favourable to a change where a minute could be lodged setting forth the amendments, and if approved of by the Court could be allowed to be lodged in process without interfering further with the original deed of constitution. This would seem to be preferable to lodging a completely new deed of constitution."

On 14th July 1903 the Court pronounced the following interlocutor:—"The Lords having resumed consideration of the petition, with the report of the Clerk, and heard counsel with reference to the amendments to the deed of constitution, Allow the petitioner to lodge in the present proceedings for the consideration of the Court at next calling a minute containing such amendments as in the opinion of the petitioner are calculated to improve the management of the affairs of the church and parish *quoad sacra* under the original deed of constitution, but excluding from said minute all such alterations as would in any way affect the rights and duties of the local trustees in respect of the obligation imposed upon them in the disposition of the church and manse respectively, and minute by the trustees, to maintain the fabrics, and remit to the Clerk to adjust with the agent for the Church the proposed amendments, subject to the approval of the Court."

The petitioner lodged a minute, and thereafter the Clerk of Teinds presented a second report, in which he stated that he could not recommend the proposed regulations.

On December 11th 1903, the Court having resumed consideration of the petition with the minute and second report of the Clerk of Teinds, pronounced an interlocutor remitting "to the Lord Ordinary to consider the petition and whole proceedings, to hear counsel thereon, and to adjust the amendments proposed to be made on the deed of constitution, and report to the Court. Proposed amendments of the deed of constitution were thereafter adjusted by the Lord Ordinary and reported to the Court, and the petitioner lodged a minute moving the Court to approve of the amendments of the deed of constitution as adjusted by the Lord Ordinary, and to grant warrant for a supplementary deed of constitution in terms thereof granted by the General Assembly or the delegation thereof, to be received by the Clerk and lodged in the process of disjunction and erection of the parish of Oban in order that the same might be acted on in time coming as supplementary to the existing deed of constitution. The proposed amendments provided for the election of a committee of three members of the Kirk-Session and six members of the Church, who generally were to manage the affairs of the congregation. Their relation to the trustees was determined by article 9, which was as follows:—"It shall, subject to the conditions underwritten, be lawful and in the power of the trustees to authorise the Church Committee, by minute signed by the chairman and the clerk to the trustees, to keep the church, manse, and appurtenances thereof in good order and repair, to superintend the seat-letting and to administer the proceeds of the same, and of the church collections for statutory purposes, provided always (1) that the upkeep of the church, manse, and appurtenances thereof shall be a primary charge upon the revenues of the church arising from seat rents and from special collections for statutory purposes; (2) that the trustees shall be entitled to require the Church Committee to make a special church collection for the upkeep of the said buildings at such time or times as they may think proper if in their judgment it is necessary so to do; (3) that the Church Committee shall upkeep said buildings to the satisfaction of the trustees, and in the event of their failing to do so the trustees may recal the foresaid authority to the Church Committee and resume the management of the financial and other business affairs of the church as if such authority had never been granted; and (4) that nothing herein contained shall in any way affect the rights and obligations of the trustees under the Act 7 and 8 Vict. c. 44, the charter of novodamus of 1st March 1867, under which they hold the church and burying-ground, the feu-charter of 6th March 1867, under which they hold the manse, and the said minute subscribed by them on 11th March 1867."

On 18th March 1904 the Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and whole proceedings, with the report by the Lord Ordinary, dated 15th March current, and relative amendments of the deed of constitution therein referred to, and minute for the petitioner, authorise and empower the Clerk to receive the supplementary deed of constitution when granted, the same being subject to the conditions therein expressed, and specially in article 9th thereof, and decern."

Counsel for the Petitioner—C. N. Johnston, K.C.—Constable. Agents—Menzies, Black, & Menzies, W.S.

COURT OF SESSION.

Thursday, March 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

INVERARITY *v.* COUNTY COUNCIL OF FORFARSHIRE.

Public Health—Special Drainage District—Assessment—Expense of Forming Special Drainage District—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 133.

Where a special drainage district has been formed in a county the County Council is entitled, under the

Public Health (Scotland) Act 1897, sec. 133, to levy on and within the special district an assessment for the purpose of raising the sum expended by the County Council in forming the special district prior to its formation, including therein the legal charges reasonably incurred in its formation.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 133, enacts—" . . . Where any special drainage district has been formed under this Act . . . the expense incurred by the local authority for sewerage or drainage within the same, or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment which the local authority shall raise and levy on and within such . . . special district."

John Duncan Iverarity, of Rosemount, Montrose, brought this action against the County Council of Forfarshire, concluding for declarator, *inter alia*—"(First) that a resolution of the said County Council at their meeting held on 5th October 1901, whereby, on a recommendation submitted as from the Brechin District Committee of said County Council, being the Local Authority under the Public Health (Scotland) Act 1897, and Acts therein incorporated, in terms of section 133 of the said Public Health (Scotland) Act 1897, they resolved to impose and did impose a special assessment to meet the expense of the sewerage and drainage incurred by the Local Authority within the special drainage district of Hillside during the year ending 15th May 1902, or for the purposes thereof, on all lands and heritages within the said special drainage district, at the rate of 7½d. per £ of valuation on the owners of such lands and heritages and at the like rate of 7½d. per £ of valuation on occupiers of such lands and heritages, was invalid, illegal, and *ultra vires* of the said County Council, and that the defenders were not entitled to impose the said assessment, and that the pursuer is not bound to pay said assessment or any part thereof, and the defenders ought and should be interdicted, prohibited, and discharged, by decree foresaid, from collecting or attempting to collect the said assessment, or any part thereof."

The pursuer was proprietor of Rosemount and Hedderwick, both of which estates were situated in the Brechin district of the county of Forfar.

The Brechin District Committee, acting under the authority of the Public Health (Scotland) Act 1897, took steps to form a special drainage district for Hillside. The pursuer and certain other proprietors objected to the formation of the special district and to the inclusion in it of any part of their lands. By interlocutor of the Sheriff, dated 27th August 1900, the Hillside district was formed into a special drainage district, and the area of that district, as ultimately determined by the Sheriff, included a large portion of the pursuer's lands.

It being necessary to provide for the payment of the expense of the formation of this district by an assessment, the County Council of Forfar, on consideration of a report of the Finance Committee on the Hillside Special Drainage District, by resolution dated 5th October 1901, "in terms of section 133 of the Public Health (Scotland) Act 1897, and of the Local Government (Scotland) Act 1889, imposed and hereby impose a special assessment to meet the expense of the sewerage and drainage incurred by the Local Authority within the said Special Drainage District of Hillside during the year ending 15th May 1902, or for the purposes thereof, and the sums necessary for payment of any money borrowed for sewerage purposes within the said special drainage district, on all lands and heritages within the said special drainage district, as the value of such lands and heritages is specified in the valuation roll completed and in force for the current year, and that at the rate of 7½d. per £ of valuation on the owners of such lands and heritages, and at the like rate of 7½d. per £ of valuation on the occupiers of such lands and heritages."

Notices of this assessment were sent to the various heritors, and a demand note was sent to, *inter alios*, the pursuer.

The pursuer appealed against this assessment to the Finance Committee of the County Council. His appeal did not raise any question of fact, but turned on the legal question whether the expenses attending the formation of the Hillside Drainage District were to be raised by an assessment laid on the Hillside district or by an assessment on the whole Brechin district.

The Finance Committee, by deliverance dated 22nd February 1901, dismissed the appeal.

The pursuer thereupon raised the present action.

The pursuer averred, *inter alia*, that no sewerage or drainage works had been as yet commenced in the said special drainage district; that (Cond. 3) the Brechin District Committee, in the years 1898-99 and during the year 1900 prior to 1st September, incurred expenditure principally, if not entirely, in legal expenses incurred by them in the proceedings before the Sheriff-Substitute and Sheriff and in attempts to get included in the special district certain lands, which were ultimately excluded from the special district. Such expenditure for the years 1898-1899 and 1899-1900 was met by a rate levied on owners and occupiers in the whole of the Brechin district, and the pursuer as one of such owners and occupiers has paid his share of such rate. It is averred the defenders have now transferred from the General Brechin District Account to the said Special District Account the said expenditure for the years 1898-1899 and 1899-1900, amounting to the sums of £35, 3s. 5d. and £155, 8s. 6d.

The pursuer also averred (Cond. 4) that, under colour of the resolution of the

County Council of 5th October 1901, "the defenders are about to levy the said rate and apply the proceeds thereof in payment not only of expenditure alleged to have been incurred in the year ending 15th May 1902, but also in payment of the expenditure incurred as aftermentioned and in previous years, and specially of the aforesaid sums of £35, 3s. 5d. and £155, 8s. 6d. Accordingly no assessment can be lawfully made on the special district."

The defenders averred, *inter alia*, that the estimate and plan for the proposed works in the Hillside district were approved of by the Brechin District Committee as the Local Authority for that district on 1st April 1902, but that the approval of the Board of Trade to the said plan was still awaited before the works could be commenced.

They stated (Ans. 3) that the expenses incurred in connection with the matter "were charged in the first instance against the Brechin District Public Health Account, the only account against which they could at that time be charged, and the expenditure so charged was defrayed out of the share assigned by the defenders to the Brechin district of the Local Taxation Grants as in relief of rates. Had this expenditure remained so charged the result in the end would have been that it would have been paid by the ratepayers throughout the whole Brechin district. But by the Public Health (Scotland) Act 1897, sections 133 and 135, it is provided, as it had previously been provided by the Public Health Act of 1867, that preliminary expenses incurred in connection with the formation of a special drainage district, though properly chargeable in the first instance against the General Public Health Account for the whole district, become, if and when the special district comes into existence, a proper charge against the Special District Account, and fall to be repaid to the Public Health Account out of the special rate leviable on the special district. The defenders accordingly passed the resolution of October 5, 1901, and authorised the transfer of the amount of the said expenditure from the District Public Health Account to the Special District Account, and the transfer was given effect to in the accounts for the year ending Whitsunday 1902. No additional legal expense was incurred by the District Committee in respect of lands scheduled but not included in the special district as finally designated."

The defenders admitted that they intended to levy the rate resolved on in the resolution of 5th October 1901, and to apply the proceeds in payment *pro tanto* of the whole expenses incurred in the formation of the Hillside Special District.

By interlocutor dated 7th July 1903 the Lord Ordinary (KINCAIRNEY) found that the resolution by the defenders, dated 5th October 1901, whereby they imposed the assessment set forth on record was *intra vires* of the said defenders, and valid; therefore assoilzied the defenders from the first conclusions of the summons, and decerned.

Opinion.—"This case has at first sight an appearance of complexity and obscurity, which to a large extent disappears on consideration, and it appears that the questions or question (for I think there is substantially only one) fall within a short compass.

"The pursuer is an heritor in the Brechin District of Forfarshire, and his property lies in whole or in part in the Hillside District, which forms part of the Brechin District. The Hillside District was formed into a special drainage district by interlocutor of the Sheriff pronounced in August 1900, and it became necessary to provide for the expense of that proceeding, amounting to £190 or thereby, the greater part of which consisted of legal or Court expenses. No question has arisen as to the amount of the expense, and there is no doubt that it has to be provided for by an assessment, the only question being whether the assessment should be laid on the Brechin District or on the Hillside District. The pursuer will require to contribute in either case, but the assessment falling on him will be considerably less if the assessment is spread over the whole of the Brechin District than if it is confined to the narrow area of the Hillside District.

"To meet that expense the defenders the County Council of Forfarshire, as the rating authority, imposed a special assessment. They did this by a resolution dated 5th October 1901, which is to be found in the print of the proceedings of the County Council between 5th October and 17th October 1901. This resolution specifies (1) the object of the assessment; (2) the time when the expense to be met by the assessment is stated to have been incurred, viz., 15th May 1901 to 15th May 1902; (3) the area of assessment, viz., the Hillside Special District; and (4) the rate of assessment, viz., 7½d. per £.

"Notices of this assessment were issued to the various heritors, and No. 7 of process is the demand-note which was served on the pursuer. It has not been disputed that the assessment intimated in this demand-note was correctly deduced from the resolution of 5th October, and expressed correctly the amount payable by the pursuer if that resolution was valid. But the pursuer was dissatisfied with the assessment, and he appealed against it. His appeal lay, under the statute (the Local Government Act 1889), to the Finance Committee of the County Council. It appears clearly that the pursuer's sole objection, and the only ground on which he appealed, was that the assessment was laid on the Hillside District instead of the Brechin District. I understand that his appeal raised no question of fact, but only the legal question as to the body to be assessed to meet the expense attending the formation of the Hillside Drainage District.

"I do not know whether that general question was proper for the consideration of the Finance Committee. I rather think it was not. I think that the function of the Finance Committee on appeal was only to deal with questions of detail arising on the demand-note. But however that may

be, the Finance Committee, by deliverance dated 22nd February 1902, dismissed the appeal.

"The pursuer then raised the present action, and it is necessary to attend specially to the very peculiar character of its conclusions. The main conclusion is the first, which is thus expressed, that it should be declared that the resolution of the County Council dated 5th October 1901, whereby they imposed 'A special assessment to meet the expense of the sewerage and drainage incurred by the local authority within the special drainage district of Hillside during the year ending 15th May 1902, or for the purposes thereof, on all lands and heritages within the said special drainage district, at the rate of 7½d. per £ of valuation on the owners of such lands and heritages, and at the like rate of 7½d. per £ of valuation on occupiers of such lands and heritages, was invalid, illegal, and *ultra vires* of the said County Council, and that the defenders were not entitled to impose the assessment, and that the pursuer is not bound to pay it.'

"This is a very peculiar conclusion, because if the resolution were to be challenged, it would seem that the natural conclusion would have been a conclusion for reduction of the resolution. There is, however, no conclusion in this action for reduction either of the resolution of 5th October 1901 or of the deliverance of the Finance Committee dismissing the pursuer's appeal against the demand-note following on that resolution. It may be that if the pursuer could make out that the resolution of 5th October was *funditus* null, as being *ultra vires* of the County Council, no conclusion of reduction might be necessary, but otherwise it would appear that the demand-note must be complied with.

"The main question whether the expense attending the formation of the drainage district falls to be levied from the Hillside District or paid otherwise—or rather whether it was within the power of the County Council to impose an assessment to meet that expense on the Hillside District—must, I take it, depend entirely on the 133rd section of the Public Health Act, 1897. Parties were, I think, agreed as to that.

"The 133rd section provides 'that where any special drainage district has been formed under this Act or any of the Acts hereby repealed, the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor, either before or after the passing of this Act, together with the interest thereof, shall be paid out of a general sewer assessment which the local authority shall raise or levy on or within such . . . district.'

"This section permits or rather directs special assessments on special drainage districts, whether they existed before the Act or were formed under the Act; and it is maintained that it authorised the assessment of which the pursuer complains. The pursuer maintained that it did not, and that on two grounds, (1) that it related only to expense incurred in special districts after they had been formed, and not to expenses incurred in these districts before they were formed or during the course of their formation; and (2) that the section did not authorise an assessment for expenses of litigation or other legal proceedings.

These contentions raise somewhat difficult questions. I think the general view on which the provisions as to special districts are framed is of this kind, that when certain parts of a county are separated from the rest and are accorded separate and favourable treatment to meet their special requirements, it is held to be fair that these districts should bear the exceptional expense thereby occasioned, and that such exceptional expense should not fall on the rest of the county; and, on the other hand, such special districts are exempted from the drainage expenses incurred in other parts of the county. Now, there must always be expenses attending the formation of a special district which are incurred before the district is formed. There are legal expenses without which the formation of the district cannot be effected; the authority of the sheriff must be obtained in the ordinary way; and there are or may be preliminary expenses of another kind, such as the cost of surveys and of various inquiries which have to be made; seemingly such expenses should fall under the general equitable rule just as much as exceptional expenses incurred in the district after it had been formed, and taken out of the rest of the county. The expense particularised in the section is for sewerage or drainage, under which word it might be difficult to include litigious and other legal expenses. But to these special words there are added the general words 'or for the purposes thereof,' which words, it is contended, are sufficient to include legal expenses and preliminary expenses. The section re-enacts section 93 of the Public Health Act 1867, where the same words are employed, and I was informed that they had been treated in practice as covering such preliminary expenses as are here in question. There does not seem much authority or precedent on the question. Reference was made to *Tolmie* v. *Parochial Board of Urray*, 8th June 1890, 17 R. 1027, and to *Ayr County Council* v. *Walker*, 8th June 1895, 3 S.L.T. 40, in which a similar question was brought before Lord Low, arising under section 93 of the Act of 1867.

"The pursuer referred to section 135, which relates to general assessments, and where the wider expression 'all charges and expenses' is used instead of the expression 'expense incurred for sewerage or drainage.' I do not, however, find that contrast sufficient, and I think that the language of section 133 is sufficiently wide, if due effect be given to the words 'or for the purposes thereof,' which are not in section 135.

"On the whole, I come to the conclusion that the resolution of 5th October 1901 gave in this matter due effect to the

statute, and cannot be declared to be *ultra vires* of the County Council, but was a good resolution, imposing the assessment on the heritors who reaped the benefit of the formation of the drainage district, and was within the competency of the County Council.

"The pursuer further maintained that the rate was bad on the ground that it was retrospective. I do not doubt that a rate may be relevantly objected to on the ground that it is retrospective. The pursuer quoted the case of *Saul* v. *The Wigton Rural Sanitary Authority*, November 20, 1886, 51 J.P. Cases, 406, where a rate imposed to pay a debt incurred fourteen years before was held bad for that reason.

"But I do not see how that objection can be entertained in this case. In the first place there is, I think, no record for it, neither plea, nor averment, nor conclusion on which the argument can be rested. It is a special plea dependent on special circumstances, and I think it cannot be entertained unless it is specially pleaded.

"Further, it seems impossible that it can be pleaded in support of the main conclusion. It seems impossible to maintain that the resolution of 5th October imposed a retrospective rate, seeing that it specially bore that the rate was imposed to meet expenses incurred during the year ending 15th May 1902.

"If the County Council seek to apply the sums raised under this resolution to different purposes, that would raise a totally different question. But there is in my opinion no such question before me.

"Besides, I am not at all satisfied that, even on the statement of the pursuer, the circumstances raise any question of retrospective rates. If they did, it may be that inquiry would be necessary, but I think that objection is not relevantly stated.

"It appears therefore that in this case there exists a valid resolution of the County Council imposing for the purposes therein mentioned a rate of 7½d. per £ on the property in the district of Hillside. It was within the power of the Council to impose it, and it is not said that it did not warrant the assessment laid on the pursuer and the demand note. There is no conclusion for reduction of it, and if the demand note be in accordance with it it is difficult to see how it can be objected to."

The pursuer reclaimed, and argued—The question was whether the County Council, having lawfully paid the expenses of forming the Hillside district into a special drainage district out of the funds of the Brechin district, were entitled, after the new special drainage district was formed, to impose an assessment on the new special district for the expenses so incurred and paid. This question could competently be raised by a declarator, and reduction of the resolution imposing the assessment was unnecessary—*Wordie's Trustees* v. *County Council of Lanarkshire*, November 22, 1895, 23 R. 168, 33 S.L.R. 91. Sec. 133 of the Public Health Act 1897 did not authorise the carrying forward against the new special district, on its creation, of all expenses previously incurred, but only expenses incurred in the special district after its formation. The scheme of the statute, where equitable considerations required, gave the County Council (*e.g.* section 122) power to allocate a proportion of the past costs, of which the benefit survived, to the new district, but under sec. 133 there was no such provision, and it was not to be supposed that *ipso jure* the new district on coming into existence should start in life weighed down, and with the possibility of being strangled, by a load of debt, to which, on the defenders' construction of sec. 133, there was no limit or measure. It was noteworthy that there was no provision in the Act for a rectification of the accounts, such as was necessary if what had been done here was valid. It was in itself a relevant objection to the rate imposed by the resolution that it was retrospective—*Saul* v. *Wigtown Rural Sanitary Authority*, November 20, 1886, 51 J. P. Cases, 406. There was certainly a presumption against a rate being retrospective unless it was expressly stated to be so, as in *Harrison* v. *Stickney*, 1848, 2 H. L. Cases 108. The natural reading of sec. 133 was that it referred to what happened after a special district "has been formed," *i.e.*, expenditure after formation; that natural meaning was consistent with the reason of the thing. The words of sec. 133—"expenses incurred . . . for sewerage or drainage" pointed out the special kinds of expenses contemplated by the section, and the additional words "or for the purpose thereof" must be read as covering only purposes *ejusdem generis*, *e.g.*, the purchase of lands and payment of compensation necessary for sewerage or drainage. Legal expenses were admitted to be proper administrative expenses, but they were not within the compass of the words of sec. 133. If the reclaimer's argument that the section included legal expenses was right there was no limit to the burdens that might be imposed on a new special district.

Argued for the respondents—As there was no conclusion for reduction of the resolution imposing the assessment, no operative decree could be pronounced in this action. The effect of sec. 133 was to authorise the local authority to raise the expenses necessarily and reasonably incurred in the formation of a special drainage district by an assessment on such district. Apart from this enactment there was no provision in the Act for the payment of such preliminary expenses. It was equitable that when part of a county was separated off for special treatment suited to its particular needs, it should bear the exceptional expense arising therefrom as it enjoyed the exceptional advantages accruing. The particularising in sec. 133 of "sewerage or drainage" did not limit the generality of the words "or for the purposes thereof," *i.e.*, of the new special district. Legal expenses were necessary to bring a new special district into being, and it was reasonable that the special district, after being formed, should bear the expense of its formation. The

assessment in question was not, properly speaking, retrospective, but if it were, the mere fact that it was retrospective created no difficulty. Such a case could be sanctioned by Parliament, and was indeed expressly sanctioned in the Public Health Act 1897 itself, *e.g.*, in sec. 109—*Saul* v. *Wigtown Rural Sanitary Authority, supra*; *Harrison* v. *Stickney, supra.* In the formation of a public company the statutes authorised the expenses of its promotion, &c., being made debts of the company, though there was at the time of incurring these expenses no company in existence. So here the intention clearly was that the district assessment should cover all expenses properly incurred, whether surveying or legal expenses, in forming a special district under the Act. In *Tolmie* v. *Parochial Board of Urray*, June 21, 1890, 17 R. 1027, 27 S.L.R. 922, the point, though not decided, was assumed on all hands in favour of the respondents' contention—*cf.*, *Ayr County Council* v. *Walker*, June 8, 1895, 3 S.L.T. 40, and Poor Law Magazine [1895] p. 365. The practice, as stated in Skelton's Public Health Acts—note to sec. 133 of 1897 Act—had been in favour of the course followed by the County Council here. The Local Government Board had also expressed the opinion that the course followed was competent.

LORD PRESIDENT—The question in this case is whether the defenders the County Council of Forfar were entitled to impose upon the Hillside District (a special drainage district of the county) an assessment directed to raise a sum of £190, which the pursuer alleges to have been the amount of the expenses (including legal charges) of forming that special drainage district.

No doubt is suggested as to the legality of forming the district, or as to the power (and indeed the necessity) of providing for payment of the expense of its formation by an assessment, and the question truly in dispute is whether the assessment should have been imposed upon the whole Brechin District of the county or upon the Hillside Special Drainage District, which forms a part of the Brechin District. The County Council imposed the special assessment complained of by a resolution dated 5th October 1901, which specified the object of the assessment, the time when the expense was incurred—between 15th May 1901 and 15th May 1902—the area upon which the assessment was to be imposed (the Hillside Special Drainage District), and the rate 7½d. per £. Whatever the effect of the provisions of the Act may be, it seems *prima facie* reasonable that the district which was benefited by the expenditure should be assessed for payment of it.

The pursuer appealed against the assessment to the Finance Committee of the County Council (although the competency of an appeal to that Committee on such a question is by no means clear), and the Finance Committee dismissed the appeal. Whatever importance may attach to the question of law involved, it was stated in the argument that the pecuniary difference in the present case is about £4.

The pursuer afterwards raised this action, the leading conclusion of which is to have it found and declared that a resolution of the County Council dated 5th October 1901, by which, on the recommendation of the Brechin District Committee, they resolved to impose, and did impose, a special assessment to meet the expense of the sewerage and drainage incurred by the local authority within the Hillside Special Drainage District during the year ending 15th May 1902, and for the purposes thereof, on all lands and heritages within the special district, at the rate of 7½d. per £ of valuation upon occupiers, was illegal and *ultra vires.*

The summons does not conclude for reduction of the resolution complained of, and it seems to me that the pursuer's objections to it cannot well be maintained in this proceeding unless he can show that there is some *ex facie* irregularity in what was done.

The main question depends upon the construction and effect of section 133 of the Public Health Act 1897, which provides, *inter alia*, "that where any special drainage district has been formed under this Act, or any of the Acts hereby repealed, the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor, either before or after the passing of this Act, together with the interest thereof, shall be paid out of a general sewer assessment, which the local authority shall raise or levy on or within such district."

Unless the pursuer can show that this provision does not apply to the case, it is by its terms *prima facie* imperative, providing for payment of such an expense as that in question out of the assessment which the local authority "shall raise or levy on or within the district."

While this provision seems to me *prima facie* to warrant what was done in the present case, the pursuer maintains that it does not do so, inasmuch as (he maintains) (1) it relates only to expenses incurred in special districts after they have been formed, and not to expenses incurred in such districts before they were formed or incidental to their formation; and (2) that it does not authorise an assessment for the expenses of litigation or legal proceedings.

I agree with the Lord Ordinary in thinking that the general view on which the provisions of the Act relative to the formation of special districts proceed is that when parts of a county are separated from the rest, and receive separate treatment appropriate to meet their special requirements, it is fair that these districts should bear any exceptional expense thereby caused, and that such exceptional expense should not fall upon the rest of the county, while, on the other hand, such special districts are exempted from liability to

contribute to the drainage expense in other parts of the county.

As to the first point taken by the pursuer, it is to be kept in view that there must necessarily be certain expenses attending the formation of a special district, which require to be and are incurred before the district is formed, and it seems to me that the contention of the pursuer, that the only expenses for which there is a power to rate are those incurred after the formation of the special district, is untenable. If that contention was upheld the effect would be that such preliminary expenses would require to be provided by voluntary contributions, which would not be in accordance with the general scheme of the Act or with the public interest. I do not think that the rate in question could properly be described as a retrospective rate, seeing that it was imposed at the earliest time at which it could be imposed. The Act does not say that the power of assessment is to be limited to the payment of expenses incurred after the formation of the district.

As to the pursuer's second contention, viz., that the section does not sanction an assessment for the expenses of litigation or other legal proceedings, it is true that no special provision is made in regard to such expenses, but there is no exclusion of them, and inasmuch as they may, and probably to a certain extent must be necessary, there is no good reason for declining to allow them to be made a charge upon the assessments to be levied in the district. The words which occur in section 133, "for the purposes thereof," are very large, and in my judgment include a power to rate for all expenses which have necessarily, or properly and reasonably, been incurred in the formation of the district, or without the incurring of which it could not have been formed. If, for example, a ratepayer or other person initiated proceedings to stop the proper authority from taking the initial steps for the formation of the district, I apprehend that it would be within the power of the persons who took the steps necessary for resisting such action, to pay out of the rates any expenses incurred in doing so which they could not recover from the person who initiated the litigation. I understand that what was done in this case received the previous sanction of the Local Government Board.

There is not much authority on the present question, but it appears to me that the view adopted by the Lord Ordinary receives support from the reasoning in the case of *Tolmie* v. *the Parochial Board of Urray*, 17 R. 1027, and also from the case of the *County Council of Ayr* v. *Walker*, 3 S.L.T. 40, in the latter of which it was held by Lord Low that the terms of section 94 (1) of the Public Health Act made it imperative on the County Council to levy the assessment necessary to pay the interest and instalments and current expenses of water-works formed in a district, and that there was nothing in the sub-section which had the effect of limiting its provisions to a water supply provided after the formation of the special district.

Upon the whole I am of opinion that the reclaiming-note should be refused, and that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM concurred.

LORD M'LAREN—I concur. The argument of the pursuer is I think entirely rested on the words with which the clause in the Act of Parliament begins—"After the formation of a special drainage district." With these qualifying words the section proceeds to empower the County Council or the district committee to lay an assessment for costs and charges upon the ratepayers of the special district. Now, there is a very obvious reason for beginning the clause with the words "After the formation of a special district," because there could be no question of imposing an assessment upon a certain district until that district was brought into existence. But then the fallacy of the pursuer's argument is in applying those conditions to the charges and expenses, because there is nothing in the clause of the Act of Parliament to limit the power of assessing for costs of construction or costs of administration to costs and charges that were incurred after the formation of the district. As regards costs of construction, that question would probably not arise unless you include the engineer's charges for a preliminary survey, but as there is no limitation of time I take it the power to assess is a power to assess not only for charges properly incurred in the working of the district after it has been formed, but also for charges necessarily incurred in anticipation of the formation of a special district. Of course if no special district is formed the parties who take the responsibility of advancing the money for preliminary expenses may find it difficult to lay them upon the county, but when a district is formed then I think the provision of the statute is clear, that a district assessment will cover all expenses truly incurred in the execution of the Act, and I see no distinction between expenses properly incurred on preliminary surveys or legal expenses prior to the formation and those incurred after the formation of a special drainage district.

LORD KINNEAR—I entirely agree with your Lordship and also with the additional observations which Lord M'Laren has made. The argument was that the disputed power to assess is conferred in terms which show that it cannot be exercised until a special district is already formed. It is plain enough that an assessment cannot be imposed upon a special district until the district has been formed, but it does not follow that it may not be imposed to provide for expenditure which has been incurred in forming it. The purposes for which the assessment may be laid on are not expressed by the same words as those which define the district to be assessed. I am of opinion, for the reasons already given, that the argument which has been

rejected by your Lordships really proceeds upon a misconception of the proper reading of the section.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—Nicolson. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Solicitor-General (Dundas, K.C.)—Dove Wilson. Agents—J. & J. Galletly, S.S.C.

Thursday, March 17.

FIRST DIVISION.

LYON'S TRUSTEES *v.* AITKEN AND OTHERS.

Trust—Church—Resolutive Condition in Trust-Disposition—Dissolution of Church—Congregation Ceasing to Belong to One Dissenting Body and being Admitted into Another.

A testator in his trust-disposition and settlement directed his trustees to set aside and invest in their names a specified sum, and after dividing such sum into thirty-five equal shares, to hold it for behoof of and pay the income to, *inter alia* (1) the minister of the United Original Secession Church at K. eight shares; (3) the minister and kirk-session of the United Original Secession Church at L. three shares; (4) the minister and kirk-session of the United Original Secession Church at B, three shares; and (5) the minister and kirk-session of the United Original Secession Church at K. one share. With regard to the shares so destined he directed that "should any of such churches cease to exist as a separate congregation and unite as a church with some other church, the income of the share destined to such church be applied for behoof of the united churches, or should any of the abovementioned churches be dissolved without uniting as a church with any other church, such income should be applied for behoof of such of the other abovementioned churches as may have continued in existence."

After the death of the testator the minister and majority of the congregation of the United Original Secession Church at K. severed their connection with that body, and were admitted into another dissenting body, but continued to worship in the same building. The minority of the congregation were unable to organise themselves as a separate congregation.

Held (1) that the congregation of the United Original Secession Church at K. had been dissolved "without uniting as a church with any other church," the term "church" being there used to denote congregation; and therefore (2) that the resolutive proviso in the settlement had come into effect, with the result that the shares of income destined to the minister and congregation of the United Original Secession Church at K. fell to the other congregations of that body mentioned in the settlement which continued in existence.

William Lyon, artist, Kirkintilloch, died on 20th March 1892 leaving a trust-disposition and settlement dated 27th October 1885, with relative codicils dated 24th January 1890 and 25th January 1892, under which he made over his whole means and estate to certain trustees.

In the fourth purpose of his trust-disposition and settlement the testator directed his trustees "to set aside and invest in their names the sum of £3500 sterling, or whatever less sum my estate may consist of, after carrying into effect the above directions; and after dividing such sum into thirty-five equal shares, to hold the same under the name of 'Lyon's Mortification' for behoof of the following persons, churches, institutions, societies, or schemes in the proportions following, paying over half-yearly at Whitsunday or Martinmas the income of the respective shares (after deducting the expenses of management) to the treasurers, secretaries, managers, or others of the said several churches, institutions, societies, or schemes:—(*First*) For behoof of the minister of the said United Original Secession Church, Kirkintilloch, eight shares of said mortification, the income thereof to be paid to himself towards his remuneration; (*Secondly*) for behoof of the schemes of the Synod of the United Original Secession Church in Scotland five shares of said mortification, the income thereof to be paid to the treasurer of said Synod, and apportioned by the Synod annually among the several schemes of said church as they may think most meet and advisable: Declaring that should the United Original Secession Church in Scotland at any future time unite with some other branch of the Christian Church, the income of said five shares shall be paid to the Treasurer of the Synod or supreme managing body, by whatever name called, of the united churches, to be applied for the benefit of the schemes of the united churches, the apportionment to be made annually by the said Synod or other supreme managing body; (*Thirdly*) For behoof of the minister and kirk-session of the said United Original Secession Church in Laurieston, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; (*Fourthly*) For behoof of the minister and kirk-session of the said United Original Secession Church in Bridgeton, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; (*Fifthly*) For behoof of the minister and kirk-session of the said United Original Secession Church in Kirkintilloch, one share of said mortification, the income thereof to be applied towards