[10*th April* 1835.]

MAGISTRATES and TOWN COUNCIL of the Royal Burgh of DUNBAR, Appellants.—*Sir W. Follett — J. A. Murray.*

MARY Duchess Dowager of ROXBURGHE, and others, HERITORS of the Parish of DUNBAR, Respondents.—*Lushington — Keay.*

Poor.—Held, (reversing the judgment of the Court of Session,) in a question between the heritors of a landward district and the magistrates of a royal burgh, both situated within one and the same parish, that the management and maintenance of the poor of the landward district were not separate from the management and maintenance of the poor within the burgh, but that the poor of both districts must be regarded as the poor of one parish.

2D DIVISION. Ld. Mackenzie. THE parish of Dunbar in the county of Haddington comprehends both the royal burgh of Dunbar and a landward district. According to the census of 1821 the population of the parish consisted of 5,272 individuals, and by the late census it was ascertained to have decreased to the extent of about 200, so that the total population was about 5,000. It was stated by the heritors (respondents) that there were ninety-nine families on the regular list of poor for the parish; that of these, seventy were resident within the burgh, and twenty-nine in the landward district. On the other hand, the magistrates (appellants) stated, that there were only eighty individuals on the list altogether, of whom fifty-eight resided within the burgh, and the remaining thirty-two within the landward dis-

trict; and that of these fifty-eight twenty had formerly resided in the landward district, but on becoming incapable of executing agricultural labour, they had taken up their abode within the burgh; so that fifty-two individuals were truly poor belonging to the landward district, while the remaining twenty-eight formed the proper poor of the burgh. It was further stated by the magistrates, that it had never been the practice to separate the poor of the parish into two classes, viz., the poor residing within the burgh, and the poor within the landward district; whereas the heritors alleged that separate lists of these two classes had always been kept, and that a higher rate of aliment had been allowed to the poor within the landward district than to the poor within the burgh, in respect that the latter were allowed to beg within the burgh.

It was admitted by both parties, that the aggregate amount required for the whole poor of the parish was decided upon at a joint meeting of the heritors, kirk session, and a member of the town council of the burgh; that the administration of this fund had always been exercised by the kirk session alone; that collections at the church doors, and the fund when levied, together with the profits of the burgh mort-cloths and the interest of a sum of 1,500 merks Scots, which had been mortified by Jane Benning in favour of the poor of the parish, had been invariably massed, and divided among the poor of the parish without any distinction between the poor of the burgh, and the poor of the landward district.

It was alleged by the magistrates, that it had been the invariable practice to levy only one assessment for the entire parish; but the heritors denied this, and stated that the only assessment which was imposed by the kirk

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

session was five sixths of the sum necessary for the support of the whole poor, on the heritors and others liable within the landward district, while the other sixth was levied from those liable within the burgh, and paid by the magistrates to the kirk session.

This division of the assessment was admitted by both parties to have originated in an arrangement made between the heritors and the magistrates in the year 1724, as appeared from the following minute extracted from the records of the town council:—

Sept. 14, 1724. "The which day the magistrates and "council, considering that there was an intimation made "yesterday from the pulpit, requiring the heritors of this "parish to meet on Thursday next, being the seventeen "instant, to concert proper measures for the maintenance "of the poor of this parish, as also for repressing stranger "and vagrant beggars; they therefore nominate and ap- "point Bailie John Ferguson, James Fall, and Charles "Fall, to meet with the heritors, and concur with them "in such measures as shall be concerted agreeable to the "several acts of parliament made thereanent, and to "report."

"The same day the magistrates and council appoint "George Wilson, John Pollock, Robert Wilson, Wil- "liam Hepburn, and George Kellie, as a committee, "to make diligent search through the town, and report "to the magistrates with all convenient speed a com- "plete list of the poor within the burgh and its suburbs; "that is, such as are actually under charity, or are in "such circumstances as to stand in need of it: as also to "report a complete list of all strangers that have become "inhabitants within this burgh within the last three "years."

" Dunbar, 21st September, 1724 years.

" This day the said Bailie Ferguson acquainted the " magistrates and council, that Mr. Fall and he had " met with the heritors and kirk session about the extent " and proportion of the poor's rates in this parish :— " That they had come to a resolution, jointly with the " heritors, that the sum of one hundred and twenty " pounds sterling would, with the several funds they " hold already for the maintenance of the poor, be " sufficient for relieving the poor of this parish for the " year ensuing; but when the question came to be " agitated, what the town's proportion of this sum " should be, they did not find themselves sufficiently " empowered to agree to the quota insisted on by the " heritors, which was, that in consideration of the " numerous poor in the town of Dunbar, that the com- " munity should contribute one-sixth part of any sum " that should bc raised by the parish for the maintenance " of the whole poor :—That he and his colleague had at " first insisted ceremoniously on fixing the town's pro- " portion by their valued rent, in conformity to the rest of " the heritors of the parish :—That the heritors who were " present continuing to insist on the large number of " town's poor, and the small extent of their valuation, " they took it on them, in name of the town, to offer to the " said heritors the paying of one eighth part as the town's " proportion; which offer the heritors did not accept of, " but still insisted they should pay one sixth: wherefore " the said Bailie and his colleague desired the further " instructions of the magistrates and council, how to " proceed in this affair. Which representation being " considered by the magistrates and council, they " unanimously approved of the conduct of the said " Bailie Ferguson and Mr. Fall in this affair, and

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" hereby empower them to set the town's quota of the " poor's stent in the parish of Dunbar at any rate they " can, not exceeding one sixth part of the whole, for " which this shall be their warrant."

" Dunbar, 2d October, 1724 years.

" The which day the said Bailie Ferguson reported, " that he and Mr. Fall having attended the meeting of " the heritors on the 21st September last, in the after- " noon, and finding them insist positively that the town " should pay one sixth of the money that was raised in " the whole parish for the maintenance of the poor, " they agreed in name of the town to that quota for " the year ensuing allenarly, with a special clause in- " serted in their minutes, that this should not be drawn " into a precedent in any time coming; they thought " it more of interest for the town to go into this measure, " than to delay or obstruct so good a work as the making " a provision for the poor in so effectual a manner " Which representation being considered by the coun- " cil, they unanimously approved of the conduct of " the said Bailie Ferguson and Mr. Fall in this whole " affair."

The minute of the heritors was in these terms: " It's " agreed by the heritors, that for making the foresaid " sum of 120*l.* effectual for maintaining the poor of the " town and parish of Dunbar, that five sixth parts of " the said sum shall be paid by the heritors and tenants " of the country part of the parish, and one sixth part " by the town of Dunbar and community thereof, and " that for one year allenarly, viz., from October 22d " 1724 to October 22d 1725; and that this agreement " shall be binding no longer, or be a precedent any " manner of way for the future."

Notwithstanding this latter qualification, it was ad-

mitted that this arrangement had uniformly since that time been acted on.

In the year 1823 a dispute having arisen between the magistrates and the heritors, the latter of whom alleged that the allotment of five sixth parts of the assessment upon them was unequal, several meetings of the heritors were held, when it was ultimately resolved by the heritors "that in future a distinct assessment should be made "for the burgh poor and the country poor, and levied "from the burgh and country heritors separately, so "that each may support its own poor." After various attempts at an extrajudicial adjustment, which failed, the heritors in 1830 brought an action of declarator and repetition, founding on the statute 1579, cap. 74, on the proclamations of William and Mary, 11th August 1692 and 29th August 1693, and of King William, 3d March 1698, and also on the statutes 1695, cap. 43, and 1698, cap. 21, ratifying these proclamations.[1] They concluded

---

[1] The Act 1579, c. 74., is in these terms:—

"*For Punischment of Strang and Idle Beggars, and Reliefe of the Pure and "Impotent.*

"Forsameikle as there is sundry lovabil Acts of Parliament maid "be our Soveraine Lord's maist nobil progenitours, for the staunching "of maisterful and idle beggars, away putting of sornares, and provision "for the pure; bearing, that nane sall be thoiled to beg, nouther to burgh "nor to land, betwixt 14 and 70 zeires. That sik as makes themselves "fules, and ar bairdes, or uthers siklike runners about, being apprehended, "sall be put in the Kingis waird or irones, sa long as they have ony gudes "of their awin to live on. And fra they have not quhairupon to live of "their awin, that their eares bee nayled to the Trone or to an uther "tree, and their eares cutted off, and banished the countrie; and gif "thereafter they be found againe, that they be hanged.

"Item, That nane bee thoiled to begge in ane parochin that ar borne "in ane uther. That the heades men of ilk parochin make takinnes, "and give to the beggars theirof, that they may bee sustein'd within the "boundes of that parochin; and that nane uther bee served with almes "within that parochin, but they that beares that takinne allanerlie, as "in the Actes of Parliament theiranent at mair length is conteined. "Quhilkes, in the time bygane, hes not beene put to dewe execution,

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

that it should be found and declared " that the manage-
" ment and maintenance of the poor of the landward
" threw the iniquitie and troubles of the time by-past, and be reasoun
" that there was not heirtofoir ane ordour of punischment, sa speciallie
" devised as need required, bot the saidis beggares, besides the uthers
" inconvenientes, quhilks they daylie produce in the commonwealth, pro-
" cure the wrath and displeasure of God for the wicked and ungodlie
" forme of living used amongs them, without marriage, or baptizing of a
" great number of their bairnes. Therefoir, now, for avoyding of the
" inconvenients, and eschewing of the confusion of sindrie lawes and
" actes concerning their punischment standing in affect, and that some
" certaine execution and gude ordour may follow thereanent, to the great
" pleasure of Almichtie God, and common weill of the realme; it is
" thocht expedient, statute, and ordained, as weil for the utter suppressing
" of the saidis strang and idle beggers, sa contagious enimies to the com-
" mon weill, as for the charitabil releiving of aged and impotent pure
" peopil, that the ordour and forme following bee observed; that is to
" say, that all persons being above the aige of fourteene and within the
" aige of three scoire and ten zeires, that heirafter ar declared and set
" foorth be this act and ordour to be vagaboundes strang and idle beggars,
" quhilkes sall happen at ony time heirafter, after the first day of Januar
" nixt to cum, to bee taken wandering and misordering themselves, con-
" trarie to the effect and meaning of thir presentes, sall be apprehended,
" and, upon their apprehension, be brocht befoir the provest and baillies
" within the brugh, and, in everie parochin in landwart, befoir him that
" sall be constitute Justice be the Kingis commission, or be the lords of
" regalitie, within the samin, to this effect; and be them to be committed
" in waird in the commoun prison, stokkes, or irons, within their juris-
" diction, there to be keeped, unlatten to libertie, or upon bande or
" sovertie, quhill they be put to the knawledge of ane assize, quhilk sall
" be done within sex dayes thereafter; and gif they happen to be con-
" victed, to bee adjudged to be scourged, and burnt throw the eare with
" ane hote iron; the processe quhairof sall be registrate in the Court
" buikes; except sum honest and responsal man will of his charitie bee
" contented then presentlie to act himselfe before the judge, to take and
" keip the offender in his service for ane haill zeir nixt following, under
" the paine of twentie pound, to the use of the pure of the town or
" parochin, and to bring the offendour to the head court of the juris-
" diction at the zeires end, or then gude pruife of his death; the clerke
" taking for the said acte twelve pennies onley: And gif the offender
" depart and leave the service within the zeir, against his will that receivis
" him in service, then, being apprehended, he sall be of new presented
" to the Judge, and, be his command, scourged and burned throw the
" eare, as is forsaid. Quhilk punischment, being anis received, hee sall
" not suffer againe the like, for the space of threescoir dayes thereafter,
" bot gif at the ende of the saidis lx. days, hee be founden to be fallen
" againe in his idle and vagabound trade of life, then, being appre-

" district and of the burgh are separate and distinct;
" and that the pursuers, as heritors of the landward dis-

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" hended of new, he sall be adjudged, and suffer the pains of death as a
" thief.

" And that it may be knawn, quhat maner of persones ar meaned to
" be idle and strang vagabounds, and worthie of the punischment before
" specified, It is declared, that all idle persones, ganging about in ony
" countrie of this realme, using subtil, craftie, and unlauchful playes, as
" juglarie, fast-and-lous, and sik uthers. The idle peopil calling them-
" selves Ægyptians, or any uther that feinzies them to have knawledge or
" charming, prophecie, or uthers abused sciences, quhairby they persuade
" the peopil that they can tell their weirdes, deathes, and fortunes, and
" sik uther phantastical imaginations; and all persones being haill and
" starke in bodie, and abill to worke, alledging them to have been herried
" or burnt in sum far pairt of the realme, or alledging them to be ba-
" nished for slauchter, and uthers wicked deides; and uthers nouther
" havand land nor maisters, nor using ony lauchful merchandice, craft, or
" occupation, quhairby they may win their livings, and can give na
" reckoning how they lauchfullie get their living; and all minstrelles,
" sangsters, and tale-tellers, not avowed in special service be sum of the
" lords of parliament or great burrowes, or be the head burrowes and
" cities, for their commoun minstrelles; all commoun labourers, being
" personnes abill in bodie, living idle, and fleeing labour; all counter-
" faicters of licences to beg, or using the same knowing them to be coun-
" terfaicted; all vagabound schollers of the Universities of Saint Andrewes,
" Glasgow, and Abirdene, not licensed be the rector and deane of facultie
" of the Universitie to ask almes; all schipmen and mariners, alledging
" themselves to be schipbroken, without they have sufficient testimonials,
" sall be taken, adjudged, esteemed, and punished, as strang beggarres and
" vagaboundes. And gif ony person or personnes, after the said first of
" Januar nixt to cum, gives money, harberie, or ludgeings, settis houses,
" or shawes ony uther reliefe to ony vagabound or strang beggar, marked
" or to be marked, wanting an licence of the provest and baillies within
" burgh, or of the judge within that parochin: The samin being dewlie
" provin at the court, they sall pay sik unlaw to the use of the pure of
" the parochin, as be the judge at the court sall be modified, swa the
" same exceed not five punds. And alswa, gif any person or persones,
" disturbis or lettis the execution of this act ony maner of wayes, or makis
" impediment against the judges and ordinarie officiars, or uthers per-
" sones, travelling for the dew execution heirof, they sall incur the same
" paine quhilk the vagabound suld have incurred in case he had bene
" convict. Providing alwayes that schipmen and souldiours, landing in
" this realme, have licence of the provest or baillies of the towne, or
" the judge of the parochin, quhair they war schippebroken, or first
" entered in the realme, sall and may passe, according to the effect of
" their licences, to the rowmes quhair they intend to remayne. And that
" the licence onelie serve in the jurisdiction of the giver; sa that gif

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" trict, with their tenants and other inhabitants thereof,
" are not liable for the support of the poor of the burgh,

" the person travelling hame have farther journey, he procure the like
" licences of the judge of the nixt parochin or towne throw quhilk he
" mon passe, and sa fra parochin to parochin, till he be at his resting
" place. And that there be certaine persones, ane or maa, nominate in
" everie burgh and parochin be the officers and judge thereof, for
" searching, receiving, and convoying of the vagaboundes, to the com-
" moun prison, irones, or stokkes, upon the commoun charges of the
" parochin. Quhilkes persones sa elected sall be halden to do their
" dewtie diligentlie, as the sadis judges will answere thereupon. And
" seeing charitie wald that the pure, and aged, and impotent persones
" suld be als necessarilie provided, as the vagaboundes and strang beggars
" repressed, and that the aged, impotent, and pure people suld have
" ludgeing and abiding places, throught the realme to settle themselve
" intil: It is, therefore, thocht expedient, statute, and ordained, that the
" Lorde Chancellar, according to the derection of sindrie lovabil Actes
" of Parliament heirtofoire maid, sall call for the erectiones of all hospi-
" talles to be produced befoir him, and inquire and considder the present
" estait theirof, reducing them, so far as is possible, to the first institution,
" as may best serve, for the helpe and reliefe of the saidis aged, impotent,
" and pure peopil; and als that the provests and baillies of ilk burgh
" and towne, and the justice constitute be the King's commission in
" every parochin to landwart, sall, betwixt and the said first day of
" Januar nixt to cum, take inquisition of all aged, pure, impotent, and
" decayed persones borne within that parochin or quhilkes was dwelling,
" and had their maist commoun resorte in the saide parochin the last
" seven zeires by past, quhilkes of necessitie mon live bee almes; and
" upon the said inquisition, sall make ane register buike, conteining their
" names and surnames, to remaine with the provest and baillies within
" the burgh, and with the justice in everie parochin to landwart; and
" to the effect, that the number of the pure people of everie parochin
" may be knawin, statutes and ordainis, that all pure peopil, within fourtie
" dayes after the proclamation of this present act at the Mercat Croce
" of Edinburgh, repayre to the parochin quhair they were borne, or had
" their maist commoun resorte or residence the last seven zeires by-
" past, and there settil themselves, under the paine to bee punished as
" vagaboundes, and contravenars of this present proclamation.

" And the said space of fourtie dayes being by-past, that then the
" Provest and Baillies within burrowes, and the judge constitute be the
" kingis commission in ilk parochin to land-wart, make a catalogue of the
" names of the saidis pure people, inquire the men and women quhair
" they wer borne, quhidder they ar maryed or un-maried, quhen and be
" quhom they war maried, and quhat bairnes they have, and quhair their
" bairnes wer baptized, and to quhat forme and trade of life they addresse
" them-selves and their saidis bairnes, gif they be diseased or haill and
" abill in bodie, and quhat they get commonly on the daye, be their

" but for that of the poor resident within the landward
" district allenarly; and the said provost, magistrates,

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" begging: And sik as necessairlie mon be susteined be almes, to see
" quhat they may be maid content of their awin consentis to accept daylie
" to live unbeggand, and to provide quhair their remaining sall be, be
" them-selves, or in hous with others, with advise of the parochiners,
" quhair the saidis pure peopil may be best ludged and abyde. And
" thereupon, according to the number, to consider quhat their neideful
" sustentation will extende to everie oulk, and then, be the gude dis-
" cretions of the saidis provests, baillies, and judges in the parochines to
" land-wart, and sik as they sall call to them to that effect, to taxe and
" stent the haill inhabitants within the parochin according to the esti-
" mation of their substance, without exception of persones, to sik oulklie
" charge and contribution, as sall be thocht expedient and sufficient, to
" susteine the saidis pure peopil; and the names of the inhabitants
" stented, togidder with their taxation, to bee likewise registrate: And
" that, at their discretion, they appoynt overseers and collectours in
" everie burgh, town, and paroche, for the haill zeir, for collecting and
" receiving the said oulklie portion, quhilkes sall receive the same, and
" deliver sa meikle thereof to the saidis pure peopil, and in sik manner
" as the saidis provests and baillies within burgh, and judges in the
" parochin to land-wart, respective sall ordaine and command; and that
" overseeres of the saidis pure peopil be appoynted be their discretions,
" to continue also for a zeir. And at the end of the zeir, that the taxation
" and stent roll be alwayes maid of new, for the alteration that may be
" throw death, or be incres or diminution of mennes gudes and substance.
" And that the provest and baillies in burrowes or tounes, and the saidis
" judges in the parochines to land-wart, sall give an testimonial to sik
" pure folk as they find not borne in their awin parochin, or making
" residence therein the last seven zeirs, sending or directing them to the
" nixt parochin, and sa fra parochin to parochin quhill they be at the
" place quhair they were borne, or had their maist commoun resort or
" residence during the last seven zeirs preceding; there to be put in
" certaine abiding places, and susteined upon the commoun almes, and
" oulklie contribution, as is befoir ordained, except leprous peopil and
" bedfast peopil, quilks may not be transported; providing that it be
" leiful to the pure peopil, sa directed, to their owin abiding places, with
" testimonialles to aske almes in their passage, sa as they passe the direct
" way, not resting twa nichtes together in any an place, without occasion
" of seekeness or storme impeede them.

" And if ony of the pure peopil refuse to passe and abide in the
" places appoynted, or after the appoyntment be found begging, then to
" be punished by scourging, imprisonment, and burning throw the eare,
" as vagabounds and strang beggars; and for the second fault to be
" punished as thieves, as is befoir appoynted. And gif the persones
" chosen collectours refuse the office, or having accepted the same beis
" found negligent therein, or refusis to make their compts, everie half

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" and council, as representing the community of the " said burgh of Dunbar, ought and should be decerned

---

" zeir, anis at the least, to the provests and baillies in the burrowes, and " to the saidis judges in land-wart, and to deliver the super-plus of that " quhilk restes in their handes, at the end of the zeir or half zeir, to sik " as sall be chosen collectours of the new: Then ilk-ane of the offenders " so offending sall in-cur the paine of twentie punds, to the use of the " pure of that parochin, and imprisonment of their persones during the " kingis will: For quhilkes paines, the saidis provests, baillies, and judges, " sall poynd and distrenzie: And gif ony persones, being abill to further " this charitable woorke, will obstinatlie refuse to contribute to the releife " of the pure, or discourage uthers from sa charitabil ane deede, the " obstinate or wilful person, being called befoir the saidis provests and " baillies within burgh, or judges in the parochins to land-wart, and " convict thereof be ane assise, on sufficient testimonie of twa honest and " famous witnesses his nichtbours, upon the supplication of the saidis " provests, baillies, and judges to the Kingis Majestie and Prive Councel, " the obstinate and wilful person or persones, sall be commanded to " waird in sik pairt, as his hienes, and his councel sall appoynt, and there " remaine quhill he be content with the ordour of his said paroch, and " performe the same in deede: And gif the aged and impotent persones, " not being sa diseased, lamed, or impotent, bot that they may worke in " sum maner of wark, sall be bee the overseeres in ony burgh or parochin " appoynted to wark, and zit reffusis the same: Then, first the refuser " to be scourged, and put in the stokkes; and for the second fault to be " punished as vagabounds, as said is. And gif any begers bairne, being " above the age of five zeirs, and within fourteene, male or female, sall " be liked of be ony subject of the realme of honest estait, the said " person sall have the bairne, be the ordoure and derection of the said " provest and baillies within burgh, or the judge of every parochin to " land-wart, gif he be a man-child, to the age of xxiv. zeires, and gif " sche be a woman-child to the age of xviij. zeires: And gif they depart, " or be taken or intised from their maister or maistresse service, the " maister or maistresse, to have the like action and remedie, as for their " hired servand or prentises, asweil against the bairne, as against the taker " and intiser thereof. And quhair collecting of money may not be had, " and that it is over great ane burding to the collectours to gadder " victualles, meat, and drink, or uther things for the releife of the pure " in some parochines, That the provest and baillies in burrowes, and " the saidis judges in the parochines to land-wart, be advise of certaine " of the maist honest parochiners, give licence under their handwrits to " sik and sa many of the saidis pure peopil, or sik uthers of them as " they sall think gude, to ask and gadder the charitabil almes of the " parochiners at their awin houses. Sa as alwayes, it bee speedily " appoynted and agried, how the pure of that parochin, sall be susteined " within the same, and not to be chargeable to uthers, nor troublesome " to strangers. And seeing the reason of this present act and ordour,

" and ordained by decree foresaid to sustain and " manage the poor of the said burgh according to law;

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" the commoun prisone, irrones, and stokkes of everie head burgh of the " schire, and uthers townes, ar like to be filled with ane great number " of prisoners, nor of befoir hes bene accustomat, in sa far as the saidis " vagaboundes, and uthers offenders, ar to be committed to the commoun " prison of the schire or towne quhair they were taken, the same prisones " being in sik townes quhair there is a great number of pure peopil, " mair nor they ar weill abill to susteine and relieve: And sa the pri- " soners ar like to perish in default of sustenance: Therefoir, the expenses " of the prisoners sall be payed be a pairt of the commoun contributions " and oulkly almes of the parochin quhair he or sche was apprehended, " allowand to ilk person ane punde of ait breade, and water to drink: " For payment quhairof, the presenter of him to prison sall give sovertie, " or make present payment: And that the schireffes, stewardes, and " baillies of regalities, and their baillies over all the realme, and their " deputes, see this present act put to dew execution in all poyntes, within " their jurisdictions respectivè, as they will answer to God and our " Soveraine Lord thereupon: And quhat ever doubt or ambiguitie sall " happen to arise upon this act, or ony pairt thereof, Our Soveraine " Lord, with advise of his saidis three estaites, commitis the interpretation, " explanation, suppliement, and full execution thereof, to his Majestie, " with advise of his Privie Councel."

The Proclamation, 11th August 1692, is in these terms:—

" *Proclamation of the Privy Council anent Beggars.*

" WILLIAM and MARY, &c. to , " Macers of our Privy Council, messengers-at-arms, our Sheriffs in that " part, conjunctly and severally, especially constitute, greeting: Whereas " several good laws have been made by our royal predecessors for main- " taining the poor, and relieving the lieges of the burden of vagabonds; " in prosecution whereof, we hereby require the heritors, ministers, and " elders of every parish, to meet on the second Tuesday of September " next at their parish kirk, and there to make lists of all the poor within " their parish, and to cast up the quota of what may entertain them " according to their respective needs; and to cast the said quota the one " half upon the heritors and the other half upon the householders of the " parish; and to collect the same in the beginning of every week, month, " or quarter, as they shall judge most fit; and to appoint two overseers " yearly to collect and distibute the said maintenance to the poor, accord- " ing to their several needs; and likewise to appoint an officer to serve " under the said overseers, for inbringing of the maintenance, and for " expelling stranger vagabonds from the parish, whose fee is to be stented " on the parish, as the rest of the maintenance for the poor is stented. " And such poor as are not provided of houses for themselves or by their friends, the heritors are to provide them with houses on the expence of " the parish, in manner foresaid.

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" or otherwise, in the event of the pursuers failing in " the above conclusion of their action, then in that case

---

" And if any parish shall fail in providing sufficiently for their own " poor, the parish so failing shall pay the sum of 200*l.* Scots, to be " uplifted, a third part to the pursuer, and two parts to be applied to the " maintenance of the poor of the parish, and that monthly, toties quoties, " as they shall fail in their duty. And if there be any mortifications " already, or if any hereafter shall accrue to any parish, the same shall be " applied, by the advice of the heritors and elders, to the use aforesaid, " but without diminution of the stock of the said mortifications. And " the heritors and elders are hereby appointed to have a second meeting " at the said parish kirks this year, on the second Tuesday of October " next, for a more exact settling of the matter; and yearly thereafter, " the heritors, ministers, and elders of every parish are to meet on the " first Tuesday of February, and the first Tuesday of August, yearly, to " consult and determine herein as shall be thought fit, for every ensuing " half-year, and to appoint overseers by the year or half-year, as they " shall conclude.

" And all the ministers are hereby required to give timeous information " to the Sheriff of the shire, if any parish shall fail in performance of this " Christian duty, in whole or in part; and the sheriff or sheriff depute " are hereby required to call the delinquent before them without any " delay, and, if guilty, to fine them in double the quota which the " minister shall attest to be wanting, and to cause poind for the same " immediately. And where churches are vacant, that two of the greatest " heritors residing within the parish shall be appointed by the first meet- " ing in September next, to inquire into the duty of parishioners and " overseers, and to inform the sheriff of their delinquence.

" And if any of the poor of the parish are able to work, the heritors " of the parish are hereby authorized and required to put them to work " according to their capacities, either within the parish or to any adjacent " manufactory, as they shall find expedient, furnishing them always with " meat and cloth.

" And if any young children be found begging under the age of " fifteen years, any person who shall take the said children and bring " them before the heritors, ministers, and elders, and cause registrate the " name and designation of the child in the session book, and shall there " enact himself to educate the said child either to trade or work, and take " an extract of the act from the clerk of the session, the said child shall " be obliged to serve the said person so educating him for meat and " cloaths, until he pass the thirtieth year of his age. And all manu- " factories are declared to have the same priviledge as to the education of " such young ones; and this to extend, not only to the children of " beggars, but also to poor children whose parents are dead, or with con- " sent of the parents, if they be alive: and if any young ones, about " fifteen years of age, shall voluntarily engage themselves upon the like " conditions, and if any of the young ones, so educated, shall disobey

" it ought and should be found and declared by decree " foresaid, that the power of taking up the lists of the " their masters when reasonably employed, their masters are hereby " warranted to correct them as they judge expedient, life and torture " excepted; and if any person harbour or reset any such servant belonging " to any other, they shall return them to their master on demand, under " the pain of one hundred merks, toties quoties, as oft as they shall be " required so to do: And if any master shall exact any inhuman or too " rigid service from any such servants, the sheriffs or justices of peace, " upon application of the servants, are to judge in the case, and if the " severity so deserve, the servant may be loosed from such a master, the " servant, or some for him, paying the master as much yearly as the fee " of servants of that quality would extend to each year, to the number " of years wanting to the thirtieth year of the servant's age. And the " heritors meeting on the days appointed, or major part of them, are " authorized and required to conclude and determine matters for that " half-year.

" And to the end that the poor may be returned to their own parishes, " and the nation freed of vagabonds, we strictly require and command " all beggars within the kingdom forthwith to repair to their several " parishes with all diligence, and to keep the ordinary highways to the " same; and so soon as they come to their parish, to present themselves " to the heritors and elders, that their names may be listed amongst the " poor of the parish, and they lodged and entertained accordingly; with " certifications to all who shall be found begging without the bounds of " their parish after the said second Tuesday of September next, they " shall be seized as vagabonds, imprisoned, and fed on bread and water " for a month, or till they be sent home to their parish, in manner after " mentioned; and if they be found vaguing a second time, they are to " be marked with an iron on the face; and all the lieges are hereby pro- " hibited to give any almes to such begging vagabounds, other than " bread and water allenarly, after the second Tuesday of September, " until they arrive at their own parishes.

" And to the end that our will hereanent may be more speedily made " practicable, we strictly command and charge all our lieges within this " our ancient kingdom, to apprehend such beggars as they shall find " vaguing without their own parish after the second Tuesday of Sep- " tember, and forthwith to carry them to the principal heritor of the " parish where they were apprehended, if it be in landward, and to one " of the baillies in towns, who shall examine the beggar in the shire and " parish where he was born, and shall direct him forthwith to the nearest " parish that lies in the road to the parish of his birth, and deliver him " to the nearest heritor that lies in that highway in the next parish, and " so forth from parish to parish in the same road, until he arrive at the " parish of his nativity, who shall then list him, and entertain him amongst " the poor; and the heritors to whom the vagabonds are delivered, are " hereby authorized and required to send two fencible men of their

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" aggregate poor, determining the assessments, and " managing the funds belongs to the meeting of heri-

" parish to convey every beggar to the heritor of the next parish, and to " send a note of the beggar's name and the parish where he was born, " which is to be delivered to the next heritor who receives him; and " every heritor who receives him is to return a note signed of his reit, " and so forth, from heritor to heritor, in every several parish; and if any " of the saids beggars offer to make their escape in their transportation, " the beggar so doing shall be scourged, and fed with bread and water " during the rest of his journey. And whoever gives almes to any " beggar not in their parish after the second Tuesday of September, and " shall not seize him, in order to his transportation, as said is, shall be " fined in 20*s*. Scots, toties quoties, to be uplifted by the overseers, " and applied to the use of the poor of the parish. And if the heritor " to whom the vagabound be brought fail in his duty of sending him, " he shall be fined in 20*l*. Scots, toties quoties, to be applied as said is. " If any fencible man sent to convey them refuse or fail in his duty, he is " to be fined in two merks Scots, toties quoties, to be applied as said is; " and the said fencible men are to be chosen by turns, as the said parishers.

" And whereas by Act 18, Session 3, Parliament 2, Charles II., " correction-houses are appointed to be erected in several burghs therein " mentioned, for employing the poor people in work, as they are capable, " which have hitherto too much neglected, (until the lesser burghs be able " to perform what is there required, lest so good a design should totally " fail,) we hereby strictly require our burghs of Edinburgh, Stirling, " Dundee, Aberdeen, Inverness, Glasgow, Jedburgh, Dumfries, and " Cupar in Fife, or such of them as have not already established correction- " houses, in the manner and to the ends prescribed by the said act, to " erect and establish such houses, and to receive such poor for work " therein as shall be sent to them from any parish, in manner and on the " conditions prescribed by that act and this, but prejudice of erecting of " correction-houses in other burghs therein mentioned with all con- " veniency. Our will is herefore; and we charge you strictly, and " command that incontinent, these our letters seen, ye pass to the " Market Cross of Edinburgh, and to the Market Crosses of the whole " head burghs of the several shires of this kingdom, and there, in our " name and authority, by open proclamation, make publication of the " premises, that none pretend ignorance: And ordains these presents to " be printed."

The proclamation of 29th August 1693 is in these terms:—

" *A Proclamation of the Privy Council anent Beggars.*

" WILLIAM and MARY, &c. Forasmuch as the intent and design of our " Proclamation, of date 11th August 1692, requiring all beggars within " this kingdom forthwith to repair to their several parishes with all dili- " gence, hath been much disappointed and frustrated by the uncertainty " of the parishes where the said respective beggars have been born, and

" tors, provost, minister, and elders; and that the assess-
" ments to be imposed for the support of the aggregate
" for want of suitable provision made by the heritors and magistrates of
" the respective parishes where the said beggars have been born, or had
" their last seven years residence; for remeid whereof, we, with the advice
" of the lords of our Privy Council, strictly require and command all the
" beggars within this kingdom immediately to repair to the several
" parishes where they were born; or where the parish or place of
" their birth is not certain or distinctly known, that they repair to the
" parishes where they last resided for the space of seven years together,
" and to keep the ordinary highways to the several parishes of their birth,
" or last seven years residence; and so soon as they come to the said re-
" spective parishes, to present themselves to the heritors and elders; and
" where parishes are vacant, and have no elders, to the heritors alone,
" whom we, with advice foresaid, require and command to make the
" provisions necessary for the said beggars, and to list their names among
" the poor of the parish, that they may be lodged and entertained accord-
" ingly, with certification to all who shall be found begging after the
" second Tuesday of September next, they shall be seized as vagabounds,
" imprisoned, and fed with bread and water for a month, or till they be
" sent home to the respective parish of their birth, or last seven years
" residence, in manner mentioned in our said former proclamation: And
" we, with advice forsaid, require and command the magistrates of our
" burghs royal to meet and stent themselves conform to such order and
" custom, used and wonted, in laying on stents, annuities, or other public
" burdens, in the respective burgh, as may be most effectual to reach all
" the inhabitants: And the heritors of the several vacant parishes likewise
" to meet and stent themselves, for the maintenance of their said respective
" poor; and to appoint the ingathering, uplifting, and applying of the
" same for the uses foresaid, sicklike, and in the same manner as the
" heritors and elders are appointed by our former proclamation: And all
" the ministers and heritors are hereby required to give timeous intima-
" tion to the sheriff of the shire, if any parish or person shall fail in per-
" formance of this Christian duty, in hail or in pairt, and the sheriff or
" sheriff depute are hereby required to call the delinquents before them
" without any delay; and if guilty, to fine them in double of the quota
" which the ministers or heritors shall attest to be wanting, and to cause
" poind for the same immediately. And further, for preventing of any
" question that may arise betwixt the heritors and kirk session in the
" several parishes of this kingdom, about the quota of the collections at
" at the church doors, and otherwise to be made by the said session, to be
" paid into the heritors for the end foresaid, we do hereby, with advice
" foresaid, determine the same to be the half of the said collections, and
" ordains the said kirk session to pay in the same from time to time to
" the said heritors, or any to be by them appointed accordingly; and we
" ordain our said former proclamation to stand in full force, &c. and to
" be put in execution, in so far as the same is not hereby altered."

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" poor shall be laid on the whole inhabitants of the " parish equally, whether in burgh or to landward, ' ac-

---

The proclamation of 3d March 1698 is in these terms :—

" *Proclamation anent the Poor.*

" WILLIAM, &c. That where the many good and laudable laws made " for maintaining the poor, and suppressing of beggars, vagabounds, and " idle persons, have not hitherto taken effect, partly because there were " no houses provided for them to reside in, and partly because the persons " to whom the execution of these laws was committed have been negligent " of their duty; for remeid whereof, we, with the advice of the lords of " our Privy Council, ordain the former proclamations formerly emitted, " of the date the 11th August 1692, the 29th August 1693, and last of " July 1694, ratified and approven by act 29, session 6, of our current " Parliament, to be reprinted, and put to full and vigorous execution in " all points: And in order to make the said proclamations the more " effectual, we, with the advice foresaid, revive act 18, sess. 3. Parl. 11. " Charles II., in so far as concerns the providing correction-houses for " the receiving and entertaining of beggars, vagabounds, and idle per- " sons, within the burghs therein mentioned,—viz. one correction-house " at the burgh of Edinburgh, for those of the town and shire of Edin- " burgh, (*a number of others are then mentioned*) each of which houses " shall have a large closs, sufficiently enclosed for keeping in the said " poor people, that they be not necessitate to be always within doors, to " the hurt or hazard of their health: And ordains the said magistrates " of the said burghs to provide the correction-houses, and appoint mas- " ters and overseers for the same, by advice of the presbytery, or such as " they shall appoint, who may set the poor persons to work, and that " betwixt and the 1st day of October next, under the paid of 500 merks " quarterly, until correction-houses be provided for conform to the said " act.

" But in place of the commissioners of excise, mentioned in the same " act, we, with advice foresaid, require and command the Sheriffs of the " shires and their Deputes to put the said act in execution within their " respective shires, as to every thing that by the said act was committed " to the Commissioners of Excise; and ordains the said Sheriffs and their " Deputes to give account of their diligence herein, betwixt and the 1st " of December, under the pain, every one of them, of 500 merks, who " shall failzie and neglect to do the samen, to be employed for the use of " the poor of the shire, and to be liable in 100*l.* weekly, after the said day " before they return an account of their diligence to our Privy Council, " to be employed for the use foresaid.

" And ordains the several parishes within every shire and district, to " send their poor to the magistrates of the towns where the correction- " houses are to be provided, against the 1st day of November next, that " they may be put into the said correction-houses: And in case the said " correction-houses be not ready to serve the poor against the said day, " ordains the poor to be sent to be maintained by the magistrates of the

" ' cording to the estimation of their substance, without " ' exception of persons;' or our said Lords ought and " should find and declare in the premises as to them " shall seem just." They further concluded for repetition of such sum as should be ascertained " to be the " excess of assessments contributed by the pursuers " during the course of the process beyond the propor- " tion for which they are justly liable under the fore- " going declarator, with the legal interest due thereon " from the periods of payment."

The discussion was confined to the leading conclusion, the alternative one being postponed till that primary one should be disposed of.

" burgh who were to provide the said correction-houses, and that aye " and while the correction-houses be provided; and that by and attour " the foresaid penalties imposed by the said Act of Parliament, in case " of failzieing of providing the said correction-houses against the said " day: And in the mean time, before the said correction-houses be pro- " vided, ordains the said acts and proclamations of our Privy Council to " be put to full execution.

" And because there may some questions arise in putting the said acts " in execution for which there can be no general rule set down, in re- " spect of the different conditions and circumstances of several places of " the country, therefore, that the said act may be more effectually, and " with greater expedition, put in execution, we, with advice foresaid, give " power and warrant to the ministers and elders of each parish, with " advice of the heritors, or so many of them as shall meet and concur " with the ministers and elders, upon intimation to be made by the " minister from the pulpit upon the Sabbath-day before, to decide and " determine all questions that may arise in the respective parishes in " relation to the ordering and disposing of the poor, in so far as it is not " determined by the laws and Acts of Parliament, and the former Acts of " our Privy Council, which are ratified by the Act of Parliament fore- " said. Our will is herefore, and we charge you strictly, and command " that incontinent, these our letters seen, ye pass to the Market Cross of " Edinburgh, and remanent Market Crosses of the head burghs of the " several shires and stewartries within this kingdom, and thereat, in " our name and authority, by open proclamation, make intimation here- " of, that none may pretend ignorance: And ordain these presents to " be printed."

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

The magistrates in defence pleaded—1. That "it was "contrary both to the letter and spirit of the poor laws, "to make any separation of the parochial poor into two "classes, or to subdivide the parochial fund for the support of the poor into two distinct funds,—the one "liable for the support of the burgh poor, and the "other for support of the poor who live to landward." And—2. Referring to the practice which had existed, they contended that "there was no sufficient ground "either in law or otherwise for overturning or in any-"wise altering the existing rule and practice of contri-"bution and assessment in Dunbar parish; and if the "heritors were entitled to interfere with the existing "practice, and to insist on a new arrangement of "interests, as between them and the magistrates of the "burgh, the defenders were entitled to insist on having "all things restored to their original position; and more "especially they were entitled to a reconveyance of the "burgh mort-cloths, and to have the proceeds of Bin-"ning's mortification duly applied to the purposes for "which it was given." On the other hand the heritors pleaded—1. That "by the statutes and proclamations "relative to the poor, the management and maintenance "of the poor of royal burghs was totally distinct and sepa-"rate from that of the landward portion of the parish in "which the burgh is situated; that the magistrates had "no powers for carrying the poor laws into execution "in the landward district, nor the heritors and the kirk "session in the burgh; and according to the true con-"struction of the statutes and proclamations, the poor "of the burgh and of the landward district must be "supported and managed separately and distinctly by "the burgh and the landward district respectively."

And—2. That "no length of usage could prevent the "heritors and kirk session of a parish, or the magis- "trates of a burgh, from reverting even from one legal "mode of assessing for and maintaining the poor to "another, and still less could it prevent them from "turning from an illegal mode to one sanctioned by "law."

In the meanwhile a similar dispute had arisen between the heritors of the parish of Lanark and the magistrates of the burgh of Lanark; and in order to have the question tried, the magistrates of Lanark caused a burgh pauper to present an application to themselves, and also another to the kirk session for aliment. The magistrates granted the pauper an aliment to the extent of one third of what they deemed sufficient maintenance; this third being the proportion which they thought it reasonable the burgh should contribute. The kirk session, on the other hand, refused the application to them altogether, on the ground that the pauper did not belong to the landward district. These judgments were brought under review of the Court of Session, in the name of the pauper, by separate advocations. These advocations were thereupon conjoined; and Lord Medwyn, Ordinary, reported them to the Court on Cases, who ordered them to be laid before the other judges for their opinion.

With the view of bringing the present question under the consideration of the Court at the same time, Lord Mackenzie, before whom it depended, also reported it upon Cases; but before they were lodged, the judges had communicated their opinions in the Lanark cause. The Court, however, before pronouncing judgment in the present case, directed the Cases to be laid before their Lordships for their opinions.

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

In the Lanark cause LORDS PRESIDENT, BALGRAY, GILLIES, COREHOUSE, FULLERTON, and MONCREIFF delivered this opinion:—" On considering all the acts of " parliament and proclamations of the privy council on " the subject of assessments and maintenance of the poor, " we are of opinion that there can be but one list or roll " of poor in any parish, whether entirely burgal, entirely " landward, or partly burgal and partly landward; and " that there cannot be two lists or rolls, one of burgh " poor and the other of country poor, but that they are " all indiscriminately the poor of the parish, and en- " titled to relief out of the whole funds of the parish.

" Specific rules are laid down for assessments in the " cases of parishes wholly burgal or wholly landward; " but we do not find any specific rule for levying " assessments for the poor in mixed parishes, such as " Lanark; and by the returns laid before us, which " were taken in the case of Parker v. Buchanan, we " observe that the practice is different in different " parishes of a mixed character; and therefore, as no " rule for such parishes is laid down by parliament, we " are of opinion that each mixed parish ought to con- " tinue to follow the rule of assessment used and wont.

" If any such practice has existed in Lanark, we " think it ought to be continued; if there be none, " which seems to be the fact, we think that, having " fixed that there can be but one list or roll of poor, " that the heritors, kirk session, and magistrates ought " to be left, in the first instance, to try to arrange what " in the circumstances of their parish will be the most " fair and equitable mode of laying on the assessment.

" We observe, that in the case of Scott v. Fraser, " 19th January and 5th March 1773, (observed by

" Lord Hailes, p. 523,) the Court authorized the assess-
" ment to be levied according to the real rent.
" This was in a case very similar, viz., the West Kirk
" parish of Edinburgh, in which, though there is not a
" royal burgh, there are burghs of barony and regality;
" and we rather think, that this is the only fair and
" equitable rule in all cases of parishes partly burgal
" and partly landward, and is analogous to the rule now
" fixed by the House of Lords for building kirks, by
" the cases of Peterhead and Crieff."

In the present case their Lordships delivered this opinion:—" Agreeably to the opinion we have given in
" the case of Lanark, that, as there is no rule laid down
" by any of the acts for mixed parishes, partly landward
" and partly burgal, each parish of that description
" ought to continue to follow the rule of assessment used
" and wont; and therefore, as there has been a rule
" acted upon in the parish of Dunbar for a great length
" of time, we are of opinion that this rule of assessments
" ought to be continued."

In the Lanark cause LORD CRAIGIE gave this opinion:—" The general points of law which are the
" subject of the present consultation are of great impor-
" tance, and attended with considerable difficulty; but
" upon the grounds stated in the opinions already given,
" it does not appear that in the actions now depending
" any conclusive or satisfactory determination can at this
" time be given with regard to them.

" In the parish of Lanark no assessments for the
" support of the poor were imposed until the year 1814,
" the whole expence being defrayed out of certain funds,
" real and personal, under the management of the kirk

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" session. At that time, although contrary to the will " of the donors, where the funds had been derived from " individual endowments, and in all cases in opposition " to the proclamation of the Scots privy council, " (proclamation, 11th August 1692,) the whole had " been exhausted.

" From 1814 until the commencement of the present " litigation, it is on all sides agreed that assessments " were imposed and levied separately in the burgh and " in the landward district of the parish; the inhabitants " of the burgh, however, as distinguished from the " proprietors and tenants of land or houses, being " exempted.

" In 1828, in the name of Jean Ferrier, one of the " paupers residing in the burgh, but at the expence of " the magistrates, proceedings were held before the " magistrates and in the kirk session of the parish, in " which the magistrates declared their willingness to " defray one third of the expence necessary for the " pursuer's maintenance, while the kirk session refused " the application in toto, on the ground of the pauper's " residence being within the burgh.

" Against these proceedings there are two advoca- " tions, both in the name of the pauper, one directed " against the kirk session and heritors in the landward " district, and the other against the magistrates of the " burgh. In the answers given in for the magistrates, " instead of opposing the prayer of the application, " they, as might be expected, agree to every thing which " had been proposed in the name of the pauper, viz., " that the whole poor in the parish ought to be sup- " ported in the same manner. Whether the inhabitants

" in the burgh, quà such, were again to be exempted, " is not expressly said, but they have not been called as " parties.

" In these circumstances, I consider the proceedings " as irregular in every point of view. Under the autho- " rity of the usage, ever since an assessment was laid on, " the paupers within the burgh have been maintained " out of the funds of the burgh; and unless at the sug- " gestion of the magistrates, the pursuer had no occasion " to interpose more than the other paupers, who, as " well as the pursuer herself, it must be presumed, are " still supported as formerly; and the same uniform " course ought to be followed, until a declaratory action " is brought and decided upon. This was the principle " of the decision of the Court, after a consultation, in " the late case of Colville and others against Graham " and others, where some doubt might have been enter- " tained as to the application of the general rule; and " I well remember a similar decision many years ago, " in a question between the magistrates of Perth and " some landward heritors, in one of the four parishes " into which the city had been divided, where the Court " were unanimous; and indeed, unless the same deter- " mination were to be given in all similar cases, the " whole paupers in the parish, where the dispute arises, " might remain without support until a final decision " was given.

" It is therefore humbly thought, that the bill of " advocation, so far as relates to the landward heritors, " should be dismissed, or superseded, until the necessary " declaratory actions are brought; while in the separate " bill of advocation against the magistrates there should " be a remit, with instructions to the magistrates in the

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" meanwhile to advance to the pursuer, as well as to " the other individuals similarly situated, the necessary " and ordinary supplies.

" According to this view, there would be no occasion " at the present time to make any further observations; " but as the interlocutor in the other division of the " Court calls for an opinion upon the general questions " discussed in the pleadings, I shall proceed to state, as " briefly as I can, what has occurred to me on the sub- " ject. My opinion is the same which has been already " given in this case by the kirk session of the parish.

" The general scope and object of the law of Scot- " land in reference to the support of the poor, depend- " ing upon the particular enactments referred to by the " parties, joined to various proclamations of the secret " or privy council of Scotland as authorized or ratified " in parliament, appear to be, 1st, To distinguish be- " tween those who by infirmity or disease are unable " to work for their livelihood, and those who are not " willing to work though able; with regard to the " latter strong and coercive measures are to be fol- " lowed; but these do not fall under the present discus- " sion. 2d, With regard to the former class or des- " cription of persons, to impose the burden of supporting " them (but, as it appears, most justly and expediently, " only so far as necessary to prevent the individuals " from perishing for want of food or other necessaries,) " on the different parishes where the paupers were born, " or where they had resided during a certain number " of years preceding poverty; and 3d, To make a dis- " tinction in the mode of raising the necessary supplies " between parishes consisting entirely either of a land- " ward district or of a royal burgh. Of other burghs,

" whether of regality or barony, no notice is taken, " because in this, as well as in other respects, (1 Ersk. 4, " 30, 15th November 1759, Park,) these establishments " were not in general considered as separated from the " other parts of the regality or barony. In the case of " Greenock, 31st May 1822, not reported, the point " was held to be fixed.—Act 1597, c. 279; proclama- " tion, 29th August 1693.

" In royal burghs the care of the poor was left to " the magistrates, the sums necessary being to be raised " along with the stent or assessment at the time imposed " for the other exigencies of the community, or, in other " words, according to the estimation of their substance; " the whole inhabitants being thus made liable where " they had the means of paying.

" In landward parishes, again, the necessary powers " were given to the kirk session of the parish joined " with the heritors, the requisite sums being in the first " instance leviable from the proprietors and house- " holders, they having a claim of relief for one half of " the assessment against their tenants, so far as the " property was so occupied. Nothing is said, as in " royal burghs, with regard to the rule or standard by " which each party was to be assessed; and by a clause, " to which reference has been made in the proclamation, " 9th August 1693, the ministers and elders in land- " ward parishes may determine all questions in their " respective parishes ' in relation to the ordering and " ' disposal of the poor, in so far as not determined by " ' the former laws and acts of the privy council;' and " so, as was decided in the case of St. Cuthbert's, they " may fix either upon the real or valued rent of the

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" lands, or according to any other rule thought more " consistent with the state of the parish.

" Upon perusing the whole of these regulations, the " distinction between royal burghs and landward parishes " appears to have been attended to with the utmost " care; the produce of lands and houses in the one case " being held as the only source of assessment, while in " royal burghs, as enjoying peculiar privileges with " regard to trade and commerce, and where opulent " individuals are to be found, though not proprietors or " leaseholders, the general wealth of the inhabitants is " pointed out as forming one important means of con- " tribution, and, in the case of many of the persons " liable, the only proper standard of it.

" But throughout the whole regulations no provision " can be discovered for the case of a parish composed " partly of the territory of a royal burgh and partly of " a landward district; and holding this as casus impro- " visus, it might be a fit subject of a new enactment; " on the other hand, if it be reached by the statutes and " regulations already made, when properly explained, " the question would truly be, in what manner, con- " sistent with justice, and for the benefit of all parties, " an assessment could be made, due regard being had " to the statutory regulations in those cases where the " intention of the legislature has been distinctly ex- " pressed.

" That the rule has not been fixed by determinations " of the courts of law is admitted on all sides, and that " it cannot be ascertained by universal or even general " usage is equally clear. The reports from the town " clerks prove, that in all the parishes which are partly

" burgal and partly landward, consisting of seventy-six, " no assessment has yet been raised, unless in fourteen " cases; and in these the practice is not uniform almost " in any respect. In some the assessment is levied " separately in the two divisions of the parish, as in the " case of Lanark; in others, although the assessment is " imposed on the whole parish without distinction, it is " impossible to draw any certain inference from it with- " out more particular information as to the state of the " several parishes in respect of population, trade, and " other circumstances. In some cases, for various causes, " it may have been of little or no importance what " should be the rule of assessment; and where the pro- " prietors in the landward district are liberal and " wealthy, and in many cases from an anxious desire of " avoiding a poor's rate as it is called, which is the " scourge and disgrace of a neighbouring country, the " contribution, as it may be called, falling on each indi- " vidual, bears little or no proportion to that pointed out " by the law; and although the assessment, being made " for twelve months, and sometimes for a shorter term, " it may be varied according to the state of the parish, " this ought in no case to be done in such a way as to " affect the immediate relief of the poor, who are enti- " tled to their maintenance according to the usage, until " a contrary rule is sanctioned by general agreement, or " in the courts of law; and I do not see any difficulty " in making such an arrangement, wherever the parties " think that some alteration ought to be made; and " indeed in several instances the course I have now to " mention appears to have been followed.

" There being but one kirk session in every parish, " the members of it may require the attendance of the

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" heritors in the landward district, and of the magis-
" trates of the royal burgh, as representing the com-
" munity, while no person who has a peculiar or adverse
" interest should be excluded from attending. The
" number of the poor, and what is necessary for their
" support, will be the first objects of attention, and for
" these purposes a joint and general meeting in all cases
" seems indispensable; and thus the comparative popu-
" lation in the two districts, and what is required for an
" adequate support of the poor, will be properly ascer-
" tained from the state of the parish. There may be
" little difference in the result, whether the assessment
" is to be general or separate, or by mutual concessions;
" some equitable medium may be adopted; but to fix
" one and the same standard, in a case like this, through-
" out the parish, in the manner here proposed, and still
" more, without any proof, to limit the proportion to be
" paid either in the landward or the burgh to one third,
" or any other proportion, more or less, seems quite
" incorrect and contrary to law. On the one hand, the
" assessment in part would thus be imposed on the
" heritors and householders of the landward district,
" without affording to them their relief against their
" tenants, if they have any; è contra, the proprietor or
" householder within burgh would have relief against
" his tenants, for which there is no authority in any of
" the enactments; and in fine, if the rule hitherto
" adopted by the magistrates of Lanark were to be
" followed, the inhabitants, as distinguished from
" proprietors and householders, would be altoge-
" ther exempted, although in many cases much more
" able to bear the burden than any of their fellow
" citizens.

" As to the application of the sums contributed at the " church doors and otherwise, the presumption is that " they were intended for the general relief of the poor " in the parish; and therefore, if it had not been other- " wise particularly ordered, as long as they exist they " would be distributed according to the wants of the " poor in both divisions of the parish; but if there be " a continued and permanent poor's rate established, " by which the necessary supplies are provided for, " few or no contributions can be expected, and those " who are truly charitable will, as is often done, and " with great effect, bestow their aid upon persons " particularly known to them by their merits or mis- " fortunes.

" Something has been said of the hardship which " would be imposed upon the inhabitants of the burgh, " according to the rule of assessment which has been " suggested, those in necessitous circumstances being to " be found in greater numbers, and to be supported at " a greater expence in the burgh than in the landward " district. But, 1. No pauper is entitled to aid within " the burgh if he has not resided in it for three years " preceding poverty. 2. The same principle would " have been applied to a parish wholly burgal, but " surrounded as it must be by rural parishes, in many " cases, of greater population and wealth; and 3. It " has been shown, that an amalgamation of the two " districts, such as has been suggested, could not in any " case be listened to, without an open and avowed " breach of the law as it now stands."

In the present case his Lordship gave this opinion :— " We have here a summons containing declaratory con- " clusions, and have an opportunity, without disturbing

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" the interim possession, to decide in what manner in " the parish of Dunbar the assessment for the support " of the poor is to be imposed and levied.

" The state of the parish has not been very clearly " given. That there is a considerable part of it with- " out the territory of the burgh is not disputed; and, " for time past all memory, those residing within the " landward district have been considered as having a " separate and independent interest with regard to such " assessments. The total population at one time ex- " ceeded 5,000; at this time it is rather less, but at all " times the greater number have resided within the " burgh, although it is said that many have gone thither " after having become poor in the landward district. " The annual assessment varies from 400*l.* to 500*l.*; " and besides there is a sum of 15,000 merks Scots, " which had been bequeathed for the aid of the poor " within burgh; also the produce of the mortcloths used " in the parish, and the contributions at the church " doors, which are divided equally between the poor in " the burgh and those in the landward district. It is " said that paupers residing in the burgh are per- " mitted to beg within the territory; but that appears " to be an improper practice, and ought to be dis- " continued.

" It is not disputed that, in 1724, an agreement was " made between the magistrates of the burgh and the " proprietors in the rural part of the parish, by which " one sixth only of the necessary assessment was to be " defrayed by the former, and the remaining five sixth " parts by the latter. The writing to which both par- " ties refer bears, that the assessment was to be for one " year only, and that it should not be binding for more

10th Apr. 1835.

" than the year, nor held as a precedent in any manner " of way for the future; but so far as can be discovered, " the same rate of assessment has been followed till " lately.

" In this manner two points have been raised:— " 1. Whether the rule or standard of assessment thus " consented to was agreeable to law, and such as might " be introduced at this time in similar circumstances? " and—2dly. Whether, in consequence of the practice " and usage as above described, the rule has become ab- " solute and unalterable?

" And, 1st. If it were to be held that the case of " parishes partly burgal and partly landward had not " been provided for by any of the Scots enactments or " proclamations by the privy council in Scotland, it does " not readily occur how such an agreement could be " obligatory or effectual, unless perhaps upon those who " had voluntarily acceded to it. The case would be the " same as if an agreement of the same import had been " entered into between two separate parishes; nor " would this be the subject of much regret, the magis- " trates of royal burghs having all the necessary powers " with regard to the poor within the territory, while the " kirk session of the parish, together with the proprietors " in the landward district, may, unless within the terri- " tory of the burgh, exercise the same authority. In " this way too the complaint which has been made of " persons becoming poor in the landward district and " then retiring to the burgh for support would be re- " moved; but indeed, holding the competency of one " assessment for the two districts, although separately " levied and distributed, there seems to be no doubt " that the burden of supporting those individuals,

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" who, after having acquired a settlement in the land-
" ward district, have become poor, and choose to re-
" move to the burgh, would remain as before, and
" without regard to their residing in the burgh or
" elsewhere.

" But 2dly. And supposing that, by a large and liberal
" construction of the different regulations with regard to
" the poor, the magistrates of the burgh and the kirk
" session and heritors of the landward district could
" together and at the same time ascertain the number
" of the poor in the parish requiring aid, and levy the
" necessary assessments in the two districts, in the man-
" ner suggested, it humbly appears that the poor in the
" two districts are not to be supported from the same
" funds, but separately, and from the funds proper to
" each. While the assessment in the landward district
" may be raised either according to the real or the
" valued rent, or by any other rule for the general ad-
" vantage, what is required for the poor within burgh
" is to be levied from the inhabitants generally, so far
" as they are able to pay, and in proportion to their
" ability; and in no possible case can an assessment be
" enforced, which has no reference to any of these
" standards, but rests upon the caprice and pleasure of
" a joint meeting of the kirk session, the heritors of the
" landward district, together with the magistrates of the
" burgh. It is possible that a payment of one sixth
" part of the assessment out of one of the divisions, and
" of the remaining five sixths out of the other division,
" might be the same which would be exigible if the legal
" rules of assessment were adhered to in due form; but
" to adopt such a proportion, or any other, without re-
" ference to any of the legal standards, and still more,

" as in the present case, in direct and professed opposi-
" tion to them, appears, with great deference, altogether
" inadmissible.

" Here our attention is to be called, not so much
" to the mode or form in which the assessment is
" to be carried on, as to the rate of assessment for
" which each individual or the individuals of a cer-
" tain portion of the parish are to be made liable.
" According to the pursuers' statement, the poor in
" the burgh are to those in the landward district as
" eighty to forty or thereabouts; and on all hands it is
" agreed, that the poor in the burgh have always ex-
" ceeded those in the country part of the parish. In
" these circumstances, unless in consequence of an
" express consent given to a particular assessment,
" it seems impossible to discover in what manner, in
" such a case as this, instead of paying less than the
" inhabitants of the burgh, as they ought to do, those
" in the landward district should be rated for five
" sixths of the whole assessment; and yet to this result
" the plea on the part of the defenders does necessarily
" come.

" Still, however, the question remains, how far, in
" opposition to the practice or usage subsequent to
" 1724, the pursuers can be permitted at this time to
" propose a different assessment? And on this point I
" can see no doubt or difficulty.

" In such a case, the defenders cannot raise a plea of
" prescriptive right; it is not in the power of an indi-
" vidual, or of a corporation, to raise such a plea in op-
" position to the public law, unless where the practice
" is such as to do away the law itself. It has been
" shown that in about seventy parishes, consisting of a

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" royal burgh with a landward district, only fourteen " have been subjected to an assessment for the poor; " while with regard to some of these a distinct assess- " ment has been imposed in the two divisions of the " parish; and from the nature of the assessment, as " authorized by law, no certain or invariable rule can " be formed.

" The assessments for the poor do not form a real " burden on the lands in the parish; they do not " even, like tithes, affect the rents or produce of the " lands for the assessment that is then exigible. The " obligation imposed upon the individuals in the parish " is altogether of a personal nature, and depending upon " his condition and circumstances at the time. In addi- " tion to all this, the assessment can only be raised for " one year at a time, or for a shorter period; and " although, by acquiescence merely, and without any " formal renewal, the same mode of assessment may be " followed for a very long time, this cannot prevent the " parties interested from making any alteration agree- " able to the public law, and just in itself. This was in " terminis decided in the case of the West Church, and " cannot well be disputed.

" I lay no stress on the declaration inserted in the " agreement in 1724; it was quite unnecessary, " although it proves beyond all doubt what the " opinion of the parties was at the time, and it " must be held as forming a part of every after " assessment.

" Upon the whole, I am humbly of opinion, that the " first conclusion in the present action is well founded; " and that the pursuers, as heritors of the landward dis- " trict of the parish, with their tenants, are not liable

" for the support of the poor of the burgh, but for that " only of the poor having acquired a settlement within " the landward district.

" There is a separate or alternative conclusion in the " summons, that if there were to be no separate assess- " ment in the two divisions of the parish, the heritors, " provost, minister, and elders, should be authorized to " make an assessment for the whole aggregate poor, to " be laid upon the whole inhabitants of the parish " equally, whether in burgh or landward, and according " to the estimation of their substance, without exception " of persons; but it does not occur to me that such a " determination can be required, and it would not be " agreeable to law."

In the Lanark cause, LORDS MACKENZIE and MEDWYN delivered this opinion:—" While the laws " enacted in this country for the provision of the poor " distinguish the two cases of the poor within burgh and " the poor in country, or, as they are termed, landward " parishes, there seems to be no enactment applicable to " the case of a parish consisting of a royal burgh with " a landward district, not burgage, included within it. " Throughout the whole series of enactments on this sub- " ject, the poor, as they belong to a royal burgh, or a " parish to landward, are contradistinguished, and both " the persons who are to superintend the poor and ad- " minister the fund for their support, as well as the " mode and rule of assessment for raising the fund, are " different in relation to the two sets of poor. The " foundation of the whole system is the act 1579, " c. 74. This act directs the provosts and bailies within " burghs, and a judge constitute by the king's commis- " sion in each parish to landward, to make a catalogue

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" of the names of the poor people, and then, by the " good discretion of the saids provosts, bailies, and judges " in the parishes to landward, 'to tax and stent the " 'hail inhabitants within the parish, according to the " 'estimation of their substance, without exception of " 'persons;' they are also to appoint overseers and " collectors in every burgh, town, and parish, which " shall receive the weekly portion, and 'deliver as " 'meikle thereof to the saids puir people, and in sik " 'manner as the saids provosts, and bailies, and judges " 'in the parochin to landwart respectivè sall ordine and " 'command.'

" Thus a distinct line of separation is drawn between " royal burghs and parishes to landward, in regard to " the administration of their respective poor, which is " kept up throughout the whole series of statutes, whether " as to the poor or vagabonds; and it appears never to " be contemplated, that the magistrates within burgh, " or the managers to landward, are to be conjoined in " the management of the poor, or in assessing or dis- " tributing the funds.

" The only alterations made in this original plan of " our poor laws are, that by 1597, c. 272, the care of " the poor is transferred to each kirk session, 'in place " 'of several commissions in landward to be granted by " 'the king,' with whom, by the act 1672, c. 18, the " heritors of the parish are conjoined; and that by the " proclamation 11th August 1692 the heritors and " kirk session of landward parishes are to assess them- " selves for support of the poor, and to lay the burden, " the one half upon the heritors, and the other half upon " the householders of the parish, adopting very nearly " the rule for such parishes imposed by 1663, c. 16,

" for the expence of employing vagabonds and idle " persons.

" As this proclamation did not apply to royal burghs, " nor to vacant parishes, where of course there was no " kirk session, this omission was supplied by proclama- " tion 29th August 1693, which requires ' the magis- " ' trates of our burghs royal to meet and stent them- " ' selves,' &c.; ' and the heritors of the several vacant " ' parishes to meet and stent themselves for the main- " ' tenance of their respective poor.'

" If the rule of assessment had continued as prescribed " by the act 1579, so that each person paid according " to the estimation of his substance, one difficulty would " have been removed, when it is proposed, in a burgh " with a landward district forming one parish, to make " one roll of poor and one assessment; and there would " remain only the objection to the different jurisdictions " or managers, under whom the poor, according as they " are within burgh or not, are respectively placed. But " the assessment in a country parish is levied by the " appointment of the heritors and kirk session, half " payable by heritors, conform to the old extent or " valuation, ' or otherwise, as the major part of the " ' heritors shall agree,' the other half to be paid by the " tenants and possessors according to their means and " substance; while the magistrates within burgh stent " the inhabitants in terms of the proclamation 29th " August 1693, ' conform to the order and custom used " ' and wonted in laying on stents, annuities, and other " ' public burdens in the respective burghs, as may be " ' most effectual to reach all the inhabitants.' These " proclamations are ratified by act 1695, c. 43.

" Thus the magistrates of burghs are to provide for

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" the poor under their jurisdiction, and to assess the " inhabitants for their support, according to certain " rules from which there is no warrant to deviate; while " the heritors and kirk session of a parish to landward " are to provide for the poor in such parishes by an as- " sessment regulated on totally different principles. We " do not find any warrant for authorizing one roll of " poor in a parish, partly burgal and partly landward, so " that either the magistrates shall be under the necessity " of providing for the poor beyond the burgh, or the " heritors and kirk session for those within burgh; " neither do we see that it is ever contemplated that the " magistrates, heritors, and kirk session are to form one " body, and provide for the general mass of poor, burgal " and landward. Further, the magistrates are autho- " rized to stent in the burgh only, according to the " estimation of the substance,—a mode by which the " heritors to landward are not to be assessed; and on " the other hand, the heritors and kirk session cannot " assess the inhabitants of a burgh over whom they have " no jurisdiction, and those whom they assess they are " to assess by a rule quite different from the burgal " mode.

" If it shall be said, that the proclamation 3d March " 1698 gives sufficient authority to the Court to regulate " assessments for the poor in a burgh with a landward " district, so as to oblige the magistrates, heritors, and " kirk session to act as one body, and make up a " single roll of poor to be supported by assessment, we " are unable to come to that conclusion; for it seems " impossible to suppose that it could be the intention of " the privy council to create such a legislative power " affecting the inhabitants of royal burghs by instructions

" addressed only to 'the ministers and elders of each " 'parish, with advice of the heritors, or so many of " 'them as shall meet and concur with them,' and in " which the magistrates are not so much as mentioned, " by merely authorizing them 'to decide and determine " 'all questions that may arise in the respective parishes " 'in relation to the ordering or disposing of the poor, " 'in so far as it is not determined by the laws and " 'acts of parliament, and the former acts of our privy " 'council;' obviously meaning only the ordinary ques- " tions in the management of that class of poor which " is already under their charge, so as not however even " there to run counter to what is established law on the " subject.

" Further, supposing there was to be only one roll of " poor, the difficulty would still remain; what portion " of the expence is to be raised by the burgh, and " what by the landward heritors? Each by law are " entitled to be assessed according to a particular rule, " producing equality of burden among themselves, " when each class raises a specific sum; but, if " extricable at all, great inequality would arise when " applied to raise a single fund. Neither class is " bound to give way to the other, so as to adopt the " same rate of payment over all; and as to the " inhabitants within burgh, and the inhabitants in the " country, they can be legally assessed according to a " certain specified rule, and no other.

" It seems to us that the only mode in consistence " with the rules established for assessments by burghs " and landward parishes is to hold that the poor " within burgh are subject to the jurisdiction of the

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" magistrates, and must be supported by the assessment " leviable by them from the burgal inhabitants, stented " according to use and wont; and that the poor to " landward are to be maintained from the assessment " upon the heritors and inhabitants under the juris- " diction of the heritors and kirk session, assessed " according to the rule in country parishes. This is " the rule which has hitherto been adopted in Lanark; " and we see no necessity for change, and no authority " which the Court has to compel any alteration upon " it. It is true that in several parishes, nay in most, " similarly situated as Lanark is, the difficulty has been " solved by a special agreement, by which there is but " one roll of poor, for whom the burgh and landward " portion of the parish contribute in certain fixed " proportions, differing according to the circumstances " of each case. But this is entirely a matter of special " agreement; and we think it is beyond the power of the " Court to compel those who are unwilling to adopt " any such rule. Further, we think that the case of the " West Kirk parish, Scott against Fraser, 19th January " 1773, is inapplicable; because there was no royal " burgh there entitled to a peculiar mode of assessment, " and a jurisdiction distinct from the heritors and kirk " session. Burghs of barony have never been recog- " nised as having any such privilege in this matter of " the poor, and they are treated as landward parishes, " both as to the jurisdiction of the heritors and kirk " session, and the mode of assessment, which, as to the " heritors' quota at least, may be by the old extent, the " valuation in the cess-books, 'or otherwise as the major " 'part of the heritors shall agree;' and accordingly

" the Court confirmed the resolutions of the majority, " that the assessment there should be according to the " real rent.

" As to the collections at the church door, if the " magistrates, and heritors, and kirk session respec- " tively do not agree about the proportion in which " they are to be divided, as it is impossible to know in " what proportion the attenders at church from the " burgh or landward portion of the parish respectively " contribute to the funds, we are of opinion that the only " rule of division which can be recommended is, that " the quota set apart for the poor should be divided in " proportion to the amount levied upon each portion " of the parish respectively."

In the present case their Lordships delivered this opinion: — " We remain of the opinion we gave in the " case of Lanark, that there is no warrant in our sta- " tutory system of poor laws for imposing upon the " landward part of a parish, in which there is a royal " burgh, the burden of contributing to the maintenance " of the poor who have a legal claim to parochial relief " as residenters within burgh. Our reasons for this " opinion we have given in that case, to which we beg " to refer.

" The present is so far different, that while, in the " case of Lanark, the management of the poor, as they " were locally situated within the burgh or the landward " district of the parish, had always been separately pro- " vided for,—those within burgh by the magistrates, as " representing the community, and those resident in the " rest of the parish by the landward heritors,—here there " seems to have been an agreement entered into between " the magistrates of Dunbar and the landward heritors

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" in 1724, by which a joint arrangement was agreed to " ' for the year ensuing allenarly,' with a special clause, " that ' this should not be drawn into a precedent in " any time coming.' The agreement was that the " burgh was to pay one sixth, and the landward heri- " tors five sixths, of the assessment for the poor.

" There is no evidence as to future years, till the year " 1774, since which time this same proportion has been " paid. We do not think that this usage, guarded more " especially as it was at the commencement by the ex- " press stipulation that it should not form a precedent " any manner of way for the future, can bind the land- " ward heritors, so as to compel them to continue it " longer than they think it expedient. We are of opi- " nion, that the agreement was entirely voluntary at the " time; that, if not contrary to the law, it was at least " not supported by the law; and that the heritors who " entered into it, and those in succession who conformed " to it, have not bound the present heritors to the con- " tinuance of a practice commenced under the proviso " here so anxiously introduced.

" We are therefore of opinion, that decree should be " given in favour of the pursuers, in terms of the first " alternative conclusion of the summons."

On these opinions being communicated to their Lordships of the Second Division, they delivered their opinions orally, of which the following notes were laid before the House of Lords as embracing the substance of them :—

" LORD JUSTICE CLERK :—Six of the consulted judges " are of opinion, that the usage ought to fix the rule of " assessment in the burghs of Lanark and Dunbar; " the other three judges who were consulted, have de-

" livered a different opinion, founded entirely upon the " interpretation of the statutes which ordain an assess- " ment for the maintenance of the poor. With these " conflicting opinions before me, I have given the point " the fullest consideration; and, after having weighed " all the arguments for and against, I must confess that " my opinion coincides with that of the minority. I " cannot discover on what principle usage can or ought " to be introduced as the rule of the assessment. The " provision for the poor, and the powers to impose the " assessment are the mere creations of statute. There " is here no case of very ancient usage. But although " the usage had been long and inveterate, I can see no " ground for deciding that it is to be imperative or " binding on the parties liable to an assessment. The " usage may continue from generation to generation— " it may go on from century to century—the country " may not complain of the usage, and the assessment " may be imposed and levied for a long time undis- " turbed; but when any one becomes refractory, and " calls in question the right or mode of assessment, we " must recur to the statute. It is admitted, that the " common law here is out of the question; hence the " question is narrowed to this, whether the assessment " has been imposed under the provisions of the statute? " No usage will be sufficient. But even if this were a " question of usage, we would have to consider whether " the usage of one hundred years should be the rule, or " merely the usage since 1814? The latter usage, in " the case of Lanark, I look upon as a direct violation " of the law: for example, there is a provision with " regard to mortified funds, that the capital is not to " be touched, and yet the provision has been disre-

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" garded. It is said that this cannot operate against the " principle of usage; but in my view of the question, " usage, however continuous, establishes no right. In " this state of matters we are just driven back to con- " sider the first question, which is, What is the state of " the law under the statute with regard to a mixed " parish? The enactments relate to two different sets " of poor, and to two distinct localities,—a royal burgh " and a parish to landward. In the case of a burgh, " the rule applies to every burgh which has a provost " and magistrates. This is the clear provision of the " act 1579; and here I must remark, that I cannot " join in an obiter opinion, which is said to have been " expressed by Lord Corehouse at the advising of the " case of Parker; viz. that all the statutes have been " done away with, and that we are to look for the law " in the proclamations alone. I can find no trace of " authority for such an opinion. On the contrary, are " we not in the practice every day of entertaining decla- " rators in which it is implied that the act 1579 is still " in observance? We might just as well put the four " proclamations in the fire as the act 1579. It, as well " as the proclamations, are recited in the statute of 1698; " and in truth the act 1579 is the very origin and basis " of our system of poor laws. It lays down a clear " code of regulations, both for the burghs and the land- " ward parishes. The burghs are those which have a " provost and magistrates, no matter how many parishes " they are divided into. A distinct mode of assessment " for the poor is provided by it. It provides how the " lists are to be made up—it contains certain regula- " tions as to begging—and it clearly defines the manage- " ment by the magistrates. As to a parish to landward

" the act confides the power of assessment to a judge " constituted by the King's commission; but this was " afterwards so far altered, that the powers and duty of " the judge were devolved on the heritors and kirk " session by 1597 and 1672. Then again we have, on " the one hand, the proclamation of 1692, by which the " heritors and kirk session of landward parishes are to " assess themselves for the support of the poor; and on " the other hand, the proclamation of 1693, by which " the magistrates of the burghs are empowered and " required to impose the assessment; so that it appears " to me there is a clear distinction between the poor " themselves — the assessments — the management of the " funds — and the provisions for the maintenance of the " poor. With regard to the burghs, the rule extends " to all royal burghs, whether they have any landward " territory or not. I make this remark in passing, be- " cause there are one or two burghs without territory, " as Queenferry for example; but the words are exten- " sive and comprehensive enough to include all royal " burghs. As to all royal burghs this is the rule, " although it is not so with the burghs of barony, which " are in this question to be treated as villages. There " is no express notice in the statutes or proclamations " of, nor are there any provisions for mixed parishes; " they apply to the poor of the burgh and the poor of " the landward parishes respectively. To me it is plain " that they lay down two systems of management which " are quite distinct. When a usage has been estab- " lished, it may be convenient to follow it; but when- " ever a question is stirred as to the matter of right, we " must give effect to the law as we find it. We must, " in this case, steer by the law as we find it in the

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

" statutes and proclamations. We have no right to " deviate from the provisions of the law to meet a par- " ticular case; nor do I see that usage can supply the " want. It might be desirable that a settlement were " effected, and I should be happy to hear, that the " parties were to withdraw their opposition, and adjust " matters; but mere usage in a case of this kind is not " sufficient to create a law for the community. It may " be submitted to for a time. But there are cases " where, from the increase of population and other " causes,—as in the case of the West Kirk parish,—it " is of extreme importance to ascertain the right by " which a compulsory assessment is to be regulated. In " such cases we must just look to the law by which the " assessment is authorized. I would only further re- " mark, that the usage of which we have any evidence " is in general very unsatisfactory. From the report " made in Parker's case, it appears, that three burghs " follow one usage, three another, and three a third. " From such a usage it is impossible to elicit any thing " like a general principle. There is an utter vagueness " in it; a remark which holds good, particularly in " regard to that of which the evidence is now before us; " so much so, that it cannot even regulate the particular " cases. The usage of one burgh cannot establish a " law for other burghs. The statutes and proclama- " tions must rule. I am therefore of opinion with the " minority, and would propose, in regard to Dunbar, " to find in terms of the first conclusion of declarator. " As to Lanark, it is clear the woman must be sup- " ported; and as she belongs to the burgh, we should " dismiss the one advocation, and in the other remit to " the magistrates to maintain her, according to law.

" *Lord Meadowbank.*—I am of the same opinion.
" *Lord Cringletie.*—I agree.
" *Lord Glenlee.*—I also agree.
" *Lord Justice Clerk.*—There being six of one opinion, " and seven of another opinion, we accordingly decern " by the majority in the first conclusion of the decla- " rator."

The Court accordingly, on the 4th of July 1833, decerned and declared in terms of the first conclusion of the summons, thereby finding " that the management " and maintenance of the poor of the landward district " and of the burgh are separate and distinct, and that " the pursuers, as heritors of the landward district, with " their tenants, and other inhabitants thereof, are not " liable for the support of the poor of the burgh, but for " that of the poor resident within the landward district " allenarly; and the said provost, magistrates, and " council, as representing the community of the said " burgh of Dunbar, ought and should be decerned and " ordained, by decree foresaid, to sustain and manage " the poor of the said burgh according to law." A judgment to a similar effect was at the same time pronounced in the Lanark cause.*

A farther interlocutor was pronounced, finding it unnecessary to decide upon the alternative conclusion, and of consent assoilzieing the Magistrates from the conclusion for repetition.

The Magistrates appealed.†

---

* 11 S. D. B. p. 879.

† It is stated in the case for the respondents, that, on the judgments above mentioned being pronounced, applications were made both by the magistrates of Lanark and by those of Dunbar, to have their respective causes taken to appeal; and on considering these, the Convention of 1833 determined to take the appeal in the present cause; but the appellants

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

Appellants.—The law of Scotland relative to the maintenance of the poor proceeds entirely upon a parochial system, the whole poor within each parish forming one class to be provided for indiscriminately out of the whole funds of the parish. There is nothing in the

---

having failed to lodge their case in terms of the standing orders of the House, their appeal consequently fell.

The respondents thereupon obtained a certificate of dismissal of the appeal, and extracted the decree of the Court of Session; and they gave notice to the appellants that they would proceed to charge them for implement thereof, unless some arrangement were gone into for regulating the interim management; so that if the appellants should not revive their appeal, or if the judgment of the Court of Session should be affirmed, the respondents might have the benefit thereof from its date.

An arrangement was accordingly entered into between the appellants and respondents, whereby the latter agreed to assess themselves for the whole poor as formerly, on the condition, that, should the judgment be affirmed, the appellants should "make good to the heritors the difference "betwixt the assessment levied according to the old system, and the "burden as fixed by the decision of the Court."

With the view of determining what this difference would be, a committee of the heritors was appointed, who, in conjunction with a similar committee of the magistrates and kirk session, made a thorough investigation of the roll of paupers, ascertaining which belonged to the burgh, and which to the landward parish.

The result of this investigation, made at the sight of, and to the conviction of both parties, has been as follows:—

Total number of paupers in burgh and to landward -	- 103
Of these — have a settlement in the burgh -	- 86
ditto in the landward parish	- 17
	103

It was further ascertained, that of these 103 paupers there were

Born and brought up in the burgh - -	- 50
Ditto in the landward parish -	- 10
Immigrated from other parishes - -	- 43
	103

An assessment was accordingly imposed as formerly, but under the condition stated, that should the judgment be affirmed the landward parish should be relieved of all burden, except for the maintenance of the seventeen paupers settled in the landward parish.

Thereafter the appellants presented a new petition, and had their appeal revived of this date, the respondents consenting thereto.

statutory enactments, upon which alone the poor law is founded, either in ordinary construction, or as they have been explained by usage, which sanctions in any case the division of the poor of one parish into separate and distinct territorial classes — such as the burgh poor and the landward poor in the case of a parish partly burgal and partly landward, — or authorises the formation of a separate list or roll of paupers to be made up with reference to such territorial division,—or directs provision to be made for their maintenance out of distinct and separate funds.

Although a distinction has been introduced between parishes formed entirely of a royal burgh, and parishes entirely landward, with reference to the mode of imposing and levying the assessment, and the parties liable to be assessed, there is not, through the whole series of the statutory enactments on this subject, including the proclamations, any clause in which the maintenance of the poor is ever considered except with reference to a parochial arrangement. The establishment of a magistracy in a burgh royal may have afforded certain facilities for the explication of the system there; and the circumstances of such a burgh, with respect to the condition of its inhabitants, and the nature of the property they possess, may have appeared to justify or require a different mode of assessment and principle and rate of liability, where a parish is entirely within the town, from that which suggested itself in the case of a parish entirely landward. Any difference of arrangement, however, depending upon such peculiarities, forms only a subordinate part of the system; it forms not even an exception from the system as a proper parochial system. On the contrary, it proceeds upon the ground that every

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

parish is to support its own poor, introducing only a special arrangement for furnishing that support, where a royal burgh, containing a magistracy, of itself forms a parish. Nothing that is said about the powers of magistrates within burgh, in regulating the maintenance of the poor, as contradistinguished from the powers vested in the heritors and kirk session and justices of the peace and sheriffs, does in any view trench upon the leading feature of the system, that the poor laws, so far as regards the territorial division of the parties entitled to relief, and of the parties bound to furnish it, rests entirely upon and follows the division of the country into parishes.

The leading principle upon which the poor laws of Scotland proceed is that the poor of each parish shall be relieved by funds derived from voluntary contributions at the parish church, mortifications, &c., and, in aid of these funds, by a parochial assessment within each parish respectively. Whether the question be considered with reference to the law of settlement — to the funds and parties liable for the paupers' maintenance — to claims of repetition and relief at the instance of those who, though not truly liable, may have given interim support, — to the law of removal even, in so far as that law has obtained in Scotland, there is nothing but a parochial system.

The doctrine of the respondents would lead to the most absurd and impracticable results. Suppose a party to claim aliment after having resided, first two years in the burgh, and then two years in the landward part of the parish, it is clear that he is chargeable against the parish, to the relief of the parish of any former settlement. But the respondents say that his maintenance is

a burden, not upon the whole parish generally, but upon the one or the other district. If so, which district shall be liable in the case supposed? He has not finished a sufficient period of residence in either.

Again, suppose that, before becoming chargeable, he had resided for two years and a half in the burgh, and for the last six or seven months in the landward district, or vice versâ. Here there is a clear liability against the parish; because, as regards the whole parish, the settlement is complete. But, according to the respondents' scheme of subdividing the parish, there is no settlement acquired in either district.

So take the case of removal; although the law of Scotland does not permit removal on the mere ground that a party may become chargeable to the parish, unless he has begun to beg, or has become chargeable; yet even this limited power has, like all the rest of the law on this subject, been administered on the principle of parochial system. It is a removal from parish to parish. No one ever heard of such a thing as a removal from one district of a parish to another. Removal, like every other part of the poor laws, proceeds on the supposition of settlement. It is the removal of a party who has become a pauper, and is so chargeable, to the proper parish of his settlement.

The practice throughout Scotland, and in this very parish, has also uniformly taken place on the principle of a parochial system, and not on a subdivision of parishes. This is proved by the Reports as to the practice ordered by the Court below in the case of Buchanan v. Parker, 21st February 1827.*

* See 5 S. D. p. 362, new edition; and p. 390, old edition. The reports will be found at p. 364 of the new edition.

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

No difficulty has hitherto arisen as to the administration of the poor laws in the cases like the present, of which many exist; if any dispute arise the Court of Session is entitled to decide and to regulate the matter. This was done in the case of Scott v. Fraser.*

Analogy is also in favour of the appellants' principle of a parochial system, and adverse to that of the respondents. In the case of Peterhead, relative to the building of a church, the Lord Chancellor Eldon, in moving judgment in this House said, that "the expence of "building or repairing a parish church was a parochial "burden, which ought to fall on the property of the "parish, and should not be regulated by reference to "the population in different parts of the same parish,"— adding, that the case of Crieff, in which the last rule had been introduced, had been recently pronounced, and was no authority in the case of Peterhead, to determine which, therefore, it was necessary to resort to principle. In this opinion, Lord Thurlow is stated to have concurred.†

Apply that decision and its principle to the present case. The respondents cannot make out here nearly so strong a case for apportioning the burden in the ratio of the population as existed in the parish of Peterhead; because here there are the various and insuperable difficulties pointed out, connected with the law of settlement and removal and with the rights of the claimants upon the parish funds as a common source of relief, none of which occurred as to the building of the church. The very same general ground, therefore, which rejected the

---

* 19 Jan. 1773, Mor. 10,577, Hailes, 522.

† Connell's Supplement to a Treatise on the Law of Parishes, p. 25.

ratio of the population in the case of Peterhead should equally lead to its rejection here. The support of the whole poor of the parish is one common burden, to be borne by the whole parish; but the rate at which the parish is to be assessed, is not in proportion to the poor who may happen to reside in one particular part of the parish; for such a rate of assessment would end in this, that each separate property should maintain its own poor, there being no reason for stopping such a subdivision if it is once commenced.

Respondents.—Compulsory assessment for support of the poor rests entirely on statutory enactment, and can neither be extended beyond, nor exercised differently from what is prescribed, by the statutes and ratified proclamations authorizing the same. By these statutes and proclamations, the management and maintenance of the poor of royal burghs is totally distinct and separate from that of the landward portion of the parish in which the burgh is situated. Accordingly, express provision is made for the maintenance and management of the poor of all royal burghs under the exclusive jurisdiction of their own magistrates, separately and distinctly, without reference to any landward district not within the burgh. In like manner express provision is made for the separate maintenance and management of the poor of landward parishes having a royal burgh situated therein, under the exclusive jurisdiction of the heritors and kirk session, independent of such burgh. Indeed a conjoint management and system of maintenance of the poor of the landward district and royal burgh is not only unsanctioned by the statutes and proclamations, but cannot be carried into effect without a direct and open violation of all their most important provisions. While the system

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

for the support of the poor is, in so far as regards the landward parts of the country, parochial, that system, in so far as regards the royal burghs, is strictly and exclusively burgal in all its parts,—in its machinery, its rules of assessment, and in its extent; comprehending and extending over the whole burgh, although it contains several separate parishes, and limited to the bounds of the burgh when it is situated within a parish. On the other hand, although the landward districts of parishes containing royal burghs are included under the provisions in the statutes regarding landward parishes, yet the royal burghs are excerpted therefrom, and are erected into separate districts relative to the poor, under a management peculiar to themselves, and exclusive of the landward parish. No general consuetude can affect the construction of the statutes as to this matter, and no length of usage in a particular place can prevent the heritors and kirk session of a parish, or the magistrates of a burgh, from reverting even from one legal mode of assessing for, and maintaining the poor, to another; and still less can it prevent them from turning from an illegal mode to one sanctioned by law.

The fallacy into which the appellants have fallen, and which has been adopted by the learned judges in the minority, is in considering the statutory system of provision for the poor to be exclusively "parochial." This is shown to be a fallacy from the circumstance that when a burgh is divided into several parishes, it still remains one district quoad the poor. If, however, the doctrine of the appellants were correct, it would necessarily follow, that wherever a burgh was divided into separate parishes, the poor of each parish must be separately maintained. In Edinburgh there are thirteen

parishes, and though some of them, having been erected by the Church Courts only, may be considered as separate parishes only quoad sacra, others were erected in early periods by the Privy Council, which exercised a civil jurisdiction in such matters; and those more recently erected were so erected by virtue of acts of parliament, and of course constituted parishes quoad civilia. In Glasgow, again, several of the parishes were erected by the Teind Court; and in Dundee, Perth, and other burghs, there are also distinct parishes quoad civilia. It never was however imagined, that these burghs were to be divided into separate districts as to the maintenance and management of the poor; that there was to be a separate assessment for the separate parishes; or that a pauper residing two years in one parish, and a third in another, but still within the burgh, did not acquire a settlement therein, as not having resided three years in any one parish. On the contrary, the whole poor of the burgh, as one separate and distinct, but purely burgal, district, are indiscriminately held to acquire a settlement by residence within the burgh, though never two years in the same parish, and are maintained by one general assessment over all the inhabitants, without the slightest regard to the parochial divisions in which they live.

On the other hand, when towns, not being royal burghs, are divided into separate parishes, the management and maintenance of the poor becomes also separate; and so in the town of Greenock, which had been divided into two parishes by the Court of Teinds, and a separate management thereby introduced, when it was deemed expedient to revert to a general management, an act of parliament was necessary to unite, quoad the poor, the parishes which had been so erected.

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

The reason of this difference is plain. It is only royal burghs that are held to be included under the provisions as to burghs in the statutes regarding the poor. Other towns are not erected, as to this matter, into separate districts, and subjected to a burgal management, but remain subject to a parochial management, being in the eye of the law landward in their character, and still parts of a landward parish. The proprietors in such towns, therefore, are still deemed heritors. The magistrates have no powers as to the management of the poor, which is vested exclusively in the heritors or proprietors, and elders, whether in the town or country district; and when such a town is divided into two parishes, the system being strictly parochial, there is thereafter a complete separation between the parishes into which it has been divided.

The contrast as to royal burghs is very striking, and arises necessarily from the peculiarity, that they have been, by the statutes relative to the poor, erected into separate districts as to that matter, not parochial, but purely and exclusively burgal, so as on the one hand to be limited to the burgh, although the parish may be more extensive, and on the other to be extended over the whole burgh, although it may consist of several separate and independent parishes.

No inconvenience therefore, or confusion, can ever arise as to the rights of parishes belonging to the landward or burgal district, any more than in regard to two entirely separate or distinct parishes.

Then, as to general usage there is nothing of the kind. From the returns in Parker's case, it appears that there are only nine burghs which can be appealed to in proof of usage at all. Of these, there are three in which the

burgh and the landward parish are treated in all respects as separate and distinct parishes, according to the rule contended for by the respondents; three in which they are treated entirely and in all respects as one parish; and three, including Dunbar, where they are treated as one parish quoad the distribution of the fund, and are sub-divided into subordinate districts as to the rule of imposing the assessment. There is no ground, therefore, for allowing the matter of usage to affect the decision of the general question, to determine which purely, and without specialty, the present appeal has been expressly taken.

LORD BROUGHAM.—The parish of Dunbar, which is of great extent, consists of the royal burgh of that name, and a country or landward district. The population of the burgh is about 3,200, and of the landward part nearly 1,700. The management of the poor is admitted to have been for above a century on its present footing; and there is no evidence of any other kind of management at any time. Both parts of the parish, the burgh and landward district, have been considered as one, without any division or difference of system, or any separation. There has been but one assessment paid from the whole parish, and no distinction has been made of the poor into two classes or parties,—the burgh poor, and the landward poor; nor has any separate list or roll been ever made up of the rate classes. The one sum assessed having been each time ascertained, the usage has been to distribute it into two portions; one sixth to be levied in the burgh, and five sixths in the landward parish; but when received, the whole has been uniformly treated as one fund, and distributed as such among the whole

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

poor without any distinction. In like manner, the kirk-door collection has been one for the whole; and in all questions of settlement a distinction has never been made between the two parts of the parish. There is some discrepancy between the statements of the parties as to the proportions of the poor in the burgh and in the landward part. The one states the burgh poor at 70, and the landward at 30 per cent.; the other gives these numbers as 60 and 40 per cent. But it is clear that the numbers of poor actually residing within the burgh must be any thing rather than a fair criterion of the proportions of persons thrown upon the parish funds by the two districts; for many of the poor who now live in the burgh are labourers formerly employed in the country, while many of the persons at all times working in the country are resident in the burgh. It is accordingly stated, and I do not find this explicitly denied, that nearly one half, certainly more than a third, of the poor residing in the burgh, were formerly country labourers, independently of those who always lived in the burgh, while working in the landward part. In these circumstances, which compose the whole facts of the case, the respondents, who are the heritors of the parish, naturally enough felt desirous, if they could, to shift upon the burgh the maintenance of its own poor, reckoning all to be burgh poor who reside within its bounds, although a great number of them belong properly to the country district. This desire they have in common with every part of a district which has a population of varying density, and a wealth distributed in proportions not at all relative to the numbers of inhabitants. There are many parishes in which eight or ten thousand persons are crowded into one corner, while not a thousand

occupy the rest; the wealthy part, being that which is thinly peopled, has to pay by far the larger share towards maintaining all the paupers that belong to the smaller and poorer district; and there is not one such parish which has not as good right as the heritors of Dunbar to complain of the irregularity in the distribution of the burden. Such complaints, if listened to and acted upon by the legislature, would lead to the most unjust divisions of the country; indeed they would soon render all division into districts impossible. The question here is, however, not what would be advisable had we the law to make anew, but what the law now is; not what right the Dunbar heritors have to complain, but what legal redress there is for their alleged grievance. They proceeded to institute an action of declarator and repetition against the magistrates, as representing the burgh, and concluded to have it "found and declared "by decree of the Lords of our Council and Session, "that the management and maintenance of the poor of "the landward district, with their tenants and other in-"habitants thereof, are not liable for the support of the "poor of the burgh, but for that of the poor resident "within the landward district allenarly; and the said "provost, magistrates, and council, as representing the "community of the said burgh of Dunbar, ought and "should be decerned and ordained by decree foresaid "to sustain and manage the poor of the said burgh ac-"cording to law; or otherwise, in the event of the pur-"suers failing in the above conclusion of their action, "then and in that case it ought and should be found "and declared by decree foresaid that the power of "taking up the lists of the aggregate poor, determining "the assessments, and managing the funds, belongs to "the meeting of heritors, provost, minister, and elders;

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

" and that the assessments to be imposed for the support
" of the aggregate poor shall be laid on the whole of
" the inhabitants of the parish equally, whether in burgh
" or to landward, 'according to the estimation of their
" substance, without exception of persons;' or our said
" Lords ought and should find and declare in the pre-
" mises as to them shall seem just: and further, the said
" provost, magistrates, and council, as representing the
" community of the said burgh, ought and should be
" decerned and ordained to repeat and pay back to the
" pursuers the sum of 1,000*l.* sterling, or such other
" sum as shall be ascertained, before extract of the
" decree to follow hereon, to be the excess of assess-
" ments contributed by the pursuers during the course
" of the process, beyond the proportion for which they
" are justly liable under the foregoing declaration, with
" the legal interest due thereon from the periods of
" payment." The question then which was raised before the Court below, and is now brought before your Lordships by appeal, is, whether or not the parish of Dunbar is by law divisible, or rather divided, into two districts quoad the management of its poor; one of these districts being the royal burgh under the magistrates, and the other the landward part under the minister and kirk-session. The Court below, on consultation of all its judges, held that it was so divided, and pronounced its decree to that effect; the claim of repetition being given up by consent. But this decision was made by the narrowest majority, and learned judges of great eminence gave their countenance to both the opinions entertained. Upon a careful consideration of the whole case, I am of opinion that the judgment of the smaller number was right, upon every principle of sound construction which can be applied to the statutes, and upon all the established

general views of law which can govern questions of this description. It is admitted that there are no authorities, either of text writers or decided cases, which can be resorted to for our guidance in this question. We must attend to the statutory enactments,—to the principles which are applicable to such provisions in a case of this kind, and to the usage in this parish, as well as in almost all the rest of Scotland. It is most justly observed by the Lord Justice Clerk, that the provisions for the poor, and the powers to assess for their relief, are the mere creations of statute. Every thing then must, in respect to those important matters, turn upon the statutory enactments. But I cannot go along with his Lordship, when, for this reason, he denies that usage, however long and inveterate, could be binding and operative on the parties. It is quite true that, as against a plain statutory rule, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language not to be misunderstood,—a language plainly and indubitably differing from the purport of the usage. When the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; or when the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed sense: optimus legum interpres consuetudo, which is sometimes termed contemporaneous exposition; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the period of contemporary exposition. Let us now look to the statutes; and the first and leading one on which all turns is the act of 1579, cap. 74. The preamble,

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

referring to the older acts, is chiefly remarkable as reminding us, that by those still earlier provisions all the arrangements touching the poor were of a parochial nature, and bore immediate and constant reference to parishes; no other boundary is by them recognized. The act of 1579 itself pursues the same course, and regards no division but that of parishes, unless in the case of burghs, that is, of a parish or parishes wholly burgal; and the reason why it specifies this latter case, and provides for it, is not so much to deviate from the principle of regarding only parochial boundaries, as to save the jurisdiction of magistrates within their own peculiar province, — the royal burgh over which they preside. Thus the first enactment relates to vagrants and sturdy beggars. These are to be carried before the magistrates in burghs, and in landward parishes before justices to be appointed, or lords of regality; and those authorities,—that is, the magistrates in burghs, and the justices and lords of regality in landward parishes,—are to punish the offenders, or take security for their conduct. The other provisions respecting vagrants are to the like effect as regards the burgh and landward parishes, with this additional circumstance, that they never once mention the burgh magistrates or burgh jurisdiction as applicable to provisions made both touching burgh and landward parishes; while once or twice, probably per incuriam, "parish" alone is mentioned, and parish jurisdiction, although it seems plain that the burgh jurisdiction must be supplied for burgh parishes. This is only worth observing as evincing how much more parochial division was in contemplation of the legislature than any other, even when parishes wholly burgal were in contemplation. The rest of the act is framed on the same plan. Registers or lists of the poor

are to be made by inquisition, taken by the magistrates of each burgh and town, and by the justice appointed in every landward parish; the lists are to be kept by the magistrates in each burgh, and the justice in each landward parish; and all the poor are required to repair to the parish where they were born, and there settle themselves, under pain of being deemed vagrants. They are not to return to the burgh or town, but to the parish, because parochial division is the thing mainly regarded throughout the act; and a burgh may have more parishes than one. Here let us only observe, that in case a pauper was born in a parish partly burgal, partly landward, he complied with the statute, and escaped the penalty by resorting to and abiding in any part, burgal or landward, of the parish; but, if he was born in one of two burgh parishes, he was liable to the penalty, if he resorted to the other, though still he would be in the same town. The construction which would raise a distinction between the landward and burgh parts of the same parish must admit that a pauper, born in the landward part, might safely return to and settle in the burgh part, and then he would encumber the burgh fund, and so vice versâ of one born in the burgh part of the parish. Now, if the division contended for by the argument of the pursuers and respondents has any meaning at all, it is, that the landward poor shall be sustained by the landward part, and the burgh poor by the burgal part. But that is rendered impossible by this provision respecting their several settlements. If, again, to escape from the force of this consideration, it be said that the landward-born poor must resort to the landward parts, and the burgh-born poor to the burgh part, I ask what provision of the act hints at such a distinction in respect of settle-

THE MAGISTRATES OF DUNBAR *v.* THE HERITORS OF DUNBAR.

10th Apr. 1835.

ment? But the matter here dealt with is of a penal nature, and even highly penal; for vagrancy may terminate, by the provisions of the act, in even capital punishment. Therefore this provision, relating to settlement, must be most strictly interpreted, and consequently we are not at liberty to supply, by intendment, a provision which is not in any way to be found in the act, namely, that persons having a landward settlement by birth, or seven years' residence, shall go to the landward part, and those having a burgh settlement to the burgh part. The exigency of the act is clearly complied with by the party returning to any part of the parish. To illustrate this point further, suppose a pauper brought before the burgh magistrates as a vagrant, and indicted for that offence, his vagrancy consisting in having continued out of his parish where he was born or had lived seven years last past, above forty days after the proclamation, the indictment must follow the section which constitutes that absence a constructive vagrancy, and the very words must be used. The averment must be, that the defendant being born within the parish of Dunbar, and not having lived during seven years last past in any other parish, and being a pauper, did not return and repair to the said parish and there settle himself within the space of forty days after proclamation made of a certain act passed in such a year. Now, if the pauper had been born in the country part, and had returned to the burgh part, he must have been acquitted; for the material averment of the indictment would be negatived by the evidence. No consideration of burgh or landward would ever have been had. The same may be said of the remaining provisions. The lists are to be made by the magistrates for towns and the justices for landward parishes; and the magistrates and

judges in the parishes to landward are to tax and stent the whole inhabitants within the parish according to their substance; and distributions are to be made among the poor by the magistrates within burgh, and the judges in the parishes to landward respectivè. So testimonials are to be given by the magistrates in towns, not distinguïshing parishes, and by the justices in parishes to landward, manifestly in order to enable the magistrates to certify for all the parishes within the town indiscriminately. The subsequent act laid the duties formerly assigned to justices upon the kirk session; and the proclamations in the reign of William and Mary follow nearly the same course, only inclining more to the construction which lays the duty on the parishes merely. In all these provisions, then, we can discover only one case in which the bounds of the royal burgh and the jurisdiction of the magistrates are recognized,—one case only in which there is a distinction taken between burgal and landward, and that is the case of a parish or parishes wholly burgal, and a parish wholly landward. This is no exception at all to the general principle of parochial division followed throughout the act, for that division is here also strictly preserved. But no provision whatever is made,—no notice at all is taken of a parish partly burgh and partly landward; it is considered, therefore, as a parish, and dealt with as such. The silence of the act on this case is quite decisive, and we have no right to speak for it. When we see nothing recognized throughout but parochial boundary, we can have no right to imagine another division of burgal and landward districts. Burgh and landward are indeed terms used; but how used? Not as designating parts of the same parish, but as de-

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR.

10th Apr. 1835.

noting two different kinds of parishes. There is notice taken of and provision made for a burgh which is a parish, or it may be two parishes, though that is only in one or two instances. There is likewise notice taken of and provision made for a landward parish, but no mention whatever seems, nor is any thing at all rested upon the distinction between that part of a parish which is burgal and that which is landward. We should be introducing a perfectly new matter, if we supposed any such division to be made. We should be really inventing a kind of district or territory wholly unknown to the law. The law is conversant with parishes; it is our most ancient division of territory, and loses itself in the most remote antiquity in every part of the island, being in England, as in Scotland, far beyond the time of legal memory. The law is likewise conversant with burghs, and their bounds are ascertained, though, generally speaking, established in much more recent times. But that portion of territory which is in a parish and not in a burgh, is wholly unknown to the law, as contradistinguished from the rest of the parish. It is a part of the parish, and known as such, that is, known in relation to the parish. But we have no name even, much less any legal description, of such a district. To maintain any such distinction in any such district is contrary to all legal principle, and is indeed arbitrary and gratuitous. Equally so, perhaps still more violent, is the supposition which would give birth to a new jurisdiction extending over and limited to such a district. The magistrates have their known jurisdiction in burghs, the kirk session in parishes. But we are called upon to create a jurisdiction, and to vest it in the kirk session, com-

prising it within certain limits wholly unknown to the law. It is the jurisdiction of the kirk session over that part of a parish which falls beyond the bounds of a town, but which is situated in the parish. This intention might be accomplished,—the jurisdiction might be conferred,—the district might be created; and its bounds being defined, the jurisdiction might be extended over that district, and limited by those bounds. The Legislature might have done this, and it may now do it. If it had done so, there would have been an end of the question; the statute would have said so, and that would have been enough. But it must have said so expressly and plainly; no conjecture and no constructive reasoning can supply any such thing. Nay, such a division of territory, and such a creation of jurisdiction, is exactly the last thing that we are at liberty to fancy or to imply. At the same time, if for a long course of years the poor of the parish of Dunbar had been managed, as to assessment, settlement, and sustentation, in two divisions, and the parish had thus been divided, as it were, into two parishes, for the management of the paupers; and if the same kind of division and double administration had been uniformly followed in all or almost all the other mixed parishes of Scotland, I am not disposed to deny that this would have entitled us to impose a construction upon the act according to the practice or use. There being nothing absolutely self-repugnant in the division, we might have regarded the case of a mixed parish as not omitted, but capable of being raised by construction,—a somewhat forced construction certainly on the words of the act, but raised solely by the usage being of a contemporary date, and of an uniform kind. That, however, is not the case here; and the act, therefore, must be construed according to

THE MAGISTRATES OF DUNBAR v. THE HERITORS OF DUNBAR,

10th Apr. 1835.

its plain intent, which excludes all such new divisions as the respondents contend for, and the decree appealed from adopts. With this I should probably have been satisfied. But the case is considerably stronger, for the usage both in Dunbar and elsewhere is plainly with the construction contended for by the appellants. It would be a strong thing, indeed, to alter a practice so long established in this burgh, upon any speculative construction of the statute. But when we find that the same usage which prevails here has also prevailed almost everywhere else, it would be overlooking that which would have been a very important aid in the construction of a doubtful provision, and that which is a strong confirmation of the construction naturally put upon a provision by no means doubtful, were we to leave out of view the additional weight which this usage gives to the arguments against the decree. I have no hesitation, therefore, in recommending to your Lordships to reverse the interlocutors complained of, and to remit to the Court below, with instructions to dismiss the action of declarator and repetition, and to assoilzie the defendants from the conclusions of the summons.

The House of Lords ordered and adjudged, "That the "interlocutor complained of in the appeal be, and the same "is hereby reversed: And it is further ordered, That the "cause be remitted back to the Second Division of the "Court of Session, in order that the Court may proceed "further in the cause, as shall be just and consistent with "this judgment."

RICHARDSON and CONNELL — SPOTTISWOODE and ROBERTSON, — Solicitors.