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 custodier 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. *Held* 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

have the same meanings as are attached thereto respectively in the Act 17 and 18 Victoria, cap. 91, intituled 'An Act for the Valuation of Lands and Heritages in Scotland.' But it does not appear to the Lord Ordinary that this reference brings the enactment nearer to the case of the parish clergyman. There is no special reference either to the parish minister, or to his manse or glebe, to be found in the Valuation Act. The phrase 'lands and heritages' is there declared to import minerals, harbours, and a number of other defined subjects; and the phrase 'proprietor' is declared to comprehend liferenters, trustees, and others,—much as is done in the Poor-law Amendment Act, where, in like manner, 'owner' is declared to comprise liferenters, tutors, and others. But it still remains true that, according to the two reported cases, the parish minister is neither proprietor, tenant, or occupier of lands, under whatever of the included denominations, and therefore does not fall under the assessing clause. With regard to any vague implication derived from the valuation roll, made up under the Valuation Act, comprehending manses and glebes, as it was said it did in practice, it is to be observed that not only is there no enactment declaring an entry in the valuation roll to be a sufficient ground of taxation, but, on the contrary, the Valuation Act itself expressly declares (section 41) that 'nothing contained in this Act shall exempt from, or render liable to, assessment any person or persons not previously exempt from or liable to assessment.'

"Another argument employed by the defender was rested on the 63d clause of the Kirkcudbright Roads Act, which specially exempts from the road assessment school-houses and certain other buildings, including amongst others any 'house for religious worship or charitable purposes.' The inference was, that manses and glebes, not being specially exempted, must be held comprehended in the assessment. But whatever weight might be given to this inference in a popular point of view, it fails of all legal effect, unless manses and glebes are to be considered comprehended in the previous assessing clause, so as to render necessary a clause of exemption; in other words, unless parish ministers are to be held, in respect of the manse and the glebe, to be proprietors, tenants, or occupiers. This, the Lord Ordinary thinks, they cannot be held to be, consistently with the authority of the reported cases.

"It is on these cases that the Lord Ordinary proceeds, in arriving at his conclusion in favour of the pursuer. Looked at by themselves, the expressions used in the Kirkcudbright Roads Act might be sufficient to comprehend the manse and glebe, for they might be reasonably construed to comprehend all lands and heritages whatever, without exemption of any. But in the cases in question the manse and glebe were expressly construed not to fall within the general category, nor the minister within the legal character of proprietor, tenant, or occupant. The construction thus put by the Supreme Court on the statutory expressions must be presumed to have been known to the Legislature, and not ignored by it. When, without any specific enactment applicable to the case of the minister, the same general words are again used, it appears to the Lord Ordinary the necessary inference, that, whatever may be guessed at as being intended, the Supreme Court cannot judicially bring the case of the parish minister more within the enactment now than before."

The defender reclaimed.

The LORD ADVOCATE and BLAIR for him.

The DEAN OF FACULTY and WATSON in reply.

At advising—

LORD PRESIDENT—The Lord Ordinary has rested his judgment on the authority of two cases, *Cargill* v. *Tasker*, and *Forbes* v. *Gibson*. (His Lordship then read the first paragraph quoted above from the Lord Ordinary's note.) If I could come to the conclusion that these two decisions settled such an important general principle as that parish ministers enjoy an exemption from local taxation in respect of their manses and glebes, I should do so with much satisfaction, and consider the rule defensible on grounds of reason and expediency. But it appears to me that the Lord Ordinary has misunderstood the import of these judgments. I think both cases apply only to poor law taxation. Under Poor Law Acts parish ministers are exempted. Previously the inveterate usage of Scotland exempted them, and it was in consequence of this inveterate usage that the Poor Law Acts continued the exemption. This is clearly seen from the opinions of the Lord President, and of Lord Fullarton, in *Cargill's* case. His Lordship seems to say, (1) at the date of the Poor Law Amendment Act there existed a special exemption of ministers, in respect of their manses and glebes; (2) according to the proper interpretation of section 49 of that Act it was not intended to take away that exemption. Lord Cunningham no doubt takes a somewhat broader and more general ground, but the majority adopt the views of the Lord President and Lord Fullarton, and their judgment was affirmed in the House of Lords.

The question now is, whether the present case resembles the case of Poor Law Assesssment? If there were here a similar inveterate usage, and if this statute contained a provision equivalent to the 49th section of the Poor Law Amendment Act there would be similarity in the two cases. But if not, the two decisions quoted by the Lord Ordinary have no application.

The 51st section of the Stewartry of Kirkcudbright Roads Act 1864 provides for the incidence of this taxation. It enacts that one-half shall be payable by the proprietors, and the other half by the tenants or occupiers of the lands and heritages in the Stewartry. Now, what is the meaning of the words "proprietor," "tenant," "occupier"? The interpretation clause says they shall have the same meaning as is attached to them in the Act 17 & 18 Vic., c. 91, entitled "An Act for the Valuation of Lands and Heritages in Scotland." That statute enacts, by section 42, that the word "proprietor" shall apply "to liferenters, as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons *who shall be in the actual receipt of the rents and profits of lands and heritages*." The 51st section of the Kirkcudbright Roads Act must mean that the assessment shall be paid one-half by the person who has the beneficial interest in the subjects, whatever his title may be, and the other half by the tenant or person in occupation of the subjects.

The 63rd section of the statute is the only one which introduces anything in the shape of an exemption. It expressly exempts certain subjects, not individuals or classes of individuals but *subjects*. It is therein provided that "no assessments shall be imposed or levied under the authority of this Act for or in respect of any house or building, or portion of a house or building, exclusively used

as a school-house, reformatory, house of refuge, poorhouse, public lunatic asylum, town-house, sheriff, burgh, or justice of the peace court-house, town or county prison, police station or lock-up house, or house for religious worship or charitable purposes." But ministers' manses and glebes are not among the exemptions. It is impossible to hold the 51st section broad enough to cover the case of a manse and glebe. The minister, though not in a proper sense a *proprietor*, falls within the designation of a "person in receipt of rents."

Again, was there anything at the time the Act was passed to give the minister the benefit of the case of *Forbes* v. *Gibson?* certainly not.

I hold that there was no exemption of ministers at the time of passing the Act, and nothing in the Act exempting them. I therefore entertain no doubt, that under the Stewartry of Kirkcudbright Roads Act 1864 the pursuer is liable to be assessed in the manner in which he has been assessed, and that the Lord Ordinary's interlocutor should be recalled.

LORD DEAS and LORD ARDMILLAN concurred.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—Hunter, Blair, & Cowan, W.S.

## *Friday, July* 10.

### FLETCHER *v.* FLETCHER CAMPBELL.

*Entail—Destination—Construction of Clauses.* A executed a deed of entail conveying her estate of P to B, second son of X, and the heirs-male of his body, whom failing to C, third son of X, and the heirs-male of his body, with the provision that, in the event of any of the heirs of tailzie succeeding to the estate of A, then the estate of P should forthwith devolve on the next immediate heir of tailzie, so that the estate of P should never be conjoined with the estate of A; and that the said heir succeeding to A should thereupon be obliged to denude himself of P in favour of the next branch of the *heirs* of tailzie; and that the estate of P should be redeemable from the said heir succeeding to A by the next immediate second or other son or brother, and the heirs-male of their bodies called to the succession of P, upon payment of ten merks Scots to the said heir succeeding to A at the first term of Whitsunday or Martinmas after his succession. B took P under the entail, but afterwards succeeding to A, devolved P on C. C also succeeded to A, but kept both estates till his death, when his eldest son D took A, and his second son E took P. In a subsequent action at the instance of D's eldest son, born after the partition of the estates between D and E, to have E ordained to denude himself of P in his favour—*Held*, (1) that on a sound consideration of the intention of the entailer, as expressed in the deed of entail, E had a preferable right to the pursuer in the estate of P; (2) that the eldest son of the heir in possession of P did not belong to a different but to the same branch of heirs of tailzie as his father; (3) that the branch of heirs on whom P devolved by the succession of the previous branch to A, acquired under the entail an indefeasible right to P, and could not afterwards be forced to denude in favour of a subsequently emerging heir of the former branch; and (4) that the words "next immediate second or other son or brother," in the devolution clause of the deed of entail, meant "next immediate second or other *younger* son or brother."

*Question*—Whether E had right to P in preference to D's *second* son?

*Entail—Succession—Prescription.* E succeeded to an entailed estate in 1806. E's elder brother D had a son born in 1827, who came of age in 1848, and in 1867 brought an action of declarator against E, claiming his estate. *Held* that the claim was not excluded by prescription.

This was an action of declarator, brought by Mr John Fletcher, eldest son of Mr Fletcher of Salton, against his uncle, Mr Henry Fletcher Campbell of Boquhan; and the object of the action was to have it found that, under the entail of the said estate of Boquhan, the defender is now bound to denude in favour of the pursuer.

The question arose out of the deed of entail of the estate of Boquhan, executed by Mrs Mary Campbell in the year 1759.

The estate was by this deed conveyed, under the fetters of an entail, "to and in favour of Lieutenant-Colonel Henry Fletcher, *second* son to Andrew Fletcher of Milton, one of the senators of the College of Justice, and the heirs-male of his body; whom failing, to John Fletcher, *third* son to the said Andrew Fletcher, and the heirs-male of his body; whom failing, to the *second* son of Andrew Fletcher, auditor in Exchequer, and the heirs-male of that second son's body; whom failing, to the *younger* sons of the said Andrew Fletcher, auditor in Exchequer, according to their seniority, and the heirs-male of their bodies; whom failing, to the *second* or *other* sons of the heir in possession of the estate of Salton, descended of the body of the said Andrew Fletcher of Milton and Elizabeth Kinloch, his spouse, according to their seniority, and the heirs-male of their bodies."

The deed afterwards declares, "that in case the said Henry Fletcher, and the heirs-male of his body, or any of the said heirs of tailzie who shall, in virtue hereof, be possessed of the lands and others before disponed, shall, at any time hereafter, succeed to the lands of Salton, or that the same shall devolve to any of them, then and in any such event, whensoever and how oft soever the same may happen, the lands and estate before disponed shall forthwith devolve to the next immediate heir of tailzie, and the heirs-male of his body, under the substitution before limited, so that the said lands and estate of Boquhan shall never be conjoined with the estate of Salton; and the said Henry Fletcher, and the other heirs of tailzie, shall, upon succeeding to the estate of Salton, be obliged to denude and divest themselves of the lands and others before disponed, to and in favour of the next branch of the heirs of tailzie; and the said lands and estate of Boquhan are hereby declared to be redeemable from the said Henry Fletcher and the other heirs of tailzie who shall succeed to the lands and estate of Salton, by the next immediate second or other son or brother, and the heirs-male of their bodies, called to the succession of the estate of Boquhan by the limitations of the succession above written, upon payment of ten merks Scots to the said Henry Fletcher, or any other of the said heirs of tailzie who shall succeed to the foresaid lands and estate of Salton, at the first term of Whitsunday or Martinmas, or any