements of let or leases between the pursuer and the Provost, Magistrates, and Councillors of the royal burgh of Ayr, are referred to for their terms, beyond which no admission is made."

The pursuer *pleaded*—"The pursuer not having been at any time 'tenant and/or occupier' of the said three stances for the purposes of the Valuation of Lands (Scotland) Acts, in respect (*a*) that the lets are seasonal lets, and (*b*) that he is not in rateable occupation of these stances, is entitled to decree of declarator and interdict as concluded for."

The defenders Alexander Walker and others pleaded, *inter alia*—"1. The action is incompetent and should be dismissed. 3. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed.

The defenders the Parish Council of Ayr, pleaded, *inter alia*—"1. The action as laid being incompetent should be dismissed. 5. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed."

On 2nd March 1921 the Lord Ordinary (BLACKBURN) sustained the first plea-in-law for the defenders the Parish Council of Ayr, and dismissed the action.

Opinion. — "Under a lease dated 15th April and 4th May 1920, entered into between the pursuer and the Provost, Magistrates, and Council of the royal burgh of Ayr, there were let to the pursuer three 'refreshment stances' in a public park in Ayr called the Low Green for a period of five seasons from and after 5th April 1920. These stances consist of concrete blocks 12 feet square and 3 inches thick embedded in the ground, and are so constructed as to admit of a moveable kiosk or refreshment stall being placed on the top of the block and held in position by runners bolted to the concrete block. The lease provides that the period of let each season will be from the Monday preceding the April Holiday to the Saturday succeeding the October Holiday, on which day the pursuer is bound to remove from the stances let. The total rent payable for the three stances amounts to £744. Now whether this contract be regarded as a lease for five years or as five leases for six months each, its effect is to give the pursuer the exclusive right to occupy the stances for a period of six months in each of five consecutive years.

"The pursuer has rented one or more of the said stances for a number of years prior to 1920 and has been annually entered in the valuation roll as tenant thereof and has paid assessments levied in respect of said entries.

"On 25th August 1920 the defender Alexander Walker, the burgh assessor, served on the pursuer a notice of valuation of the three stances in which the pursuer was described as 'tenant and occupier' of the subjects, and their yearly rents or values were respectively entered at sums amounting *in cumulo* to £744. The pursuer appealed against the proposed entry. The only ground of appeal was that the valuation was excessive, and no reference was made to the entry of himself as tenant and occupier. The appeal was dismissed and a Stated Case was taken to the Valuation Court which is presently pending.

"The pursuer has now been assessed for rates and taxes by the burgh authorities and the Parish Council, and avers that he is threatened with proceedings for recovery of assessments. He has accordingly raised

the present action in which he calls as defenders the assessor of the burgh who is responsible for the entry in the valuation roll, the Provost, Magistrates, and Councillors who impose the burgh rates, and the burgh collector who ingathers them, and also the Parish Council and their collector. He concludes for declarator against all the defenders that he is not 'tenant' or 'occupier' of the stances in the sense and for the purposes of the Valuation Acts, and is not liable to be rated or assessed in respect of the stances as tenant or occupier thereof. He also concludes for interdict against the defenders other than the burgh assessor from proceeding against him by summary warrant or otherwise for recovery of any rates or assessments leviable in respect of the said stances. The conclusion for expenses is only directed against those of the defenders who appear to defend the action.

"All the defenders have appeared and they all plead that the action is incompetent. This plea is maintained on two quite distinct grounds. It is said in the first place that the question whether the pursuer is properly entered in the valuation roll as 'tenant and occupier' is a question which falls within the jurisdiction of the Lands Valuation Appeal Court, and that it is therefore incompetent for me to deal with it. The question appears to me to be one of law and not of value, and I think it is quite clear that the jurisdiction of the Lands Valuation Appeal Court is confined to questions of value alone. This was expressly decided by the Lands Valuation Appeal Court (Lords Low and Dundas) in the case of *The British Linen Bank* v. *Assessor of Aberdeen* (1906, 8 F. 508). The only case subsequent to that decision in which a question which, so far as I can judge, had no relation to values was entertained and decided by the Appeal Court is the case of *The Popular Amusements, Limited* v. *Assessor for Edinburgh* (1909 S.C. 645), in which the same two Judges took part, but in which the question of competency was never raised. I do not think that this decision detracts in any way from the carefully considered judgment in the *British Linen Bank* case. In a later case of *Ferguson* (1912 S.C. 768) objection was taken to the competency of an appeal on the ground that the question at issue was whether the appellant was an owner under the Land Acts or a tenant. The Court, while fully recognising that it only had jurisdiction to deal with questions of value, considered that the rent or value of the subjects was so involved in the question at issue as to justify the Court in dealing with it. Finally, it appears to me that the decision of the House of Lords in *Moss' Empires* v. *Assessor of Glasgow* (1917 S.C. (H.L.) 1) makes it clear that the *British Linen Bank* case was well decided. Accordingly I have no doubt that the jurisdiction of the Court of Session to deal with the question raised is not excluded by the jurisdiction of the Lands Valuation Appeal Court.

"The other ground on which the competency of the action is objected to is that the pursuer failed to avail himself of the opportunities afforded to him by the Valuation Acts of having the entry of which he now complains corrected before the valuation roll was finally adjusted. Under section 6 of the Valuation of Lands (Amendment) Act 1879 (42 and 43 Vict. cap. 42) it is competent for any person to appeal to the magistrates against any particular set forth in an entry in the valuation roll 'other than the yearly rent or value of the lands and heritages to which such entry refers.' The magistrates have power 'to deal with the appeal in the same manner and subject to the same conditions and provisions (except in regard to the right of requiring a case to be stated)' as with appeals having regard to the value stated in the entry. It is quite clear that in terms of this section the pursuer might have appealed to the Magistrates against the entry of which he now complains. It is also clear that his failure to do so was not due to want of notice, because he did take an appeal against the entry as to value. I was referred to several cases in which an application to the Court of Session to refuse effect to an entry in the valuation roll was held to be competent, but they all present features very different to the present case. In *Sharp* v. *Latheron School Board* (10 R. 1163), where owing to a mistake in the valuation roll the same subjects had been twice entered, the Court interdicted the School Board from levying a double assessment. It appears from the passage in Lord Kinnear's opinion in this case quoted by Lord Shaw in *Moss' Empires* (1917 S.C. (H.L.), at p. 11) that no notice of the double entries had been served on the complainer. In *Hope* v. *Corporation of Edinburgh* (1897, 5 S.L.T. 195), subjects outwith the burgh were included in the burgh valuation roll. As the owner was not subject to the jurisdiction of the magistrates, it seems to me that there was no course open to him except to apply in the Court of Session for interdict, and this was entertained by Lord Stormonth Darling, the Lord Ordinary. In *Moss' Empires v. Assessor of Glasgow* it was averred that the assessor had not complied with the statutory requirements as to notice, and the action was entertained and a proof allowed. In *Abercromby* (1909, 2 S.L.T. 114) an appeal to the magistrates had been taken under section 6 of the Act of 1879, and Lord Salvesen being of opinion that the decision of the magistrates was wrong, held that in a question of assessment he was entitled to treat the entry in the valuation roll as erroneous on the authority of *Sharp* v. *Latheron* (*supra*). This case raises the question whether the decision of the magistrates under section 6 of the Act of 1879 is final, on which I express no opinion, but the case differs from the present in respect that the complainer had at least exhausted all possible remedies open to him under the Valuation Act before coming to the Court of Session. As the pursuer in this case has failed to exhaust his possible remedies and does not aver that his failure to do so was due to any irregularity on the part of the authorities in making up the valuation roll, or to any mistake of which he had no notice, I think it is incompetent for him to contradict the

accuracy of the entry as he now endeavours to do. This is enough for the decision of the case, but I may add that even if I had thought it competent for the pursuer under the circumstances to challenge the entry in the valuation roll, and he had succeeded in satisfying me that he is not a 'tenant and occupier' in terms of the Valuation of Lands Acts, this would not, in my opinion, have been sufficient to justify the conclusions for interdict. The pursuer's right to interdict really depends on whether he is an occupier within the meaning of the Burgh Police and Poor Law Acts under which the assessments complained of are levied, and this is not pleaded. I do not think it follows that a person who may not be an occupier in the sense of the Valuation Acts is necessarily not an occupier in the sense of the assessing statutes. The definition of occupier in the Burgh Police Act 1892, section 4 (21), is very wide, and includes tenants for less than a year of all subjects other than furnished houses. The assessment is to be levied (section 340) on 'all occupiers of lands or premises within the burgh according to the valuation roll made up or according to an estimate of the valuation roll about to be made up.' This reference to the valuation roll would appear to be primarily for the ascertaining of values. Section 345, which provides that 'owners who shall let for rent or hire lands or premises for less than a year, shall themselves be responsible for the said assessment and the same may be recovered from such owners,' does not appear to relieve the occupier of liability for assessment, but to make the owner responsible for its being paid, and the concluding words of the section are permissive and not obligatory. Without going into the sections of the Poor Law Acts, I think it is clear that under both sets of the assessing statutes the pursuer might be quite properly assessed as occupier of the three stances, even if under the Valuation of Lands Acts it was incorrect so to describe him, a question on which I express no opinion. I shall accordingly dismiss the action as being incompetent as laid."

The pursuer reclaimed, and argued—The Court ought to grant the decree of declarator and also the decree of interdict concluded for. 1. The present action was competent—*Abercromby* v. *Badenoch*, [1909] 2 S.L.T. 114; *Hope* v. *Corporation of City of Edinburgh*, (1897) 5 S.L.T. 195; *Sharp* v. *Latheron Parochial Board*, (1883) 10 R. 1163, 20 S.L.R. 771; *Moss' Empires* v. *Assessor for Glasgow*, 1917 S.C. (H.L.) 1, 54 S.L.R. 12, *per* Earl Loreburn at 1917 S.C. (H.L.) 2, 54 S.L.R. 13, Viscount Haldane at 1917 S.C. (H.L.) 4, 54 S.L.R. 14, and Lord Kinnear at 1917 S.C. (H.L.) 6, 54 S.L.R. 15; *Dalgleish* v. *Livingston*, (1895) 22 R. 646, 32 S.L.R. 347, *per* Lord Rutherfurd Clark at 22 R. 655, 657, and 658, 32 S.L.R. 351, 352, and 353. The plea of competent and omitted was not pleadable against a pursuer—*Macdonald* v. *Macdonald*, (1842) 1 Bell's App. 819, *per* Lord Campbell at 829—and the reclaimer was pursuer in the issue as to whether he should or should not be placed on the valuation roll. Section 6 of the Valuation of Lands (Scotland) Amendment Act 1879 (42 and 43 Vict. cap. 42) was not obligatory. It was permissive merely. Moreover, it was *ultra vires* of the Valuation Commissioners to deal with the pursuer's case at all, as he was not a tenant or occupier. 2. The pursuer was not a tenant or occupier for the purposes of the Valuation Acts. The lets to him were seasonal lets, and where a lease was for a shorter period than a year the proprietor's name and not the occupier's name should be placed on the valuation roll — *Duffus* v. *Assessor for Aberdeenshire*, 1919 S.C. 484, 56 S.L.R. 115, where the proprietor was entered as occupier—see 1919 S.C. 484-485; *Assessor for Inverness-shire* v. *Macpherson's Trustees*, 1918 S.C. 615, 55 S.L.R. 241, *per* Lord Johnston at 1918 S.C. 618, 55 S.L.R. 243; *Maitland* v. *Assessor for Midlothian*, (1893) 20 R. 628, 30 S.L.R. 618, *per* Lord Wellwood at 20 R. 629, 30 S.L.R. 619; *Berwick* v. *Assessor for Fifeshire*, (1888) 15 R. 629, 25 S.L.R. 460, *per* Lord Lee at 15 R. 630, 25 S.L.R. 461; *Allan* v. *Maitland*, (1858) 20 D. 1356; *Allan* v. *Campbell*, (1858) 20 D. 1356; Armour-Hannay, Valuation for Rating (2nd ed.), p. 262; Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), secs. 1, 3, and 6. The valuation roll was the source from which the entries in the burgh roll were taken, and anyone improperly entered in the valuation roll was improperly entered in the burgh roll. The Burgh Police Act 1892 (55 and 56 Vict. cap. 55), sec. 4, sub-sec. 21, defined "occupier," and the terms of the sub-section were not repugnant to the view contended for by the reclaimer. The Burgh Police Act 1892, secs. 339, 345, and 347; the Poor Law (Scotland) Act 1845 (8 and 9 Vict cap. 83), secs. 34, 37, and 40; Muirhead, Municipal and Police Government (2nd ed.), p. 638; and Graham, Poor Law, p. 261, were also referred to. The pursuer's hours of occupation of the stances were limited, and therefore his name should not have been placed on the valuation roll — *Popular Amusements, Limited* v. *Assessor for Edinburgh*, 1909 S.C. 645, 46 S.L.R. 426, *per* Lord Low at 1909 S.C. 651, 46 S.L.R. 430; *Smith & Son* v. *Lambeth Assessment Committee*, (1882) 9 Q.B.D. 585, *per* Field, J., at 592; *North British Railway Company* v. *Greig*, (1866) 4 Macph. 645, *per* Lord Neaves at 655; Armour-Hannay, Valuation for Rating (2nd ed.), p. 189.

Argued for the respondents Alexander Walker and others — The Court should assoilzie the respondents from all the conclusions of the summons. 1. The present action was incompetent. The pursuer's only remedy was an appeal to the magistrates—Valuation of Lands (Scotland) Amendment Act 1879, sec. 6; *British Linen Company* v. *Assessor for Aberdeen*, (1906) 8 F. 508, 43 S.L.R. 442, *per* Lord Dundas at 8 F. 516, 43 S.L.R. 445; *Sharp* v. *Parochial Board of Latheron*, (1883) 10 R. 1163, 20 S.L.R. 771, *per* Lord Ordinary (Kinnear) at 20 S.L.R. 773, and Lord Justice-Clerk (Moncreiff) at 10 R. 1165, 20 S.L.R. 774; *Moss' Empires* v. *Assessor for Glasgow*, 1917 S.C. (H.L.) 1, 54 S.L.R. 12, *per* Lord Shaw at 1917 S.C. (H.L.) 10, 54 S.L.R. 17; *North British Railway Company* v. *Greig*, *per* Lord Neaves. Where a person

had a statutory remedy and neglected to take it he could not come to the Court of Session for another remedy—*Milne & Company* v. *Aberdeen District Committee*, (1899) 2 F. 220, 37 S.L.R. 171, *per* Lord Adam at 2 F. 229, 37 S.L.R. 175; *Magistrates of Portobello* v. *Magistrates of Edinburgh*, (1882) 10 R. 130, 20 S.L.R. 92, *per* Lord Justice-Clerk (Moncreiff) at 10 R. 137, 20 S.L.R. 94; *Crawford* v. *Lennox*, (1852) 14 D. 1029, *per* Lord Justice-Clerk (Hope) at 1033; *Alexander* v. *Seymour*, (1828) 7 S. 117, *per* Lord Pitmilly at 123; *Craigie* v. *Mill*, (1826) 4 S. (N.E.) 453, *affd.* (1827) 2 W. & S. 642; *Campbell* v. *Mill*, (1823) 2 S. (N.E.) 392; see also *Walsh* v. *Magistrates of Pollokshaws*, (1905) 7 F. 1009, 42 S.L.R. 784; *Sharp* v. *Wakefield*, [1891] A.C. 173, *per* Lord Chancellor (Halsbury) at 178. If the Magistrates had acted *ultra vires* the pursuer might have brought an action of reduction, but the present action was not an action of reduction but a declarator. Moreover, it was incompetent to grant a declarator with regard to the future action of the Magistrates—*Caledonian Railway Company* v. *Glasgow Corporation*, (1905) 7 F. 1020, 42 S.L.R. 773, *per* Lord President Dunedin at 7 F. 1033, 42 S.L.R. 781. (2) The mere fact that the pursuer's occupation of the stances was seasonal and that his hours of occupation were limited did not show that the occupation had not a rateable character, and in any event the pursuer had not relevantly averred the case he was seeking to make. Moreover, assessment depended on the assessment roll. Muirhead, Municipal and Police Government (2nd ed.), p. 629; the Burgh Police Act 1892, secs. 340, 342, 344, 345, 346, 348, and 351, and the Valuation of Lands (Scotland) Act 1854, secs. 8 and 30 and sec. 2, repealed by the Representation of the People Act 1884 (48 Vict. cap. 3), sec. 9, sub-sec. 6, were referred to.

The respondents, the Parish Council of Ayr, adopted the argument of the respondents Alexander Walker and others—*Crawfurd* v. *Stewart*, (1861) 23 D. 965, *per* Lord Justice-Clerk (Inglis) at 971; the Poor Law (Scotland) Act 1845, secs. 34, 36, 37, 38, and 40; and the Valuation of Lands (Scotland) Act 1854, secs. 12, 30, 33, and 41 were referred to.

At advising—

LORD JUSTICE-CLERK—Several important questions are raised by this reclaiming note, some of which I have found of considerable difficulty. The stances in question and other like stances, all called refreshment stances, have for several years been let to various tenants including the pursuer, and the valuation rolls for the respective years have hitherto shown these stances as separate items with the pursuer and those in similar positions as tenants and occupants at the rents at which the several persons acquired right to possess and occupy these stances. The pursuer alone now challenges the accuracy of these entries. In his condescendence he sets out, *inter alia*, that the stances in question were exposed to lease by public roup, and that after competition he was preferred as tenant of stances 2, 3, and 6 at the respective seasonal rents of £305, £169, and £290, and that thereafter a lease conform was entered into between him and the Town Council of Ayr. In condescendence 2 he avers that on 15th April and 4th May 1920 a lease of said three stances was entered into between the magistrates as proprietors and the pursuer as seasonal tenant. He then sets out the main provisions of the lease. By the lease the town council, in consideration of the rent, &c., let to the pursuer and his heirs, excluding assignees and sub-tenants, the said three stances for five seasons from 5th April 1920, when pursuer was to get possession. The season was to be from a specified Monday in April to a specified Saturday in October of each of the five years, ending 1924, in which year the pursuer was to remove, tacit relocation being excluded. The pursuer was not to sell anything on the Low Green where the stances were, or on the stances, except during permitted hours, and was to remove his whole effects each evening after the permitted hour till seven next morning, subject to this, that he might erect on the stances a kiosk to remain during the whole season. The kiosk was to be closed up each night and removed within a week of the close of each season. The tenant was to conform to the burgh bye-laws and to obey the directions of the police. Power was given to the town council in certain events to terminate the lease. The pursuer avers that he has all along possessed the stances on the terms and conditions of the said lease; that the stances are situated on a public park known as the Low Green; that they are constructed of cement on the top of 6 or 8 inches of stone bottoming, and which cement is 12 feet square and 6 inches thick; that he uses them for the storage, display, and retail of refreshments; and that on each of them he has at his own expense erected a kiosk 12 feet square and held down by runners bolted to the cement.

The pursuer also avers that on 25th August 1920 the assessor served on him a notice of a valuation of the stances, and that he was not then and has never been tenant or occupier of the said three stances for the purpose of the Valuation Acts. The pursuer appealed to the Valuation Committee of the burgh. That appeal, however, was only against the amount of the valuation and not against the entry of the pursuer as tenant and occupant. The appeal was refused by said committee. The pursuer admits that for a number of years he had rented one or more of said stances and hitherto was entered in the valuation roll thereof and duly paid assessments. An appeal was also taken by the pursuer to the Valuation Appeal Court, but this appeal was departed from a few days before this action was raised, though this is not mentioned on record. The pursuer avers that he "is threatened with proceedings for recovery of rates and taxes in respect of the said entry" in the valuation roll. The said entry does not warrant any proceedings for recovery of any rates or taxes. The only plea for the pursuer is as follows—"The pursuer not having been at any time 'tenant

and/or occupier' of the said three stances for the purposes of the Valuation of Lands (Scotland) Acts in respect (*a*) that the lets are seasonal lets, and (*b*) that he is not in rateable occupation of these stances, is entitled to decree of declarator and interdict as concluded for."

Nothing whatever is said on the record of the assessing statutes or of the assessment rolls prepared under the same. In his appeal to the Valuation Committee the pursuer did not—as he could have done—raise the question as to the correctness of his entry in the valuation roll as tenant and occupier. The result is that while the Valuation Acts provided for an appeal to the Committee against that entry, the pursuer did not avail himself of that appeal, but, on the contrary, accepted that entry as correct and did not challenge it until he raised the present action. The result is that though we in December 1921 are asked to deal with the valuation roll of 1919-20, and if our judgment is appealed to the House of Lords a final judgment may not be obtained till sometime in 1922, perhaps not even then. No reason whatever is given on the record for the pursuer's neglect to take the statutory appeal which was open to him. As at present advised I incline to the view that the judgment of the Valuation Committee is final in the sense and for the purposes of the Valuation Acts, but I do not think that that necessarily involves that such a "final" determination would under no circumstances be open to challenge or review. But in my opinion the process of completing the valuation roll by the machinery provided for that purpose is intended to be a summary and rapid process. It may be that when all the steps open to an owner, tenant, or occupier under the Valuation Acts have been taken, such owner, tenant, or occupier who complains of what has been done as contrary to law may still be able to obtain redress by the ordinary process outside of what the Valuation Acts provide. But in my opinion a party complaining of what has been done under the statutory procedure, who has accepted and adopted what has been so done and has not availed himself of the statutory forms of review, is not entitled, after disregarding these opportunities of review or appeal, to have recourse to ordinary common law proceedings, and in any event is not entitled to do so without setting forth in his record a relevant case for so doing. There is no attempt to make such a case by the pursuer, and in my opinion, therefore, we ought not to allow the present action to proceed. Whether the proper plea is incompetency or irrelevancy or both seems to me a matter in this case of little consequence, the result in my opinion would be the same, viz., that this action should be dismissed; the result being that for the particular year in question the entry in the valuation roll must remain.

But apart from the considerations to which I have referred there is another aspect of the questions involved. The conclusions of the summons are as follows:—"It ought and should be found and declared that the pursuer is not 'tenant' or 'occupier' in the sense and for the purposes of the Valuation of Lands (Scotland) Acts of the stances Nos. 2, 3, and 6 on the Low Green of the Royal Burgh of Ayr, let to him by the defenders, the Provost, Magistrates, and Councillors of the said royal burgh, by lease, dated 15th April and 4th May 1920, and is not liable to be rated or assessed in respect of the said three stances as tenant or occupier thereof—And the defenders the said Provost, Magistrates, and Councillors of the royal burgh of Ayr; Thomas Lindsay Robb, collector of the burgh, general, and other assessments; the said Parish Council of Ayr; and Robert Pyper, collector of said parish council, ought and should be interdicted, prohibited, and discharged by decree of our said Lords from proceeding against the pursuer by summary warrant or otherwise for recovery of any rates or assessments leviable in respect of said three stances;" and there is a relative conclusion for interdict. I propose to treat these conclusions separately.

As regards the first declaratory conclusion it may be admitted that verbally condescendence 5 and the pursuer's plea may support this conclusion. But is this support more than verbal? In my opinion the subjects let by said lease included lands and heritages in the sense of the Valuation Act, viz., the said stances. The period of lease was for five seasons extending over 5 years, the season in each year being apparently regarded as the only time during which beneficial occupation could be had. Even if the period of let were for less than a year that would not in itself, in my opinion, result in the omission from the valuation roll of the names and designations of the tenants or occupiers. Section 2 of the 1854 Actconcludes with this proviso—"Provided always that it shall be in the power of such commissioners or magistrates, if they think fit, not to insert in any valuation roll under this Act the names or designations of the tenants or occupiers of any lands and heritages separately let for a shorter period than one year or at a rent not amounting to four pounds per annum." The magistrates have not seen fit not to insert the pursuer's name; on the contrary they have hitherto inserted his name and have done so for the year now in question. Though an appeal is provided against their so doing, the pursuer, as I have already pointed out, did not avail himself of it. That proviso just referred to was repealed in 1884, but subject to this proviso—"The proviso" referred to "shall be repealed—Provided that in any county in Scotland the commissioners of supply or the parochial board of any parish or any other rating authority entitled to impose assessments according to the valuation roll may, if they think fit, levy such assessments in respect of lands and heritages separately let for a shorter period than one year or at a rent not amounting to four pounds per annum, in the same manner and from the same persons as if the names of the tenants and occupiers of such lands and heritages were not inserted in the valuation roll." The

defenders, who are rating authorities, have apparently not thought fit to impose assessments in respect of the said stances as if the names of the tenants and occupants thereof were not in the valuation roll. But the pursuer avers nothing about this. In my opinion the period of the lease, or, to use the language of the pursuer's plea, the fact that the lets are seasonal lets, does not on a sound construction of the Valuation Acts justify the pursuer's contention that the defenders are not entitled to enter his name on the valuation roll as tenant and occupant. On the contrary, on a fair construction of these Acts those responsible for making up the valuation roll are, in my opinion, entitled to continue the practice which has heretofore prevailed and to enter the pursuer's name therein as they have done. In my opinion under the said lease there was a proper lease to the pursuer of lands and heritages, and even if the period of lease was less than a year that did not prevent the pursuer from being entered in the valuation roll as tenant and occupant thereof.

It was argued that all that the lease gave was a liberty or franchise to sell certain goods. I think this is not the fair construction of the lease. It may have given such a liberty or franchise or privilege. But it did more in my opinion. The lease is in my opinion what it professes to be, viz., a lease of lands and heritages under which the pursuer is the tenant and occupier thereof. I do not think that any of the provisions of the lease deprive it of its character as a lease or alter the pursuer's position as possessing the character of a tenant and occupier. Reference may be made to *M'Bain* and *Wallace*, 6 A.C. 588, especially the judgments of Lord Chancellor Selborne and Lord Watson.

I am therefore of opinion that the pursuer is not entitled to decree in terms of the first conclusion of the summons.

As to the second declaratory conclusion, that the pursuer is not liable to be rated or assessed in respect of the said three stances as tenant or occupier thereof, I do not think that the pursuer has made averments relevant to support this conclusion. The rates in question are the burgh rates under the Police Act and the poor-rate under the Poor Law Act. But the pursuer in his pleadings makes no reference to either of these statutes. He confines his pleadings to the Lands Valuation Act. That Act, however, is not a taxing Act; it is merely a Valuation Act. This view was well expressed by Lord Neaves when delivering the judgment of this Division in *M'Laren* v. *Clyde Trustees*, 1865, 4 Macph. 58. His Lordship said (at p. 64)—"The Valuation Act is not an Act for taxing parties. It is an Act merely for valuing properties. The warrant and nature of each assessment must be looked for in the original Acts imposing it, and it is only the arithmetical ascertainment of its amount that the valuation roll is intended to facilitate." Section 41 of the Act of 1854 provides, *inter alia*—"And nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment." The interlocutor of the Second Division was affirmed in the House of Lords, 6 Macph. 81—see also *The University of Glasgow*, 4 P.L.M. 214. The pursuer says nothing about either of the rating Acts and, as already pointed out, his only plea is confined to the Valuation Acts. Under the rating or assessing Acts referred to the rating authorities must accept the valuation roll so far as value is concerned, but they are not bound by the other entries in the roll, and, in my opinion, liability to be rated or assessed is not determined by the valuation roll but by the assessment roll. As to these rolls the pursuer says nothing at all. In my opinion, therefore, the pursuer's averments are not relevant either as to the second declaratory conclusion or as to the conclusion for interdict.

I am of opinion that the action is incompetent and the pursuer's averments irrelevant, and that the action should be dismissed.

LORD SALVESEN—In this case the pursuer seeks declarator that he is not tenant or occupier in the sense and for the purposes of the Valuation of Lands (Scotland) Act of certain stances on the Low Green of the royal Burgh of Ayr which were let to him by the Magistrates of the burgh under a written lease, dated 15th April and 4th May 1920, and that he is not liable to be rated or assessed in respect of them as tenant or occupier thereof. He also asks interdict against the Magistrates and the Parish Council of Ayr from proceeding against him by summary warrant for recovery of any rates or assessments leviable in respect of these three stances. The Lord Ordinary has sustained a plea to the effect that the action as laid is incompetent and should be dismissed. The main ground of his judgment is that while the pursuer appealed to the Valuation Committee against the valuation of the subjects, he did not avail himself of the right of appeal against the entry in the valuation roll which described him as tenant and occupier, as he was undoubtedly entitled to do. I think the Lord Ordinary's view proceeds on a misconception of the pursuer's demand. He does not seek reduction of the entry in the valuation roll. Nor does he maintain that that roll can be amended or altered by any decree of this Court. The object of his declarator, which is not limited to a single year but applies to the whole period of his lease, is to prevent his being assessed on the ground that the entry in the valuation roll does not afford a legal basis on which the assessing authorities can act in his case, as they have no legal right to demand assessments from one who has no relation either as owner, tenant, or occupier of the subjects in respect of which the assessment is imposed. He points to the terms of the lease itself as conclusive evidence of the fact that he has only a limited right of occupation of certain small areas of ground for a period extending to only a part of each year, viz., from a date in April to a date in October. Even during

that period he has no right of occupation except within certain hours permitted by the statutes, bye-laws, or regulations during week-days, and he is not permitted the use of the stances at all on Sundays. He further maintains that the sum which he agreeed to pay annually was not paid in respect of the areas of ground which were let to him and which in themselves were of trifling annual value, but for the privilege of selling refreshments of various kinds on the areas set apart for his benefit.

These being the averments, I cannot see how his action of declarator is in any sense incompetent. The reason why the pursuer seeks the declarator is obvious enough, for, if he was properly entered as a tenant or occupier of the stances in question he could not challenge the assessments which have been imposed on the basis of the valuation roll. The first question, therefore, to be determined appears to me to be whether, within the meaning of the Valuation Acts, the pursuer was in fact tenant or occupier of the premises in question who falls to be entered upon the valuation roll. Now the leading Act of 1854 provides that the valuation roll shall be made up to show the yearly rent or value of the lands or heritages, and while it goes on to provide that where there are tenants or occupiers of lands they are to be entered on the roll, I think it must be implied that in the ordinary case they must be tenants or occupiers for a year, although there is a provision in the leading Act for entering the names of tenants or occupiers whose rights of possession are for less periods than a year. There are many such cases in our large towns. Working-class houses may be let for a month or three months, and in the course of a single year there may be half-a-dozen tenants or occupiers. If all such persons were entered upon the roll as tenants or occupiers and assessed in consequence for the proportional part of the year during which they had had occupation, endless difficulties would be occasioned. In practice, therefore, in cases where there are not yearly tenants the proprietor is entered as the occupier and he is assessed both as proprietor and occupier on the footing of the yearly value to him of the premises, which may be roughly ascertained by the amount of rent which he is able one year with another to recover from his tenants after making allowance for the cost of collection and for the fact that he has to bear the occupier's rates as well as the owner's. That practice has been universal and is illustrated by the various cases that have arisen with regard to grass parks, which are usually let from May to November and remain unlet during the rest of the year. In these cases the proprietor has invariably been entered as the occupier and not the grazing tenant, the reason being that there was not an annual let. The main point of controversy in these cases has no bearing upon the question raised here, for it related merely to the value that was to be put upon the subjects. That value the Valuation Court have now decided, in accordance with an earlier opinion of Lord Fraser, ought to be measured by the rent obtained for the only part of the year during which the parks were capable of beneficial possession. The point of importance is that during all these years that the 1854 Act has been in force there is no case, so far as I am aware, where lands or heritages were let for a period of less than a year where the tenant or occupier was put upon the valuation roll, and accordingly the whole rates were in the first instance imposed upon the proprietor as occupier. The matter is also illustrated by cases of subtenancy. Even if subtenancies are of yearly duration the subtenant does not fall to be entered in the valuation roll as the occupier. The reason is obvious, for it is the yearly value to the proprietor that requires to be ascertained, that yearly value being measured by what he receives in the way of rent from his own tenant. Where the subtenant pays a higher rent it would be unfair to insert that as the annual value of the lands, because then the proprietor would be called upon to pay an assessment based upon a figure which did not represent the yearly value to him. So far as I am aware the practice has been absolutely uniform, and we were not referred to a single case where a person who was not tenant or occupier on a yearly let was entered as such in the valuation roll. I cannot resist the view that this practice proceeds on a sound interpretation of the Lands Valuation Acts and that endless confusion would result from adopting any other course.

In the course of the argument we were referred to a number of sections in the Burgh Police (Scotland) Act, and especially those beginning with section 340, which deal with rating powers. On a full consideration of these sections they appear to me to support the view at which I have otherwise arrived. It is quite true that while there is a general provision that the Commissioners are to assess all occupiers of lands or premises within the burgh according to the valuation roll provision is made (section 351) for the Commissioners amending the roll or book of assessment, *inter alia*, "by inserting therein the name of any person who ought to have been assessed, or who since the making thereof has become liable to be assessed, or by striking out the name of any person who, according to a written certificate by the assessor ought not to have been assessed." The assessment roll, therefore, in its completed form, need not correspond in every particular with the valuation roll except in respect of the value to be entered, which by the same section (351) can only be corrected when it is inaccurately entered—that is to say, as I read it, where there has been some clerical mistake made in the figures of the valuation roll. The general direction, however, with regard to the making up of the assessment roll (section 348) is the same as for the valuation roll—that is to say, it is to show the yearly rent or value of the lands and premises in the burgh liable to be assessed. There is also, however, a special provision (section 346) with regard to premises occupied for part of a year. But instead of that

aiding the defenders' argument it seems to me to be destructive of it, for it applies only to premises which are not usually let for any period shorter than one year, whereas here it is common ground that the stances in question have been let for only a part of the year. In such cases the owners are to be (section 345) made responsible for the assessment for the whole year although, in the cases to which section 346 applies successive occupiers may be entered and assessed for a proportional part of the yearly value corresponding to the period of their respective occupancies.

It was conceded by Mr Watson for the defenders that if the matter raised in this action is properly one to determine the pursuer's liability for assessment, the Court of Session is the only appropriate forum. I do not see how such a concession could have been withheld in view of such cases as the *North British Railway Company* in 4 Macph. 645. It is true that the question was not precisely the same as it is here, for it was complicated by the fact that a special valuation roll requires to be made with regard to railways. But the case is conclusive authority for the view that the valuation roll does not *per se* fix the liability for assessment. In that case it appears from the judgment of the Lord Ordinary that the entry of the North British Railway Company as owners and occupiers of the various premises had been challenged before the magistrates, who had decided against the company. The Lord Ordinary held that the magistrates were only entitled to determine upon the accuracy of the valuation in cases admittedly falling within the province of the burgh assessor, and not on the question whether the subject was legally assessable as part of the railway or as a separate heritage within the burgh. "Any proceedings before the magistrates could not form *res judicata* in the present controversy." This view appears not to have been traversed in the Inner House. While the precise ground of Lord Kinloch's decision is not applicable here the opinions of all the Judges support the pursuer on the merits. The leases of the cabstands and the bookstalls are very similar to the lease of the three stances to the pursuer, with this difference that the former were let by the year whereas the pursuer is only a seasonal tenant. Yet in regard to those Lord Neaves, who gave the opinion of the majority, said there was no proper tenancy nor a proper subject of tenancy. With regard to the numerous cases cited, two Outer House decisions — *Hope*, 5 S.L.T. 195, and *Abercrombie*, 1909, 2 S.L.T. 114 — appear to be precisely in point, although the assessments there related only to a single year. In *Moss' Empires, Limited*, 1917 S.C (H.L.) 1, the question was not one of assessability at all but of value, with regard to which the valuation roll is conclusive. Accordingly in that case it was necessary to show that the entry in the valuation roll had been vitiated by the failure of the Assessor to follow the statutory procedure. The Lord Ordinary says that in *Abercrombie's* case, unlike the present, the complainer had at least exhausted all possible remedies open to him under the Valuation Acts before coming to the Court of Session. That is true, but unless the matter is committed to the Valuation Committee for final decision I cannot see how that excludes the legal remedy. The pursuer was not bound to avail himself of an appeal to a tribunal which *ex hypothesi* could not finally decide the question he desired to raise, and which, he had every reason to suppose would not favourably consider his complaint. The question whether a particular individual is legally assessable in respect of burgh or poor rates is one which can only be determined by the law Courts, for if he is not so assessable the assessing authority has no right to levy assessments upon him, and if they attempt to do so are acting beyond their statutory jurisdiction—*Lord Advocate* v. *Perth*, (1869) 8 Macph. 244.

On the whole matter I have come to be of opinion that the Lord Ordinary has erred in dismissing the action, and that we ought to grant the pursuer decree in terms of the conclusions of his summons.

LORD ORMIDALE—One of the grounds on which the Lord Ordinary has based his decision is, that as the pursuer has failed to exhaust his possible remedies before raising the present action it is incompetent for him in this action to contradict the accuracy of the entry in the valuation roll of which he complains. In my opinion the Lord Ordinary is right. The pursuer's complaint is that he is entered in the valuation roll as tenant and occupier of the stances on the Low Green let to him by the Corporation of the Burgh of Ayr. It is not disputed that under the Valuation of Lands (Amendment) Act 1879 (42 and 43 Vict. cap. 42, sec. 6), it was open to the pursuer to appeal to the magistrates of the burgh in regard to this particular of the entry, and that he did not do so. Now in a statutory matter such as valuation, when by the statutes a particular remedy is provided, it has been decided more than once that an aggrieved party must seek relief from the tribunal appointed by the Act to take cognisance of appeals or complaints. That such tribunals are competent and sufficient to deal with the matters submitted to them by way of appeal is the view of the Legislature, and it seems to me to be irrelevant to maintain that an appeal to the magistrates in the present instance would have been of no avail and a mere formality. There is nothing special said on record to support or warrant the suggestion that the magistrates here would have acted *ultra vires* or with undue bias. Had they decided an appeal so taken by the pursuer in his favour there would have been no occasion to raise the present action. I agree with the Lord Ordinary that it is not necessary to express an opinion as to the finality of the magistrates' decision whatever it might have been, and it is not perhaps expedient to do so, but I may say that as at present advised there is much to be said in favour of the view that their decision would have

been final having in mind the closing words of section 8 of the Valuation of Lands Act 1854 (17 and 18 Vict. cap. 91)—words which appear to be applicable to the appeals allowed by the amending Act of 1879, sec. 6, viz. — "And the deliverances of such commissioners and magistrates respectively upon such appeals and complaints shall be final and conclusive and not subject to review."

Of course if it could be shown that the decision was *ultra vires* this Court might be appealed to for relief, but merely to predicate of the decision of the magistrates in the event of their determining that the entry in the valuation roll was correct that such a determination would be mistaken in law does not necessarily infer that it was *ultra vires* and liable to be set aside. In *Milne & Company* v. *Aberdeen District Committee* ((1899) 2 F. 220), which was an action for reduction of a decree by a Sheriff, the Lord President (Balfour), after stating that he did not think that the Sheriff's judgment was in any respect erroneous, added—"But even if this had been otherwise the defenders point to the declaration in section 57 that the Sheriff's judgment is final, and this they say means that it is final in questions of law as well as of fact, so that even if he had construed the statute erroneously this Court could not have reviewed or set aside his judgment. It seems to me that this contention is well founded." An opinion to the contrary had been expressed by the Lord Justice-Clerk (Moncreiff) in the earlier case of *Lord Advocate* v. *Police Commissioners of Perth*, (1869) 8 Macph. 244, at p. 246. That, however, was a very special case, it being admitted that the proceedings complained of were clearly outside the statute, and I note that the case was cited though not followed in *Milne's* case. In *Caledonian Railway Company* v. *Glasgow Corporation* (7 F. 1020), where the Court were of opinion that a register of streets which it was sought to reduce was *in fraudem* of an Act of Parliament, and was in essence an *ultra vires* act, while not sustaining a plea to the competency dismissed the action as premature, on the ground that the matter being still before the Sheriff they were not prepared to assume that he would take an incorrect view of the statute. The position here is not precisely the same as in the last case cited, because the present pursuer has ignored the inferior tribunal altogether, but the principle of the decision appears to be applicable, and supports the view that it is incumbent on the pursuer to take the judgment of the magistrates before he can raise such an action as the present. In the case of *Abercrombie* (1909, 2 S.L.T. 114) the pursuer had appealed to the magistrates.

I may add that I cannot read the pleadings of the pursuer as having reference to the whole period of his lease. It may be that the conclusions of the summons taken by themselves are capable of being so read. I do not say that they are, but to my mind it is clear that the averments of the pursuer are insufficient to support such a construction even with reference to the entry on the valuation roll. In condescendence 5 the pursuer narrates the service on him on 25th August 1920 of notice of a valuation of the three stances of which he is described as "tenant and occupier," and then goes on to aver—"The pursuer was not then and has never been tenant and occupier of the said three stances for the purpose of the Valuation of Lands (Scotland) Acts." In condescendence 6 he narrates an appeal taken by him (on the question of value only) to the Valuation Committee against the proposed entry, and the sole ground for asking interdict is thus stated by him—"The pursuer is threatened with proceedings for the recovery of rates and taxes in respect of said entry." His plea-in-law must be read with reference to these averments. It seems to me that according to these averments it is the existing entry on the valuation roll, and only that entry, which is made the subject of attack, and I cannot well see how it could be otherwise.

In my opinion, therefore, the action as laid is incompetent and should be dismissed.

If the merits of the question have to be considered, then I shall state shortly the grounds on which in my opinion the pursuer has failed to show that the entry in the valuation roll is erroneous. By the Lands Valuation Act of 1854 the commissioners of supply and the magistrates of burghs are to make up a valuation roll showing the yearly rent or value of the whole lands and heritages in the county or burgh, the names of the proprietors, and where there are tenants or occupiers the names of the tenants or occupiers. That is a quite general provision, but by the proviso to section 2 a discretionary power is given not to insert in any valuation roll the names of the tenants or occupiers of any lands or heritages separately let for a shorter period than one year or at a rent not amounting to £4 per annum. That proviso was repealed by section 9 (6) of the Representation of the People Act 1884, and the discretionary power of omitting from the valuation roll such tenants or occupiers would thus appear to have been discharged. It may be the common practice where a let is for a shorter period than a year to enter the owner as the occupier—a practice having its origin perhaps in the discretionary power referred to—but it cannot be said to be the universal practice, for the present pursuer and other persons in the same position as himself have for many years been entered in the valuation roll without objection taken as tenants and occupiers of stances on the Low Green. The entries made by the assessor would appear to be in order therefore unless the special grounds of objection taken by the pursuer, viz., that the lets to him are seasonal lets and that he is not in rateable occupaion of the stances, are well founded.

I am not satisfied that they are well founded. The cases relating to grass parks beyond affording an illustration of the practice of entering the owner in the valuation roll as occupier when the let is for less than a year give no assistance. No exception appears in any of the cases cited to have been taken to this practice, the ques-

tion raised in each of them relating to value only, and the dicta of Lord Lee in *Berwick*, 15 R. 629, in delivering an opinion as to the proper value to be entered, do not appear to me to be couclusive on the matter of competency, for they are based on an admission made and the then settled practice in similar cases.

With regard to the second objection, as I read the agreement between the pursuer and the magistrates, it is a lease of lands and heritages. It is called a lease and the consideration paid is called rent. The duration of the lease is for five seasons, a season being from April to October in each year, and the subjects of let are called refreshment stances. His right of occupation, though no doubt restricted, is exclusive; and the restrictions are not of such a nature as in any way to derogate from his character as tenant. What is let to him is not the "exclusive right of selling" anything, nor is it similar to the "exclusive privilege" of supplying cab accommodation at a railway station—*North British Railway Company* v. *Greig*, 4 Macph. 645. It is a let of certain small areas of ground as refreshment stances. *Popular Amusements, Limited* v. *Assessor for Edinburgh*, 1909 S.C. 645, does not support the pursuer's contention. While it was held in that case that the appellants to whom certain portions of ground which had been let to an exhibition committee had been allocated by the committee were not in the position of lessees, that was on the ground that the lease to the committee expressly excluded subtenants and assignees.

The Lord Ordinary has dealt with the further question, whether apart from the entry in the valuation roll the pursuer has or has not been duly assessed by the magistrates and parish council. And I think this is a question of vital importance. The Valuation of Lands Act is not a taxing Act. Its purpose is the ascertainment of the value of lands and heritages. The determination of the validity of an assessment cannot be arrived at without a consideration of the provisions of the assessing statutes, viz., the Burgh Police Act and the Poor Law Act, and in my opinion the averments of the pursuer are insufficient to raise the question to which he wishes an answer, for no reference at all is made by him to the statutes in question. *Non constat* that if the entry in the valuation roll is erroneous it necessarily follows that the rating authorities, the magistrates and parish council, were not, under the powers given them thereanent, entitled to proceed as they have done. It seems to me that it was necessary for the pursuer to make some averments showing that the entry in the valuation roll being such as it is the defenders were under their assessing statutes disabled from imposing and levying the taxes complained of. But, I repeat, he makes no reference at all to the Burgh Police Act or the Poor Law Act, or to the assessment rolls of the defenders. He does not aver that the entries therein are erroneous or incompetent. He does not even tell us what they are. Accordingly I think that his case on this ground is irrelevant, and that it is not necessary to examine the various sections of the assessing statutes to which we referred at the debate.

LORD DUNDAS was absent.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Adhere to the said interlocutor, and in supplement thereof sustain the first and third pleas-in-law for the defenders Alexander Walker and others, and the fifth plea-in-law for the defenders the Parish Council of Ayr: Of new dismiss the action, and decern. . . ."

Counsel for the Reclaimer (Pursuer)—Fraser, K.C.—W. A. Murray. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents (Defenders) Alexander Walker and Others—Hon. W. Watson, K.C.—Normand. Agents—T. and W. Liddle, Maclagan, & Cameron, W.S.

Counsel for the Respondents (Defenders) the Parish Council of Ayr—Guild. Agents—M. J. Brown, Son, & Company, S.S.C.

Saturday, December 10.

SECOND DIVISION.

[Dean of Guild Court at Edinburgh.

STEPHEN *v.* BROWN'S TRUSTEES.

Property—Servitude—Accretion—Grant of Negative Servitude a non domino—Subsequent Acquisition by Grantor of Servient Property—Jus superveniens.

Accretion operates to validate a grant of a negative servitude over property not at the time in the ownership of the granter but subsequently acquired by him.

By disposition dated January 1781 A disponed to B a plot of ground with a right of servitude *non altius tollendi* over another plot of ground which A did not at that time own, but to which, by disposition dated November 1781 in his favour by the owner of the ground he subsequently acquired right. In an action between a singular successor of A and a singular successor of B, *held* (*diss.* Lord Hunter) that the original grant had been validated by accretion.

Alexander Stephen, shopfitter and cabinet-maker, 1 Queen Street, Edinburgh, *petitioner*, presented a petition in the Dean of Guild Court at Edinburgh in which he craved warrant to extend the west front, and to raise the walls and form one storey above the street, so as to make an office over the ground floor with entrance from Queen Street. *Inter alios*, Isabella Morrison Geddes or Brown, widow of the late Marcus John Brown, and Roderick Geddes Brown, S.S.C., Edinburgh, Mr Brown's trustees, were called as *respondents*, and lodged answers in which they maintained that the proposed erections were prohibited by a right of servitude *non altius tollendi* in their favour.