and receive effect till such reclaiming-note be disposed of by the Court,' viz., sections 85, 147, 150, &c.

"Now, section 85 provides for the restraint of proceedings against a company at any time after the presentation of a petition for winding-up, and before an order for winding-up has been given.

"Section 147 is the clause in the statute which authorises the Court to make an order directing that the voluntary winding-up shall continue subject to the supervision of the Court; and section 150 provides for the appointment of an additional liquidator or liquidators when an order for winding-up subject to the supervision of the Court is made.

"These several sub-sections deal with liquidation proceedings at their outset, and before any remit can be made by a Division of the Court to a Lord Ordinary in the Outer House, and the statute plainly recognises that the Lord Ordinary on the Bills may deal with the matters therein enumerated, including an order for the voluntary winding-up of the company under supervision.

"Having regard to the circumstance that in the sub-sections of section 5 there is a clear recognition of the power of the Lord Ordinary on the Bills to make initial or first orders in liquidation proceedings, I have come to be clearly of opinion that the enacting words of section 5 must be read as amounting to a declaration that when the expression 'the Court of Session' or 'the Court' occurs in the Joint-Stock Companies Acts referring to the Courts in Scotland it means and includes in time of vacation the Lord Ordinary on the Bills, and I therefore sustain the competency of this application, and on the merits I have no doubt the prayer of the petition ought to be granted."

Thereafter the Lord Ordinary on the Bills (Lord Shand), on a note craving, *inter alia*, power to sell being presented by the liquidator, granted power as craved.

Counsel for Petitioner—Thorburn. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Note.—The same jurisdiction was subsequently exercised by Lord Fraser, Ordinary on the Bills, in a petition for winding-up of the Edinburgh and Provincial Plate Glass Insurance Co., and by Lord Trayner, Ordinary on the Bills, in a similar petition.

Tuesday, September 29, 1885.

OUTER HOUSE.

[Lord Trayner, Lord Ordinary on the Bills.

CITY PARISH OF GLASGOW *v.* ASSESSOR OF RAILWAYS AND CANALS.

Valuation Cases—Valuation of Waterworks yielding no Profit—Deductions.

Held that in valuing waterworks which belonged to a corporation who were by their statutes debarred from making a profit out of the undertaking, deduction ought to be allowed of a proportion of the rates and taxes paid in respect of the subjects, such proportion being that which would be payable by a tenant; and (2) that deduction of working charges, such as salaries of officials, &c., and expenses of maintenance ought to be allowed; and (3) that deduction of law and parliamentary charges ought not to be allowed, these being *prima facie* landlord's and not tenant's charges.

In making up the valuation roll for the year ending at Whitsunday 1886, the assessor of railways and canals under the Valuation Act 1854 (17 and 18 Vict. cap. 91) assessed the sum of £113,188, 2s. 5d. as the yearly rent or value of the undertaking of the Corporation Gasworks, a portion of which is situated within the City Parish of Glasgow. In doing so he allowed deduction (1) of the whole of the salaries paid in the treasurer's, engineer's, and clerk's departments, amounting to £8402, 17s.; and (2) deduction of the wages paid to inspectors, clerks, and other servants, and amount spent on causewaying, amounting to £13,187, 8s. 7d. He further allowed (3) the whole of the rates and taxes, amounting to £9225, 2s. 8d., and (4) structural alterations, maintenance, and repairs, being £5692, 11s. In thus stating the valuation the assessor was guided, as regarded the 1st, 2d, and 4th of these items, by the opinion of Lord Kinnear in the case between the assessor and the *Corporation of Glasgow and Others*, Oct. 1, 1884, 22 S.L.R. 10, where his Lordship held the claim for deduction of working charges and expenses for maintenance to be well founded, and "that a deduction should be allowed from the gross revenue of all necessary outlays for management, maintenance, and repairs which are not properly chargeable against revenue, and not merely a proportion of such charges."

The Inspector of Poor of the City Parish appealed to the Lord Ordinary on the Bills (Trayner) against this valuation, contending (1), with regard to the salaries of treasurer's office, etc., that the deduction should only be £6202, 17s. as the just proportion falling on the Corporation as tenants or occupiers, while the other £2000 was truly applicable to the duties of the officials in the interest of the Corporation as proprietors; (2), with regard to the deduction of wages, that only the half (£6693, 14s. 3d.) should be allowed, the remainder of the wages being for work done in the interest of the Corporation as proprietors; (3) that only half the rates and taxes should be allowed, and not the whole; (4) that the cost of the repairs and alterations were payable by the Corporation as proprietors. He submitted that giving effect to these contentions (and certain contentions on minor points) the true valuation should be, not £113,188, 12s. 5d., but £132,275, 6s. 1d.

He further appealed against the allocation by the assessor of the *cumulo* valuation among the parishes in which the lands and heritages were situated, in respect that the principle the assessor had adopted of making it in proportion to the structural cost in each parish was erroneous, and that the true principle was to apportion the *cumulo* valuation among the parishes in which the area of distribution was situated, that area being the only profit-distributing part of the undertaking, "or otherwise to hold the value of the portions of the undertaking outwith the area of distribution to be the value of the land occupied, as compared with the same extent of land in the immediate neighbourhood, together with four per centum on the cost of the structural works erected thereon, and to apportion the remainder of the *cumulo* valuation among the parishes in which the area of distribution, being the profit-producing part of the undertaking, is situated." The result,

he contended, was that instead of there being allocated to the City Parish £20,000 or thereby, only £11,476 was allocated.

In making the valuation he had made the assessor had followed the *Dundee* case, Dec. 21, 1883, 21 S.L.R. 261; and also the decision of Lord Kinnear in the case quoted *supra*.

A similar appeal was taken by the City Parish in the valuation of the Gasworks of the Corporation. This appeal also involved the correctness of a deduction by the assessor of £449, 13s. 2d., for law and parliamentary charges.

The Corporation of Glasgow were owners of both the Gasworks and the Waterworks under a statutory disability to make profit.

The appellant (the City Parish of Glasgow) founded on section 37 of the Poor Law Act of 1845, which provides that the annual value shall be rent at which lands, &c., might be expected to let from year to year, "under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same," while the subsequent Act of 1854 enacts that it shall be the rent at which they would let from year to year, and leaves out the proviso as to deductions. It must be taken that there was a purpose in leaving out the proviso as to deductions. That argument was not before Lord Kinnear in the case of the previous year. He also founded on *Dundee Gas Commissioners*, January 12, 1881, 9 R. 1240, where the decision of Lord Curriehill and Craighill was inconsistent with that of Lord Kinnear; and was not quoted to him. The practice, therefore, and the balance of authority, favoured the appellant, and the weight of argument was also on his side.

No argument was offered on the question as to the principle of allocation.

The assessor maintained the valuation on the authority of Lord Kinnear's decision.

The Lord Ordinary pronounced these interlocutors:—I. *In the Waterworks Case.*—"The Lord Ordinary having considered the appeal and heard counsel, Finds 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 proportions payable by a tenant: Finds that the amount to be now deducted in respect of such proportion of rates and taxes is the sum of £4612, 11s. 4d., sterling, being one-half of the whole amount of the rates and taxes paid or payable in respect of said heritages; to this extent and effect sustains the appeal: *Quoad ultra* dismisses the appeal, and remits to the assessor to amend the valuation in accordance with this interlocutor.

"*Note.*—It was argued for the appellant that the assessor had erroneously allowed deduction of the whole expenses of management and maintenance on the ground (1) that a proportion at least of these would necessarily fall upon the landlord, and (2) that in valuing heritages the gross rental received by the landlord should enter the valuation roll without any deduction, on account of the expense he had been put to on account of management and maintenance. I should not hesitate to give effect to this argument in the ordinary case of landlord and tenant. But this is not the ordinary case; it is the case of landlord and tenant in one person, prohibited from making any profit by his enterprise or business. In these circumstances there is considerable difficulty in reaching the standard of valuation given by the Valuation Act, viz., 'the rent at which one year with another such lands 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 a tenant in such case could reasonably be expected to give as rent is just what he received, less the cost of management and maintenance; and what the tenant paid and the landlord received under such an arrangement would be the gross rent. I would agree in the opinion of Lord Fraser and Lord Kinnear 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 the tenant's expenditure, and cannot, in my opinion, be allowed as deduction from year's rent. I have allowed therefore, as 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."

II. *In the Gasworks Case.*—"The Lord Ordinary having considered the appeal and heard counsel, Finds (1st) 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 (2d) 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 (3d) 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 purposes 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 the Glasgow Waterworks, 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 Assessor—Sol.-Gen. Robertson, Q.C.—G. W. Burnet.

Counsel for City Parish—Lord Adv. Balfour, Q.C.—Dickson. Agents — W. & J. Burness, W.S.

Friday, October 15.

SECOND DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

COOK *v.* STARK.

Master and Servant — Reparation — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42)—*Personal Superintendence of Manager of a Quarry at Dangerous and Unprecedented Operation*—Culpa.

Held that while the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal superintendence to an operation which is dangerous and unprecedented, and his failure to do so will in the event of an accident amount to such *culpa* as will render his master liable in damages in an action under the Employers Liability Act 1880 at the instance of the injured man.

Reparation—Contributory Negligence.

A workman in a quarry who had been sent by the manager to assist an experienced man who had been engaged for half-an-hour in attempting to draw an unexploded charge of gunpowder from a rock, used for the purpose a steel "jumper," which generated sparks on striking the rock, thereby causing an explosion which injured him. *Held* that he was not guilty of contributory negligence, inasmuch as the use of the tool was not so obviously dangerous as to render him inexcusable in using it.

This was an action of damages (which was ultimately insisted in only under the Employers Liability Act 1880) at the instance of Cook, a labourer, against Alexander Stark, the owner of a quarry at Kilsyth, for the loss of his left hand, which was blown off above the wrist while he was helping to extract an unexploded charge of powder from the rock. The pursuer having finished loading stones into a canal boat belonging to the defender was told by the defender to apply to William Stark, the manager of the quarry (who was a brother of the defender's), for instructions as to what to do next. The manager, William Stark, ordered him to go and take the place of a man M'Innes who was assisting another brother of the defender, James Stark, in quarry work. He found them extracting from a bore a charge of powder which had missed fire, and told M'Innes to go and work at another hole at which the latter had been previously engaged, and proceeded to assist James Stark. They poured water into the hole, in the depth of which the gunpowder was packed, and the pursuer held in the bore a steel jumper which James Stark struck on the head with a hammer in order to dislodge the "stemming." The charge exploded under the blows and the injury in respect of which the action was raised took place. The averments on which the action was laid were to the effect that the operations were delicate and dangerous, and not such as should have been entrusted to a man like the pursuer, who was ignorant of the danger he ran, and of the proper methods and tools necessary for the work; that the tools for the removal of the charge ought to have been of copper and not of steel, which on its coming into contact with the rock was liable to cause sparks to rise and ignite the powder.

The defence was (1) that the pursuer and James Stark had ultroneously, and without the knowledge and authority of the manager, entered upon the performance of the operation; (2) that the pursuer was well experienced in quarrying operations, and knew that he was doing wrong in using the steel jumper; and that in any view he was guilty of contributory negligence.

The defender pleaded—"(3) The pursuer having undertaken the said work without the authority and without the knowledge of the defenders or their foreman, the defenders are entitled to absolvitor. (4) The pursuer having engaged in work that was obviously dangerous, he is barred from complaining of the consequences or suing on account thereof. (3) The pursuer's injuries being attributable to his own fault, he is barred from suing the present action. *Separatim*, he is barred by contributory negligence."

The facts which in the opinion of the Court were established are detailed in the findings of the Sheriff (MUIRHEAD) *infra*.

The Sheriff-Substitute (BUNTINE) found—"(3) That this work was not dangerous if conducted by a skilled person, and that the said James Stark had sufficient experience and skill to be safely entrusted by the manager therewith; (4) that while the said James Stark and the pursuer were engaged in boring out this hole the gunpowder in the hole exploded, and inflicted the injuries to the pursuer which are described on the record; (5) that the explosion was caused by the use of a steel-jumper instead of a copper instrument, in extracting the shot; (6) that the manager, William Stark, gave no instructions to them to use this instrument, and that it is not proved that he was aware that the said James Stark was using the same when he instructed the pursuer to go and help him in his work; (7) that the said James Stark and the pursuer were, or ought to have been aware, that it was dangerous to use this steel instrument in their work, and were guilty of negligence in so doing; (8) that it is not proved that the defenders failed in their duty to supply pursuer and the other workmen with proper tools for conducting their work, or that the manager, the said William Stark, was not well qualified for the position of manager of the quarry." He therefore found in law that the defenders were not liable, and assoilzied the defender.

On appeal the Sheriff (MUIRHEAD) found as follows — "Finds in fact (1) That the pursuer on 15th July 1885 was a labourer in the service of the defender Alexander Stark in his quarry at Auchinstarry, and in receipt of a wage of 21s. a-week; (2) that the manager of said quarry was William Stark, a brother of the defender's; (3) that in the forenoon of said day the pursuer, having finished loading stones into a canal boat, was told by the defender to apply to the said William Stark for instructions as to what