

allotment of that stock would receive a portion of the capital of the company which ought to be left to yield dividend. There may be a little difficulty as to the way in which the Lord Ordinary has dealt with the dividend warrants. The 5 per cents. may be entitled, as in a question with the ordinary shareholders, to get payment of these arrears, and it may be quite right to give them a voucher to enable them to claim them afterwards. The objection is not to the giving of the warrants, but to the terms in which they are expressed. If a qualification is inserted, that they are not to compete with the  $\frac{4}{2}$  per cent. shareholders, I suppose that will be satisfactory.

LORD ARDMILLAN—I have scarcely anything to add. We are dealing with two sets of preference shareholders, we are not in a competition between preference and ordinary shareholders. The holders of 5 per cent. stock have a preference; so have the holders of  $\frac{4}{2}$ , and what the Statute has given is a *pari passu* ranking for dividends. The words of the 22d section are, not a *pari passu* ranking of debts or a *pari passu* ranking of creditors, but that the "dividend so attached to the said new shares shall rank *pari passu* with the dividend on the preference shares." Now, I think the dividends which the company distribute are the annual profits—there is to be an annual distribution between these two classes. To allow one of them to be dealt with as if holding a preferable debt over the other, or to claim a *pari passu* ranking for the year's dividend, plus arrears, would give a right to accumulate arrears year after year until the one class would swallow up the other. According to the ordinary understanding, a dividend is an annual payment, it is a distribution of a sum at a particular date, and what I think here is, that the dividends are to be divided annually *pari passu* between these two classes of shareholders. I do not think that would be the case if Mr Young's argument was sustained.

LORD KINLOCH—I have arrived at the same result. As to the leading question, of what is the sound meaning of the 22d section, I think the sound meaning is, that the 5 per cents. and the  $\frac{4}{2}$  per cents. are put on the same footing. I think what they are to rank for is the dividend for the year and not the arrears. It is quite true that the right of the 5 per cents. to arrears is not taken away, but what is meant by that is, that they are to have a preference with the ordinary shareholders. Anything else would be begging the question. On the second point, I think the case of *Hoole* is sound in principle, and ought to be adhered to.

Agent for Pursuers—James Webster, S.S.C.

Agents for Great North of Scotland Railway Company—Henry & Shires, S.S.C.

Agent for Standard Life Assurance Company—A. J. Russel, C.S.

Agents for City of Glasgow Assurance Company—Hunter, Blair, & Cowan, W.S.

Agents for Clydesdale Bank—Ronald & Ritchie, S.S.C.

Wednesday, July 8.

LORD ADVOCATE v. KEITH'S TRUSTEES AND ARBUTHNOTT.

*Teinds—Valuation—Act 1707, c. 9.—Prescription—Aequiescence—Extract—Excerpt.* An extract valuation recorded under the authority of the Court in terms of 1707, c. 9, which was in the following terms:—“(2) At Edinburgh the

third of Februar javvic. and threttie-six yeirs. The landis called the five-pairt landis of B., pertaining to R.A., are worth and may pay auch scoire bolls beir for stock and teynd parsonage and viccarage; the landis of W.K., pertaining to thesaid R.A., six chalders victuall; the burrow ruids of the toune of L., fourtie bolls beir; the lands of C., fourtie merks; B., fourtie merks; W. of K. and D., twa chalders victuall; the lands of S., K. of K., six chalders victuall;” contained in a writing which concluded with these words—“This is the just extract of the valuatione of the foresaidis landis as is mentionat in the principall registers thereof, extracted by me, Mr Thomas Murray, advocat clerk-deput to my Lord Register, and keiper of the said registers. (*sic sub.*) ТВО. МURRAY.” Held (diss. the Lord President and Lord Ardmillan) to contain all the elements of a decree of valuation, and to have force as such.

This was a question arising in the locality of Kinneff and Catterline, between the Lord Advocate, on behalf of her Majesty and the Commissioners of Woods and Forests, on the one hand, and the trustees of the late Viscount Keith and the Viscount of Arbutnott on the other. The respondents founded on the following document, which they alleged to be an extract decree of valuation of certain lands in the locality:—

(Titled on back) “Valuatione of my Lord Arbuthnot's Landis wtjn. mentioned” (all on face of same sheet of paper).

“(1.)—At Edinburgh, the 25th of March javvic & threttie-six.

“The Baronies of Arbuthnot and Futties, lyand within the parochin of Arbuthnott, and landis within the parochins of Fordoune and Eglisgreig, pertaining to my Lord Arbuthnot, are raitted and estimat to be worth yeirle of constant rent in stock and personage teyndis particularlie as efter followis:—To witt, the maynes of Arbuthnot nyne chalders victuall, twa pairt meill and thrid pairt bier; the landis of Bamff fyve chalders victuall, twa pairt meill and thrid pairt beir; the landis of Kirktoune of Arbuthnott ane chalder fourteen bolls victuall, twa pairt meill and thrid pairt beir; the landis of Pittarles four chalders victuall, twa pairt meill and thrid pairt beir; the landis of Pitquorthie and Thraipland thrie chalders aucht bolls victuall, twa pairt meill and thrid pairt beir; the landis of Meikle Futthes four hundreth merks; the landis of Cauldcoittis twa chalders twelf bolls victuall, twa pairt meill and thrid pairt beir; the landis of Elpetie twa chalders meill; the landis of Gratismyre twelf bolls meill; the landis of Brumhairishill ten bolls victuall, twa pairt meill thrid pairt beir; the landis of Brigend ten bolls victuall, twa pairt meill thrid pairt beir; the landis of Cowdoune four bolls twa firlofts meill; the landis of Mongoldrum twentie bolls victuall, twa pairt meill and thrid pairt beir; the landis of Cadnoskeyne four bolls twa firlofts; the landis of Lais nyne bolls victuall, twa pairt meill thrid pairt beir; the landis of Craighill ten bolls victuall, twa pairt meill and thrid pairt beir; the landis of Dunrabin nyne bolls victuall, twa pairt meill thrid pairt beir; the landis of Drumzochries twentie bolls victuall, twa pairt meill and thrid pairt beir; the landis of Peathill nyne bolls victuall, twa pairt meill and thrid pairt beir; and the landis of Auldeooks twentie bolls victuall, twa pairt meill and thrid pairt beir.

"(2).—*At Edinburgh, the third of Februar jaiwic & threttie-six yeirs.*

"The landis called the five-pairt landis of Bervie, perteing to Robert Arbuthnot of yt Ilk, are worth and may pay aucht scoire bolls beir for stock and teynd, parsonage and vicarage; the landis of Wester Kinneff, perteing to the said Robert Arbuthnot of yt Ilk, six chalders victuall; the burrow ruids of the toune of Innerbervie fourtie bolls beir; the landis of Craigaine fourtie merks; Barrescroft, fourtie merks; Ward of Kinneff and Densyde, twa chalders victuall; the landis of Slaines, Kirktoone of Kyneff, six chalders victuall.

"(3).—*At Edinburgh, the Twentie-fyft of March jaiwic & threttie-six.*

"The landis of Wysmaistoune and Orchardtoune twentie aucht bolls meill; the Carnetoune six chalders victuall, twa pairt meill and thrid pairt beir; the landis of Cowlie thrie chalders meill; the landis of Little Cairnbeg threttie-six bolls meill; the mylne landis of Pittranny twelf bolls victuall, twa pairt meill and thrid pairt beir; the landis of Portertoune thrie chalders twa bolls victuall, twa pairt meill thrid pairt beir; the landis of Kirksyde aughten bolls meill; the landis of Drumelzie, ane hundredth merks money, and the aikers of Fordoune twenty-twa bolls victuall, twa pairt meill and thrid pairt beir.

"(4).—*At Edinburgh, the twentie-fourth of March jaiwic & threttie sevin.*

"The landis of Drumelzie, Kirksyde, Cowlies, Fordoune, Carnetoune, Littell Carnebeg, Wysmes-toune, Orchardtoune, Portertoune, and myln landis of Pittreny, perteing to Robert Arbuthnot of yt Ilk, nyneitein chalders victuall, twa pairt meill thrid pairt beir, ane hundredth merks money, grof the vicarage is ane pairt, and valued to threttie-six pundis fyve shillings money.—Ext. This is the just extract of the valuatione of the foresaidis landis, as is mentionat in the principall registers thereof, extracted by me, Mr Thomas Murray, Advocat, Clerk-Deput to my Lord Register, and Keiper of the saids registers. (*sic sub.*)

"THO. MURRAY."

The valuation in question here was part 2, comprising lands partly still belonging to Lord Arbuthnot, and partly belonging to Lord Keith, who had acquired them from Lord Arbuthnot since the date of the alleged valuation.

The Crown lodged objections to this valuation, and answers thereto were given in by the respondents, on which a record was made up.

The following were the chief objections and relative answers:—

"*Obj. 4.* The document founded on by the respondents as an extract decree of valuation is not, and does not bear to be, a decree of valuation; it is not, and does not bear to be, an authentic extract of any decree. It does not bear to proceed upon a proof led, either before the High Commission or before any Sub-Commission, of the true worth and value of the teinds. It was not and does not bear to have been pronounced by any competent court in any process in which the minister, or titular, or any party having a legal interest had been called. It is not duly recorded, and it is altogether informal and imprubative. In reference to the statement introduced into the answer, it is believed to be true that Robert Arbuthnot was proprietor of the lands of Wester Kinneff and others. The petition and interlocutor founded on are referred to for their terms. Denied that the alleged extract decree was produced, that

it was found to be authentic, and that it was recorded by authority of the Court. It is explained that the whole proceedings in said petition were *ex parte*, and were not intimated to the titular, or to any party interested. *Quoad ultra* the counter statement is denied.

"*Obj. 5.* The document founded on is alleged to be extracted from the register by Mr Thomas Murray, advocate, clerk-depute to the Lord Register. Mr Murray acted as depute to Sir Archibald Johnston of Warriston, during the period when Sir Archibald held the office of Lord Clerk Register, between the years 1657 and 1661. The said Mr Murray had no power or authority to grant extracts of decreets of valuation, either of the High Commission or any Sub-Commission for the valuation of teinds.

"*Ans. to Obj. 4 and 5.* The statements in these articles are denied; and it is explained—(1) The valuation of the teinds of the said lands consists of a decree of the High Commission, dated 3rd February 1636; (2) The lands at the time they were valued belonged to Robert Arbuthnot of Arbuthnot, and are so described in the decree; (3) An extract of the decree of valuation, authenticated by the depute-clerk register, was produced with a petition, presented to the Court of Teinds in 1792 by John, Viscount Arbuthnot, then proprietor of the lands, in terms of the act 1707, c. 9; (4) The said extract was found to be authentic, and was thereafter, by appointment of the Court of Teinds, recorded in the appropriate register on 14th November 1792; (5) The said decree of valuation has been given effect to in the various processes of locality of the stipend which has been awarded to the minister, and in all proceedings connected with the teinds of the said united parishes.

"*Obj. 6.* By statute 1661, c. 9, the meetings of the pretended Parliament and the Committees of the Estates in 1649, and all acts or deeds done by them, or their warrant, are rescinded and annulled. It is declared in the said statute that the acts, decrees, and sentences of a Commission appointed by the said Parliament for the Plantation of Kirks and Valuation of Teinds shall be valid. The document founded on as an extract is not one of the acts, decrees, or sentences of the said Commission, and is null.

"*Ans. 6.* Denied that by the statute, 1661, c. 9, the decrees pronounced by the Commissioners of Teinds, or the extracts thereof, were invalidated or in any way affected. On the contrary, the decrees issued by the Teind Commissioners were expressly excepted by saving clauses in the rescinding acts which were passed after the Restoration."

The objector pleaded:—(1) The only legal proof that the teinds of any particular lands have been valued in terms of the statutes in that behalf, is a regular decree of valuation obtained in a competent court against the titular and other parties having interest, and as no such decree has been produced applicable to the lands mentioned in the foregoing statement, these lands cannot be held to have been valued. (2) The writing founded on as a decree of valuation of the said lands is not a decree pronounced by a competent court in a legal process. (3) The alleged extract is null and void under the Act 1661, c. 9. (4) The writing founded on, not being in itself a good decree of valuation, cannot be validated by being recorded in the register of old decreets. (5) The said writing has not been duly recorded in terms of the Statute 1707, c. 9.

The respondents pleaded:—(4) It is incompetent

to impugn the decree of valuation of the respondent's lands by the High Commission, which has been acted on for more than two centuries, without bringing it under reduction. (5) All objections to the said decree are excluded by the positive and negative prescriptions, or one or other of them. (6) There are no grounds under the provisions of the Act 1661, cap 9, for objecting to the valuation of the teinds of the respondent's lands, or the extract thereof.

The Lord Ordinary (BARCAPLE) sustained the objections, and found that the respondents had not produced valid and effectual decrees of valuation of the teinds of their lands. His Lordship's reasons are contained in the following extract from the note to his interlocutor:—"The extracts which are founded upon as equivalent to or as instructing valuations of the respondent's teinds are, so far as the Lord Ordinary is aware, altogether anomalous. They bear to be extracts issued and signed by the Depute-Clerk Register during the period when the Clerk Register was held by Johnston of Warriston, that is between 1649 and the Restoration. If they were otherwise sufficient the Lord Ordinary would not be prepared to sustain the objection taken to them by the objector, that the authority of Warriston, as Clerk Register, and of his depute, fell by the Recisory Act 1661, c. 9. But it does not distinctly appear on the face of the documents from what register they bear to be extracts, and they do not set forth or distinctly refer to any procedure of the nature of a process of valuation. The Lord Ordinary does not think that documents so imperfect and irregular can be received as instructing valuations of teinds. If the original extracts are, as the Lord Ordinary thinks, altogether insufficient in themselves, it does not appear that they can derive additional validity or effect from having been recorded under the provisions of the Act 1707, c. 9."

The respondents reclaimed. The case was heard by seven judges, and inquiry was ordered with reference to the usage in regard to such "short extracts."

MONRO, CLARK, and NEVAY for reclaimers.

The SOLICITOR-GENERAL and KINNEAR for the Crown.

At advising—

LORD BENHOLME (after reading the extract):—The question is, Is this a form of extract to which the act 1707, c. 9, applies? It is answered that it is impossible to know from this extract whether the process of valuation was properly brought into Court; if the pursuer had a good title to sue; whether there was a proper defender; if all parties were called that should have been called, or—in short—anything about the process. The terms of the Statute are broad enough to comprehend any authentic extract. Extract here I hold equivalent to *except*. There is a maxim in law that, in regard to judicial acts, where there is no suspicion of irregularity, all acts are presumed to have been rightly and regularly done. This maxim is derived from Roman Law, (*omnia præsumuntur rite et solemniter esse acta*), and has cut a great figure in our own. On that footing I am humbly of opinion that the objection in question is not well founded.

But there is another objection of a narrower kind. The document is titled on the back "Valuation of my Lord Arbuthnot's Landis within-mentioned." It consists of four parts—all of them only extract valuations of lands belonging to the then Lord Arbuthnot. The particular valuation in question is the second—[*His Lordship read it.*] There were in

this locality three heritors who founded on such extracts—the Governors of Donaldson's Hospital, Lord Arbuthnot, and Lord Keith's Trustees. The extract valuation of the lands belonging to the Governors of Donaldson's Hospital was open to the same objection as the present; it did not mention the Court in which the decree of valuation was obtained. This objection was pleaded at the bar of the First Division (*Lord Advocate v. Governors of Donaldson's Hospital and Others*, 20th July 1866. 4 Macph. 1096), and unanimously repelled. But here there is a difference, and the Court thought that, with regard to the valuations of the other two heritors, there should be an investigation as to the general practice. This investigation has been very complete, and has strongly convinced me of the soundness of the decision in the case of the Governors of Donaldson's Hospital, and shows that the other two heritors stand in at least as strong a position as the Governors of Donaldson's Hospital.

The result of the investigation is this. Extract No. 1 in the document before us regards the barony of Arbuthnot; and No. 3 appears to consist of approbations of decrees of the sub-commissioner. No. 1 has already been sustained in two localities. No. 4, relating to lands in the parish of Fordoun, has been very remarkably supported by a "long extract" regarding that very valuation, and it confirms the short extract No. 4. No. 4 has been sustained in three different localities. No. 2 remains, and is the one now questioned; but before proceeding to its history I may mention an objection to No. 3 which had with me considerable weight. No. 3 is dated 25th March 1636; No. 4 24th March 1637. Both are "short extracts" and relate to the same lands, but there is a difference in the valuation. How are we to account for this? The minister when he raised his augmentation had to correct the valuation of the year before. But No. 4 gives about one per cent. less victual than No. 3, and it may be urged, surely the minister would not lower the quantity of victual. But the minister got a considerable advance by the correction; for though there is less victual the more valuable grain is just about double. In 1792 this paper of valuations was given in by Lord Arbuthnot, and since then they have been produced in every locality in which they could be brought to bear. They have regulated rights of parties since 1792; and this very document was approved in 1807, and again in 1830. Has it not been approbated and homologated? Has it not been acquiesced in by the Crown? The Crown, who now appears as objector, has always acquiesced in the validity of this valuation. This is a very strong objection to going back upon the document upon what is called a nullity on the face of it. If it were such a nullity, prescription would have no effect; but in that case the party should have seen it forty or fifty years ago; and if the nullity is not patent on the face of it does not prescription come in and operate effectual protection to the document? On the whole, on the strength of the decision of the Court in the case of the *Governors of Donaldson's Hospital*, and also on general grounds, I am for altering the Lord Ordinary's interlocutor, and giving to Lord Arbuthnot and to Lord Keith's trustees the same protection as to the Governors of Donaldson's Hospital.

LORD DEAS—By interlocutor of the First Division of 20th July 1866, the Court disposed of the reclaiming notes in this locality so far as concerned the Governors of Donaldson's Hospital, but ordered

further investigation regarding this document. It was a unanimous judgment. That appeared to me to leave nothing open to us but this, Whether, assuming the other interlocutor to be right, the special objections to this document made any difference? (His Lordship examined the objections *seriatim*, and held that they were not such as to make a difference between this case and that of the Governors of Donaldson's Hospital.)

But it is said that the former judgment is erroneous. The Statute 1707, c. 9, says that "the said Estates do hereby appoint and ordain that any authentic extracts from the said records be brought in, and, being presented to the said Lords, be recorded in a particular register. And that the said extracts so brought in be kept by the Lord Clerk Register and his depute-clerks, to be appointed by him for that effect as their warrands, which shall be held and reputed als valid and authentick as the principall warrands themselves, if the same were yet extant." The question is—Is this an authentic extract from the record, and does it, or does it not, show an authentic valuation? What is an extract of valuation? What the regulations were then we don't know. Till 1707 we have no regulations regarding extracts, and even they do not bear on the *form* of extracts. We have nothing but the practice to guide us respecting the form of extracts. An extract was not a copy of a whole deed. It was an abstract of all that had been done, and it was left very much to the discretion of the keeper. It is true it may not enable me to say if every step has been taken, but the same objection would apply to a *long* extract. I can't understand how it can be doubted that this is an extract. Thomas Murray, the subscriber, says:—"This is the just extract of the valuatione of the foresaidis landis, as is mentionat in the principall registers thereof.—Extracted by me, Mr Thomas Murray, Advocat Clerk-Deput to my Lord Register and Keiper of the saids Registers." Now, if he is the keeper (which is not doubted) this must be conclusive. It is an extract—from where? He says from the principal register of the Commission of Teinds. I am of opinion that both here and in the case of the Governors of Donaldson's Hospital the documents contain all the essentials of a valuation by the Commissioners.

LORD COWAN and LORD NEAVES concurred.

LORD ARDMILLAN—It is with great diffidence that I must say I am not able to concur. I agree with the Lord Ordinary. A decree of valuation is declared by the high authority of Lord Balgray in *Lord Lynedoch v. Liston*, 28th Jan 1836, 14 S. 374, to be "a title to teinds just as much as a charter is a title to lands. It is the charter" (he continues) "of a proprietor's teinds, and in order to get the benefit of it in a locality, he must not attempt to rear it up incidentally, or by inference, or by offering some adminicles in place of the decree itself. He must either produce the decree or an extract of it; or he may get this process sisted for a reasonable time, to allow a proving of the tenor to be brought." In the present case no decree of valuation was produced. The Court gave the respondents permission to prove the tenor. They stand upon the extract. This does not possess the essential character of a decree of valuation. I do not think that the word *extract* in the Act of 1707 means *excerpt*. The question is, Is this an extract of a decree of valuation? The first answer is, that

this extract has been recorded, the effect of which is said to be to exclude questions as to its authenticity and validity. I do not think the mere act of registration has this effect. I hold it still an open question, and I do not see evidence that it has been properly recorded. Recording is for preservation, not for curing defects.

The objections to the extract are—(1) that it is not authentic; and (2) that, if authentic, it is not an extract of a decree of valuation. It has been said the point was judicially disposed of in the case of the *Governors of Donaldson's Hospital*. I had very great difficulty in concurring then. I did ultimately come to concur that, looking on a separate writing with a doquet attached to it, it might be regarded as an extract provided there were no hostile subsequent circumstances. It was not because the extract was short, but because it was defective that I then had difficulty. On hearing the point re-argued, my former doubts have been strengthened. There has been no *res judicata*, because this case is not between the same parties, and there has been no series *rerum judicatarum*. The present Lord President was not then in the First Division, and he has expressed his doubts on the question. And in the previous case the opinion of Lord President Colonsay was against sustaining No. 2 as a valuation. Even without challenging the former case, I am of opinion that this document (No. 2) before us is not authentic. There are four extracts in the writing. Their dates are different. They are not separately attested and subscribed, but only at the end of No. 4. Such records are unprecedented. The records have been searched and none such found. We must assume none such exist. No. 3 is not authentic, and this, in my opinion, is fatal to the authenticity of No. 2. You cannot overleap No. 3 and authenticate No. 2.

But even if we are to hold it as authenticated by its signature, the question arises, What is its import? I see no ground for saying it is an approval of a sub-valuation. Is it then an extract of a proper decree? No such extract has ever been shown prior to the decision of the Governors of Donaldson's Hospital. It is to be observed that every proper decree is pronounced in some process before some competent Court. This does not bear to be pronounced by any Court proceeding on any evidence, and in any process. It does not bear any essential marks of a decree.

LORD PRESIDENT—I am unable to concur with the majority. According to *Lord Lynedoch v. Liston*, a heritor must produce his extract-decree of valuation, or raise an action of proving the tenor. That being settled law, the only question here is, whether the document entitled "Valuatione of my Lord Arbutnot's landis," is an extract-decree of valuation, or rather contains in one sheet of paper four extract-decrees of valuation? If I could agree in Lord Benholme's suggestion—that anything could be registered under 1707, c. 9, that is an extract or excerpt—I might think differently.

The term *extract* is of technical signification in the law of Scotland, and I am not aware that it has ever been used in any other signification in any statute or institutional writer; nor can I find it ever used in the sense of the word *excerpt*. The question then is, Is it used in this loose sense in the Act 1707, c. 9? I cannot think so.

Is this paper an extract-decree of valuation? What is an extract-decree? It is a statement

under the hand of a proper officer of Court that a certain decree has been pronounced. It may be challenged *de recenti*, and have its proper grounds and warrants produced, but after a certain time this is excluded. But here there is nothing tantamount to a statement that any decree whatever had been pronounced. And no usage in practice has been alleged. Parties founding on this document have had ample means of investigation, and no trace of any practice of such extracts being received has been found. Reference has been made to some forms of extracts which are very short, but these differ materially from this one, for in each there is a distinct statement by the proper officer that a decree of valuation had been pronounced by the competent Court, and the terms of the decree are given, although shortly. No doubt this is different from the ordinary form of extract. But if it can be shown that this was the form of extract at that time, I should be sorry to say it was not a good one. But it may be said—If one custodian may shorten, there is no reason that another may not have a form of his own. But no other extracts under the hand of Mr Murray have been produced in this form. There is one extract produced under his hand, but it is in the usual form.

I entirely concur in the grounds given in the Lord Ordinary's note. Although bound, and as much inclined as bound, to respect the judgments of this Court, and especially one so recent as the one in the case of the *Governors of Donaldson's Hospital* (and Lord Ardmillan, who heard that case, concurs with me), it appeared to me most desirable that this case should be heard before seven judges.

LORD CURRIEHILL absent, but the LORD PRESIDENT stated that he had his authority for mentioning that he concurred with the majority.

Lord Ordinary's interlocutor recalled.

Agent for the Crown—W. H. Sands, W. S.

Agents for Viscount Keith's Trustees—Mackenzie & Kermack, W. S.

Agent for the Viscount of Arbuthnott—J. N. Forman, W. S.

Friday, July 10.

COWAN (MINISTER OF KELTON) v. GORDON  
(KIRKCUDBRIGHT ROAD TRUSTEES.)

Road—Assessment—Exemption—Parish Minister—*Stewartry of Kirkcudbright Roads Act 1864.*

Hold that a parish minister is assessable on account of his manse and glebe under the *Stewartry of Kirkcudbright Roads Act 1864.*

This was an action of declarator and interdict at the instance of the Rev. Samuel Cowan, minister of the parish of Kelton, in the *Stewartry of Kirkcudbright*, against David Hutchison Gordon, clerk of the Road Trustees for said *Stewartry*. The summons concluded that it ought to be found and declared that the pursuer was not liable, in respect of his manse and glebe, to any assessment under the *Stewartry Roads Act 1864*, and that the defender was not entitled to insert in the assessment-rolls the pursuer's name as a person liable to such assessment; and also that the defender should be interdicted from so inserting the pursuer's name, and from levying or attempting to levy from the pursuer any assessment for payment of the parish road debts, or for the repair and maintenance of roads, &c., under the *Roads Act*

1864. The defender maintained *inter alia* that the pursuer, being proprietor, tenant, or occupier, in the sense of the *Stewartry of Kirkcudbright Roads Act*, of the manse and glebe of the parish of Kelton, was liable to be assessed in respect thereof.

The Lord Ordinary (KINLOCH) found in terms of the conclusions of the summons, resting his judgment upon the cases of *Heritors of Cargill v. Tasker*, 29th February 1816 (F. C.), and *Forbes v. Gibson*, 18th December 1850 (13 D., 341), affirmed in the House of Lords, 14th June 1852, 1 Macq. 106. In the note appended to his interlocutor, his Lordship said:—

“Combining the two decisions, the Lord Ordinary cannot escape from the conclusion that, in the legal terminology of Scotland, as settled by the decision of her Supreme Court with reference to the matter of taxation, the parish minister does not come under the general description of proprietor, tenant, or occupier. He is not to be considered liable to taxation merely because these words are used in the taxing statute. The practical result is one involving no hardship; it is merely that, when the Legislature intends to tax the parish minister, as such, in respect of his manse and glebe, it must insert a plain and specific clause to that effect, as was done with regard to the stipend in the Poor-law Amendment Act. The question in the present case arises on the terms of the *Stewartry of Kirkcudbright Roads Act, 1864*. There had been the usual statute-labour in operation, and afterwards its conversion; and various of the roads of the county had been made turnpike, and were under the regulation of the General Turnpike Act. It was agreed on both hands that none of the money levied for support of the statute-labour roads had been ever chargeable on any parish minister in respect of his manse or glebe. In this respect there had been all along an exemption from taxation on the part of the parish minister similar to what was so much relied on in regard to poor-rates in the two reported cases already alluded to.

“By the *Stewartry Roads Act of 1864* it was provided that the roads should no longer be maintained by tolls, but by a general assessment. The assessment leviable was twofold. There was, first, an assessment for paying off the existing road debts; and this was, by section 39, leviable ‘on the proprietors of all lands and heritages.’ There was, secondly, an assessment for the future maintenance of the roads; and this was, by section 51, ‘payable one-half by the proprietors, and the other half by the tenants or occupiers of all lands and heritages.’

“According to the principle settled in the two reported cases already mentioned, the Lord Ordinary conceives that these are phrases which do not reach the case of a parish minister in respect of his manse and glebe. The application of the reported cases is direct. It was there fixed that a parish minister was, in a legal sense, neither a proprietor, a tenant, nor an occupier of land, and was not subject to a taxation imposed only on those so designed. There is not in the *Kirkcudbright Roads Act* any special clause imposing the burden on the clergyman as occurred in regard to the stipend in the Poor-law Amendment Act.

“The defender relied much on that part of the interpretation clause of the *Kirkcudbright Roads Act* which declares, ‘the expressions, lands and heritages, proprietor, tenant, and occupier, shall