purposes of the works of the Merryflats Patent Brick Company."

Agents for Complainer—Murray, Beith, & Murray, W.S.

Agents for Respondents—Millar, Allardice, & Robson, W.S.

Saturday, June 27.

SECOND DIVISION.

SCOULLARS *v.* CRAWFORD & FULTON.

Issue—Reparation—Culpa. Form of issue adjusted to try an action of assythment founded on the alleged fault of the defenders, the pursuers alleging that the deceased was lawfully on the premises when he received the injury which caused his death.

This was an action of damages by the widow and children of a man who was killed by the falling of the roof of a shed in course of erection by the defenders. The pursuers averred that the shed fell through the fault of the defenders, and that the deceased was at the time "at work below the roof which fell, being then engaged in laying a line of rails through the shed." The defence was (1) a denial of fault, and (2) that the deceased had no business to be where he was when the shed fell.

The pursuers proposed an issue for trial, simply putting the question whether the deceased was killed through the fault of the defenders. The defenders objected to the proposed issue that it did not embrace the question whether the deceased, who was not in the defenders' employment, was at the time lawfully within the premises. They maintained that this ought to be put in issue, because, even assuming fault on their part to be proved, there was no obligation on them to pay damages to the pursuers unless it was also proved that the deceased was lawfully on the premises; and without this averment the action would not have been relevant. They referred to *Teasdale* v. *Monklands Railway Company*—Sc. Law Rep., ii, 6.

The Lord Ordinary (Ormidale) reported the point, with an opinion that the pursuers were not bound to take the issue contended for by the defenders.

Watson and Trayner, for the pursuers, argued that the whole case could be tried under the general issue of fault. They referred to *Frazer* v. *Younger & Son*, 5 Macph. 861.

Solicitor-General and Burnet, for the defenders, were not called upon.

The Court held that the pursuers were bound to take an issue as proposed by the defenders, and it was adjusted in the following terms:—

"It being admitted that the pursuer, Mrs Isabella Smith or Scoullar, is the widow, and the other pursuers are the lawful children, of the said deceased Andrew Scoullar.

"Whether, on or about the 4th day of December 1867, the said Andrew Scoullar, when engaged in laying a line of rails below a shed, then in the course of erection by the defenders, upon the west quay of the Albert Harbour, Greenock, sustained injuries, in consequence of which he died, by the falling of the roof of said shed, through the fault of the defenders—to the loss, injury, and damage of the pursuers, or any of them?"

Agents for Pursuers—Neilson & Cowan, W.S.

Agent for Defenders———Wm. Mason, S.S.C.

HOUSE OF LORDS.

Monday, June 8.

GREIG *v.* UNIVERSITY OF EDINBURGH.

(3 Macph. 1151.)

Poor-Rates—University—Assessment—Crown—Annual Value—Beneficial Occupation. The University of Edinburgh held liable in poor-rates.

Per Lord Chancellor. The general principle is, that, the Crown not being named in the assessing Statutes, and not being bound by Statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

The University buildings have an "annual value."

The University of Edinburgh brought an action in the Court of Session against the appellant, George Greig, inspector of poor of the City parish of Edinburgh, for declarator that they were not liable, either as owners or as occupants, to be assessed for poor-rates for the city parish of Edinburgh, in respect of the University buildings. The ground upon which the University claimed exemption was, that the buildings of the University were national or public property, or property dedicated to national or public purposes, and from the occupation of which no revenue was derived.

The Lord Ordinary (Barcaple) found against the pursuers, but the Second Division of the Court reversed, and decerned in terms of the conclusions of the summons.

This appeal was then presented.

Sir Roundell Palmer, Q.C., J. T. Anderson, and Turner, for appellant.

Lord Advocate (Gordon) and Mellish Q.C., for respondents.

At advising—

Lord Chancellor—My Lords, in this case an action of declarator was raised by the University of Edinburgh against the Parochial Board of the parish of Edinburgh, through their public officer, to have it declared that the University are not liable as owners or occupiers of the University buildings to any assessment for the poor-rate. The record was closed, but no proof was led; and, upon the averments on the record and consideration of the pleas in law, the Lord Ordinary assoilzied the defender from the conclusions of the summons. From that interlocutor a reclaiming note was presented to the Second Division of the Court of Session, to recall the interlocutor and declare in terms of the conclusions of the libel. The Court of Session pronounced an interlocutor to that effect, and from that decision of the Court of Session this appeal comes before your Lordships.

My Lords, two questions which are very different have been argued at your Lordships' bar. One of the arguments has been that the buildings of the University of Edinburgh were exempt from rateability on the score of what I may term Crown privilege,—irrespectively of any question as to value. The second ground of argument was, that they were exempt—or rather that they ought not to be rated—on the score of being of no annual value. I think your Lordships will be of opinion that these two questions must be kept distinct. If the argument of the respondents prevails on either of these grounds

of course they will be entitled to the benefit of the argument; but it will be impossible to combine a portion of the claim for exemption upon one head, with a partial support of the claim for exemption on the other head.

Now, as to the first of these questions, namely, the claim for exemption on the score of Crown privilege, the manner in which the case is put by the pleas in law for the respondents is this. They say that the buildings of the University being national or public property, or property dedicated to national or public purposes, are not subject to assessment. The Court of Session has gone somewhat further than the plea in law, for I observe that the Lord Justice-Clerk in his opinion on the subject states that the University of Edinburgh is, in its corporate capacity, a servant of the Crown, owning and occupying the University buildings under the control and supervision of the Crown and government of the country for important national objects.

My Lords, the general principle which regulates the decision of questions of this kind has been well settled in your Lordships' House. I refer to the cases of the *Mersey Docks* and *Adamson* v. *The Clyde Trustees*, and the *Commissioners of Leith Harbour*. The general principle, as I understand it, approved by your Lordships in these cases is this, that the Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

My Lords, if that is the true principle, (and such it must now be taken to be), I think your Lordships will find that it is very easy of application to the present case. The University of Edinburgh is, no doubt, a great public and national institution; but the corporation of the University of Edinburgh is a corporation independent of the Crown, no doubt originally created by, but still independent of, the Crown. Its property is not Crown property, but it is properly vested in the Senatus Academicus for the University purposes. I agree with the statement of the Lord Ordinary, who said that the property could not be considered in any sense Crown property, nor would the assessment of the property directly or indirectly affect the Crown. With regard to the allegation in the pleas in law, that it is property dedicated to public purposes, that dedication, after the decisions of this House in the cases to which I have referred, must now be taken to be a wholly insufficient ground of exemption. Therefore, on the first argument of exemption on the score of Crown privilege, it appears to me that the buildings of the University of Edinburgh cannot be brought in any sense under that exemption.

Then, my Lords, on the second point, the question of value, the manner in which it has been put on behalf of the respondents at your Lordships' bar is this. It has been stated that the property is not capable of producing value. Now I must remind your Lordships, in the first place, that we are not here to decide on any question of quantum of value in respect of which the property should be assessed. That may be a matter of some difficulty which may have to be considered in detail hereafter. The question which your Lordships have now to deal with is, whether the argument now adduced, which was not much relied on in the Court below, that the premises are not capable of producing value, is an argument which ought to prevail.

My Lords, it might be sufficient to dispose of that argument to say that in a case where we find the University of Edinburgh actually in occupation and conducting all the great purposes for which they are incorporated, in and by means of these buildings, that alone is a beneficial occupation, which, subject to the question of what the quantum of benefit may be, is clearly an occupation rateable for the relief of the poor. And I might further point out to your Lordships that it appears clear, partly by the record and partly by admissions at your Lordships bar, that the University are in the habit of receiving matriculation fees from the students who attend these buildings, which fees would clearly not be paid unless there were buildings of which the students could have the benefit for the purpose of receiving instruction. Further than that, I might remind your Lordships that it appears on the record, and by those admissions, that the professors are allowed to receive fees from the students who attend their classes, and it is, of course, obvious that if the professors were not allowed to receive those fees, they would themselves have to be remunerated by higher salaries paid to them by the University. And, therefore, indirectly again, in that shape the University obtains the benefit of the fees which are paid to the professors; which fees, again, would not be paid by the students unless there were proper class-rooms in which the professors could deliver their instructions to the students. But I am bound to say that, even beyond that the Act of Parliament which deals with this question suggests (I will not say more, nor is it necessary that your Lordship should now say more) a test of value which, as it appears to me, might well be made applicable to cases of this kind, because the 8th and 9th of the Queen, chapter 83, after providing in the 34th section "that one-half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish," the 37th section enacts, "that in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might, in their actual state, be reasonably expected to let from year to year," under certain deductions therein mentioned.

It was argued at the Bar that it must be taken that a tenant who became the lessee of these lands would not be able to use them otherwise than as the University could use them, that is to say, would not be able to put them to any other uses than the University would do. It may not be necessary to determine that question now, but it appears by no means clear that any such ingredient is to be taken into account when you are endeavouring to ascertain what a tenant would give for the premises in their present state. That point may better be determined when the question is specifically raised. But on the grounds I have mentioned I think your Lordships will be of opinion that there is in these premises clearly an annual value, and, if that be so, they are not exempt from rateability on the ground that they are like the case put in argument in one of the cases that came before your Lordships,—the case of a barren rock,—which is utterly without any value.

Speaking therefore, my Lords, with great respect for the decision of the Court of Session, I am bound to advise your Lordships, and I move your Lord-

ships, that the decision of the Lord Ordinary was right, that the interlocutors of the Second Division of the Court of Session ought to be reversed, and that in substance the defender should be assoilzied from the conclusions of the libel, with expenses both of the proceedings before the Lord Ordinary and also of the reclaiming note to the Court of Session.

Lord Cranworth—My Lords, I entirely concur, and have very little to add to what has fallen from my noble and learned friend. I think the Court of Session has fallen into a great error in its application of the *Mersey Dock* case. I find that the Lord Justice-Clerk says, as the foundation of his opinion, that this comes within the exception of Crown property, that "throughout the whole history of the University, and very specially in recent Acts of Parliament, the Crown is recognised both as the fountain from which the whole rights of the University flow, and also as the visitorial authority to the control of which it is at all times subject." That may be perfectly true, but that does not make the property Crown property. As has been suggested in the course of the argument at the bar, so far from what is alleged showing the property to be in the Crown, it distinctly shows it to be out of the Crown, for it was part of the argument that by Royal Charter it was granted to the University—so that clearly the ownership is entirely out of the Crown. But if the ownership is out of the Crown, then *a multo fortiori* the occupancy is out of the Crown. That the occupancy is in the University is clear from this.—The professors are allowed, and it is their duty to use certain rooms to attend for their classes, but they can only occupy them for such purposes and in such mode as the University shall permit. They could not, as was suggested, give dinners or balls there—certainly not—as they might do in any other rooms of which they had the sole occupation. Therefore it seems to me perfectly clear that the University are not only the sole owners but the occupiers of the property; and, as to the supposition that they are occupying it as servants of the Crown, and that the Crown is performing certain duties there as in the case of courts of justice, it is absurd; because the Crown does not grant decrees or deliver lectures, nor do those who perform these acts in any respect perform them as servants of the Crown, therefore the Crown is quite out of the question.

With regard to the question of there being no value, I think the receipt of the matriculation fees is quite sufficient; and the fact that the professors by occupying rooms belonging to the University, and under the control of the University, receive fees from the classes, is, I think, also conclusive. But I desire also to be understood as concurring with my noble and learned friend when I say that I very much doubt whether any of these matters are at all to be taken into consideration. When the Statute says that the value is to be calculated according to what a solvent tenant would pay for the property, making certain deductions which are specified, I cannot say that I am at all satisfied that it means that the tenant is only to occupy it for the same purposes for which it is occupied by the body that is proposed to be rated.

I have no hesitation therefore in concurring with my noble and learned friend in thinking that the interlocutor of the Lord Ordinary was right, and that the interlocutors of the Second Division of the Court of Session must be reversed.

Lord Westbury—My Lords, upon an examination of the summons in this declarator, it would appear that, strictly speaking, one question only is raised by it, and that is the question of exemption from poor-rate. The question whether the buildings are or are not of any rateable value does not appear to be included in the summons. Now, on the question of exemption, anterior to the decisions of your Lordships' House in the *Mersey Dock* cases, great looseness of expression prevailed in the language of the decisions. We had a variety of decisions in which it was held that property held for charitable purposes, being held for public purposes, was not to be regarded as liable to poor-rates. The true ground of exemption was ascertained and expressed by this House in the *Mersey Dock* case; and it was found to rest altogether upon this fact, that the poor laws did not include the Crown, the Crown not being named in the Statute. The result therefore was, that Crown property, and property occupied by the servants of the Crown, and then—according to the theory of the constitution—property occupied for the purposes of the administration of the government of the country, became exempt from liability to poor-rate. The confusion and looseness involved in the words "national objects" were thereby removed; and those words, in speaking of the law upon this subject, ought to be considered as applicable to those purposes which are essentially involved in the administration of the government of the country. Now, nobody will contend that the functions of a University—to teach, to instruct, to confer degrees—are functions involved in the administration of the government of the country. They are perfectly distinct, and it is impossible therefore to bring the functions of a University within the proper meaning of government purposes; and, if so, it is impossible to hold that property granted by the Crown to the university, or for the purposes of a University, is property granted for the service of the government of the country. This ground of exemption, therefore, not being at all applicable to the University, the conclusions of this declarator must on that ground alone be repelled, and the defender assoilzied from the action.

But it may be requisite to observe that, independently of exemption on the grounds of the property belonging to the government, there may be another ground of non-liability perfectly distinct, namely, where the property has no rateable value. Now, I do not mean by anything that I say on this occasion to prejudice at all the proper consideration of that question; for it may possibly be held that if property is occupied by persons for a purpose yielding no value at all, and they are absolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held that there is no rateable value in that property; and that, in that sense, therefore, it ought not to be assessed to the poor-rate. But the possession of property of no rateable value is wholly distinct from the possession of property in a character which entitles it to be exempt. In this case it may be sufficient to observe (though perhaps it is hardly necessary) that it is impossible to deny, with respect to the University of Edinburgh, that it is at once the owner of the property in a character which does not exempt it, and it is also the occupant of the property in a character and for a purpose that entitles it to receive, and in respect of which it does actually receive, a certain amount of pecuniary value which must be regarded as incidental to its occupation of this property. Although, therefore,

we are not required by the conclusions of this declarator to advert to that circumstance at all, it may be satisfactory to advert to it only for the purpose of observing that there is no case here brought before the House which proves that the property is incapable of yielding value, and therefore ought not to be rated; but, on the contrary, the facts show that the property is capable of yielding and actually does yield in a certain sense, value to the University that occupies that property.

I therefore, on these grounds, entirely concur in the motion of my noble and learned friend the Lord Chancellor, that the defender ought to be assoilzied from the conclusions of this summons, with expenses, extending also to the expenses of the interlocutor of the Lord Ordinary. The interlocutor of the Second Division will be reversed, and there will be an absolvitor from the conclusions of the summons. That I apprehend will be the proper form of order.

Lord Colonsay—My Lords, I concur in the judgment which has been suggested, and upon the grounds stated. I also concur in the reservation which has been made by my noble and learned friend who last spoke. Possibly a question may be raised as to the rateable value of this property. The summons of declarator that is before us is a summons which concluded for absolute non-liability. Now, to that I cannot give an assent. Therefore it is necessary that from that there should be an absolvitor. But other questions may be raised—other questions have been raised of a more limited kind. I do not think they are properly before us here, nor have we all the materials for disposing of them; and, therefore, while I would be for assoilzing the defender from the conclusions of this action, I would not be for precluding the pursuers in the action from raising any question as to the measure of liability which attaches to them when that question comes fairly to be raised.

The cases that were decided anterior to the *Mersey Dock* case and other recent cases, and the practice that prevailed anterior to those decisions, did, I think, give great countenance to the judgment pronounced in the Court below; and had it not been for these recent cases, I do not know that I should not have concurred in that judgment, taking those former cases to be correct exponents of the law. But the principle laid down in the *Mersey Dock* case, and some other cases almost concomitant with it, are, I think, sufficient to show that the buildings of the University of Edinburgh are not buildings of the kind which entitle the owners and occupants of them to exemption from liability for poor-rate.

Interlocutors appealed from reversed, and defender assoilzied from conclusion of summons, with expenses, before the Lord Ordinary and the Court of Session.

Agents for Appellant—G. &. H. Cairns, S.S.C., and Murdoch, Rodger & Gloag, Westminster.

Agents for Respondents—John Cook, W.S., and Loch & Maclaurin, Westminster.

Thursday, June 15.

CARRICK *v.* MILLER.

(*Ante*, iii, 350.)

Entail—Montgomery Act—Lease—Irritancy—Statutory nullity—Powder Magazine—Nuisance—Equitable Jurisdiction. Held that a tenant's failure to comply with the conditions in section 3d of the Act 10 Geo. III., c. 51, inferred a statutory nullity of the lease. *Question*, whether the Montgomery Act authorises the erection of a powder magazine?

The respondent, heir of entail in possession of Frankfield and Gartnaig, brought this action of reduction and declarator against the appellant, asking a reduction of—(1) a lease between the respondent's father and the appellant, dated January 1851; and (2) a back letter granted by the respondent's father to the appellant of same date. By the lease it was declared that the granter, in virtue of 10 Geo. III., c. 51 (the Montgomery Act), let to the appellant on a ninety-nine years' lease a portion of ground for the purpose of erecting thereon a powder magazine, and, in terms of the Act, it was conditioned that the lease should be void if one dwelling-house at least, not under the value of £10, should not be built within ten years from the date of the lease, for each half-acre of ground comprehended in the lease. By the back letter the granter declared that so long as there should be on the ground a gunpowder magazine of the value of £1000, it was not his intention to enforce the clause as to the erection of dwelling-houses, and so far as he could legally do so he dispensed with the necessity of building the dwelling houses.

The deed of entail prohibited the heirs who should succeed to the lands from granting tacks of more than twenty-five years' duration. The gunpowder magazine was erected in 1851. No dwelling-houses were erected. The granter of the lease and back letter died in 1864, on which event the respondent succeeded to the entailed estate.

The First Division of the Court pronounced an interlocutor on 29th March 1867, finding that the appellant, as tenant in the lease, having failed to fulfil the condition of building dwelling-houses on the ground (as provided by the 5th section of the Statute 10 Geo. III., c. 51), subject to which condition only the parties could lawfully contract in terms of the lease, the lease was ineffectual, and not binding on the respondent as heir of entail succeeding to the granter.

Carrick then presented this appeal, stating these reasons:—"1. Because the lease in question has not become ineffectual in consequence of the appellant having failed to build dwelling-houses on the ground, as provided by the 5th section of the Statute 10 Geo. III., c. 51, the appellant having been ready to build such houses as soon as the respondent's demand was intimated, and being still ready to do so; and (2) because the lease in question is valid and effectual for a period of twenty-five years from its date, in virtue of the powers which Mr Miller possessed as proprietor of the estate, and which he exercised in granting the lease."

The respondent stated these reasons in support of the judgment:—"1. Because the Act 10 Geo. III., c. 51, in virtue and in terms of which the lease by the respondent's father bears to have been executed, did not confer on him power to grant, and does not authorise the granting, of a lease for such a purpose as that for which the lease in question was granted. 2. Because, even assuming that the Act 10 Geo. III., c. 51, authorises the leasing of portions of entailed estates for the erection thereon of such buildings as gunpowder magazines, the lease granted by the respondent's father for this purpose was not granted in terms of that