Valuation Act viz., 'the rent at which, one year with another, such land and heritages might in their actual state be reasonably expected to let from year to year,' It is not impossible however, to apply that standard to the present case. A tenant would scarcely be found to enter upon the works in question at a loss to himself, but a tenant might be found to carry them on without gain. The corporation is in fact its own tenant on these terms. What the tenant in such case could reasonably be expected to give as rent is just what he received less the rent of management and maintenance, and what the tenant paid and the landlord received under such an agreement would be the gross rent. I agree in the opinion of Lord Fraser and Lord Kinnear [*ante*, vol. xxii. p. 10, and p. 114] that the yearly rent or value of the works in question is the income derived from the rates after all necessary outlays have been met. Rates and taxes, however, stand in a different position. These are imposed on landlord and tenant in a certain proportion. That which is imposed on, and may be directly recovered from, the landlord as such, cannot be said in any view to be tenants' expenditure, and cannot, in my opinion, be allowed as a deduction from gross rent. I have allowed therefore a deduction—one-half of the amount paid or payable as rates or taxes in respect of the heritages in question, the assessor informing me that that is the amount fairly chargeable against the tenant."

Gasworks.

"Finds (first) that in fixing the annual rent or value of the lands and heritages in question deduction should only be allowed of a proportion of the rates and taxes paid in respect of such heritages, being the proportion payable by a tenant: Finds (second) that the amount to be deducted in respect of such proportion of rates and taxes is the sum of £14,371, 15s. 7d. sterling, being three-fourths of the whole amount of the rates and taxes paid or payable in respect of said heritages: Finds (third) that the deduction of £449, 13s. 2d. on account of law and parliamentary charges should not be made; to this extent and effect sustains the appeal; *quoad ultra* dismisses the same, and remits to the assessor to amend the valuation in accordance with the interlocutor.

"*Note.*—No explanation was offered as to the circumstances under which, or the purpose for which, the charge for law and parliamentary expenses was incurred; *prima facie* these are landlord's, not tenant's, charges, and I disallow them as deductions in ascertaining the yearly rent or value of the subjects in question. As regards the other deductions which form the subject of appeal, I refer to the note appended to my interlocutor on the appeal relative to *Glasgow Waterworks* [*supra*], adding only that in fixing the amount to be allowed as deduction in respect of taxes I have proceeded on the information of the assessor, who had satisfied himself that about one-fourth of the taxes was all that could be regarded as the landlord's proportion."

Counsel for Appellant—D.-F. Balfour, Q.C.—Dickson. Agents—W. & J. Burness, W.S.

Counsel for Assessor—Sol.-Gen. Robertson—G. Wardlaw Burnet. Agents—Millar, Robson, & Innes, S.S.C.

Wednesday, November 18.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WATT *v.* WILKIN.

Husband and Wife—Succession—Courtesy.

Courtesy extends only to so much of the estate as the wife acquires *præceptione hæreditatis.*

Husband and Wife—Courtesy—Conquest.

One of four daughters who was entitled, as heir of provision to her father, to one-fourth of a heritable estate, succeeded to the whole of it by his deed. She died survived by her husband. *Held* that his right of courtesy extended only over one-fourth of the heritage, the other three-fourths having come to her by deed, and therefore being, as conquest, not subject to courtesy.

James Little, writer in Annan, and his spouse Mrs Jane Little, by mutual disposition, dated 11th August 1853, bequeathed to their daughter Mrs Janet Little or Wilkin and the children of her body a small estate called Guysgill, in the shire of Dumfries. The testators also bequeathed to their daughter Janet and to their other three daughters, equally among them and the children of their bodies, the whole of the rest of their means and estate, including certain other heritable subjects in Annan.

James Little died on 18th November 1854.

Thereafter Mrs Janet Little or Wilkin took, as disponee under the said mutual disposition, the Guysgill property and the one-fourth share of the other heritable subjects in Annan. She died intestate in November 1857, survived by her husband Herbert Wilkin, and also by three children, Alexander Wilkin, Mrs Barbara Wilkin or Watt, the pursuer of this action, and Thomas Wilkin, the defender, each of whom was entitled by their grandfather's settlement to one-third of the properties disponed to their mother as heirs of provision of her.

After Mrs Wilkin's death in 1857 her husband Herbert Wilkin drew the rents of the Guysgill property and one-fourth of the rents of the Annan property, and continued to do so down to his death in 1877.

By will he left his whole estate to his son Thomas Wilkin, the defender of this action.

The present action of count, reckoning, and payment was raised by Mrs Barbara Wilkin or Watt, as an individual, and as executrix-dative of her brother Alexander (who died in February 1879), against Thomas Wilkin, as executor of his father Herbert Wilkin, concluding for an accounting of Herbert Wilkin's intromissions with the rents of the estate of Guysgill from 1857, the date of his wife's death, to the date of his own death in 1877, in order that the proportion of the rents due to the pursuer, and as an individual and as executrix-dative, might be determined.

The pursuer averred that though her father Herbert Wilkin drew the whole rents of the lands of Guysgill after his wife's death, and also one-fourth of the rents of the Annan property, and appropriated them to his own uses, his right of courtesy as regarded Guysgill, if any existed, extended only to one-fourth part of the

rents, his wife having got the property by singular title, and her interest, in the event of her father dying intestate, was limited to one-fourth *pro indiviso* of the said subjects. The pursuer further averred that she and her brother Alexander being, from and by their mother's death in 1857, part-proprietors of Guysgill, were entitled as such to one-third each (or at least one-third of three-fourths) of the rents, which were estimated to amount to £30 per annum, but that the defender refused to acknowledge their claim.

The defender averred that the share of estate that Mrs Wilkin got from her father James Little was less than she would have succeeded to if there had been no settlement; that his father Herbert Wilkin drew the rents in virtue of the courtesy of Scotland, and expended a large sum in the maintenance of the pursuer, and that no sum existed with reference to which there could be any accounting.

The pursuer pleaded—"(1) The defender, as executor of the late Herbert Wilkin, is bound to hold just count and reckoning with the pursuers for the said Herbert Wilkin's intromissions with the rents of the said Guysgill subjects from 23d November 1857 till 4th April 1877, and to make payment to them of two-thirds of three-fourths thereof, with interest thereon as claimed, with expenses. (2) The late Mrs Wilkin being one of four co-heiresses, and having taken the Guysgill subjects by singular title, the said Herbert Wilkin's courtesy extended only to one-fourth thereof, being the share in which his wife was *alioquin successura*, and which she may be held to have acquired *præceptione hæreditatis*."

The defender pleaded—"(2) The late Herbert Wilkin having been entitled to the rents in question by virtue of the courtesy of Scotland, the defender is entitled to absolvitor."

The Lord Ordinary (M'Laren) on 3d June 1885 pronounced the following interlocutor:—"Finds that the father of the pursuer and the defender was only entitled to courtesy out of one-fourth *pro indiviso* of his wife's estate, and that the pursuer is a creditor of her father's representatives for the surplus rents of her mother's property not falling within said right of courtesy: Finds, accordingly, that the defender is liable to hold count and reckoning with the pursuer, as concluded for, and appoints him to lodge an account of his intromissions in ten days.

"*Opinion.*—The pursuer Mrs Watt is one of the three children of Herbert Wilkin and Janet Little, his spouse. Alexander, deceased, and the defender Thomas, are the two other children, and the pursuer is Alexander's executrix. The three children were their mother's heirs of provision in the lands of Guysgill and others, and their father (who survived his wife, but is since deceased) drew the rents of this small property during his survivance by the title of courtesy. In the present action the pursuer disputes her father's right to courtesy, and claims from his son and representative an accounting for the uplifted rents. The point may be stated in a sentence. Janet Little, the mother, was one of four daughters, and she acquired the property from her father by deed. She might have served herself heir-portioner to her father to the extent of one-fourth *pro indiviso;* but as regards three-fourths *pro indiviso* Janet Little had no title whatever except her father's disposition. It is therefore contended that as regards three-fourths of the property Janet Little's title was one of conquest, from which the husband's courtesy is excluded. I am of opinion that this conclusion is well founded. Courtesy extends only to so much of the estate as the wife acquired *præceptione hæreditatis*. The case of *Primrose* and the other cases cited do not, and indeed could not, in principle, put the right of courtesy on a higher platform. It is alleged by the defender that James Little, Janet's father, divided his heritable property amongst his four daughters by giving separate subjects to each, together with an equalising portion in money. The fact may be so, but in my apprehension it is a fact which does not enter into this question. James Little had the power of excluding or restricting the courtesy in express words. Nothing is more usual in testamentary gifts to daughters than a clause excluding the husband's rights. Having this power, James made a provision to his daughter Janet in a form which makes the greater part of it conquest, and it lies with the defender, the party setting up the title of courtesy, to show cause why courtesy should come out of an inheritance to which no such right is attached by law. He cannot found on the will of James Little, because Mr Little expressed no wish on the subject, and he cannot found on the rule of law if my opinion on this subject is correct. I must therefore find the defender liable to account as concluded for."

The defender reclaimed, and argued—That Mrs Wilkin, instead of getting one-third of her father's *universitas*, got the Guysgill estate, which was less in value than her proper share of his *universitas*. Her husband would have been entitled to courtesy on one-third of the *universitas*, and was therefore entitled to the whole rents of Guysgill, which was less in value than the one-third. The present case was on all-fours with that of *Primrose*, M., App., *voce* "Courtesy"—See also Hailes, vol. i, 458. The true test in courtesy is infeftment. As the property taken by disposition was not the one Mrs Wilkin would have succeeded to, the question came to be, Did courtesy apply? and this the case of *Primrose* answered in the affirmative.

Authorities—*Lawson* v. *Gilmour*, 1709, M. 3114; *Hodge* v. *Fraser*, 1709, M. 3119; *Paterson* v. *Ord*, 1781, M. 3121; *Knight*, 1786, M. 8715; Sandford, vol. ii., 117 and 118; *Clinton* v. *Trefusis*, December 18, 1869, 8 Macph. 370.

Replied for respondent—*Primrose's* case only decided that when there was a subject which might be served to by a daughter, her husband should not lose his right of courtesy to the lands truly coming to her *præceptione hæreditatis*. The husband can only get courtesy on the lands to which his wife has succeeded *præceptione hæreditatis*. It did not matter how the title was made up if the subject was a proper *hæreditas*. The distinction lay between service and disposition. Stair (ii. 16, 19) said courtesy existed where there was a proper *præceptio*. Guysgill could not be called a *hæreditas*, as Mrs Wilkin could only have succeeded *ab intestato* to one-third; to the remaining two-thirds she succeeded by another title; therefore to the one-third alone courtesy applied, and on principle it could not be extended further.

At advising—

Lord President—The facts of this case, so far as it is necessary to refer to them, are as follows:—The late James Little, writer in Annan, had four children, all daughters. He was possessed of some heritable property which would have gone to his daughters as heirs-portioners had he not left a deed of settlement by which he conveyed to his daughter Mrs Wilkin (the mother of the pursuer and defender here), and to the children of her body, a certain subject in Dumfriesshire called Guysgill. His other heritage in the burgh of Annan he conveyed to his four daughters equally and to the children of their bodies.

Mrs Wilkin on her father's death in 1854 was infeft as disponee of her father in the Guysgill property, and in one-fourth of the other subjects. She had three children, the present pursuer Mrs Watt, the defender Thomas Wilkin who was the youngest son, and another son Alexander who died intestate in 1879, and who is represented by the pursuer as executrix-dative.

Upon the death of Mrs Wilkin in 1857 her husband, who survived her, drew the rents of Guysgill and one-fourth of the rents of the Annan property as in virtue of the title of courtesy, and continued to do so down to the date of his death in 1877.

He left his entire estate to the defender, who represents him, and the present action is brought to compel the defender to account to the pursuer for the rents thus drawn by his father.

If the pursuer had demanded two-thirds of the rents of the entire heritable subjects for herself, and as representing her deceased brother, a different question would have arisen, namely, whether the husband of Mrs Wilkin was in any event entitled by courtesy to the rents of the property taken by his wife by singular title, but to which she was *alioquin successura*, on which question I give no opinion. For the pursuer has conceded by her first and second pleas-in-law that the defender is entitled, as representing his father, to a certain share of the rents of these lands, and the Lord Ordinary has found in terms of these two pleas-in-law to the following effect, namely, "that the father of the pursuer and the defender was only entitled to courtesy out of one-fourth *pro indiviso* of his wife's estate, and that the pursuer is a creditor of her father's representatives for the surplus rents of her mother's property not falling within said right of courtesy." Now, in dealing with this branch of the law I adhere to the views which I stated in *Lord Clinton's* case, that all questions about courtesy depend entirely on artificial rules of law fixed by authority, and that it is inexpedient in such cases to attempt any exposition of legal principles. Lord Kinloch in the same case said the right of courtesy "is more completely, than can be said in most other instances, *positivi juris*. It is governed by rules of which several rest on little better footing than that it has been so fixed."

The Lord Ordinary's interlocutor is in my opinion quite supported by that series of decisions which makes the law of courtesy.

Lords Mure and Shand concurred.

Lord Adam, who was absent on Circuit when the case was debated, delivered no opinion.

The Court adhered.

Counsel for Pursuer — Mackintosh — Watt. Agent—David Milne, S.S.C.

Counsel for Defender — Darling. Agents—Bruce & Kerr, W.S.

Wednesday, November 18.

FIRST DIVISION.

[Sheriff of Dumfries.

DOUGAN *v.* M'CREDIES.

Process—Appeal—A.S., 10th March 1870—*Omission to Lodge Prints in Due Time—Reponing.*

Circumstances in which the Court sent an appeal from the Sheriff Court to the roll although the appellant had failed to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sub-sec. 1 of section 3 of Act of Sederunt, March 10, 1870.

This was an appeal from the Sheriff Court of Dumfries and Galloway at Stranraer, and the respondent objected to its being sent to the roll on the ground that the appellant had failed to print and box the note of appeal, &c., timeously in terms of the Act of Sederunt, 10th March 1870. The appeal was taken on the 23d October 1885, and the time for boxing the papers in the appeal expired on the 6th November 1885 without their having been duly boxed.

A note was presented to the Court on the 14th November by the appellant John M'Credie to be reponed, explaining as the grounds of the delay that he was a cattle-dealer, and that in the prosecution of his business he had to attend markets in various parts of the country, and was frequently away from his home for a considerable time; that his agent had written and telegraphed to him for instructions regarding the appeal, but had received no answer, owing, it was afterwards discovered, to his never having received either the letter or the telegram; that his (the appellant's) father William M'Credie was an old man of about 90 years of age, infirm, and unable to attend to business; and that his (the appellant's) agent on receiving no answer to his communications supposed that the appeal was not to be proceeded with, and thus the time allowed by the Act of Sederunt was permitted to expire.

Authorities—*Walker* v. *Reid*, May 12, 1877, 4 R. 714; *Sutherland* v. *Greig*, November 3, 1880, 8 R. 41.

The Court reponed the appellant upon payment of two guineas of expenses.

Counsel for Appellant—Orr. Agents—Martin & M'Glashan, S.S.C.

Counsel for Respondent—Dunsmore. Agent—T. Carmichael, S.S.C.