machinery of the steamer gave way, not from stress of weather or any external cause, but from inherent defects, though not attributable to any *culpa* on the part of the owners. It might be fairly argued in such a case that the owners of the steamer, having guaranteed her sufficiency for the employment, could not bring the case within the category of accident contemplated by the contract. But no such case occurs here; and it is unnecessary to pronounce on it by anticipation. It is not disputed that the hawser was quite sufficient at the commencement of the voyage. It broke by what I think must be held pure accident, probably in consequence of the severe strain occasioned by what seems to have been exceptionally boisterous weather. The case, therefore, I consider to fall directly under the provision of the contract, applicable to the case of an accident which results, not in the separation of the vessels, but in the steamer being detained for a longer or shorter time beyond the ordinary period of the voyage, in order to accomplish her undertaking. I conceive the extra charge to have become due, as found by the Lord Ordinary.

LORD PRESIDENT—The ground of the Lord Ordinary's judgment is, that the detention occurred by the breaking of the hawser, and that that did not arise from the fault of the defenders, but from accident, which, under the contract, renders the defenders liable in demurrage. The defence which appears to have been maintained in the Outer-House was, that this result was not pure accident, but was caused by the fault of the pursuers, and two propositions were submitted to the Lord Ordinary—(1) that the hawser was insufficient; (2) that the captain of the tug failed in his duty, after the hawser parted, of re-attaching the ships. As regards both of these grounds, I agree with the Lord Ordinary. There is no evidence that the hawser was defective; and, as to the re-attachment of the ships, I think the master of the tug is, in the first place, the proper judge of that being done. It would be unsafe to hold anything else. But it is objected that only one witness—the captain of the tug himself—speaks to this point, while there are several witnesses on the side of the defenders who are corroborated by the coast-guard men and other people that were making observations through telescopes from the shore. I don't say that I should not have listened to the defenders if they had been able to make out a clear case of neglect of duty. But in the circumstances of the present case, there being a whole gale of wind blowing, the captain was the proper judge of whether the ships could be safely re-attached or not.

The only remaining question arises under the conditions of the contract—(*refers to the agreement*). In case of accident two things are provided for—(1) that there is to be no extra charge; but (2), if in consequence of accident detention arises, that is to be paid for at the rate of £10 per day. The word accident is not a common one in maritime contracts, and is one of modern use. The older styles, with greater reverence, spoke of "the act of God," and "perils of the sea." I think that accident here means the same thing, and that it is impossible to construe this contract except as your Lordships have done. Nor do I see any want of equity in this construction. The service in which tugs are employed is one of considerable peril, and a stipulation of this kind is quite reasonable. It is easy, undoubtedly, to figure cases which might properly be called accidents which would not be within the contract. Any proper failure on the part of the tug, such as the breaking down of her machinery, would not be an accident for which she could claim demurrage. But here we have a pure accident, the hawser parting from the state of the weather, and for that the defenders have undertaken liability.

Adhere.

Agents for Pursuers—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders—J. & R. D. Ross, W.S.

OUTER HOUSE.

(Before Lord Jerviswoode.)

AITKEN *v.* DARLINGTON AND YOUNG.

Assessment—Annuity-Tax — Prescription — Exemption of a Member of Her Majesty's Household—Mode of Recovery. Held (by LORD JERVISWOODE, and acquiesced in), on construction of the annuity-tax of 1661, that errors committed in the course of following out the steps of procedure essential as warrants for the summary diligence provided by the statute, do not operate immunity from payment of the tax constituted by the leading enactment of the statute, and prevent recovery thereof by ordinary action.

These were actions at the instance of William Aitken, collector of the arrears of the annuity assessment for the city of Edinburgh, against (1) Henry Darlington, upholsterer in Edinburgh, concluding for payment of £80, 1s. 4d., as the amount of assessment due by them; and (2) Archibald Young, cutler at Edinburgh in ordinary to Her Majesty, for £48, 9s. 10d., being the amount of annuity-tax due by them, "under and in virtue of the following Acts of Parliament, viz., An Act of the Scottish Parliament, dated 6th June 1661, 7th Geo. III, cap. 27; 25th Geo. III, cap. 28; 26th Geo. III, cap. 113; 49th Geo. III, cap. 21 (28th April 1809); and 17 and 18 Victoria, cap. 91, and under and by virtue of a deliverance of the Sheriff of Mid-Lothian, dated 17th December 1855, fixing the rate at which the said assessment or annuity money should thereafter be leviable, and pronounced by the said Sheriff, under the authority of the last mentioned Act, on the petition of the Magistrates and Town Council of Edinburgh, for premises possessed by them within the royalty or extended royalty of Edinburgh."

Under the authority of the Acts mentioned, the magistrates were in use to appoint stent-masters for the purpose of making up a roll of and valuing the subjects from which the tax was exigible, and according to which the tax was exacted. This practice was continued down to 1855, when it was superseded by the new procedure introduced by the Valuation Act, 17 and 18 Vict. c. 91, sec. 39, the tax being thereafter levied according to the valuation-roll annually made up by the assessors for the burgh of Edinburgh, at the rate of 4¼ per cent., as fixed by the Sheriff of Edinburgh.

The defenders, after referring to the Acts of 1634, 1648, and 1649, set forth certain provisions of the Act of 6th June 1661 (2 Car. 265, 7 Thomson's Acts, 244), whereby it was *inter alia* provided "that the said annuity and imposition shall be laid upon all the inhabitants, tenants, and occupiers of all the saids houses within the said burgh, after exact survey, be four sworne men in every paroche who shall survey and value the house

maills aforesaid, whairof two shall be citizens, to be choisen and sworne be the Town Councill, and other two shall be nominat, choisen, and sworne by the Colledge of Justice, or such as they shall appoint; and the roll of the rents being subscrived by the saids four survayors in every paroche, shall be the unalterable rule of collecting for that year, except be warrand and authority of the commissioners underwritten, in so far as concerns the members of the Colledge of Justice; declaring that if the members of the Colledge of Justice shall either not accept, or not concur in the said employment being required, then and in either of the saids caises, the remanent of these persons choisen and sworne be the Town-Councill, shall have power to goe on in the said employment and act be themselffs without the members of the Colledge of Justice not accepting or concurring as said is." They contended that it was incompetent to dispense with the appointment of stent-masters in relation to the annuity-tax assessment; that all arrears prior to Whitsunday 1857 had prescribed under the Act 1669, c. 9; and contended further, with regard to the tax previous to 1858, that where the rolls had only been signed by one stent-master, or where the signature was that of a deceased stent-master and not proved to be authentic, the requirements of the Act 1661 were not fulfilled, and there was no proof of the debt. The defenders referred to *Winter* v. *Magistrates of Edinburgh*, 21 Dec. 1837, 16 S. 276; and *Ministers* v. *Magistrates of Edinburgh*, 6 Bell, 509. They also stated a preliminary plea of no title to sue.

The defender Young, for himself, further pled that as cutler to Her Majesty he was not liable for the arrears sued for, or any part thereof, and founded on the Acts 1592, c. 155; 1594, c. 225; 1597, c. 279; and 1681, c. 137.

THOMS for pursuer.

J. M'LAREN for defenders.

Aitken v. *Bryden*, 38th March 1861, 23 D. 888; and *Aitken* v. *Harper*, 16th Nov. 1866, 4 Macph. 36, were cited.

The Lord Ordinary repelled the first plea, as preliminary, and a proof was allowed.

Thereafter the Lord Ordinary repelled all the defences, and gave decree for the pursuer in both actions. The interlocutor in Young's case, except so far as it dealt with his special privilege, was the same *mutatis mutandis* as that in Darlington's case, which was as follows:—"*Edinburgh, 7th January* 1868.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, proof, productions, and whole process: Finds it proved, as matter of fact, that the defender has occupied premises within the royalty or extended royalty of the city of Edinburgh, as set forth in the condescendence for the pursuer (with the exception of the premises No. 7 Frederick Street, during the year ending at Whitsunday 1848, in respect of which an assessment is charged against the defender to the amount of £1, 11s. 2d.), during the periods, and of the annual value or rent set forth in the state of debts, or account, referred to in the summons, and as contained in the state No. 7 of process: And, as respects the matter of law raised on the record, repels the pleas stated in the defence, in so far as not already disposed of, assoilzies the defender from the conclusions of the summons in regard to the said sum of £1, 11s. 2d., with the interest thereon; *quoad ultra* decerns in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—This case has been argued by the parties in the course of a discussion which has relation, not only to the demand made under the summons against this defender, but to the cases of parties who have resisted the payment of the tax sued for in other actions of a kindred character, which are also now before the Lord Ordinary for judgment. But it was stated on behalf of the parties jointly, and as the Lord Ordinary thinks correctly, that with two exceptions,* a judgment pronounced here, would in effect establish a rule applicable to all now at avizandum.

"The Lord Ordinary shall therefore endeavour to explain, in brief terms, the main grounds on which he has here proceeded. These are to be found in the provisions of the statute of 1661, which contains the first and leading enactment under which the claim of the pursuer is rested. As the Lord Ordinary reads that statute, it contains a distinct and positive enactment to the effect that the 'yeerly stipends of six of the ministers of the said burgh shall be imposed upon and paid be the inhabitents, tennents, and occupyers of the several dwelling-houses, chambers, buiths, cellers, and all other houses, heigh and laigh, within the said town, without exemption or exception of and house whatsoever holding or nature the same be of, or of any persone or persons of whatsomever degree or quality, or place, on pretence of any priviledge or pretext whatsoever.'

"The statute contains further and anxious provisions, framed with a view to enforce payment of the annuity by summary process, 'but any interruption be suspension or other trouble.' But while the machinery of the law was thus to be brought into operation to enforce the fulfilment of the objects of the statute, the Lord Ordinary cannot read the statute so as to hold that the provisions framed for the secure and rapid recovery of the impost, entered, as conditions precedent in any sense, into the constitution, or were necessary to the validity, of the impost itself. That is enacted and secured under the leading provisions of the statute. Therefore, assuming that errors shall have occurred in the course of following out those steps of procedure essential as warrants for the summary diligence provided by the statute, such errors cannot, it is thought, suffice in any sense to operate absolute immunity from the radical obligation to make payment of the impost itself.

"If this be so, the judgment of the Court in the case of *Winter* v. *Magistrates of Edinburgh*, 21st December 1837 (16 S. 276), which was referred to in the course of the debate, has in truth no direct bearing on the matters with which the Lord Ordi-

* These exceptions were Young's case and another against M'Gregor of the Royal Hotel, in which the specialties relied on were—(1) That he was not the occupant but his customers (repelled in respect of Lord Cockburn's opinion in *Anderson* v. *Union Canal Company*, 12th January 1847, 9 D. 408); and (2) that the premises assessed were entered as No. 53 Princes Street, whereas his premises were not No. 53, but Nos. 51, 53, and 55. This latter specialty was—in respect it was proved to be one hotel which was composed of three houses, and that the entrance to the hotel was 53 Princes Street—also repelled.

nary has here alone to deal. For there the question arose under a suspension of a charge, and as in the matter of summary diligence, it was not surprising that the Court should interfere to arrest the diligence of the law, as the Lord Ordinary would certainly have been inclined to do, had the question with which he has to deal been presented in circumstances like to those which there existed.

"But if there be any point here which is at all affected by the views expressed by the Court in the case of *Winter*, it would seem to be that which falls within the matter of the reservation carefully made by Lord Mackenzie, in the course of his opinion, in relation to the right of the ministers themselves to insist for recovery of the arrears, and it is with reference to, and as having regard to that right alone, that the Lord Ordinary has here proceeded in sustaining the present ordinary actions against the defenders in this, and against those in the kindred actions now before him.

"These parties are, in respect of their occupation of premises within the city, burdened by statute with this payment, and it would require the statement of a strong case indeed on their behalf which would lead to the conclusion that they have obtained absolute immunity from payment of the impost now in question, through the failure in the statutory machinery which was created with a view to secure its collection by summary process.

"On the whole the opinion of the Lord Ordinary is, that in the present case, and in the other cases of the same class now before him, the defences must be repelled.

"But he trusts that, in arriving at that conclusion, he is giving no countenance to any doctrine which would go to support looseness or irregularity in the use of diligence, which must always proceed strictly in conformity with the rules under which it is authorised."

The defenders reclaimed, but did not insist in their reclaiming notes, which were accordingly, on 20th October 1868, refused (in Second Division as a transferred cause), with additional expenses.

Agents for Pursuer—G. & H. Cairns, W.S.
Agent for Defenders—J. D. Wormald, W.S.

Saturday, March 20.

FIRST DIVISION.

JENKINS AND OTHERS *v.* ROBERTSON AND OTHERS.

Caution for Expenses—Right of Way—Dominus litis—*Nominal Pursuer.* Pursuers of declarator of right of way ordered to find caution for expenses as a condition of the action proceeding, it being proved that these pursuers had no means of their own, and were put forward by other parties who desired to escape from liability for costs.

This was an action brought by William Jenkins, shoemaker in Elgin; William Halket, gardener there; and Alexander Youngson and Alexander Simpson, labourers in Lossiemouth, for the purpose of establishing a public right of footpath along the banks of the Lossie, through the lands of the defenders. The case has been repeatedly before the public, the House of Lords having repelled a plea of *res judicata*, founded on the proceedings in a similar case at the instance of the Magistrates of Elgin; and the points now before the Court were two pleas stated by the defenders, and amounting substantially to this—(1) That the present pursuers were not the true *domini litis*, and that the cause should be sisted until the true *domini litis* were called; and (2) that, at least in the circumstances, the pursuers ought not to be allowed to proceed without finding caution for expenses. The last defence was principally insisted in. The Court, recalling the judgment of Lord Jerviswoode, allowed a proof of certain of the defenders' averments. It appeared that one of the pursuers had withdrawn from the action, and that two of the others did not know whether they were still pursuers or not.

DUNCAN and RUTHERFURD for reclaimer.

SCOTT for respondents.

The following authorities were cited:—*Ball* v. *Ross*, 1 Scott. New Rep. C. P. 217; *Evans* v. *Reid*, 2 Adolph. and Ell. Q. B. 334; *M'Ghee* v. *Donaldson*, 1 June 1831, 10 S. 604; *Fraser* v. *Dunbar*, 6 June 1839, 1 D. 882; *Walker* v. *Wotherspoon*, 23 March 1843, 2 Bell Ap. 57.

The LORD PRESIDENT said that the pursuers were all in the position of working men, having no means but what they earned by manual labour. They sued a public right, and they had an undoubted title to do so. Jenkins, the pursuer, not only had a theoretically good title, but was practically, being a resident in Elgin, interested in the matter. There was no patrimonial interest on the part of the pursuers involved here. Now, it was completely established by the evidence that the pursuers did not furnish the funds for the litigation. The funds were raised by subscription, and the pursuers had been selected by this club of subscribers simply because they were poor men, and because, in the event of their failing in the action, the defenders would not get their expenses from them. Now, if the subscribers of the funds had themselves become pursuers, there would probably have been no room for the defenders' motion. But it was a very serious question when these subscribers proposed to put forward men with no means at all, in order to save their own pockets in the event of the defenders getting absolvitor,—and this apart from the peculiarities of the case, though this was undoubtedly a very hard case for the defenders. They had substantially succeeded in the former action, though unfortunately, owing to the way in which it had been ended, the matter was not *res judicata*. Formerly the pursuers were substantial; but here, unless the defenders' motion was granted, they, if successful in the end, would never get any of their expenses. In these circumstances it was just and equitable that the pursuers should find caution. There must be a power in every Court to give such an order, because the absence of it would lead to the most unjust and improper results.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—There cannot be any doubt that the Court has power to order security to be found for costs, as the condition of a litigation being allowed to proceed. The power is one which must be exercised with great discretion and care. But the possession of it is undoubted. An equitable arrangement as to expenses, either by payment or security, and either in whole or in part, as a condition of judicial procedure, pervades the whole of our practical jurisprudence.

At the same time, it is important that it should be clearly understood that poverty in a ligitant is, by itself, no ground whatever for obliging him to find security for expenses. Some additional ele-