divest myself of the impression, that neither did these persons contemplate pledging their individual responsibility, nor did those who became partners with them contemplate such liability, or look to anything but the trust estate for contribution. Nor does it seem to me, that there is anything in the nature of the business which makes such an arrangement improbable or unreasonable. A single individual takes a certain number of shares; he is liable to the full extent of all that he possesses. Beyond this his personal liability is worth little or nothing. Six trustees take the same number of shares, and are jointly and severally liable to the full extent of the estate which they represent. In this view of the case there seems to me to be no great inequality. But take it on the other hypothesis. The one gives his single liability, and the six are supposed to give each his individual responsibility, to the full extent of all he possesses. In other words, supposing the personal responsibility of both parties to be equal, the trustees give six times the security of the one. The first hypothesis, therefore, seems to me to be at least as reasonable and probable as the other. But I think, that in either case the same rule would apply as to creditors and as to copartners. There is no private dealing as amongst the copartners. If the acts done by the trustees do not infer liability to the one class, they cannot, in my opinion, infer it in the other.

I own, that the great reliance which I am disposed to place on the authority of the considerable majority of the Judges below, is somewhat weakened by their reluctance to deal with this question.

For the reasons which I have stated I am much inclined to think, that, unless the express provisions of the deed are such as to exclude the construction put upon it by the Court below, the judgment complained of is right, and supported by the principles of Scotch law, and the reason and probability of the case. But when persons have signed deeds of this description, it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered on any speculation founded on mere probabilities, that they did not really intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the deed and the second deed of accession, can be read so as by some interpretation to exclude those who sign as trustees, it is not disputed, that the covenant infers personal liability, and there seems to me to be in this insuperable difficulty.

Upon the whole, with some hesitation and regret, I am obliged to concur in the opinion already expressed by your Lordships. As to Dr. Buchanan, I think there can be no doubt, that the judgment should be affirmed with costs.

The *Attorney General* called attention to the fact, that the interlocutor of the Court below did not distinguish Dr. Buchanan from the other trustees, and that the best course would be to assoilzie him from the conclusions of the summons.

LORD CHANCELLOR.—I think the interlocutors must be taken together. Of course Dr. Buchanan is liable to the extent of the trust funds, and there is no certainty that there may not be trust funds still in the power of the trustees, As Dr. Buchanan does not appeal from the interlocutor, all we can do is to dismiss the appeal, and give Dr. Buchanan costs. As to the respondents, therefore, except the respondent Dr. Buchanan, the interlocutors will be reversed, and an order made in terms of the conclusions of the summons, and, with respect to the respondent Dr. Buchanan, the appeal will be dismissed with costs.

Interlocutor reversed, except as to one of respondents.

Appellants' Agents, Davidson and Syme, W.S.; Murray and Hutchins, London.—*Respondents' Agents*, Gibson Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.

FEBRUARY 12, 1866.

HENRY JACK, Inspector of the Poor of the Parish of Dundee, *Appellant*, *v.* ROBERT HAWKER ISDALE, Hat manufacturer, Dundee, *Respondent.*

Poor (Able Bodied), Right of, to Relief—Statute 8 and 9 Vict. c. 83, § 68—Right to Demand Relief—*Before* 1845 *able bodied paupers were not entitled to relief; but the kirk session might give relief to them as occasional poor out of the church door collections. By* 8 *and* 9 *Vict. c.* 83, § 68, *occasional poor as well as permanent poor were declared entitled to relief out of the assessments, but nothing was to confer a right to demand relief on able bodied paupers.*

HELD (affirming judgment), *That the "right to demand relief" was the same thing as the "right to relief," and that no part of the assessment can be given to able bodied paupers since that Statute.*[1]

The facts of the case were as follows:—The Parochial Board of Dundee were applied to in June 1863 for parochial relief to two men. One applicant, John Conolly, a weaver, and native of Ireland, had acquired a residential settlement in Dundee, and was a married man with four children. His ground of application for relief was stated to be "a sick wife, and slackness of trade, whereby he cannot get full employment." The other applicant, Francis O'Neill, was also a weaver, and native of Ireland, residing in Dundee, but having no settlement in Scotland. He was a widower with six children, the eldest being twelve years old. His ground of application was inability to get work, and a numerous family of small children requiring attendance. Both these applicants were in good health, and able bodied. During periods of temporary depression in the weaving trade, the Parochial Board of Dundee had been in the practice of occasionally affording relief to destitute persons willing to work, but unable to procure employment. Accordingly, when the above applications were made, the standing committee of the Parochial Board, on 12th June 1863, came to the following resolutions:—

"*Inter alia*, the meeting having considered the circumstances of the case of John Connolly, who at present, in consequence of a depression in the branch of trade in which he works, is unable to get employment to support himself and family, by a majority, resolve. in their discretion, to allow him casual relief for six weeks in the mean time at the rate of 3*s.* 6*d.* a week.

"The meeting having also considered the circumstances of the case of Francis O'Neill, at present unable to support himself, by a majority, resolve, in their discretion, to allow him casual relief for six weeks at 4*s.* a week in the mean time."

Mr. Isdale, a member of the Parochial Board, protested against these resolutions of the Board as illegal, and presented a note of suspension and interdict seeking to prohibit the Board from applying the funds in this manner.

The Lord Ordinary (Kinloch), after the case was argued, gave judgment in favour of the suspender, holding, that "the Parochial Board was not entitled to give relief, either permanent or occasional, to persons who, being able bodied, are in destitution or poverty merely from want of employment." When the case was reclaimed to the First Division, cases were ordered to be laid before the other Judges. In the result, seven of the Judges, viz. Lord Justice Clerk (Inglis), Lords Cowan, Benholme, Mackenzie, Kinloch, Jerviswoode, and Ormidale were in favour of the suspender, and against the Parochial Board; while the other six Judges, viz. Lord President (M'Neill), Lords Curriehill, Deas, Ardmillan, Neaves, and Barcaple, were in favour of the Parochial Board. The final interlocutor was, that the Lords of the First Division adhered to the interlocutor of the Lord Ordinary.

The sections of the Poor Law Amendment Act, 1845, 8 and 9 Vict. c. 83, material to the question, were the following:—

The 33rd, which declares it competent to the Parochial Board "to resolve, that the funds requisite for the relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment."

The 54th, which enacts—"That in all parishes in which it has been agreed, that an assessment shall be levied for the relief of the poor, all moneys arising from the ordinary church collections shall, from and after the date on which such assessment shall have been imposed, belong to and be at the disposal of the kirk session of each parish: Provided always, that nothing herein contained shall be held to authorize the kirk sessions of any parish to apply the proceeds of such church collections to purposes other than those to which the same are now in whole or part legally applicable."

The 68th, which enacts—"That from and after the passing of this Act, all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor: Provided always, that nothing herein contained shall be held to confer a right to demand relief on able bodied persons out of employment."

And the 91st, which declares—"That all laws, statutes, and usages shall be, and the same are hereby repealed, in so far as they are at variance or inconsistent with the provisions of this Act: Provided always, that the same shall continue in force in all other respects."

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the appellant.—The old Statutes and practice established a well known distinction between the right to demand relief and the right to distribute relief, the two rights not being correlative. One half of the church door collections used to be appropriated among those who were not entitled to demand relief, but who were called the occasional poor as contrasted with the permanent poor. The occasional poor included able bodied

[1] See previous reports 2 Macph. 978: 36 Sc. Jur. 484. S. C. L. R. 1 Sc. Ap. 1: 4 Macph. H. L. 1: 38 Sc. Jur. 221.

paupers.—Report of General Assembly in 1820; Moneypenny on the Poor Law, 33. The heritors and kirk session had a joint right to administer the relief to the poor—*Heritors* v. *Kirk session of Humbie*, Mor. 10555. Practically, however, the heritors did not interfere. The provision for the occasional poor was just as legal a provision as that for the permanent poor, and the obligation on the kirk session to distribute half the funds to the occasional poor was as much a legal obligation as that relating to the permanent poor. Such being the state of the law prior to the Act 8 and 9 Vict. c. 83, the 68th section was plainly intended to put the occasional poor on the same footing as the permanent poor, except that that part of the occasional poor consisting of the able bodied were not to be entitled to demand relief. But excepting the right to demand relief, the able bodied were on the same footing. There is nothing inconsistent in saying, that the Parochial Board shall be bound to administer relief to a class, while, at the same time, none of that class shall have a legal right to demand it. The right to give is not correlative to the right to get relief. That distinction is recognized in *M'Williams* v. *Adams*, 11 D. 719; *ante*, p. 24; 1 Macq. Ap. 120; *Thomson* v. *Lindsay*, 11 D. 719. It is true, *Petrie* v. *Meek*, 21 D. 614, seems opposed to the present appellant, but it ought to be overruled. The practice has been in conformity with the appellant's view, and the right to give relief to the occasional poor has been of great benefit in large towns.

Anderson Q.C., and *Neish*, for the respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, that the point involved in this case is one of great importance, we cannot doubt. It raises the question, whether persons who may be from time to time in Scotland, in circumstances requiring relief, are or are not capable of receiving out of the parochial funds money which has been raised under the Act of the 8 and 9 Vict. c. 83. I confess, that I think the question turns not partly but wholly upon this single Act of Parliament, and the only legitimate purpose to which we can put what preceded it would be that, for which the Lord Advocate very properly did refer to it, namely, to see what was the meaning of the words "permanent and occasional poor" in the 68th section of that Act. I think it was only fair to refer to reports and to such evidence as could be furnished to shew, that under the head of occasional poor were included persons who were not permanently disabled, and therefore not placed upon the permanent roll to receive relief, but who were from temporary illness and other causes in a state of destitution, and therefore objects of charity. And I take it, according to what has been pressed so much by Mr. Rolt, that under "occasional poor" would be included persons who are in destitution, because, though able bodied, they cannot get work.

Now, what has the Statute said upon that subject? It has said, that after the passing of this Act, all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor. If the clause had stopped there, supposing that the Lord Advocate, and Mr. Rolt are right in saying, that a person, though able bodied, who cannot get work, comes under the description of "occasional poor," it would have enabled him to obtain relief. But it does not stop there; it goes on to say, "provided always, that nothing herein contained shall be held to confer a right to demand relief on able bodied persons out of employment."

It has been already decided almost unanimously in the Court of Session, (I do not go into the question now as to whether it has been rightly or wrongly decided, though I believe it has been perfectly rightly decided,) and that decision has been affirmed after great deliberation in this House, that no able bodied person, though he might come under the description of occasional poor, had any right to demand relief. But then it is said, that that is not the present case. The person does not demand relief in this case, or at least if he does, it is not because he demands it, that it is given to him. No doubt he really does demand it or ask for it. But what is said is this, although he could not have demanded it, it is competent to the administrators of this fund to give it to him, whether he demands it or not. That appears to me to be absolutely inconsistent with the notion of a fund levied for a certain definite purpose defined as that purpose is in the 33rd section of the Act of the 8 and 9 Victoria c. 83, which is this, that it shall be lawful for the parochial board, at any meeting to be called for the purpose, to resolve, that the funds requisite for the relief of the poor persons entitled to relief shall be raised by assessment.

Now, is this a person entitled to relief? Clearly not, unless he is entitled to demand relief. I am unable to distinguish or to see any difference in principle between being entitled to relief and being entitled to demand relief. The whole argument rests upon the very subtle distinction, that in that last line of the 68th clause the words are that nothing herein contained shall be held to confer "a right to demand relief" instead of "to relief." Suppose the words had been a right to relief, there would not have been a shadow of foundation for the argument. But it appears to me, that variation in the language makes no real difference, and although it was not actually the point decided in this House in the case of *M'William* v. *Adams*, it is impossible not to see, that both LORD BROUGHAM and LORD TRURO thought, that the right to give and to receive relief were correlative; that if there was no right to demand, there was none to give relief. It must be so. It cannot be, that where a fund has been raised for the special purpose defined in an Act of Parliament, and given into the hands of the persons whose duty it is to carry the Act

into execution, it is open to them to say, "We think that you are not within the class of persons defined in the Act, but we think you are a proper object of relief, and therefore we shall give it to you, although we are not authorized by the Act to do so."

It is not unimportant to observe, that when a discretion was intended to be given for a purpose very similar to this, it is given in the 67th section. It was seen, that it might be very convenient that the administrators should have the power to subscribe to hospitals or objects of that nature, and therefore a discretion is expressly given to them in that 67th section. That seems to exclude the notion, that they could have had any discretion if it had not been so conferred upon them.

In common I believe with my noble and learned friends, I do not in general like to decide a case, however strong my opinion may be, until I have heard it all out. It may be said that that applies particularly to the present, where there has been a minority in the Court below so numerous that it amounts to its being, we may say, nearly evenly balanced. But I confess that the case, turning, as it appears to me to do, not upon any elaborate construction of old Acts of Parliament, but simply upon the construction of two or three clauses in this Act, and being for my part utterly unable to see any distinction in principle between this case and the case decided in your Lordships' House fifteen years ago, I think it is unnecessary to occupy your Lordships' time any further with the consideration of it. And therefore, without any disrespect to the minority of the learned Judges of the Court of Session, I shall move, that this appeal be dismissed.

LORD CHELMSFORD.—My Lords, I entirely agree with my noble and learned friend on the woolsack, and if it were not for the difference of opinion which existed amongst the learned Judges of the Court of Session, I should have thought that there was very little difficulty in this case.

Before the Act of the 8 and 9 Victoria, the relief of the poor in Scotland was provided for partly by assessment and partly by collections at the church doors. A moiety of those collections at the church doors was blended with the assessments and administered for the relief of the permanent poor. The other moiety, after payment of certain expenses by the kirk session, was distributed by them for the relief of occasional poor, and amongst those able bodied persons out of employment were generally included.

That being the state of things the Act of the 8 and 9 Victoria was passed, and the 54th section of that Act provides, that the whole of the church collections shall remain with the kirk session, shall belong to, and be at the disposal of. the kirk session of each parish. So that after this enactment there was no longer a moiety of the collections at the church doors, to be blended with the assessment for the relief of the permanent poor.

A new parochial board was established, and that parochial board was, in the first place, by the 32nd section, to make up every year a roll of the poor persons claiming, and by law entitled to relief from the parish or combination, and of the amount of relief given, or to be given, to each of such persons. Of course, that was a roll which applied merely to the permanent poor, because those were the only persons who were certain.

Then, the 33rd section of the Act provides, that it shall be lawful for the parochial board to resolve that the funds requisite for the relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment. Now, it is quite clear from the words of this section, that that assessment was to be applied to the persons, and applied solely to the persons, who were entitled to relief from the parish. And therefore, if nothing more had been said by the Legislature, it is clear, that the occasional poor would not be included in the persons who were to be relieved out of this assessment. But it was the intention of the Legislature, that a certain class of the occasional poor should have relief, not that they should be entitled to relief, but that they should have relief out of this assessment. Accordingly, the 68th section, upon which the whole question turns, provides, not that the occasional poor, observe, shall be entitled to relief out of this fund, but that "all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor." Therefore that gave the parochial board a power to administer relief to occasional poor out of those funds which were originally to be an assessment for persons who were entitled to relief. But then, inasmuch as able bodied persons out of employment had been treated as occasional poor, if nothing more had been said, they would have been included within this prior part of the enactment in the 68th section, and therefore, to guard against that, the Legislature introduces a proviso to this effect: "That nothing herein contained shall be held to confer a right to demand relief on able bodied persons out of employment."

Now, taking the few sections of the Act which I have brought to your Lordships' attention into consideration, what can be more clear than this, that it was the intention of the Legislature that able bodied persons should not have relief out of this particular fund which was an assessment raised for the relief of persons entitled to relief, and was to be extended only to occasional poor by the provisions of the 68th section. The matter appears to me to be so perfectly clear,

that I cannot hesitate for a moment to concur with my noble and learned friend on the woolsack, that the appeal should be dismissed.

LORD KINGSDOWN.—My Lords, I entirely concur with my noble and learned friends.

Mr. Anderson.—My Lords, I am instructed by the respondents to say, that they do not ask for any expenses in this case.

Interlocutors affirmed, and appeal dismissed.

Appellant's Agents, J. Galletly, S.S. C. : Martin and Leslie, Abingdon Street, Westminster.—*Respondents' Agents*, G. and H. Cairns, W.S. : W. Robertson, Duke Street, Westminster.

FEBRUARY 15, 1866.

GEORGE STRANG of Westertown of Briech, *Appellant*, *v.* ROBERT STEWART of Wester Briechdyke, *Respondent*.

Property—March fence—Repairs—Hedge and Ditch—Common interest—Evidence of Agreement, &c.

HELD (affirming judgment), *That where A and B become owners of adjoining fields which originally belonged to the same owner, they may by express agreement constitute the boundary a march fence, and if they have used it as such, an agreement to that effect will be implied, provided the user is inconsistent with any other origin.*

QUESTION, *whether there is any difference between common property and common interest in a march fence?*[1]

The pursuer (appellant) is proprietor of the lands of Wester Briech, in the county of Linlithgow, and the defender is proprietor of the adjoining lands of Briechdyke, and part of Auchenhard, which bound the lands of Wester Briech on the south and west. The lands of Briechdyke are higher than Wester Briech, and between the two lands is a hedge, and along the Briechdyke side of the hedge there is a ditch.

The pursuer presented a petition to the Sheriff of Linlithgow, setting forth, that the thorn hedge and ditch formed together, and had for time immemorial formed, the march fence between the two properties; that the ditch was, moreover, necessary to prevent the water from the higher lands, Briechdyke, from flowing over the lower tenement, Wester Briech, and that the ditch had become choked up, and the hedge had fallen into disrepair. The petition prayed, that the respondent, Mr. Steuart, present defender, should be ordained to join with the petitioner in the necessary operations for cleaning the ditch, as forming an essential part of the march fence, and as necessary for carrying off the water rising on Mr. Steuart's lands, and dressing and protecting the thorn hedge, and generally for putting the ditch and hedge in a fencible condition.

To this petition the defender lodged answers, in which he stated various objections to the competency of the petition, and among others, that it was incompetent in the Sheriff court. These preliminary defences were repelled by the Sheriff substitute, who pronounced a judgment affirming the pursuer's right to have the hedge and ditch considered and treated as the march fence, but adverse to his claim to have the ditch so cleaned as to carry off the water from the lands of Briechdyke. On appeal the Sheriff superseded consideration of the case, intimating in his note his opinion, that the pleadings would require to be remodelled.

The pursuer then brought the present action, the Sheriff court case being afterwards advocated *ob contingentiam*. The summons concluded for declarator, that the thorn hedge and ditch "form together the march fence betwixt the said properties, and is the common or mutual property of the pursuer and the defender: And further, that the pursuer and defender are bound to uphold and maintain the said hedge and ditch at their joint expense, and that the defender is not entitled to encroach upon or fill up the said ditch by his agricultural operations, or otherwise."

The pursuer averred, that the hedge and ditch formed the march fence, and were formed at the same time, and were one and the same operation, the thorn plants forming the hedge having been planted on the earth excavated and thrown out in forming the ditch, and that the hedge could not have grown up or thriven without the ditch; that this march fence, consisting of hedge and ditch, had fallen into great disrepair, but was quite capable of being thoroughly repaired;

---

[1] See previous report 2 Macph. 1015; 36 Sc. Jur. 510. S.C. 4 Macph. H. L. 5; 38 Sc. Jur. 223.