below, who has said, that "the case had been imperfectly and inadequately stated by the Judge, and so stated as tending to mislead the jury." At the same time I am not surprised, that the learned Judge who tried the case should have been embarrassed by the rather unsatisfactory and somewhat conflicting state of the authorities and decisions on a branch of law which has only lately approached maturity.

A point was made on the Statute of the 23 and 24 Vict. c. 151. I am not disposed to pronounce any opinion in reference to the effect of that Statute. I think there may be questions of considerable nicety arising upon it. It was a public Statute passed for the avowed purpose of giving greater safety to workmen in mines. It imposed duties on the owners of mines, and a question may be raised whether workmen engaging in the service of a mineowner may not be entitled to rely upon such duties being performed as being employed in the contract of service. That is a point of which I do not wish to express any opinion, because the subject we are now dealing with is apart altogether from any such question.

*Interlocutor affirmed, and appeal dismissed with costs.*

*Appellant's Solicitors*, Thomas White, S.S.C.; Shaen and Roscoe, London.—*Respondents Solicitors*, W. B. Glen, S.S.C.; James Dodds, Westminster.

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## JUNE 8, 1868.

## GEORGE GREIG, Inspector of Poor, *Appellant*, *v.* THE UNIVERSITY OF EDINBURGH, *Respondents*.

Poor rates—Assessment—University Buildings—Purposes of Government—Exemption—*The buildings composing the University of Edinburgh are not exempt from assessment to the poor rate on the ground of being property held for Crown purposes or purposes of public government, nor on the ground of being incapable of producing annual value.*[1]

This was an action at the instance of the University of Edinburgh against the inspector of poor of the city parish of Edinburgh, concluding for declarator, that the buildings of the University were exempt from the burden of poor rates.

The plea in law of the pursuers was—The buildings of the University being national or public property, or property dedicated to national or public purposes, and from the occupation of which no revenue was derived, was not subject to assessment for poor's rates.

The defender's pleas in law were—1. The subjects belonging to the pursuers, being lands and heritages in the sense of the Poor Law Act, are assessable for poor's rates. 2. Under the Poor Law Act and the Valuation Act the defender was entitled to levy poor's rates from the subjects, and from the pursuers as the owners and occupants thereof, according to the value fixed in the valuation roll. 3. There being no statutory or other ground of exemption pleadable by the pursuers, the defender ought to be assoilzied, with expenses.

The Lord Ordinary, Barcaple, on 24th February 1865, sustained the first and second pleas in law of the defender, and assoilzied him from the whole conclusions of the libel. On reclaiming note the Second Division, on 20th July 1865, recalled the Lord Ordinary's interlocutor, repelled the defences, and declared, interdicted, and prohibited, in terms of the conclusion of the libel. The defender appealed against the latter interlocutor.

*Sir R. Palmer* Q.C., *J. T. Anderson*, and *Junner*, for the appellant.—The University buildings are *primâ facie* liable to assessment according to the principle laid down in several recent cases, which confine the exemption to those buildings which are occupied by the Crown or its servants, or for government purposes—*Mersey Board* v. *Cameron*, 11 H. L. C. 443; *Clyde Trustees* v. *Adamson*, 4 Macq. 931, *ante*, p. 1351; *Leith Harbour Commissioners* v. *Gardiner*, L. R. 1 Sc. App. 17, *ante*, p. 1384. Here the buildings are not occupied for government purposes or by servants of the Crown, or by the Crown in the proper sense of the term.

A great deal of antiquarian information as to the University is alleged in the condescendence, of which the Court seems to take judicial knowledge as if it were all conceded to be true; but there have been no admissions warranting such an inference. It is enough to say, the buildings are capable of producing rent, and are of value, inasmuch as the students pay fees to the professors and trustees.

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[1] See previous report 3 Macph. 1151; 37 Sc. Jur. 598. S. C. L. R. 1 Sc. Ap. 348; 6 Macph. H. L. 97; 40 Sc. Jur. 520.

*Lord Advocate* (Gordon), and *Mellish* Q.C., for the respondents.—This is a case of buildings held on a public trust, and for purposes at least closely allied to government purposes. It has been held, that purposes of local government are within the exemption—*Justices of Lancashire* v. *Cheetham*, L. R., 3 Q. B., 17. It is difficult to say, that property on which a trust like this is impressed can be said to be of any annual value in the ordinary sense; for, in the circumstances of the property, there could be no tenant who could take it for any purpose other than those declared in the trust. No defined annual value can be put on the buildings in such a case; and if there is no defined value, it is practically the same thing as if the property were exempt altogether. On both grounds the interlocutor of the Court below was right.

LORD CHANCELLOR CAIRNS —My Lords, in this case an action of declarator was raised by the University of Edinburgh against the Parochial Board of the parish of Edinburgh, through their public officer, to have it declared, that the University are not liable, as owners or occupiers of the University buildings, to any assessment for the poor rate. The record was closed, but no proof was led, and upon the averments on the record, and consideration of the pleas in law, the Lord Ordinary assoilzied the defender from the conclusions of the summons. From that interlocutor a reclaiming note was presented to the Second Division of the Court of Session to recall the interlocutor, and declare in terms of the conclusions of the libel. The Court of Session pronounced an interlocutor to that effect, and from that decision of the Court of Session this appeal comes before your Lordships.

Two questions which are very different have been argued at your Lordships' bar. One of the arguments has been, that the buildings of the University of Edinburgh were exempt from rateability on the score of what I may term Crown privilege, irrespectively of any question as to value. The second ground of argument was, that they were exempt, or rather, that they ought not to be rated, on the score of being of no annual value. I think your Lordships will be of opinion, that these two questions must be kept distinct. If the argument of the respondents prevails on either of these grounds, of course they will be entitled to the benefit of the argument, but it will be impossible to combine a portion of the claim for exemption upon one head with a partial support of the claim for exemption on the other head.

Now, as to the first of these questions, namely, the claim for exemption on the score of the Crown privilege, the manner in which the case is put by the pleas in law for the respondents is this: They say that the buildings of the University, being national or public property, or property dedicated to national or public purposes, are not subject to assessment. The Court of Session has gone somewhat further than the plea in law; for I observe, that the Lord Justice Clerk in his opinion on the subject states, that the University of Edinburgh is in its corporate capacity a servant of the Crown, owning and occupying the University buildings under the control and supervision of the Crown and government of the country for important national objects.

The general principle which regulates the decision of questions of this kind has been well settled in your Lordships' House. I refer to the cases of the *Mersey Docks*, *Adamson* v. *The Clyde Trustees*, and the *Commissioners of Leith Harbour*. The general principle, as I understand it, approved of by your Lordships in these cases, is this, that the Crown not being named in the English or Scotch Statutes on the subject of assessment, and not being bound by Statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

If that is the true principle, and such it must now be taken to be, I think your Lordships will find, that it is very easy of application to the present case. The University of Edinburgh is no doubt a great public and national institution; but the Corporation of the University of Edinburgh is a Corporation independent of the Crown, no doubt originally created by, but still independent of, the Crown. Its property is not Crown property; but it is property vested in the Senatus Academicus for the University purposes. I agree with the statement of the Lord Ordinary, who said that the property could not be considered in any sense Crown property, nor would the assessment of the property directly or indirectly affect the Crown. With regard to the allegation in the pleas in law, that it is property dedicated to public purposes, after the decisions of this House in the cases to which I have referred, that must now be taken to be a wholly insufficient ground of exemption.

Therefore, on the first argument of exemption on the score of Crown privilege, it appears to me, that the buildings of the University of Edinburgh cannot be brought in any sense under that exemption.

Then, on the second point, the question of value, the manner in which it has been put on behalf of the respondents at your Lordships' bar is this: It has been stated, that the property is not capable of producing value. Now I must remind your Lordships, in the first place, that we are not here to decide on any question of quantum of value in respect of which the property should be assessed. That may be a matter of some difficulty which may have to be considered in detail hereafter. The question which your Lordships have now to deal with is, whether the argument now adduced, which was not much relied on in the Court below, that the premises are not capable of producing value, is an argument which ought to prevail.

It might be sufficient to dispose of that argument to say, that in a case where we find the University of Edinburgh actually in occupation and conducting all the great purposes for which they are incorporated in and by means of these buildings, that alone is a beneficial occupation which, subject to the question of what the quantum of benefit may be, is clearly an occupation rateable for the relief of the poor. And I might further point out to your Lordships, that it appears clear, partly by the record and partly by admissions at your Lordships' bar, that the University are in the habit of receiving matriculation fees from the students who attend these buildings, which fees would clearly not be paid unless these were buildings of which the students could have the benefit for the purpose of receiving instruction. Further than that, I might remind your Lordships, that it appears on the record and by those admissions, that the professors are allowed to receive fees from the students who attend their classes. And it is of course obvious, that if the professors were not allowed to receive those fees, they would themselves have to be remunerated by higher salaries paid to them by the University. And therefore, indirectly again in that shape, the University obtains the benefit of the fees which are paid to the professors, which fees again would not be paid by the students unless there were proper class rooms in which the professors could deliver their instructions to the students. But I am bound to say, that, even beyond that, the Act of Parliament which deals with this question suggests (I will not say more, nor is it necessary that your Lordships should now say more,) a test of value which, as it appears to me, might well be made applicable to cases of this kind, because the 8th and 9th Victoria, chapter 83, after providing in the 34th section, that one half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish, in the 37th section enacts, "That in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year," under certain deductions therein mentioned.

It was argued at the bar, that it must be taken, that a tenant who became the lessee of these lands would not be able to use them otherwise than as the University could use them, that is to say, would not be able to put them to any other uses than the University would do. It may not be necessary to determine that question now, but it appears by no means clear, that any such ingredient is to be taken into account when you are endeavouring to ascertain what a tenant would give for the premises in their present state. That point may better be determined when the question is specifically raised. But on the grounds I have mentioned, I think your Lordships will be of opinion, that there is in these premises clearly an annual value; and if that be so, they are not exempt from rateability, on the ground that they are like the case put in argument in one of the cases that came before your Lordships—the case of a barren rock, which is utterly without any value.

Speaking, therefore, my Lords, with great respect for the decision of the Court of Session, I am bound to advise your Lordships, and I move your Lordships, that the decision of the Lord Ordinary was right, that the interlocutors of the Second Division of the Court of Session ought to be reversed, and that in substance the defender should be assoilzied from the conclusions of the libel, with expenses both of the proceeding before the Lord Ordinary, and also of the reclaiming note to the Court of Session.

LORD CRANWORTH.—My Lords, I entirely concur, and have very little to add to what has fallen from my noble and learned friend. I think the Court of Session has fallen into a great error in its application of the *Mersey Dock case*. I find that the Lord Justice Clerk says, as the foundation of his opinion, that this comes within the exception of Crown property, that throughout the whole history of the University, and very specially in a recent Act of Parliament, the Crown is recognized both as the fountain from which the whole rights of the University flow, and also as the visitorial authority, to the control of which it is at all times subject. That may be perfectly true, but that does not make the property Crown property. As has been suggested in the course of the argument at the bar, so far from what is alleged shewing the property to be in the Crown, it distinctly shews it to be out of the Crown, for it was part of the argument, that by royal charter it was granted to the University. So that clearly the ownership is entirely out of the Crown. But if the ownership is out of the Crown, then *a multo fortiori* the occupancy is out of the Crown. That the occupancy is in the University is clear from this: The professors are allowed, and it is their duty to use, certain rooms for their classes, but they can only occupy them for such purposes and in such mode as the University shall permit. They could not (as was suggested) give dinners or balls there—certainly not, as they might do in any other rooms of which they had the sole occupation. Therefore, it seems to me perfectly clear, that the University are not only the sole owners, but the occupiers of the property. And as to the supposition, that they are occupying it as servants of the Crown, and that the Crown is performing duties there as in the case of Courts of Justice, it is absurd, because the Crown does not grant degrees or deliver lectures, nor do the professors perform these acts in any respect as servants of the Crown. Therefore, that the Crown is the owner and occupier is quite out of the question. With regard to the question of there being value, I think the receipt of the matriculation fees is quite

sufficient. And the fact, that the professors, by occupying rooms belonging to the University, and under the control of the University, receive fees from their classes, is, I think, also conclusive. But I desire also to be understood as concurring with my noble and learned friend when I say, that I very much doubt whether any of these matters are at all to be taken into consideration. When the Statute says, that the value is to be calculated according to what a solvent tenant would pay for the property, making certain deductions which are specified, I cannot say that I am at all satisfied, that it means, that the tenant is only to occupy it for the same purposes, for which it is occupied by the body that is proposed to be rated. I have no hesitation, therefore, in concurring with my noble and learned friend in thinking, that the interlocutor of the Lord Ordinary was right, and that the interlocutor of the Second Division of the Court of Session must be reversed.

LORD WESTBURY.—My Lords, upon an examination of the summons in this declarator, it would appear, that strictly speaking, one question only is raised by it, and that is the question of exemption from poor rate. The question, whether the buildings are or are not of any rateable value, does not appear to be included in the summons. Now, on the question of exemption, anterior to the decision of your Lordships' House in the *Mersey Dock cases*, great looseness of expression prevailed in the language of the decisions. We had a variety of decisions in which it was held, that property used for charitable purposes being held for public purposes, was not to be regarded as liable to poor rates. The true ground of exemption was ascertained and expressed by this House in the *Mersey Dock case;* and it was found to rest altogether upon this fact, that the Poor Laws did not include the Crown, the Crown not being named in the Statute. The result, therefore, was, that Crown property and property occupied by the servants of the Crown, and then, according to the theory of the Constitution, property occupied for the purposes of the administration of the government of the country, became exempt from liability to poor rate. The confusion and looseness involved in the words "national objects" were thereby removed. And those words, in speaking of the law upon this subject, ought to be considered as applicable to those purposes which are essentially involved in the administration of the government of the country. Now, nobody will contend, that the function involved in the administration of the University of Edinburgh is part of the administration of the government of the country. They are perfectly distinct, and it is impossible, therefore, to bring the function of a University within the proper meaning of government purposes. And if so, it is impossible to hold, that property granted by the Crown for the University, or for the purposes of a University, is properly granted for the service of the government of the country. This ground of exemption, therefore, not being at all applicable to the University, the conclusions of this declarator must, on that ground alone, be repelled, and the defender assoilzied from the action.

But it may be requisite to observe, that, independently of exemption on the ground of the property belonging to the government, there may be another ground of non-liability perfectly distinct, namely, where the property has no rateable value. Now, I do not mean, by anything that I say on this occasion, to prejudice at all the proper consideration of that question. For it may possibly be held, that if property is occupied by persons for a purpose yielding no value at all, and they are absolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held, that there is no rateable value in that property, and that in that sense, therefore, it ought not to be assessed to the poor rate. But the possession of property of no rateable value is wholly distinct from the possession of property in a character which entitles it to be exempt. In this case it may be sufficient to observe, (though perhaps it is hardly necessary,) that it is impossible to deny, with respect to the University of Edinburgh, that it is at once the owner of the property in a character which does not exempt it, and it is also the occupant of the property in a character, and for a purpose, that entitles it to receive, and in respect of which it does actually receive, a certain amount of pecuniary value which must be regarded as incidental to its occupation of this property. Although, therefore, we are not required by the conclusion of this declarator to advert to that circumstance at all, it may be satisfactory to advert to it, only for the purpose of observing, that there is no case here brought before the House, which proves, that the property is incapable of yielding value, and therefore ought not to be rated, but, on the contrary, the facts shew, that the property is capable of yielding, and actually does yield, in a certain sense, value to the University that occupies that property.

I therefore, on these grounds, entirely concur in the motion of my noble and learned friend, the LORD CHANCELLOR, that the defender ought to be assoilzied from the conclusion of this summons, with expenses, extending also to the expenses of the interlocutor of the Lord Ordinary. The interlocutor of the Second Division will be reversed, and there will be an absolvitor from the conclusion of the summons. That I apprehend will be the proper form of order.

LORD COLONSAY.—My Lords, I concur in the judgment which has been suggested, and upon the grounds stated. I also concur in the reservation which has been made by my noble and learned friend who last spoke. Possibly, a question may be raised as to the rateable value of this property. The summons of declarator that is before us is a summons which concludes for absolute non-liability. Now to that I cannot give an assent. Therefore, it is necessary, that

from that there should be an absolvitor. But other questions may be raised; other questions have been raised of a more limited kind. I do not think they are properly before us here, nor have we all the materials for disposing of them. And therefore, while I would be for assoilzieing the defender from the conclusions of this action, I would not be for precluding the pursuers in the action from raising any question as to the measure of liability which attaches to them, when the question comes fairly to be raised.

The cases that were decided anterior to the *Mersey Dock case* and other recent cases, and the practice that prevailed anterior to those decisions, did, I think, give great countenance to the judgment pronounced in the Court below; and had it not been for these recent cases, I do not know that I should not have concurred in that judgment, taking those former cases to be correct exponents of the law. But the principles laid down in the *Mersey Dock case*, and some other cases almost concurrent with it, are I think sufficient to shew, that the buildings of the University of Edinburgh are not buildings of the kind which entitles the owners and occupants of them to exemption from liability for poor rates.

*Interlocutors appealed from reversed, and defender assoilzied from conclusion of summons, with expenses before the Lord Ordinary and the Court of Session.*

*Appellant's Solicitors*, Alexander Greig, S.S.C.; Murdoch, Rodger, and Gloag, Westminster. —*Respondents' Solicitors*, W. and J. Cook, W.S.; Loch and Maclaurin, Westminster.

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## JUNE 15, 1868.

JOHN CARRICK, Architect, Glasgow, *Appellant, v.* GEORGE JOHN MILLER of Frankfield, *Respondent.*

Entail—Montgomery Act—Building Lease—Powder Magazine—Waiving Statutory Condition—*By the Statute* 10 *Geo.* III. *c.* 51, *heirs of entail may grant building leases for certain purposes for* 99 *years, but these are to be void if a dwelling house is not built within ten years.*

HELD (affirming judgment), *That notwithstanding the heir dispenses with this latter condition, the lease becomes absolutely void at the end of ten years, if the dwelling house is not built.*

QUESTION, *whether a lease for erecting a powder magazine can be granted by an heir of entail under the Montgomery Act?*[1]

This was an appeal from a judgment of the First Division. The heir of entail of the estate of Frankfield raised an action of reduction to set aside a building lease for 99 years, granted by his father in 1851, when heir in possession of the said estate. The deed of entail prohibited heirs of entail from granting tacks for more than 99 years. The Montgomery Act, 10 Geo. III., c. 51, enables heirs of entail to grant building leases for 99 years under certain conditions, one of which is, that within ten years after the lease one dwelling-house at least, not under £10 in value, shall be built for each half acre, otherwise the lease to be void. In 1851, the pursuer's father, as heir of entail, granted a lease for 99 years of ground for the purpose of a powder magazine to be erected, but by a back letter, the lessor agreed not to enforce the statutory condition if a powder magazine worth £1000 should be kept in good repair. No dwelling houses accordingly had been built pursuant to the Statute.

The Lord Ordinary (Kinloch), on 22d June 1866, held the lease void, and the First Division (Lord Curriehill dissenting) recalled the interlocutor, holding the lease was not void, but had only become so by reason of the condition as to erecting dwelling houses within the ten years not being fulfilled.

The defenders appealed.

*Dean of Faculty* (Moncreiff), and *Cotton* Q.C., for the appellant.—The lease was not void until the heir in possession had required the dwelling houses to be built, and which the appellant was ready to do. It was an irritancy which might be purged—Stair, iv. 18, 3; i. 17, 16; Ersk. ii. 5, 25; ii. 8, 14; 1 Bell, Com. 70; 1 Bell, Leases, 129; *Stewart* v. *Watson*, 2 Macph. 1419. Moreover, the lease was at all events good for 25 years, under the proviso in the deed of entail.

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[1] See previous report 5 Macph. 715: 39 Sc. Jur. 368. S.C. L. R. 1 Sc. Ap. 356: 40 Sc. Jur. 530: 6 Macph. H. L. 101.