Salvesen pointed out that in the case of *Leslie* v. *Cumming & Spence*, 2 F. 643, the First Division interfered with the discretion of a Lord Ordinary in reducing the amount to be allowed out of a parish minister's stipend. Therefore both on principle and authority we are entitled to exercise our discretion in this matter if the circumstances warrant that course being followed. In my judgment the circumstances here do warrant the exercise of our discretion in imposing conditions. The sum of £100 mentioned by the appellant is a very moderate one, and accordingly I move your Lordships that as a condition of the bankrupt obtaining his discharge he should make provisions for paying during the occupancy of the office he now holds the sum of £100 out of his present salary until his debts are paid, with suitable adjustments for changes in the present position.

LORD DUNDAS—I agree. I think this appeal should be allowed to the extent and effect your Lordship proposes. It might, no doubt, have been difficult for us to arrive, apart from agreement, at any definite figure to be allowed out of the salary, but the appellant has suggested £100, which seems reasonable, and the respondent's counsel agrees that if any payment is to be made that amount is not unreasonable, and therefore I think the course your Lordship proposes is right.

LORD SALVESEN—I concur. I think the bankrupt here is in no better position than a parish minister in regard to the question whether he shall assign a portion of his salary as a condition of getting his discharge. This is the first occasion—so far as reported cases go—on which the Courts have applied the rule applicable to stipends, pensions, or alimentary allowances, to personal earnings derived from a salary paid under a contract of service. But I am unable to see any distinction between the case of a parish minister or other person holding an office from which they derive emoluments and the case of a gentleman who at the date of his bankruptcy had a salaried position and continued to draw the same salary after his bankruptcy.

As regards the amount to be assigned I think the sum asked is very moderate. In fixing the amount to be assigned the Court must first ascertain how much is necessary to maintain the bankrupt in the position in life which he holds, and only require him to assign the surplus to his creditors. The proportion which the amount ordered to be assigned bears to the total income will vary according to whether the surplus is large or small, but the leading consideration is that a reasonable maintenance to the bankrupt in the position of life to which he belongs must first be provided and only the surplus given to his creditors. We are not deciding that the income which this bankrupt will still have available for the support of himself, his wife and family, is required for their reasonable maintenance. The appellant has perhaps wisely, in view of the source of the bankrupt's income, restricted his demand to an annual sum of £100, and we cannot therefore give more.

LORD GUTHRIE—I agree. In view of the bankrupt's circumstances, proved by documents by the bankrupt or admitted, I think the appellant's demand as now stated is a moderate one, and should be made a condition of discharge. Special circumstances have been hinted at with the view of showing that the bankrupt's income is subject to serious deductions, but these are too vague to be made the subject of inquiry either here or in the Sheriff Court.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute dated 22nd May 1916, in so far as it repels the objections stated for the appellant, and in so far as it finds him liable in expenses: Find that as a condition of the bankrupt being granted his discharge he shall undertake in such manner as to the Sheriff-Substitute shall seem sufficient to secure payment for behoof of his creditors in satisfaction of their claims the sum of £100 per annum out of his salary or emoluments so long as the same amounts to not less than £500 per annum, and in the event of said salary or emoluments falling short of £500 per annum, the excess, if any, above £400 shall be secured in lieu of said sum of £100: *Quoad ultra* affirm the said interlocutor of the Sheriff-Substitute and remit to him to proceed with the application for discharge: Find the appellant entitled to the expenses of the appeal against the respondent, and remit the account to the Auditor to tax and to report: *Quoad ultra* find no expenses due to or by either party."

Counsel for the Objector (Appellant)—Watson, K.C.—Hamilton. Agents—Weir & Macgregor, S.S.C.

Counsel for the Applicant (Respondent)—Moncrieff, K.C.—Wark. Agent—Robert Miller, S.S.C.

Wednesday, July 5.

FIRST DIVISION.

CALEDONIAN RAILWAY COMPANY AND NORTH BRITISH RAILWAY COMPANY *v.* LANARK COUNTY COUNCIL.

Water — Railway — Rates — Lanarkshire (Middle Ward District) Water Order 1913 (*Confirmed by* 3 *and* 4 *Geo. V, cap. clx*), *sec.* 44—*Option to Charge for Water Supply by Rate or by Measure as Applied to the Various Different Parts of Railway Undertaking.*

The Lanarkshire (Middle Ward District) Water Order 1913, section 44, authorised the County Council to charge in respect of buildings or premises supplied with water for non-domestic purposes either the domestic rate applicable

to such buildings or premises or for the actual water supplied, but not to adopt both alternatives.

The County Council assessed two railway companies in the water district in respect of certain of the stations, depôts, &c., by domestic water rate, in respect of other stations, depôts, &c., they charged for the water actually supplied, and for the rest of the railway undertaking they levied the domestic water rate. *Held* in a special case (*diss.* Lord Johnston) that a railway undertaking was not one indivisible heritage, so that the adoption of one method of charging for water supply at one part excluded the right to adopt the alternative method elsewhere, and that the actings of the County Council were in terms of the Lanarkshire (Middle Ward District) Water Order 1913.

The Lanarkshire (Middle Ward District) Water Order 1913 (confirmed by 3 and 4 Geo. IV, cap. clx) enacts, section 44—"(3) The County Council may and they are hereby authorised and required annually to impose and levy an assessment to be called the domestic water rate upon all lands and heritages within the limits of supply of the District Committee at such rate in the pound of the annual value thereof respectively as entered in the valuation roll as shall be sufficient when supplemented by the public water rate (if any) and the other water revenues received under the Water Acts and this Order to defray the expenses incurred or to be incurred for the purposes of water supply under the Water Acts and this Order for and during the year next ensuing the fifteenth day of May then last past, including the sums necessary for payment of interest on and repayment of principal of any money borrowed for the purposes of the Water Acts and this Order. (4) Provided that the domestic water rate shall not be assessed or levied in respect of (*a*) Dwelling-houses, railway stations, or other buildings unless such dwelling-houses, railway stations or other buildings shall have been actually supplied with water by the District Committee, or unless some pipe of the District Committee shall be laid down within one hundred yards of the same measuring from the outer wall thereof, or of any domestic office in contact therewith and occupied as appurtenant thereto. . . . (5) Provided further that for the purposes of the domestic water rate—(*a*) The annual value of the following lands or premises shall be held to be one-fourth of the annual value thereof entered in the valuation roll, viz., (i) all lands and premises used exclusively as a canal or basin of a canal or towing path for the same, or as a railway or tramway, excepting the stations, depots, and other buildings which shall be assessable in like manner and to the same extent as other lands and buildings within the limits of supply; (ii) all water-works, sewage works, gas works, electric power stations or substations, or electric supply works, and underground or other pipes, mains, or cables of any water company, gas company, electric power or electric supply company, corporation or commissioners; (iii) all public works and manufactories . . . (6) When under the Water Acts or this Order water is supplied to any buildings or premises for other than domestic purposes it shall not be lawful to charge both the domestic water rate applicable to the buildings or premises so supplied and also for the supply of water so furnished for other than domestic purposes to such buildings or premises, but the County Council may either charge the said domestic water rate leviable on such buildings or premises or charge for the supply of water furnished to the same as they may think fit. (7) The domestic water rate by this Order authorised to be imposed and levied shall for all the purposes of the Water Acts and this order be substituted for and be deemed to be the domestic water rate authorised to be imposed and levied by the Act of 1892."

The Caledonian Railway Company and the North British Railway Company, *first parties*, and the County Council of the County of Lanark, *second parties*, brought a Special Case for the determination of questions relating to the mode in which the first parties were liable to be charged for water supplied to them in the Middle Ward District of the County of Lanark.

The Case stated—"1. The first parties are railway companies incorporated under Act of Parliament, and in virtue of various statutes they have acquired and constructed extensive systems of railway lines, with stations, sidings, and other pertinents in various counties in Scotland. Considerable portions of the first parties' said systems are situated within the county of Lanark, and particularly within the middle ward district of that county.

"2. For the purpose of being entered in the valuation roll made up for the county under the Valuation of Lands (Scotland) Acts, the first parties' railway systems fall to be valued annually by the assessor of railways and canals in accordance with the relative provisions of these Acts [viz.—The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), section 21, as amended by the Valuation of Lands (Scotland) Acts Amendment Act 1894 (57 and 58 Vict. cap. 36), section 2; The Valuation of Lands (Scotland) Act 1854, section 22, as amended by the Valuation of Lands (Scotland) Amendment Act 1867 (30 and 31 Vict. cap. 80), section 4; The Valuation of Lands (Scotland) Act 1854, sections 27 and 42; The Valuation of Lands (Scotland) Amendment Act 1867 (*cit.*), sec. 5]. . . .

"7. The collective result of these enactments is that in the valuation roll for the county of Lanark the following particulars appear with reference to each of the first parties' undertakings respectively, viz.—(1) the length of railway line within the county, distinguishing the length within each burgh, parish, and special district; (2) the estimated capital cost ascertained in terms of section 21 of the Act of 1854 of the several stations, depots, &c., within the county, distinguishing the amount applicable to each burgh, parish, and special district, and the value thereof being the sum

of 5 per cent. on the estimated capital cost as aforesaid of such stations, depots, &c., distinguished as aforesaid; and (3) the value of the portions of the whole undertakings within each burgh, parish, and special district, including therein the amount of 5 per cent. on the estimated capital cost as aforesaid of the stations, depots, &c. There is thus shown on the face of the valuation roll both the proportion of the *cumulo* annual value of the first parties' undertakings allocated to their stations, depots, &c. within each burgh, parish and special district, and also the proportion of the *cumulo* annual value of the first parties' undertakings allocated to their undertakings as a whole so far as within each burgh, parish and special district. The value of the various portions of the railway lines alone within each burgh, parish and special district is not shown, but this can easily be ascertained by subtracting from the annual value of the portion of the whole undertaking within any burgh, parish, or special district the sum of 5 per cent. on the estimated capital cost of the stations, depots, &c. situated therein, and this is what is done in practice.

"16. The second parties consider that . . . the first parties are liable to be assessed to the domestic water rate on one-fourth of the value of their respective undertakings excepting stations, depots, and other buildings, and as regards the excepted stations, depots, and other buildings are liable to be assessed on the full value of these when either water has actually been supplied to such stations, depots, and buildings or some pipe of the district committee has been laid down within one hundred yards of the same measuring from the outer wall thereof, or of any domestic office in contact therewith and occupied as appurtenant thereto, subject, however, to this qualification, that where the supply afforded to any buildings or premises is non-domestic in its nature the second parties may either charge the domestic rate leviable on such buildings or premises, or may charge for the supply of water furnished to the same as they may think fit, but cannot exact both the domestic rate and the charge for water in respect of the same premises.

"17. Acting on this view, the second parties for the year from Whitsunday 1913 to Whitsunday 1914 levied and imposed on the first parties the domestic water rate on one-fourth of the value of their respective undertakings other than stations, depots, &c. In regard to such of these stations, depots, &c. as either received a supply for non-domestic purposes or were within 100 yards of some pipe of the second parties, the course adopted by the second parties was to exercise the option which they conceived to have been conferred upon them in the matter by section 44 (6) of the Order of 1913, and to consider the case of each station, depot, &c. separately. Where water was supplied and the charge by meter exceeded the amount which could have been recovered by imposing the domestic rate on the particular subject, an account was rendered for the water consumed. Where, however, the amount of the domestic rate would have exceeded the charge by meter the domestic rate was exacted. The first parties did not appeal against the assessments for 1913.

"18. The second parties adopted the same procedure in regard to the first parties' undertakings for the year from Whitsunday 1914 to Whitsunday 1915, but on this occasion the first parties took exception to the competency of the second parties' action, and appealed against the charges for the supply of water by meter to certain of their stations, on the ground that the second parties must treat the whole of each railway undertaking within their district as one subject, and must either adopt the method of assessing the whole undertaking to the domestic rate so far as liable to such rate, or if they preferred to charge for water supplied for non-domestic purposes, must accept the amount of such charges as the whole contribution due from the undertaking and depart from the domestic rate.

"19. The appeal came before the rates appeal committee of the second parties for the Hamilton and Airdrie districts of the Middle Ward of the county of Lanark on 1st March 1915, when the first parties were heard by counsel. The appeal was subsequently dismissed.

"20. The first parties have intimated that they consider the decision of the rates appeal committee erroneous in point of law."

The first parties *contended* "that upon a true construction of section 44 of the Order of 1913 the second parties must treat the whole undertaking of each of the first parties within the Middle Ward Water District as one heritage, the property of one owner, and must make their election between levying the domestic rate on the whole undertaking so far as liable thereto, or exacting charges for water supplied for non-domestic purposes by meter at various places on the undertaking within the district, but that in no case can the second parties assess part of the undertaking to the domestic rate and at the same time charge for water supplied for non-domestic purposes to other parts." The second parties —"That under section 44 of their Order of 1913 they are entitled to regard the railway lines of the first parties and each station, depot, &c., as a separate and distinct subject, and that accordingly where water is supplied for non-domestic purposes to any station, depot, &c., they are entitled to elect as regards that particular subject between the domestic rate and the charge for water supplied, the only limitation on their right being that they cannot charge any individual station, depot, &c., with both the domestic rate and an account for water supplied."

The *questions of law* were—"In the event of the first parties in any year taking at any of their stations or depots within the Middle Ward Water District supplies of water for non-domestic purposes under section 31 of the Act of 1892—(*a*) Are the second parties entitled for that year to treat each such station or depot as a separate subject, and to exact from the first parties in respect of each such station or depot either payment for the

water actually supplied to it or the domestic rate on the valuation of such station or depot, as they may think fit, and at the same time to levy the domestic rate on the first parties' railway lines within the district, and on their other stations or depots within the district so far as these stations and depots are liable to the domestic assessment by reason of their being situated within 100 yards of some pipe of the second parties? or (*b*) Are the second parties bound for that year to treat the whole undertaking of each of the first parties within the Middle Ward Water District as an *unum quid* to the effect that they must elect as they may think fit either (*a*) to charge the domestic water rate leviable on such undertaking as a whole, or (*b*) to charge *in cumulo* for the water actually supplied to the first parties for railway and station purposes?"

Argued for the first parties—The undertakings of the first parties were each a *unum quid*, *i.e.*, a railway undertaking. Each, no doubt, consisted of various portions differing in nature, *e.g.*, the metals, canals, dock, wharves, stations, but these were all indelibly appropriated to the whole and not separable into distinct units. These undertakings were each one heritage, and were so treated for valuation purposes, a proportion of the whole being taken for each valuation district. The stations were not separately entered in the valuation roll. This single heritage consisted of buildings and premises, and as such fell within the scope of the Lanarkshire (Middle Ward District) Water Order 1913 (confirmed by 3 and 4 Geo. V, cap. clx), sec. 44 (6), and consequently could be charged for water supply either by meter or by way of domestic water-rate but not by both, and the second parties could not divide this *unum quid* so as to charge by meter for one part of it and by domestic water-rate for another. That section was of general operation and was not confined to railways, but the contention of the second parties was inapplicable when applied to subjects other than railways, *e.g.*, farms. They must, if they adopted at any part of this *unum quid* one of these alternatives, apply it to the whole. Alternative (*b*) of the question in law must be answered in the affirmative.

Argued for the second parties — The general law was contained in the Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), secs. 125, 126, and 134, and the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 264 and 347. The effect of the Water Acts of the second parties was to modify the general law in favour of railway companies, &c. The Lanarkshire (Middle Ward District) Order 1913, secs. 44, 45, fixed their assessment at a quarter their value, stations, depots, and other buildings excepted, and this applied to other subjects as well as railways. The result contended for by the first parties was usually accomplished by the insertion in Water Orders of what was known as an aggregation clause, *e.g.*, the East Stirlingshire Water Act 1900 (63 and 64 Vict. cap. xciii), sec. 42, but here no such clause was inserted, advisedly in view of the concessions made by these Acts. The section clearly treated stations, depots, and other buildings of railway companies as separate entities for rating purposes, for it excepted them from the limited valuation of a quarter, and rendered them assessable like other lands and buildings. This separation must be carried into section 44 (6), and the result was that a station, *e.g.*, might either be assessed or charged by meter, but could not be dealt with in both ways. The first parties' contention was absurd, for if the railway was one heritage, then if the second parties laid a water-pipe within 100 yards of any station on it every station on it and the whole line would be liable for water-rate though it actually took no water — section 44 (4) (*a*). This contention involved the ascertainment of the value of the stations, but that presented no difficulty.

At advising—

LORD PRESIDENT—In order to decide the question submitted for our consideration and judgment in this case I find it unnecessary to recapitulate the history of legislation relative to the assessment of railway undertakings for water supply, for the controversy—such as it is—turns exclusively upon the construction of section 44 of the Mid-Lanarkshire Water Order of 1913.

I may summarise the provisions of that section in the following propositions:—(First) The local authority is empowered to levy a domestic water rate on all lands and heritages within the limits of supply. It is conceded that this embraces the whole railway undertaking. (Second) The domestic water rate is to be levied upon the railway proper—as distinguished from the station buildings, depots, and other buildings—on one-fourth of its annual value as entered in the valuation roll. (Third) The rate is to be levied on railway stations, dwelling-houses, and other buildings actually or constructively supplied with water on the full annual value of these subjects as entered in the valuation roll. (Fourth) No domestic water rate is to be levied upon dwelling-houses, railway stations, or other buildings which are not actually or constructively supplied with water. (Fifth) In the case of railway stations, depots, and other buildings which are actually supplied with water, the local authority may charge either by way of assessment on the full annual value as entered in the valuation roll or by way of water rate—they are empowered to do either; they are forbidden to do both.

Now these seem to me singularly plain rules for the guidance of the local authority in levying the rate and charging for the water. And it is not averred in this Special Case, nor was it argued to us, that there is any difficulty, or at all events any insurmountable difficulty, in giving effect to these rules. Why, then, should they be denied effect? "Because," says the railway company, "our undertaking is one heritage; we are the proprietors of a single

heritage within the limits of supply; and therefore whatever method of charge for the water is adopted for any station, depot, or building within the limits of supply, the same method must be followed as regards the whole undertaking."

That appears to me to be a perfect example of a *non sequitur*. Why, because the railway undertaking consists of one heritage effect should be denied to the plain enactments of the 44th section with its numerous sub-sections I cannot tell, and counsel for the railway company could not explain.

It seems to me therefore that on the plain meaning of this enactment the local authority are stating its effect with perfect precision when they say that "they are entitled to regard the railway lines of the first parties and each station, depot, &c., as a separate and distinct subject, and that accordingly where water is supplied for non-domestic purposes to any station, depot, &c., they are entitled to elect as regards that particular subject between the domestic rate and the charge for water supplied, the only limitation on their right being that they cannot charge any individual station, depot, &c., with both the domestic rate and an account for water supplied." In short, the keynote of the 44th section is discrimination and not aggregation. And therefore I propose to your Lordships that we answer the first question in the affirmative and the second question in the negative.

LORD JOHNSTON—This case is intended to present for determination the question whether the County Council of Lanark, on behalf of the District Committee of the Middle Ward, are entitled to assess the Caledonian Railway Company and the North British Railway Company for their railways and stations under the Middle Ward District Water Acts on certain novel alternatives in their option. The claim is based on certain clauses in the Middle Ward's recent Water Order Confirmation Act 1913. If the claim is well founded it certainly increases the burden upon the railway companies, and they dispute the construction of the County Council's powers on which it is supported. A modification of the mode of assessment or charge in force under the Middle Ward original Water Act of 1892 (55 and 56 Vict. cap. clxix), was made by the Order of 1913, and particularly by section 44 thereof in its various sub-sections. I am disposed to think that neither the District Committee in framing this section nor the parties in preparing and arguing this case have given sufficient attention to the bearing of the general Valuation Acts, and consequently that it is impossible to determine the true question between the parties on this Special Case. The provisions of the Valuation Acts require first to be considered before dealing with the Middle Ward's Special Acts.

Under the Valuation Act of 1854 (17 and 18 Vict. cap. 91) a general system of valuation of all lands and heritages in Scotland is established, and under lands and heritages are included "railways." While the Act requires a general valuation roll of lands and heritages to be made up, there are to be excluded from this roll all lands and heritages in Scotland belonging to or leased by railway companies and forming part of the undertakings of such companies, and a separate valuation roll of railways is to be made up on a basis entirely different from that applied to lands and heritages in general, and by a special official.

This Act of 1854 contains important provisions as to the use of the valuation rolls to be made up thereunder, both general and of railways, for the purpose of the assessment of rates and taxes. It proceeds on the preamble that it is "expedient that one uniform valuation be established of lands and heritages in Scotland according to which all public assessments, leviable or that may be levied according to the real rent of such lands and heritages, may be assessed and collected, and that provision be made for such valuation being annually revised."

Section 33 declares that where any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament, is authorised to be imposed according to the real rent or value of lands and heritages, the real rent of such lands and heritages as appearing in the valuation roll in force for the time under the Act should be deemed to be the real rent for the purpose of the imposition of such assessments, rates, and taxes, which should be assessed and levied accordingly, any law or usage to the contrary notwithstanding. The Lanarkshire (Middle Ward District) Water Act 1892, in establishing a general water supply scheme for the Middle Ward, gave certain powers to impose both a domestic and a public water rate upon lands and heritages within the district, and enacted (section 58) that such assessments should not exceed those authorised by the Public Health (Scotland) Acts, and should be "imposed and levied and be payable and may be recovered in the same manner as nearly as may be as assessments under the provisions of the said Acts." Though there have been a number of amending Acts, including the Lanarkshire Middle Ward Water Confirmation Act 1913, I do not find that they contain any provision affecting section 58 of the Act of 1892. The provisions therein referred to of the Public Health Act 1867 (31 and 32 Vict. cap. 101), namely, sec. 93 *et seq.*, now superseded by the Public Health Act 1897 (60 and 61 Vict. cap. 38), sec. 133 *et seq.*, may be shortly said to impose all the assessments thereunder on the valuation of lands and heritages in the valuation roll in force for the year of assessment.

Returning now to the provisions of the Valuation Act 1854, relative to making up a valuation roll for railways, viz., sections 20 to 29 of the Act, I think that it will be found that these do not regard each individual railway station as a separate land and heritage, or separate valuation entity, or contemplate their separate valuation or their separate entry in the valuation roll as such, but for the valuation and entry of

the whole railway undertaking in certain specific areas, burgh, parish, and county respectively, as comprehensive items of valuation and entry in each such area. It is of course the case that these areas will overlap.

It is desirable to state first the object in view in providing a separate valuation roll of railways, the difficulties presented, and the general method adopted to meet them.

The object in view in 1854 was to provide the various assessing authorities in the country, county, parish, and burgh, to which other special areas were by subsequent Acts added, with a means of knowing at once the assessable valuation of the railway undertaking within their respective boundaries, and to give it, not in bits, but comprehensively, for that was all that was deemed to be practically needed.

Throughout the provisions anent railway valuation it is always made abundantly clear that the general conception of the Act was to be maintained as nearly as might be, and that the basis of valuation was to be the yearly rent or value "*in terms of this Act*"—that is, in terms of section 6 of the Act of 1854. The main difficulty presented was that the portion of the undertaking situated in any particular area, say the parish of A, was, taken by itself, of no practical rental value, for it could not be expected to let from year to year in isolation for any appreciable sum. Its value was only as a part of the whole undertaking. A further difficulty was that, similarly, the stations, goods depots, and other business premises within any given assessing area were not, taken by themselves, and except for the uses of the undertaking, of any appreciable value so that the rental year by year test could be applied to them. Neither line nor stations could be regarded separately, but only in combination as parts of the undertaking.

The method adopted, speaking generally, for overcoming this difficulty was this—In the first place, to take the undertaking as a whole and ascertain its "yearly rent and value in terms of this Act;" in the second place, to apportion that value between the various areas of assessment. This apportionment was effected in the following practical manner, without any striving after accuracy of comparative values which it was impossible to attain. The whole undertaking having been valued on an estimated rental basis, the cost of construction of the whole stations, &c.. on the line was first to be ascertained, and then 5 per cent. on this gross amount was to be deducted from the gross valuation of the undertaking. The difference was assumed to be the value of the line. This difference was then to be divided up so as to give the proportional part of the value, corresponding to lineal measurement of the line, in any particular area. And this proportional part, with the addition of 5 per cent. on the cost of construction of the stations, &c., in that area was to be deemed to be the valuation of the part of the undertaking within that area. Though the total value of the undertaking was based on a rental value, it is manifest that the apportionment of this total value, area by area, was not so, but merely a convenient practical method of proceeding to the end desired, viz. attributing to each area for assessment purposes an aliquot part of the total valuation, and probably it was the best in the circumstances. To carry this out then the Act proceeds on this apparently complex but really comparatively simple method, thus: — the assessor is directed (section 21)—

First, to inquire into and fix *in cumulo* the yearly rent or value, in terms of the Act, of all lands and heritages belonging to or leased by the company and forming part of its undertaking.

Second, to inquire into and fix the amount which one year with another would be required in order to the acquisition, formation, and erection of the several stations, wharfs, docks, depots, counting-houses and other houses or *places of business* respectively of or connected with the railway undertaking.

Third, to inquire into and fix all other matters necessary to enable him to make up a valuation roll of railways, &c., as after mentioned. And then the rest of section 21 enumerates what matters are to be set forth in the valuation roll, while section 22 defines how the yearly rent and value "in terms of this Act" is to be ascertained.

It must be pointed out, in order to the appreciation of what follows, that there is included only what forms part of the railway undertaking, and therefore as regards buildings only what are, to use the phrase of the statute (section 21), places of business. Hence if there happen to be at or near any station a station-master's dwelling-house, pointsmen's cottages, and the like, as very frequently happens, these are excluded.

It is convenient to take first section 22 which deals with the ascertainment of the yearly rent and value. The assessor is to ascertain the yearly rent and value, in terms of the Act, of the whole lands and heritages belonging to or leased by the company and forming part of its undertaking. From that *cumulo* valuation there is to be deducted in the first place a sum equal to three (raised by 30 and 31 Vict. cap. 80, section 4 to 5) pounds per centum of the whole cost of the whole stations, depots, &c., of and connected with the undertaking of the railway company. Then the difference is to be divided in proportion to lineal measurement of the line within the area of burgh, parish, and county respectively, as compared with the lineal measurement of the whole line, so as to give the value of the line within each such area respectively. And such proportion with the addition of the percentage on the cost of any station, &c. or place of business (and the singular includes the plural) within the burgh, parish, or county connected with the undertaking of the company, "shall be deemed and taken to be the yearly rent or value in terms of this Act of the lands and heritages in such parish, county, or burgh, belonging to or leased by such railway . . . company and forming part of its undertaking."

There is thus no mention of a separate yearly rent or value of the line, or of the stations or places of business in the respective areas, and the valuation results, not in a separate entry of the valuation of each item of heritage belonging to the company and forming part of its undertaking situated in say, burgh A, parish B, and county C, but of a comprehensive entry covering all such heritage situated in such burgh, parish, or county respectively.

Going back to section 21 and the matters there directed to be inserted in the valuation roll of railways, &c., there is to be set forth (1) the yearly rent and value of the whole lands and heritages in Scotland forming part of the company's undertaking; (2) the names of the burghs, parishes, and counties through which the line runs and in which the lands and heritages or any part of them are situated; (3) the lineal measurement of the entire line and of the part thereof in each such burgh, &c.; (4) the amount of the cost of the several stations, &c., and places of business connected with the undertaking, and the proportion of such gross amount expended in each such burgh, parish, and county respectively; and (lastly) "the yearly rent or value in terms of this Act ascertained as after mentioned" (*i.e.*, in section 22) "of the portion in each county and burgh in Scotland of the lands and heritages belonging to or leased by each railway . . . company, and forming part of its undertaking."

Again I draw attention to the fact that what is to enter the valuation roll for each area is (1) as regards stations and places of business, not the yearly annual value, but merely the proportion of the gross expenditure on such effeiring to such area; and (2) as regards the company's undertaking as a whole, merely the yearly rent or value within the area, of the lands and heritages connected with the undertaking regarded as one subject in each such area. There is no valuation of the station, &c., as an item of lands and heritages separately regarded, as there would have been in framing the ordinary valuation roll. The consequence is that the assessing authority, say that of the city of Edinburgh, cannot assess on the Waverley Station and the Haymarket Station as an item of lands and heritages, still less as two separate items of lands and heritages, in the city and burgh of Edinburgh, but only on the valuation of the lands and heritages of the North British Railway Company within their area, as one comprehensive item of lands and heritages, as that valuation has been directed to be entered on the roll.

The district of the Middle Ward when they obtained their Act of 1892 had evidently fully before them the peculiar position of railway property under the general Valuation Act, and the special provisions of the Local Act regarding assessment or other payment for water supplied exactly square with the provisions of the Valuation Acts. Under sections 54 and 55 of the Act of 1892 the District Committee are to budget for their annual requirements, and may impose and levy an amount (to be called the domestic water rate) upon all lands and heritages within the limits of the Act which shall have been supplied with water for domestic purposes by the District Committee at such rate per pound as may be sufficient to defray the expense incurred. But this is subject to the proviso that no railway company shall be liable to be assessed in respect of its undertaking for the domestic water rate, but in respect of any houses or premises belonging to such railway company actually supplied with water such railway company shall be deemed to have entered into a contract for a special supply as provided for in section 29 of the Act. This section 29 empowers the Committee to enter into agreements for the supply of water in bulk on such terms as may be agreed on, while section 31 empowers to supply water for other than domestic purposes and to enter into agreements for such supply by meter either for domestic or other purposes. I think that the distinction between sections 29 and 31 is meant to be between the supply on a large scale and with a view more or less to redistribution of the water, and the supply on a small scale such as for stables, gardens, shops, &c. Probably section 29 was singled out because what was prominently in view was a supply for locomotive purposes, and the supply necessary for sanitary purposes was such a minor thing as not to be regarded. Otherwise it would more naturally have fallen to be charged under section 31. Section 32 provides for a general table of rates and conditions of supply. "Domestic purposes" are not defined in the Act. But the Water-works Clauses Act 1863 (26 and 27 Vict. cap. 93), sec. 12, incorporated therein, though it does not define "domestic purposes" directly, at least tells us what are not to be deemed domestic purposes. It excludes watering of bestial, washing water for livery or carriers' stables, supply for trade, manufacture, or business, or for gardens. It may be conveniently added here that the Water Order Confirmation Act of 1913 specially declares, section 40, that domestic purposes shall not include a supply for steam engines or a supply "for railway purposes." As I have said, anything of the nature of a dwelling-house, accessory to a railway station, &c., is dealt with as an ordinary item of lands and heritages and enters the general valuation roll and is assessed accordingly. With such we are not concerned but only with buildings which are places of business and so part of the railway undertaking. The supply of water to a railway station, depot, &c., can then, as locomotive supply is not a supply to the building, only be a supply for sanitary purposes at waiting-rooms, lavatories, &c., or for the cleaning of the premises. As the stations, depots, &c., are places of business connected with the undertaking (Valuation Act 1854, section 21) water supplied to them is supplied for trade or business (Act 1863, *supra*) or for "railway purposes" (Act 1913, section 40, *supra*), and is not a supply for domestic purposes. Water supplied to stand-pipes

for watering engines is equally impliedly excluded prior to 1913, and expressly so after 1913.

It does not follow that water could be demanded for either stations or engine supply under the 1892 Act without payment. As I have pointed out, the mode of payment by meter was provided under sections 29 and 31 of that Act, and the committee are secured in a return for the supply though not by assessment on a valuation.

So things remained from 1892 to 1913 through a series of amending Acts. But in 1913 the district committee sought to widen their net, and in particular to impose a heavier burden upon railway companies. In doing so I think they did not keep before them the situation created by the Valuation Acts.

While sections 29 and 31 of the Act of 1892 are left standing to rule the supply of water in bulk and by meter, section 55, regulating the assessment for domestic supply, is repealed by the Act of 1913, section 44, sub-section (1), and the same section, sub-section (3), authorised the imposition of a domestic water rate, not as under the Act of 1892 upon all lands and heritages within the limits of the Act which are supplied actually or constructively with water, but upon all lands and heritages within the limits of supply without any condition of supply. This then brought railway companies under assessment on their whole valuation *per aversionem* within the district of the Middle Ward, and their valuation, as has been seen, covers without discrimination their line stations and other places of business connected with the undertaking within the area of each assessing authority. But this is followed in sub-section (4) by a proviso that domestic rate shall not be levied in respect of, *inter alia,* railway stations unless they have been actually or constructively supplied with water; and in sub-section (5) by a further proviso that for the purposes of the domestic water rate all lands and premises used exclusively as a railway shall be assessed on one-fourth of their annual value, but "excepting the stations, depots, and other buildings, which shall be assessable in like manner and to the same extent as other lands and buildings within the limits of supply." And lastly, sub-section (6) adds—"When under the Water Acts or this Order water is supplied to any buildings or premises for other than domestic purposes, it shall not be lawful to charge both the domestic water rate applicable to the buildings or premises so supplied and also for the supply of water furnished for other than domestic purposes to such buildings or premises," but the county council, who come in place of the district committee may charge in either way in their option. Here I think that the district committee and the County Council as representing them have got themselves into a dilemma, if not into an impasse, by their neglect of the provisions of the general Valuation Acts and of the provisions of their own Acts, which define at least *negativé* domestic purposes, for they cannot comply with section 58 of their own Act of 1892 in laying on their 1913 assessment on the valuation of lands and heritages appearing in the valuation roll in force for the year of assessment.

They are supplying water (*a*) to stations for sanitary and similar purposes which I hold are not domestic but railway purposes and (*b*) to stand-pipes for engine supply. For the water so supplied the Council may possibly still have power to recover under the Act of 1892, section 29 and section 31, for as at present advised I do not find that they are prevented doing so by anything in their Order of 1913, and particularly in section 44, sub-section (6).

But the question is, can they do anything more? Can they competently assess on the value of the undertaking after deducting the value of stations? And can they assess on the value of the stations, &c,, or in their option charge for water supplied thereto? The answer, in my opinion, is that they are held up by the Valuation Acts. Their assessment must be laid on on the basis of the Valuation Acts. Now, as I have shown, there is, by set purpose, no valuation under the Valuation Acts of the company's stations and other premises coming under the statutory category of places of business within the middle ward, and therefore no entry of these, either separately or in combination, as lands and heritages, or of their valuation in the valuation roll. Nor is there, also by set purpose, a valuation of the undertaking less the stations, &c., that is of the line, so far as within the Middle Ward as a land and heritage, and no entry thereof in the roll. The Council are thus unable to assess on the modified provision of their Order of 1913, and many of its provisions are therefore abortive. Thus under section 44 (3) they might have levied an assessment or domestic water rate on the company's lands and heritages, that is, on their undertaking within the ward, for that is found from the valuation roll made up under the Acts. But they cannot assess under section 44 (5) upon the annual value of the railway undertaking excepting the stations, &c., because that annual value is not ascertained and is not "entered in the valuation roll." Nor can they assess stations, &c., "in like manner and to the same extent as other lands and buildings within the limits of supply," for the same reason.

As for these reasons they cannot competently assess on the value of the undertaking under deduction of the value of stations, &c.; for the same reasons they cannot competently assess on the valuation of the stations taken together or separately, though they may possibly still charge by meter for water supplied to them.

It seems to be assumed, and that I understand is your Lordship's opinion—at anyrate it underlies the judgment which your Lordship has just pronounced—that materials exist from which the annual value of the whole stations of a railway undertaking, and of each one of them in the Middle Ward, can be ascertained by calculation, and that therefore the Council's assumed powers under the Act of 1913 can be practically

exercised. This may or may not be so. But it is not possible to sanction this course without throwing over the Valuation Act and the Middle Ward's own Act, which imposes its provisions—and may be limitations—upon their committee, or without judicially amending both. I do not think that we can competently do either.

In these circumstances, though I may have my own impression as to how the question between the parties should be solved, I do not find myself able to dispose of the present case as stated. I can indeed go with the first parties in sustaining their contention that upon a true construction of section 44 of the Order of 1913 the second parties must treat the whole undertaking of each of the first parties within the Middle Ward District as one heritage, the property of one owner, and at the same time in negativing the contention of the second parties that under section 44 of their Order of 1913 they are entitled to regard the railway lines of the first parties and each station, depot, &c., as a separate and distinct subject. But as the case is presented, and indeed has been argued, I regret that I cannot go further or give an answer to the queries presented to the Court.

LORD MACKENZIE—The rival contentions of the parties to this case deal with the construction to be put upon section 44 of the Lanarkshire (Middle Ward District) Water Order 1913.

The railway companies each contend that the whole undertaking within the water district must he treated as one heritage, the property of one owner; the result, according to this contention, is that the County Council must elect between levying the domestic rate on the whole undertaking (so far as liable) or exacting charges for water supplied for non-domestic purposes by meter at various places on the undertaking within the district. Each company argues that in no case can the County Council assess part of the undertaking for the domestic rate and at the same time charge for water supplied for non-domestic purposes to other parts.

This contention is equivalent to maintaining that section 44 is in effect what is known in Water Acts as an aggregation clause, of which an illustration was given in argument from the East Stirlingshire Water Act of 1900 (63 and 64 Vict. cap. xciii).

The County Council, on the other hand, maintain that section 44 does contemplate and provide for disintegration. They say that they are entitled to regard the railway lines and each station, depot, &c., as a separate and distinct subject, and that accordingly where water is supplied for non-domestic purposes to any station, depot, &c., they are entitled to elect as regards that particular subject between the domestic rate and the charge for water supplied, the only limitation on their right being that they cannot charge any individual station, depot, &c., with both the domestic rate and an account for water supplied.

The contentions thus put forward definitely limit the question put to us. Parties are agreed that they desire our decision upon the question so raised, and I see no reason why we should not give an answer.

In my opinion the County Council are clearly right in their contention.

The argument proceeded on the footing that although the annual value of each station is not entered in pounds, shillings, and pence in the valuation roll, yet there is no difficulty in practice, by an arithmetical calculation, in taking out the annual value of each, by reckoning a percentage on the capital cost which does appear in the valution roll. Mr Macmillan's argument was not that this could not, but that it should not be done. The argument was that the water authority should not be allowed to cut and carve, but must take the whole undertaking as a *unum quid*.

This, however, as it appears to me, is just what the statute does not provide. Section 44 differentiates between railway lines and railway stations. It provides, sub-section (3), that the domestic water rate is to be levied on all lands and heritages within the district, but sub-section (4) provides that the domestic rate is not to be levied on, *inter alia*, railway stations unless actually or constructively supplied with water. Then sub-section (5) provides that for the purposes of the domestic water rate the annual value of, *inter alia*, lands used exclusively as a railway shall be held to be one-fourth of the annual value entered in the valuation roll, with this important addition—"excepting the stations, depots, or other buildings, which shall be assessable in like manner and to the same extent as other lands and buildings within the limits of supply." Sub-section (6) contains the provision common in Water Acts that the ratepayer is not to be assessed on two different methods in respect of the same subjects. The wording of the section does not provide assistance in reaching a conclusion, for it is admitted the principle is applicable here. The controversy is as to what the integer is. In my opinion sub-section (6) means that the same station is not to be assessed on two different methods.

The whole scheme of section 44 provides for disintegration. The railway lines are assessed for the domestic water rate irrespective of supply; the assessment of railway stations for the domestic water rate is dependent upon supply. The railway lines are to be assessed on one-fourth of their annual value; the railway stations are to be assessed on their full annual value. The effect of sub-section (5) (A) (i) is just to restore a station, if supplied with water, in terms of sub-section (4) (A), to the position of a land or heritage dealt with in the leading words of sub-section (3).

For these reasons I am of opinion that the first question should be answered in the affirmative and the second in the negative.

LORD SKERRINGTON—The only question argued before us was whether section 44 of the Provisional Order bears the meaning which the railway companies attribute to it in the printed case or the meaning there

attributed to it by the County Council. I have no hesitation in agreeing with the majority of your Lordships that the interpretation of the County Council is the right one. That seems to me to be the end of the matter. I decline to go into a question which was not argued, namely, whether any difficulty in giving effect to that construction of the Provisional Order arises out of the provisions of the general valuation law of Scotland applicable to railways.

The Court answered branch (*a*) of the question of law in the affirmative, and branch (*b*) in the negative.

Counsel for the First Parties—The Dean of Faculty (Clyde, K.C.)—Macmillan, K.C.—Gentles. Agent—James Watson, S.S.C.

Counsel for the Second Parties—Wilson, K.C.—Fraser. Agents—Ross, Smith, & Dykes, S.S.C.

Friday, July 7.

WHOLE COURT.

HUTTON'S TRUSTEES *v.* HUTTON'S TRUSTEES AND ANOTHER.

Succession—Legitim—Husband and Wife—Fund for Legitim—Donations inter virum et uxorem Unrevoked at Donor's Death.

A husband made considerable donations to his wife during his life and died without revoking these donations. The representatives of one of his children who survived him claimed legitim. *Held* (*diss.* Lord Johnston and Lord Salvesen) that the donations to the wife, whether consumed or unconsumed at her husband's death, did not fall to be taken into account in ascertaining the amount of the legitim fund.

Fann v. *M'Donald*, 1913 S.C. 937, 50 S.L.R. 716, *overruled.*

Mrs Janet or Jessie Nairn or Hutton and others (trustees of Alexander Hutton), *first parties*, John Clark Gibb and others (trustees of Alexander Angus Croll Hutton, son of Alexander Hutton), *second parties*, and Mrs Janet or Jessie Nairn or Hutton (widow of Alexander Hutton) as an individual, *third party*, brought a Special Case to determine whether certain gifts made by the said Alexander Hutton to the third party were to be taken into account in order to ascertain the amount of the legitim fund.

The Case stated—"1. The late Alexander Hutton, retired banker, residing at The Sycamores, 1 Albany Terrace, Dundee, died on 31st July 1914, leaving a trust-disposition and settlement, whereby he nominated [the first parties and another who declined to accept office] to be his trustees and executors. . . .

"2. The provisions of the said Alexander Hutton's trust-disposition and settlement are shortly as follows—In the first place, for payment of debts: In the second place, the trustees are directed to allow to the third party the free liferent, use, and enjoyment of his house and ground No. 1 Albany Terrace, Dundee: In the third place, the trustees are directed to deliver to the third party as her absolute property the household furniture, &c., belonging to him except such articles as he should specially bequeath: In the fourth place, the trustees are directed to pay certain legacies free of Government duty at the first term of Whitsunday or Martinmas occurring after his death with the exception of one legacy payable on the death of the third party: In the fifth place, the trustees are directed to pay the net annual income or produce of the residue of the estate to the third party, with power to encroach if necessary to a limited extent on capital should the income be insufficient in the opinion of the trustees to provide for her comfortable maintenance; in the event of the second marriage of the third party, the liferent is reduced to one-half of the income of the estate: In the sixth place, upon the death of the third party the trustees are directed to hold the residue of the trust estate for behoof of his two surviving children, Mrs Edith Margaret Hutton or Nairn and the said Alexander Angus Croll Hutton in equal proportions, and the survivor of them, and the share falling to the said Edith Margaret Hutton or Nairn is directed to be paid over to her. The trustees are directed to retain the share falling to the said Alexander Angus Croll Hutton for his behoof and for behoof of his children, and to pay over the income or annual produce thereof to him, with power to the trustees instead of paying the income to him to apply it for his behoof or pay the same or such portion thereof as they may consider prudent and advisable for the maintenance of his wife and any children he may have. On the death of the said Alexander Angus Croll Hutton the trustees are directed to hold the said portion of the residue of the estate for behoof of such of his children or more remote issue as shall survive, whom failing for behoof of the said Mrs Edith Margaret Hutton or Nairn and her issue. The legacies bequeathed by the deceased included, *inter alia*, a legacy of £2000 to his wife, a legacy of £2000 to the said Mrs Edith Margaret Hutton or Nairn, and a legacy of £250 to the said Alexander Angus Croll Hutton, increased by codicil of 16th October 1912 to £800. The testator explains that the legacy to the said Alexander Angus Croll Hutton is less than the legacy to the said Mrs Edith Margaret Hutton or Nairn, as he had made over to the said Alexander Angus Croll Hutton, several years before, certain investments which have since increased in value. It is provided by the said trust-disposition and settlement that the provisions in favour of the testator's wife and children shall be in full satisfaction to them respectively of all terce, *jus relictæ*, legitim, portion-natural, executry, and everything else they could claim or demand respectively by and through his death, and that in the event of any of them claiming his or her legal rights or any of them in the estate, he or she, and his or her issue, should forfeit all his, her, or their rights, interests, and benefit, under the said