chargeable with duty under the Income-Tax Acts 5 and 6 Vict. cap. 35, and 16 and 17 Vict. cap. 34, and sections quoted above.

At a meeting of the Commissioners for General Purposes for the Kintyre district of the County of Argyll, under the Property and Income-Tax Acts, held at Campbeltown on 25th January 1878, the Rev. George Walter Strang, minister of the second charge of the parish of Campbeltown, appealed against an assessment of £100, for 1877-78, made upon him under Schedule E of the income-tax, in respect of a sum paid to him in the following circumstances, and alleged to be an emolument of his office:—

It was admitted on behalf of the appellant that since he had come to Campbeltown, about three years before, he had received at each Christmas time a pecuniary gift from his congregation of £100, as a token of their regard for him, and that at Christmas 1877 he had received this gift, which was raised by voluntary subscription among his friends—the majority being members of the congregation. The appellant had granted no receipt, the contributors were under no obligation whatever to repeat the gift, and it might never be repeated.

The appellant contended that the gift formed no part of his income within the meaning of the Income-Tax Acts. He paid income-tax on his stipend, glebe, rents, &c., being the full amount of the profit derived by him from his public office or employment as a minister of Campbeltown parish. The gift did not follow the office, nor did it fall under any of the descriptions given in the Act as "salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices or employments."

In support of the charge the Surveyor referred to Schedule E of the Act 16 and 17 Vict. cap. 34, under which duties in respect of every public office or employment of profit were granted, and to the rules for charging these in section 146 of the Act 5 and 6 Vict. cap. 35. The first rule there provided that the duties should be annually charged on those persons having, using, or exercising the office or employments of profits mentioned in Schedule E, "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices or employments." And by the third rule it was provided that the duties should be paid in respect of, *inter alia*, "any office or employment of profit held under any ecclesiastical body."

The appellant being a minister of the Church of Scotland as by law established, his benefice, it was contended, was clearly within the description of an "office or employment of profit held under any ecclesiastical body, and so chargeable under Schedule E; and the £100 received annually, though voluntarily paid, accrued to him by reason of his holding such office under that ecclesiastical body, and was a pecuniary profit or perquisite liable to duty. Even although the sum in question should not be deemed a profit chargeable under Schedule E, the appellant was nevertheless liable to assessment therefor as "annual profits or gains," under the general rule, Sch. D, 5 and 6 Vict. cap. 35, which by virtue of section 188 of the same Act could be applied to the assessment in dispute.

The Commissioners sustained the appeal, and relieved the appellant, whereupon the Surveyor craved a case for the opinion of the Court of Exchequer, which was granted.

No appearance was made for the Rev. Mr Strang, and after hearing counsel for the Surveyor, the Lord Ordinary in Exchequer (CURRIEHILL) on 14th June 1878 found that the determination of the Commissioners was wrong. He added this note to his interlocutor:—

"*Note.*—Although this case has been heard *ex parte*, the appellant not having appeared, I have not disposed of it as in absence, but only after carefully considering the argument for the appellant stated in the case. It is with some reluctance that I have formed the opinion that the Commissioners are wrong and that the appellant is liable for income-tax on the £100 mentioned in the case. It is true that it is a voluntary contribution by the parishioners—one which they are under no obligation to make, and which they may withdraw at any time—but still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes. This being so, it follows that the payment must be regarded as either "emolument" under Schedule E, or "gain" under Schedule D of the statutes 5 and 6 Vict. c. 35, and 16 and 17 Vict. c. 34, and that it is chargeable with duty.

The interlocutor was acquiesced in.

Counsel for the Inland Revenue—Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, July 12.

FIRST DIVISION

[Lord Craighill, Ordinary.

FAIRBAIRN *v.* MILLER (COCKBURN'S TRUSTEE.)

Process—Petition for Order for Delivery of Premises at Instance of Trustee on Bankrupt Estate—Warrant of Ejectment following without Intimation.

Held that a warrant of ejectment following upon an order pronounced in the Sheriff Court in a petition at the instance of the trustee on a bankrupt estate, ordaining delivery of certain premises, &c., which were in the occupation of the defender, was illegal, in respect there had been no intimation of the application to nor service of it upon the defender, and damages found due therefor.

This was an action of reduction and damages brought in the following circumstances:—The pursuer in this action, Thomas Fairbairn, had for some time carried on business in Caledonian Terrace, Edinburgh, as a spirit merchant, but in February 1877, having got into difficulties, he came to an agreement with a brother-in-law named John Cockburn, who had previously carried on business there, that he should take back the business at a price named, but that he was himself to remain in the premises and receive a certain weekly sum from Cockburn for the sake of his licence. Cockburn became bankrupt in December 1877, and his estates being sequestrated, Mr Hugh Miller, C.A., the defender in this action, was appointed trustee.

On 13th December, after having written to Fairbairn calling upon him to give up the shop, &c., Mr Miller, the trustee, presented a petition in the Sheriff Court of Midlothian, *inter alia*, praying the Court "to ordain the defender to deliver up to the pursuer the whole goods and effects at present in or pertaining to the licensed grocer's shop No. 13 Caledonian Terrace, Edinburgh, and the business carried on therein, and also the whole books, accounts, vouchers, and documents in said shop, and belonging and pertaining and having reference to said shop and the business carried on therein, wherever they may be in his possession, and to remove himself from the occupancy of said shop, and deliver up the keys thereof to the pursuer."

The Sheriff (HALLARD) thereupon pronounced an interlocutor ordaining Fairbairn to deliver up the keys in question, and the whole books, accounts, vouchers, and documents in the shop. That judgment was not extracted, nor was any charge or service of it made on the pursuer. Next day the trustee's agent appeared, and stated that Fairbairn had refused to obtemper that order of the Court, "and moved the Court to grant warrant to officers of Court summarily to eject' him from his shop, whereupon the Sheriff-Substitute pronounced the following interlocutor: — "Edinburgh, 14th December 1877.—The Sheriff-Substitute, in respect of the foregoing minute, grants warrant to officers of Court summarily to eject the defender Thomas Fairbairn, all as craved, and decerns. — FREDERICK HALLARD." Under that warrant the ejection was carried out the same day. Fairbairn then raised this action against the trustee for reduction of the warrant and damages for the ejectment, which he alleged had taken place with considerable violence. The pursuer alleged that he was tenant of the premises, and had been carrying on the business for his own behoof. He pleaded, *inter alia*—"The pretended warrant ought to be reduced, in respect (1) that it was granted in a process to which the pursuer had not been cited; (2) that it was *ultra petita* of the petition in the said process; and (3) that the granting of it was irregular and not sanctioned by statute or by common law."

The defender answered—"(4) The defender was entitled, without any judicial warrant, to have turned the pursuer out of the shop and taken possession of the same, and of the stock, &c., therein, the pursuer being only a servant to the bankrupt, and having no right of tenancy in the shop, or property in the goods therein. (5) The petition, procedure, and warrant of ejection having been regular and legal in every respect, the defender was entitled to proceed as he has done."

After proof the Lord Ordinary pronounced an interlocutor, in which, after a certain finding in fact, he assoilzied the defender. The pursuer reclaimed. It is unnecessary to notice any point except that relating to the regularity of the procedure in the Sheriff Court. The defender maintained that the proceedings in the Sheriff Court were warranted by the 16th section of the Bankruptcy Act 1856 (19 and 20 Vict. c. 79).

At advising—

LORD PRESIDENT—The first conclusion of the summons in this case is for the reduction of certain proceedings in the Sheriff Court of Edinburgh, and particularly of a warrant of ejection granted on 14th December last. The petitioner in the Inferior Court prayed the Court "to ordain the defender to deliver up to the pursuer the whole goods and effects at present in or pertaining to the licensed grocer's shop No. 13 Caledonian Terrace, Edinburgh, and the business carried on therein, and also the whole books, accounts, vouchers, and documents in said shop, and belonging and pertaining and having reference to said shop and the business carried on therein, wherever they may be in his possession, and to remove himself from the occupancy of said shop, and deliver up the keys thereof to the pursuer."

Now it appears that this petition was never served on the pursuer. Not only was there no citation, but there was no intimation of any kind given to him. This certainly seems a very extraordinary course, and I am not aware of any precedent of a warrant of this kind being used without such intimation. It is said that this man was not in regular occupation, but was in fact no better than a domestic servant who might be turned away by his master without any warning, and that therefore, even if the proceeding was illegal, the ejectment under that warrant was justified *seu facti*. That is a very strange argument to hear from the mouth of the applicant in the Sheriff Court, for the whole of the prayer of his petition is based on the assumption that the pursuer was actually in possession of the shop, and that it was necessary to remove him so that the trustee might get possession of the subject. In fact, every statement there goes to show that the petitioner recognised the fact that the pursuer was for the time really in occupation.

But further, when we come to the facts of the case, it is clear that he was in one sense in occupation of the shop. The business and shop had once belonged to him, and it was only because of certain missives of sale that the Lord Ordinary decided that he had ceased to be the owner of the shop. But the possession remained. He discharged the accounts, his name was upon the shop-front, and every thing appeared to be in the same position as it was before the transfer from Fairbairn to Cockburn. It was, however, indispensable that if the trustee wanted to get possession he should get a warrant for removal unless the pursuer would voluntarily consent to go.

Now, that being the state of the case, is this a legal warrant? For my part I can hardly see on what grounds anyone can attempt to support it. Reference was made to the Bankruptcy Act 1856, section 16, but that section certainly recognises nothing whatever of the kind. It is not applicable in any way to an application like the present by a judicial factor. It is impossible that he should take any benefit from it. I looked with some anxiety at the Sheriff Court Act of 1866 to see whether any justification of such a course could be found there (for very great changes were made by that Act), but I found nothing approaching to an action of a proceeding like this, and therefore no benefit can be taken from that Act

I am on these grounds of opinion that the warrant was illegal, and consequently that the pursuer, who has been ejected from the premises under that illegal warrant, is entitled to have the proceeding reduced, and also I think he is entitled to damages, but in fact the damages are little better than a legal fiction, for the pursuer has

suffered nothing from being so ejected, and therefore I think the damages should be nominal. There seems to me to be no ground whatever for the allegation of personal violence.

LORD DEAS—With the exception of his finding as to the reduction of this warrant, I think the Lord Ordinary is right, and on that point I think we have no alternative but to reduce the proceeding.

But the facts being as they are, it does not follow that there should be any substantial damages. On the contrary, I think the nominal damages proposed by your Lordship are quite sufficient to satisfy all parties, and no further damages ought, in my opinion, to be awarded in the case.

LORDS MURE and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer Thomas Fairbairn against Lord Craighill's interlocutor dated 15th March 1878, Adhere to the said interlocutor in so far as regards the findings in fact: *Quoad ultra* recal the said interlocutor; Sustain the reasons of reduction; Reduce, decern, and declare in terms of the reductive conclusion of the summons: Find the defender liable in damages for the use of the illegal warrant now reduced; assess the same at one shilling sterling, and for which sum decern against the defender for payment to the pursuer: *Quoad ultra* sustain the defences, assoilzie the defender, and decern: Find no expenses due to or by either party."

Counsel for Pursuer (Reclaimer)—Smith—Lang. Agent—Daniel Turner, S.L.

Counsel for Defenders (Respondent)—Trayner—M'Kechnie. Agent—William Lowson, S.L.

Saturday, July 13.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HORN *v.* NORTH BRITISH RAILWAY CO.

Railway — Action of Reparation by Father for Damages in respect of Son's Death by Accident—Liability of Company issuing Through Ticket where Accident happened on Line of another Company.

A passenger travelling with a through ticket from Kirkcaldy to London, issued by and in the name of the North British Railway, was killed by an accident at Morpeth, in Northumberland, on the North-Eastern Railway portion of the line. His father brought an action for reparation in the Court of Session against the North British Railway Company, and the following was the issue sent to the jury:—"Whether . . . . the pursuer's son, while travelling as a passenger from Kirkcaldy towards London, in virtue of a ticket issued by the defenders, suffered injuries in his person, whereby he died, through the fault of the defenders," &c. The jury found that the death was caused "through the fault of the defenders," owing to certain defects upon the North-Eastern Railway. Upon a bill of exceptions to the charge of the Judge (Lord Gifford)—*held* (*diss.* Lord Ormidale) that upon the action as laid the fault of the North-Eastern Company's servants was the fault of the defenders, and that the pursuer was entitled to have compensation afforded him according to the law of Scotland, *i.e.*, the law of the place where the contract was made.

Observed—per the Lord Justice-Clerk (Moncreiff)—that such actions at the instance of a father where his son has met his death, or of a son where a father has, are not ordinary suits for patrimonial loss, and (approving the remarks of the Lord President (Inglis) in *Eisten* v. *The North British Railway Company*, July 13, 1870, 8 Macph. 980) that the liability arises out of contract, the true foundation of the right to sue being partly the nearness of relationship and partly the existence during life of a mutual obligation of support.

Opinion—per the Lord Justice-Clerk (Moncreiff)—that the law of the place of performance will regulate the incidents of a contract only (1) where it may be reasonably inferred that it was so agreed originally between the parties thereto, and (2) where there is what can be properly called a place of performance, which there cannot be in the case of a railway journey.

Reparation—Amount of Damages for Pecuniary Loss and Solatium in a Case of Death by Railway Accident.

A youth of twenty-four, who had had the active management of an extensive drapery business under his father, an old man and in frail health, and was paid £150 a-year therefor, was about to be made a partner under a deed of copartnery for ten years with his father, by which he was to get, in addition to the £150, the half of the profits of the business, which were estimated at £700 a-year, when he met his death by railway accident. In an action for reparation at his father's instance the jury awarded £550 as pecuniary loss, and £150 as solatium. In an objection taken to the first as excessive the Court *held* that it was not so unreasonably large as to call for their interference.

On 24th March 1877 Henry Horn junior was a passenger from Kirkcaldy to London, and purchased a through return ticket between those stations from the North British Railway Company. The ticket was issued in their name only. The train by which he travelled was timed to leave Edinburgh at 10.30 P.M. On the night in question it was rather late, but proceeded safely till it was passing a curve to the south of Morpeth station, in Northumberland, when it suddenly ran off the line. The result was that Henry Horn junior, among others of the passengers, was killed.

Henry Horn senior, the father of the deceased, then raised this action against the North British Railway Company concluding for £2000 as reparation for the injury he had sustained through the death of his son. He averred (Cond. 2) "On or about the 24th March 1877 Henry Horn junior was a passenger from Kirkcaldy to London under a contract with the defenders to convey him to London. The defenders accordingly gave to him a ticket issued at Kirkcaldy on said date by or on behalf of the defenders on payment of the legal fare, by virtue of which the pursuer's son was entitled to