*Tuesday, November 30.*

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## LEITH DOCKS COMMISSIONERS *v.* MAGISTRATES AND COUNCIL OF LEITH.

*Burgh—Magistrates and Council—Powers—Costs of Opposing Bill in Parliament—Application of Public Health Assessments — Public Health (Scotland) Act* 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 95.

The Public Health (Scotland) Act 1867 by section 95 authorises the local authority to impose assessments to meet the expenses incurred by them "in executing this Act."

The City of Edinburgh introduced into Parliament a bill, the purpose of which was, *inter alia*, to have the burgh of Leith amalgamated with and made part of the city. The Magistrates and Council of Leith successfully opposed the amalgamation.

*Held* that they were not entitled to charge the expenses incurred by them in opposing the amalgamation upon the assessment levied by them as Local Authority under the Public Health Acts.

*Statute — Interpretation of Statute — Whether Applicable to Scotland—Municipal Corporations (Borough Funds) Act* 1872 (35 *and* 36 *Vict. c.* 96).

*Opinions* (*per* Lord Justice-Clerk and Lord Pearson) that the Borough Funds Act 1872, enabling governing bodies in certain cases to apply the funds or rates under their charge in promoting or opposing bills in Parliament, applies to Scotland.

In November 1896 the Commissioners for the Harbour and Docks of Leith, incorporated by "The Leith Harbour and Docks Act 1875," presented a note of suspension and interdict against the Magistrates and Council of the Burgh of Leith as such, or as coming in place of and as representing The Commissioners of Police of the Burgh of Leith, acting under the Burgh Police (Scotland) Act 1892, and as Local Authority under the Public Health Act 1867, and Acts amending or extending the same. The complainers prayed the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents from assessing, demanding, and levying, or proceeding to carry out a resolution by them to assess, demand, or levy, under or in virtue of the Public Health Acts, any rate or assessment on the properties of the complainers within the said burgh, or on any rental or valuation thereof, to be applied directly or indirectly in or towards payment, in whole or in part, of the expenses incurred by the respondents in or connected with opposition by them to or in connection with the bill promoted by the corporation of the city of Edinburgh, in the session of Parliament 1896, for the extension of the boundaries of said city, and the amalgamation of the burghs of Leith and Portobello therewith, or in or towards payment of money borrowed, or to borrowed by them, for the purpose of paying said expenses."

The following epitome of the circumstances of the case and the contentions of parties is taken from the note to the interlocutor of the Lord Ordinary (PEARSON):—"In the Parliamentary Session of 1896 the Corporation of Edinburgh promoted a private bill for the extension of the boundaries of Edinburgh, which became the Edinburgh Extension Act 1896. As originally presented, it proposed to extend the boundaries of Edinburgh over Leith, Portobello, and a considerable area of the county. Various petitions were lodged by opponents of the bill; and, among others, a petition by the Provost, Magistrates, and Council of the Burgh of Leith, objecting to the inclusion of Leith, for reasons fully stated in the petition. The Committee of the House of Commons, without calling on the Leith authorities to lead evidence, sustained their objection to amalgamation, and Leith was dropped from the bill, together with a part of the county lying to the eastward of it.

"There remained, so far as Leith was concerned, only certain questions as to a portion of the county territory lying to the west amounting to about 122 acres, upon part of which Leith had recently erected a fever hospital at a cost of about £50,000. Leith desired this territory to be excluded from the bill and to remain in the county, mainly on the ground that, looking to the effect of the bill otherwise, this was the natural and indeed the only direction in which Leith could extend. Mainly on this ground Leith followed the bill to the House of Lords, but unsuccessfully. There were, however, certain amendments added to safeguard the position of Leith, as regards the fever hospital and the sewer connected with it.

"The parliamentary opposition cost the Magistrates and Council of Leith about £3500, by far the larger part of which was the cost of the proceedings in the Commons. They have now, acting as the Public Health Local Authority, resolved to pay the whole of this sum out of the Public Health Assessment, in equal instalments over a period of five years; and they have added to their Public Health Estimate for the year current when this note was presented, a sum of £700 in pursuance of that resolution.

"The Leith Harbour and Dock Commissioners now seek to have the Corporation interdicted from carrying out that resolution. The Commissioners are statutory owners of the harbour and docks of Leith, as well as some small properties outside the harbour and docks; and their valuation amounts to a sixth or a seventh of the entire valuation of the burgh. They stand in this peculiar position, that while they are liable to be assessed on the harbour and docks for public health purposes, they are by statute exempt from the Burgh

General Assessment, and also from assessment under the Roads and Bridges Act. The Burgh General Assessment falls on occupiers only; the Public Health Assessment on owners and occupiers in equal proportions.

"The respondents say that they levy assessments under these and various other statutory powers, and that in the exercise of their discretion as trustees for the administration of those statutes, they have elected that the costs in question should be borne by the assessments levied under the Public Health Acts. Their reasons for doing so they explain to be (1) that the bulk of the case for the City of Edinburgh was rested on public health grounds; and (2) that the assessment being leviable equally from owners and occupiers, the burden would be distributed equitably on the ratepayers of the burgh.

"The objection stated by the complainers is that this course of procedure is *ultra vires*. They rest this on two grounds—(1) On the provisions of the Municipal Corporations (Borough Funds) Act 1872 (35 and 36 Vict. cap. 91); and (2) on the general law."

On 16th July 1897 the Lord Ordinary pronounced the following interlocutor:—"Suspends the proceedings complained of, and interdicts, prohibits, and discharges the respondents from imposing and levying, and from proceeding to carry out a resolution to impose and levy, on the complainers in respect of their properties within the Burgh of Leith, any rate or assessment as under the Public Health Acts, in so far as the same is to be applied directly or indirectly in payment of the expenses incurred by the respondents as mentioned in the prayer of the note; or in payment of the one-fifth thereof effeiring to the year ending Whitsunday 1897; or in payment of money borrowed or to be borrowed by them for the purpose of paying said expenses, and decerns."

*Note.*—[*After statement of circumstances as above*]—"First, as regards the Borough Funds Act. So far as appears, that has never been made use of in Scotland since it was passed, and no procedure was taken under it in the present case. The complainers maintain that it applies to Scotland, and that it prescribes an exclusive code of procedure under which alone municipal bodies in Scotland, since the passing of that Act, can apply their funds in defraying parliamentary costs. If the Act applies, the mode of obtaining the consent of the ratepayers in the district is prescribed by reference to the English Local Government Act 1858. Now, the first question is whether the Act of 1872 applies to Scotland. I have said that it has never, so far as known, been acted upon in this country, although the reasons for it apply as much in Scotland as in England. But it is a general rule in the interpretation of statutes that they apply to the United Kingdom, unless their scope is limited by express terms or by necessary implication. Now, the language of this statute is certainly most inappropriate for use in Scotland. The statutes to which it refers are entirely English, and it prescribes a procedure which is purely English, and which was introduced by an English public general Act. But there is one clause in it which shows that the mind of the Legislature was directed to the question of the extent of its application. The eleventh section says expressly that 'this Act shall not extend to Ireland.' Such an exception is not conclusive as to the Act extending to Scotland, because it might be that an Act plainly applicable in its language only to England and Ireland might not be held to apply to Scotland by a mere exclusion of Ireland. Here I see no impossibility in working out the Act in Scotland, and as the reason for it applies wherever municipal bodies exist, it seems to me that the fact that Ireland is expressly excluded affords an argument of some weight to show that Scotland is within the Act.

"A leaning in favour of this view was indicated by the judges in the case of the *Perth Water Commissioners*, and on the whole I am disposed to adopt it.

"The next question is, whether the statutory procedure is exclusive, or whether parliamentary expenditure can still be justified on grounds which would have been sufficient if the statute had not passed. Now, the statute has a saving clause, section 8, which says that nothing in the Act shall take away or diminish any right or power possessed or enjoyed by any governing body. The question whether this will suffice for the respondents is a somewhat narrow one. But, on the whole, I am prepared to adopt the conclusion arrived at by the late Master of the Rolls in the *Brecon* case, L.R. 10 Chancery Division, 204, and to hold that the statute, while it applies to Scotland, does in its saving clause keep alive the existing powers and rights of municipal bodies in this particular.

"I must therefore consider what is the respondents' position apart from that statute. Are they entitled to pay these parliamentary costs out of funds in their hands, and in particular out of the public health assessment? Now, these are two different questions, and I shall deal with them in their order.

"The general question whether a municipal corporation is entitled to defray parliamentary expenses out of the public moneys has often been canvassed, and the rule which has been adopted (subject to certain qualifications) is that the costs will be allowed if they were incurred in the course of a reasonable administration of the trust. If they were not so incurred they cannot charge them at all. I presume that even the 'common good' would not be liable to a charge of this nature unless the authority were prepared to show and did show that the act was one of reasonable administration. But if they show that, then I think in the general case, and apart from questions which may arise as to burdening a particular assessment with it, the rule is as I have stated.

"Now, in this connection there are several tests of the reasonableness of the adminis-

tration which has led to the expenditure. It is a favourable circumstance to begin with, that it was incurred in opposing and not promoting a bill. Then the success or failure of the parliamentary action taken is an important consideration; and here the opposition of Leith was to a very large extent successful. Further, one must have regard to the nature of the proposals which are resisted, and here there is much to be said for the view that the respondents were defending not merely their corporate existence but the separate existence of the burgh of Leith as such. It would not be sufficient if they had merely defended their personal dignity or their personal administration, nor even (in the narrower sense) their own existence as trustees; because, as has been said, a trustee, unlike an individual, has no vested interest in his own existence. But the proposals of Edinburgh went much further. Whatever word may be used as describing the effect of these proposals on Leith, there can be little doubt that the union which was contemplated would have meant in several important particulars the absorption of Leith by Edinburgh. The basis of the whole Act was the extension of the boundaries of Edinburgh, and although the old names would doubtless have been continued for convenience, Leith would (from the municipal point of view) have counted as so many wards of Edinburgh. Then again the attitude of the community is not unimportant, and in the present case I am informed that, except one gentleman, there are no ratepayers taking any objection other than the present complainers, and that is the more significant because in the second part of the case, which I shall deal with separately, the interest of the complainers is diametrically opposed to the interests of the general ratepayer.

"I do not think that the conclusion at which I arrive on this part of the case runs counter to any of the authorities which were quoted.

"This is a case of successful opposition to parliamentary procedure, and that is the strongest case for acknowledging the right to charge the costs upon public funds. And although this will not always be allowed, the cases where it has been refused have proceeded on the construction of statutory words, which have been held to exclude the power, as in the case of the *Mayor of Sheffield*, Law Rep. 6 Q.B. 652.

"But it does not follow that the Town Council, as the Local Authority under the Public Health Act, are entitled to defray this expenditure wholly out of the Public Health Assessment, which is what they have resolved to do; and indeed they have already debited the whole against the Public Health Account, though they spread the charge over five years. That seems to me a very different question, not depending on the same considerations as the other, and a question of really much narrower scope, It does not lie on the complainers to point out what other sources of payment may be available to Leith if this source is closed to them. It may be that the common good would be available; and that would extinguish the amount in about seven years instead of five. It may be that the expenses could be allocated over other funds. But the only proposal which the complainers have to resist is the proposal made to defray all out of the Public Health Assessment. I note that at this part of the case the complainers part company with the general body of ratepayers, whose interest it is, if the charge is to be allowed at all, to have it laid on over the largest possible area. Still the complainers have obviously a title and interest to raise this question; and they plead that when a body of persons in the respondents' position seek to lay a charge of this kind on a statutory assessment, they must show that it is within their statutory powers.

"I may observe that at this point the argument that was urged for the respondents upon the prior part of the case will not serve them, namely, the argument that they were defending their trust. For if they had been absorbed into Edinburgh, or amalgamated with it, their existence would have been brought to an end in a great many more capacities than as public health authorities. And therefore though that argument might warrant them, if it were otherwise legal to do so, in laying the costs proportionally on the various rates in their hands, it would not entitle them to lay them all on the Public Health rate. Nor do I think it avails the respondents on this point to say that the public health administration was affected by the parliamentary proposals. Their public health administration in the past was certainly criticised, and one may say attacked. No doubt that might bear upon the prosperity of Leith regarded as a residential town, and in that sense they were, as guardians of the interests of Leith, entitled to vindicate its amenity. But, in the main, that was a personal matter, which affected only the administrators themselves, who were alleged to have been lax in their duty. Even the contention that this rate has been selected by the Magistrates because it operates more fairly than any other which they might have chosen, will not carry the respondents very far. On that point they say, in the first place, that it brings in the owner instead of leaving the occupier to pay it, as would have been the case if they had laid it on the Burgh General Assessment. Now, where there is difference of incidence between two assessments, I must assume the difference is founded on good reasons; but these reasons do not touch the question whether it is more fair that the one assessment or the other should pay for these parliamentary costs. The one thing has no connection with the other. Nor is it very important to my mind that this enables them to bring in the Harbour Commissioners, who would otherwise pay no part of the expenses. These subsidiary reasons seem to me rather to weaken the respondents' case on the question under the statute; for if they are right under the statute, they require no such collateral reasons for their action. The assessment

in question has been imposed by the magistrates as the Public Health Local Authority, and therefore I assume they imposed it on the footing that the expenses which it is to meet were expenses incurred by them as such Local Authority.

"Now, to begin with, I entertain considerable doubt as to whether it is made out that any of the expenses were in fact incurred by them as Local Authority under the Public Health Acts; and I cannot see how it can be successfully contended that all of them were so incurred. In the first place, the petitions to both Houses of Parliament were not in their names as Local Authority, but as the Provost, Magistrates, and Town Council of Leith. In that capacity, or as Police Commissioners, they are no doubt the Local Authority under the Public Health Act, but they have distinct powers as Local Authority, and the mere mention in the petitions of the fact that they hold that separate position does not seem to me to make out that the petitions were presented by them in the capacity of administrators of Public Health. But further, the bill as introduced and as passed does not seem to affect Public Health administration, either in the sense or altering the general law or of diminishing the power of the Local Authority here over their district. What it proposed was to enlarge the body which should administer the same set of public statutes. Possibly it made the duties of individual members of that body more onerous; but it was not shown by Leith that any of the proposals of Edinburgh would tend to impair the efficiency of the Leith Public Health administration, or would even increase the Leith Public Health rate. The bill did not interfere with the Leith Public Health administration in the sense in which a bill might have interfered with it had it affected sewers or any other part of the Public Health equipment. I think that the statements of the respondents on record show that the bill aimed mainly at amalgamation, and that in challenging Edinburgh on the Public Health question, which is said to have bulked largely in the evidence, they did so by way of reply to the case made by Edinburgh, to the effect that it was one of the reasons for amalgamation that the Leith administration of Public Health had been lax in the past. That no doubt put the Leith administrators on their defence in that particular; but that is quite a different thing from saying that the expenses were incurred by them as Public Health Authority.

"But even assuming there was less of this personal element than I think there was, I am not satisfied that these expenses were in any sense incurred under the powers of the Public Health Act. I read the powers in these Acts fairly and even liberally in a question of this sort; and I find that by section 95, which I think was the only section founded on, the charges and expenses 'incurred by the Local Authority in executing this Act' may be defrayed out of the assessment called the Public Health Assessment. Were these Parliamentary costs incurred by the Local Authority in the execution of the Public Health Act? I must say I cannot hold that they were; and on that second and narrower ground I must negative the contention that they are entitled to lay the whole of them upon the Public Health Assessment, either all at once or by instalments, which, as I understand, is the only resolution at which they have arrived.

"In the view I take it is unnecessary to deal separately with the House of Lords expenses. I have been speaking of the main expenses of the opposition, but undoubtedly in another aspect of the case the expenses incurred in relation to the House of Lords discussion would deserve to be considered separately. By that time Leith had dropped out of the bill; it was not to be amalgamated; that was settled and done with. It is plain that in the House of Lords the main question was whether the 122 acres lying to the west, including Pilton Hospital, should not be left in the county, in order that Leith might have an opportunity of expanding in that direction; and on that question Leith was unsuccessful. But, as I have said, in the view I take it is not necessary to draw the line between expenses in the House of Lords and in the House of Commons. It follows from what I have said that I must grant interdict, but I should like parties, and especially the complainers, to explain their view as to the proper interdict to be granted in the circumstances, having regard to the prayer of the note."

The respondents reclaimed, and argued—They were entitled to pay the expense of the opposition out of the Public Health Assessments. Their existence as a Local Authority under the Public Health Acts was threatened by the bill. A public body were not entitled to expend the rates under their charge in promoting a bill to extend their jurisdiction—*Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050, or in watching and opposing general legislation—*Wakefield* v. *Commissioners of Supply of Renfrew*, November 25, 1878, 6 R. 259, but they were entitled, like any other body of trustees, to defend an attack in Parliament against their existence, and rights, and powers, and to defray the expense incurred by them out of the rates under their charge—opinion of Lord Justice-Clerk Moncreiff in *Perth Case*, *supra*, 6 R. 1050; *Brighton* v. *North* (1847), 16 L.J., Ch. 255; *Attorney-General* v. *Mayor of Wigan* (1854), 23 L.J., Ch. 429; *Attorney-General* v. *Mayor of Brecon* (1878), L.R., 10 C.D. 204. The fact that the opposition to the bill was successful showed that the defence of the Magistrates was reasonable. If the Court were of opinion that they were entitled to take a part of the expense out of the Public Health Assessment, it must be left to the discretion of the Magistrates to determine what proportion should be taken out of that fund, because if the discretion of the Magistrates was interfered with, the administration of their functions would become unworkable. The Magis-

trates were of opinion that the whole expenses should be paid out of Public Health Assessment, because (1) the bulk of the expense of opposing the bill had been incurred on public health grounds. The opposition might therefore be said to be in execution of the purposes of the Act—Opinion of Jessel, M.R., in *Brecon Case, supra*, L.R., 10 Ch. D. 215. (2) It was the most equitable course, as the Public Health Assessment was paid by both owners and occupiers, while the Burgh General Assessment was only paid by occupiers. It was said that the expenses could be paid out of the burgh funds, but their funds were insufficient for the purpose, and if the Court held that the Magistrates were not entitled to pay the expenses out of the burgh assessments, the result would be that the Council would be unable to resist Edinburgh's next attack on Leith. The Borough Funds Act 1872 did not affect this case, because (1) the Act did not apply to Scotland, as the phraseology was English and the machinery appropriate to England, and (2), even if the Act did apply to Scotland, the saving clause, sec. 8, exempted a case like the present.

Argued for complainers—The question to be decided was, whether it is competent for the Magistrates to charge on the Public Health rate the whole expense of a contest on the subject of the amalgamation of Leith with Edinburgh. The opposition of the Council of Leith to the bill did not rest on the ground of public health at all, but consisted of (1) an attempt to resist amalgamation, and (2) an attempt to obtain a larger territory for Leith. If Edinburgh had succeeded in its attempt to incorporate Leith, the public health of Leith would not have suffered in the slightest degree. The body of trustees would in that case have been enlarged, but the purposes and administration of the trust would have been left untouched. If the passing of the bill had necessitated the Water of Leith being turned into a sewer, the Magistrates, on the authority of the *Wigan* case, *supra*, might have justified their attempt to charge the expense of their opposition on the Public Health Assessment. But the passing of the bill would have no injurious effect on the public health of Leith, and therefore the expense of opposition to such a bill could not be considered expenses incurred by the Local Authority "in executing this Act" in terms of section 95 of the Public Health Act 1867. In the *Brecon* case, founded on by the respondents, the burgh funds were alone dealt with. The burgh funds in English boroughs were equivalent to the "common good" in Scottish burghs, and it might be that the Magistrates were entitled to defray the expense of their opposition out of the common good. But no case had been cited to support the view that magistrates were entitled to take the expense incurred in opposing a bill like that in question out of the burgh assessments, and the authorities were all the other way—*Perth Water Commissioners, supra; Wakefield, supra; The Queen* v. *Mayor of Sheffield* (1871), L.R., 6 Q.B. 652. Further, the Magistrates of Leith had taken no steps to ascertain if the ratepayers approved of their action, in terms of the Boroughs Fund Act 1872. That Act applied to Scotland, because (1) although the phraseology used was English there was no difficulty in interpreting it in accordance with Scottish law, and (2) Ireland was expressly excluded, and there was therefore a presumption that all the other parts of the United Kingdom were included. Section 8 of the Act must be read along with the context, and did not exclude the application of the Act to this case. In any view, the interlocutor of the Lord Ordinary should be affirmed.

At advising—

LORD JUSTICE-CLERK—The Magistrates and Town Council of Leith having incurred expense in opposing a bill in Parliament promoted for the purpose of amalgamating that burgh with the city of Edinburgh, resolved to charge the expenses of the opposition against the Public Health rate, which they are authorised to levy under an Act of Parliament under which they have powers for the maintenance of the health of the community. They appear to desire to do this mainly because they will thus be able to throw a considerable proportion of that expense upon the property of the Leith Dock Commissioners, who are exempted from the ordinary burgh and road rates, I suppose because they provide their own police, ways, and similar expenses out of their own funds.

The Leith Docks Commissioners resist this impost, and the Lord Ordinary has held that they are entitled to interdict. I am of opinion that the decision of the Lord Ordinary is right.

I do not enter here upon the question whether the reclaimers would have been entitled to defray these expenses out of any other funds in their hands, or out of any other rates. It is probably an expenditure which at common law they might have been justified in defraying out of the common good. On the assumption that the community were at one with their representatives in the policy they adopted, the fact that their proceedings were entirely those of defence against a proposal to absorb their burgh might be ground for saying that income of their property could be applied to meet the expense. I agree with the Lord Ordinary that such a case is the strongest there can be for allowing the expense to be charged on public funds, and that unless there be some statutory exclusion of power in the particular case, the payment of the costs out of the common good of the burgh could not be successfully resisted by a section of the citizens. But here the proposal is to place the whole of such expenses upon a statutory assessment imposed for defined statutory purposes and under statutory powers only. In plain words, an assessment, the purpose of which is the promotion and maintenance of the

health of the community, is to be taken and applied in a way having no direct connection with public health at all, the question which was fought out in the dispute giving rise to the expense being whether Leith was to retain its status as a separate burgh under its own municipal government. Accordingly, they appeared as petitioners in Parliament, not as a public health authority, but as the Provost, Magistrates, and Town Council of Leith. The bill which they were opposing would have had no effect upon the administration of the Public Health Act. It was not and could not be any part of their case that the passing of the bill would cause detriment to the public health administration in their area. It is true that questions as to health administration seem to have had prominence in the parliamentary contest, but that did not constitute the contest one upon health administration. That it certainly was not in any true sense.

The Public Health rate was intended by the Legislature to be applied in executing the Public Health Act—that is, in carrying out those operations of inspection, disinfection, isolation, and many kindred matters directly within the scope of sanitary work. I cannot hold that opposing a bill in Parliament, and the success of which could not in any way stop or hinder the "execution" of the Public Health Act, was itself an execution of the Act, and it is charges and expenses "incurred . . . in executing the Act," and such only, that may be defrayed out of the assessment called the Public Health Assessment.

Taking this view of the case, it is unnecessary to enter upon the question whether the Borough Funds Act of 1892 applies to Scotland. If it were necessary to decide that question, I should be inclined to hold that it does so apply. I am unable to see that by any necessary implication Scotland is excluded, while Ireland is excluded in express terms. The fact that sufficient care may not have been taken to make the procedure conform to Scots law and practice, is not of itself sufficient to prevent the application of an Act to Scotland. But, as I have said, a definite decision upon that matter is unnecessary, holding as I do that as the reclaimers have proposed to do with the Public Health Assessment what they are not entitled to do, their proposal not being in accordance with the statutory provision in regard to that assessment. The judgment reclaimed against is right, and ought to be adhered to.

LORD TRAYNER—The question raised by this action of suspension and interdict is, whether the respondents are entitled to charge upon the assessments levied by them under the Public Health Act the expenses incurrrd by them in opposing a bill introduced into Parliament by the city of Edinburgh, the purpose of which was to have the burgh of Leith amalgamated with and made part of the city. The Lord Ordinary has decided this question against the respondents, and I think he has rightly done so. I agree with the respondents' contention, that a burgh or corporation is entitled, out of the funds belonging to the burgh or corporation, to defend its existence, or any of its property or privileges when threatened or attacked. There is ample authority for that proposition, and a good deal of it was cited to us. But to admit that proposition does not aid the respondents in the contention that they are entitled to charge expenses so incurred out of all or any of the funds which they are called on or authorised to levy and administer. A corporation, like a body of private trustees, cannot defend the existence, property, or privilege of one trust, out of the funds belonging to a different trust. But that is, in effect, what the respondents propose to do; for it is their contention that they may defend the burgh of Leith and its privileges at the expense of the assessment levied under the Public Health Act. Now, that assessment can only be levied and expended according to the terms of the statute which authorises it to be levied "in executing this Act." It was said that these words must be construed liberally, as covering more than the purposes expressly mentioned in the Act, and reference was made to the judgment of the Master of the Rolls in the *Brecon* case as supporting this view. I agree. I think executing the Act, or executing the purposes of the Act, may quite reasonably be read as meaning more than the purposes expressly set forth. This was also the opinion of the Lord Justice-Clerk in the case of the *Perth Water Commissioners*. But the "purposes" to be covered by such an expression must (if not expressly mentioned) be such as are incidental to, or arise necessarily out of, the purposes expressed, or be involved in the due and reasonable administration of the Act. But that again being conceded, does not advance the respondents in their argument to support the right which they claim to have, and which by their resolution they have declared their intention to exercise. The expenses, now in question, were certainly not incurred in "executing" the Public Health Act, nor were they incurred in proceedings arising out of or incidental to its administration. Indeed, the bill in Parliament had nothing more to do with the Public Health Act than it had with the Burgh Police Act, the Roads and Bridges Act, the Registration of Voters Act, the Registration of Births Act, or many others, under all of which the respondents were equally the local authority charged with the execution of their provisions. What the bill in question was intended to effect was the absorption of Leith in Edinburgh, and by consequence the transference to Edinburgh of the administration of all the statutes which Leith, so long as it was a separate burgh, was authorised to administer. But neither the Public Health Act nor any other special Act was asked or desired to be transferred in its administration from the one burgh to the other. The purpose of the Act was to extinguish Leith as a separate burgh, and make it a part of Edinburgh—nothing more nor less. The ex-

penses of opposing this may very well form a charge against the funds and property of the burgh—its common good—but cannot, in my opinion, be charged against a fund levied under a special Act, and devoted by that Act to special purposes. I think, therefore, that the reclaiming-note should be refused.

LORD MONCREIFF — The resolution of which the suspenders complain in this process is a resolution of the respondents, the Magistrates and Town Council of Leith, by which they resolved that *the whole* of the expenses incurred by them in opposing the Edinburgh Extension Bill should be taken from the Public Health Assessment. That is the only resolution before us ; and what we have to decide is whether the respondents are by law entitled to carry it into effect.

They profess to impose the assessment as Local Authority under the Public Health Act of 1867, under the assessing powers conferred by that statute, as being expenses incurred by them "in executing this Act" (sec. 95). In order to justify a statutory body like the respondents in paying such expenses out of a rate levied by them under statutory powers, they must show that the purpose for which the money was expended was in a reasonable sense incidental to the statutory purposes for and to which they are entitled to levy and apply the statutory rate ; and further, that the money was expended in the proper and reasonable administration of the trust vested in them under the rating statute. In my opinion the respondents have failed to do so.

The respondents are the municipal corporation of Leith ; they also are the statutory authority for the execution of various statutes : for instance, The Burgh Police (Scotland Act 1892, the Roads and Bridges (Scotland) Act 1878, Public Health Act 1867, and Acts amending the same, the Cattle Diseases (Scotland) Act, the Water of Leith Purification Act 1889, &c. Under all those statutes they have powers of assessment for the special purposes of the statutes.

Their contention, stated in its broadest form, appears to be that they are entitled in their discretion to take those expenses incurred in defending their existence as a corporation out of any one of the rates which they are empowered to levy under the various statutes, or proportionately from them all. The Public Health rate has been selected as the most suitable, presumably because it is payable both by owners and occupiers, and thus embraced the complainers, a wealthy body who would otherwise have escaped liability ; but according to the respondents' argument they might in their discretion have selected any other rate. Now, I think that before such expenses can be taken out of any one of these rates, it must be shown that the opposition to the bill was truly incidental to the execution of the particular statute in question.

The respondents have, in my opinion, failed to show that their opposition to the Edinburgh Extension Bill was in any proper sense incidental to the execution of the Public Health Acts. They do not pretend that their opposition was solely in connection with those Acts, though they say that it was partly connected with them. Now, the leading purpose of the bill was to extend the boundaries of the city of Edinburgh and amalgamate Edinburgh and Leith. If it had been successful as regarded Leith, the various statutory trusts held by the respondents, and in particular their position as Local Authority under the Public Health Acts, would undoubtedly have been affected. They would have been merged in the Corporation of Edinburgh as extended. But the bill did not in any proper sense deal with or affect the execution of the Public Health Acts. It proposed to alter the constitution of the trust, but only in the same way as it proposed to alter the constitution of the other statutory trusts held by the respondents, viz., by absorbing the Corporation of Leith with all its statutory duties, powers, and liabilities. The leading object of the bill was amalgamation. The leading object of the respondents' opposition to the bill was to defend their own corporate existence. This I assume was a perfectly legitimate object ; but it does not follow that they are entitled to charge the expenses against any of the rates which they are entitled to levy. The expenses of their successful defence of their corporate existence may form a good charge against the common good. On that I offer no opinion, certainly no adverse opinion ; but I am clearly of opinion that the respondents are not entitled to levy all these expenses on the Public Health rate, with which they had no closer connection than this, that the corporation happen to be the authority entrusted with the execution of the Public Health Acts, just as they happen to be Commissioners of Police.

The true question which we have to decide is not whether the respondents were entitled to defend their corporate existence, but whether the expenses of their opposition are to come out of this particular fund. If the bill had proposed merely to substitute another body as local authority under the Public Health Acts, leaving the respondents' corporate position untouched, the question would have been different, and perhaps more difficult. Even in that case I think the balance of authority would be against the respondents, but that is not how the question stands. In the bill, as brought in, public health was not mentioned expressly either in the preamble or clauses. The expediency or the reverse of the proposed transference of the execution and administration of the Public Health Acts to the Corporation of Edinburgh, as extended, was no doubt used in correspondence and argument for and against the bill, but only as one among many reasons for or against the complete amalgamation of Edinburgh and Leith. This is very fairly stated by Mr Hunter, town clerk of Edinburgh — "We believed that the administration of the whole united burghs would be better managed by a large central

administration than it could be separately by two independent councils. Evidence was led in regard to that and other matters, because that matter was expected to extend to all departments of municipal administration, including public health. Leith took up the position that they had managed the department of public health quite satisfactorily, and could continue to do so. For what they actually said and did I refer again to the report of the proceedings. Among other matters that arose for consideration was the question of the jurisdiction of the courts, the abolition of the old gas and water trusts, and the advantage of a single authority for purposes of assessing and borrowing, and also the advantages of amalgamation with regard to public parks and the tramway system."

I am therefore of opinion that the assessment, so far as laid on for the purpose of meeting the respondents' Parliamentary expenses, is illegal, and that, as I read it, is the meaning of the Lord Ordinary's interlocutor.

The question whether the Public Health rate can be made available for a proportion of the expenses is not before us. A proposal by a municipal corporation to defray the expenses of defending an attack on their existence proportionately out of separate rates levied under statutes dealing with diverse and unconnected purposes of which the corporation are *ex officio* administrators, would be, so far as I know, novel. My present opinion is against the admissibility of such a proposal, and I see great difficulties in the way of giving it practical effect supposing it to be legal.

As to authority, this case is novel, and none of the authorities cited directly apply; but they are valuable as illustrating the principles on which such a use of statutory funds is permitted or forbidden. Certain points may be held as settled. The fact that the expenditure results in benefit to the burgh or undertaking is not enough; it must be properly incidental to the execution of the trust. On the other hand, want of success will not of itself deprive trustees of their right of reimbursement.

Express statutory power to incur such expenses is not essential; it may be implied. Opposition to a bill which may affect the trust is more favourably regarded than promotion of a bill with a view to obtaining extended powers. Defence of the property of the trust or the estate administered will in general warrant such an application of the rates if the opposition be proper and necessary.

Opposition to a proposed alteration of the constitution of the trust, or a limitation of the powers of the trustees, is in a more doubtful position; and this brings me to consider the case of the *Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050. That was a unanimous decision of the Second Division of this Court affirming the judgment of the Lord Ordinary; and I apprehend that if it applied directly to the present case we should be bound to follow it unless we thought it required reconsideration by a fuller Court. If the question which we had to decide proceeded on the footing that the expenses in question were incurred in opposition to a bill which merely proposed to alter the constitution of the Local Authority of Leith by amalgamating it with the Local Authority of Edinburgh—the case of the *Perth Water Commissioners* would be closely in point. In that case the expenses in question were incurred by Water Commissioners acting under the Statute of 1829, in opposition to a bill, one of the purposes of which was the entire abolition of the trust created by that statute; and yet the Court held that those expenses did not form a proper charge against the rates which the trustees were empowered to levy for the purposes of their Act. The only distinction which I can see between that case and the case which I have supposed, is that there the attack came from within the jurisdiction of the trustees, while in the latter, *ex hypothesi*, it came from without.

Six months before that decision was given the Master of the Rolls, Sir George Jessel, delivered judgment in the case of the *Attorney-General* v. *Mayor of Brecon*, December 1878, L.R., 10 Ch. Div., p. 204. The case is not referred to in the report of the *Perth Water Commissioners* v. *M'Donald*, and probably was not reported when the decision in that case was pronounced. This is to be regretted, because there are certain statements of the law in the opinion of the Master of the Rolls which is hard to reconcile with the opinions of the judges in the other case. He attaches greater weight than they do to the right of a corporation to defend, at the expense of the corporate funds or rates, an attack on its existence or powers; and expresses an opinion that such a right is necessarily incident to their position as trustees and the due execution of their trust. It is to be observed, however, in the first place, that in addition to that ground of judgment the corporation maintained that the bill which they opposed would, if passed into law, be prejudicial to the rights of the inhabitants of the borough, and legalise the creation and continuance of public nuisance within the borough; and secondly, that however deserving of respect the opinion of that eminent Judge necessarily is, we have the decision of this Court by which, as matters at present stand, we must be ruled if it cannot be reconciled with the English decision.

But, as I have already said, I do not think it is necessary to pronounce an opinion upon that point, because the case put to us is much more simple; namely, whether the respondents are entitled to charge all the expenses of defending their Corporation upon this rate.

In the view which I take of the case, it is not necessary to decide whether the Municipal Corporations Borough Funds Act 1872 applies to Scotland; or if it applies, whether the 8th section takes the respondents out of the operation of the Act.

On the whole matter, I am for adhering to the Lord Ordinary's interlocutor.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against; and decern.

Counsel for the Complainers — Sol.-Gen. Dickson, Q.C. — Guthrie, Q.C. — Sym. Agents—Torry & Sym, W.S.

Counsel for the Respondents—Balfour, Q.C.—Salvesen. Agents — Irons, Roberts, & Company, W.S.

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*Tuesday, November* 30.

## FIRST DIVISION.

[Dean of Guild Court, Edinburgh.

## SANDERSON'S TRUSTEES *v.* YULE.

*Property — Right of Property in Roof of Tenement— Whether Owners of Separate Rooms in Attics Joint-Owners or Separate Owners of Roof.*

The proprietor of a flat in a tenement, and of an attic room in an upper storey, presented a petition to the Dean of Guild for authority to construct a storm window in the room. He was bound by his titles "to uphold and keep in repair a proportional part of the roof of the said tenement."

Objections were lodged by two other proprietors of attic rooms. The titles of one contained an obligation "to maintain and uphold the roof," and of the other the burden "of supporting and upholding the roof . . . proportionally with the other proprietors."

It was admitted that the expense of keeping the roof in repair had hitherto been borne by the proprietors of the tenement generally. The respondents objected to the proposed alterations, on the grounds (1) that the roof was the joint property of the proprietors of the attic storey, no one of whom could make any alterations thereon without the consent of the others; (2) that the proposed alteration would increase the burden of upkeep of the roof.

*Held* (1) that the proprietor of each attic was also proprietor of that part of the roof over his attic; (2) that an increase in the expense of upkeep of the roof was not a relevant objection to alterations which would not interfere with the stability and efficiency of the roof.

*Opinion reserved* as to whether such increase in the expense of upkeep would be a good objection to a claim against the other proprietors for a proportional share of future repairs.

A petition was presented in the Dean of Guild Court of Edinburgh by the marriage-contract trustees of Mr and Mrs Sanderson, proprietors of certain subjects in 9 Antigua Street, Edinburgh, praying the Court "to grant warrant to the petitioners to construct a storm window in the garret-room, being the innermost upon the east side of the passage leading north from the common stair at No. 9 Antigua Street." The petitioners were proprietors of the dwelling-house forming the northmost half of the third flat or storey above the cellars in the tenement No. 9 Antigua Street, with the attic room described in the prayer of the petition quoted above.

Answers were lodged by Mr Alexander Yule, proprietor of the main-door flat of the tenement, consisting of shops with cellarage beneath, and also of the first flat above it, with a garret in the upper storey.

Answers were also lodged by Mr William Geddes, proprietor of the fourth storey of the tenement, and of two garret rooms immediately above.

The titles of the petitioners and of the two respondents to these subjects contained respectively the following clauses:—

A disposition of the petitioners' property granted in 1805 described the subjects conveyed as "All and Whole that dwelling-house, being the third storey or flat above the cellars in the third tenement built and erected by the said James Moffat and the said James Besillie and his trustees, in that street called Antigua Street, . . . the said dwelling-house consisting of four fire-rooms, kitchen, and closets, with the garret-room in the upper storey, being the innermost upon the east side of the passage, also two cellars. . . . But declaring that the said John Fraser and his foresaids shall in no respect be liable to uphold or keep in repair the roof of the foresaid tenement of which the dwelling-house hereby disponed is a part, in respect that the same is wholly defrayed by the other proprietors of the said tenement."

The description remained unchanged throughout the progress of titles except with regard to the upkeep of the roof.

By a precept of poinding and arrestment in 1812 at the instance of one of the respondent William Geddes' predecessors, "In respect it was not instructed that the whole expense of maintaining the roof in question fell to be defrayed by the other proprietors of the tenement" Fraser was found liable for his proportion of one-fourth thereof.

Thereafter the titles bore that the house was disponed "under the declarations and reservations contained in the previous titles of said subjects; and notwithstanding of such declarations it is hereby specially provided and declared that our said disponees and their foresaids shall be liable to uphold and keep in repair a proportional part of the roof of the said tenement of which the said dwelling-house above disponed is a part."

In the titles of the respondent Yule the subjects as originally conveyed were described as "All and haill that dwelling-house, being the first storey or flatt in the southmost of the three tenements lately built and erected . . . the