[*6th June* 1839.]

(Appeal from the Court of Session, Scotland.)

JAMES EWING [1], WILLIAM DUNN, and the MAGISTRATES and TOWN COUNCIL of GLASGOW, Appellants.—*Attorney General (Sir John Campbell)—Knight Bruce.* (No. 13.)

REV. JOHN BURNS, D.D., and others. — *Lord Advocate (Rutherfurd) — Pemberton. — A. M'Neill.*

Poor.—Parish.—Stat. 39 & 40 *Geo.* III. *c.* 88.—Where lands had been disjoined and separated by act of parliament from a parish in which the same had been previously assessed for poor rates, and annexed to and made part of the extended royalty of a burgh;—In an action by the kirk session of the original parish against the owners and occupiers of houses on the disjoined lands for payment of the proportion of poor rates leviable on said lands, as if still liable to the original parish, and against the magistrates and council of the burgh, as liable in relief to the other private defenders:—Held upon construction of the act of parliament (reversing the judgment of the Court of Session), 1, That the owners and occupiers of houses on the lands so disjoined were not subject to their former liability for poor rates to the original parish, and also that the magistrates and council were not liable directly to the original parish, or in relief to the other defenders for such poor rates; 2, (also reversing as aforesaid) That an action directed not only against the alleged primary obligants but also against other parties as liable in relief to them, and a decree following thereon by which the parties as liable in relief

[1] Rep. 15 D., B., & M., 936.

were ordained to make payment of sums decerned for against the primary obligants, in the event of such primary obligants failing to pay, were incompetent.

Consuetude:—Held that usage, or acquiescence in a particular construction of a statute, founded upon alleged circumstances and practice, to which the individual defenders were not parties, could not relevantly be admitted as evidence of such construction to be binding on those defenders.

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

IN 1772 the property of the lands of Ramshorn and Meadowflat, part of and situated in the barony parish, was acquired by the magistrates of Glasgow. These lands continued to be liable for and to pay the assessments for the poor and other burdens to the barony parish, thus yielding a considerable sum in consequence of the increased value of the property and buildings thereon.

The magistrates of Glasgow having about the end of the last century contemplated an extension of the royalty by act of parliament, various communings took place betwixt the heritors of the barony parish and the magistrates with reference to the introduction of a clause into the proposed bill providing against the lands intended to be annexed to the royalty being relieved from supporting the poor of the barony parish. In the beginning of 1800 the trades house, who held part of these lands, passed the following resolution:—

"That the said provost, magistrates, and council would "not only free and relieve the inhabitants of the "barony parish whose property is to be annexed to "the royalty, of the statute labour, but also of the "poor's rates in the said parish."

In the year 1800 a statute was passed (39 & 40 Geo. 3. c. 88.,) intituled "An act for extending the royalty of

" the city of Glasgow over certain adjacent lands, for " paving, lighting," &c., " and for raising funds and " giving certain powers to the magistrates and coun- " cil, and town and dean of guild courts for the above " and other purposes."

In the preamble it was set forth that " it is just and " reasonable that the royalty of the said city should " be extended over those lands, in consideration of the " expense incurred in purchasing the same, and of the " further sums of money which must be expended in " paving therein, &c.; and also for the equal appor- " tioning of the public burdens and benefits among " all the inhabitants of the place."

By the second section the magistrates and council were " empowered to levy the same maills, duties, cus- " toms, conversion of statute labour, and other taxes " within the said annexed grounds, as they are en- " titled to levy within the present royalty."

By the third section it was provided, " that the " magistrates and town council shall hereafter pay, " from the money raised for the conversion of the " statute labour within the said city, to the heritors " legally appointed to repair and maintain the public " roads in the western district of the barony parish of " Glasgow, 5*l.* sterling yearly, as a conversion for the " statute labour of the said annexed lands, and shall " also, from the funds of the community of the said " city, relieve the holders and occupiers of houses or " lands in the said extended royalty of the poor's rates " payable by them to the said barony parish as having " been a part thereof before passing this act."

By the sixth section it was provided, " that it shall " be competent to the sheriff and justices of the peace

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" for the county of Lanark to exercise the same powers " and jurisdictions within the said lands hereby an- " nexed to and comprehended within the said royalty, " as are competent to the said sheriff and justices of " the peace within the ancient royalty."

The tenure of the lands continued in virtue of the seventh section unchanged.

By the eighth section it was enacted, " that the said " magistrates and town council shall have full power " to appoint stent masters, assessors, and collectors to " assess and to levy from the proprietors and occupiers " or possessors of the said annexed grounds, and of " all such houses as are built or hereafter shall be " built upon the foresaid grounds hereby annexed to and " comprehended within the said royalty, an equal and " rateable portion of the cess, trades stent, poor's rates, " conversion of statute labour, and other taxes payable " by the inhabitants of the city of Glasgow, in the " same manner as they are now levied within the " present royalty."

The tenth section provided, " that the several lands " hereby annexed to the royalty of the city of Glasgow, " besides the cess to be levied by the collectors of the " town for and in respect of the houses and buildings " erected thereon, shall remain liable and be subjected " to the payment of a rateable proportion of the cess " or land tax, and other public burdens imposed or " to be imposed on the shire of Lanark for and in " respect of the ground, which cess shall be paid by " the magistrates and town council of the said city " from the funds of the community, and shall be levied " in the usual manner."

The eleventh section enacted as follows:—" And be

" it enacted, that the said grounds hereby annexed to " and comprehended within the royalty of the city of " Glasgow, shall be and the same are hereby for ever " separated from the barony parish, and are hereby " annexed to the parishes within the said city to which " they lie most contiguous, or to which the magistrates " and town council shall by any act or acts of council " hereafter direct and appoint."

The twelfth section provided, "that the tithes payable " out of the lands hereby annexed shall be saved and " reserved to the true owners thereof in the same " manner as if this act had never passed."

The thirteenth section enacted, "that the right of " patronage of such church and churches as shall be " built and endowed by the community of the city of " Glasgow upon any of the said lands hereby an- " nexed to and within the said royalty, shall and the " same is hereby declared to belong to the magistrates " and town council of the said city, in the same " manner as they hold and enjoy the patronage of the " churches within the ancient royalty."

The fourteenth section was in these terms:—"Saving " always, and reserving to His Majesty, and all other " person or persons concerned, all rights and interest, " other than the present extension of the said royalty, " which they had, have, or may have in the lands " hereby annexed."

The act also contained provisions relative to paving, lighting, and cleansing the streets of the city, regulating the police, and appointing officers and watchmen, dividing the city into wards, appointing commissioners, raising funds, regulating markets, recovering penalties, and the limitation of actions, &c., which

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are followed by this proviso in section ninety-ninth:—
" And be it enacted, that all regulations, provisions,
" and other things whatsoever herein-before enacted,
" shall be equally applicable and shall extend and be
" construed to extend to the lands hereby annexed to
" and comprehended within the royalty of the said
" city, as to those comprehended in the ancient royalty
" of the said city in so far as is consistent with the
" former parts of this act, and excepting as herein-
" before expressly excepted."

After this act of annexation took effect, and down to the year 1810, the heritors and kirk session of the barony parish raised the sums required for the support of the poor by assessing the heritors of the annexed lands according to the valued rent, the magistrates actually paying the sums so assessed. In the year 1811 it became necessary to increase the amount of the assessment for the poor, and to lay the valuation upon the real rent instead of the valued rent, thus making householders as well as heritors liable. The magistrates and council remitted to a select committee to inquire into the question of liability, who in a report expressed their conviction that looking to the statute the increased demand would not be resisted. The report was approved and acted on. It did not appear that the householders on the annexed lands were parties to this report.

The magistrates continued, down to 1831, to pay the share of the poor rates apportioned on the inhabitants of the extended royalty; the largest sum levied in any one year in respect of the property within the royalty being 1,795*l.*

In 1831 the barony parish having demanded from

the magistrates and council a larger sum than had been collected, the magistrates and council, in December of that year, intimated their intention to resist farther payments until their liabilities were judicially determined.

Two of the wealthy inhabitants of the extended royalty, Mr. Ewing and Mr. Dunn, were in arrear in the payment of poor rates for the respective sums of 27*l.* and 26*l.* for the years 1830, 1831, and 1832.

In June 1833, in order to try the question and to recover the large arrears of poor rates then due, Dr. Burns, and Dr. Black his assistant and successor, ministers of the barony parish, for themselves and the other members of the kirk session, and William Robertson, the collector appointed by the heritors and kirk session, brought an action against Ewing and Dunn as individual heritors and householders, and against the magistrates and council, founding on the provisions of the third and other sections of the aforesaid statute; and setting forth, "That the intendment, "legal import, and effect of the statute was to leave "the properties of the defenders and the other heri-"tors in a similar situation within the said extended "royalty, subject to a rateable share with those of all "the other heritors of the said barony parish, of the "annual burden of supporting and maintaining the "poor in all time coming, reserving the right of "heritors to relief of the sums from the magistrates "of Glasgow, as the burdens might arise or be im-"posed; or otherwise, to render the magistrates and "council of Glasgow, as representing the community, "directly liable to the pursuers and their successors "for such assessments as might be imposed on the

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" properties of the said heritors in the part foresaid of " the said extended royalty"; and concluding that " the said James Ewing ought and should be decerned " and ordained, by decree of the lords of our council " and session, to make payment to the pursuers of the " sum of 27*l.* 6*s.* sterling, with the legal interest " thereof, or of the foresaid respective portions thereof" (specifying the items); " and the said William Dunn " ought and should be decerned and ordained, by " decree foresaid, to make payment to the pursuers of " the sum of 26*l.* 6*s.* 6*d.* sterling, with the legal interest " thereof, or of the foresaid respective portions thereof " as follows" (specifying the items), " reserving right " to the defenders and to each of them to claim such " relief from the magistrates of Glasgow as they or " either of them may be able to establish in the pre- " mises; or otherwise, in case it should be found that " the magistrates of Glasgow are now directly liable " to the pursuers in the said sums, then and in that " case the Lord Provost of the city of Glasgow, and " magistrates of the said city, and the other members " of the town council thereof, as representing the " community of the said city, and their successors in " office, ought and should be decerned and ordained, " by decree of the lords of our council and session, " to make payment to the pursuers of the several " sums of money, principal and interest, above specified; " and the said defenders ought and should be decerned " and ordained to pay the expenses of the process."

In defence Messrs. Ewing and Dunn pleaded, 1, that they are not liable, in respect of their properties libelled, for the support of the poor of the barony parish, as that parish now exists, and are not liable,

directly or indirectly, to be assessed therefor by the heritors and kirk session of that parish, or otherwise; 2, that on the contrary they are, along with the other inhabitants within burgh, liable for the support of the poor of the city of Glasgow allenarly; 3, that, having accordingly been assessed for the support of the burgh poor, and having regularly paid their assessments, the present action is wholly groundless as regards them, and they ought to be assoilzied simpliciter from its conclusion, with expenses.

The magistrates and town council, referring to the separate defences for Messrs. Ewing and Dunn, pleaded that the sole ground on which the pursuers pretend to rest their case against them, is the enactment in section three of the statute, viz., "That the said magistrates "and town council shall also, from the funds of the "community of the said city, relieve the holders and "occupiers of houses or lands in the said extended "royalty of the poor's rates payable by them to the said "barony parish, as having been a part thereof before "passing this act;" and such being the case, they were not liable to the pursuers in the sums pursued for, or in any part thereof.

The cause having been debated in the Outer House, Lord Jeffrey, Ordinary, 15th March 1836, pronounced the following interlocutor, with a relative explanatory note[1] annexed thereto:—"The Lord Ordi-

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[1] *Note.*—"The Lord Ordinary cannot persuade himself that there is "any difficulty in this case, and thinks that it is impossible to read "attentively through the fourteen first sections of the act, as they stand "in their order, and entertain any doubt as to their true meaning and "effect.

"The defenders, at the debate, did not find it convenient to proceed in "this natural course. They went at once to the eleventh section, which

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" nary, having resumed consideration of the debate, " with the closed record, productions for the parties,

" provides in general terms for the disjunction of the annexed lands from " the barony parish, and their annexation to the parishes of the old " royalty: and then, contending that this disjunction, not being in any " way qualified or limited in its terms, imported a total separation, and " consequent liberation from all future parochial burdens in the parish " from which they are disjoined, they went to the second section (as " illustrated by the eighth,) to shew that they were accordingly sub- " jected to a new, and, as they maintained, substituted set of burdens, in " their new connection; and argued that, as a double liability was in no " case to be presumed without express words, this was a conclusive con- " firmation of their views as to the effect of the absolute disjunction. " They then proceeded to point out the very different terms in which the " future payments of cess and statute labour money to the county, from " which the annexed lands were disjoined, are provided for in the act, and " the provisions there supposed to be made for future poor assessments; " and concluded by suggesting that these last provisions, which they " represented as being merely for relief from contingent and imaginary " claims, must have been inserted to satisfy the groundless anxiety or " apprehensions of the owners of the annexed property, but could never " be held to import that the claims themselves were just or maintainable.

" The Lord Ordinary takes a very different view of the object and " effect of the statute. It was enacted on the petition of the magistrates, " and for the purpose of conferring a great benefit on the city, by putting " under its municipal jurisdiction, and subjecting to its burgal assess- " ments, a very wealthy and flourishing quarter of the actual town; at the " same time, it was obvious that if this rich assessable district was to be " entirely withdrawn from the parish and the county to which it formerly " belonged, and exempted from all future contributions to their local " taxations, a great loss would be sustained by these communities, and a " proportionally heavier burden laid on what remained of them. It was " necessary, therefore, to provide for this by special enactments; and it " is impossible to read the act, and have any doubt as to the principle on " which these are framed. That principle is, beyond all question, that " the annexed lands shall be liable to a double assessment, but that the " owners or occupiers shall only pay those chargeable for the city, and be " relieved of such as continued due to the county or parish, by the public " funds, or some particular branch of the public funds of the city. That " this is the case as to the cess and all the other proper county burdens, " and the statute labour, cannot possibly be disputed; and as there were " obviously as strong, if not still stronger, reasons for applying the same " principle to the assessments for the poor, the Lord Ordinary would not " have hesitated to construe any doubtful or ambiguous words in the pro- " vision as to these assessments upon that assumption, and according to " the analogy of the kindred provisions, as to which there was no doubt.

" and whole process, finds, that according to the just
" and true construction of the act of the 39 & 40 Geo. 3.

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" But in fact it does not appear to him that the words, even if they stood
" by themselves, are in the least degree doubtful or ambiguous. The
" provision as to the cess, &c. (section 10) is, that besides the cess to be
" levied from the annexed lands for the town, they should also remain
" liable to their rateable proportion of the county cess, and all other
" county burdens; ' which cess,' &c. it is added, ' shall be paid by the
" ' magistrates and town council of the said city from the funds of the
" ' community.' Then, as to the statute labour, it is specially provided
" (and obviously in terms of a previous agreement), that an annual sum
" of *5l.* shall be paid by the said magistrates and town council to the
" heritors of the barony parish, ' as a conversion for the statute labour of
" ' the said annexed lands;' and then immediately after, and as the sequel
" of the same section, follows the provision as to the poor rates, in these
" words:—' And they (the magistrates and council) shall also, from the
" ' funds of the said city, relieve the owners and occupiers of lands and
" ' houses in the said extended royalty, of the poor's rates payable by them
" ' to the said barony parish as having been a part thereof, before pas-
" ' sing this act.' If this does not mean that the annexed lands were
" still to pay poor's rates (as well as cess and statute labour money) to
" the barony parish, and that the magistrates were to protect the owners
" and occupiers, by paying these rates for them out of the public funds,
" it is not easy to conceive what it does mean.

" Accordingly, the defenders are driven to great straits to give it a
" meaning; and actually maintained, at the debate, first, that the whole
" of this provision about the poor's rates really had no meaning, and must
" have been inserted by mistake, or per incuriam; and next, that it could
" only have been inserted to satisfy the groundless apprehensions of the
" owners and occupiers as to possible, but evidently incompetent claims
" on the part of the barony parish; or finally, that it might possibly
" relate to the arrears of former assessments. It is not thought necessary
" to make any remarks on these extraordinary suppositions.

" The variance in the phraseology, and indeed in the substance of the
" arrangements as to the cess and other county burdens, the statute labour
" and the poor's rates, on which the defenders dwelt largely, is very easily
" explained. The principle, it has been seen, is the same as to all; but
" the arrangements for carrying it into effect are naturally different, and
" the expression accordingly varies. The cess being a fixed and invariable
" sum, the provision is merely that it shall be annually paid over by the
" city, and there was in that case no need for any other arrangement.
" The statute labour assessment again was liable to fluctuation, though
" not to any great extent; and it was quite practicable, therefore, and
" seems to have been thought more convenient, to fix an average amount
" in the statute, which should be paid in all time coming, as its conver-
" sion. But the poor assessments were liable to great and incalculable

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" c. 88., the lands thereby annexed to the royalty of " the city of Glasgow, and disjoined from the parish " variations; and (as the result has shewn) no fixed average could have " been taken with any tolerable safety, as the rule of contribution in all " time coming. They were, therefore, left to be settled as before by the " annual assessments; and as these assessments must necessarily be made " on the individual owners and occupiers of the annexed property, the " burden taken by the magistrates is correctly expressed as an obligation " to relieve those individuals, against whom personally a charge must have " been first constituted, before the amount to be paid for them by the " magistrates could in any one year be ascertained. The whole pro- " visions, therefore, as to each and all of these county and parish burdens, " are not only perfectly congruous and identical in substance, but the " particular arrangements and expressions as to each are judiciously " adapted for carrying the principle into effect.

" After this plain exposition of the words of the act, it can scarcely be " necessary to say any thing as to the defenders main argument, that the " general terms of the express disjunction of the district in question, from " the barony parish, must necessarily import a disjunction quoad omnia. " The conclusive answer is, that the statute has not left the nature or " effect of that disjunction to inference, but has expressly provided and " enacted in what respects, and to what effect, the disjoined property shall " still be tributary to the parish from which it is divided, and has, in an " especial manner, enacted, inter alia, that it shall still be liable to poor's " rates in that parish; in fact, there is no civil burden for which it does " not continue liable as before, both to the parish and the county; and " while the annexation, with all its consequent liabilities, is complete and " total, it may be truly said that the disjunction can extend to eccle- " siastical relations only; for there is nothing else left on which it can " possibly operate.

" One simple and obvious question brings out the palpable fallacy of " the defenders whole argument. If it was really intended by the act to " exempt the owners of the annexed territory from future poor assessments " in the barony parish, why was it not so provided? and above all, why " was a clause inserted looking so very like a special provision the other " way? It could not be that the framers of the act trusted to the effect " of the general words of the annexation and disjunction, for they leave " nothing whatever to the operation of these words; every thing is " separately and anxiously provided for. They do not rely on the express " annexation and consolidation with the old royalty, even for the extension " of the magistrates jurisdiction over the new territory; but this, with " everything else, is specially enacted. But, unluckily for this trusting " hypothesis, there is a special clause about those poor's rates, and the " defenders theory is, that it was introduced to quiet the idle fears of the " annexed owners, as to the possible insufficiency of the general words to " secure their exemption. Whoever else trusted to the virtue of these

" of barony, and the owners and occupiers of the said " lands, or of the houses and buildings thereon, are

" words, therefore, it is certain that these owners did not trust to them ; " and that the legislature knew this, and in order to remove their distrust, " is supposed to have put in this clause, binding the magistrates to relieve " them from their imaginary perils. The Lord Ordinary must say, that " this appears to him to be nothing short of a mere absurdity; if the " object was not only to secure these owners from the barony assessments, " but to quiet their foolish apprehensions of danger from them, was not " the plain way to do this, just to enact that they should be exempted? " or is it conceivable that, with this object in view, the legislature, having " full power to settle the whole matter by a word, should take this " indirect and really unintelligible course to effect it? It is needless to " add, that the whole phraseology of the clause excludes this strange " hypothesis. The magistrates are there taken bound to give relief, not " against possible claims, but against ' rates payable to the barony parish ;' " and this relief is to be given, not by refuting the assessors, but by paying " them, not by a successful argument on the effect of the clause of disjunc- " tion, but ' from the funds of the community of the city.'

" When the case is so clear upon the construction of the act itself, " there is no need to refer to the powerful corroboration which this " construction receives from what confessedly preceded its enactment, or " from the interpretation which has, till very recently, been put upon it " in practice. It is quite certain that when the act was in preparation " the heritors of the barony parish required that satisfaction, both as to " the statute labour and the poor's rates, which the Lord Ordinary thinks " they have obtained by the clauses in question; and it is admitted, that " after they had submitted their amendments, they allowed the act to " pass without opposition. He is aware, however, that the admissibility " of such evidence, however powerfully it may influence the mind, is very " questionable, and, therefore, he in no degree rests his judgment upon it. " With regard to the subsequent practice, however, he inclines to think, " that when it has been uniform, of many years standing, and against the " interest of those by whose consent it has been established, it may " fairly be looked to for elucidating the true meaning of any doubtful or " obscure enactment; against a plain and precise statute, (at least since " the union,) no practice can be of any avail, and the Lord Ordinary " thinks the statute clear enough here. But the defenders can scarcely " deny, that in their view of its meaning, its enactments are full of " obscurity, and that it is competent, therefore, to refer to early and long " continued practice for their elucidation. Now, the practice in this case " amounts to no less than this, that ever since the passing of the act in " 1800 down to 1831, the magistrates, upon whose petition it proceeded, " have all along recognized their liability under the clause in dispute, and " have every year paid over large sums, varying from 300*l.* to 1,795*l.*, " their share of the barony poor assessments. In 1811, when the first

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" not relieved from their previous liability for the " assessments made or to be made for the support of " the poor of the said parish, along with the other " lands, and the owners and occupiers thereof, within " the said parish; and that the magistrates and town " council of the said city are bound to relieve the " owners and occupiers of the annexed lands and " houses and buildings thereon of the whole of the " said assessments made or to be made for the support " of the poor of the said barony parish, by paying " over from the funds of the community of the said " city the whole amount of the said assessments as " they have or shall become due to the proper officer " of the said parish, or person entitled to collect and " receive such assessments; and therefore repels the " defences set forth and maintained by both sets of " defenders: Decerns in terms of the conclusions of " the libel against the defenders, James Ewing and

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" great increase of these assessments took place, the matter was remitted " to a select committee, who gave in a full and well-considered report, " expressing their clear conviction, that the increased demand could not " be resisted, and this was deliberately adopted by the Council, and acted " upon ever after. In 1821, some objections having been taken, not to " the general legality of the charge, but to the way of ascertaining its " amount, another committee of the town council was appointed to adjust " this matter with the barony heritors, which they accordingly effected, and " gave in a long and elaborate report to the council, with a scheme for " checking the assessor's charges in a particular way, which was also " adopted and acted upon down till 1831. In that year a new light broke " in upon the magistrates, and it was discovered, that they who framed " and carried through the act in 1800 were altogether mistaken as to its " meaning; and that their practice, and that of their successors for thirty " years was against its true construction, as well as their own interest and " duty to the city.

" The Lord Ordinary thinks, that a more extravagant allegation never " was brought forward in a Court of Law; and sees nothing but the " greatness of the interest at stake, which can explain the conduct of the " magistrates in embarking in so unpromising a litigation."

" William Dunn severally, for the sums of money con-
" cluded for against each of the said defenders, with
" interest upon the said several sums as libelled;
" and in the event of payment not being made of the
" said several sums by the said defenders, within
" twenty-one days after this interlocutor shall be final,
" decerns also against the other defenders, the magis-
" trates and town council of the said city of Glasgow,
" and their successors in office, for such of the said
" sums as may then be unpaid: Finds the whole of
" the defenders, conjunctly and severally, liable to the
" pursuers in expenses; allows an account thereof to
" be given in; and remits the same, when lodged, to
" the auditor for his taxation and report."

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Against this interlocutor a reclaiming note was presented by the defenders (appellants) to the second division of the Court of Session, and after hearing counsel their Lordships ordered cases on the whole cause; and thereafter, upon advising the cases, adhered to the interlocutor of the Lord Ordinary, and found the defenders (appellants) liable in additional expenses.

Judgment of Court, 17th May 1837.

Messrs. Ewing and Dunn and the magistrates appealed.

Appellants.—The interlocutor of the Lord Ordinary adhered to by the Court is erroneous in point of form or substantial justice, and it is also ill-founded in its construction of the act. The error in the decerniture against the magistrates was pointed out to the Court, and, though adverted to by the presiding judge, was left uncorrected.

Appellants Argument.

1. The kirk session might have a right to sue, but

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what right had they to sue the corporation? There may be a question of indemnity between the private defenders and the corporation, but the barony kirk session have no right, in suing the party liable directly to them, to sue also any third party who may be bound to relieve their supposed debtor. But the judgment goes even further than the illegal conclusion of the summons requires, for it finds that if the private defenders fail to pay then the corporation shall make payment; thus Ewing and Dunn have been found liable in the expenses of a record loaded with unnecessary parties. Or suppose the obligation thrown upon the corporation, as betwixt them and the barony kirk session, then Ewing and Dunn are unnecessary parties.

2. As to the question of liability of Ewing and Dunn the Court was so far right in holding that it turns upon the construction of the statute; and keeping in view those canons of construction,—(1.), that a Court must so construe an act as to make every part of the instrument effectual, if it can be made so; (2.), that a clear and precise intention expressed in one part of the instrument is not to be held by implication or otherwise to be repealed or annulled from ambiguous expressions in another part, and thence inferring a different intention by the granter, see Doe v. Hicks [1], a case which depended in Chancery as well as in the courts of common law, and in particular the opinion of Tindal, C. J., rep. p. 484; (3.), that no question is to be raised upon the order in which the clauses are to be read, as the whole must be read as forming one

[1] 8 Bingh. 475.

instrument, clearly there was complete disjunction by the eleventh section, in every respect, betwixt the annexed lands and the barony parish; and if they were "for ever separated" they thus became extra-parochial in all questions of jurisdiction and liability connected with the barony parish. Nay, more, the disjoined lands are declared to be assessable in an equal proportion of the poor rates payable within the royalty to which they are annexed. The Leith Case, Hill v. Cunninghame [1], in which the principle of double assessment was discountenanced, differs a little from this, but there is no substantial distinction betwixt the two cases; there were no express words of disjunction in that case; and if it was decided as that case was, where there were no words of disjunction, the magistrates here ought not to have been blamed for disputing their liability when there are express words of separation as well as annexation.

There is not,—as would have been requisite to meet the respondents view,—any express clause of reservation of the rights of the barony parish, as was introduced to save the rights of the county for cess and the tithe owners. Against the magistrates there is confessedly no direct clause of liability, neither can any subsidiary liability be contended for. The judges affirmed the interlocutor of the Ordinary, but differed on the grounds, Lord Medwyn, upon the construction of the act, rightly differing from the Lord Ordinary and the other judges, but finding himself tied up by usage. Now as usage, to which the private defenders were no parties, could not be admitted in evidence, the other judges improperly took that view, and went equally far wrong in their

[1] 25th June 1835, F. C., and 2 Sh. and M'Lean, 773.

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construction of the act, which Lord Medwyn put the right construction upon.

Respondents.—The question lies within the four corners of the statute; but still it is necessary to look to the pre-existing state of matters to which the act bore reference. Then, having regard to the language of the act itself, one finds that the construction, which it fairly admits of, is consistent with what was proved by extrinsic evidence to have been the intention of the parties, shown by their practice for the last thirty years. The heritors, and afterwards the heritors and house-holders, continuing to pay through the corporation just as the heritors paid before the act, redargues the presumption of separation, and shows that the separation was qualified so as to continue the liability of the separated lands to the barony parish, as well as what they should be liable for within burgh, the magistrates relieving them of the burden.

In construing a local act of parliament, if its terms be clear, there can be no relevancy in introducing usage or decisions of courts to control its meaning; but if the language be of doubtful meaning, and there have been decisions explaining it, a court is bound by the construction of other judges, even though originally there might have been room for letting in a different construction; not that usage of parties or decisions of a court can alter the clear meaning of the legislature, but that if parties, for a period of years, put a construction, by practical observance, upon the enactments of the legislature, the court is induced and is entitled to look to this contemporanea expositio in explaining clauses of contradictory or doubtful import.

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If for thirty years the public has been in the practical observance of a statute, interpreting it by an uniform usage, a court of justice feels bound to give its support to that usage, which proceeds upon a direct recognition and no disregard of the act. Even in the construction of public acts usage is admitted,—King v. Hog [1], Stammers v. Dixon. [2] In Anderson v. Bank of England [3] the ground upon which the judges went when the case was sent for opinion at common law [4] was, that the documents objected to were understood to be included among modern bills, and that usage was, so far, a strong confirmation of the statute; and the House of Lords gave effect to the same principle in the case of Magistrates of Dunbar v. Heritors.[5]

Upon the point of form, there was nothing in the decree inconsistent with the alternative form of the summons. Now, both parties stated the same defence; if the private parties are not liable, then there is nothing in the clause of relief. The private parties cannot be allowed to plead that the action is good against the magistrates as liable in the claim of relief. The conclusions might have been directed against both sets of defenders; but there was no ground to complain that decree had been asked first against the private defenders, and then a decree of relief against the corporation in so far as necessary.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, which was heard before your Lordships a few days ago, was an appeal from the interlocutor of the Lords of Session,

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[1] 1 T. R. 728. [2] 7 East, p. 200. [3] 2 Keen's Rep. p. 328.
[4] 3 Bing. new ed. 666. [5] 1 Sh. & M'Lean, 195.

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by which certain persons occupying lands in a district which formerly formed part of what is generally called the barony parish, contiguous to and now part of the burgh of Glasgow, were decreed to make payment of an assessment imposed by the authority of the barony parish; and the interlocutor proceeded to direct that in the event of those individuals not paying, the corporation of Glasgow should pay out of the funds belonging to that corporation.

My Lords, it appears to me extremely important to dispose first of that part of the case which is a decree against the magistrates of Glasgow; for, as your Lordships will very soon see if the interlocutor is clearly wrong in that respect, not only will that dispose of that part of the case, but that will most materially affect the ground upon which the learned judges in the court below have, as it appears to me, proceeded in the judgment they have formed.

My Lords, the act in which this interlocutor has been founded, as far as the magistrates of Glasgow are concerned, merely directs that "they shall also, from "the funds of the community of the said city, relieve the "holders and occupiers of houses or lands in the said "extended royalty of the poor's rates payable by them "to the said barony parish, as having been part thereof "before the passing of the act." My Lords, those are the words to which it will be material to call your Lordships particular attention in another part of the case, at present I consider them only as they affect the interlocutor against the magistrates of Glasgow.

My Lords, that is the only part of the act which has been relied upon, or can be relied upon, as imposing a liability on the magistrates of Glasgow; but, on

the authority of that proviso in that act, the judgment below has proceeded to direct payment by the magistrates of Glasgow to the authorities of the barony parish. Now, that can proceed only upon this, which is clearly unknown as a principle of the law of this country or the law of Scotland (and I am happy to find that that relieves me from any anxieties upon that subject), which is recognized in the judgment of the learned judges in the court below, namely, that a contract of indemnity between A. and B. is to be the foundation of a charge by the party contending to be actually indemnified against another party. If A. undertakes to indemnify B. against any liability to C. it is clearly a strange principle to contend that A. is consequently liable to C., and yet that is the only ground which I can find in this act, or the proceedings in this cause, on which the judgment of the Court of Session has been given against the magistrates of Glasgow, directing them to pay to the pursuers, namely, the authorities of the barony parish.

My Lords, the learned judges of the court below appeared perfectly aware of the irregularity in that respect, but I must say they pass over that irregularity much more readily than it appears to me it was judicious to do; they seem to think that, being of opinion the occupiers were liable, and that the magistrates of the district were liable, to indemnify the community against what they might be called upon to pay, it was a matter of little consequence whether they were directed to pay directly to the pursuers, or whether they were only to be liable in the mode in which it was by the statute imposed upon them. My Lords, it appears to me to be of the highest importance that these distinc-

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tions should be kept up, because, if not, all principle may be set at defiance; if because in the abstract a liability to pay exists, and by some circuitous proceeding, practically the payment of that sum of money may be claimed, therefore the liability may be enforced in a suit that is not calculated to give effect to that liability.

My Lords, if then there is no ground for this, I have the satisfaction of knowing, from the report of the proceedings in the court below, that three at least of the learned judges expressed their opinion, some more strongly than the others, but all sufficiently to show, in the opinion of three, I think, of the learned judges below, the interlocutor was in that respect erroneous. My Lords, it will follow, of course, that whatever may be the case between the authorities of the barony parish and the occupiers within the ceded district, the interlocutor cannot be entertained as against the magistrates of Glasgow.

Now, my Lords, if that be so, your Lordships, adverting to the grounds on which the learned judges below have proceeded, will find that a great majority of them have founded their judgment, not upon the construction of the act of parliament so much as upon the course of proceeding which has been followed since the act passed; certainly the proceedings are of very considerable length, inasmuch as the act passed in the year 1800; but if in this suit the magistrates of Glasgow are subject to no liability, and if, as between the magistrates of Glasgow and the authorities of the barony parish, there is no privity, and therefore no liability, on the part of the magistrates of Glasgow to pay to the authorities of the barony parish, then it is

material to inquire if any such evidence was admissible between the parties on the construction of this act of parliament; whether there has been any practice of dealing between the parties in this case, who are the only proper parties to the litigation, namely, the occupiers in the barony parish,—the particular occupiers who have been selected for the purpose of compelling payment to the parish represented by them. The only evidence which has been so much observed upon at the bar, and which seemed to be so much relied upon in the judgment of the learned judges, is entirely that of transactions between the authorities of the parish and the magistrates of Glasgow.

Now, if the magistrates of Glasgow are entirely out of the suit, and they ought never to have been actual parties to the suit, and in adjudicating upon the rights of the parties to the suit, you may consider the magistrates of Glasgow as no parties to it, what evidence is there of transactions between the parties to the suit? That is, what evidence of practice is there, if evidence is admissible at all as against the occupiers, to show that they have by conduct of theirs, or conduct of those having interest in that property which they now possess, which for that purpose might be the same—what evidence is there to show that they have entered into any obligations not imposed by the provisions of the act? My Lords, there is obviously none. It is unnecessary in that view of the case therefore to inquire how it has happened that this course of dealing has taken place between the magistrates of Glasgow and the authorities of the parish. A very natural solution, I think, has been suggested, that as they were before the act passed in the habit of paying a small sum for a

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particular district, that payment was continued without adverting to the particular provisions of the act. The attention of the inhabitants of the town was called to it only when the demand became so large as naturally to force itself upon the attention of those whose duty it was to consider the interests of the town.

My Lords, then I proceed to consider how the case stands as between the pursuers and the individuals occupying lands, and in respect of that possession of property being called upon to pay rates for the relief of the poor.

My Lords, there are two points which may be considered as free from all doubt, and which in point of fact have not been the subject of any dispute, namely, that ordinarily speaking, and without any special provision in the act for that purpose, the liability to contribute to the poor rate of the parish can only affect those who are the occupiers of property within the parish. No doubt an act of parliament may impose that liability upon any individual, but if there be no act of parliament, if there be no statute for the purpose, then the liability is confined to those who are within the parish, and so the authorities of the parish have considered, because the rate is imposed on the property in the parish, the right, therefore, and the exercise of that right are in this case entirely consistent.

Well, then, the question is really a very simple one, when it comes to be considered whether there is any thing in the act which take this case out of the ordinary rule of law. Is this property occupied by these two defenders within the barony parish, or is it not? Now, my Lords, in the South Leith case there was not an act of parliament which took the land out of the parish of

South Leith, and annexed it to any parish in Edinburgh, but there was an act of parliament which included it within the royalty of the city of Edinburgh, and gave the magistrates of Edinburgh a right to levy rates on that ceded district. Some difference of opinion prevailed in the Court of Session how this was to be carried into effect, and how far the lands in question were or were not liable to pay the rates to the parish of South Leith. When it came to your Lordships House those difficulties were removed; and though there was in that act no provision taking any of the lands out of the parish of South Leith, and annexing them to any parish in Edinburgh, your Lordships held that the act having imposed this liability on the lands to pay rates to the magistrates of the city of Edinburgh, that was sufficient to relieve them from the liability to pay rates to the parish of South Leith. My Lords, that case, therefore, would be applicable to the present if there had not been in this act that which you find in the eleventh section most clearly and explicitly enacted, and if there had not been such provisions in the act directing the lands in the case to which I have referred. According to the opinions of all the learned judges it appeared to them, that no question would be raised as to the liability of the inhabitants to contirbute to the rates of South Leith under the eleventh section; the question is not, whether there is any obligation by the statute to pay rates not within the parish, but whether those lands are or are not within the barony parish, or whether they are taken out of that parish and annexed to other parishes.

My Lords, upon that point there is no ambiguity; the words are "such lands hereby annexed to and com-

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" prehended within the royalty of the city of Glasgow " shall be and the same are hereby for ever separated " from the barony parish, and are hereby annexed to " parishes within the said city to which they lie most " contiguous, or to which the magistrates and town " council shall by any act or acts of council hereafter " direct and appoint." After that enactment had passed the legislature, and had become the law of the land, it is impossible for any man to contend any longer that those lands are within the barony parish. Then, if they are not within the barony parish, how is it that they can be made liable to rates? No doubt this act might have done what it did with respect to tithes, what it did with respect to cess, what it did to a certain extent with respect to statute labour; it might have enacted, that although all these lands ceased to be part of the barony parish, and therefore were placed in a position which would not make them liable to contribute to the rate for the relief of the poor of that parish, yet that they shall for certain purposes be still within the barony parish, and not only shall be within the barony parish, but that they shall contribute their proportion of the rates raised within that parish.

The question then is, has the act said so? My Lords, there are various sections in this act which if there were any doubt on the eleventh section would clearly manifest the intention of the legislature that this should cease to be part of the barony parish. It has said expressly that it shall not be for that purpose, and it is not necessary to advert to the other parts of the act. If it had not said so, and there had been any doubt whether or not this land were part of the barony parish, would not that afford the strongest possible

proof that it was no longer to be continued part of the barony parish, because if it continued to be part of the barony parish the liability to tithe would of course remain? But the act has taken care to provide for the interest of those entitled to receive tithe, a provision which would have been unnecessary if the lands had continued part of the parish; and, accordingly, it provides "that the tithes payable out of the lands "hereby annexed shall be and the same are hereby "saved and reserved to the true owners thereof in the "same manner as if this act had never passed."

My Lords, a similar provision is inserted with respect to the cess, although that perhaps is of more importance as keeping it within the county of Lanark than within the parish, except so far as this, that the parish being assessed for a certain contribution to the county, if these lands had been taken out of one parish and put into another, while the same sum would have been to be paid by the parish out of which this was taken, of course that would have thrown an additional burden upon those who remained occupiers and possessors of land within the parish, to the extent of the sum which otherwise would have been contributed by those whose lands were taken out of it, and, therefore, it was extremely proper that provision should be made to prevent the other inhabitants of the parish so suffering. The act therefore provides what it would have been unnecessary to provide if those lands were to remain within the barony parish, namely, that the same sum shall continue to be paid as had been paid for those particular lands.

So, with regard to the statute labour, the framers of the act conceived that the inhabitants of the barony

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parish ought not to be sufferers by the loss of the amount of statute labour that had been contributed by the occupiers of those lands, and therefore the corporation undertook (and all this is matter of arrangement, which is found in the act itself) to pay a certain annual sum as compensation to the parish for that loss which they would otherwise sustain by the loss of that land. Your Lordships see therefore that there is a distinct enactment that these lands shall not continue within the parish, and you find in the three instances to which I have referred that a distinct provision is made, reserving to a certain extent compensation to the parish for the loss which the parish would sustain from those lands being taken out of it. Now, if there had been any intention in the act to extend a similar provision to the subject of poor rates, why did not the act contain some provision similar to that which is to be found with regard to those several other objects, but there is no such provision.

It was said by some of the learned judges in the court below that the reason was obvious, because the one was a fixed and the other an uncertain amount. That is no reason why there should not be a distinct enactment, that the land should be liable; the amount of charge would be still uncertain, but the obligation to pay that which would have been payable in respect of those lands would have remained and might have been as much the subject of a distinct enactment as the provision with regard to tithes, or cess, or statute labour, but there is no such provision in this act.

My Lords, the other provision in the act is to be found in the third section, and it is the same section which provides for the contribution by the magistrates

in lieu of statute labour, which makes it still more strong, and, in my opinion, still more free from doubt, that if there had been any such intention it would have been distinctly enacted in the act. That very section (the third) does distinctly enact, with regard to statute labour, "that the magistrates and town council shall "hereafter pay from the money raised for the con-"version of the statute labour within the said city to "the heritors legally appointed to repair and maintain "the public roads in the western district of the barony "parish of Glasgow, 5*l.* sterling yearly, as a conversion "for the statute labour of the said annexed lands." There is no ambiguity or doubt as to that enactment. Then these words follow, "and shall also, from the "funds of the community of the said city, relieve the "holders and occupiers of houses or lands in the said "extended royalty of the poor's rates payable by them "to the said barony parish, as having been a part "thereof before the passing of this act." The obligation as to statute labour is, that the magistrates shall pay to the parish; there is no such obligation with respect to the poor's rates, but the only obligation is that the magistrates shall from the funds of the community of the city relieve the holders and occupiers of lands of the poor's rates payable by the occupiers of the annexed lands to the barony parish. Now, why was that change? Why was not the principle of enactment which is applied to the statute labour applied also to the poor's rates? There can be but one reason, namely, because it was not the intention of the legislature that such a provision should be contained in the act. It was intended with regard to statute labour that there should be a liability on the magistrates to pay over a certain sum to the

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authorities of the parish. If there had been any such intention with respect to the poor's rates, beyond all doubt it would have been made applicable to the circumstances of the case, and would have been found in the act with regard to the poor's rate also, but there is no such provision to be found, the only enactment being that there shall be a liability to indemnify the occupiers in respect of the poor's rates payable by them as having been part of the parish before the passing of the act. If there had been any thing wanting in the other parts of the act to show that this land had ceased to be part of the barony parish, it would have been the very expression, "as having been a part thereof before "the passing of the act," in the particular section which is relied upon as creating the obligation between the magistrates of Glasgow and the authorities of the parish; there is here an express recognition in the provisions of the act that the lands had ceased to be part of the barony parish.

My Lords, it is said that some sense must be given to this section; some sense no doubt must be given to it if possible. It is desirable to give a good sense to the section, but some sense must be given to it consistent with the expressions to be found in it; and when the section is used for this purpose, and treated as a matter so clear that no doubt can be entertained by any reasonable person as to the meaning of it, I beg your Lordship's attention to the consideration, how it is possible that the framers of this act could have had the intention, which is now imputed to them, in this section, namely, that the lands in question, though separated from the barony parish, should continue to pay to the authorities of the parish a portion of the

rate rateable on the parish. There is no such enactment; there is a mere contract of indemnity on the part of the magistrates and town council undertaking to indemnify the parties in respect of any possible claim. Now the language of the section clearly refers to something either existing or past; the words are "the poors' "rate payable by them to the said barony parish as "having been a part thereof before passing this act." Now what poors' rate was payable in respect of lands because they had been part of the parish having ceased to be part of the parish? No lands can be liable to the poors' rate because they once belonged to a parish after they have ceased to be part of the parish, but if there is an assessment on property not yet paid,—if there is a liability arising from the lands having been within the parish,—then there would be a claim to make good that which must otherwise be made up out of what remains part of the barony parish, however small the amount might be; it is very natural that they should be held liable for the rates imposed before this became a a part of the city, and that the parish should require to be secured and indemnified even for the half year's rate that would be payable before the expiration of the poors' rate imposed upon the parish.

My Lords, the second question is, whether this proviso undoes all that the other provisions of the act intended to do, namely, to remove the lands from the barony parish, and annex them to the city of Glasgow; whether it is intended to subject them to the parish rates, though removed beyond the limits of the parish. The terms do not require that, and there is no doubt it would require a very distinct enactment to do that where the lands were made liable to contribute to the

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city assessment. If it was intended that they should also remain liable to the barony parish, we should expect to find a distinct clause continuing the old rate while they would be liable to the new. In the act with respect to South Leith there was no such provision; there was no such separation of the lands of South Leith, but they were held to be discharged from payment in the one parish because they were liable to pay in the other. The principle of a double payment was held to be so objectionable in itself that it would require a very direct enactment; but your Lordships would, if you entered into the views of the respondent, put a construction upon the act in effect imposing a double liability. I find nothing from which it is to be inferred,—I find an unequivocal declaration, that the lands have ceased to be part of the barony parish, and I find no enactment by which, being so separated from the barony parish, they can be held or made liable to the poors' rates imposed upon that parish.

My Lords, for these reasons I have very anxiously looked into this case; seeing the very strong opinions which have been expressed by the learned judges in the court below, I have been led to review the conclusion to which I came upon the hearing, to an extent leading me to exhaust every means in my power to ascertain whether there was any ground for the construction of the court below; but on the fullest consideration I have come to a conclusion directly the reverse; and having done so I feel it my duty to advise your Lordships to reverse the interlocutor of the Court of Session. And, my Lords, this being a claim by the authorities of the parish, first of all, against the magistrates, and for which there was no case, and next, against the occu-

piers of these houses on a claim of liability to which they are not subject, it is but just that the parties making that claim and failing in the claim should pay the costs of the proceeding in the court below. The expense of the proceeding in this house being an appeal against the judgment of the court below is not matter of question; but the course I should propose to advise your Lordships to adopt is, to reverse the interlocutor of the Court of Session, and to assoilzie the appellants from the conclusions of the summons, and to direct the respondents to pay the costs in the court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed, and that the appellants be assoilzied from all the conclusions of the summons: And it is further ordered, That the said respondents do pay or cause to be paid to the said appellants their costs of this suit in the Court of Session in Scotland.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.