

Friday, November 22.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WORDIE AND OTHERS (WORDIE'S TRUSTEES) v. COUNTY COUNCIL OF LANARKSHIRE.

Public Health—Local Authority—Assessment—Public Health (Scotland) Act (31 and 32 Vict. c. 101), sec. 94—Agreement to Assess in a Manner Inconsistent with Statutory Powers—Ultra vires.

A local authority, acting under the Public Health (Scotland) Act 1867, has no power to enter into an agreement with another local authority to levy an assessment within its own district in a manner other than that prescribed by the Act which empowers it to assess.

The Parochial Board of C., as the local authority under the Public Health (Scotland) Act 1867, after forming a portion of the parish into a special water supply district, entered into an agreement, under sec. 92 of the said Act, with a neighbouring local authority, by which, in return for a supply of water, the said parochial board undertook to levy an assessment within the said district in a manner different from that prescribed by the said Act. The same parochial board also formed a special drainage district within the parish, and entered into a similar agreement with the same neighbouring local authority with regard to the disposal of the drainage of the said district. An assessment was levied in the said districts in terms of these agreements until the County Council of Lanarkshire, coming in place of the parochial board as local authority under the Public Health Acts, in virtue of the Local Government (Scotland) Act 1889, levied an assessment for 1894-5 in the statutory manner.

In an action raised by the proprietor of lands situated in the said special water supply and drainage districts, to have it declared that the agreements above mentioned were binding on the County Council, and that they had no right to levy an assessment otherwise than in terms of the agreements—*held* (altering judgment of the Lord Ordinary) that the defenders must be assoilzied, on the ground that the agreements were *ultra vires* of the parochial board.

In 1874 the Parochial Board of the Parish of Cadder, acting as local authority under the Public Health (Scotland) Act 1867, formed a portion of the parish, including the lands of Millersneuk, into a special water supply district.

In 1875 the said Parochial Board entered into an agreement, under section 92 of the said Public Health Act, with the Police Commissioners of the adjoining burgh of Kirkintilloch, by which the said Commissioners agreed to allow the inhabitants of the said special water supply district a

supply of water on certain terms and conditions.

By the fifth article of the said agreement it was provided:—"The second parties (*viz.*, the Parochial Board) and their successors in office shall, during each year the present agreement subsists, assess and levy from the inhabitants of the said special water supply district upon the rental of property within the said district as appearing from the valuation roll aforesaid, an equal rate of assessment with the rate of assessment levied by the first parties (*viz.*, the Commissioners) and their successors, for the same year on the inhabitants within the burgh of Kirkintilloch."

A supply of water was thereupon led into the special water supply district in terms of the said agreement, but in the year 1881 certain questions arose between the parties to the agreement regarding the assessments to be levied by the Parochial Board, and paid to the Commissioners, for the year from Whitsunday 1881 to Whitsunday 1882, for water supply to the said special water supply district, one of the questions being as to the basis on which agricultural lands within the district should be assessed. The parties referred the dispute to the amicable decision of James Gale, C.E., Glasgow, who pronounced a formal decret-arbitral on 8th March 1883.

Finding three of the said decret-arbitral was in the following terms:—"(*Thirdly*) I find that on like construction (*i.e.*, a fair and reasonable construction) of the said agreement the second parties (the Cadder Parochial Board) are only bound to assess, and levy, and pay over, to the first parties (the said Burgh Commissioners) for the foresaid year an assessment of one shilling per pound, upon the nearest aggregate sum of pounds sterling to one-fourth of the annual value of all woodland, arable, meadow or pasture lands or other land used for agricultural purposes, within the said special water supply district, as appearing from the valuation roll aforesaid." This finding was in accordance with the statutory mode of assessment within the burgh, but not with that prescribed for a parish where the local authority was the parochial board.

In 1887 the Parochial Board formed into a special drainage district part of the parish of Cadder, including that portion formed into a special water supply district in 1874, and again entered into an agreement, under section 87 of the Public Health Act, with the Police Commissioners of Kirkintilloch by which the Commissioners undertook the collection, treatment, and disposal of the sewage of the special drainage district on terms and conditions practically identical, as regards the assessment of the inhabitants of the special drainage district, with the conditions in the agreement dealing with the special water supply district.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101) enacts, sec. 93, that where any special drainage district has been formed, a special assessment may be levied by the local authority; (sec. 94), that

where any special water supply district has been formed, a special assessment may be levied by the local authority, to be assessed, levied, and recovered in like manner, and under like powers as . . . the assessment for the relief of the poor where the local authority is a parochial board.

By the Local Government (Scotland) Act 1889 the powers and duties of the Parochial Board of Cadder, as local authority under the Public Health Acts, were transferred to and vested in the County Council of Lanarkshire. The said County Council imposed an assessment, for the year 1894-5, for drainage and water supply upon the gross valuation of lands in the said special districts, under deduction of 10 per cent.

In these circumstances, John Wordie, carting contractor, Glasgow, and others, testamentary trustees of the late William Wordie, proprietor of Millersneuk, in the parish of Cadder, raised an action on April 26th 1895 against the County Council of Lanarkshire, to have it declared that the above-mentioned agreements and decree-arbitral were "operative and binding upon the defenders in the same way, and to the same extent and effect in all respects, as the same were binding upon the second parties to the said agreements" (viz., the parochial board), and further, that the defenders, so long as the said agreements subsist, in assessing for the purposes of water supply and drainage within the special water supply district and the special drainage district, "are only entitled to assess in respect of woodland, arable, meadow or pasture land, or other land used for agricultural purposes, belonging to the pursuers, and situated within the said districts, upon the nearest aggregate sum of pounds sterling to one-fourth of the annual value thereof entered in the valuation roll."

The pursuers founded on the agreements and decree-arbitral, and pleaded—(1) The defenders being the successors, and subject to all the liabilities of the Parochial Board of Cadder, as local authority under the Public Health Acts, the foresaid agreements and decree-arbitral are binding upon them to the same extent and effect as they were binding upon the said Parochial Board, and the pursuers are entitled to a declarator to this effect. (2) In virtue of said agreements, as explained by said decree-arbitral, the defenders being entitled to assess the pursuers for water and drainage purposes only upon the nearest aggregate sum of pounds sterling to one-fourth of the annual value of their lands within the said district, the pursuers are entitled to decree of declarator in terms of the second conclusion of the summons."

The defenders pleaded—(1) No title or interest to sue. (2) All parties not called. . . . (4) On a sound construction of the agreements and decree-arbitral, they do not bear the meaning contended for by the pursuers, and the defenders should be assolizied. (5) *Separatim*, on the assumption that the agreements and decree-arbitral have the meaning and effect attributed to

them by the pursuers, they are in contravention of the Public Health Acts and the Local Government (Scotland) Act 1889, and *ultra vires* of the predecessors of the defenders, who are not bound thereby, and should be assolizied."

On 6th July 1895 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor sustaining the first and second pleas-in-law for the defender, and dismissing the action.

Note.—"The first conclusion of the summons is to the effect that it should be declared that these two contracts and the decree-arbitral were binding on the County Council of Lanarkshire to the same extent and effect as on the Parochial Board of Cadder—in other words, that it should be found that the County Council of Lanarkshire, as now the local authority, represented the Parochial Board of Cadder.

"The defenders pleaded that if the contracts should be construed as binding the Parochial Board to lay on their assessments otherwise than as provided by the Public Health Act, such an agreement would be *ultra vires*, and could not be binding on them. But this argument, well or ill founded, forms no objection to the conclusion, for declarator is not sought to the effect that they are bound by these contracts absolutely, but only to the same extent as the Parochial Board was bound; and if it were made out that the contract was originally *ultra vires*, it could bind neither the Parochial Board nor the County Council. I do not know that any argument was offered against the position; that in these matters the County Council comes in place of the Parochial Board. But the conclusive objection to declare that the County Council is bound in a contract with the Police Commissioners of the burgh of Kirkintilloch is that the Police Commissioners are not called as parties to the action. That objection might, no doubt, be obviated, were it worth while, by calling the Police Commissioners; but it is not worth while, because that first conclusion is only formal, and the pursuers fail, in my opinion, in the second or practical conclusion. That conclusion seeks to enforce the contracts, which have been mentioned, according to the construction contended for by the pursuers. But the defenders contend that the pursuers have no title to enforce that contract, and I am of opinion that they have not. The pursuers are not parties to the contract, and represent neither party. They are not suing in the interests of the Police Commissioners, nor yet in the interests of the Parochial Board, for they are suing against the body now said to come in their place.

"Unless there can be found in the two agreements between the Commissioners of Police and the Parochial Board some unexpressed but implied subordinate agreement between the Parochial Board and the ratepayers binding the Parochial Board to assess the ratepayers in some special and exceptional manner, it is clear that the pursuers cannot prevail, and I think it clear that there is no such agreement.

"I do not construe the agreements as the pursuers construe them. I do not see that

they provide at all for the mode in which the Cadder assessment shall be imposed. But if they did, I could only understand that they provided a method for ascertaining the amount of the contribution to be paid by Cadder. So long as the Commissioners received that amount, the manner in which it was raised did not signify to them. They had no interest in it and cannot be understood to have contracted for it. I am of opinion that the pursuers have no title to enforce the contract libelled, and that the defenders' first and second pleas that the pursuers have no title to sue, and that all parties have not been called, must be sustained.

"I desire to add that the case would have been wholly different had it been alleged that the defenders were assessing for a greater sum than they were bound by their contracts to pay to the Police Commissioners; but I find no averment of that kind."

The pursuers reclaimed against this interlocutor.

Argued for pursuers and reclaimers—The meaning of the agreements here in question had been decided by the arbiter's award, which was binding on the Parochial Board so long as it existed. But what was binding on the Parochial Board was binding on the County Council, to which the Local Government Act 1889, sections 11 and 17 (2) (4), had transferred all the powers, duties, and liabilities of the Parochial Board as local authority under the Public Health Acts. The County Council was therefore bound by these agreements.

Argued for defenders—The pursuers interpreted the agreements wrongly. But even if their interpretation was right, the agreements were *ultra vires* of the Parochial Board; for they laid down a method of assessment different from that enjoined by the statute.

At advising—

LORD PRESIDENT—This action is clearly unmaintainable, but I think that the true objection to it is founded upon a broader ground than that stated by the Lord Ordinary.

The action in substance, and indeed in expression, is an application to the Court to have it declared that the County Council is bound to levy the assessments in a manner for which there is no statutory warrant. The pursuers are ratepayers, and are bound to pay only such assessments as the assessing body has a right to impose. Now, they say that the predecessors of the County Council, the Parochial Board, agreed with the Police Commissioners of the burgh of Kirkintilloch that the latter should let them have a supply of water from their special water supply district—so far the proceeding was quite regular and proper—but they go on to say that the agreement prescribes as a consideration for the supply that the Parochial Board should not pay a contribution to the Police Commissioners, but should assess the inhabitants of the special water supply district in the same manner as the people in the burgh

are assessed by the Police Commissioners. No doubt it is competent for the local authority to enter into an arrangement by which they should get a supply of water and pay for it, and they may fix the amount to be paid, by any standard of calculation which they may choose to imagine, but their contribution, whatever it is, must be raised in a manner allowed by their own assessing powers. It would be competent for them to stipulate that they should pay either a lump sum or a proportion of the total liability, provided that the local authority raise the funds according to their statutory powers. But what never can be done is that the assessing body should acquire right to levy assessments otherwise than is allowed by statute, and therefore the agreement, so far as it prescribes a non-statutory mode of assessment, is entirely invalid. Accordingly, the County Council have no course open to them but to disregard the agreement, and to satisfy what they are bound to pay by levying assessments in the only lawful way. On that ground I think that the defenders are entitled to absolvitor, but I am not satisfied that the pursuers would have no title to sue on the agreement on the assumption that it was a lawful agreement. I think, if the agreement had merely regulated the amount of contribution, and the assessment had been in excess of this, it would be by no means clear that the pursuers could not found upon it. But this is to imagine a different case from what we have here.

LORD ADAM—I agree. I think your Lordship has put the case upon the right grounds.

LORD KINNEAR—I entirely agree with all that your Lordship has said, and have nothing to add except that, if the agreement could be construed as meaning that the Parochial Board should be bound to contribute towards the expense of the special water supply a sum not exceeding the amount which would be raised by an assessment on one-fourth of the value of land, then I do not say that effect could not be given to it. But I quite agree with your Lordship that that is not the meaning of the agreement. It is not an undertaking to contribute a sum, but to levy an assessment.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, and assolizied the defenders.

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