long series of cases that where a party has a right of property in subjects, as Mr Russell here has, any restriction on his use thereof is not to be implied, but must be clearly and distinctly expressed. The case of *Heriot's Hospital*, as decided in the House of Lords (1774, 3 Paton 674), has often been referred to as a strong example of that doctrine. I have been in use so to refer to it myself for nine-and-twenty years. We cannot go back on that case. But it may be enough to say that if there are here two ways of construing this clause, that which is unfavourable to the restriction should be adopted, for the whole series of cases leads to this result, that where either of two constructions can fairly be put upon words, that one should be preferred which does not lay a restriction upon a man in the use of his own property. I do not rest my decision very much on the case of *Heriot's Hospital*, for that was one between superior and vassal, while this is a question between one proprietor and another. But I think the principle which I have stated is one clearly recognised in our law, and sufficient for the decision of this case.

Then, as to the question of light, I agree with your Lordships in thinking that we should give great weight in that matter to the expressed opinion of the Dean of Guild, who is a professional man, and has given us the benefit of his professional opinion. On the whole matter, I am for refusing the appeal.

The LORD PRESIDENT was absent.

The Lords refused the appeal.

Counsel for Objectors (Appellants)—Mackay—Hay. Agents—Leburn & Henderson, S.S.C.

Counsel for Petitioner (Respondent)—D.-F. Macdonald, Q.C.—J. P. B. Robertson. Agent—J. Smith Clark, S.S.C.

Friday, February 24.

FIRST DIVISION.

[Sheriff of Aberdeen.

MARTIN AND OTHERS *v.* BOYD.

Principal and Agent—Heritors—Clerk—Property of Documents.

A person appointed by the heritors of a parish to collect an assessment imposed by them upon themselves for repair of the parish church, formed a scheme of rental, and engrossed it in a book, which contained, besides a statement of the amount of sums collected, accounts of his expenses and receipts. *Held* that as the book was made in the service of the heritors, and paid for by them, it was their property, and could not be retained by the person so employed by them after the completion of his task.

On the 24th August 1864, at a meeting of the Presbytery of Deer, and of certain of the individual heritors and feuars of the parish of Peterhead, it was resolved that Mr William Boyd, solicitor in Peterhead, should be appointed to collect an assessment to meet the expenses which had been incurred in making certain repairs on the church. The assessment was to be laid on the landward heritors and the owners of these feus and houses in the town of Peterhead upon which the assessment for building the parish church had been levied. The terms of Mr Boyd's appointment by the said meeting were as follows:—"And the said heritors and feuars now present, and the agents, doers, and representatives for absent heritors and feuars, with concurrence of the Presbytery, thereupon appointed and hereby appoint William Boyd, solicitor in Peterhead, to be the collector of said assessment for the heritors and feuars liable therein, craving the Lords of Council and Session, and other judges and magistrates competent, to interpone their authority, granting letters of horning, decrees, and all other executorials and action necessary in form as effeirs to pass in his name."

In order to facilitate the collection of this assessment the defender made up in a book a statement showing the persons whom he held to be liable for it, and of the sums payable by each according to his rental. There were also inserted statements of the sums collected, and some receipts in his favour for payments made by him.

In February 1878 Mr David Martin was appointed clerk to the heritors, and in January 1881 he was instructed to collect a certain assessment imposed by them. He applied to Mr Boyd for delivery of the former rental and scheme of division, but this was refused, on the ground that the book containing it was the property of Mr Boyd and not of the heritors.

In these circumstances the present action was raised in the Sheriff Court of Aberdeen and Kincardine at Peterhead, by David Martin, as clerk to the heritors, and by certain of the heritors, for the purpose of having Boyd ordained to give up the document in question.

The pursuers pleaded that the rental and scheme of division engrossed in the said book having been made in their service, and paid for by them, was their property.

The defender pleaded—"The whole transactions relative to the collection of assessments made by the defender having been brought to an end many years ago, the present body of heritors as a *quasi* corporation have now no interest in them, or in the records of them made by the defender." He denied that the book was the property of the pursuers, and claimed it as the only means he had of vouching for the due and proper administration of his duties.

The Sheriff-Substitute (COMRIE THOMSON) having heard parties' procurators, allowed the following minute to be lodged in process—"In terms of the suggestion by the Court, the defender hereby states his willingness to allow the pursuers to take a copy to be certified by him of the book referred to on record, and that at the sight of the Clerk of Court, the defender's sole object being that he shall not be deprived of the possession of the said book as contended for by the pursuers." By a subsequent interlocutor, in respect of the offer made by the defender in the said minute, he found it unnecessary to pronounce any order on the merits of the dispute, and added the following note:—

"*Note.*—The defender seems to have good grounds for his refusal to part with the *ipsum corpus* of the book in question, and if the pursuers accept the offer he has now made they get practically all they are entitled to."

On appeal the Sheriff-Depute (GUTHRIE SMITH) recalled the interlocutor appealed against, and found that the book was made by the order of the heritors, and paid for by them, and was therefore their property, and decerned the defender to give instant delivery in terms of the prayer of the petition.

The defender appealed, and argued—On every consideration the defender was the owner of the document. It was made by him for his own convenience, and contained vouchers of his; it was useless to the pursuers for any future assessment; but even if useful, offer had been made of all the use they could ask. The book was not the property of the body represented by the pursuer Martin, for when it was made the present body did not exist.

At advising—

LORD PRESIDENT—This is an application by the clerk to the heritors of Peterhead for delivery of a book, the property of the heritors. The defence is that the book is not the property of the heritors, but the property of Mr Boyd, solicitor, Peterhead, and that it was kept for his own, not for their use.

Mr Boyd was employed to collect an assessment which was in 1864 laid on the heritors for the parish church, and the terms of his appointment are contained in a minute dated 24th August 1864:—"And the said heritors and feuars now present, and the agents, doers, and representatives for absent heritors and feuars, with concurrence of the Presbytery, thereupon appointed and hereby appoint William Boyd, solicitor in Peterhead, to be the collector of said assessment for the heritors and feuars liable therein, craving the Lords of Council and Session, and other judges and magistrates competent, to interpone their authority, granting letters of horning, decrees, and all other executorials and action necessary in form as effeirs to pass in his name." These are the sole words, but it is clear from the terms that the assessment required details in apportioning it, and therefore a scheme of rental of the heritors and feuars was formed, the expense of which is taken into account in fixing the aggregate amount of expenses incurred. The book in question contains the scheme of rental of the heritors and feuars of Peterhead, and it extends over a large part of the book. The only other articles are a statement of the amount of sums collected, accounts of Mr Boyd's expenses, and receipts by Mr Morrison, the treasurer to the kirk-session.

At the time when the assessment was laid on the parish was in a peculiar position, inasmuch as the assessment for the parish church was to be laid partly on the landward part of the parish and partly on the feuars and heritors of Peterhead, the rule of fixing it being that the whole of the owners were to be held liable according to the real rents of their properties in proportion to the value thereof. It has been said that the pursuer Martin did not represent the heritors of Peterhead, and therefore that he is not entitled to recover the book. There is no reference to the precise terms of his appointment, but there is not any body of heritors in the parish except the very class of persons from whom Mr Boyd got his appointment. In this case, the real rent and nothing else rules, and the parties liable are the owners of lands in the parish, therefore the parties represented by Martin are the same as those who employed Boyd to make the assessment.

Looking at the book, one is puzzled to see what use it can be to anyone. Still the question remains for decision, Whose property is it? Now, it seems that Mr Boyd when he made the book was paid for everything he did. The Sheriff seems to think he was highly paid—I do not; but that has nothing to do with the question, whose property is this book? I think it was made in the service of the heritors, and for the purposes of the heritors, and that they paid for it. No doubt it was intended for the guidance of Mr Boyd, but it was for his guidance in the service he had undertaken for behoof of the heritors, and it related entirely to that service, and therefore the property is in the heritors.

LORD DEAS—The only thing I have to refer to is more especially the question, Who are now the heritors of the parish? Originally, under the judgment in the Peterhead case, the parties liable were not what we call heritors, but all the proprietors within certain bounds, and liable according to the real rent. It seems that it is the same now, with this exception, that the Ecclesiastical Buildings Act (31 and 32 Vict. cap. 96) defines who the heritors now are—"The expression 'heritor' shall mean any proprietor of lands and heritages at present liable in the assessments, which may be imposed according to the real or valued rents thereof, as the case may be." Now, according to this definition, "heritors" means just those persons previously liable under the judgment in the Peterhead case. These heritors are entitled to have a clerk, and have elected Mr Martin. Mr Martin, as clerk, is entitled to the custody of the heritors' documents, and he has a right to this particular document as well as to any other belonging to the heritors.

LORD MURE—The pursuer as clerk to the heritors is the party who has the right to bring an action for the delivery of a book if it belongs to the heritors. That it does belong to the heritors is apparent, for the difficulty suggested—that the meeting included feuars—does not interfere with its character as a meeting of heritors.

On a question of right I concur with the statement of law in the Sheriff's note. The book was made by Boyd while in the employment of the heritors, and paid for by them.

LORD SHAND—I am of the same opinion. I think the defender here would have been successful if he could have made out either that he held a position independent of these pursuers—because he was acting not only for them but for other heritors in holding the documents in question—or that in fact the documents were his and not theirs. But in my opinion he fails on both grounds. In the first place, the pursuer Mr Martin undoubtedly represents the whole heritors of the parish of Peterhead. And on the second point, it is clear from the terms of the minute of 24th August 1864 what was Mr Boyd's position in regard to the heritors, and what he was to do for them. He was appointed "to be the collector of said assessment for the heritors and feuars liable therein." That being so, I

think the scheme in question clearly became their property. Mr Boyd's position seems to me to be not different from that of an accountant into whose hands someone has put his leases and other documents with a view to getting his accounts made up and his affairs settled. It is clear a person so employed could not claim to retain possession of the accounts after his employment was over. As to the correspondence in the case, all I can say is, that I think the less said about it the better—a view which your Lordships have acted upon even more completely than I now do.

The Lords refused the appeal.

Counsel for Appellant (Defender)—Trayner—Wallace. Agent—Alexander Morison, S.S.C.

Counsel for Respondents (Pursuers)—Mackintosh—J. A. Reid. Agent—R. C. Gray, S.S.C.

Friday, February 24.

OUTER HOUSE.

[Lord M'Laren, Lord Ordinary on Teinds.

STEWART *v.* THE COMMON AGENT IN LOCALITY OF AUCHTERGAVEN AND LOGIEBRIDE.

Teinds—Expenses—Common Agent—Power of Common Agent to Carry on a Litigation without Consulting the Heritors.

A common agent, without previously consulting the heritors, lodged answers to objections raised by one of the heritors in the course of a locality. The objections were sustained and expenses awarded. The Lord Ordinary subsequently *refused* a motion to have the common agent found personally liable in the expenses of that litigation at the instance of a heritor who was subjected in a large share thereof, and who averred that the result of the litigation, even if successful, would not have affected his interests.

Observations (*per* Lord M'Laren, Ordinary) on the powers and duties of common agents in the matter of litigation.

In the locality of the united parishes of Auchtergaven and Logiebride objections to the rectified state of teind were lodged for the Duke of Athole, who stated that the Common Agent, Mr James Allan, S.S.C., proposed to take for teind one-fifth of the stock, or four bolls of victual and £77, 6s. 8d. Scots, or £6, 8s. 10⅔d. sterling, in place of certain rental bolls which his Grace maintained were the extent of the teind. The objector stated that the teind of the parish of Logiebride being possessed in rental bolls, it was obviously incompetent, under the terms of the submission of the bishops and clergy of Scotland to Charles I. in 1628, and the confirming decree-arbitral and Act of Parliament 1633, c. 19, to "hurt or diminish them in quantity or quality," or to use any other standard in reckoning the teind of the parish. Answers were lodged for the Common Agent, who stated that he was only continuing the principle of allocation applied by former common agents in the locality, and relied, as founding a plea of *res judicata*, on certain interlocutors pronounced by Lords Ordinary in previous localities of the parish in the years 1801 to 1809, which, however, had never received the sanction of the Court. The Lord Ordinary (Rutherfurd Clark) sustained the objections, and decerned against the Common Agent for expenses.

The Common Agent having subsequently moved the Lord Ordinary to approve of the Auditor's report on his account of expenses in the locality, objections to the report, in so far as the expenses, amounting to £100, 3s. 1d., incurred in the above litigation with the Duke of Athole were allowed by the Auditor, were lodged by Sir A. D. Stewart, one of the principal heritors in the united parishes.

Argued for the objector—The Common Agent should be found personally liable in the expenses of the litigation with the Duke of Athole. (1) That litigation on its merits was one which a prudent agent would not have entered upon. The amount at stake was small, under £10 per annum, and the doctrine of rental bolls well settled. (2) In any view, the Common Agent should have consulted the heritors before trying such a question. His appointment gave him *eo ipso* no general mandate to carry on any litigation for the heritors. (3) The objector, if consulted, would have had no possible interest to take part in this question. For the result, even if the common agent had been successful, could not have affected his teinds, which were held on heritable right, and were already exhausted. The objector would have to pay about £50 of these expenses for a law-suit as to which he had not been consulted, and by which he could in no view have profited. In *Common Agent of South Leith* v. *Sligo's Trustees*, March 5, 1878, 5 R. 731, the common agent was found personally liable in the whole expenses of the reclaiming note, though this did not appear from the report of the case. Common agents had no more authority to enter on law-suits without consulting their constituents than trustees in bankruptcy or judicial factors, and if they did so imprudently or unnecessarily they should bear the expenses of the litigation.

Replied for the Common Agent—The Common Agent was justified in lodging answers to the Duke of Athole's objections—(1) On the ground that the question raised was a fair one for trial; (2) because he had instructed counsel to prepare them only if he thought fit to do so. The powers of a common agent included all reasonable administration for the interests of the heritors—1 Connell on Tithes, 477. It was not the practice to convene the heritors before entering on litigations in localities. It would be a very exceptional measure to find the common agent personally liable in these expenses.

The Lord Ordinary (M'Laren) pronounced the following opinion: — This is no doubt rather a hard case for Sir Archibald Stewart, who has to pay a large proportion of the expenses of a litigation in which a very small sum was at stake, which seems to have been entered into by the Common Agent without his consent or approbation, and in the result of which he appears to have had no interest. I do not know that there is any obligation on individual heritors to assent to litigations raised or entered upon by the Common