Tuesday, June 22.

SECOND DIVISION.

HOGG *v.* PAROCHIAL BOARD OF AUCHTERMUCHTY.

Process—Competency—Declarator.

Held (diss. Lord Ormidale) that it was competent for a minister assessed under statute for school-rates in respect of his manse and glebe to raise the question of exemption by action of declarator.

School—35 and 36 Vict. c. 62, sec. 44—School-Rates—Minister.

The Education Act (Scotland) 1872 enacts, *inter alia*—"The school-rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate." *Held* that the privilege of exemption enjoyed by ministers from the burden of poor-rates was not extended by this clause to the case of school-rates.

The Reverend David Hogg, minister of the parish of Auchtermuchty, in the county of Fife, having been assessed by the parochial board of that parish for school-rate under the Education (Scotland) Act 1872 (35 and 36 Vict. c. 62, sec. 44), in respect of his manse and glebe, was sued for the amount in the Small Debt Court of the Sheriff of Fife; decree was pronounced against him by the Sheriff (CRICHTON), reversing the judgment of the Sheriff-Substitute (BELL), on 16th September 1879. He accordingly raised an action of declarator in the Court of Session against the school board and the parochial board of the parish, craving that the decree might be reduced, and that it should be declared that he was exempt from liability for school-rate in respect of his manse and glebe.

He founded on section 44 of the Act of 1872, and pleaded—"(1) The said decree being illegal and unjust, in respect the pursuer, as a parish minister, is exempt from liability for school-rates, the pursuer is entitled to decree of reduction as concluded for. (2) The pursuer, as minister of the parish of Auchtermuchty, being exempt from school-rate or assessment, under 'The Education (Scotland) Act 1872,' in respect of his manse and glebe, is entitled to decree of declarator in terms of the conclusions of the summons."

The defenders, on the other hand, pleaded that —(1) The action was a declarator of the meaning of an Act of Parliament, and should be therefore dismissed. (2) The decree sought to be reduced was in all respects regular and well founded.

Section 44 of the Education (Scotland) Act (35 and 36 Vict. c. 62) enacts—"Any sum required to meet a deficiency in the school fund, whether for satisfying present or future liabilities, shall be provided by means of a local rate within the parish or burgh in the school fund of which the deficiency exists. The school board of each parish and burgh shall annually, and not later than the 12th day of June in each year, certify to the parochial board or other authority charged with the duty of levying the assessment for relief of the poor in such parish or burgh, the amount of the deficiency in the school fund required to be provided by means of a local rate, and the said parochial board or other authority is hereby authorised and required to add the same under the name of 'school-rate' to the next assessment for the relief of the poor, and to lay on and assess the same, one-half upon the owners and the other half on the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and to pay over the amount to the school board; and where any burgh, parish, or school district with a school board under this Act, shall include two or more parishes or parts of two or more parishes having separate parochial boards under the Act of the eighth and ninth years of the reign of Her present Majesty, chapter eighty three, the school board shall certify to the parochial boards of such parishes respectively the amount of the rate on each pound of rental which they shall lay on and collect as 'school-rate' along with their several assessments for the relief of the poor within such burgh, parish, or school district for which the school board acts; and any surplus in the school-rate which may arise in any one year shall be applied for the purposes of the succeeding year, and in like manner any deficiency which may occur in any year may be included in the assessment for the succeeding year; and should there be no assessment for the poor, or should that assessment not be laid one-half on the owners and the other half on the occupiers of all lands and heritages within such parish or burgh, the school board shall be entitled and bound directly to assess for and levy the said school-rate in the same manner as if it were poor's assessment duly authorised to be assessed and levied in the same manner, and for that purpose shall have all the powers and authorities of any parochial board or other authority with respect to assessing, levying, and collecting poor's assessment, and the school-rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate."

The Lord Ordinary (CURRIEHILL) found in terms of the declaratory conclusion of the summons, and added the following note:—

"*Note.* . . . . . The pursuer during the debate intimated that he did not now insist on the reductive conclusion, but he pressed for decree of declarator—while the defenders, who are the School Board of Auchtermuchty, the parochial board of that parish, and the collector of the rates, maintain (1) that the declarator is incompetent in respect it asks the Court to declare the meaning of an Act of Parliament, and (2) that on the merits the pursuer is not entitled to exemption.

"In support of their plea of incompetency the defenders found upon the cases of *Todd and Higginbotham* v. *Burnet*, 16 D. 794; and *Stewart* v. *The Parochial Board of Keith*, 8 Macph. 26. It is true that in these cases opinions were pronounced by the Court unfavourable to the competency of an action for declaring the meaning of an Act of Parliament, but I am inclined to think that in the case of *Todd* the Court were mainly influenced by the fact that proceedings were at the time in dependence in the Dean of Guild Court in Glasgow, in which the question

was competently raised, as to the scope and operation of the Act in question, viz., a Smoke Prevention Act, and they declined to anticipate the decision of that Court. It would also seem that the Court were to some extent influenced by the very broad terms in which the decree was there sought. In the case of *Stewart*, in like manner, the Court refused to pronounce decree of declarator as to the mode in which a parochial board should fix the deductions authorised by the Poor Law Act of 1845 to be made from the gross rental before imposing assessment for poor-rates. But in that case the Court thought (1) that the construction which the pursuer sought to place on the statute was erroneous; (2) that the remedy of suspension to which the pursuer had actually resorted was in the circumstances the proper remedy; and (3) that the declarator was an attempt on the part of the pursuer to dictate to the parochial board the manner in which they should exercise the discretionary power of making deductions conferred on them by the statute.

"On the other hand, the pursuer refers to the case of *Cowan* v. *Gordon*, July 9, 1868, 6 Macph. 1018, as an instance in which the Court, in an action of declarator at the instance of a parish minister seeking exemption from a road assessment under an Act of Parliament, seem to have considered such an action competent; see also the *Edinburgh Street Tramway Company* v. *Torbain*, 3 R. 655. It humbly appears to me that the present question is competently raised by the pursuer in this action of declarator. The question is a simple one, involving no specialties, and the decision, whatever that may ultimately be, will regulate the future practice in almost every landward parish in Scotland. Hitherto the practice has been very conflicting, the Sheriffs of several counties having decided the question in favour of the ministers, while as many have decided it the other way. And as the amount of assessment on the minister is generally of small amount, the review of this Court cannot be obtained by way of suspension or reduction. It appears to me to be desirable that the question should be settled once for all by an authoritative judgment of this Court. I am therefore for repelling the objection to the competency of the declarator.

"On the merits the pursuer maintains that he is exempt from the burden of school-rate, and that the parochial board have exceeded their powers altogether in imposing any assessment upon him. In approaching the consideration of this question it is necessary to bear in mind that under the laws in force for the relief of the poor prior to 1845 parish ministers had by long usage been exempt from the burden of poor-rates in respect of their manses and glebes, or of their means and substance. And in the case of *Cargill* v. *Tasker*, February 29, 1816, Fac. Coll., the Court pronounced a judgment to that effect, holding that in the sense of the earlier statutes the minister was neither an 'heritor,' a 'tenant,' nor a 'possessor.' After the passing of the Poor Law Act of 1845 (8 and 9 Vict., cap. 83) the question was again raised in the case of *Gibson* v. *Forbes* (1 Macq. App. p. 106), and the House of Lords, affirming the judgment of this Court, held that parish ministers were not liable to be assessed for poor-rates under that statute in respect of their manses and glebes. That statute authorised assessments for the relief of the poor to be imposed in various ways, one of these being by an assessment on all lands and heritages in the parish, whereof one-half should be laid on the owners and the other half on the occupants thereof, 'owners' being declared to include the 'persons actually in receipt of the rents and profits of the lands,' &c. According to another mode, the assessment might be imposed upon the inhabitants according to their means and substance, and it was expressly enacted that ministers should be liable to be assessed in respect of their stipends, which were regarded as forming part of their means and substance. The House of Lords held that while the term 'owners' might of itself be held to be wide enough to include ministers, the express enactment that ministers should be liable to be assessed upon their stipends showed that it was not intended to do away with the exemption from assessment in respect of their manses and glebes which they have from time immemorial enjoyed.

"Such being the position of parish ministers under the existing poor laws, the Education (Scotland) Act 1872 was passed, which provides in section 44 that any deficiency in the school fund is to be provided by means of a local rate within the parish or burgh in which the deficiency exists. The school board is annually to certify the amount of deficiency to the parochial board or other authority charged with the duty of levying the assessment for the relief of the poor, and the parochial board or other authority is to add the local rate under the name of school-rate to the next assessment for the relief of the poor, and is to 'lay on and assess the same—one-half upon the owners and the other half on the occupiers of all lands and heritages—and to levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and to pay over the amount to the school board.'

"If there had been nothing more in the Act I should have had much difficulty in holding that ministers were not liable as owners or occupiers of their manses and glebes, which are undoubtedly lands and heritages producing profits. But the subsequent portion of sec. 44 appears to me to have the effect of restricting the assessment for school-rate to the owners and occupiers of lands and heritages assessable for poor-rates. Thus it is provided that 'where any burgh, parish, or school district with a school board under this Act shall include two or more parishes or parts of two or more parishes having separate parochial boards under the Act of the eighth and ninth years of the reign of Her present Majesty, chapter 83, the school board shall certify to the parochial boards of such parishes respectively the amount of the rate on each pound of rental which they shall lay on and collect as "school-rate" along with their several assessments for the relief of the poor within such burgh, parish, or school district for which the school board acts.' It appears to me that the 'rental' on which the school-rate is to be 'laid on' is just the rental on which the poor-rate is assessed, *i.e.*, the whole rental of the parish, excluding the rent of the manse and glebe; whereas, if the defenders are right, it must mean the rental of the parish, including the rent of these subjects. This I do not think can have been intended, and it would be contrary to what I conceive to be the sound construction of the statute.

"But section 44 goes on further to enact that 'should there be no assessment for the poor, *or should that assessment not be laid one-half on the owners and the other half on the occupiers of all lands and heritages within such parish or burgh*, the school board shall be entitled and bound directly to assess for and levy the said school-rate in the same manner as if it were poor's assessment duly authorised to be assessed and levied in the same manner, and for that purpose shall have all the powers and authorities of any parochial board or other authority with respect to the assessing, levying, and collecting poor's assessment, and the school-rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate.'

"Now, the first observation suggested by the words just recited, and especially by the words which I have italicised, is, that if the words 'owners and occupiers of all lands and heritages' in the early part of the section are to be read as including parish ministers, they must be read in the same sense in this part of the section. But the result of so doing would be to throw upon every school board in the kingdom the duty of assessing for school-rate independently of the parochial board, because in no parish is any part of the poor-rates raised by assessment on 'all lands and heritages' if manses and glebes are to be held to be lands and heritages within the sense and meaning of the Education Act of 1872. In short, the object of the statute, which was to avoid the expense and complication of double assessments and collection, would be entirely frustrated. I think that the words 'owners and occupiers of all lands and heritages' must be read in all parts of section 44 in the restricted sense in which they are obviously used in the latter part of it, viz., as embracing only those owners and occupiers who are liable to assessment for poor-rates.

"The second observation suggested by this part of the Act is entirely constructive of the first, because the powers given to a school board which may find it necessary to assess directly for school-rate are co-extensive with, and neither more nor less than, those which are vested in parochial boards in connection with the assessment for the relief of the poor. Without repeating the words of the section which have been already recited, I am of opinion that the school board could not in the circumstances supposed lay an assessment for school-rate upon any person upon whom the parochial board would not have power to lay an assessment for the poor; and as the laws applicable to the imposition, collection, and recovery of the latter assessment by parochial boards do not reach ministers in respect of their manses and glebes, it seems to follow that they cannot authorise the imposition of school-rate upon ministers when that rate is to be imposed by the school board. In short, I am of opinion that this part of section 44 not merely indicates the machinery by which school-rates are to be imposed and levied, but defines the limits within which the tax is to operate. Liability for poor's rate is to be the measure of the liability for school-rate, and those persons who are by law exempt from liability for the former are likewise exempt from liability for the latter.

"The pursuer will therefore obtain decree of declarator with expenses, but subject to modification in respect of his failing to maintain the reductive conclusions of his summons."

The defenders reclaimed, and argued—(1) It was incompetent to bring an anticipatory action of declarator to interpret an Act of Parliament. The proper course was to wait till charged to pay, and then bring a suspension of the charge—*Todd and Higginbotham* v. *Burnet*, 16 D. 794, and 26 S.J. 374; *Stewart* v. *Parochial Board of Keith*, Oct. 16, 1869, 8 Macph. 26. (2) Under the existing poor-laws ministers have in respect of their manse and glebe been exempt from the burden of paying poor-rates laid on the owners and occupiers of lands and heritages. The Education Act of 1872 by enacting that "the school-rate shall be in all cases levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate," clearly meant to extend their exemption to the case of school rates—the word "imposition" refers to the incidence of the assessment, and is equivalent to "liability for."

The pursuer argued—(1) The action of declarator was competent—*Cowan* v. *Gordon*, July 9, 1868, 6 Macph. 1018; *Edinburgh Street Tramway Company* v. *Torbain*, May 18, 1876, 3 R. 655—aff. July 6, 1877 (H.L.), 4 R. 87; *The University of Edinburgh* v. *Greig*, July 20, 1865, 3 Macph. 1151; *Gardiner* v. *Commissioners for the Harbour and Docks of Leith*, June 17, 1864, 2 Macph. 1234—aff. March 12, 1866 (H.L.), 4 Macph. 14; *Wallace* v. *Fraserburgh Harbour Commissioners*, Jan. 27, 1877, 4 R. 368. (2) The privilege of exemption from poor-rates, which was a class one, depending for its existence not on statute but on immemorial usage, was not extended by section 44 of the Education Act. The word "imposition" referred to the rating authority and the machinery for laying the rate on those subject to it.

At advising on the preliminary plea for the defenders—

Lord Gifford—The question which the pursuer has raised in the present action is as to whether he as a parish minister is liable to be assessed in respect of his manse and glebe for school-rate under the Education (Scotland) Act 1872? Though admittedly an important and serious question, it is said that it is not competent to raise it anticipatorily by a declaratory process. Why? In general it is quite competent, and the advantage of such a process has often been commented upon. Why should this serious question, affecting as it does hundreds of parishes in Scotland, not be raised by the particular action of declarator? It is said that it is incompetent because it is virtually an action declaratory of the meaning of an Act of Parliament. There may be foundation for that if the party raising the action puts it in terms not to go beyond his own interest, and I quite sympathise with the grounds of the judgment given in the case of *Todd and Higginbotham* v. *Burnet*, but the conclusions in the present action are of quite a different nature, for here the pursuer only asks to have it declared that he is exempt from liability for school-rates or other assessment exigible

under the Education (Scotland) Act. Nothing can be more narrow. It is merely saying that you (the parochial board) shall not assess me. On the other hand, it is a very hard plea to take that a man should never have the power of declaring by anticipatory process his exemption from a burden which he does not think justly rests upon him. Such a formidable plea as this would cut out many declarators which are quite familiar at the present day. But it is said it has been already decided that the action is incompetent—the cases founded upon being *Todd and Higginbotham* v. *Burnet*, and *Stewart* v. *The Parochial Board of Keith*. I need only say with reference to these that I quite agree with what the Lord Ordinary has said in his note. They are both of them special cases decided on specialties, and can have no weight as applied to the present case. I am of opinion, then, that the pursuer has quite competently raised the present action of declarator.

Lord Young—This objection is a formal one, in which the party pleading it has no interest whatever, although if it is good his want of interest is his affair, and he is at liberty to state it. I put it to the defender's counsel whether the Court had not jurisdiction to entertain the question raised between the parties, and whether that question was not to be argued and decided here on the very same grounds on which it must be argued and decided whatever the form of action? Yes. What question then is there? Simply this, that it ought to have been raised in the form of a suspension. It was to be tried by the same Court, the same parties, and the same costs were to be awarded. I asked further what difference does it make if the action takes the form of a declarator, and got the answer that in one caution for the costs is provided and not in the other. But the pursuer said you shall have your caution if you wish it. Mr Asher in fact appeared ashamed to urge the plea, as he stated that he did it in obedience to his client's instructions; that he had no interest in urging it is obvious. But it is said that the Court had decided in two cases that such an action is incompetent, and therefore idle as the objection is we must entertain it. Now, I agree with Lord Gifford that both the cases cited are inapplicable to the present, but I shall confine my observations to the case of *Todd* v. *Burnet*, and I think I can show to demonstration that this case does not apply in the present.

There were conclusions in that case, the first being a general declarator of the meaning of a public statute, and certainly a conclusion of that nature is unprecedented so far as I know. Taken alone, the plea was in these terms, "that the enactments in section 22 of Statute 7 and 8 George IV., c. 43, did not extend or apply to certain manufactories erected prior to the passing of the said Act, although otherwise of the character and description therein specified." This is the only part of the conclusion of which it could be predicated that it was a general declarator of the meaning of a public statute, and I think that with that alone it might quite properly have been thrown out. But then there was another plea—"and in particular that the said provisions and enactments do not extend or apply to the power-loom cloth manufactory situated in Commercial Road, Hutchisontown of Glasgow, occupied by the pursuers, or to the fire-engines and steam-engines used therein, or the fire-places or furnaces and chimneys of such steam-engines, and other works forming part of or connected with the said power-loom cloth manufactory, the same having been erected prior to the passing of the said Act." Now, on this latter plea the facts were that there had been a previous action in the case—Burnet, as Procurator-Fiscal of the Dean of Guild Court, had presented a petition to the Dean of Guild against Todd, founded on the statute. Todd had brought a note of suspension and interdict against these proceedings, but the note had been refused. That being so, a plea in a second action to the effect that it was incompetent for the Dean of Guild to make a remit to engineers and pronounce any decree under the statute was, as Lord Ivory said, merely trying the action of suspension and interdict over again; for the Dean had remitted to an engineer to inspect, and when the Lord President decided the note of suspension he said he saw no ground to interfere with his doing so. In these circumstances the Court refused to entertain the action on the first plea as unprecedented, and refused to entertain it *quoad ultra* as being merely a suspension and interdict in another form. I therefore agree entirely with Lord Gifford that this case is not in point at all.

The pursuer here is quasi-proprietor (he has the freehold as they would say in England) of certain land and heritage in virtue of his office. The defenders say that as owner and occupier of property he is under a continuing liability to pay annually certain burdens attaching to it. He brings this action with a declaratory conclusion that he is not so liable. I cannot figure a more proper subject for an action of declarator. Whether the question of this liability depends on common law or statute law, or (what is more common) both combined, it does certainly depend on the law which is administered in this Court, and which it is our business to decide on as affirming the rights of parties. If a party kicks before he is spurred, and brings an action in Court anticipatory of demands not yet made, we can throw it out as idle whether the legal right depends on statute or on common law; but here the pursuer has not only been threatened but the annual payment has been exacted, and he now wishes the legal question settled whether the exaction has been made according to law or not. That certainly is not crying out before he is hurt, but the defenders say, "Wait till you are hurt; again." But almost the only virtue of an action of declarator is that a party may have a decision by anticipation as to his legal rights, not as needlessly alarmed, but properly, if the law be as he alleges it.

Now, if the law be what the pursuer states, it is certainly not right that he should be harassed in future. The question is of serious importance to him. His rights do not altogether depend on statute law. The statute of 1872 refers to common law as the criterion of liability. Thus you introduce common law in a moment in the determination of the question of liability. Why, then, not make it the subject of an action of declarator? I never could find a ground for doubting that you can do so, and I was surprised when I saw the Lord Ordinary entertaining the doubt. I am

prepared to lay down this general principle, that a declarator of liability on the one hand, or of exemption on the other, to a continuing money claim—whether that liability depends on the application of statute law or of common law to the facts of a particular case—may be always raised in the form of a declarator, and I do not think that either of the cases quoted touches that rule.

Lord Ormidale—As I understand the opinions of both your Lordships, you would hold it not to be competent for an individual to bring an action of declarator purely to have a particular clause of an Act of Parliament determined, but that the present action is one of a totally different nature, and has been competently raised. If I could see this I should be of the same opinion, but as I view the summons it is a general declarator to interpret an Act of Parliament, though it is true the pursuer in conclusion refers to his own glebe and manse to give him the right to seek this interpretation. There is nothing peculiar with reference to his manse and glebe to allow him to say he is exempt, and therefore I think the Lord Ordinary is right when he says that the question as concerns him is a simple one involving no specialties. It is a startling thing to me to hear that any individual who may fancy he is subject to taxation under a particular Act of Parliament may bring an action of declarator to have that Act interpreted, and I cannot think that it is recognised by any authority, but is directly opposed to the principle founded on in the two cited cases—and indeed there is a reason why it should be so. The pursuer is here going beyond his own interest in bringing this action. It is on this ground, then, that I entertained doubts as to the decision to be pronounced here on the views of both your Lordships. It is nothing more or less than a declarator in the abstract of the interpretation of an Act of Parliament, and the defenders have an obvious interest to say that the action is incompetent. The best answer that could be made is, look at the Act of Parliament yourself, judge for yourself, and do not come here at all.

On these grounds the cases cited are conclusive to me, and I therefore must dissent from the views which your Lordships have expressed on the competency of this action.

The judgment of the Court on the merits of the case was delivered by

Lord Young—The question presented to us for decision is, Whether or not the privilege enjoyed by parish ministers of exemption from poor's assessment in respect of the ownership and occupation of their manses and glebes extends to the school-rate under the Education Act 1872?

The question depends on the meaning and effect of the rating clause (sec. 44) of the Education Act, and in judging of it we must attend to the whole language of the clause, taking note of such particular words and expressions as are especially relied on in support of the extension contended for. I have done so to the best of my ability, and will now state what appears to me to be the general import of the clause, and express my opinion as to the meaning and effect of the particular words and expressions mainly founded on by the pursuer.

The sum to be raised by rating in any year is to be determined by the school board, and the rate is to be laid "one-half on the owners and the other on the occupiers of all lands and heritages." To these fundamental provisions there is, I think, no exception. It was the fact that the assessment for relief of the poor was generally, and for the most part, although not universally, "so imposed and levied," *i.e.*, "one-half on the owners and the other half on the occupiers of all lands and heritages." These words, indeed, are taken from the Poor-Law Act 1845. Accordingly, with a view to economy, or as the Lord Ordinary expresses it, "to avoid the expense and complication of double assessments and collection" in cases where the poor's assessment "is so imposed and levied," the school board is directed to certify to the parochial board the amount of school-rate to be raised, and the duty of imposing it on the individual ratepayers, and collecting and recovering it from them, is put on the parochial board, who are required to pay the produce to the School Board. The expense of collecting the school-rate is thus saved whenever it can be collected "along with" the poor-rate, as it now always can be, and as generally, and for the most part, it could be under the law as it existed in 1872. I think it clear that this was the only purpose of the reference to the poor's assessment, and of the provision for simultaneous collection. But, as I have observed, the poor's assessment although generally was not under the law as it existed in 1872 universally laid one-half on the owners and one-half on the occupiers of all lands and heritages. In some parishes it was laid on income (means and substance). In others it was laid partly on means and substance and partly on rental of heritage. In others, again, it was laid on according to various local customs. It was, however, intended and provided that the incidence of the school-rate should be invariable, and not subject to the varieties attending the incidence of the poor's assessment, or the changes that might be made on it from time to time in particular parishes under the Act of 1845. Accordingly, it is provided that "should that assessment not be laid one-half on the owners and the other half on the occupiers of all lands and heritages" (the invariable incidence of the school-rate), the school board shall themselves directly assess for and levy the school-rate "as if it were poor's assessment duly authorised to be assessed and levied in the same manner," *i.e.*, one-half on owners and one-half on occupiers of lands and heritages. The expense of a separate collection cannot in this case be avoided, and so the rate will be slightly increased, but the incidence remains the same, and to maintain it wherever that of the poor's assessment was different was plainly the whole object of the provision. The school board is in this case necessarily armed with the powers essential to a rating authority, and this is done briefly by reference to the powers of parochial boards as the rating authority under the Poor Law Act.

I have purposely omitted to notice the provision for the case where a burgh, parish, or school district includes two or more parishes, or parts of parishes having separate school boards, as it seems to me to have no bearing on the case, and indeed was admitted by the pursuer's counsel to have none. In other respects I have examined

the whole clause and stated my opinion of its meaning and effect.

Before proceeding to notice the particular words and expressions mainly relied on by the pursuer, and the judgment of the Lord Ordinary, I think it will be convenient to consider the character of the pursuer's privilege of exemption from poor's assessment which he asks us to extend to the school-rate.

It is, I think, undoubtedly a class privilege, which the pursuer enjoys only as an individual member of the class, and does not attach to the parish manse and glebe in whose hands soever they may be, but only to his own ownership and occupation of them as parish minister. If he let the manse to a householder, or the glebe to a neighbouring farmer, it is not, I suppose, doubtful that his tenants would be liable to poor's assessment as occupiers of these lands and heritages. The ownership of manses is probably inalienable, though the right of occupation is not, but glebes may be feued or long leased to the effect of subjecting the feuars and leaseholders to assessment as owners. It is, however, unnecessary to press or dwell on this topic, the conclusion that the privilege of exemption is personal to the minister being otherwise clear. Now, this personal, or rather class, privilege stands on ancient usage, *i.e.*, on customary or common law, according to a well-known principle of which the usage is the measure of its extent. But according to this measure the extent is clearly limited to poor's assessment.

But it was contended that the privilege so limited to begin with is extended by these words with which section 44 of the Education Act concludes—"And the school-rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the poor rate"—the word chiefly relied on being "imposition," which it was urged refers to the incidence of the assessment, and is equivalent to "liability for." I think this is not the meaning of the word, and certainly not the sense in which it is here used, and it is indeed manifest that taken in this sense it would be repugnant to and defeat the whole scheme of the clause by making the incidence of the school-rate vary with that of the poor's assessment—a result which is carefully and even elaborately guarded against by the direction to school boards to be themselves the rating authority, and themselves to assess and levy the rate directly wherever the incidence of the poor's assessment does not exactly correspond with that which is enacted for the school-rate. The word "imposition," like the words "collection and recovery" which are associated with it, refers to the rating authority, and to their proceedings in allocating or laying the rate on those who are subject to it, which though a formal and simple is a necessary preliminary to collection and recovery. It was observed that as a rating authority cannot effectually impose a rate on a person who is not liable to be rated, liability is a condition of effectual imposition. That is not an argument, but only a captious remark. Assuming liability, it is necessary that the rate shall be duly and formally laid on or imposed, by the proper authority, and that they or their officers shall proceed regularly in the matter of collection and recovery. These are usually subjects of statutory provision, and the purpose of the words founded on is to apply to the school-rate the provisions on these subjects which shall for the time be applicable to poor's assessment.

The Lord Ordinary observes that it appears to him "that the 'rental' on which the school-rate is to be 'laid on' is just the rental on which the poor-rate is assessed, *i.e.*, the whole rental of the parish excluding the rent of the manse and glebe." But the rent of the manse and glebe is not excluded even for the poor-rate unless they are owned and occupied by the minister, in which case his privilege of exemption if pleaded is allowed according to ancient usage, and to assume that an equivalent privilege is to be allowed with respect to the school-rate is to assume the affirmation of the question in dispute. For my part, I see no reason for thinking that such extension was intended, and I cannot imply it from the reference to the poor's assessment and the provision for simultaneous collection in cases where its incidence happens to concur with that enacted for the school-rate, the reference and provision being purely economical—to save the trouble and expense of a double collection—a purpose quite foreign to the subject of personal or class privileges of exemption standing on the common law.

But a convincing argument, in the Lord Ordinary's opinion, is afforded by the provision that when the poor's assessment is not laid "one-half on the owners and the other half on the occupiers of all lands and heritages within such parish or burgh," the school board shall directly assess and levy the school-rate. The argument is, that if you read the words "all lands and heritages" with a tacit exception of manses and glebes, the ministers will escape under the early part of the clause, and if you read them without that exception the school board will themselves have to assess and levy the school-rate in all cases, whereby "the object of the statute, which was to avoid the expense and complication of double assessments and collection, would be entirely frustrated." Mr Trayner declined to maintain this argument before us, and I agree with him that it is untenable. The words "all lands and heritages" are taken from the clause of the Poor-Law Act (1845), which specifies the several modes of assessment, and are exactly accurate only if taken to be used (as in truth they are) without reference to privileges of exemption standing upon usage or otherwise. They are substantially accurate, and intelligibly and sufficiently express a mode of assessment notwithstanding that some privileges of exemption may exist. There are indeed lands and heritages in every parish which are exempt from all rates and taxes. The parish church and churchyard are familiar examples; these are exempt by usage. Other heritages, such as dissenting places of worship, are exempt by statute.

The case is interesting chiefly as referring to the solitary survival, at least so far as I know, of a class privilege of exemption from taxation. In 1845, when the poor law was amended, it escaped the destruction which has in one way or other overtaken all its kind and species. It did so by what is generally, and probably rightly, regarded as a blunder in the Act of that year, viz., a declaration, not seemingly favourable to parish ministers although it proved to be so, to the effect that they should be liable to be assessed on their

stipends. This being an express partial repeal of their privilege of exemption, was held to imply that it should in other respects continue to subsist, and they have enjoyed the benefit of the implication ever since. Such privileges, which are necessarily enjoyed at the cost of others, are in their nature invidious, and are regarded with disfavour in these days, and the wonder is, not that all but this have disappeared, but that this has been so long lived. The demand now is for its extension, and although irrespective altogether of its invidious character I can find no good grounds for the demand, I think it proper to say that *in dubio* I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.

In my opinion, the interlocutor of the Lord Ordinary ought to be reversed and the defenders assoilzied from the action with expenses. Had any expense been occasioned by the defender's objection to the competency of the action, I should have recommended it to be taken account of by allowing a modification, but plainly it only somewhat prolonged, without adding to the expense of, the one debate in the Outer House and here which necessarily took place. The expense of a separate appearance for the school board ought not in my opinion to be allowed. They, as the statutory trustees of the ratepayers under the Education Act, ought clearly to have concurred in a common defence with the parochial board, who are mere collectors. Neither board had more interest than the other, *i.e.*, neither had any interest at all except the discharge of a public duty, to see that a question of interest to the ratepayers was fairly tried. Separate appearances were quite unwarrantable.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied both defenders.

Counsel for Pursuer (Respondent)—Trayner—J. A. Reid. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defenders (Reclaimers)—Asher—Millie. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff of Midlothian.

SMITH AND OTHERS *v.* SMITH.

Executor — Incomplete Inventory — Remedy of Next-of-Kin where Deceased Intestate—Confirmation.

Where an executor-dative of a person who has died intestate has omitted from the inventory given up for confirmation effects belonging to the deceased, it is competent for the next-of-kin as being creditors—(1) To confirm to such effects as executors *ad omissa*; or (2) to bring an action against the executor for the value of the effects omitted, if his intromissions therewith can be proved.

Robert Smith, baker in Edinburgh, died intestate in June 1879, and his youngest son Robert Smith was decerned executor-dative to him. The inventory given up by him specified estate to the value of £6. For some years previous to his death the deceased was blind, and resided with his son Robert. In December 1879 an elder son Richard Smith, for himself, and as factor and attorney for his brother Peter Smith, miner in Pennsylvania, and a daughter Mrs Ann Smith or Anderson, with consent of her husband Thomas Anderson, raised this action against their brother Robert, as executor of their father, in the Sheriff Court of Midlothian, for production of his executry accounts, and for payment of the sum of £40 to each of the three pursuers, which they alleged was due to them as next-of-kin of their father on a true accounting of his estate. Alternatively they concluded for payment of a sum of £50 each in the event of failure to account. They alleged that Mrs Catherine Smith or Anderson, a widow, their sister, who had died on 8th January 1879, had left a will under which the defender was appointed executor, whereby she bequeathed her whole estate, excepting a certain legacy to her father, to her brothers and sister in equal shares; and that the defender had obtained not only his own share of one-fifth of this estate, but had also appropriated that of his father, who had, as above mentioned, lived in the same house with the defender. This share of Mrs Anderson's estate, as well as a quantity of household furniture, belonged, the pursuers alleged, to their father at his death, and ought to have been accounted for by the defender. The defender stated in defence that the burden of his father's maintenance for several years before his death had fallen upon him and that his father had handed to him on its receipt his share of the deceased Mrs Anderson's estate in part payment of the cost of his maintenance. The defender produced an account of his intromissions, and also an account between himself and the deceased, bringing out a balance due to him of nearly £300.

The Sheriff-Substitute (HALLARD) on 4th February 1880 dismissed the action, adding this note—

"*Note.*—This is an action at the instance of two brothers and a sister against their brother, the defender, as executor-dative of their father the late Robert Smith, who died intestate on 27th June last. The inventory discloses an estate amounting to £6.

"The pursuers' complaint is that this sum by no means truly represents the estate which the deceased died possessed of, and which truly fell into the hands of the defender as his executor. Except on one point their averments are very vague. The one point on which a definite issue is joined between the parties is as to a certain share which fell to the deceased from the inheritance of a daughter who predeceased him, a Mrs Catherine Smith or Anderson, whose settlement is in process. The defender was executor-nominate under that settlement, and had also produced his confirmation and relative inventory in that capacity. He distributed that estate in terms of that settlement, and there is no dispute on that point, the pursuers' discharges as parties interested therein being also produced in process. A part of that estate fell to the father of the parties. The defender says it was more than ab-