them out of the trust-estate. Considering the trust-estate was very small, it would be inadvisable to saddle the expenses of the litigation on it. But, on the other hand, it would not do to make the petitioners personally liable, as they formed the majority of the tutors nominated by Major Brown; and the applications had been made for the children's benefit. The taxed expenses of both sides should therefore come out of the capital of the trust-estate.

Agents for Petitioners—Dalmahoy & Cowan, W.S.

Agent for Respondents—John Martin, W.S.

Thursday, March 17.

SECOND DIVISION.

DUKE OF ABERCORN AND SIR W. H. DICK CUNYNGHAM, BART. *v.* REV. HENRY DUFF, CLERK OF PRESBYTERY OF EDINBURGH.

Church—Repairs—Assessment—Valued-Rent Heritors—Feuars—Possession—Lands Valuation Act 1854, *sec.* 33—*Presbytery.* Almost the entire area of the church of Duddingston had from time immemorial been let by the valued-rent heritors, and the sum derived from the seat rents and mortcloth dues had been handed over to a commissioner on behalf of these heritors, and had been by him expended in repairing the church, &c., any deficiency being made up by a voluntary assessment among the valued-rent heritors in proportion to their respective amounts of valued rent. It became necessary to execute considerable repairs on the church, and to defray the cost of these the Presbytery imposed an assessment on the heritors in proportion to their valued rent. There were only four valued-rent heritors, and on the other hand there were upwards of 500 seat-rent heritors, among which were comprised the feuars of Portobello. The valued-rent heritors brought a suspension. *Held* that the decree of the Presbytery was good, in respect it proceeded on the state of possession that had existed from time immemorial.

But any right of relief competent to the valued-rent heritors against the feuars reserved.

Observations by Lord Cowan on the *Mauchline* and *Peterhead* cases.

The question raised in this suspension was, Whether an assessment imposed by the Presbytery of Edinburgh to defray the cost of certain repairs executed under their authority upon the parish church of Duddingston was rightly imposed upon the heritors, in proportion to their valued rent—there being upwards of 500 seat-rent heritors in the parish, among whom were comprised the feuars of Portobello; while there were only *four* valued-rent heritors—viz., the suspenders, the Duke of Abercorn, and Sir W. H. Dick Cunyngham, and two others.

Several grounds of suspension were stated on record, but the only one which was seriously insisted on was—that having regard to the decisions in the *Peterhead* case (1802, 4 Pat. App., 356) and in the *Mauchline* case (1837, 15 S., 1148), and to the fact that the area of the church of Duddingston had never been allocated among the heritors according to the valued rent, so as to bring the case within the *proviso* of the 33d section of the Lands Valuation Act of 1854—the Presbytery had done wrong in assessing according to the valued rent.

The material averments of the respondent, who as collector appointed by the Presbytery had given the charge sought to be suspended, were that the area of the church of Duddingston had been divided or allocated among the heritors of the old valuation; and that from time immemorial the expense of repairing the church had been borne by these heritors alone, the management also being kept entirely in their hands. The respondent pleaded in substance (1) that the suspenders were bound to convene the other heritors; (2) that they were barred from insisting in the suspension by their conduct before the Presbytery; and (3) that in the circumstances of the parish, and in respect of the allocation and usage condescended on, or of one or other of them, the Presbytery had done right in taking the valued rent as the rule of assessment for the repairs.

A proof was taken, from which it appeared that, with the exception of a loft and a gallery appropriated to the Abercorn and Prestonfield families respectively, the whole of the area of the church of Duddingston—which was a fabric of very great antiquity—had from time immemorial been let by the valued-rent heritors; and that the sum derived from the seat-rents and from mortcloth dues had been from time to time handed over by the kirk-treasurer to the commissioner for Lord Abercorn on behalf of these heritors, and had been by him applied in payment of repairs upon the church, manse, and schoolhouse, church-officer's salary, &c.; and that any deficiency had been made up by a voluntary assessment among the same four heritors in proportion to their respective amounts of valued rent.

On the 9th March 1869 the Lord Ordinary (Manor) suspended the charge, finding no expenses due on either side.

The respondent having reclaimed, the Court, on 11th June 1869, repelled the pleas stated for him so far as urged to exclude consideration of the merits, but superseded consideration of the reclaiming note, to allow him, if so advised, an opportunity of bringing the feuars into the field.

The respondent having, after deliberation, declined to avail himself of this opportunity, the case was recently reheard.

Solicitor-General and Mackenzie for suspenders.

Watson and Cheyne in answer.

At advising—

Lord-Justice-Clerk—This is a suspension of a charge proceeding on a decree of the Presbytery of Edinburgh for sums required for the repair of the parish church of Duddingston. The suspenders do not deny that they are heritors of the parish, or that the repairs are necessary; but they maintain that the assessment ought to have been laid on by the Presbytery according to the real rent of property within the parish, and not according to the valued rent. Their plea amounts in substance to a contention that others besides themselves are liable to the burden.

The importance of the question thus raised is very great, as, if the plea of the suspenders is well founded, the large and populous communities of Portobello and its vicinity will be included in the assessment. Important however as it is to the heritors, it is one of comparatively little import-

ance to the Presbytery or to the minister, both of whom are only concerned with seeing that the church is sufficiently repaired.

Such being the question, it is certainly to be regretted that we should have to consider it in the absence of the only parties who have any interest to resist the heritors' plea. Such questions have no doubt been sometimes raised by way of suspension of a presbytery's decree; but generally, in similar cases, where the dispute lay solely between the heritors themselves, other proceedings have been taken by the heritors to bring all the real parties into the field; and I am not aware of any instance of the liabilities to assessment of a large body of proprietors being discussed and decided in their absence. It is true the collector has declined to call the proprietors who are said to be liable along with the suspenders. I cannot wonder at his declining to do so unless authorised to that effect by the heritors. For the allocation of the sums necessary for the building or the repair of a church is truly the concern of the heritors themselves, as a *quasi* corporate body. They have not only the power but the duty to take all necessary steps for this purpose, and to assess themselves in the first instance as they may think according to their several liability; and it is only when their duty is neglected that the Presbytery have the power to intervene.

As the heritors, however, have contented themselves simply with suspending the charge on the Presbytery's decree, and have taken no step whatever to try this question of allocation, we must deal with the suspension in the state in which it comes before us.

In my opinion this suspension should be refused; reserving to the suspenders their relief against any other persons they may consider liable to them. I shall state shortly the reasons which have led me to that conclusion.

It will be kept in mind that the assessment in question was laid on for repairs, not for rebuilding,—a very important element, in my opinion, in the question before us. Questions as to liability in such cases vary very much according as the rate is levied for building or for repairs. When a new church is to be built, the state of the parish is the rule, and new rights will arise. New dimensions may be required, and a new allocation of the church area may be necessary. But when the question relates to repairs, the state of possession becomes very material; and while it may not foreclose the heritors from bringing in, if they can, other proprietors to share their burdens, will afford to the proceedings of the Presbytery great support if their procedure has been in conformity with it.

Now, the state of possession in this Church of Duddingston has not been doubtful. From time immemorial no heritor but those whose representatives appear in this process have had any share in the possession or managememt of the church. They are four in number; but two have a very unimportant share; the other two, Lord Abercorn and Sir W. Dick Cunyngham, alone have had material possession of the fabric, interest in its concerns, or expenditure for its maintenance.

The management of the fabric has been substantially the following:—Lord Abercorn has a loft in the church, and Sir William Dick Cunyngham a seat. The remainder of the church is let, and the seat-rents thrown into a common fund, under the immediate management of the kirk-session but accounted for to the heritors, out of which, along with some strictly ecclesiastical purposes, the fabric of the building has been from time to time repaired. The accounts of Mr Guthrie Wright carry back the practice beyond the years of prescription, and there is no doubt that it has existed beyond the memory of man. It appears also from these accounts that when expenditure was required on account of the fabric it was assessed on the four heritors according to their valued rents.

What is contended for is, that the Presbytery at their own hand should have inverted this state of possession, and laid the burden on proprietors who have no beneficial use of the fabric, who have never had any interest in it, and never can have any—as long as this immemorial usage lasts.

I am of opinion that the Presbytery could not be required to do this as a qualification of the assessment required for these repairs; but on the contrary, that they acted rightly in laying the burden on those whom they found in possession. This does not, in my opinion, preclude the heritors *inter se* from determining their mutual rights, nor foreclose them from any claim of relief they may have. My opinion goes no farther than this,—that in a question relating to repairs, the Presbytery were warranted in proceeding on a state of possession which had existed from time immemorial.

I should have been content with this consideration as sufficient to dispose of this case, apart altogether from the words introduced into the 33d section of the Valuation Act. But whatever ultimate effect may be given to these words, they go very far to recognise the principle that the actual possession of the fabric is a material element in the question of liability for repairs. I am not prepared to say that the area of this church has not been allocated in the sense of the clause. Certainly the whole area has been converted to the use of the heritors, to the exclusion of all other proprietors; and I do not see how the latter are to be made liable for assessment, while they are excluded from beneficial occupation. But this last is not a question with which the Presbytery had any power to deal. That matter ought to be raised between the parties who have an interest in discussing it.

I am therefore of opinion that the Presbytery are not bound to decern against any but the heritors according to their valued rent. Whether the case of *Peterhead* applies to a case of repairs, and how far the erection of the *quoad sacra* parish of Portobello would modify the application of that case, I do not say. But I think we shall do no more than justice by sustaining this charge, with the reservation I have mentioned.

LORD COWAN—At the former advising of this cause I took occasion to express the views which I entertained upon the matters which were then argued. It is not my intention to resume that part of the argument, or to say more in regard to it than that it was certainly my understanding that the Court, as then constituted, were of opinion with the Lord Ordinary that there were no such peculiarities in the history of this parish as to exclude the discussion of the more general question on the merits, viz., whether the assessment imposed by the Presbytery has been legally imposed on the valued rent heritors, or whether it ought not to have been imposed upon the real rent heritors within the parish? To that point I shall exclusively direct my observations.

In the recent argument both parties referred to section 33 of the Valuation of Lands Act, 17 and 18 Vict., c. 91, as conclusive in their favour respectively. On the one hand, the complainers maintained that there was by that enactment an absolute provision rendering it imperative that, this being a parochial assessment it should be imposed upon the real rent of lands and heritages. And, on the other hand, the respondents maintained that, under the proviso there was specially excepted such an assessment as the present from the operation of the statutory rule as to real rent, and that it was imperative the assessment should be laid on the valued-rent heritors. I cannot adopt either of these views. For, in the first place, the enactment is carefully limited to assessments, be they municipal or parochial, authorised by any Act of Parliament "to be imposed or laid upon or according to the real rent of lands and heritages;" it being provided that in every such case such real rent or value should be taken from the valuation roll in force for the time. The purpose of the enactment plainly was not to determine that all assessments under Acts of Parliament should thenceforth be leviable only on the real rent—although the Act authorising the assessment was silent as to valued rent or real rent being taken as the basis of assessment, and that was fixed otherwise than by the Act itself: its declared object solely was to fix that the real rent, when it was prescribed as the rule, should in every case be taken from the real rent inserted in the valuation roll. And entertaining this view of the enactment, I cannot reach the conclusion contended for by the complainers that there is an end of the present controversy. But as little can I hold that, in the circumstances of this parish, the terms of the proviso settles the question the other way, and entitles the respondents to have judgment. The proviso is "that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, &c., all assessments for the repair thereof shall be imposed according to such valued rent." This provision has special reference to the case when the area of the parish church has been allocated among the heritors according to their respective valued rents. Unless this be admitted or be shewn upon the proof to have been the fact, the proviso has no application. And when that is the case, an assessment for the repair of the parish church, as regards the class of heritors upon whom it is to infringe, is left to be regulated by the same rule as other parochial assessments. As to this, the Lord Ordinary, in his note, explains that from the proof it appears that the area of this church, which is one of great antiquity, had never been divided or allocated. In this view of the import of the proof I entirely concur; and had the Court at the former advising thought differently, the statute left no option but to have decerned that the valued rent alone was the rule of assessment. But so far from this course having been adopted, the interlocutor was pronounced by which, with a view to the discussion of the question on the merits, the respondents were allowed to call the real rent heritors into the field if they were so advised. This has not been done; and the case is now for judgment as to the validity of the assessment imposed on the valued rent heritors.

This parish church, the original foundations of which cannot be traced, is stated in the New Statistical Account, revised in 1843, to have been, about four years previously, repaired, enlarged, and painted; but in 1865 or 1866 it was again found to require extensive repairs; and plans having been obtained by the Presbytery, an amount required to be provided for by assessment of between £600 and £700. This amount was assessed upon the valued-rent heritors by the Presbytery; and a charge having been executed against these heritors for payment of their respective proportions, this suspension was brought to try the question whether the principle of this assessment was legal, the contention of the heritors being that as a parochial assessment it was leviable upon real rent.

Had the question been one as to the rebuilding of the church, there does not seem to be room for question that the assessment to provide for the expense would have fallen to be imposed upon real rent, agreeably to the rules fixed by the judgment of the House of Lords in the case of *Peterhead*, 1802, Paton's Appeals, 356; and the subsequent case of *Mauchline*, Dec. 9, 1834, 13 Shaw, 150. The admitted circumstances of this parish, as stated in the record, bring it within that class of parishes to which those in reference to which the two judgments mentioned were pronounced belong. Nor would the circumstances referred to by the respondents—that a portion of the town of Portobello, which is within the parish, has been erected into a *quoad sacra* parish—have probably been held materially to affect this matter, although it does introduce an element that would have required consideration, if not inquiry. I cannot therefore hold it to be attended with much, if any, doubt that, had the Presbytery resolved on a new church being erected, the expense of it must have been levied on the real rental of the parish. The Lord Chancellor, in the case of *Peterhead*, observed that the rule of law was that all the heritors should contribute according to the value of their land—that it might appear strong to say that heritors are to find a church "roomy enough" for the population of a town; "but if it once become a parochial burden it must fall on the value of the land in whatever shape it may be occupied or divided;"—and he adds, that if a different rule were adopted, greater inconveniences would follow, *e.g.*, a manufacturer might bring into the parish what people he chooses, and it would be the duty of the (valued rent) heritors to provide a church fit to accommodate all the parishioners. Hence it was that the judgment fixed the liability to be on the real rental of lands and houses, and so secured equality.

The question which remains for consideration is—Whether, this being an assessment, not for rebuilding the church, but for repairing an existing structure, there is room for a different principle of assessment? The attention of the counsel for the parties was specially directed to this distinction on every occasion when this case was before the Court: that any decision in which real rent had been taken as the basis of assessment for repairs should be brought under our view. But it was stated at last debate that no such precedent had been found; and the argument of the suspenders entirely rested upon the supposed analogy that existed between the erection of a new church and the repairing of an existing structure. And certainly, so far as my own researches have gone, no case of this kind has occurred for the judgment of the Court. Ought then the same principle to be applied in a case of repairs as in the case of a new erection? Or, rather, can it be so, with due regard

to the relative position and just rights of the parties interested?

On the one hand, it cannot well be doubted that the purpose is a parochial one, and the burden in a certain sense parochial; and as such, it may be said to be within the principle recognised in the *Peterhead* case, that parochial burdens must fall on the value of the land, in whatever shape it is occupied or divided. But then an essential part of the reasoning in that case altogether fails in its application to the present. The heritors, when called on to build a church, are to find one roomy enough for the whole population. Their duty is to provide such accommodation, and, when the church is thus erected at the expense of these heritors,—that is, of the whole owners of lands and houses within the parish,—all the parties who have thus contributed to the expense will be entitled to an allotment of seats on the division of the area of the church. This can have no application to the repairs of a structure which, to this hour, has been under the charge exclusively of the valued rent heritors, and of which the expense of all previous repairs have been paid out of funds under administration of these parties. Supposing the real rent heritors assessed for these repairs, could they assert any right to accommodation within the building? It was not alleged by the suspenders that they could. I have a clear opinion that they could not advance such a claim; and in this view the analogy relied on by the suspenders entirely fails; for the possession and management of the repaired church must go on in time to come as it has been in time past. The real rent heritors paying for repairs would have no claim to seats in the area, as they would certainly have if called on to pay for a new church when it came to be allocated.

As this distinction between the two cases so materially affects the analogy on which the argument of the suspenders rests, it is material to have in view the principle on which the division of the area of the parish church takes place. Originally the burden was imposed on the "parishioners;" but in the course of time it became quite settled that the expense of the erection and repair of the parish church devolved on the heritors according to the valuation of their several lands within the parish. And when the church was allocated it was so for the use and accommodation of the several heritors, their families, and tenants. In landward parishes, where the assessment for the erection lay with the valued rent heritors, they alone were entitled to share in the allocation of the area. The rule of allocation, subject to some alteration to meet the peculiar circumstances, was followed in parishes where, valued rent being taken as the measure of assessment, there was a large village or town with a considerable population. And in like manner, where the parish was known as a landward burghal parish, the division of the area was made in proportion to the share of the assessment for its erection,—paid respectively by the heritors on the one hand, and by the burgh on the other. But when the assessment for the erection came to be imposed, not on the valued rent heritors, but on the real rent heritors, the allocation of the church necessarily underwent an entire change. The principle being that those who paid for the structure should have the area allocated among them, the measurement of the assessment could not but be the measure of the allocation. The principle is well explained and traced to its practical results by Lord Braxfield, in the case of *Crieff*, 1781, reported by Lord Hailes, page 892. The reversal of the judgment of this Court in the case of *Peterhead*, which followed some years afterwards, and to which I have referred, as it fixed the burden on the real-rent heritors, essentially affected the allocation of the area—*Cujus commodum ejus est incommodum.* Reciprocity of burden and of right to seats was adopted as the rule in the allocation of the area. Mr Dunlop, in his work on Parochial Law, states that "the area of a parish church falls generally to be divided according to the same rules which regulate the apportionment of the expense of building it;" and after explaining the rule as to purely landward parishes, and the practice followed in parishes consisting partly of a burgh or town, and partly of a landward district, he refers to the judgment in the case of *Peterhead*, imposing the expense of rebuilding the church upon owners of lands and houses in proportion to their real rents, and adds that this judgment "would undoubtedly be held to have altered the rule of division; and the area of the church of a parish partly rural and in part consisting of a town, would fall to be divided among the whole owners of lands and houses in proportion to the real rents of their respective properties."

The palpable distinction between an assessment for erecting a new church and one for repairing an existing structure is thus manifest. In the first the parties assessed have an equivalent in the allocation of the area; in the second they would have no such equivalent, but would be assessed for the benefit of the valued-rent heritors to their own exclusion. The analogy thus fails on which in principle the argument of the suspenders was based. Be it that a new church was erected in this parish, the assessment would have been on real rent. The case is entirely different when it is the expense of repairs that require to be provided for; and then those who have hitherto had, and will in time coming continue to have, the management of the church and the possession and enjoyment of the area, by themselves or others under them, must bear the burden.

For these reasons I cannot hold that the assessment in question has been wrongously imposed by the Presbytery upon the valued-rent heritors. On the contrary, I consider that they were entitled to act as they did, and that the suspenders have been unsuccessful in showing, either upon principle or from authority, that the burden of these repairs ought to have been laid on the real-rent heritors. And I may only add, that this conclusion at which I have arrived, independently of them, is greatly strengthened by the specialties attending the parochial administration and management of the church which has prevailed in this particular parish for time immemorial; but to these I need do no more than allude, as they have been fully adverted to in your Lordship's opinion.

Lord Benholme—My principal difficulty in this case is to preserve my mind free from the influence of a foregone conclusion, in case the important question shall ever come before us as between the valued-rent heritors and the real-rent heritors; because, as to forming an ultimate opinion on that important question, in the absence of all the parties having interest to maintain one side of the question, it is a thing that is quite abhorrent to my notions of judicial duty. But the real and the only question that I have to decide is one, not between the

valued-rent heritors and the real-rent heritors, but between the Presbytery and the valued-rent heritors. The question is, has the Presbytery, in the circumstances of this case, done right in the course it has taken? That in my mind leaves quite open the ulterior question whether the valued-rent heritors are not entitled to have their assessment relieved and remodelled in the same way in which the law would have dealt with it had this been the building of a new church. Now, having guarded myself against its being supposed that anything I should say is an argument to which I must yield in any future contention between these heritors, I think there is enough in this case of *prima facie* liability to justify the conduct of the Presbytery, and to warrant our refusing to suspend this charge. It is evident that this was a Roman Catholic church. Its date goes very far back, and it has not been rebuilt, though it has been altered and repaired; and there never has been in the memory of man an occasion for a division and allocation of the church. Whether it was allocated in any other way than in Catholic times it was, between the parson and the patrons, or the parishioners, in reference to the chancel as distinguished from the rest of the church, I do not know; but certainly we have no record whatever, and I do not think it is contended that there is any distinct evidence of a definitive allocation of this church. In fact there could not be. Where there is an allocation of a church at its building or rebuilding, there is a rule of law which is alluded to in the Valuation Act, which provides that the valued rent in such a case must be the rule of assessment. But although that is the case, that does not in the least exhaust in my mind the cases in which valued rent must be taken; for just as in the present case, where we cannot trace the practice up to any distinct allocation, if we find that the practice has been, since the earliest times of which we have any record, that the valued-rent heritors have had the whole management, and undertaken, with certain reliefs, the whole repairs of the church—when we see that they have not only had sittings of their own free, but have had the management of letting and turning to account, which they have done through the instrumentality of the kirk-session, of the rest of the area not occupied by themselves rent-free—when we see that they have had all that management, and have defrayed the expenses, in the first place, out of the revenue they derived from that letting, and, second, apportioning the surplus amongst themselves as valued-rent heritors, that is a strong *prima facie* case—I do not carry it further—that the law will say in this case, if it ever should come to be tried as between the two sets of heritors, that the valued rent heritors are bound in the first place and ultimately to bear the expense. There are many considerations which my brother Lord Cowan has well stated, and in his opinion, so far as I am forming a mere *prima facie* judgment, I concur; but I would not by any means go the length of saying they are to my mind conclusive. I only say they go this length, that I think they give the Presbytery a *prima facie* case against the valued-rent heritors; and, without seeking to determine the main and ultimate question, is it not right that this Court should, from the analogy of possessory judgments in other cases—keeping the possession of things in the same state, and having that most equitable analogy—look at the circumstances of the case in order to bring out the rights of the parties as between the Presbytery and the heritors, who really have to address themselves very much to that matter? How has the possession been? We do not say ultimately that you are to be liable, but we say, in respect of what has taken place as long back as we have any information, you have been the persons who have borne this expense. No doubt it may be said to have been voluntary, but duties are very often voluntarily discharged. It is quite right they should be so, and the circumstance that the performance of them has been voluntary does not at all in my mind deprive it of the character of a duty. It is a duty voluntarily incurred; but if it has been constantly discharged, I should say that the presumption is that there is a duty at the bottom of it. We have been very much embarrassed in this case from the desire which I think was most natural in the minds of the Court to get at the parties who, if they were to be decerned against, might be enabled to bring forward all the arguments that the law might suggest to them in defence of their own rights. That was a most natural desire on the part of the Court, and I have felt that to a painful extent. We therefore cast about in different directions, and we suggested to the one party the duty of bringing the real heritors; we cast about to get the real parties into the field, and we have been totally unsuccessful. In these circumstances we must do the best we can, and I agree with what your Lordship has proposed, for the reasons suggested in your judgment, and also in that of Lord Cowan—with which I concur, especially in his Lordship's exposition of the 33d section of the Valuation Act, which I think is decisive in neither way. It was not the intention, and it would have been beyond the purview of the Valuation Act, to decide points of law about assessments. The true object of it was to lay down a mode of assessment which should be adopted wherever the law was that real rent should be the rule. It mentions the case of allocation of parish churches as an instance where the application of the statute could not take place—not that the statute was making or declaring the law, but it was merely stating an exception to the existing law, in reference to which it might or might not be desirable that the exception should be stated. My own impression is that that clause was of very little use. It did not declare the law, and it could not alter the law in my apprehension. But the case of allocation was a case which so distinctly pointed at a different rule, that this clause was put in. But surely that was not to exhaust all the cases in which the valued rent might be the rule. It was not saying that wherever there was not allocation then the real rent must be taken. I cannot hold that. I think it leaves the law exactly where it was. It mentions a case which fell clearly under the rule of valued-rent assessment, but it did not exhaust the cases; far less did it introduce any new law or abrogate any old law. On the whole, I think the conclusion we have come to is consistent with the justice and equity of the case. I feel deeply the embarrassment in which the Presbytery has been involved in this case. I think they had hardly any other course or rule to follow than that of long possession. I should be extremely sorry that a judicial body which has so embarrassing, and in some degree inconsistent, functions to discharge should be put to extreme inconvenience by following what appears to be a practice so long continued in reference to this matter; and I am happy to think that

your Lordships are of opinion that they may now be discharged of that extreme embarrassment by the present suspension being refused.

Lord Neaves—I have considered this case with great anxiety, and I have arrived at an opinion which I must say is a very decided one in favour of the charger in this case. Looking back at what has been done in the case, I consider that nothing was decided except this—certain steps in the course of the proceeding were urged by the Presbytery, to the effect that the suspenders had lost their opportunity of stating their objections in time, and were now barred from raising them. These were repelled—and I think properly repelled—in so far as there was any attempt to avoid the consideration of the true merits of the case, which are, whether this assessment was properly laid on by the Presbytery in the decree that is now the subject of this charge? That question—whether it was properly laid on upon these parties—may or may not be the the same question with the question relating to the ultimate and permanent liability. It is perfectly sufficient for the decision of this case if on satisfactory grounds we arrive at this, that the Presbytery did right, in the position in which they were placed, in imposing the assessment on the parties on whom they imposed it. As to that matter nothing whatever was decided; but certainly we were anxious, looking to the position of the Presbytery, that they should have an opportunity of considering whether they would or would not convene the other party who was said to be liable, and who might, with greater zeal and more personal interest, take up the discussion of this important question, namely, the real heritors. It was for the Presbytery to think of that, but we can never compel them to take that course. If they had done so, it would have been a more satisfactory way perhaps of having the question exhausted. At the same time, the Presbytery were quite entitled, if they pleased, to defend their own judgment, and not to involve themselves further, and to submit whether in the circumstances in which they were placed the assessment was rightly laid on. They have stood in defence of their own decree, which they were entitled to do. The question then is, Were the Presbytery justified in laying on this assessment on the valued-rent heritors? I think a great deal depends upon the distinction which your Lordships have pointed out between the repairing of an existing church and the erection of a new one. That is a most fundamental difference in this question; and perhaps one of the most striking uses of the clause of the Valuation Act is to show that the law recognises a distinction between repairing and building, because it says that repairing shall continue as the possession of the church exists, without at all saying that that is to be the state of the case with reference to a new church. As long as a church can be repaired, the original fabric is to be taken as the church. There can be no new allocation of a repaired church if there has been an allocation. There can be no inversion of any possession that can be ascribed to legal title. I do not speak of mere usurpation, which is another affair. There can be no consideration of the magnitude of a church in the repairing of it, but if you come to erecting a new church, you go into totally different elements—you then look to the population of the parish for whom the church is to be built, and you are to suit the dimensions of the church to the wants of the population in that respect. As that varies very much, and may be greater or less than formerly, a new allocation must inevitably take place of the new church, with an entire overturn of all old and existing arrangements, unless they be of some very peculiar kind, such as sometimes occurs in burghs. But the question arises when a church is to be repaired in order to make it water-tight, or otherwise fit for occupation; the parties that ought to bear the burden in that case, are those that are in possession of the church for the purposes of worship, and that leads to this question, whether there may not be cases in which the long possession of advantages from the church, and long recognition of burdens in the church, will not amount to such a possessory state of things as may be equivalent to the most formal allocation? I rather think the presumption is that all churches are allocated. No doubt, if a church is of such modern date that you can tell the time within which it was erected, the absence of a decree of allocation will be very good evidence of a negative kind that there has been no allocation. Suppose a church erected within half a century, I should say it is not conceivable that if you have not evidence of an allocation, there should have been an allocation; but when you go back to remote times, we know very well that the titles of churchmen generally, and of the church itself particularly, have been lost in the lapse of time, and there may have been an allocation either by decree of some competent authority, or by what I conceive to be an admissible thing in law,—a formal agreement entered into between those who built the church, and who were the sole proprietors of it, to settle matters at that time. If there is presumptive evidence of that, I take it that that is not only enough to justify, but I am very much inclined to say, to compel the Presbytery to recognise it. We have here unquestionably the whole valued-rent heritors in possession of the administration of this church. I cannot doubt that is a fact. Not only so, but it is an allocation of some kind or other to them, because we see that the Abercorn family have a loft, and that the other heritor of a considerable amount has a family seat. That is one of the most important steps in the allocation. We see also that their tenants sometimes paid seat rent, and sometimes did not. It may be that that is matter of arrangement between the heritor and his tenant. I do not think that the kirk-session is in possession of this church. That is not their function at all. The church belongs to the heritors as a body, and if they originally built the church, and paid for it, and then divided it among themselves, being at that time the sole heritors within the parish, they are in possession of it as representing the body of heritors who built it, and who apportioned it among themselves. Now, when this has gone on for so long a time, and when there is no contrary practice within the memory of man, there cannot be a doubt that it is the valued rent that was the criterion among them. We see that all other burdens and apportionments are according to the valued rent. This is not the plea—that by feuing out the Duke of Abercorn has alienated, *pro tanto*, a portion of his interest in the area of the church. That would be a very doubtful matter—that each of the feus which Lord Abercorn granted involved a *pro rata* share of the loft of His Grace. How many feus there are on the Abercorn lands I do not know; but the very narrowest breadth of beam I think that any sitter possesses would scarcely enable them to cramp themselves

into the area that was previously given by His Grace to these valued-rent tenants. There was a question which was long agitated among the schoolmen, how many thousand angels could dance on the point of a needle? How many feuars can sit in the Abercorn loft would seem to be a question of the same kind, except that they are human beings instead of incorporeal substances. However, that is out of the question. Now, these parties who retained it up to the time when this church was again to be repaired are the persons who plead now that they have no allocation; but they only do so when the burden comes upon them, and they seek the Presbytery to disregard the allocation and to disregard the possession; to assume that there has been no allocation; and to call into the field and attempt to assess the whole heritors of the parish, in the sense of embracing the feuars of Portobello and everybody else in the parish. Now, in a question with these parties, I think that is an unreasonable demand. No one can doubt that if the Presbytery had taken that course they would have been met by the most serious opposition; and I humbly think it was not their business to unsettle the position of things. None but the Supreme Court can enter into these questions of permanent right. The Presbytery is only an inferior judicatory, and the question of titles and of permanent rights is not in general within the scope of these judicatories. The Sheriff must take things as they are possessed, and I cannot blame the Presbytery for doing the same, and for saying we know nothing of the history of these beyond this—that as far back as we can go, we find you four valued heritors who were at one time the sole heritors of the parish,—because if the whole valued rent was at one time divided among them, they and their ancestors must be the sole heritors,—you have kept possession of the church notwithstanding that you have been granting feus, you have not called us feuars to sit along with you, or to take shares with you; you do not bring an action calling for the division of the church, but you ask us, the Presbytery, to do a thing which virtually challenges your possession and seeks to oust you of that which you are in. I cannot think the Presbytery were bound to do that. They were entitled to say, we find you in possession of this church, when it is repaired—it might be merely putting on slates to keep out the rain—you will sit there as before, and we will lay on you the burden according to the possession you have had. When it comes to be a new church that is a totally different matter. Other elements may come in there. The question of *quoad sacra* may come in in a very singular way, and I give no opinion upon that. I doubt if these things have been well considered in the Act of Parliament; because when you come to build a new church the question being whether the inhabitants of the *quoad sacra* parish are to share in the expense of building the church, that will involve this other question—is the new church to be built of such magnitude as to provide for the examinable persons in the *quoad sacra* parish? If it is to do that, they will bear a share. But it would be a very odd thing to have people provided with two places of worship. On the other hand, if the new church, when it comes to be built, is to exclude the *quoad sacra* parish, and only to be built of a magnitude such as will comprehend the examinable persons within the original parish as diminished by the *quoad sacra* parish, then of course it will be confined to those heritors, because those who participate in the burden will be entitled to divide the area, and the questions of the possession and division of the area are the questions that are commensurate with the incidence of that burden. Now I think that the parties who had the exclusive possession are the parties on whom the Presbytery was entitled to lay the burden as it had been before. If you can raise up a case, and throw the church open, bringing a new action of allocation as if there never had been one, we shall consider that on a future occasion of repairs; but in the meantime we proceed on the *prima facie* and possessory view of the question. The long possession, established in a way that is quite undeniable so far as regards the fact, is equivalent to an allocation. They were entitled to proceed upon that, and it would be most unreasonable to expect that they should have done otherwise and have brought a nest of hornets about them of a different kind, contrary to the practice that has hitherto prevailed.

Solicitor-General — Would your Lordships allow me to make an explanation, it seemed to be thought by one of your Lordships that the complainers had said that there could be no present allocation of the church. Now, what the complainers have contended is that there has as yet been no allocation of the church.

Lord Justice-Clerk—I quite understood that the argument of the suspenders was that there had been no allocation at all.

Solicitor-General—I was referring to something which Lord Cowan said which rather implied that we admitted that there could be no present allocation.

Lord Cowan—I referred to the statement made by the Lord Ordinary, that there was no evidence of allocation, and I adopted his view of the proof as to that matter.

The Court accordingly recalled the Lord Ordinary's interlocutor, repelled the reasons of suspension, found the letters and charge orderly proceeded, and found the respondents entitled to expenses. The Court at the same time inserted in the judgment a reservation of any right competent to the suspenders against the feuars.

Agents for Suspenders—Mackenzie & Kermack, W.S.

Agent for Presbytery—William Mitchell, S.S.C.

Friday, March 18.

FIRST DIVISION.

LYELL *v.* INSPECTOR OF KINNELL.

Poor—Relief—Expenses. Held that a pauper was not entitled to incur unnecessary expense by enforcing relief by legal proceedings from the parish on which she was chargeable, but in which she was not resident.

Isabella Lyell presented a petition to the Sheriff of Forfar, craving for an order upon the respondent for relief, and for the expenses of her application. Kinnell is the birth settlement of Lyell, and it, admittedly, is the parish on which she is chargeable. For some time past she had obtained relief, first from the parish of St Vigeans, and latterly from the parish of Arbroath, but the payments made by