second, third, and sixth questions in the negative.

Counsel for the First and Second Parties —Dundas, K.C. — Macphail. Agents — Mackenzie & Black, W.S.

Counsel for the Third and Fourth Parties —Younger. Agent—J. C. Couper, W.S.

Friday, July 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PUMPHERSTON OIL COMPANY, LIMITED *v.* WILSON.

Poor—Assessment—Valuation of Lands—Deduction—Average Annual Repairs—Landlord's and Tenant's Repairs—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 36—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91), *secs.* 6 *and* 41.

Held that in estimating the value of lands and heritages for the purpose of assessment for poor rates a parish council is bound, under the provisions of section 37 of the Poor Law Amendment (Scotland Act 1845, as modified by the Valuation of Lands (Scotland) Act, sections 6 and 41, to deduct from the valuation appearing in the valuation roll "the probable annual average cost of the repairs, insurance, and other annual expenses necessary to maintain such lands and heritages in their actual state;" and that in making such deduction for repairs the parish council is bound to deduct the cost thereof whether such cost falls to be borne by the landlord or by the tenant.

The owners and occupiers of certain chemical works were assessed for poor rate on the annual value of the works as it appeared in the valuation roll, under deduction of 20 per cent. In a suspension of a charge for this assessment, *held* (*aff.* judgment of Lord Kyllachy, Ordinary), after a remit to a reporter (from which it appeared that the average annual cost of the repairs necessary to maintain the works in their actual state amounted to 80 per cent. of the annual value appearing in the valuation roll) that a sum amounting to 80 per cent. of that appearing in the valuation roll fell to be deducted for the purpose of assessment for poor rate in respect of the cost of such repairs.

Magistrates of Glasgow v. *Hall*, January 14, 1887, 14 R. 319, *followed*.

Certain chemical works at Mid-Calder, of which the Pumpherston Oil Company, Limited, were owners and occupiers, were entered in the valuation roll for the county of Mid-Lothian as of the annual value of £5400. The Parish Council of the parish of Mid-Calder assessed the Pumpherston Oil Company for poor-rates in respect of these chemical works on the said annual value of £5400 under deduction of 20 per cent. The company having refused payment, R. Straton Wilson, the collector of rates for the parish of Mid-Calder, upon a certificate obtained by him under section 97 of the Taxes Management Act 1880, obtained a warrant for collecting the said assessment by poinding and sale. Against this poinding the Pumpherston Oil Company brought a note of suspension and interdict. The amount of the rate in question was consigned in bank to await the orders of Court.

The complainers averred that they had called on the Parish Council to ascertain by a mutual remit to a man of skill the amount of the deductions falling to be made under section 37 of the Poor Law Amendment (Scotland) Act 1845 (quoted *infra*), in respect of the expenses necessary to maintain the subjects in their actual state, and that the Parish Council had refused this demand.

The complainers pleaded, *inter alia*—"(2) In estimating the annual value of lands and heritages for assessment the Parish Council are bound to take into consideration the actual and average cost of maintaining the lands, and the actual and average amount of the other deductions to be made from the annual value as fixed by the valuation roll, and are not entitled without investigation to make an arbitrary deduction which has no reference to the circumstances of the lands in question. (3) The deduction made from the said annual value being greatly less than the actual average amount of said repairs and others, the amount of said assessment is oppressive and unjust."

The Collector of Rates lodged defences, in which he pleaded—"(1) The action is irrelevant. (2) The assessment in question being legal, the note should be refused with expenses. (3) The Parish Council having after due consideration allowed an adequate deduction in terms of the statute, the assessment should be upheld and the note dismissed. (4) In ascertaining the annual value of lands and heritages for assessment the Parish Council are bound only to allow deduction for such repairs, taxes, and insurance as landlords expend in maintaining and insuring said lands and heritages, including all capital charges for the permanent repair or renewal thereof, together with landlords' taxes and insurance, and the complainers are not entitled to require the Parish Council to give deduction for the cost of such works or temporary repairs as they in their character of tenant of the said lands and heritages have executed in the conduct of their business for the acquisition of tenants' profits, or for tenants' taxes or insurance."

The Poor Law Amendment (Scotland) Act 1845 enacts—section 37—"In estimating the annual value of lands and heritages the same shall be taken to be 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, 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."

The Valuation of Lands (Scotland) Act 1854 enacts — section 6 — "In estimating the yearly value of lands and heritages under this Act the same shall be taken to be 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," . . . Section 41— "Nothing contained in this Act shall alter or affect any classification or power of classification, or any deductions or allowances, or power of making deductions or allowances from gross rental made or imposed by any body, persons, or person entitled to impose or levy assessments, but the same shall not affect the value to be inserted in the valuation roll in terms of this Act."

On 9th December 1899 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor: — "Before answer remits to Mr W. J. Armstrong, estate agent, 57 Manor Place, Edinburgh, to consider and report to the Lord Ordinary, with special reference to the statements and pleas of parties as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates, taxes, and public charges payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor Law (Scotland) Act 1845, and to report upon any other matter which either party may consider material to the question at issue."

In obedience to this interlocutor Mr Armstrong lodged a report, from which the following excerpt is taken — "Having made a careful examination of the books of the Pumpherston Oil Company, and the relative vouchers with regard to outlays for repairs, insurance, rates, taxes, and public charges, during the last five years from 1894 to 1899 inclusive, finds that the average annual outlay has been as follows, viz.—(1) *Repairs*—The whole of the repairs of every kind (which are exceptionally heavy, particularly in the chemical works) are executed by and at the expense of the Pumpherston Oil Company, and the average outlay has been as follows, viz.—'*On Works*—After deducting the sales of scrap iron, old lead and brass, the average annual outlay on repairs has been no less than £4336, 11s., or 80 per cent. on the annual value per valuation roll; that is exclusive of the cost of new retorts and other new works, which are not included in this report. Amongst the heaviest items for repairs are iron stills, which last from one to two years only, and lead-lined tanks or receptacles in the sulphate of ammonia works. On the 27th of January 1900, the reporter received a letter from Mr J. Thom, agent for the defenders, requesting him to differentiate between such expenditure as would have been made by the Pumpherston Oil Company if they had been proprietors only (of the chemical works), and such expenditure as would have been made by them if they had been tenants only. The reporter is not able to comply with this request, and he cannot for a moment suppose that any sane proprietor 'only' would undertake or become responsible for the repairs and upkeep of chemical works of the nature referred to. No part of the expenditure reported upon forms part of the capital charges for the renewal of works that a landlord would be legally bound to defray, or for renewal of the company's new system of retorts; new works of this description are charged to capital account, not to repairs. The reporter has rejected all subjects about which he had any doubt as to whether they came under the head of 'repairs,' and he has, as before stated, excluded all underground pumps and machinery, and also the cost of upkeep of shafts and roadways into and in mines. The expenditure on these underground works amounts to upwards of £2000 per annum on average."

The reporter then proceeded to deal with the expense of insurance and taxes, and submitted the following schedule of deductions—

"*Works*—

Repairs,	£4336 11 0	or 80 per cent. on	£5400 0 0
Insurance,	247 16 10	,, 4½ do.	
Rates and taxes,	535 8 1	,, 10 do.	
	£5119 15 11	,, 9½ do.	

Parties having been heard on objections to the report, the Lord Ordinary on 21st February 1901 pronounced an interlocutor by which, after findings in respect of certain other questions on which parties had come to an agreement, he made the following findings — "(3) that with regard to the chemical works it is admitted by the complainers that only the landlord's and not the occupier's taxes fall to be deducted from the valuation, and to that effect the respondent's objections to the report by Mr Armstrong fall to be sustained. *Quoad ultra* repels the said objections and approves of said report: Finds in terms of said report that a sum amounting to 90 per cent. on the valuation of the said chemical works represents the legal and proper deduction to be made from said valuation in terms of section 37 of the Poor Law (Scotland) Act 1845, 8 and 9 Vict. cap. 83, and that the amount of the assessment in respect thereof is £36, 11s. 3d.: Finds the respondent entitled to payment out of the sum consigned in Court of the said sum of £36, 11s. 3d., with bank deposit interest on said sum till payment . . . from the 7th day of June 1899, and also of the further sum of £22, 18s. 7d., being one-half of the expenses of the diligence brought under suspension, and authorises the respondent to uplift said sum and interest from the consigned sum contained in deposit-receipt, No. 6 of process: Finds the suspenders entitled to the balance of the said consigned fund and accrued interest, and authorises them to uplift same, and in order thereto grants warrant to the Accountant of Court to exhibit and deliver the deposit-receipt, and to the Clydesdale Bank, Limited, Edinburgh, to make such payments, and that both on production of a certified copy

hereof: Further, in respect of the foregoing findings, sustains the reasons of suspension, suspends the said certificate, warrant, poinding, and notice of sale, and whole grounds and warrants thereof, and interdicts, prohibits, and discharges the respondent from proceeding to have the said articles valued and sold, and decerns: Finds the complainers entitled to expenses modified at one-half of the taxed amount thereof."

Opinion.—"In this case the complainers have now accepted the respondent's offer to make a deduction of 15 per cent. in respect of repairs, insurance, and taxes on the mines and minerals of which the complainers are the tenants and occupiers. The parties are further agreed that with respect to the chemical works only landlord's taxes should be deducted. They are also, it appears, agreed as to the amount to be deducted in respect of insurance. This being so, the only question for decision is as to the deduction to be allowed for repairs on the chemical works—that is to say, the repairs on the heritable subjects, consisting of buildings, fixed plant and machinery which form these works, and of which the complainers are both owners and occupiers.

"The reporter has fixed this deduction at the sum of £4366, 11s. He finds that the sum in question represents the average sum expended during the five years from 1894 to 1899, and he explains that this average is exclusive of the cost of new retorts and other new works which are not included in his report. He also explains that the heaviest repairs are those on the iron stills, which last from one to two years only, and lead lined tanks or receptacles in the sulphate of ammonia works, of all which it would appear that the cost of upkeep is very heavy.

"The respondent does not dispute the accuracy of the reporter's figures—that is to say, he does not dispute that for the upkeep of the heritable subjects which are entered in the valuation roll the complainers have expended on repairs, apart from renewals, the average sum which the reporter states. Neither does he dispute that the repairs were proper and necessary. But he suggests that the complainers being both owners and occupiers the expenditure must, at least to a large extent, be held to have been made by them in the latter character, and to be really part of what he calls their working expenses.

"I am unable to find in the Poor Law Statute any ground for the distinction suggested. If repairs are made on heritable subjects which are necessary for their upkeep, it does not appear to be of importance whether they are executed by the landlord or by the tenant, or whether they are executed by the landlord *qua* owner or the landlord *qua* occupier. That circumstance may be material in the Valuation Court in fixing the valuation, but it cannot, in my opinion, affect the deduction claimable under the Poor Law Act. The deduction falls to be made from the annual value appearing on the valuation roll, which value it must be assumed has been properly ascertained. A good deal was said in the course of the argument as to the necessity of assuming a hypothetical tenancy; but that is a topic which I need hardly say is only relevant in the Valuation Court. I see, however, no reason to doubt that in the present case the valuation was properly made. I quite agree with the reporter's observation that no tenant would be at all likely to pay a rent of anything like £5400 for the heritable part of these chemical works except upon the footing that the landlord undertook the cost of upkeep. But however that may be, it is, in my opinion, enough that the repairs in question have been in fact made, and that no doubt is suggested as to their being proper and necessary to maintain the heritages in their actual state."

The respondent reclaimed, and argued—(1) The Parish Council had no power to make any deduction at all, but were bound to assess on the sum appearing in the valuation roll, Section 37 of the Poor Law Act of 1845 (quoted *supra*) though not repealed was rendered inoperative by the provisions of the Valuation Act of 1854. Under that Act the duty of estimating the value of lands, which was formerly laid upon the Parochial Board, was entrusted to the county assessor. It was his duty in making his assessment under section 6 of the Valuation Act (quoted *supra*) to take into consideration the repairs, &c., necessary to maintain the subjects in their actual state, and to deduct the average annual expense of such repairs from his valuation. The Parochial Board were only entitled to make deductions in "estimating the annual value of lands." As it was no longer their duty to estimate annual value, the power to make deductions was necessarily abolished. Section 41 of the Valuation Act (quoted *supra*) only reserved the power to make general deductions in respect of particular classes of property, and not the power to make deductions in any particular case. There was no decision to the contrary in *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, and any opinions to that effect were *obiter*. (2) Assuming the Parish Council had the power to make deductions, that power only referred to deductions for repairs which would fall upon the landlord, and a new remit should be made to the reporter to distinguish between landlord's and tenant's repairs. The principle was that the assessment should be laid on the annual value of the subjects to the landlord, *i.e.*, the net amount he received after deducting what he required to spend. This rule was assumed in the cases on the subject—*Edinburgh and Glasgow Railway Company* v. *Adamson*, June 28, 1855, 17 D. 1007; *Glasgow Gas-Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727; *Edinburgh and Glasgow Railway Company* v. *Hall*, June 29, 1866, 4 Macph. 1006.

Argued for the respondents—(1) The Parish Council, as coming in the place of the Parochial Board, had power to make deductions under section 37 of the Poor Law Act 1845, and were therefore bound to

make them. The Valuation Act 1854 said nothing about repairs, but directed the assessor to take the rent of the subjects without any deduction at all. The power of the parochial board, and of the parish council in its place, to make deductions was preserved by section 41 of the Valuation Act, quoted *supra*. This was the constant and invariable practice, and was sanctioned in the cases of *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229, and *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319. (2) The whole average annual expense of maintaining the subjects should be deducted, whether as a matter of private contract it was borne by landlord or tenant. In either case it was really a deduction from the rent received. There was no sanction in section 37 of the Poor Law Act for any distinction between landlord's and tenant's repairs.

At advising—

LORD KINNEAR—The Pumpherston Oil Company are the owners and occupiers of certain chemical works in the parish of Mid-Calder, and they complain of a poinding at the instance of the Collector of Poor's Rates for that parish upon various grounds which the Lord Ordinary has disposed of. It is only one of these grounds which we are required to consider. The parties are content to accept the Lord Ordinary's judgment in all other respects, but the collector reclaims against it in so far as it gives effect to the complainer's contention that in charging the lands and heritages belonging to them for poor-rates the collector ought to have deducted from the annual value entered on the valuation roll the average cost of repairs, insurance, and other expenses necessary to maintain the lands and heritages in their actual state in terms of the 37th section of the Poor Law Amendment Act 1845. The reclaimer objects to the judgment upon this point on two grounds—first, that the annual value of the subjects is conclusively ascertained by the valuation roll, and that no deduction whatever can be allowed from the amount there entered; and secondly, that if any deduction be allowed, it must be confined to what he calls landlord's repairs as distinguished from tenant's repairs, the outlay for which latter kind of repair he says is already taken into account by the assessor in making up the valuation roll.

The first of these two points does not appear to have been argued to the Lord Ordinary, and is not raised in the pleadings. But since it was argued with great force and ability we have thought it right to consider it in order that we may at least determine whether it would be proper to give the reclaimer an opportunity to amend his record, so as to raise it formally for decision. If the question were open I should have thought that there was force in Mr Campbell's argument that the 37th section of the Poor Law Amendment Act imposed only one duty on the collector or on the parochial board, viz., to ascertain the annual value of lands and heritages, enjoining upon them at the same time an ordinary and reasonable procedure for the performance of that duty by taking the rent of the subjects in their actual state, and deducting the expenditure necessary to enable them to command that rent, the result being the true annual value of the subjects to the landowner; that the Valuation Act of 1854 imposed precisely the same duty upon the assessor for the purpose of "establishing one uniform valuation of lands and heritages, according to which all public assessments leviable according to real rent might be assessed and collected; that that is a duty which cannot be reasonably or justly performed without allowing for the expenditure necessary to earn the rent; and lastly, that the 41st section, which provides that nothing in the Valuation Act shall affect the power of making deductions or allowances provided by any body entitled to impose or levy assessments, refers only to allowances which assessing bodies were authorised to make in favour of certain specific classes or persons, and not to the ordinary deductions which must necessarily be made in the normal course of valuation in order to reach the true value. The consequence is, according to the argument, that the duty imposed upon the parochial board by the Act of 1845 has been transferred in its entirety to the assessor by the Act of 1854, and that as the valuation roll is conclusive it is the duty of all assessing bodies to assess and collect these rates according to the value as ascertained without any alteration whatever. But whatever weight might otherwise have been conceded to this reasoning, the answer is that the contrary has been decided in the case of the *Magistrates of Glasgow* v. *Hall*, where it was held that the Poor Law Act imposed two separate duties upon the parochial board—first, to ascertain the rent, and secondly, to make the deductions in question; that the first of these duties has been transferred to the assessor, but not the second, and that accordingly the duty of the parochial board and its officers under the law introduced in 1854 is to take the estimate of the annual value of lands and heritages as it appears in the valuation roll of the year, and then to make the deductions specified in the 37th section of the Poor Law Act. This decision is in accordance with opinions of great weight and authority delivered so far back as 1864 in the case of *Edinburgh and Glasgow Railway Company* v. *Meek;* it sanctions a practice which had obtained since the passing of the Valuation Act, and has been followed by a constant and unvarying practice since its date, and it cannot now be called in question. I take it to be clear, therefore, that the sum of £5400 which is entered in the valuation roll as the annual value of the complainers' chemical works must be taken to be the gross rent or annual value of the heritable subjects, and that the complainers are entitled to insist that the deductions allowed by the 37th section of the Poor Law Act shall be made from that amount in order to ascertain the true annual value

for the purpose of the assessment for poor-rates.

The only question that remains is that which has been determined by the Lord Ordinary, and I am of opinion for the reasons the Lord Ordinary has given that his Lordship's decision of that question is right. The Lord Ordinary finds that a sum amounting to 90 per cent. on the valuation of the chemical works represents the legal and proper deduction to be made in terms of the 37th section. The only objection to that finding is that the deduction for repairs, amounting to 80 per cent., or £4336, 11s., is excessive, inasmuch as it includes or may possibly include tenant's repairs as well as landlord's repairs. I think that the Lord Ordinary's answer is perfectly sound when he says that he cannot find in the Poor Law Statute any ground for that distinction. But in order to consider the objection properly we must have in view the precise character of the subject to be assessed. It is land occupied by buildings, and also by fixed plant and machinery, which are heritable only by reason of annexation to the land, which appear to be very valuable, and which are shown to be perishable by use. All of these subjects have been included, and we must assume rightly included, in the valuation entered on the valuation roll. But the amount stated in the valuation roll is the gross annual value or gross rent of the heritable subject, and the question is, what deduction is to be made for the probable annual cost of the repairs necessary to maintain those lands and heritages in their actual state. Now, that is a question of fact, and I do not think it is disputed that the Lord Ordinary adopted the proper method for ascertaining the fact by making a remit to a man of skill "to consider and report to the Lord Ordinary, with special reference to the statements and pleas of parties as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates, taxes, and public charges payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor Law (Scotland) Act 1845, and to report upon any other matter which either party may consider material to the question at issue." No objection is stated to the terms of that remit, and I think the report which the Lord Ordinary received is perfectly clear and satisfactory, and that no good objection has been brought against it. The reporter says — [*His Lordship read Mr Armstrong's report as quoted supra*]. All this shows that the reporter clearly understood the duty required of him, and knew that he was to ascertain the annual cost of those repairs only which are necessary to maintain the subjects in their actual state. But the most valuable part of the subjects consists of machinery which lasts only from one to two years, and therefore it is not surprising that the annual cost of repairs should be very nearly equal to the annual value of the subjects. It is open to the reclaimer to challenge the reporter's results if he can show that he has included any factor in his estimate which he ought not to have included. But the only objection is that the outlays for repairs are tenant's outlays, "that as such they have been already allowed by the assessor, and that the deductions reported upon when made from his valuation would not disclose the annual value of the works to the complainers as landlords, the annual value to them as landlords being the rent which is hypothetically receivable by them, less what they as landlords expend for repairs, insurances, and taxes." Now, I confess I do not know what is meant by the distinction between landlord's and tenant's outlays as applicable to a subject of the peculiar kind we are considering, which is occupied in fact by the proprietor, and not by a tenant holding under a lease; there is no abstract rule of law for defining that distinction, and the reclaimer's counsel were perfectly unable to explain it. They have entirely failed to specify any particular repair or class of repairs of which they can say that it ought not to have been allowed because of its involving tenant's, and not landlord's expenditure, and therefore I think they have failed to make any relevant allegation that on any specific point the reporter has gone wrong. But the best answer is, that the reclaimer's objection is based on an entire misconception of the true meaning and effect of the statutes. I do not say that they are easy of construction, but now that they have been construed, the direction which the two statutes taken, together give to the valuing and assessory bodies is perfectly simple. The assessor under the Valuation Act is to ascertain the gross annual value of the lands and heritages, and the poor-law officers are to take his statement of amount as conclusive, and deduct from that amount the expenses mentioned in the 37th section. It follows that we are not called upon in this case to consider the procedure of the assessor under the Valuation Act. We have no jurisdiction to inquire how he has arrived at his results. It is equally clear that the poor-law collector has no title to inquire as to the assessor's procedure, and no right to speculate as to what would be given as rent by a hypothetical tenant, or on what conditions it would be given. He has nothing whatever to do with the hypothetical tenant, or with any other method, artificial or otherwise, for ascertaining annual values. He must take it as fixed that the subject valued is the heritable subject alone, and that the gross annual value of that subject is the sum stated in the valuation roll; and the only function that remains for him to perform is to deduct from that amount the expenses required for maintaining the subjects in their actual state. Now, that is a simple question of fact, and in order to solve it he is not required to consider the respective liabilities of landlord and tenant. I see no authority in the statute to justify him in saying repairs are necessary for

maintaining this heritable subject in its actual state, but I shall not allow a deduction for them, because I think they are repairs which should be made at the tenant's expense. I have no doubt that as a rule the deductions contemplated by the statute are those required by the outlays of the proprietor, because the intention is obviously to allow such deductions from the gross rent as will enable the subjects to be maintained in a position to command that rent. But if that is the effect of the statute, the poor-law officer is not called upon to enter into any elaborate calculation outside the statute for the purpose of attaining it. He must confine himself to the single task imposed upon him by the Legislature, and taking the gross annual value of lands and heritages as it is given him in the valuation roll he must deduct the average cost of the repairs which are necessary to maintain such lands and heritages in their actual state. The reporter has set himself to do this and nothing more in the estimate which he has given, and I find no relevant averment that in doing it he has committed any error which requires to be corrected. The apparent difficulty which seems to arise from the magnitude of the deductions in proportion to the total annual value of the subjects turns out to be no difficulty at all when the nature of the subjects is considered. The greater part of the value of this complex heritage is due to the inclusion of machinery and plant, which would not be considered as land and would not be valued at all but for the operation of a somewhat artificial rule of positive law. But if it turns out that the things so included are perishable in the using, and if therefore the cost of maintaining the entire complex heritage in its actual state turns out to be so great as to bring down the annual value of the whole to its proprietor to something not much exceeding the proper rental of the lands and buildings without the machinery and plant, there is nothing anomalous in that result, and at all events it is the consequence of an estimate which is made in exact conformity with the statute.

It may no doubt be assumed that the annual value of the trade carried on in the complainers' work is very much greater than the sum which the Lord Ordinary finds should be taken as the basis of assessment. But it is not the complainers' trade but their heritable property only which is to be valued and assessed.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR intimated that Lord Kincairney, who was present at the hearing but not at the advising, had read his opinion, and concurred in it.

The LORD PRESIDENT and LORD M'LAREN were absent at the hearing.

The Court adhered.

Counsel for the Complainers and Respondents—Salvesen, K.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent and Reclaimer — W. Campbell, K.C. — Munro. Agents—Douglas & Miller, W.S.

Wednesday, May 29.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

GOVERNORS OF MUIRHEAD COLLEGE *v.* MILLAR.

Superior and Vassal — Restrictions on Buildings—Enforcement by Vassals inter se — Mutuality — Enforcement against Superior—Defect in Plan Attached to Feu-Contract—Personal Bar.

In a feu-contract, dated in 1864, of a portion of the lands of L., it was stipulated and declared that the vassal should not be entitled to make any erections on the ground feued other than villas or dwelling-houses to be occupied exclusively as such, and the superiors bound themselves not to use and occupy the portion of their lands of L. "within the limits delineated on the said plan endorsed hereon, for the erection of buildings other than self-contained houses or villas, and bound themselves in feuing to subject the same to similar restrictions." The plan referred to showed an adjacent portion of the superior's lands of L. delineated on the plan by a red line. The ground feued was subsequently acquired in 1869 by a person who also acquired from the superiors another piece of land adjacent thereto, and received from them a feu-contract and charter of novodamus which conveyed to him (1) the portion of ground newly acquired by him, and (2), the original feu *de novo*. The deed of 1869 contained the same stipulations and declarations, and the same obligations on the superiors as were contained in the deed of 1864, but, *per incuriam*, the plan endorsed thereon showed only the land disponed by the deed, and did not show any portion of the adjacent lands delineated by a red line. The deed of 1869 also contained a declaration that the piece of ground thereby disponed of new was so disponed under the restrictions contained in the deed of 1864. An educational trust entered into a conditional agreement to acquire both pieces of ground so feued by the deeds of 1864 and 1869. They also acquired the superiority of these two pieces of ground. They brought an action to have it declared that they were entitled to use the two pieces of ground in question for the purposes of their college. They called as defenders the feuars of the adjacent portions of the lands of L. They maintained that the absence of any delineation of an adjacent portion of the