The Court unanimously adhered.

Agents—Morton, Whitehead, & Greig, W.S.; M'Ewen & Carment, W.S.; Goldie & Dove, W.S.; A. & A. Scott, W.S.

Tuesday, December 13.

DUNN'S TRUSTEES *v.* BARSTOW AND OTHERS.

Trust — Reduction — Multiplepoinding — Fund in medio. A truster died, leaving to certain trustees large property, heritable and moveable, for certain purposes. A great number of claims having been made against the trustees, both under the trust-deed and at common law, the trustees brought an action of multiplepoinding, in which the fund *in medio* embraced the whole estate of the deceased. Thereafter the heir-at-law of the truster brought an action of reduction of the trust-deed *ex capite lecti*, in so far as it disposed of a certain estate. He was successful in this action, and thereafter brought an action of count and reckoning against the trustees for the rents of said estate during the time they had administered it. *Held* that the proper course was to take the estate in question out of the fund *in medio*, as not being part of the trust-estate of which the trustees were administrators, and to proceed with the accounting in the action of count and reckoning, and not in the action of multiplepoinding.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agent for Defenders—Wm. Ellis, W.S.

Wednesday, December 13.

TRAQUAIR'S TRUSTEES *v.* HERITORS OF INNERLEITHEN.

Assessment—Annual Real Rent or Value—Heritors —Long Lease— Valuation-Roll. A heritor of a parish possessed lands let upon long leases for £80 per annum of *cumulo* rent, while the estimated annual rent or value of the lands was entered in the valuation-roll at about £1100 per annum. *Held* that an assessment laid upon the heritors of the parish for the purpose of rebuilding the parish church, according to the real annual rent or value of their lands, must be levied, not upon the actual rent received by the heritor under the long leases, but upon the estimated real annual rent or value as appearing from the valuation-roll.

This was an action of declarator at the instance of the trustees of the late Earl of Traquair against the whole other heritors of the parish of Innerleithen, for the purpose of having it judicially declared that the pursuers were not liable to be assessed for rebuilding the parish church of Innerleithen to a greater extent, in respect of certain lands belonging to them and let upon long leases, than the actual rent received by them under these long leases. The pursuers alleged—"A considerable portion of the village or town of Innerleithen, which has now become a place of large population, and is an important seat of the woollen manufactory in Scotland, consists of dwelling-houses and other buildings erected on ground held on leases of ninety-nine years, some of which are renewable for ever, and on ground held on leases of longer duration, some being for 999, and some for 1000 years, granted from time to time in the course of the present and the latter part of the last century by the said Charles Earl of Traquair and his predecessors. No grassums were paid, and the rent stipulated for and now payable was that which at the time was taken to be, and was in fact, the true annual value of the subjects leased as building ground. Buildings, consisting partly of houses and similar structures, and partly of mills and public works, have been erected by the tenants on the lots of ground leased as aforesaid. The present yearly values of the said subjects largely exceed in every instance the rents payable to the pursuers. The tenants under said leases are proprietors of the subjects according to the provision in sect. 6 of the 17 and 18 Vict. c. 91, entituled 'An Act for the Valuation of Lands and Heritages in Scotland.'"

In the valuation roll the pursuers are entered as of the lands let on long leases, and the rents payable to them are set forth. The roll also contains the yearly rent or value of the said subjects. The *cumulo* rents paid for the subjects to the pursuers amounted to £80, while the estimated *cumulo* annual rent or value, as entered in the valuation, amounted to £1100. The question was, which of these sums was the "real rent" upon which the pursuers fell to be assessed for the re-erection of the parish church?"

The Lord Ordinary (MURE) pronounced the following interlocutor and note:—

"2*d June* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions in the conjoined actions: Sustains the first plea in law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds them entitled to expenses, of which appoints an account to be given in; and remits the same when lodged to the auditor to tax and report.

"*Note.*—It has been settled in the case of *M'Laren*, 17th November 1865, that tenants under leases for upwards of twenty-one years, even when entered in the valuation roll as proprietors, are not liable in assessment for the building of a parish church imposed upon heritors according to the real rent, because they are not heritors in the sense of the enactments under which such assessments are authorised to be made. Now it is not disputed that in the present case the assessment in question has been legally imposed according to the real rent; and the pursuers are admittedly heritors in the parish of Innerleithen, who are liable in that assessment. In these circumstances, the only question which appears to be here raised for determination is, whether the defenders, as contended for by the pursuers, have done wrong in assessing the pursuers in respect of ground given off under long leases upon 'the yearly rent or value' of that ground, as appearing from the valuation roll in force at the time, instead of upon the amount of rent actually drawn under those long leases, and which is entered in the valuation roll under the head of 'rent payable under such lease.'

"Upon considering the provisions of the statute, the Lord Ordinary has come to a conclusion adverse to the view thus maintained on the part of the pursuers. It may be that there are strong grounds in equity for holding that a proprietor,

upon whom an assessment is laid according to the real rent, ought not to be assessed upon a sum very considerably greater in amount than the rent actually received by him. But regard being had to the terms of the 33d section of the Valuation Act, the Lord Ordinary conceives that it is not open to him to deal with the matter upon any such grounds; because it is by that section expressly enacted that when any parochial or other public assessment is made according to the real rent of lands and heritages, 'the yearly rent or value, as appearing from the valuation roll, shall always be deemed and taken to be the just amount of real rent' for the purpose of such assessment.

"In the present case, the defenders have followed this direction by laying on the assessment on the 'yearly rent or value,' as stated in the valuation roll. And the circumstance that there is in that roll as now framed a column in which the 'rent payable under such leases' is entered, as well as a column for 'the yearly rent or value,' cannot, it is thought, be held to qualify the requirements of the 33d section of the Valuation Act, because that additional column is no part of the original Act, but has been inserted of recent years for registration purposes only, under section 4 of the Act 24 and 25 Vict. cap. 83."

The pursuers reclaimed.

MILLAR, Q.C., and BALFOUR for them.

FRASER and WATSON in answer.

The case was reheard before seven Judges.

At advising—

LORD JUSTICE-CLERK—The present action is brought by the late Lady Traquair's trustees against the heritors of the parish of Innerleithen and their collector, complaining of the amount of an assessment laid on them for building a new church in the parish. By a resolution of the heritors, the expense of the church was to be raised by an assessment laid on the heritors according to the real rent of lands and heritages within the parish; and the pursuers complain that they have been over-assessed. They have paid the amount, and have raised this action, which concludes for declarator in terms of this summons, and for repetition of the assessment. The defenders do not deny that the pursuers have been assessed on the value of the interest of the long leaseholders, but they say that this sum is entered on the valuation roll as the value of the lands of which the pursuers are entered as proprietors, and they plead (*reads first and second pleas*).

We made some inquiry into the duration of and rents payable under these leases. It seems that of these there are fourteen for 1000 years, six for 999 years, seven for 99 years, with clauses for payment of buildings, and two for 19 years, renewable with consent of the lessor.

The sums paid under the leases amount to about £80, which is all the pursuers receive from the lands. The value which appears on the valuation roll, and which is admittedly the value of the leaseholders' interest, is £1100, or about fourteen times the amount of the rent received. We shall see in the sequel how the valuation roll stands in this respect.

Now, this matter of valuation is eminently one to which equitable principles have always been applied. Of course statutory directions must be obeyed; but the subject is plainly one to be ruled mainly by justice. We have no question here as to the liability of the long leaseholders to this assessment, and I wish to give no opinion as to how far those of the leases which are equivalent to perpetual rights ought to be considered as fair. Neither is there any question here as to the division of the area of the church. The only question relates to the amount of the real rent on which the pursuers are to be assessed, and the real rent for the purpose of this assessment must be the same as that for all assessments on real rent. The plea of the defenders leads to this result, that while they, the other heritors in the parish, are to pay 3s. in the pound of what they receive from their lands and heritages within it, the pursuers are to pay 30s. for every pound which they receive. But the importance of the principle contended for goes far beyond that result, startling as it is. All assessments on real rent—and there are many—must be ruled by it; and in many cases one year's assessment laid on on this principle would far exceed the fee-simple of the landlord's interest. But I am of opinion that the contention has as little foundation in law as in justice.

From the course of the debate it is necessary, though otherwise I should have thought it elementary and superfluous, to recall attention to the legal import of an assessment laid on according to the real rent of lands and heritages altogether irrespectively of the terms of the Valuation Act. Real rent as the basis of assessment does not mean the absolute value or the market value of lands in a parish. If it did it would be utterly unfit for being assumed as the basis of an assessment. It means, of course, the relative value of the lands to the man on whom the assessment is to be laid; and when proprietors are assessed on their real rent that which they receive or have right to is assumed as a fair criterion of their interest in the object of the assessment. Real rent, in short, means the owner's or heritor's interest when applied as the measure of a tax, and it never means anything else.

This real rent may be the gross income from the land without deductions for outgoings, or the net income from the lands after deduction for outgoings, according to the principles of assessment adopted. When the tenant has to bear half the tax, or all the tax, his interest is held to be equivalent to that of the landlord according to a well established and generally equitable estimate. But in no case does an assessment on real rent mean anything but one laid on according to the heritor's real interest in the lands.

It is therefore certain that this system of assessment—rough, but not unjust—is very far indeed from representing the absolute value of lands within its area. Value, however substantial, is of no consequence if the heritor's interest is not thereby augmented. A farm held under a 19 years' lease may be doubled in value during its currency; but an assessment on real rent will be laid on according to the rent payable under the lease, and the market value of the land will be entirely disregarded until the lease expires. The heritor or owner may be only the landlord of a piece of ground held under a long lease for a quit rent, under which the tenant derives twenty or thirty times the amount which he pays to the heritor. A city may have been built on the surface, or wealth amounting to millions may have been discovered beneath the surface. The leaseholders' good fortune may have been communicated to others; but at common law no part of this value would be represented in the assessment on real rent. In like manner, all rents drawn by sub-tenants, and in many cases they are very large,

are untouched by any assessment laid on according to real rent. These are only illustrations of what is notorious to all who are conversant with this subject. These things enter into and constitute the value of the land, but they do not enter into or constitute the real rent, seeing they do not affect the heritor's interest, on which alone he is to be assessed.

If, therefore, this assessment had been imposed prior to 1854, the demand of the defenders, that the pursuers should be assessed on ten times the amount of their interest in these lands, in respect of the value of the leaseholders' interest, could not for a moment have been maintained.

This assessment would have been illegal under the old law. I now inquire whether the Valuation Act in any way supports it?

The Valuation Act, as its preamble bears, was intended to afford a uniform basis for the assessing and collecting of all rates laid on according to the real rent of lands and heritages. It is a record of the heritors' interest in lands and heritages, and only as such could it have afforded a uniform basis either for assessing or collecting such rates. In that sense, and that sense only, is it an Act for the Valuation of Land; and hence arises an answer to one important fallacy in the argument for the defenders. They forget that the sole object of the Act was to establish a uniform valuation of lands and heritages, according to which all public assessments leviable, or which may be levied according to the real rent of such lands and heritages, may be assessed and collected. It was to be a record of the amount of the heritors' interest, and to show, for the purpose of assessment and collection, the name of the heritor and the name of the occupier, and the value of the heritors' interest.

The rules by which the heritors' interest, or real rent, is to be ascertained are laid down in the 6th section, and a careful consideration of the terms of that section will, I think, remove much of the difficulty which has been supposed to attend its construction. The value which the assessor is to ascertain and include in his roll is defined to be the rent for which, one year with another, the property valued, in its actual state, might be expected to let—that being, of course, as a general rule, the expression and measure of the proprietor's interest. But, then, this rent or interest is to be ascertained and estimated by different processes in different circumstances.

First, as to property in the occupation of the proprietor, or of persons holding for him. In such a case the value will be estimated on the general principle; only woods and plantations, &c., are to be valued as grazing ground.

Second, as to property not in the occupation of the proprietor, or of any one for his behoof, but possessed under derivative rights:—

Here the general rule does not apply, but suffers modifications which are necessary to bring out the heritor's assessable interest. And there are three special cases provided for:—

1. A lease under which the lands are let for a rent *bona fide* conditioned without *grassum* or consideration as the true value of the property. In that case the rent is to be assumed as the value, not because it is the value of the land, but because it is the value of the heritor's interest.

2. Where the lands are let with a *grassum* or consideration over and above the rent. It is clear that in that case the annual value of the *grassum* or consideration must be added to the rent, in order to ascertain the real rent.

3. The third case is that which occurs here, where property is let on a lease for more than 21 years. The problem is, how to ascertain the heritor's assessable interest, which is solved in this way.

The rent payable to the landlord is not to be the necessary measure of the real rent or value, but this is to be ascertained irrespectively of the rent so payable. But if the provision had stopped there it would have led to the injustice of valuing, as the real rent, a heritor's interest that which did not belong to him. The clause, therefore, proceeds to provide that, for the purpose of the statute in such a case, the leaseholder shall be deemed and taken to be the proprietor. Now, the purpose of the statute was to provide a basis for assessing and collecting rates laid on according to real rent: and, therefore, the valuation made under this provision is one for the purpose of creating machinery, &c., assessing the tenant on his real rent or interest, as if, in regard to the property valued, he were the proprietor.

On the other hand, the valuation so made is not to be the rule for assessing the landlord as proprietor. But he is not to escape altogether. He is to pay on his interest, as before. That interest is to be measured by the rent he receives, and the amount of the assessment corresponding to such rent is to be drawn back from the landlord by the tenant who has been assessed as proprietor.

Now, the effect of this clause, in cases to which it applies, is to bring in within the circle of assessment interests which have hitherto escaped altogether. But in every case in which they are brought in the landlord is not to be prejudiced. He is not to be proprietor in the sense of the Act, but is to pay on the same interest on which he would have paid before, and that interest the statute measures by the rent which he receives. In this way, in respect of separate interests in the same property, the Act expressly provides for separate assessment on separate value. It is true the landlord's interest is not directed to be valued on the valuation roll, but the rent he receives is not the less recognised as the measure of his liability.

Now, it is under this provision that the value on which the assessment in question has been laid on the pursuers was entered on the valuation roll. The plea of the pursuers seems conclusive—that the very words which authorise the assessor to adopt this value and insert it in the roll, expressly provide that it shall, for the purposes of this Act, be held to represent the tenant's interest, and shall not be held to represent the landlord or heritor's interest in any question of assessment. It is, however, contended by the defenders that the leaseholder is not liable in this assessment, in respect of the 43d section of the statute, and the decision of the House of Lords in the case of *M'Laren* v. *Clyde Trustees*. I am at a loss to understand how this proposition assists the defence. If the leaseholder is not liable in this assessment, the heritors, and the pursuers among the number, take no advantage by the provision of the 6th section, and must pay as they did before. They have lost nothing. But the non-liability of the leaseholder will never make the valuation of the leaseholder's property the valuation of the landlord's interest contrary to the clear and precise injunction of the statute.

It is, however, a mistake to suppose that the judgment in *M'Laren's* case renders this clause inoperative. On the contrary, although it leaves the leaseholder free, as he was before, from assessments on real rent imposed under previous laws which did not make him liable, the provision, even as so limited, was one essential to the utility of the statute. It still fixed the value of the tenant's interest in all assessments on real rent for which he was liable as proprietor, as under the clause of the Poor Law Act; and it afforded a basis for all assessments imposed by subsequent legislation, by which leaseholders should be included among proprietors. At this moment these very leaseholders are paying poor-rates as proprietors on the very valuation which is now said to represent the landlord's assessable interest.

But we have no question here as to the interest of the leaseholder. The question relates solely to the interest of the heritor, whose liability depends in no degree on that of the tenant, and I think it too clear to justify further observation, that the assessor was prohibited by the 6th section of the statute from entering the value of the leaseholder's interest as that of any property belonging to the landlord, and that for the purpose of levying and collecting this assessment on real rent that valuation cannot be used or looked at as representing the defenders' assessable interest.

This remark is enough, in my opinion, to dispose of the attempted gloss put on the 33d section, the meaning of which seems to me sufficiently plain. This clause makes the valuation appearing on the roll conclusive as regards all interests which are to be found valued there. It seems needless to say that it is not conclusive of the value of interests not valued there. If in any future statute it were declared that tenants and sub-tenants should be held to be proprietors, for the purpose of an assessment on real rent, only one value would be found on the roll; but that would neither represent the assessable interest of the landlord, on the one hand, or that of the sub-tenant, on the other. These would be valued on the principles which would have been applicable before the Valuation Act.

And this is the result at which I arrive in this case. The code of valuation provided by this statute is not complete—and that is all. Although I believe that the Act has been found of public utility, and of easy and successful administration, this is not the only instance in which it fails of full effect. But its imperfections, as I have shown, do not leave us at liberty to do injustice. Our duty is not to scan the words of the Act with microscopic eyes, but, on a subject of all others one for equitable adjustment, to be guided by the plain and manifest expression or implication of its provisions.

Referring, however, to the provisions of the 6th section, it seems quite clear that the landlord's assessable valuation in such a case ought to be estimated by the rent which he receives; and as this rent is now found on the valuation roll, I see no difficulty whatever in ascertaining the amount on which this assessment should be laid on the pursuers.

Lords Cowan and Neaves gave the following joint opinion:—

The question here raised relates to the effect of the valuation roll established by the existing Acts of Parliament on that subject as applicable to the rebuilding a church.

The church of Innerleithen having fallen into decay the heritors resolved to rebuild it, and to impose the necessary assessment on the heritors' lands according to the real rent or value.

In reference to an assessment of this kind, two questions always arise—1, Who are the parties liable to be assessed? 2, What is the value according to which the assessment is to be laid on?

With regard to the first question, it has long been fixed that the parties liable to repair and rebuild churches under the statutory description of parishioners are the heritors of the parish; and it is also fixed that the heritors are those who are feudally entitled to the *dominium plenum* or *dominium utile* of lands and heritages in fee. Superiors are not liable and liferenters are not liable.

There may be room for saying that if the course of our decisions had included among "parishioners" those parties who possess long leases of lands, there would have been some equity for that view. But no such conclusion has ever been arrived at. The only parties liable for this burden are, as they always were, the heritors, and it is beyond question that no lessee, however long his lease, has ever been held to be a heritor.

That doctrine, if it needed confirmation, has received it in the recent case of *M'Laren* v. *The Clyde Trustees*, to which I shall afterwards refer, although it is true that the leases there in question were not of the great length of some of those that here appear.

But, in truth, the pursuers do not raise any question as to their general liability as heritors. They do not say that the long lessees are liable. They limit their plea to an objection to the *quantum* of the assessment laid upon them, which is a matter falling under the second of the questions above referred to.

Now, looking at this second question in a general point of view, I consider it to be clear that the law intends that burdens of this kind should be borne by the land in proportion to its value. How to find out that value is another matter. But the thing to be found out is the true value; and then the heritor, as representing the land, is to pay according to that value. The heritor does not pay according to his beneficial interest—according to the value of his estate in the land. He comes in place of the land itself, and must bear the full brunt of the burden. If he is a feuar, his beneficial interest is the value of the land, *minus* the feu-duty; but that is not taken into view. If there is a liferent on the land, the fiars' interest may for many years be *nil;* but this also is immaterial. Given the true value of the land, the true heritor must bear a corresponding proportion of the value. In the case already mentioned, the feuar would pay on the whole value, without having allowance for the feu-duty, any more than the fiar would be allowed for the liferent.

An heritor cannot relieve himself of the burden corresponding to the value of the subject, except in so far as he ceases to be the heritor. He may do so by disponing or by feuing. He thereby ceases to be heritor of the subject feued or disponed, and transfers both the right and the burden to another heritor. But he does not cease to be a heritor by granting a liferent or by granting a long lease. In either case the value of the subject is unchanged, and the heritor must pay accordingly,

though he may have reduced his present interest to little or nothing. This is clear as to a liferent, and there is no reason why it should be different under a liferent lease.

It would, indeed, be a very strange thing if an heritor could exempt his property from taxation by letting a long lease of it to a friend or relative at a small rent. Such a proceeding would be most unjust to the other properties and proprietors in the parish, and ought not to be suffered or encouraged.

The various systems of valuation that have prevailed in this country have always had in view the ascertainment of the value of the subject to be valued in itself, not the value of any partial interest which individuals might have in it. The old valuations for purposes of cess or supply proceeded on that footing.

The new Valuation Act seem to me to have the same object.—(*Reads the following clauses :*—Preamble, § 6, § 30, 33–41.) From these I deduce these conclusions—

1. This is a valuation, not a taxing Act, a view which is confirmed by *M'Laren's* case (House of Lords).

2. The thing sought to be valued is the land itself, not partial interests in land.

3. The value sought for is the rent which the subject would yield from year to year in its existing state.

4. This value may be found by means of the rent stipulated for in ordinary leases, but not by the rent under extraordinary leases, which afford no criterion.

5. There is only one value for all purposes, owners and occupiers, subject to any special deductions in the taxing Acts. Other particulars are added, partly under the Election Act, but not for valuation. The proper value is independent of these, and this value is to be found only in the last column of the schedule. That value, as value, is conclusive.

6. This value is now substituted for the old valuation, or old valued rent—rent being synonymous with value—and the rule is plainly applicable to churches, by the exception as to the use of former valuation in division of area.

Now, then, look to the conclusions of the summons. The rent or value is sought to be limited to the rent receivable in the long leases, directly in the teeth of the sixth clause, which says that such rent shall not be taken as value, but value got otherwise under Act. Seems impossible to affirm that conclusion. None of the other conclusions agreeable to valuation Act, though valuation roll is not repudiated.

As to sixth clause, it is certainly not a taxing clause. I should not have thought it such even without the 41st section, much more with the aid of that clause. It may be applicable to some arrangements, existing or future, but not such as to liberate the pursuers if otherwise liable.

It is said that all this is unjust, because under these long leases the pursuers get so little rent. It may be so; but whose doing is this?

The pursuers' author made these leases, he gave a right of possession to his tenants, but he kept the character of heritor exclusively to himself. The tenant was no heritor, the landlord was exclusively such. He had alone a right to all the advantages of heritorship, so as to become a Commissioner of Supply, a co-proprietor of church area, of churchyard, &c.

"Cujus est commodum ejus debet esse incommodum,
Cujus est *honos* ejus debet etiam esse *onus*."

The contract of lease was a virtual agreement to relieve the lessee of all Church taxes, and this is not disputed as to liability, the pursuer seeking redress merely as to value. Under any long lease now to be granted the landlord may make his own arrangements, and will make them as parties may agree. But as to the past, he cannot get quit of a burden on himself as heritor without laying it, in whole or in part, on another, as becoming heritor in his place.

The contention of the pursuers comes to this, that an heritor or owner may truly exempt his property from its fair share of taxation, which it would bear if in his own possession, by granting a long lease. He cannot do so by a liferent, but he may do so, it is said, by a long lease, and thereby increase the burden on the other heritors.

The Act requires that valuation in all assessments shall be according to the valuation roll; and this plainly extends to the rebuilding of churches. The effect of this as to other heritors is that each shall be assessed for no more than his proportion of the total valuation. The 6th clause itself implies that other heritors shall not bear the burden falling on a property under long lease. The property in that situation must bear its own proportion, and the question whether lessor or lessee is to bear it is one in which they alone,. and not the other heritors, are concerned.

Under the Valuation Act it is plain that if the pursuers' plea is good, that there is here no valuation against the landlord in these long leases, this must apply to every case of land let on a lease longer than twenty-one years, whatever may be its endurance, whatever may be its conditions, and however near it may be to its conclusion. Under a long lease the lessor may have prospective interests in the subjects of immense value, and his rent may be small because the tenant makes beneficial expenditure from year to year; while in a long lease approaching its termination the lessor may be on the point of reaping an extensive advantage which creates no equity in favour of his escaping from his liability for building a church.

These views suggest considerations in favour of the result that thus comes about. But be that as it may, the enactments are express. It is impossible to find grounds for holding any one else to be a heritor as to this ground, or its taxation, than the pursuers; or to find any other value of the subject than that exhibited by the valuation roll in its proper column of value.

It is quite possible for a proprietor so to manage his property that he or his heirs shall derive no annual and immediate benefit from it, and yet that he and they shall be liable for its burdens. He may constitute total or partial liferents over it—he may saddle it with annuities—he may allow squatters to occupy it without rent—he may sacrifice present interest to some ultimate and very distant benefit, as by becoming or making his descendants become the owners of a large and populous village or town; but if he remains the heritor, and if the subject in its existing state is capable of being valued under the valuation, the heritor, I conceive, is plainly liable to bear its burdens in proportion to that value, though he should have nothing to pay it with.

I may further observe that here the heritor's arrangements tend to increase the population, for

which the church is needed, while yet he seems to escape the liability, and in the same way could claim no share of the area.

As to the plea that these valuations are bad, as being in absence or behind the back of the heritor, and not binding on him, that is not the ground taken by the pursuers in this action, the conclusions of which seem to be clearly contrary to statute, both as to rent and value. But further, such a plea would imply that all valuations under this Act are null and void in so far as affecting heritors who have granted leases of more than twenty-one years, —that all taxations that have taken place under the Act as to such heritors are null and void— and that all such valuations must be set aside judicially. I do not think the basis of this argument is well founded. But in any view the Act is express; the valuation is highly privileged; and I cannot bring myself to stultify the Legislature to such an extent, and nullify an Act intended to lead to such a different result, and to form so general and important a facility in the ascertainment of valuation.

LORDS DEAS and BENEHOLME agreed with LORDS COWAN and NEAVES, while the LORD PRESIDENT and LORD ARDMILLAN concurred with the LORD JUSTICE-CLERK.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Pursuers—T. & R. B. Ranken, W.S.
Agent for Defenders—Stewart Neilson, W.S.

Wednesday, December 14.

FIRST DIVISION.

LEES AND OTHERS *v.* DUNCANS.

Road— Public Right of Way—Terminus—Jury— New Trial. Circumstances in which, though the public had been in the habit of using, for the requisite period, a certain path, leading from a point on the high road near a town, along the edge of the beach, and then along the top of the cliffs to two places on the shore, at one of which there existed merely a natural curiosity, and at the other of which there was alleged to be a boat harbour, it was *held* that the former place could not be, and that there was an insufficiency of evidence to show that the latter place was, a public place in such sense that it could form the terminus of a public right of way. A new trial was therefore granted.

The pursuers in this matter were inhabitants of St Andrews, and as members of the public they sought to establish a public right of way from the east end of the town of St Andrews, along a path which led from the East Sands along the top of the cliffs, to a place called the Rock and Spindle, and to Kinkell Harbour, and thence to the harbour and village of Boarhills. They accordingly brought two actions of declarator, one against David Duncan, tenant of and residing at Brownhills, in the parish of St Andrews; and the other against Thomas Duncan, the proprietor of Kinkell. These cases were tried before Lord Mure and a jury upon identical issues, which differed only in stating two different points upon the road from St Andrews to Crail as the point of departure of the alleged public right of way at the St Andrews' end.

The first of these issues was as follows:— "Whether, for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers, in the direction of the red line on the plan, No. 17 of process, leading from a point of the turnpike road from St Andrews to Crail, marked 'A' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle' and to Kinkell Harbour, and thence leading by a line near the seashore, along the said lands of Kinkell and the lands of Kingask and other lands, to the harbour and village of Boarhills, or to or between any, and which, of the said points or places?"

The second issue only differed from this in that it assumed another point, marked "B" upon the plan, on the road from St Andrews to Crail as the point of departure of the said alleged right of way at the St Andrews end. In fact, two different means of access from the Crail road to the East Sands were claimed, and from the East Sands onward there was but one path claimed under both issues as a public right of way.

The jury's verdict in both cases was as follows: —"Find for the pursuers under the first issue— That for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers in the direction of the red line on the plan, No. 17 of process, leading from a point of the turnpike road from St Andrews to Crail, marked 'A' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle,' and to 'Kinkell Harbour:' And find for the defender under the said issue for the rest of the way—viz., from 'Kinkell Harbour' to 'Boarhills Harbour:' And further find for the pursuers under the second issue, That for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath or right of way for foot passengers in the direction of the red line on the plan, No. 17 of process, from a point of the turnpike road from St Andrews to Crail, marked 'B' on the said plan, to the East Sands, and thence along the margin of the said sands, and thence along the lands of Brownhills to the 'Maiden Rock,' and thence along the said lands and the lands of Kinkell to the 'Rock and Spindle,' and to 'Kinkell Harbour:' And find for the defender under the said second issue for the rest of the way—viz., from 'Kinkell Harbour' to 'Boarhills Harbour.'"

Both the pursuers and the defenders moved for a rule, to show cause why a new trial should not be granted, in respect that the jury's verdict, so far as against them respectively, was contrary to evidence. A rule was allowed in both cases.

It is unnecessary to go much into the evidence, in respect that the question as to a new trial depended not so much upon the public use of the path, of which there was little doubt, but on this farther question, whether the terminus of the right of way, as found by the jury, was a public place in the sense which is required by the law on this subject. There was no doubt that the harbour and village of Boarhills, the termini of the more extensive right of way attempted to be established, were such public places; but there was much doubt