the granter. The 41st section enacts that the deed is to be read over. Now, all that the defenders averred in their joint-minute was that the draft deed had been read over. But (2) even though the extended deed had been read, the Act of 1874 was a relaxation of the law on certain conditions, and these must be strictly complied with. The form, then, contained in the schedule was an obligatory one, or at least it was essential that it be stated that the deed was "read" over.

At advising—

LORD JUSTICE-CLERK—I think that on the whole we should be in a better position to decide the not unimportant question raised here if the facts were ascertained. The Lord Ordinary, it seems, once thought that it would be the most desirable course to adopt, and now that we have heard the case argued, I think that is what we should do. Whether the words used in the docquet are "to the like effect" as if it had been said that the deed had been "read over" to the granter is a question upon which I would rather not enter till I know the facts.

LORD YOUNG—I think the course proposed by your Lordship is the most expedient, and, indeed, is the only course to follow. One has sympathy with any departure from form or style made by a private party whereby prejudice is incurred. But where a public officer departs from statutory words and forms it is altogether inexcusable. However, I am averse, if it can be legally avoided, to allow a private party to suffer wrong if it was owing to an accident, and if relief can be given without injustice. A proof may disclose that in fact all was done which is required by statute. In that case the question arises sharply whether the deed is to fall from the fact that the very words required by statute were not used. But on that question I abstain from indicating any opinion. In my opinion there is practically no other course open than to ascertain the facts, which may, and I hope will, relieve the case from further difficulty.

LORD CRAIGHILL—It occurred to me early in the discussion of the case that we should adopt the course proposed. On the technical question raised I have not formed any opinion. I think that we shall be much better able to decide it after we have had the facts cleared up by a proof.

LORD RUTHERFURD CLARK—I am sorry to differ. I think this is a purely technical question, and is just whether this deed has been executed with or without the statutory solemnities. It is a question in which we can get no aid from extraneous evidence, and must be determined solely and exclusively by reference to the terms of the deed itself. Even assuming that it turned out that the notary had read every word of the deed over to the party who executed it, the technical question would still, I think, remain, whether the words used in the docquet were to be held as in accordance with the word "read," which I look on as a statutory solemnity. Personally, then, I am disposed to think that the question should not be settled by resort to extraneous evidence.

The Court recalled the interlocutor of the Lord Ordinary, and "before answer allowed parties a proof of their respective averments."

Counsel for Pursuers — Brand — M'Watt. Agent—A. Morison, S.S.C.

Counsel for Defenders (Beneficiaries)—Guthrie Smith. Agent—W. R. Patrick, Solicitor.

Counsel for Defenders (Trustees) — Lang. Agents—J. Young Guthrie, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HERITORS OF ANNAN *v.* M'LEAN AND OTHERS.

Manse — Repairs — Rule of Assessment where Parish partly Landward and partly Royal Burgh—Usage.

In a parish partly burghal and partly landward, the owners of lands and houses within the burgh are heritors in the sense of the Act 1663, imposing on heritors the duty of providing a manse for the minister, and the heritors may assess themselves for the fulfilment of the obligation according to the real rent of such lands and houses as well as that of the lands in the landward portion of the parish, there being no usage to assess for such repairs only on the valued rent.

The Valuation of Lands (Scotland) Act, sec. 33, enacts, *inter alia* — "Where in any county, burgh, or town, any county, municipal, parochial, or any other public assessment, or any assessment, rate, or tax under any Act of Parliament, is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation roll in force for the time under this Act in such county, burgh, or town shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding: Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents as appearing upon the present valuation rolls, all assessments for the repair thereof shall be imposed according to such valued rent."

The parish of Annan is partly landward and partly burghal, the latter part consisting of the royal burgh of Annan. In 1871, on the occasion of the death of an incumbent, a meeting of heritors deemed it necessary to repair the manse for his successor. In conformity with the resolution of the meeting a remit was made to an architect, who recommended certain repairs and additions. In February 1872 another meeting of heritors, convened in terms of the Ecclesiastical Buildings

and Glebes Act, resolved on the repairs recommended. This meeting was adjourned, and resumed again three weeks later. A third was held in March, a fourth in November, and a fifth in February of the next year (1873). The number of heritors on the old cess or valued rent-roll of the parish was only sixteen. Each of these meetings was attended by much more than sixteen heritors. The majority of those present were heritors within the burghal part of the parish, none of whom were entered on the old valued rent-roll, but who were entered as heritors on the valuation roll made up in terms of the Valuation Act. In the landward part of the parish there were some heritors who were not entered in the cess or old valued rent-roll — *e.g.*, certain railway companies — but who were entered in the valuation roll, and had paid their assessments. At the meeting on the last mentioned date "In order to meet the expense of repairs on the manse, on the motion of Mr Skelton, seconded by Mr Downie, the meeting unanimously resolved that an uniform assessment be imposed, as the meeting do hereby accordingly impose an assessment, on the heritors for the purpose to the extent of £600 sterling. Thereupon the clerk was directed to allocate and collect the same from the heritors of the parish." In pursuance of this instruction the clerk on 24th March 1873 prepared a scheme of allocation, and intimated by circular to each of the heritors of the parish, both landward and burghal, whose names appeared on the valuation rolls made up in terms of the Valuation Act, the resolution of the heritors, the proportion due by each heritor, and the amount of the rental on which such heritor was assessed. The said circular was in the following terms:—"*Annan, March 24th*, 1873.—At a meeting of the heritors of the parish of Annan, held within the parish church on 20th February last, the heritors resolved to assess themselves to the amount of £600, and I hereby beg to intimate to you, in terms of such resolution, that the proportion due by you on a rental of £ is £ , immediate payment of which is requested at the parochial schoolhouse, Greenknowe.—I am, Sir, your obedient servant, A. C. MORRISON, *Heritors' Clerk.*"

The sum of £600 being found inadequate to pay the expenses of the repairs resolved on, a meeting of the heritors, both landward and burghal, was, after due intimation in terms of the said Ecclesiastical Buildings and Glebes (Scotland) Act, held within the parish church in November 1874. At this meeting the heritors resolved to assess themselves to the amount of 4d. per £ in addition to the previous assessment of 6d. per £, and the clerk was directed again to allocate and collect the same from the whole heritors of the parish. The clerk accordingly prepared a supplementary scheme of allocation in pursuance thereof; and having in view the fact that some of the heritors had not paid the prior assessment, he issued to each of the heritors, both in the landward and burghal portion of the parish, a circular requiring payment of both assessments on or before 1st May 1876 under threat of legal proceedings. Several of the heritors, and in particular Mr Campbell M'Lean, merchant in Annan, defender and reclaimer in the present action, having failed to make payment of the assessments, the clerk to the heritors in July 1876 raised in the Sheriff Court of Dumfries and Galloway an action against M'Lean for a sum of £9, 8s. 4d., being the assessment of 6d. per £ on a rental of £376, 15s., the real rent or valuation of subjects in the parish belonging to the defender. The action also concluded for 18s. 8d. of interest thereon, and contained a reservation of the additional assessment of 4d. per £. The Sheriff-Substitute on 14th November 1876, after various findings in fact, found—"(3) That under the resolution of 20th February 1873 the pursuer was not entitled to allocate the assessment on the real rental of the heritors; and (4) that therefore the defender is not liable in the sums sued for, or any part thereof." He therefore assoilzied the defender. This judgment was appealed to the Sheriff, who on 2d January 1877 adhered to the interlocutor appealed against, and dismissed the appeal. The heritors again assembled at a meeting called in terms of the statute "for the purpose of considering the case, and of giving such further instructions thereanent as should be deemed right and expedient." This meeting was held on the 12th March 1877, when it was resolved and declared by the said heritors "that the former assessment was intended to be imposed, and was imposed, on the real rental, and the collector has so far properly carried out his instructions, but that in respect of the decision of the Sheriff, and to remove all doubts, the meeting hereby of new impose the assessments formerly made, being respectively 6d. and 4d. in the £ upon the real rental and upon all the heritors of the parish, and direct the collector or clerk to credit such of the heritors who have already paid their respective assessments; and further resolve and instruct the collector to bring an action of declarator and payment in the Court of Session against Mr Campbell M'Lean (the defender in the Sheriff Court aforesaid), and such other persons as it may be considered prudent, failing him or them making payment of the respective proportions of said assessment within three weeks after a request to that effect shall be made to each." This resolution was carried unanimously. In pursuance of the said resolution the clerk on 20th October 1879 sent to each of the heritors of said parish of Annan, landward and burghal, who were in arrear in respect of the said assessments, or either of them, a circular calling for payment of arrears of assessments, and intimating his instructions to adopt the necessary legal measures to enforce it. The majority of the heritors, landward and burghal, paid the assessments so imposed, with interest, but a considerable number, and *inter alios* Mr Campbell M'Lean, refused to make payment.

The present action was raised by the clerk of the heritors against those heritors within the burgh who refused to pay their assessment, and *inter alios* Campbell M'Lean, who was sued for payment of a sum of £7, 1s. 9d. in respect of the first assessment, and of £4, 14s. 6d. in respect of the second, with interest, assessed on heritable property within the burgh of which the real rent was £283, 10s. The conclusions of the summons were for declarator that the defenders were proprietors of lands and heritages in the parish within the meaning of the Valuation (Scotland) Act 1868 (31 and 32 Vict. cap. 91), and heritors of the parish within the meaning of the Ecclesiastical Buildings and Glebes

Act, and that the expenses of repairing the manse as assessed at the several meetings should "be apportioned and allocated among the heritors of said parish according to the present value or real rent of the lands and heritages within the said parish, as appearing from the valuation rolls made up under and in terms of the said first-mentioned statute, and which were in force at the dates when the said assessments were imposed, and that in accordance with the schemes of apportionment thereof set forth in the condescendence, and that the said assessments do not fall to be apportioned or allocated according to the old valued rent of the said parish as appearing from the cess-roll thereof, and for payment of the sums assessed." Then followed petitory conclusions for payment of the amount of assessment as above mentioned.

The pursuer averred that "According to the custom, practice, and usage of the said parish from the time of the erection of the said church, or at all events for forty years, or from time immemorial, the landward heritors and burghal heritors paid their individual proportions of the assessments and other monies levied for the repair of the church and manse, and for all other ecclesiastical and parochial purposes, direct to the collectors, and were assessed and paid in proportion to the value of their respective properties, whether within or without burgh. It never was the custom, usage, or practice of the said parish that the magistrates of the burgh of Annan were as a body assessed for, or paid any, of these assessments in respect of property held by individual heritors within the burgh."

A number of the persons thus sued did not defend the action, but made payment of their proportions of the assessment, and no decree was therefore asked against them.

Defences were lodged by Campbell M'Lean and two other proprietors within the burgh.

They maintained that the magistrates of Annan, as representing the burgh and community, have from time immemorial been assessed for manse repairs on a valuation of 880 merks out of a total valuation in the cess rolls for the whole parish of 3882½ merks, and that from 1807 (when the manse was built) repairs on it had been borne by the heritors according to the amount of the "valued rent" as appearing in the cess books of the county, the share of which pertaining to the heritors in the landward part of the parish amounted to 3002½ merks, and the share pertaining to the magistrates, as representing the burgh and community of Annan, 880 merks, and that from time immemorial the heritors in the landward district, and the magistrates as representing the community, had paid, in the above proportions, the whole expense of repairs and alterations on the manse. No assessment for church or manse repairs had ever, they further averred, been imposed upon the real rent of the lands and heritages in the parish and burgh, and until the assessment imposed on 20th February 1873 no owner of lands and heritages within the burgh was in respect of such lands and heritages ever assessed or charged for the expense of any repairs or improvements on the manse.

They further set forth that the church was built in 1791; that by virtue of an agreement then made between the landward heritors and the magistrates, the church was divided between the landward heritors and the town and community of Annan, on the condition that the magistrates should pay half of the expense of building, and half the cost of repairs that might be afterwards found necessary; that the town council in the same year subdivided the area allowed to them among the proprietors within the burgh; that the magistrates had since 1791 had right to one-half of the church, had paid one-half the cost of repairs, and from time to time revised the allocation among heritors of subjects within burgh of one-half the area pertaining to them.

The pursuer pleaded—"(1) The said assessments having been competently imposed and duly allocated upon all the heritors in the parish, the defenders are liable in their share thereof. (2) The defenders being proprietors of lands and heritages, and being heritors of the said parish under and in terms of the statutes 17 and 18 Vict. cap. 91, and 31 and 32 Vict. cap. 96, are liable to be assessed for manse repair. (3) The assessment having been imposed at meetings of heritors, both burghal and landward, who both sanctioned the repairs, the defenders cannot repudiate liability. (4) The assessment being imposed on a principle in accordance with the custom, practice, and usage of the parish, the defenders are liable therefor."

The defender pleaded—"(2) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (3) The magistrates and town council of the royal burgh of Annan, and not the feuars holding of them, are the heritors liable to be assessed for heritages within the burgh—(1st) At common law; and (2d) in virtue of the agreements and usage set forth by the defenders. (4) *Separatim*, the assessment sued for cannot be maintained, having been imposed, contrary to usage in the said parish, upon heritors according to real rent."

It was proved from the minutes of meetings of heritors which had been called at various times for considering the question of repairs on the manse in various years from 1731 to 1788 inclusive, and also of several meetings in the year 1826, that the heritors within burgh did not attend such meetings individually, but were represented by one or two magistrates, usually entered in the minutes as appearing "for the town of Annan," or "as representing the burgh of Annan." The minutes of meeting of 7th January 1744 narrated how there was given in by the clerk "a cast of the proportions of the several heritors of the parish of Annan, according to their several valuations, for the sum laid on for repairing the windows of the church of Annan," which bore—"The sum of £9, 18s. 5d. sterling laid on for repairing the windows of the church of Annan is thus divided amongst the heritors according to their valuations—The Marquis of Annandale, valued at one-fourth of the parish, pays £2, 9s. 7¼d. sterling; the burgh of Annan, valued at one-fourth of the parish, pays £2, 9s. 7¼d. sterling; Bonshaw, valued at 450 merks Scots, pays £1, 5s. 4¼d.," &c.

The minutes of another meeting in 1749 contained an assessment in similar terms.

It appeared from minutes of meetings of the town council in the years 1788 to 1791 that when a new church was completed in the last mentioned year, one-half of the seat area was allocated to the town or community of Annan on

condition of its undertaking to pay one-half of the expenses of erection, and one-half of all repairs that should thereafter be found necessary.

The Lord Ordinary (KINNEAR), after allowing proof of the usage only to assess for repairs of the manse on the valued rent, found and declared in terms of the declaratory conclusions of the summons, and decerned against the defenders in terms of the petitory conclusions.

"*Note.*— . . . The defender Mr Campbell M'Lean maintained that he was not liable to pay the sums sued for—1st, In respect of the agreement of 1791, and of the usage averred by the defenders; and, 2d, because at common law the assessment should have been imposed upon the heritors according to their valued rent.

"The agreement applied only to the erection of the church. A proof of the alleged usage was allowed; but no sufficient evidence has been adduced to justify a decision upon that ground. The heritors not being precluded by any special usage from allocating the cost of repairing the manse upon the assessable subjects within the parish according to their true value, they appear to me to have judged rightly in resolving that the assessment should be imposed according to the real rent as appearing from the valuation-roll. The parish is partly landward and partly burghal, and the law of the *Peterhead* case is therefore applicable. But even if the parish be purely landward, there is sufficient ground in the circumstances of the case for taking the real rent as the only equitable basis of assessment. The rule, as settled by a well known series of decisions, is thus expressed by Lord Cowan in the case of *The Highland Railway Co.* v. *The Heritors of Kinclaven* (8 Macph. 860)—'The import of the decisions 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 taking the real rent as the basis of apportionment, this last must be adopted.' On this ground it is a sufficient justification of the course taken by the heritors, that if they had proceeded upon the valued rent, they must have excluded from assessment lands and heritages belonging to the Glasgow and South Western Railway Company, entered in the valuation-roll as of the yearly value of £2810, and lands and heritages belonging to the Solway Junction Railway Company, entered in the roll at £240.

"The defenders maintained, on the authority of *Lockhart* v. *Lockhart*, 10 S. 243, that the assessment leviable on heritors within the burghal territory should have been imposed on the magistrates of Annan, as representing the community, and not upon individual proprietors. In the case referred to, an assessment for repairing the manse of Lanark had been imposed according to a rule which had been followed on previous occasions in that parish, and the cost of repairs was apportioned between the landward heritors and the burgh, according to the amount of cess paid by 'the shire and burgage lands respectively.' It was held that the magistrates, as representing the community, were heritors in the seuse of the statute, and liable in that character for the proportion of assessment applicable to the burghal territory. The whole of the burghal territory was treated as a single subject, of which the magistrates were the heritors. But the decision is inapplicable to a case where the assessment is imposed upon all the lands and heritages within the parish according to the real rent, without regard to any distinction between the landward and burghal districts."

Campbell M'Lean reclaimed, and argued—The burgh was, irrespective of usage, heritor for all the lands within it, and not the individual inhabitants. The assessment fell to be laid on the burgh as a corporation, which should recover in its own way from the inhabitants. The true debtor was not any proprietor within the burgh, but the burgh itself. The history of the burgh showed that on every similar occasion for a century and a half the assessment had been made on the burgh as a single heritor. No instance could be shown till now where an individual inhabitant had come to vote at a heritor's meeting, but always a couple of magistrates on behalf of the burgh. The old landward assessment was in the old valued rent for the landward heritors, and the burgh was itself assessed as a valued rent heritor. The present differed from the cases in which the pursuer relied on the fact that none of them was concerned with a royal burgh, and no usage was proved in an opposite direction. The case of *Lockhart* (*infra*) combined with the proof of usage was conclusive in defender's favour. That of *Clapperton* (*infra*), though on another subject, implicitly recognised its authority. If the defender was not individually a heritor by law and usage, he could not be made one by a resolution of the heritors to change the assessment from valued to real rent. The Act of 1663 gave warrant to cite him as a heritor; and the question was, Did the Valuation Act make any difference? It was no answer to the question to say that because the latter Act mentioned real rent, every assessment must be made upon real rent, for it had been again and again decided that the Act was not taxative—that it was for valuation merely, and not for assessment. It merely fixed a convenient modern standard of assessment for the old one which was obsolete. It would not make a new kind of heritor out of an inhabitant of a royal burgh where usage forbade it; even if it changed the incidence of the tax to real rent, the defender was not affected as to his main contention — that he as an individual was not the debtor.

The respondent replied—The individuals called were the proper heritors. The case of *Boswell* (*infra*) was on all fours with the present in all material points. Choosing to be represented at heritors' meetings by their bailies did not make them not heritors. They fulfilled every requisite of heritors under the Valuation Act, and enjoyed all heritors' privileges in connection with the church. Under sec. 33 of the Act it was imperative to assess them. Usage in respect to the church did not apply to the manse. A corporation could not be a heritor in the sense of the Act of 1663. The result of the defender's contention might come to be that the assessment would not be a tax on lands and heritages, but on the common good of the burgh, which might ultimately come to be liable, and might thus be prestable by a debtor who had no lands. It would come to this, that you added up all that was owed by each individual proprietor and said the total was due by another person who was not a proprietor at all—which was clearly in the teeth of the 33d

section. The abolition of burgage tenure had not carried along with it the distinction between in-town and out-town heritors.

Authorities referred to by both parties — *Sinclair* v. *Heritors of Kinghorn*, 1761, M. 7918; *D. of Argyll and Others* v. *Rowat* (*Campbelton*), 1775, M. 7921; *Harlow* v. *Merchant Maiden Hospital* (*Peterhead*), 4 Pat. App. 356; *Lockhart* v. *Lockhart*, Jan. 24, 1832, 10 S. 243; *Clapperton* v. *Magistrates of Edinburgh*, July 14, 1840, 2 D. 1385; *Magistrates of Elgin* v. *Gatherer*, Nov. 17, 1841, 4 D. 25; *D. of Abercorn* v. *Presbytery of Edinburgh*, March 17, 1870, 8 Macph. 733, p. Lord Justice-Clerk, 741, and Lord Neaves, 745; *D. of Roxburghe*, June 1, 1876, 3 R. 728, 4 R. (H. L.) 76; *Stiven* v. *The Heritors of Kirriemuir*, Nov. 14, 1878, 6 R. 174; *Highland Railway Company* v. *Heritors of Kinclaven*, June 15, 1870, 8 Macph. 858, p. Lord Cowan, 860; *Maxwell* v. *Gordon* (*Anwoth*), 1816, 4 Dow. 279; *Boswell* v. *Hamilton* (*Mauchline*), June 15, 1837, 15 S. 1148; *Bruce* v. *Bruce* (*Lerwick*), June 24, 1873, 11 Macph. 755; *Farie* v. *Leitch*, Feb. 2, 1813, F.C.; *M'Neel* v. *Robertson*, May 27, 1836, 14 S. 849; Ersk. ii. 10, 56; 1663, c. 21; Valuation Act, sec. 33.

At advising—

Lord Justice-Clerk—The parish of Annan consists partly of the royal burgh of that name and partly of a landward district. In 1871 it was found necessary to execute certain repairs on the manse of the parish minister, and several meetings of the heritors of the parish were held with this object; proprietors of real property both within and beyond the boundary of the burgh were called, and attended. At one of these meetings on the 20th of February 1873 the following resolution was passed — "In order to meet the expense of repairs on the manse, on the motion of Mr Sketton, seconded by Mr Downie, the meeting unanimously resolved that a uniform assessment be imposed, as the meeting do hereby accordingly impose an assessment, on the heritors for the purpose to the extent of £600 sterling. Thereupon the clerk was directed to allocate and collect the same from the heritors of the parish." Circulars were subsequently sent out to each heritor in pursuance of this resolution. It seems that the sum of £600 turned out not to be sufficient, and a further assessment was imposed in the same way to meet the deficiency, the greater part of which has been paid by those assessed. Some, however, of the proprietors within burgh have challenged the regularity of these proceedings, and accordingly the present action of declarator and payment has been raised to enforce payment from the defenders.

The Lord Ordinary has given judgment in terms of the conclusions of the summons, and we have heard a very full and able argument on the present reclaiming-note. This argument was almost entirely confined to the contention by the defenders that the owners of lands and houses within a royal burgh are not heritors within the meaning of the Statute 1663, but that the municipality, as representing the community of the burgh, alone possess, or are liable to be assessed, in that character. On this question I entirely agree with the Lord Ordinary.

It is conceded that the minister of a parish partly burghal and partly landward is entitled to be provided with a manse, and if so, that his right rests on the Statute 1663, c. 21. That statute lays the burden of building and repairing manses on the heritors of the parish. No definition of the term heritor is given, nor is any mode of procedure prescribed; but it has always been assumed that heritor means an owner of lands or heritages, and that the measure of liability on the part of an heritor is the annual value, however ascertained, of the property held by him.

The burden is thus a tax on real property, according to its annual value. The statute says nothing as to how it is to be ascertained, and certainly the rent appearing from the valuation, called valued rent, authorised by the convention of 1667, did not enter into the obligation imposed by the statute; indeed it could not have done so, as it did not receive sanction for four years afterwards. The mode of ascertaining the proportion of liability of each heritor has been left, in the practice of the Court, very much to the parties concerned, to special agreement, to usage, or to what might seem fair, equitable, or convenient in the special circumstances of the parish, or the people. The one characteristic which runs through the long series of by no means uniform authorities on this head is the anxiety displayed by the Court in each case not to enforce arbitrary rules, but to make the incidence of the burden square with the current of usage, or the convenience or justice of the case. As regards the valued rent, it seems to have been the privilege of the landward heritors to elect to be assessed according to it, although they might in the ordinary case of a landward parish resort to the real rent if no conflicting interest were thereby affected. But in the case of a parish partly consisting of a royal burgh and partly landward there was this difficulty, that to assess on the real rent implied a new valuation of the property, while, on the other hand, the cess books gave no return of the value of real property within burgh. To meet this dilemma it seems to have been thought convenient in such cases to assess on the valued rent for the landward part of the parish, and to allow the landward heritors to treat the corporation as the heritor representing the community of the burgh, and to levy the proportion from the burgh effeiring to the amount of cess appearing on the burgh roll, leaving the corporation to reimburse themselves as they best might from the common good, or assessment of the ratepayers. Such was the *ratio* of the case of *Lockhart*, to which the Lord Ordinary referred, and which was so strongly urged upon us. But it is quite manifest that this course was only resorted to because the value of individual property within burgh did not appear from the valuation of 1667. It was an inevitable, but withal an inconvenient, result of the want of a complete valuation. How inconvenient it was may be seen from the case of *Elgin*, in which every owner within the burgh was called separately, and from that of *M'Neel*, in which Lord Moncreiff very pointedly indicates the obstacles which might arise from treating the corporation as the sole heritors in cases in which the burgh had no funds. But all these were cases in which the assessment was laid on according to valued rent. They have, in my opinion, no application when the real rent is the basis of assessment, and it never has been so applied. I see nothing in the present case to

compel us to resort to an obsolete device when the means of equitable adjustment are ready to our hand. Lord Eldon in the *Peterhead* case defined a heritor to mean "an owner of houses or lands,' and the present assessment was imposed by the combined consent of the owners within and beyond the burgh of Annan.

I have not found in any of the decisions since the case of *Lockhart*, or any of the best writers, any indication of the view that this case established the doctrine so earnestly pressed on us, that there could be no heritor in a royal burgh except the corporation, in the sense of the Statute of 1663. On the contrary, Mr Bell in his Principles, speaking of the Church, says — "Section 1164. When the parish is mixed, both landward and burghal, the building or repairing of a church is a parochial charge to be defrayed by all the owners of lands and houses in proportion to their real rents." And in the last edition of Dunlop's Parochial Law (p. 18), it is stated as the tendency of the decisions that there is and should be no distinction between royal burghs and burghs of barony or regality in this matter.

I say nothing as to the patrimonial rights arising out of the erection and repairing of churches and manses. These may stand on a different footing. But as to the mode of assessment, I am of opinion that the heritors here were within their right in imposing this assessment on the real rent, and that the rent must be ascertained by the valuation roll.

Lord Young—I agree with your Lordship's opinion in all respects. The fundamental proposition here is, that by the statute law of Scotland, the manse—the residence of the parish minister—is provided by taxation of the heritors in respect of their heritable property within the parish. In the old days of valued rent it was laid on it. In these days of real rent—of more equitable incidence of taxation—it is laid on the real rent according to the valuation roll. The expense of provision for repair of a manse is simply a tax on lands and houses within the parish, and where a manse has to be provided or repaired, there is no ground for any distinction—at least in my mind—between one part of the parish and another—that one part is a royal burgh makes no difference in the incidence of the tax. The proprietors of houses thus are simply proprietors within the parish, and liable to the tax equally with those in other parts of the parish which are not burghal.

Lord Rutherfurd Clark—I also concur in your Lordship's opinion.

Lord Craighill was absent on Circuit when the case was heard.

The Court adhered.

Counsel for Pursuer (Respondent) — Lord Advocate (Balfour, Q.C.)—Dickson. Agents—T. & R. B. Ranken, W.S.

Counsel for Defender (Reclaimer)—Solicitor-General (Asher, Q.C.)—Graham Murray. Agents—J. & A. Hastie, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GALLAGHER V. BURRELL & SON.

Reparation—Master and Servant—Liability for Servants' Acts—Negligence in a Matter unconnected with the Service.

In an action by a widow for damages for the death of her husband, who had been killed, as she alleged, through the fault of a servant of the defenders, it appeared that the act complained of had been done by the defenders' servant at the request of the deceased himself, and that in any view it was entirely unconnected with the servant's employment. The Court on these grounds *assoilzied* the defenders.

Mrs Susan Gallagher, the pursuer of this action, sued Messrs Burrell & Son, shipping agents, Glasgow, for payment of £500 as compensation for the loss of her husband, who was drowned owing to the alleged fault of a man in their employment named Monteith, at a lock on the Forth and Clyde Canal near Grangemouth. The pursuer averred that on the 27th July 1882, her husband, who was the skipper of a barge plying on the canal, was proceeding to Grangemouth with a boat laden with pitch, and had got as far as No. 4 lock, and had nearly cleared it, when the sluice-gate was prematurely opened by Monteith, who was in charge of a barge of the defenders lying outside the lock. The result was that the helm of Gallagher's boat being struck by the water which was thus admitted, swerved round, and the tiller of it knocked him overboard, and he was drowned.

The defenders denied liability (1) on the ground that it was at the request of the deceased himself that Monteith had raised the sluice, and (2) that this act, assuming it to have constituted fault on Monteith's part, had not been performed by him as their servant.

They pleaded—"The defenders are entitled to absolvitor, in respect—(1) Neither they, nor any person for whom they are responsible, caused the accident in question; and (2) Alexander Monteith was not acting as their servant, but as deceased's assistant, and at his request, in raising the sluice."

The proof disclosed the following facts:—Monteith was on board the "Goliath," and west of the No. 4 lock fell in with Gallagher, who was on the "Fibre." Gallagher offered to "give him the lock" (*i.e.*, let him pass through first), but as he was in no hurry he declined the offer, and lay in the reach above the lock to wait his turn. When the "Fibre" was inside the lock, there was another boat, the "Bouncer," between it and the "Goliath." When Gallagher was trying to take the "Fibre" out of the lock his boat got jammed, and he called to the driver of his horse, a man named Dunn, to go on with the horse, and to Monteith to "give him three nicks on the sluice." The meaning of this was to raise the bar of the sluice admitting water to the lock to the extent of three teeth, in order that the boat might by the admission of the water be straightened in the lock, and that she might be the more easily drawn out.