At advising—

LORD PRESIDENT—I am for refusing the prayer of this petition. The precedents much relied on by Mr Shand are not in point. All that they establish is, that when a clerical error has been committed by an officer of court, or any other public officer, the Court have the power to order that clerical error to be rectified. But in this case the error has not been committed by a public officer, but by one of the parties to the deed, or his agent, and consists in a wrong spelling of one of the names in the testing clause. Now, it is not for the Court to anticipate what may be the effect of this mistake, but in my opinion they have not the power to order an alteration to be made upon a private probative deed upon the mere allegation of a clerical error. And if they had such power, in my opinion it would not be expedient that they should exercise it.

LORD DEAS agreed with the Lord President, that if this were a private deed the Court had no power to authorise any alteration, but it certainly raised a difficulty in his mind that this deed was executed by the parties on an application to the Lord Ordinary for disentail, and he would like to consider a little more carefully this peculiarity.

LORDS ARDMILLAN and KINLOCH concurred with the Lord President.

LORD PRESIDENT—It is of importance to observe that this deed was executed previous to the presentation of the petition for disentail.

Agents for Petitioner—Hill, Reid & Drummond, W.S.

Wednesday, June 15.

SECOND DIVISION.

HIGHLAND RAILWAY COMPANY *v.* FOSTER & SONS.

Heritors — Assessment — Repairs on Manse — Real-Rent — Valued-Rent — Railway. Held that the heritors of a landward parish were entitled to lay on the assessment necessary to defray the expense of repairs on a manse according to the real-rent, the principle of the decided cases being that the heritors are entitled to depart from the valued-rent whenever the adoption of the real-rent is required in order to distribute the burden over the whole property in the parish.

This was an action of reduction at the instance of the Highland Railway Company against the Heritors of the parish of Kinclaven, and the schoolmaster as their collector, and a relative appeal from the Sheriff-court of Perthshire in which the same point was involved.

The question in these cases was whether the heritors of the parish of Kinclaven, in Perthshire, were entitled to lay on an assessment for the repair of the manse according to the *real rent* of their several properties, or whether they were bound to adopt as the basis of the assessment the old *valued rent?* The Railway Company, whose share of the real rent is £577 per annum, and to whose subjects there is no valued rent applicable, maintained that, the parish being purely landward, all ecclesiastical burdens fell by established usage to be levied according to the valued rent. The heritors, on the other hand, maintained that, there being no statutory rule, they were entitled to depart from the customary rule whenever the proportions of valued rent did not approximately correspond with those of the real rent; and they founded in support of this contention upon the *Peterhead* case (4 Paton's Appeals, 356), where the House of Lords sanctioned an assessment according to the real rent in respect of growth of feus, &c., within the parish.

The Lord Ordinary (MURE) assoilzied the defenders from the conclusions of the action of reduction. His Lordship added the following note to his interlocutor:—"Although the parish of Kinclaven is a landward parish, it is admitted that in the rental of £9487, heritable subjects are included of the value of upwards of £3600, consisting principally of railways, which have no valued rent attached to them, and the question here raised for decision is, whether an assessment for the repairs and alterations of a manse, which has been laid on according to the real rent, has been illegally imposed? The Lord Ordinary, upon considering the authorities, has come to the conclusion that it has not.

"The rule which was at one time generally acted upon, that assessments for the building and repairing of churches and manses fell to be levied from the heritors according to the valued rent of their lands, has of late years been gradually departed from, when the justice of the case required that a different basis of assessment should be adopted. This appears to have been first done in the case of *Crieff*, Nov. 20, 1782 (M. 7924), when it was decided that the expense of building a new church must be defrayed by the heritors of the landward part of the parish according to their valued rents, and by the feuars and proprietors of houses in the burgh according to their real rents. A decision substantially to the same effect was repeated in the case of *Peterhead*, and affirmed by the House of Lords, 24th January 1802 (4 Paton's Appeals, p. 356), but altering the judgment of the Court of Session in so far as any portion of the assessment was laid upon the valued rent, and deciding that the assessment fell to be levied from all the owners of lands and houses within the parish in proportion to their real rents.

"These decisions were pronounced in cases where the parishes were partly landward and partly burghal. But in 1837 a further step was taken in the same direction, in *Boswell*, June 15, 1837, in which it was held that the same rule must be applied in a parish where there was a large village which had never been erected into a burgh, notwithstanding the apprehension which was expressed by several of the Judges that this might lead to great practical inconvenience from the want of any regular assessment roll. The rule was still further extended in the recent case of *Macfarlane* v. *Monkland Railway Company*, Jan. 29, 1864, in a parish in which there was no burgh and no village, but a considerable number of detached feus, and it seems to have been assumed as settled in that case and the relative case of *Coupar-Angus*, decided the same day, that railway companies which were not specially exempted are liable in assessment for churches and manses as owners of heritable subjects in the parish.

"All these decisions appear to have proceeded upon the rule laid down by Lord Eldon in the case of *Peterhead*, that 'all the heritors should contribute according to the value of their land,' and that where any considerable portion of the heritors would not be reached by an assessment on the

valued-rent, the real-rent must be taken as the basis of assessments. Now, the circumstances of the present case appear to the Lord Ordinary to require that the real-rent should be adopted in order that this rule may be fairly applied. And as the reasons which seem to have led the Court to refuse to lay the assessment for a manse upon a real-rent in the old case of *Steele*, Jan. 31, 1712 (D. p. 5131), and to hesitate in disposing of the case of *Boswell*, viz., the trouble and expense which would be occasioned from the want of an assessment roll, have no longer any application, inasmuch as the Valuation Act has removed all such difficulties, the Lord Ordinary has been unable to see any sufficient ground for holding that the defenders were wrong in adopting the real-rent as the basis of assessment in the present case."

The pursuers reclaimed.

SOLICITOR-GENERAL and LANCASTER for them.

MILLAR, Q.C., and ADAM in answer.

At advising—

LORD COWAN—This question originated in the Sheriff-court of Perthshire. Certain repairs and alterations were necessary on the manse of this parish, and the heritors, in assessing for the expense, adopted the principle of real-rent as the basis of charge, and fixed on certain proportions thereof as due by this Railway Company. For payment of that sum an action was brought by the collector, in which the interlocutors were pronounced which are brought under review by appeal. Thereafter this action of reduction was instituted of the resolutions of the heritors, and it may be well to observe the terms of those resolutions—(*Reads the resolutions in the minutes under reduction*). Thus the question substantially is, whether valued-rent or real-rent ought to be the basis of assessment?

The issue involved is of much practical moment, and of extensive application, having regard to the peculiar circumstances of the case, and character of this parish. But for the formation of the railway it was certainly a landward parish. There is no village or town or large body of feuars within its bounds. The Highland Railway, however, has been formed, and runs through it. By this the real-rent of the parish has been largely increased. Under the valuation-roll of the year, while the whole valuation was £9487, the portions of the sum attaching to railways is £2706. Having all this in view, we have to consider whether the heritors have done wrong in adopting the resolutions under reduction.

The assessment is for a parochial burden; as such, it is payable by the heritors of the parish, for so by the practice of the country, and the decisions of the Court, the term "Parishioners" in the statute 1663 has been construed. There is a railway company having property for the purposes of their undertaking within the parish. Is the company liable as heritors for this burden? Railway companies have been held liable as heritors and occupiers of land for poor-rates. They are so for statute-labour conversion money. And as regards assessments for church and manse, the *Slamannan* case, referred to in the debate, proceeded upon that recognised footing. Accordingly, liability is not matter of controversy in this case. The pursuers have admitted that they are liable according to their *valued* rent, although what that is has not been ascertained; and in a division of the *cumulo* it must be a trifling amount which will be attached to the *solum* of the railway.

Something was said at the debate as to the power of the heritors to assess, in their option, on the principle of real-rent or of valued-rent. On the one hand, it was contended for the pursuers that valued-rent alone could be taken, having regard to the character of this parish as purely landward, and, on the other hand, it was maintained that real-rent alone could be the basis of assessment. I think the law on this point is well stated by Mr Dunlop in his Parochial Law, p. 9, section 11, to this effect—(*Reads.*) But without authoritatively solving that point, the present enquiry is, whether the principle of real-rent was rightly adopted in this case?

The import of the decisions referred to by the Lord Ordinary, and largely commented on by the parties, appears to me to be that, where equity, as regards the incidence of the tax on the assessable subjects within the parish, cannot be secured by taking the valued-rent, and can be reached only by the real-rent as the basis of apportionment, this last must be adopted. Mere population was rejected by Lord Eldon, Chancellor, in the *Peterhead* case. The existence of a town composed of feuars, whose property can be got at only by taking real-rent, was the main consideration. And so in the case of *Mauchline* and the like cases. Thus, wherever there is a body of heritors, or even one heritor possessed of subjects assessable, but capable of being reached only by taking real-rent as the basis of taxation, I apprehend the principle of the decided cases must be adopted as alone applicable to the circumstances of the parish. And in the case of *Maxwell*, House of Lords, 1815, the observations by the Lord Chancellor, and the remit of the case, appear to me to strengthen the view I take of the principle to be derived from the other decisions. This brings the case to this enquiry, whether a railway company, possessed of assessable property to the extent of one-third of the whole real-rent of the parish, are to escape from this parochial burden? for this must be the result, except to the extent of the merest trifle, should valued-rent be taken as the basis of assessment. I cannot think so. The principle of equitable adjustment of the burden on all the property within the bounds of the parish requires that the assessment should be imposed on real-rent. And in truth the effect of assessing by real-rent is to bring matters as to imposition of these burdens back to the radical principle of equality on which the tax was originally imposed. There was in 1663 no valuation-roll. Actual value must have been in view at the date of the statute. Further, it was actual value of property at the time on which the valuation-roll was prepared, which ascertained what is called valued rental. The valued rental thus fixed is confessedly no measure whatever of the real worth and value of the lands and other assessable subjects now. When, therefore, real-rent comes to be taken as the rule of assessment, it recognises only what the Legislature had from the first recognised. On the whole, I am of opinion that the interlocuter of the Lord Ordinary should not be disturbed.

LORD BENHOLME and LORD NEAVES concurred.

LORD JUSTICE-CLERK—I concur. The persons liable in this burden are the parishioners according to the value of their lands and heritages in the parish. There is no question that railways are owners of lands and heritages and therefore heritors.

We have no concern in this enquiry as to the way of ascertaining the real value of the railway. If the assessment is lawfully laid on the real value,

the valuation-roll is the rule. The question is, whether the heritors were entitled to ascertain real value by the actual value on the valuation-roll, or were bound to ascertain it by the old valuation. There is not, and there never was, any statutory injunction to use the old valuation of Charles the Second's time as the mode of ascertaining the value of lands and heritages. It was a rule of convenience, there being no other authorised standard of value, and so a certain customary sanction grew up. But the *Peterhead* case decided that the fact to be ascertained was still the real value, and that where the old valuation from any cause was grossly and palpably inaccurate, however inconvenient, the fact must be ascertained. Here the old valuation is deficient by a third, and I think that a sufficient disparity to justify an abandonment of the old valuation.

Agents for the Pursuers—H. & A. Inglis, W.S.
Agents for the Defenders—Tods, Murray & Jamieson, W.S.

Thursday, June 16.

FIRST DIVISION.

SPECIAL CASE—WALKER'S TRUSTEES.

Succession—Construction—Devolution—Lapsed Share—Vesting—Expenses. B executed a trust-deed in 1846, which provided, *inter alia*, that if survived by his son and daughter, then one and four years old, his son's share should be retained till he was twenty-five, and his daughter's share be payable on her majority or marriage to her and her heirs and assignees; but the trustees were directed, if she married, to settle it on herself in liferent and her family in fee, exclusive of her husband's *jus mariti* and right of administration. In the middle of one of the purposes of the trust-deed it was provided that a share lapsing by the death of one child should devolve on the surviving "children," under the same conditions as they were to receive their shares. The daughter was married in 1866, and by her marriage-contract conveyed all *acquirenda* to the marriage-contract trustees, with a direction that failing issue the estate should go to the survivor of herself and husband. Her father was a party to the contract, and a few days after executed a codicil in implement of his obligations under it. His son survived him, but died, unmarried, before he was twenty-five, leaving a trust-conveyance. *Held* (1) the son's share had not vested in him, and could not pass to his trustees; (2) "children" must be read as "child," and the clause containing the word be held generally applicable, and not confined in its scope to the purpose containing it; (3) the lapsed share must go to the daughter under the same conditions as her own share; and (4) that it had been carried by the marriage-contract to the marriage-contract trustees.

The expense of the case was only ordained to come out of the fund in dispute after all the parties to the case had signed a minute requesting the Court so to decern.

The late George Walker, M.D., had only two children, viz., Mary Scott Walker, now Gavin, born on 15th January 1842, and George Murray Walker, now deceased, born on 3d April 1845. Dr Walker died on 28th September 1866, survived by his children, and leaving a trust-disposition and settlement of his whole estate, heritable and moveable, dated 24th February 1846, and four codicils thereto. Miss Walker was, on 14th January 1866, married to Mr John Gavin. An antenuptial contract of marriage, dated 8th and 10th January 1866, was entered into between them, with the special advice and consent of Dr Walker. The trustees thereby appointed were parties to the case. Only one child has been born of the marriage. The means and estate of which Dr George Walker died possessed consisted almost exclusively of house property in Edinburgh. His moveable property consisted, with some trifling exceptions, of his household furniture, plate, books, and pictures, which were, by a holograph testament, dated 20th June 1866, specially bequeathed to his son George Murray Walker, subject to his mother's liferent. Dr Walker's liabilities consisted of—(1) a debt of £600, secured over one of the houses; (2) debts to the amount of £600 due by personal bonds; (3) the sum of £5000 provided by him to his daughter in her marriage-contract; and (4) his ordinary personal and household accounts. When the trustees proceeded to divide the trust-estate in terms of the directions in Dr Walker's trust-deed, it appeared that the sum of £5000 provided to Mrs Gavin by her marriage-contract considerably exceeded one-third of the value of the house property provided to her by her father's trust-deed; and it was arranged, with the consent of all parties, that Mrs Gavin's provision should be paid by the trustees granting a bond and disposition in security over the whole trust-estate for the said sum of £5000 in favour of Mr and Mrs Gavin's marriage-contract trustees, to be held by them for the purposes of the marriage-contract. This was accordingly done, and, subject to the above bond, the trust-estate remained vested in the trustees for the purposes of the trust, except the provision thus dealt with. George Murray Walker attained the age of twenty-one, and survived his father; but died on 21st December 1869 without having attained the age of twenty-five years. He left a trust-disposition and settlement, dated 1st November 1866, in favour of trustees, by which he conveyed to them his whole estate, heritable and moveable, and particularly his whole right and interest in the means and estate of his deceased father, the late Dr George Walker. The purposes of it were, however, unconnected with the Special Case. The provisions of the other deeds referred to will be found quoted in the Lord President's opinion. The trustees under George Murray Walker's settlement maintained that the share of the trust-estate set apart for George Murray Walker after his father's death, and thereafter held for his behoof, had vested in the said George Murray Walker at his death, and been carried to them by his trust-settlement. The trustees under the marriage-contract of Mr and Mrs Gavin, and Mr Gavin for his interest, maintained that the share of George Murray Walker in his father's estate lapsed by his having died without having attained the age of twenty-five years, and that the same, as undisposed of residue, now belonged to Mrs Gavin, as her father's heir, and that the same fell under her general conveyance of *acquirenda* in her marriage-contract. Mrs Gavin maintained that upon the death of her brother his share, in terms of her father's trust-deed, devolved upon her as the sole surviving child of her father, and did not fall under the conveyance in her marriage-contract, but must now, in terms of her father's trust-