

commissioner to take the evidence, or before the Court who has decided the cause on that evidence, for the matter involves the conduct of parties at the trial, and matters evolved in evidence at the time. Lord Rutherford Clark gave the certificate beyond the eight days if they are counted from the end of the proof, and not from the trial of the cause in the sense of the cause being decided. On the whole matter I think it is so difficult to apply the strict words of the Act that I am not disposed to give effect to the defender's objections which have been reserved for our consideration by the Auditor.

LORD YOUNG—I concur. It is no doubt very fitting that the practice in ordinary proofs and jury trials should continue to follow the Act of Sederunt strictly. The question for the Judge is simply, whether the evidence given by such and such a witness before him is such that it may be necessary and expedient that he should go and inspect the place where the question has arisen, and prepare himself previously to the trial. There is no provision for the exact case here, and therefore we must consider it on its proper merits, and I have no difficulty in thinking that the charges should be allowed.

LORD CRAIGHILL—I am of the same opinion. I do not think that in its terms the Act of Sederunt is applicable to this case, but in any case I think we should allow the charges objected to, because I cannot see that either the one or the other party to the action can be prejudiced. As regards the second ground of objection, I do not think notice was necessary. No doubt notice of the motion is convenient and proper from one side to the other, but I am not aware that there is any rule or practice in the Outer House which makes such notice indispensable to the success of the motion.

LORD RUTHERFURD CLARK concurred.

The Court gave decree for the amount of the pursuer's account as taxed, including the sum reserved by the Auditor for the consideration of the Court.

Counsel for Pursuer—D. F. Mackintosh, Q. C.—Dundas. Agents—Dundas & Wilson, C. S.

Counsel for Defenders—Ure. Agents—Mac-kenzie, Innes, & Logan, W. S.

Thursday, February 3.

SECOND DIVISION.

MACDONALD (CLERK TO THE POLICE COMMISSIONERS OF GOVAN) v. ARMOUR AND OTHERS.

Road—Assessment—Roads and Bridges Act 1878 (41 and 42 Vict. c. 51), sec. 54.

Section 54 of the Roads and Bridges Act 1878 enacts that the amount required for the purposes of the Act shall be levied by the local authority at such rates as may be necessary for the purpose by an assessment to be imposed and levied on all lands and heritages

within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one-half by the proprietor, and the other half by the tenant or occupier, of the lands and heritages on which such assessments are imposed. *Held (diss. Lord Rutherford Clark)* that under this enactment the Commissioners were to levy from the actual owners and occupiers severally liable such equal rate per pound as would produce the aggregate sum required, and that they were not to divide such aggregate sum into two equal parts, and levy the one part from the owners as a class equally, and the other from the occupiers as a class equally.

Galloway v. Nicolson, March 19, 1875, 2 R. 650, distinguished.

Road—Assessment—Exemption—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), secs. 54, 55, and 86—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), secs. 87, 88, and 89.

Held, on a construction of the above Acts, (1) that the occupiers of houses within a burgh, under the Roads and Bridges Act 1878, were entitled to the exemption provided to occupiers by the 87th, 88th, and 89th of the General Police and Improvement Act 1862, but that the owners of unlet and unoccupied houses were not so entitled; and (2) that the 86th section of the Roads and Bridges Act, in giving the local authority power to relieve occupiers of lands and heritages under the annual value of £4, does not derogate from the power given under the 88th section of the General Police and Improvement Act to remit payment of the assessment on the ground of poverty irrespective of the amount of rent.

This was a Special Case stated for the judgment of the Court upon certain questions relating to assessments for roads, &c., in the burgh of Govan, which was constituted in 1864 under the General Police and Improvement Act 1862, its affairs, including maintenance of roads, &c., being managed by the Commissioners of Police. Subsequently, under the Roads and Bridges Act of 1878, sec. 55, the burgh resolved that the rates and assessments for roads, &c., should cease to be levied under the Act of 1862, and they were in consequence levied under the Act of 1878 as provided by section 54 thereof.

Section 84 of the General Police Act 1862 provided that the Commissioners should "assess all occupiers of lands or premises within the burgh" according to the valuation roll in the sums necessary for the police purposes of the Act, such assessment being called the Police Assessment. Section 87 provided that in the case of lands and premises let at a rent under £4, the owners and not the occupiers should be assessed, but should be allowed a deduction of one-fourth; while section 88 provided that the Commissioners might give relief on the ground of poverty in whole or in part as they might think reasonable. Section 89 provided that "the assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the Commissioners of the assessment for any period during which any lands or premises shall

not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the Commissioners shall judge expedient."

The 54th section of the Roads and Bridges Act 1878 provided—"The amount required for carrying out the provisions of this Act within any burgh or by the local authority thereof where there is no rate or assessment now levied, wholly or partly, for the maintenance and repair of streets or roads within the same, shall be levied by the burgh local authority at such rates as may be necessary for the purpose by an assessment to be imposed and levied on all lands and heritages within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which such assessments are imposed, unless where the name of the tenant or occupier is not set forth in the valuation roll, in which case the whole of the assessment imposed on such lands and heritages may be levied from and paid by the proprietor, who shall be entitled to recover half thereof from the tenant or occupier."

The 86th section of the same Act provided—"That the local authority of any burgh shall, in the imposing, levying, and recovering of the assessments authorised by this Act, possess the whole powers, rights, and remedies in force for the time being within such burgh with reference to the imposing, levying, and recovering of the police assessment, or if there be no police assessment, any other assessment or rate levied by the local authority within such burgh, and the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment or other assessment or rate, and may be collected either separately or along therewith. The whole amount of the assessments authorised by this Act may be levied on and recovered from the tenant or occupier, who on payment and on production of a receipt therefor by the collector shall be entitled to deduct one-half of the amount, or in the case of assessments for payment of debt and interest thereon the whole amount thereof from the rent payable to the proprietor, and all such assessments shall, in the case of bankruptcy or insolvency, be preferable to all debts of a private nature due by the person assessed, provided that it shall be lawful for the local authority to relieve from assessment the occupiers of lands or heritages under the annual value of £4, as appearing on the valuation roll, on the ground of poverty."

The first parties were the Commissioners of Police of the burgh, the second parties were the owners of properties therein which were unlet, and had been so since Whitsunday 1885. The third parties were occupiers of houses within the burgh.

The second parties had been assessed by the Police Commissioners in respect of their properties in the share of the assessment provided by section 54 of the Roads and Bridges Act which is imposed on proprietors (but not in the

share imposed on occupiers), and had been refused any deduction on the ground of unlet premises. They contended that by the General Police and Improvement Act the whole burden of assessment was laid upon occupiers with a power, as contained in the 88th section, to the Commissioners to remit assessment in whole or in part on the ground of poverty or inability to pay, and with power as contained in the 89th section to the Commissioners to grant deduction from assessment from any period during which any lands or premises should not be let or occupied for three months consecutively in any one year; that under the Roads and Bridges Act owners and occupiers together took the place of occupiers under the earlier Act, and that consequently the Commissioners, in imposing assessments under the Roads and Bridges Act upon owners, were bound to exempt owners of property unlet for the year during which the assessment is levied, on the ground that such owners were under the 86th section of the said last-mentioned Act, entitled to the like exemptions and restrictions as were applicable to the assessments levied under the General Police Act. The first party contended that the deductions referred to in the 89th section of the General Police and Improvement Act had reference merely to the case of occupiers of lands or premises upon whom alone by that Act the assessment was authorised to be levied, and that as the Commissioners had assessed in virtue of the 54th section of the Roads and Bridges Act, the 86th section of that Act did not affect them at all, or if it did it compelled or entitled them to allow deductions under the 89th section of the General Police and Improvement Act to occupiers alone, and not to owners of unlet or unoccupied houses. The parties of the third part contended that in any view they were still entitled under the recited Acts to the same exemptions from assessments as they enjoyed prior to the adoption of the Roads and Bridges Act under sections 87, 88, and 89 of the General Police and Improvement Act.

The questions put in the Case were—"1. Are the Police Commissioners of Govan in levying and imposing assessments under the 54th section of the Roads and Bridges Act, subjected by the 86th section of that Act to any of the exemptions and restrictions contained in sections 87th, 88th, and 89th of the General Police and Improvement Act 1862? And if so, 2. Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act? 3. Are owners of unlet and unoccupied houses within burgh entitled to the exemptions and deductions provided for in the 87th, 88th, and 89th sections of the General Police and Improvement Act? 4. Do the terms of the 86th section of the Roads and Bridges Act giving the local authority power to relieve occupiers of lands or heritages under the annual value of £4 as appearing in the valuation roll limit or derogate from the power given under the 88th section of the General Police and Improvement Act 1862, whereby the Commissioners are empowered to remit in whole or in part payment of assessment in the case of any person irrespective of the amount of rent, on the ground of poverty or

inability to pay assessment? 5. Is it legal for the Commissioners, as the local authority, to exact from owners more than one-half of the assessment requiring to be raised for the purposes of the Roads and Bridges Act (exclusive of moneys required for payment of road debts)—that is to say, suppose they require to raise a sum of £5000, can they assess or exact from owners more than £2500?"

Argued for the first parties—As the Police Commissioners had taken the method prescribed by the statute for levying an assessment under the Roads and Bridges Act, the reading of section 89 of the General Police Act did not affect them. The Commissioners were entitled to levy the rate from the actual owners and actual occupiers equally. The case of *Galloway* did not apply here, as the words of the Poor-Law Act were different from these in the Roads and Bridges Act—*Burgh of Partick v. Marshall*, February 16, 1881, 8 R. 480; *Russell v. Ward of Lanarkshire*, 1884, 12 R. 298; *Galloway v. Nicolson*, March 19, 1875, 2 R. 650.

Argued for the second and third parties—The only important question in this case is the 5th. The assessment means the whole sum that is to be raised, and not the rate per pound; the whole sum is then to be divided, and if necessary different rates put upon the owners and the occupiers in order that a half of the whole sum may be raised from each. That was the plan followed in the case of *Galloway*, which ruled this case, and there was no real difference in the words of the two statutes.

At advising—

LORD JUSTICE-CLERK—This Special Case is brought by the Commissioners of the burgh of Govan. The questions that are raised in it are of considerable importance as regards the administration of public authorities under the Roads and Bridges Act, and also under the General Police Act of 1862.

The difficulty that has arisen, and that has led to the case being brought before us, has been caused mainly by the number of tenements and premises within the district of the Commissioners at present unlet. The question substantially is, how far the assessment which is laid on the annual value of lands and heritages within the burgh—one-half being directed to be collected from the owners and the other half from the occupiers—how far the assessment is to be divided in the circumstances that I have mentioned.

There are some other questions which I shall speak of immediately, but in the meantime I shall express my opinion on the fifth question, which is to this effect—"Is it legal for the Commissioners, as the local authority, to exact from owners more than one-half of the assessment required to be raised for the purposes of the Roads and Bridges Act (exclusive of the moneys required for the payment of the road debts)—that is to say, suppose they require to raise the sum of five thousand pounds, can they assess or exact from owners more than two thousand five hundred pounds?" Now, it is plain that there cannot be an occupant liable in assessment unless the premises are occupied. Where premises are not let, that has simply the effect of diminishing the

number of contributors who are to be assessed under the statute, seeing that the assessment is put upon the actual occupiers. Therefore the problem that is propounded in this fifth question simply comes to this, that the assessing body of the Commissioners of Police under the Roads and Bridges Act must determine how much, in the first place, they require to raise, and what amount of assessment laid on in terms of the statute will produce the sum they require for the purposes of the burgh? And of course if the area over which that assessment is to be levied is to be diminished, to a certain extent the rate per pound must be diminished also. Therefore my opinion would be, upon the complexion of this question, that it relates much more to the amount to be raised, or rather to the rate per pound which has to be assessed upon the burgh, than to any difficulty arising from the fact that there are certain premises where there are no occupiers to assess. I should say the course to be followed would be first to determine, with a view to exhausting the ratepayers—that is to say, with a view to the amount of rateable property which exists in the burgh—how much per pound, levied half on owners and half on occupiers, will furnish the amount required. The result of that no doubt is, that the owners will pay more in a way, but so also will the actual occupants, than if the premises had been all occupied. But I do not think that that is really an element which enters into the question at all. If so much a pound is levied on the actual occupants and so much on the owners, that will give the amount that these Commissioners require. I think that is what they are entitled and bound to do.

In regard to the other questions I do not think there is any material difficulty. The first question is as follows—Are the Police Commissioners of Govan, in levying and imposing assessments under the 54th section of the Roads and Bridges Act, subjected by the 86th section of that Act to any of the exemptions and restrictions contained in sections 87, 88, and 89 of the General Police and Improvement Act 1862? I think that question is too generally put, because it is not necessary for us to solve an abstract question such as that whether the Police Commissioners are subjected to any such exemptions or restrictions. It is enough that these specific questions are asked afterwards, and for us to answer them. The clause in the Road Act which has raised the difficulty—if there be any difficulty—is the 86th section of that statute. By that section it is provided that "the local authority of any burgh shall, in the imposing, levying, and recovering of the assessments authorised by this Act, possess the whole powers, rights, and remedies in force for the time being within such burgh, with reference to the imposing, levying, and recovering of police assessment, or if there be no police assessment, any other assessment or rate levied by the local authority within such burgh; and the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment or other assessment or rate, and may be collected either separately or along therewith." Then there are quoted in the 3d and 4th articles of the Case various powers which the Police Commissioners have under the Act of 1862. Now, I have no doubt at all that the provision in the Roads and Bridges Act must

be carried out according to its fair meaning and import. The first question asked after that general question, to which I have referred, is—"Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act?" My opinion is that they are. The next question is in these terms—"Are owners of unlet and unoccupied houses within burgh entitled to the exemptions and restrictions provided for in the 87th, 88th, and 89th sections of the General Police and Improvement Act?" I do not think that in regard to that question that they are, because the assessment is laid on, one-half on owners and one-half on occupiers. The third question is—"Do the terms of the 86th question of the Roads and Bridges Act, giving the local authority power to relieve occupiers of lands or heritages under the annual value of £4 as appearing in the valuation roll, limit or derogate from the power given under the 88th section of the General Police and Improvement Act 1862, whereby the Commissioners are empowered to remit, in whole or in part, payment of the assessment in the case of any person, irrespective of the amount of rent, on the ground of poverty or inability to pay the assessment?" Now, I do not think that these provisions are inconsistent with each other at all. My opinion is, that the Commissioners may give parties assessed the benefit of exemptions without any inconsistency. I therefore propose that we should answer these questions to the effect I have indicated, finding it unnecessary to give an answer to the first, but answering the second and fourth in the affirmative, and giving a special answer to the fifth, because I do not think that as put we can confirm the legality of exacting from owners more than one-half of the actual assessment. But as I have already said, I think that ought to be provided for by estimating the amount required, and what the property will actually produce.

LORD YOUNG—I am substantially of the same opinion. The only question here which the parties are interested that we should answer, and which I should have been disposed to answer at all—for we are not bound to answer any question which the parties may choose to put—is the fifth. That is an interesting question, and after the decision of the First Division in 1875 upon a similar question under the Poor Law Act, I must acknowledge that it is a case of difficulty. It is that decision alone which makes me regard the question as one of difficulty. If the words had been the same here as in the Poor Law Act, it would probably have been our duty to follow that decision; or if we thought seriously that the question ought to be reconsidered, then to request the aid of our brethren, or of some of them. But the words here are different; and therefore, without going further, I am not prepared, as at present advised, to carry that judgment any further than it goes upon the very words which were then under the consideration of the Court. I quite agree with the view which your Lordship has taken of the question. The words occur in clause 54 of the Roads and Bridges Act, and they are these—"The amount required for carrying out the provisions of this Act within any burgh, or by the local authority thereof, where there is no rate or assessment now levied, wholly or

partly, for the maintenance and repair of streets or roads within the same, shall be levied by the burgh local authority, at such rates as may be necessary for the purpose, by an assessment to be imposed and levied on all lands and heritages within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one-half by the proprietor, and the other half by the tenant or occupier of the lands and heritages on which said assessments are imposed, unless where the name of the tenant or occupier is not set forth in the valuation roll, in which case the whole of the assessment imposed on such lands and heritages may be levied from and paid by the proprietor, who shall be entitled to recover half thereof from the tenant or occupier." Now, the general question propounded here is, whether the sum which they resolve has to be raised by assessment must be divided into two parts or moieties, and the one moiety laid on the owners as a class, and the other moiety laid upon the occupiers as a class; or whether an assessment at the rate per pound resolved upon as sufficient to raise the money which is required, levied and imposed upon each individual tenement—has to be paid one-half by the owner, and the other half by the occupier, if there is one of that tenement. I certainly prefer the latter result as not only more equitable, but as the result which is alone equitable. For the result to which it leads is this—that the same rate per pound is to be laid upon the owner, and upon the occupier, there being no distinction between the two. If it is 6d. per pound—let us say upon the owner—then it is the same on the occupier—if there is one. If there is no occupier—there can be no assessment upon the occupier, but what it leads to is this perfect equality which, I think, is intended to be brought about. I merely speak at the present moment of the equity of the result—the equity, namely, of the owner and occupier which we take as an example being made to pay the same rate of assessment. The result of the other view, which was given effect to by the First Division in the case under the Poor Law Act, is this—that if you have more owners than occupiers—that is to say, if some premises are unlet and unoccupied—then there must be a larger rate per pound imposed on the occupier. There are fewer occupiers upon such an assumption, because there are no tenements without owners. The only failure that can occur is in the case of occupiers. A tenement may be untenanted or unlet, or unoccupied, but no tenement can be without an owner. Just to put a case by way of illustration—I suppose it does not occur in practice in such a marked way—but suppose you have twice as many owners as occupiers. If each class is to produce the same amount of money—you must impose upon the occupier double the assessment, or double the rate that you impose upon the owner. The case put in the question by way of illustration is this—suppose the Commissioners require to raise £5000—are they to exact from owners more than £2500? Well, if they exact £2500 from the owners who are not diminished in number by reason of premises being unlet—they must exact over £2500 from the diminished number of occupiers. That can only be done by laying upon them a larger assessment or rate per pound than is laid upon the owners. Now, that is

prima facie unjust and inequitable. I do not lay out of view the consideration that the landlords of new tenements are more or less suffering, although the fact that their premises are unlet may be entirely attributable to themselves—may be with a view to their own profit. It may be with a view to the more profitable use of their premises in the following year that their premises are unlet, or it may be owing to many other considerations. But the result of the view I have stated is just what I have indicated. I quite follow the reasoning of the words in the Poor Law Act, upon which our brethren of the First Division arrived at the conclusion that the money resolved to be raised by assessment must be divided into two classes and a half raised from the owners, however numerous they may be, and the other half raised from the occupiers, however few they may be. I quite follow that reasoning, and have in view the disparity in the rate of assessments which necessarily follows. But I shrink from the result, and I do not think that even in that case the reasoning is against me. But whether that may be so or not, I should not be indisposed, if an opportunity occurs, to have that judgment reconsidered. The words here, however, are different. I have already pointed them out. The assessment is to be imposed and levied on all lands and heritages; that is to say, the amount required for carrying out the different provisions of the Act is to be raised by assessment on all lands and heritages. Now, I think I avoided the result I have mentioned by saying that I do not think the amount is to be divided into two parts, and the one-half imposed on owners and the other half on occupiers. The amount to be raised by assessment, the amount to be imposed and levied—taking the illustration here, the sum of £5000—is the amount required for carrying out the provisions of the Act in the particular burgh or district. I do not think that is the assessment; it is the amount required and for which the assessment requires to be imposed. Indeed, the assessment imposed on the lands and heritages may be greatly more than the amount required to be raised. Indeed, it must be so with regard to all classes, because in raising an assessment you have to take into account a certain amount which must be given off by way of relief. You must take into account inability to pay, fraudulent evasions, and so on. Take the case of the income tax. In estimating the amount required for that tax in order to answer the Budget, you must take into account, in resolving what you are to levy, the sum which will be irrecoverable on account of inability to pay. You must take into account fraudulent evasion and a thousand other things. And here, as your Lordship has pointed out, one of the events to be contemplated is, that premises will be unlet and that there will be no occupier. Using your judgment, which there is always experience to guide in addition to statistics, you resolve what amount you will require to assess for over the district in order to produce, after all the contingencies which I have mentioned and which are allowed for, the sum which is actually required. The assessment imposed and levied is, I think, therefore, the assessment imposed and levied on the individual tenements. Resolving upon a sum either as that which is required or as the provision for which you require to assess is not the

assessment imposed. It is what you impose and levy on each individual tenement. There is no assessment levied and imposed on a parish or burgh, but it is on each individual property. Now, that is to be paid one-half by the occupier and the other half by the owner. The owner can never be required to pay more than the half. If there is no occupier then that half goes unpaid, but, as I have said, that is one of the contingencies which must be taken into account in determining the amount which is required to be raised by means of assessment.

I therefore arrive—I confess without any reasonable difficulty except that which is suggested by the decision I have mentioned—at the conclusion at which your Lordship has arrived, that the assessment imposed and levied on each tenement is to be divided into two parts. There is always the owner to pay one-half, and if there is any occupier he pays the other half. I do not think there is any difficulty as to any tenement in these respects. That leads to this result, that the same rate per £ will be imposed upon every owner and every occupier. The deficiency caused by want of occupation is made up by the owners and occupiers who pay, but the same rate per £ is payable by each individual according to the value of the tenement which he is owning or occupying.

Now, I should rather have thought that an answer to the other questions might have been avoided, because clause 86 of the Roads and Bridges Act authorises the whole assessment to be levied from the occupier if the Commissioners find it convenient, the occupier, where there is one, having his relief against the owner to the extent of the owner's share. There is no difficulty about that, however. I do not think the owner is bound in any case to pay the occupier's assessment, but my opinion, looking to the whole matter, is exhausted by what I have already said in regard to this particular subject.

With respect to the exemptions on the ground of poverty, there is a most comprehensive power given to the assessing body to make those exemptions. They may exempt on the ground of poverty in any case. In the Police Act there is authority given to exempt on the ground of poverty where the rent is only £4. There is also authority given there to assess that upon the owner under a certain deduction. I should have thought, however, that the provisions in this Act were sufficient in themselves for all practical purposes, one-half of the assessment being, as I have said, laid upon the owner, and the other half upon the occupier. If there is any permission to levy the whole upon the occupier, leaving him to recover from the owner where that is found convenient, still there is an absolute power to remit the amount on the ground of poverty wherever the Commissioners see cause. I must say, however, that though these are my views, I would have preferred to let the other questions go unanswered, and to have given an answer only to that which is the really interesting question here. For all that, I concur with your Lordship.

LORD CRAIGHILL—I concur in the views which have been presented by your Lordship and by Lord Young. I rather think it will be well to answer all the questions, and as regards all the questions, the answers suggested by your Lord-

ship are, I think, appropriate to the law of the case.

The only matter on which I have any difficulty in giving an affirmative answer is that which is suggested by the terms of the second question. What is there asked is this—"Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act." Now, the word "occupiers," as here used, comprehends all occupiers whatever may be the size of the houses which they occupy, and whatever may be the rents paid for those houses, but the 87th section of the Police Act, which is the Act there referred to, provides that "the Commissioners shall assess the owners in place of the occupiers of all land or premises let at a rent under £4, and levy such assessment from such owners, but the Commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof." Now, the General Police and Improvement Act did not impose an assessment on the lands and heritages, one-half to be paid by the owners and one-half by the occupiers. On the contrary, the occupiers, and the occupiers only, unless in exceptional circumstances for which provision was made, were to pay the whole. The 87th section provides that where the rent was less than £4 the occupiers were not to pay at all. The landlord was there to come in their place, and the landlord was to pay the assessment which, if the rent had been more than £4, would have been paid by the occupier, the landlord getting in consideration for the fact that he was paying something not properly his own, an abatement of one-fourth of the sum paid. In terms that section is inapplicable to the arrangement made in the Roads and Bridges Act. But when we look at clause 86 of the Roads and Bridges Act I think practically the same result is obtained. The Roads and Bridges Act provides that whatever the size of the house, and however small the rent paid may be, the occupier is to be put down as one of the two parties by whom the assessment is to be borne, and the landlord is the other. Now, the relief or exemption of the occupier cannot be procured in the way provided for by the General Police and Improvement Act. For what we find at the close of section 86 of the Roads and Bridges Act is this—"Provided that it shall be lawful for the local authority to relieve from assessment the occupiers of lands or heritages under the value of £4, as appearing on the valuation-roll, on ground of poverty." If this clause is to be read as obligatory on the Commissioners the same result ensues as would have ensued supposing the terms of this statute had been the same, for although the occupier is, in terms of the Roads and Bridges Act, to be put down as one of the parties on whom the assessment is to be levied, yet there is this power given to the Commissioners of making as complete exemption as that which was secured under the arrangement of the General Police Act. It is a discretionary power which is conferred on the Commissioners. If they see fit they may exempt parties from payment on the ground of poverty. They have to learn what the circumstances are, and act according to their discretion. That is a thing which seems to me

quite clear. In the case of the other Act there was no option. Parties under a certain rent had a right to be exempted. It was incumbent on those having the administration of that Act to make the exemption. Now, the proviso in the Roads and Bridges Act, to which I have referred, seems to me to amount to pretty much the same thing. Reading it as matter of obligation, the Commissioners are bound to come to the same conclusion—the conclusion, namely, that as all under £4 rent were exempted by the General Police and Improvement Act, so the occupant of a house the rent of which is less than £4, as entered in the valuation-roll, is entitled to exemption, which would put him in the same position. That seems to me to bring us to the same conclusion as your Lordship has suggested in the answer you have mentioned.

LORD RUTHERFURD CLARK—The only difficulty I have is with respect to the 5th question. I confess I do not see any sound distinction between the case under the Poor Law Statute and this case. I think we are bound to follow that decision. At the same time I am not sorry that your Lordships have seen your way to reach a much more equitable result.

The Court pronounced the following interlocutor:—

"The Lords . . . answer the second question in the affirmative, and the third and fourth in the negative; as regards the fifth, they are of opinion in the circumstances stated that the Commissioners are entitled to levy from the actual owners and occupiers severally liable such equal rate per pound as will produce the aggregate sum required for the purposes of the assessment: Find and declare accordingly: Find it unnecessary to answer the first question, and decern."

Counsel for First Parties—Baxter.

Counsel for Second and Third Parties—MacLennan.

Agent for all Parties—Marcus J. Brown, S.S.C.

Friday, February 4.

FIRST DIVISION.

THE EARL OF GLASGOW *v.* BOYLE.

Property—Consolidation of Dominium utile with Superiority—Prescription.

A deed of entail executed in 1715 contained, *inter alia*, the superiority of the lands of B. The *dominium utile* of these lands was soon afterwards acquired by one who subsequently in 1733 succeeded as heir under the entail; he took no infertment, either on the entail or on the disposition of the lands of B, but possessed the latter on apparenity till his death in 1741. His son made up separate titles under the entail and the disposition, and was infert in both. His son, again, thereafter made up the title under the entail only, and was infert, and possessed the lands of B for more than