Friday, January 23.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

M'GUINESS AND OTHERS *v.* GLASGOW CORPORATION.

Expenses — Process — Tender — Intimation of Minute.

In an action of damages the defenders by minute, lodged in process on 16th October 1913, made a tender of "£25 with the expenses of process." The tender was not intimated to the pursuers until 3rd December 1913. Thereafter the pursuers lodged in process a minute accepting the tender "on the footing that the expenses include expenses to the date of intimation of the minute of tender to the pursuers' agent, viz., 3rd December 1913."

Held (*rev.* the Lord Ordinary, Ormidale, *diss.* Lord Johnston) that the tender had not been accepted.

Observations (*per* the Lord President and Lord Skerrington) as to the effect of an unintimated tender on the question of expenses.

Frank M'Guiness, Mary M'Guiness or Irwin, and James M'Guiness, *pursuers*, brought an action of damages against the Corporation of the City of Glasgow, *defenders*.

On 16th October 1913 the defenders, after defences had been lodged but before the record was closed, lodged in process a minute of tender in the following terms:—"Russell for the defenders stated to the Lord Ordinary that under reservation of all his pleas he tendered and hereby tenders the sum of £25 with expenses of process as the same may be taxed, in full of the conclusions of the summons."

The tender was not intimated to the pursuers at the time the minute was lodged, but on 3rd December 1913 the defenders' agents wrote to the pursuers' agent as follows:—"Referring to our telephone conversation to-day, a minute of tender tendering the sum of £25 and expenses was lodged in this case on 16th October last."

Thereafter the pursuers lodged in process a minute of acceptance of tender in the following terms:—"Kemp for the pursuers hereby accepts the defenders' tender of £25 sterling with expenses of process in full settlement of the conclusions of the summons, and on the footing that the expenses include expenses to the date of intimation of the minute of tender to the pursuers' agent, viz., 3rd December 1913."

On 19th December 1913 the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary finds that the date of intimation of the tender, viz., 3rd December 1913, must be held to be the date of tender, and in respect of said minutes discharges the diet of trial: Decerns against the defenders for payment to the pursuers of the sum of £25 sterling: Finds the pursuers entitled to expenses . . . Finds the defenders entitled to expenses, if any, incurred by them subsequent to said tender, &c."

Opinion.—"Both parties are, I understand, willing to take my judgment at this stage on the question whether or not a tender is well and sufficiently made simply by lodging in process the minute of tender.

"In the present case the minute was lodged in process on 16th October, but as a matter of fact its existence was not brought to the knowledge of the pursuers until the 3rd December, when it was formally intimated to them. In my opinion the tender cannot be said to have been made by merely lodging the minute in process. It is of the very essence of the making of a tender that it be brought to the notice of the other party. The party to whom it is made is entitled to have a reasonable time to consider whether he shall or shall not accept it. In practice the expenses to its date includes a fee for consulting his counsel whether he should or should not accept it. It seems to me common sense that the party lodging a minute of tender in process should at the same time intimate it to the pursuer. There can be no difficulty in his doing so. I cannot think that there is any duty on the part of the agent of a litigant to examine the process every day—and it might be at some junctures in a litigation several times a day—to ascertain whether or not a minute of tender has been lodged. I should be surprised if he were found entitled to charge or to recover from the opponent the expenses of doing so. Obviously there may be long periods during which much expense may be incurred, and yet during which, in the ordinary course, there is no occasion for an agent to examine a process, *e.g.*, after an order for proof has been pronounced and he proceeds to precognosce witnesses.

"In the present case I am satisfied that no occasion arose for the pursuers' agent himself handling the process between the 16th October and 3rd December. One or two documents were lodged, but these were marked on the inventory by the clerk of the process.

"In my judgment the only proper practice is for the party lodging a minute of tender in process at the same time to intimate the tender to his opponent. This I believe to be the all but invariable practice. It is quite usual for a docquet to be endorsed on the minute of tender when lodged 'intimated of this date.'

"I note that in the case of lodging productions, &c., eight days before a jury trial, the Act of Sederunt, which is of recent date, provides that the lodging shall at the same time be intimated in writing to the opposite agent. This is at least illustrative of what is considered reasonable. I can see no good reason why the lodging of such an important writ as a minute of tender should not in the same way be intimated to the opposite agent.

"I think that technically the minute of acceptance should not, or at any rate need not, have contained its last three lines, but any objection on that head is not pressed provided that in my opinion they correctly

express the law of the matter in regard to expenses. In my opinion they do, and I shall therefore pronounce the usual interlocutor.

"The tender having in my judgment been made on the 3rd December, the pursuer was entitled to have a reasonable time thereafter to consider whether he should accept it or not, and to recover any expenses reasonably incurred in connection with that consideration."

The defenders reclaimed, and argued—In a litigation the parties should speak through the process—*Ramsay's Trustees* v. *Souter*, March 19, 1864, 2 Macph. 891, *per* Lord Justice-Clerk Inglis at p. 892. A tender made by a minute lodged in process was therefore complete and effectual without intimation, and the minute spoke as at the date when it was lodged. The expenses tendered were therefore expenses to the date of lodging only. If intimation was necessary to a complete and valid tender, no tender at all had been made by the defenders, with the result that there had never been *consensus in idem* between the parties, and consequently no contract of compromise. Reference was made to *Jack* v. *Black*, 1911 S.C. 691, 48 S.L.R. 586, and *Irvin* v. *Fairfield Shipbuilding Company*, February 22, 1899, 1 F. 595, 36 S.L.R. 473.

Argued for the pursuers (respondents)—A tender is not complete or effectual until it is intimated. The date of the tender must therefore be held to be the date on which it was intimated to the pursuers. The tender consequently must be held to tender expenses down to that date, in which case the pursuers had validly accepted what was offered.

At advising—

LORD PRESIDENT—This appears to me to be a very clear case. On the 16th October last, the defenders lodged in process a tender expressed in terms which are quite familiar to the profession. It runs thus—"Russell for the defenders stated to the Lord Ordinary that under reservation of all his pleas he tendered and hereby tenders the sum of £25, with expenses of process as the same may be taxed, in full of the conclusions of the summons." The meaning of that tender is not open to doubt. It offers £25 to the pursuers in name of damages, and expenses down to the 16th October, with, as sanctioned by practice and decision, a reasonable fee to cover the expense of consulting counsel as to whether or no the tender should be accepted.

It appears that, contrary to what we are informed is the practice, this tender was not intimated to the pursuers of the action, and its existence did not come to the knowledge of the pursuers until 3rd December 1913, when an acceptance was lodged in process, but with this condition adjected, "that the expenses include expenses to the date of intimation of the minute of tender to the pursuers' agent, viz., 3rd December 1913." And the question raised is whether or no that acceptance meets the offer. It is conceded that it does exactly meet the offer if the tender speaks not from the date when it was lodged in process, but from the date when knowledge of its existence came to the pursuers, but that it does not meet the offer if the date of the tender is the date when it was lodged in process. So that the question is quite sharply raised—Is this tender incomplete and consequently invalid unless and until it has been intimated to the pursuers? Is intimation essential to the validity of the tender? Lacking intimation, is this tender worthless?

Now, for generations, tenders in this form have been very familar to the legal profession, but never until now has it been suggested that the offer which is expressed in a tender is incomplete and ineffectual until it has been intimated. It must be observed that, if intimation is essential, it must be intimation in writing. For the incomplete offer is in writing, the acceptance is in writing, and therefore what *ex hypothesi* is essential to complete the judicial contract must also be in writing. And the consequences which flow from the acceptance of a tender are definite and far too important to be left to casual conversation and to information gathered at haphazard. Accordingly there must be written intimation as a solemnity, or none at all.

Now it appears to me to be impossible to contend that the meaning of this tender can be altered, without the consent of the parties who made it, according to the date at which knowledge of its existence reaches those to whom the offer is made. That would appear to be an extravagant proposition. I offer a simple and, as I think, decisive test—If a tender is lodged in process, is not intimated, but within a reasonable time after it comes to the knowledge of the pursuer—it may be weeks or months afterwards—is accepted, can anyone deny that a valid judicial contract is thereby effected. Of course, if the tender is incomplete and invalid, its acceptance means nothing. There can be no acceptance of an invalid and incomplete offer. And, therefore, if a judicial contract is effected by lodging a minute of acceptance of an unintimated tender, then in that case the conclusion seems to me inevitably to follow that intimation is not essential to the validity of the tender.

Every tender, says the Lord Justice-Clerk (Inglis) in the case of *Ramsay's Trustees*, 2 Macph. at p. 892, to which we were referred, "should be by minute lodged in process, for this reason, that the sufficiency of the minute depends upon the precise terms at the time that it is made, and it should, therefore, form a distinct step of procedure, in order that a perfect record may be kept of the time when it was lodged and of its terms, and it is only consonant to general practice and regular procedure that parties engaged in litigation should speak through the process."

But, according to the contention of the pursuers in this case, the date of the lodging of the tender signifies nothing. What is of importance is the date when its existence came to the knowledge of the pursuers—it may be by casual conversation, it may be by telephonic or telegraphic communica-

tion, it may be by letter or postcard, in short, by any means by which it reaches the knowledge of the opposing party. It would be idle for the parties to speak through the process if speech by letter or telegram or some other means of communication were all that signified.

Now, I am very far from saying that failure or neglect to intimate a tender may not be followed by serious consequences. If a pursuer, when he discovers the existence of a tender, accepts it within reasonable time, then in that case he should not have to pay, in my opinion, the expenses incurred by the defenders in what has been called the natural progress of the case during the period when the existence of the tender was unknown to him owing to the fault or neglect of his adversary. For I entirely agree with the Lord Ordinary when he says—"It seems to me common sense that the party lodging a minute of tender in process should at the same time intimate it to the pursuer. There can be no difficulty in his doing so. I cannot think that there is any duty on the part of the agent of a litigant to examine the process every day—and it might be at some junctures in a litigation several times a day—to ascertain whether or not a minute of tender has been lodged." Further, in my judgment, the only proper practice is for a party lodging a minute in process at the same time to intimate the tender to his opponent. But that is a very different thing from holding, as the Lord Ordinary does, that "the tender cannot be said to have been made by merely lodging the minute in process. It is of the very essence of the making of a tender that it be brought to the notice of the other party."

Differing from the Lord Ordinary, I hold that it is not essential to the validity of a tender that it be intimated to the opposite party, that the tender is valid and complete from the moment when it is lodged in process, that its meaning is then fixed and cannot be altered by the delay, howsoever excusable, of the pursuer in accepting the tender. And so holding, I reach the conclusion that we must in this case recall the Lord Ordinary's interlocutor and remit to him to proceed in the cause, for, in my judgment, while this tender has not yet been accepted, it still remains a valid and complete offer.

LORD JOHNSTON—I cannot subscribe to the opinion which your Lordship has pronounced, although I am somewhat at a loss to determine how far the result of my view really differs from that of your Lordship. I, however, entertain a difficulty which has led me to put myjudgment on a totally different ground.

If the tender as lodged is a final tender, and speaks from the actual date at which it is placed in the hands of the clerk of process, then I do not see how it is possible that it should ever be an effective tender, unless it is at once intimated or brought to the knowledge of the pursuer, and for this reason, that you cannot give it the effect which I think your Lordship really intends to give it, and which the practice of the Court, I think, would give it, without treating it as something different from what on its face it bears to be, because it says—I offer so many pounds in satisfaction of the claim in the action, "with expenses of process." If that is to be read "with expenses to the date of the tender," and I am obliged to regard this as the date of lodging it in process, it cannot be extended beyond its terms. Therefore if, say, a couple of months elapse before it comes or is brought to the knowledge of the pursuer, the result is that it is impossible that the pursuer should accept a tender so contrived either of *malice prepense* as a trap, or by negligence, possibly the former, for with expenses continuing to mount up it becomes a barren offer. You can only get out of the difficulty—as I think the Court would—by interpreting the tender in a different way. You would have to say that, whatever the actual date of the tender is, expenses must be reasonably given, not merely to the actual date of the tender, but to the date at which it becomes truly operative by being brought to the knowledge of the pursuer, in which case you would not be giving effect to the tender as your Lordship reads it.

I think, as I have said, that I probably come to the same result as your Lordship, but on a different ground. I entirely agree with the Lord Ordinary in the judgment which he has pronounced on the case as presented to him, and I did not think that the reclaiming note against that interlocutor was really arguable. But from your Lordship's judgment I must assume that there I must be wrong. The important points in the situation are these:—A tender was made in the case before the adjustment of issues. The actual date of the lodging was 16th October. Issues were lodged on the 30th October and approved on the 4th November, when the case was set down for trial on the 22nd January following; and accordingly from 4th November it was the pursuer's duty to proceed to prepare for his trial, barely three months thereafter. But the tender was not intimated to the pursuer until the 3rd December 1913, and then only accidentally and verbally, and it did not come to the knowledge of the pursuer until intimation. The question to be determined is, what is the date of the tender, and by date I mean effective date, for the actual date is known to be 16th October 1913. I agree with the Lord Ordinary, and for the reasons well stated by him, that the effective date was the 3rd December 1913.

It is, I think, pertinent to ask—What are the effects of a tender? They are these—first, the tender on the merits must be accompanied by a tender of expenses to date. If there is delay in accepting the tender the pursuer can recover no more, and is liable to the defender in expenses legitimately incurred after tender. Second, if the tender is rejected and the case is concluded in ordinary course, then (first) if the pursuer recovers more than the tender, nothing follows on the lodging of the tender; but (second) if the pursuer recovers less than the tender, he is disentitled from recovering expenses

after the date of the tender, and is liable in expenses from the date of tender. These rules are not statutory, nor do they depend on Act of Sederunt. They have every one of them been evolved by the Court on equitable considerations. In fact the whole law and practice of judicial tender is based on equity in the sense in which we use the word; and it is not too much to say that equitable considerations require, and I think always have required, that to make a tender effective—and the effect may, it is clear, be serious—it must be brought to the knowledge of the pursuer. The proper and commonsense way of bringing it to the knowledge of the pursuer is by written intimation, just as in the case of assignations, &c. That the whole law on the subject depends on equitable considerations is, I think, still further established by the fact that even the date of intimation does not fully close down the pursuer's right to recover expenses. Although expenses to date are what alone are expressly offered, the pursuer is entitled to reasonable time to consider the tender, as stated by the Lord Ordinary, and to the expense of consulting his counsel and agent on the subject. All which is manifestly just and equitable, although it is beyond the letter of the tender itself.

Before leaving that I should like to say that I too have considered most carefully the judgment of the Lord Justice-Clerk (Inglis) in the case of *Ramsay*, 2 Macph. 892, to which your Lordship has referred. But I venture to say that your Lordship's view somewhat strains the language used by the Lord Justice-Clerk, and used with reference to a totally different set of circumstances. His Lordship was not considering the question of intimation or of the tender coming to the knowledge of the pursuer. He uses the expression "the parties must speak through the process," but he uses that expression with reference merely to the question of exactitude. He demurs to the idea of anything but a written tender, because of the inexactitude which would arise if a tender was not reduced to writing. That writing must be in the process. It is true that he also says that there is another object in view, namely, to fix the date of the tender. In the case of a verbal tender, the point of time at which it is made is just as doubtful, if left to parole evidence, as the terms of the tender themselves; and therefore he desiderates that not only should the terms be reduced to writing but should be lodged in process. But I do not think that he was looking to such lodging as determining the effectiveness of the tender, or that he would have held that an unintimated tender, not coming to the knowledge of the pursuer, was to be held as effective from the literal date at which it was lodged in process, because that matter was not before him.

But there is the further case in which the Lord President (Dunedin) gave judgment, to which we were referred, the case of *Jack* v. *Black*, 1911 S.C. 691. I think his Lordship has in view the very possibility of circumstances such as we have here, for he is dealing with the question of after expenses, and he withdraws the words which he used in the previous case, the case of *Jacobs*, 1910 S.C. 756. He withdraws these words and says—"I now alter the words 'making of the tender,' because I think the true date is the date at which it is reasonable to expect that the tender should either be accepted or refused." In so speaking he is referring to the date which is to be taken as the effective date of the tender with reference to the consequences which are to follow upon the tender. The case, so far as expenses went, involved somewhat different circumstances from those here. There was some delay in accepting the tender. There was a question whether that delay was excusable or was not excusable. If it was not excusable, the date of the tender would have cut off the right to charge expenses and have allowed the opposite party to recover expenses from the date at which the tender was actually lodged in process. In consequence of a recess having intervened, it was held that the delay was not unreasonable, and therefore the postponed date was fixed as the date from which and to which expenses were to be calculated. Now that could not have been so if the tender was to be taken as your Lordship takes it—literally as an offer to pay a sum of money with expenses to the date when the tendering agent meets the clerk of the process and hands him the tender. It could only be if the effective date, as I have expressed it, of the tender was a different date from that. In the present case we have, as I say, a different set of circumstances. We have the delay occasioned not by the pursuer himself but by the party who tenders, but does not bring his tender to the knowledge of the pursuer. I think, therefore, that the view of the Lord President in *Jack* v. *Black*, is only consistent with the view which I have assumed would have been that of the Lord Justice-Clerk (Inglis) had he been speaking of the circumstances of this case and not of a totally different set of circumstances.

But there is a point in this case on which I have had substantial doubt, viz., whether the pursuer's acceptance of the tender, which though by a quite inexplicable practice of agents, it is, like other process documents the date of which is essential, undated, must have been subsequent to 3rd December 1913, is a valid and effectual acceptance? I should have been prepared to consider that point, for I think it is a very open question whether the pursuer was not bound to take the risks of his view of the law being correct, and whether to make his acceptance depend upon his view of the law being accepted was not tantamount to adjecting a condition to his acceptance which left it open to the defenders to withdraw. But the Lord Ordinary tells us that the matter was not pressed upon him, and I am not therefore required to form a concluded judgment upon it. What his Lordship says is—"I think that technically the minute of acceptance should not, or at any rate need not, have contained its last three lines, but any objection on that head is not pressed provided that, in my opinion, they correctly express the law of the matter in regard to

expenses." The Lord Ordinary held that they did correctly express the law of the matter in regard to expenses, and in that I agree.

It seems to me that when the case was presented to the Lord Ordinary on that footing, it is not possible to go behind that, and that we are therefore justified in affirming his Lordship.

LORD SKERRINGTON—In this action of damages for personal injuries the Lord Ordinary has decided that a minute of tender which was lodged in process on 16th October 1913, and in which the defenders tendered to the pursuers "the sum of £25, with expenses of process as the same may be taxed," must be construed and receive effect as if it had been lodged in process on 3rd December 1913, being the date on which it was intimated to the pursuer. He accordingly holds that the tender was validly accepted on this last-mentioned date by a minute which stated that the pursuers accepted the tender "on the footing that the expenses include expenses to the date of intimation of the minute of tender to the pursuers' agent, viz., 3rd December 1913." The only question between the parties, as it seems to me, is whether the defenders' tender ought to be construed in the manner stated in the minute of acceptance, because if not, there was no *consensus in idem* between the parties, and the action must therefore proceed to trial. In the note annexed to his interlocutor the Lord Ordinary stated that the question on which he was asked to give judgment was "whether or not a tender is well and sufficiently made simply by lodging in process the minute of tender." In one sense there can be no doubt that this question must be answered in the affirmative. Though a tender has not been intimated to a pursuer it is none the less an offer binding upon the defender, and which the pursuer can accept as soon as he comes to know of it. In another sense, however, intimation or its equivalent is, in my opinion, essential to the validity of a tender. In other words, if a defender proposes to found upon a tender as affecting his or the pursuer's liability for expenses, he must show that the tender came to the knowledge of his opponent at some particular date when, in his view, it ought to have been considered and accepted. It has been repeatedly said that a defender is bound to give the pursuer a reasonable time in which to consider the tender and to make up his mind whether to accept or to reject it—*Shaw* v. *Edinburgh and Glasgow Railway Company*, (1863) 2 Macph. 142, *per* Lord Colonsay at p. 143; *Jack* v. *Black*, 1911 S.C. 691, *per* Lord President at p. 700. This statement implies that the tender shall be brought to the knowledge of the pursuer. It appears from the reports that a defender often intimates to the pursuer that a tender will be lodged in the course of a few days, and this practice is referred to by Lord Colonsay in his opinion in the case of *Shaw*. In the reported cases it has always been assumed that the existence of the tender was known to the pursuer from its date, and generally such an assumption would be perfectly justified. In disposing of expenses after a tender has been accepted the Court does not draw a hard and fast line at the hour or even the day when the minute of tender was lodged in process, although, roughly speaking, a pursuer is entitled to his expenses up to the date when the tender was lodged, and a defender is entitled to expenses from and after that date. It has long been settled that a pursuer is entitled to the expense of consulting counsel as to the propriety of accepting a tender—*Phillip* v. *Dickson*, 1852, 15 D. 228. Again in the interlocutor giving effect to a tender and acceptance the pursuer has been found entitled to expenses up to and including one or more days, according to circumstances, after that on which the tender was lodged, and the defender has been found entitled to expenses from and after the same date—*Shaw* v. *Edinburgh and Glasgow Railway Company*; *M'Laughlin* v. *Glasgow Tramway and Omnibus Company, Limited*, 1897, 24 R. 992. In the latest case, *Jack* v. *Black*, a somewhat different formula was adopted, and the pursuer was found entitled to his expenses to the date of tender only, with a fee for consulting counsel, while the defender was found entitled to expenses from the date on which in the special circumstances the pursuer ought to have made up his mind to accept the tender. While these decisions show that a tender of expenses made either in general terms, as in the present case, or offering expenses "to date" will be construed not with absolute literalness, but reasonably and so as to include some expenses incurred after its date, they do not in any way support the result at which the Lord Ordinary has arrived. It seems to me impossible to construe the defenders' minute as offering a sum which is to be measured by the amount of expenses incurred or to be incurred by the pursuer prior to the date at which he may receive intimation of the tender. I can find nothing either in the language of the minute or in the practice and decisions as to tenders which entitles me to decide that the defenders offered to pay a sum of uncertain but gradually increasing amount.

For the foregoing reasons I am of opinion that the acceptance did not meet the tender, and that the Lord Ordinary's interlocutor must be recalled.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to proceed.

Counsel for the Pursuers (Respondents)—Crabb Watt, K. C. — Kemp. Agent — E. Rolland Macnab, S.S.C.

Counsel for the Defenders (Reclaimers)—Lord Advocate (Munro, K.C.) — Russell. Agents — St Clair Swanson & Manson, W.S.

Note.—The Act of Sederunt of 17th February 1914 enacts—"1. *Intimation of Lodging Steps of Process*—The agent lodging a

step of process other than the initial writ or defences shall give written intimation of such lodging to the agent of the other party, and the clerks shall not mark any such step as received until a certificate of intimation has been endorsed thereon."

Tuesday, January 27.

OUTER HOUSE.

[Lord Ormidale, Ordinary on Teinds.

MACPHAIL *v.* KILBRANDON AND KILCHATTAN HERITORS.

Church — Manse — Glebe — Access — Obligation of Heritors.

The heritors of a parish are bound to provide and maintain a reasonable access from the public road to the manse, suitable for foot-passengers, and also sufficient for use by a horse and trap.

Observations as to the liability of the heritors to provide and maintain an access to the glebe.

The Rev. William Macphail, minister of the United Parish of Kilbrandon and Kilchattan, *defender*, presented a petition to the Presbytery of Lorn seeking repair, &c., to the church and manse of his parish, and, *inter alia*, asking a finding "that the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse must be repaired and appointed to be not less than fifteen feet broad, and that the glebe must be sufficiently enclosed." The Marquis of Breadalbane, K.G., and others, heritors of the said parish, *pursuers*, being dissatisfied with the findings of the Presbytery, appealed to the Sheriff. On 23rd May 1912 the Sheriff-Substitute (WALLACE) remitted for report to a man of skill, with the exception of the repair of the glebe fences and of the entrance to the glebe and manse.

Note.— . . . "Pursuers however aver, and have submitted an argument to prove, that the repair of the access to the glebe and manse and of the glebe fences are matters which do not fall within the purview of the legal liability of the heritors, and that therefore the defender's petition, so far as it relates to these matters, is incompetent and should be dismissed. I have, after a careful consideration of such authorities as are available, come to the conclusion that their view is sound. I shall deal first with the repair of the glebe fences.

"Professor Rankine, in his treatise on Landownership, says at page 670 that 'where a glebe has once been provided, it is difficult to conceive of any further burden resting on the heritors by way of maintenance, *unless it be to keep up the fences and access*' (the italics are mine), and he goes on to indicate an opinion that in the absence of decisions on these matters no such obligation rests upon the heritors. Mr Black, in his work on Parochial Ecclesiastical Law, at page 160, quotes Professor Rankine's observations with approval, and remarks that 'as the minister enjoys the whole benefit of the glebe, it does not appear that he is entitled to ask the heritors to build a wall round it, and that if a fence be already round the glebe when he enters upon the benefice, it is his duty to maintain it, such maintenance being an incident to the minister's right to the glebe, *just as his payment of road and school assessment qua proprietor of manse and glebe*' (again the italics are mine). It will be noticed, however, that Professor Rankine, to whose opinion on such matters very great weight is deservedly attached, expresses himself in very guarded terms. It is, he thinks, 'difficult' (not, it will be observed, impossible) 'to conceive of any further burden resting on the heritors by way of maintenance,' but he is careful to qualify even this guarded statement by adding 'unless it be to keep up the fences and access.' So that apparently in his view it is not even difficult, much less impossible, to conceive the burden resting on the heritors of maintaining the glebe fences and access. Mr Black's statement is, however, much more sweeping than Professor Rankine's, for while the latter deals with the maintenance and repair of the glebe fences, he leaves one rather to conjecture by a process of exclusion that there does rest upon the heritors an initial obligation adequately to fence the glebe when first it is designed as such. Mr Black, on the other hand, expressly bases his opinion that the maintenance and repair of the fence does not form a burden on the heritors, on the twofold ground (*firstly*) that as the minister is not entitled to ask the heritors in the first instance to enclose his glebe, he cannot afterwards ask them to maintain a fence which *ex hypothesi* they were not responsible for erecting; and (*secondly*) that the maintenance of the glebe fences is an incident of the minister's proprietorship, just as payment of his assessments are.

"In Sheriff Johnston's erudite edition of Mr Duncan's work on Ecclesiastical Law, there occurs the following passage on page 428:—'None of the statutes anent glebes contain any requirement to the effect that the ground designed as glebe should be fenced and enclosed by the heritors, and no decision imports that walls or fences constitute an integral part of the glebe. In the case of the manse garden, a wall or enclosure of some kind has been repeatedly recognised as a necessary or proper adjunct thereof. On a somewhat similar principle it might possibly be inferred that where a dyke or fence is essential to the beneficial use of the ground *qua* glebe, the burden of erecting such enclosure would, on the designation of the ground, devolve on the heritors.' As a result it may I think be taken to be the opinion of these three eminent writers that while there may possibly (not certainly) be a liability on the part of the heritors to enclose the glebe at its designation, no liability whatever attaches to them in respect of its maintenance once it has been erected.

"I think, however, the true test of the matter is to discover to whom the ownership of the glebe belongs. Does the glebe