in the Second Division, and that the interlocutor of the Lord Ordinary should be restored with the substitution only of £23, 10s. 5d. for the sum of £117, 12s. 1d. which he awarded.

LORD WRENBURY — I agree with the opinion delivered by my noble and learned friend and I have nothing to add.

Their Lordships discharged the interlocutor appealed from, restored the interlocutor of the Lord Ordinary, with the variation of striking out the words "2½ days" and also the words "£117, 12s. 1d.," and inserting in lieu thereof the words "one half day" and also the words "£23, 10s. 5d."

Counsel for the Appellants—Condie Sandeman, K.C. — Douglas Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C., Edinburgh —Borland, King, Shaw, & Company, Glasgow—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents—Horne, K.C. —Lippe. Agents—Boyd, Jameson, & Young, W.S., Edinburgh — Holman, Fenwick, & Willan, London.

COURT OF SESSION.

Tuesday, July 18.

FIRST DIVISION.

[Lord Hunter Ordinary.

DICKSON *v.* LANARKSHIRE UPPER WARD DISTRICT COMMITTEE.

Local Administration—Rates and Assessments — Water — Premises Occupied by Owner and Supplied with Water by Meter —Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *section* 126 (2).

The Public Health (Scotland) Act 1897 enacts — Section 126 — "*Supply of Water for Districts other than Burghs.* —With respect to districts other than burghs the following provisions shall have effect:— . . . (2) The local authority, if they have any surplus water after fully supplying what is required for domestic and sanitary purposes, may supply water from such surplus . . . for trading or manufacturing and all other than domestic purposes on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied. Provided that when water is thus supplied from such surplus it shall not be lawful for the local authority to charge the persons so supplied both with the portion of the special water assessment applicable to the buildings or premises supplied and also for the supply of water obtained; but the local authority may either charge the said assessments leviable on such buildings or premises or charge for the supply of water furnished to the same as they shall think fit. . . ."

The local authority in a special water supply district proposed to charge the owner and occupier of a farm, which was to be supplied with water for non-domestic purposes, with a meter charge for the water actually supplied to him, and also with a sum equal to the assessment which would have been laid upon him as owner had he been taking no water for other than domestic purposes. *Held* (*diss.* Lord Johnston) that in so doing the local authority was acting within its statutory powers.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), section 126 (2), is quoted *supra in rubric.*

John Baird Dickson, Auchren, in the parish of Lesmahagow, Lanarkshire, *pursuer,* brought an action against the District Committee of the Upper Ward District of the county of Lanark, the Local Authority within the Lesmahagow Special Water Supply District, *defenders,* concluding for declarator "(1) that the defenders, having as Local Authority undertaken the duty of providing a supply of water for the domestic use of the inhabitants of the Lesmahagow Special Water Supply District, and for sanitary and other purposes therein, under and in terms of the Public Health (Scotland) Act 1897, are bound to afford to all inhabitants within the said district, and in particular to the pursuer, a sufficient supply of water for such purposes; (2) that the defenders, after fully supplying water required for domestic and sanitary purposes within the said district, having ample surplus water available for other than domestic purposes, are bound to afford to all inhabitants within the said district desirous of being supplied for such purposes, and in particular to the pursuer, a sufficient supply of water for such purposes, and that on equal terms; (3) that the defenders in supplying water to premises within the said district for other than domestic purposes, and in particular to the premises owned and occupied by the pursuer, are not entitled to make a special charge for the water as so supplied and also to impose the water assessments in respect of such premises exigible either from the owner or occupier thereof; (4) that it was *ultra vires* and illegal for the defenders, when requested by the pursuer to give him a supply of water for agricultural purposes at the special rate fixed by them, to demand from the pursuer, or to stipulate as a condition of such supply being given to him, that in addition to agreeing to make payment of the meter rate or special fixed annual charges when applicable, the pursuer should bind himself to pay to them for such supply a sum equal to the amount of owner's assessment on his premises that would have been exigible in respect of said premises apart from agreement or if no water had been taken by the pursuer from the defenders for other than domestic purposes; and (5) that it was wrongful and illegal on the part of the defenders, when the pursuer resisted the said illegal demand and refused to accept the said condition, to cut off the whole supply of water to the pursuer's said property of Auchren;" and for damages in the event of the defenders failing to obtemper a decree in terms

of the declaratory conclusions, and for damages in respect of the illegal actings of the defenders.

The pursuer pleaded, *inter alia*—"3. The defenders being statutorily debarred from charging for water supplied to any premises both by assessment and by special charge, decree should be pronounced in terms of the third and fourth declaratory conclusions of the summons."

The defenders pleaded, *inter alia*—"1. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 2nd June 1916 sustained the first plea-in-law for the defenders and granted leave to reclaim.

Opinion.—"The pursuer in this action, who is the proprietor and occupier of the farm of Auchren, in the parish of Lesmahagow, Lanarkshire, sues the District Committee of the Upper Ward District of Lanarkshire, as the Local Authority within the Lesmahagow Special Water Supply District, for declarator of the defenders' statutory obligations to provide water to the inhabitants in their district, and to him in particular, and for damages in respect of their having cut off the water supply to the said farm.

"According to the pursuer's averments the defenders have for a considerable time provided a supply of water in their district both for domestic and other purposes under and in virtue of the Public Health (Scotland) Act 1897. The chief non-domestic requirement of the district is said to be for stock and agricultural purposes. In terms of section 126 (2) of the Act 1897 (60 and 61 Vict. cap. 38) it is provided that the Local Authority, if they have any surplus water after fully supplying what is required for domestic and sanitary purposes, may supply water for all other than domestic purposes on such terms and conditions as may be agreed on between the Local Authority and the persons desirous of being so supplied, 'Provided that when water is thus supplied from such surplus it shall not be lawful for the Local Authority to charge the person so supplied both with the portion of the special water assessment applicable to the premises or buildings supplied and also for the supply of water obtained; but the Local Authority may either charge the said assessment leviable on such buildings or premises or charge for the supply of water furnished to the same as they shall think fit.'

"In or about April 1913 the defenders issued to all persons desirous of such supply a form of application containing the terms upon which such water supply could be obtained. In the intimation enclosing the form of application the defenders specified the rates at which they were prepared to supply water for other than domestic purposes. In the application which had to be filled up and signed by the pursuer if he was desirous of receiving such a supply there was a clause in the following terms:—'In respect that I am owner as well as occupier of the subjects supplied I bind and oblige myself to pay annually, in addition to said special rates, a sum equal to the amount of owner's assessments that would have been exigible from the said subjects had this agreement not been entered into.'

"The pursuer at first declined to sign the agreement, but finally did so, and water was supplied to him on the terms specified, one of which was payment by him of the amount of the owner's special assessment. The fixed charges were at the rate of so much for each horse, cow, &c. Alternatively to these charges, the defenders intimated that the charge for water by meter would be at the rate of 6d. per 1000 gallons. The pursuer appears to have been dissatisfied with the charges made.

"In or about the month of November 1913 the defenders issued their assessment notices. The notice issued to the pursuer made the usual assessment on him as owner in respect of the premises of which he was both owner and occupier, and in addition certain special charges. The pursuer paid the assessment, but refused to pay the special charges. An action was accordingly brought against him in the Sheriff Court at Lanark, and decree given for what the Sheriff held due under the agreement contained in the defenders' intimation and the pursuer's application to which I have referred.

"In or about November 1914 the pursuer cancelled the agreement between him and the defenders.

"Negotiations appear to have taken place between the parties as to the terms on which the defenders would supply the pursuer with water for other than domestic purposes. On 1st March 1915 the pursuer wrote to the defenders' clerk saying—'I am quite prepared to pay for the water I use on the farm on condition that when I put in a meter I shall be relieved of all water assessments.' The reply to this contained the following passage—'As I understand from your letter you would be willing to have a meter put on by the 15th of May next and pay for all the water recorded through the meter, on the understanding that your premises so supplied would be exempt from both the owner's and occupier's water assessment. As such an arrangement would give an unfair advantage to your premises over other premises supplied by meter but occupied by a tenant, unless the charge per 1000 gallons was more in your case than the other, in so far as in the other case only the occupier's water assessment could be relieved, I presume you would have no objection to the matter being equitably adjusted by means of the meter rate.'

"The pursuer did not come to any agreement with the defenders as to the meter rate at which water was to be supplied by them to him. On 27th April 1915 the defenders intimated to the pursuer that as he was not prepared to enter into such an agreement he would from 15th May be entitled to draw water for domestic purposes only, and requesting him to make any alteration of the plumbing arrange-

ments at his premises necessary to give effect to this. The pursuer appears notwithstanding this notice to have continued to use water for other than domestic purposes, with the result that on 13th September 1915 the defenders cut off the whole water supply to the pursuer's property and premises.

"The argument addressed to me in the procedure roll was confined to the declaratory conclusions of the summons. In the case of *Motherwell* v. *Colville*, 1907 S.C. 1203, it was held, on a construction of the statutory provision in the Burgh Police Act 1892 (55 and 56 Vict. cap. 55), sec. 264, which is similar in terms to the provision of section 126 (2) of the Act of 1897, that the burgh was not entitled to charge for the water supplied to a manufacturer's premises by measure and also to impose an assessment on the premises therefor. The case proceeded upon the footing that there was an agreement between the burgh and the manufacturer as to the rate at which water was to be supplied for other than domestic purposes. In order to bring his case under that decision the pursuer alleges that the special rates fixed by the defenders are detailed in the form of intimation to which I have already referred. His counsel maintained that this was equivalent to an agreement. I cannot so hold. There is nothing in the Act to suggest that the local authority may not make different agreements with different individuals on the basis of equal treatment. The defenders offered to supply the pursuer with water at a certain meter rate provided he paid the special water assessment leviable upon him as owner of his premises. This offer the pursuer declined. The defenders then offered to arrange terms which would put his premises on a position of equality with other premises where the owner was not in occupation. They did not maintain, and in view of the terms of the statute and the decision in the case of *Motherwell* they could not maintain, that he was bound to pay a meter charge for the water supplied and also the special assessment on him as owner of the premises. The pursuer's contention really amounts to this, that his premises in the matter of supply of water are entitled to preferential treatment over premises where the owner is not in occupation, for it was not disputed that in such a case the occupier had to pay the meter rate and the owner the special water assessment. For this contention I do not think that any warrant is to be found either in the statutes or in the decision on which the pursuer founds. I doubt whether the defenders would be entitled to give the pursuer the preference which he claims. In any event I do not think that they are bound to do so. The pursuer wants to be supplied with water for other than domestic purposes, not at a price mutually agreed upon, but for the price which he is willing to pay. Some of the declaratory conclusions of the summons are no doubt in terms of the provisions of the statute, but as I do not find that the defenders either on record or in the correspondence to which I was referred have taken up a position contrary to their rights, I think that these conclusions fall to be dismissed as unnecessary and therefore irrelevant. As I heard no argument upon the other conclusions of the summons I shall give the pursuer an opportunity of maintaining his position thereunder if he thinks that the opinion which I have indicated is not conclusive of the whole case."

The pursuer reclaimed, and argued—The defenders were entitled to assess for water under the Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), sec. 135, by assessments assessed, levied, and recovered in the same way as assessments under the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 52. That section, so far as manner of assessment was concerned, had been repealed by the Statute Law Revision Act 1894 (57 and 58 Vict. cap. 56), but a similar provision had been enacted by the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), secs. 26 and 27. By section 26 (4) and 27 (2) of the last-mentioned statute these assessments were to be levied one-half on owners and one-half on occupiers, according to the valuation roll, and by the Agricultural Rates (Scotland) Act 1896 (59 and 60 Vict. cap. 37), sec. 1, the occupier's share was limited to three-eighths of the annual value of the subjects as appearing in the valuation roll. By section 126 (2) of the Public Health (Scotland) Act 1897 (*cit.*) the defenders, when water was supplied by them for non-domestic purposes, had an option either to charge the persons so supplied for the water actually supplied, or might charge the assessments as above described on the buildings or premises so supplied, but they could not adopt both alternatives. Here the defender was owner and occupier of the premises; as owner and as occupier he was the person supplied with water. The pursuers had chosen to charge him as such "person so supplied" by meter, and having adopted that alternative they could not thereafter separate his two capacities and charge him *qua* tenant by meter and *qua* owner by assessment. The definition clause, section 3, had no bearing on section 126 (2), for it only applied when "owner" and "occupier" occurred in the Act. Sections 134 and 135 had no application; they only applied to cases where the assessment was levied, and here the charge was by meter. Further, under the Roads and Bridges Act 1878 (*cit.*), sec. 52, the rate was to be uniform, and to be paid one-half by the occupier and one-half by the owner. If therefore the occupier was not assessed the owner could not be, because the value of the premises could not be taken into account in fixing the assessment, for *ex hypothesi* they were not liable to assessment. The case was ruled by *Motherwell* v. *Colville*, 1907 S.C. 1203 *per* Lord President Dunedin at p. 1207, and Lord Kinnear at p. 1208, 44 S.L.R. 851. There was no material difference between the sections of the statutes under consideration in that case and those in the present case. In both the sections dealt with premises not with ratepayers, and the water-rent charge was charged as water supplied to the premises, not as water

supplied to a person who stood in a particular relation to the premises. Statutory rights and powers as to assessment must be carefully observed — *Wordie's Trustees* v. *County Council of Lanark*, 1895, 23 R. 168, 33 S.L.R. 91—and that had not been done here.

Argued for the defenders (respondents)—The provisions of the Public Health (Scotland) Act 1897 (*cit.*), section 126 (2), applied to persons desirous of being supplied with a non-domestic supply, and to them only. That person in the normal case was the occupier, and in the present case was and could only be the defender *qua* occupier. Further, section 126 (2) contemplated an agreement with the occupier. Here there was no agreement, but a cancellation of an agreement. That distinguished the *Motherwell* case, for there the decision proceeded on the fact that there was an agreement. The defenders did not charge the owner of the premises with the meter charge but only the occupier, who, as a result of section 126 (2), was exempt from any assessment so far as it applied to him. That was the effect of section 126 (2) on the Roads and Bridges Act 1878, sec. 52. But there was no provision relieving the owner; where the owner and occupier were different persons the owner could have no interest in and could not be affected by his tenant being charged under section 126 (2), and he would have to pay the assessment; the same rule must be followed when the owner and tenant were one. To relieve the owner where he was also tenant would not be treating him on an equality with other owners who were not tenants, and to secure equality the defenders were entitled to charge the meter-rate from the pursuer as tenant and the assessment from him as owner, or to make such an arrangement with him as would secure that he was not receiving preferential treatment. That was what the defenders had done, and if they exercised the powers conferred by their statutory mandate reasonably their determination was not to be interfered with lightly—*Knox* v. *Mackinnon*, 1888, 15 R. (H.L.) 83, *per* Lord Watson at p. 87, 25 S.L.R. 752. Further, the assessment was to be one-half on the owner and one-half on the occupier of each individual assessable subject, and not one-half on owners as a class and one-half on occupiers as a class—*Govan Police Commissioners* v. *Armour*, 1877, 14 R. 461, 24 S.L.R. 324—so that there was no obstacle to assessing the owner without assessing the occupier.

At advising—

LORD PRESIDENT—The pursuer is owner and occupier of the farm of Auchren, situated within the Special Water District of Lesmahagow. The Local Authority are empowered by the Public Health Act to raise the money necessary to defray the cost of supplying water out of an assessment upon all lands and heritages within the district. That assessment is to be levied in like manner as is authorised by the 52nd section of the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), and that just means that the assessment is to be imposed at a uniform rate on all lands and heritages within the district, and has to be paid one-half by the proprietor and the other half by the tenant or occupant of the lands in respect of which the assessment is imposed. All that is very plain-sailing. The Local Authority, however, have surplus water over and above that required for domestic and sanitary purposes, and the pursuer is desirous of obtaining a supply for agricultural purposes. The Local Authority are authorised by the Public Health Act to give that supply upon such terms and conditions as may be agreed upon between the Local Authority and the person desirous of being so supplied. No terms and conditions have been agreed upon here, because, so says the pursuer, the Local Authority have offered and seek to impose upon him terms which are contrary to the statute. The question in the case accordingly is whether the terms and conditions offered by the Local Authority, on which they are willing to supply the pursuer with water for non-domestic purposes, are or are not in accordance with the statutory enactment.

I am of opinion that they are. The terms which are offered are these—(*first*) that the pursuer should pay for the water according to the special rates fixed by the Local Authority for the district to be charged for the supply of water for non-domestic purposes, and (*second*) that he should pay a sum equivalent to the assessment which would be imposed upon the owner of the premises in terms of the statute. The second payment is objected to by the pursuer on the ground that it is contrary to the statute to stipulate therefor, and he appeals to section 126 (2) of the Public Health Act of 1897 (60 and 61 Vict. cap. 38), in support of his objection. That statute authorises the Local Authority, where a supply of water for non-domestic purposes is to be given, either to charge the person who is desirous of obtaining the supply a portion of the special water assessment applicable to the premises or buildings supplied, or to charge for the supply of water furnished to the premises. In the present case the Local Authority have chosen the latter alternative. But it is plain from the statutory enactment that the option does not exist in the case of the owner of the premises; he must pay his full half of the assessment in the ordinary way. The option only exists in relation to the man who is actually supplied with the water. In his case, and in his case alone, have the Local Authority this optional method of charging. Wherever the premises are owned and occupied by different persons it is plain that the owner must pay the assessment in the usual way. With regard to the occupant, the alternative method of charging exists. The Local Authority may charge according to whichever method they please. In the case, as here, where the premises are owned and occupied by the same person, I am of opinion that the same rule ought to be applied. The local authority ought to charge that person as owner with the owner's assessment, and to charge him as occupier either with the

occupier's assessment or with the meter rate for water supplied as they deem fit.

That is exactly what the local authority here propose to do, only in a different way. They propose to charge the pursuer for water actually supplied in conformity with the rates which they have fixed for the district, and also to charge him a sum equivalent to the assessment that would be laid upon an owner. These are the terms and conditions on which the local authority is now prepared to supply the pursuer with water for non-domestic purposes. They are in my opinion quite conform to the Public Health Act. Accordingly I reach the same conclusion as the Lord Ordinary, and I am in favour of affirming his interlocutor.

LORD JOHNSTON—The pursuer is the proprietor and occupant of the farm of Auchren, within the Lesmahagow special water supply district. Prior to Whitsunday 1913 he was supplied by the defenders the District Committee of the Upper Ward of Lanarkshire as the water authority with water for both house and steading, and he paid the assessment therefor both as owner and occupier. At that date the defenders apparently determined to charge the pursuer by meter, as they were entitled to do. But they made it a condition of their supply for the purposes of the steading that the pursuer should sign an obligation appended as a postscript to the agreement to pay for his water at meter rates, binding himself to pay in addition "a sum equal to the amount of the owner's assessment." The pursuer did not sign this agreement, and on being charged for 1913-14 with the owner's share of the assessment for water he paid that, but refused to pay also for the water taken by meter rate. He was sued in the Sheriff Small-Debt Court for the amount alleged to be due. Decree was pronounced against him and he paid under protest. Again in 1914-15 the District Committee insisted on the pursuer signing their form of agreement, and on his refusing to do so cut off both his house and steading supply.

Most of the above has only a bearing on the preliminary question which has been raised as to the competency of the mode of relief which the pursuer has adopted. I think that he has sought the proper remedy. The Sheriff has already pronounced decree sustaining the District Committee's demand, and presumably will repeat it. Accordingly the pursuer asks a declarator in his second conclusion that the defenders having an ample supply of surplus water, which is not denied, they are bound to afford the inhabitants within the district, and particularly the pursuer, a sufficient supply for other than domestic purposes; in his third conclusion, that the defenders are not entitled to make a special charge for the water so supplied and also to impose the water assessments in respect of his premises exigible either from owner or occupant; and in his fourth conclusion that it was *ultra vires* of the defenders to demand that in addition to paying the meter rate the pursuer should bind himself to pay, as a condition of being supplied, the owner's share of the water assessment. These are no declarators of abstract right. But they are what he is entitled to if he is well founded in his contention, after the treatment which he has received, in order to clear the way for taking steps, should that be necessary, which one cannot contemplate, to compel the District Committee to restore the pursuer's supply upon legitimate terms. There is a final operative conclusion which I do not think very appropriate. But even if it be wholly incompetent, which I do not say it is, this does not prevent the pursuer if otherwise entitled obtaining decree in terms of the declaratory conclusions to which I have adverted.

As I have said, there is no sort of pretence that there is not ample surplus water. Nor do the defenders maintain that they have any right capriciously to give of their surplus a supply to one and refuse it to another, or to discriminate in their charges among those taking such surplus water. They admit they are bound to treat all equally. In accordance with this they publish a general scale of charges. They maintain that to give equality of treatment to those having the benefit of water supply for domestic purposes only, for both domestic and other purposes, and for other purposes only, they must impose the owner's assessment as well as the meter rate upon those who are owners as well as occupiers, and who are supplied with water for other than domestic purposes. I am not sure that I fully understand the defenders' attitude, for I should assume that it follows that if they are so entitled they would also be entitled to impose the owner's share of the assessment on the owner and the meter rate upon the occupier where the owner and the occupier are different. That they seem to disclaim the latter position indicates, I think, that the former is not sound.

We are not concerned with any question of the adjustment or equalisation of consideration and benefit. If they can under the statute effect that laudable object the District Committee are right in doing so. The question which we have to determine is whether the method they have adopted, whether it attains that end or not, is *intra vires* and legal. While I am of opinion that it is *ultra vires* and illegal, I do not think that the District Committee will have much difficulty in attaining their end in another mode. But it is not for the pursuer or the Court to advise the District Committee as to other courses which they may pursue to attain their end. The pursuer is not called on to show as a condition of preventing the District Committee from taking an *ultra vires* course that he will be pecuniarily benefited. I think that he shows good reason to presume that he will be so, though not to a great extent. But he is entitled to demand that he be dealt with in strict accordance with the statute. The pecuniary result must take care of itself.

The question depends on the construction of the Public Health Act 1897 (60 and 61 Vict. cap. 38), sec. 126, and its allied sections 134 and 135. I think that it is practically foreclosed by the decision of this Division

in the *Motherwell* case, 1907 S.C. 1203, 44 S.L.R. 851, which though it arose under a different Act turns on the construction of a clause substantially identical in terms. Where they differ the terms of the Special Act are less favourable to the pursuer's case than those in the general Public Health Act. The 126th section of the latter Act provides that where surplus water is supplied for purposes other than domestic "it shall not be lawful for the local authority to charge the persons so supplied both with the portion of the special water assessment applicable to the buildings or premises supplied and also for the supply of water obtained." The contention of the District Committee is that this proviso is limited to the case of "the person so supplied," who must always be the occupier, and that all that the proviso does is to preclude them exacting from the pursuer his occupier's portion of the special water assessment applicable to the buildings and also charging him the meter rate. The answer which occurred to me at the discussion was that, under the Roads and Bridges Act 1878, sec. 52, from which the method of assessment is derived by the reference in the Public Health Act 1897, sec. 135, the assessment is not on the individual owner and the individual occupier, nor on the collective owners and the collective occupiers, but is "an assessment to be imposed at a uniform rate on all lands and heritages within" the water district, to be paid "one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which the same is imposed," and that therefore the assessment is one. It is impossible to assess the owner without at the same time assessing the occupier. But that this is the true intention and construction of the passage I have quoted from section 126 is made abundantly clear by the passage which follows and along with which it must be read and construed, viz. — "But the local authority may either charge the said assessment leviable on such buildings or premises, or charge for the supply of water furnished to the same, as they shall think fit." The "said assessment leviable on such buildings or premises" is, as I have pointed out, one assessment. This is a complete answer to the defenders' contention. This is also the view taken by the Lord President (Dunedin) and by Lord Kinnear in the *Motherwell* case (*cit.*). It is in fact the ground of their judgment.

I think therefore that the Lord Ordinary has gone wrong here, and that his interlocutor falls to be recalled and decree pronounced in terms of the three declaratory conclusions to which I have adverted, or such of them as the pursuer may think necessary for his protection and relief.

LORD MACKENZIE — I agree with your Lordship. The duty of the Water Authority is prescribed by section 135 of the Public Health Act 1897 (60 and 61 Vict. cap. 38) in regard to general assessments in districts other than burghs, which is the case we are dealing with here. The effect of that section is to refer back to section 52 of the Roads and Bridges (Scotland) Act of 1878 (41 and 42 Vict. cap. 51) in order to find out what the duty of levying the assessment is. There it is provided that the amount required is to be raised by an assessment to be imposed at a uniform rate upon all lands and heritages within such district, and such assessment shall be paid one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages upon which the same is imposed. The 1897 Act, by section 126, provides for the case of persons desirous of being supplied with water for non-domestic purposes. The Water Authority here have a surplus, and they are willing to supply it. But the person to be supplied is the occupier, and when one turns to sub-section 2 of section 126 it is found that "it shall not be lawful for the local authority to charge the person so supplied both with the portion of the special water assessment applicable to the buildings and also for the supply of water obtained."

Where the owner and the occupier are different persons there has been no difficulty. The practice has been to assess the owner on his one-half, and, so far as the argument disclosed, there has been no objection to that course being taken, the reason being that the owner does not pay by meter for the supply of water. The *raison d'être* of the option is that the Water Authority are not to take out of the same pocket both the meter rate and the assessment.

A difficulty arises when, as here, the owner and occupier are the same person. It is evident from the form of agreement which they have drafted that the Water Authority have been aware of this difficulty and have foreseen that they might be met with an argument founded on the words "person so supplied" where the owner and the occupier are the same individual. They apparently considered that it was necessary to adopt the method which they proposed to the pursuer in this case in order to equalise the position of his farm with the position of an adjoining farm let to a tenant the occupier of which was one man and the owner another, and they adjusted a payment to the exact amount in order to equalise the position of the two. We are asked to say that that is an illegal form of agreement.

I do not think it is illegal, and I reach that conclusion upon the ground that it would have been lawful for the Water Authority to deal with the owner of the farm although the same individual as the occupier, in the same way as they could have done had the owner been one man and the occupier another. Accordingly I think the pursuer's demand in the case fails. We were pressed with an argument founded on the case of *Colville*, 1907 S.C. 1203, 44 S.L.R. 851, and I think the argument was carried the length of saying that *Colville* was an authority which exactly covered the present case. I am unable to assent to that view, because in *Colville's* case there was an existing agreement, the price for the water having been fixed according to certain conditions

which then subsisted. All that was decided in that case was that the subsequent Act of Parliament had not the effect of innovating upon the agreement come to between the parties.

LORD SKERRINGTON, who had not heard the case, delivered no opinion.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—W. T. Watson—D. Jamieson. Agents—Sharpe & Young, W.S.

Counsel for the Defenders (Respondents)—Wilson, K.C.—M. P. Fraser. Agents—Steedman, Ramage, & Company, W.S.

Thursday, July 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CAZALET AND OTHERS (OWNERS OF THE S.S. "CRONSTADT") *v.* MORRIS & COMPANY (CHARTERERS).

Ship — Charter-Party — Demurrage — Exceptions — Restraints of Princes — Application to Charterers as well as to Owners.

After a mutual clause of exceptions a charter-party provided—"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner"—which clause was followed by two clauses in favour of the ship. In an action by the owners of a ship for demurrage, *held* that the charterers were not protected by the clause of exceptions, as it was conceived in favour of the owners only.

Question, whether a shortage of railway trucks due to the Government having taken them for the defence of the realm was "a restraint of princes."

Ship—Affreightment—Custom of the Port—Delivery of Cargo — Evidence — Usage of One Trader.

Charterers alleged that the custom of a port was to discharge esparto grass, which was the cargo of the ship in question, into railway trucks on the quay. Four or five cargoes a year, which were the only cargoes, were consigned to one receiver. He for twenty-five years invariably received the grass into trucks on the quay. That suited his convenience. Small quantities were occasionally received by other receivers, who received them into lorries, that suiting their convenience. *Opinion* (*per* Lord President Strathclyde) that the charterers had failed to prove the alleged custom.

Contract — Charter-Party — Damages — Right of Shipowners to Recover from Charterers Cost of Discharging Cargo into Lighters when Ship was on Demurrage through Fault of Charterers.

Owners of a ship, the lay-days having run off, discharged the cargo into lighters, being unable to discharge into trucks on the quay owing to a shortage of trucks. The charterers refused to consent to discharge into lighters. *Held* that the owners were entitled to take steps to minimise the loss occasioned by the delay, and could recover from the charterers the cost of the lighterage so far as the claim for demurrage was thereby diminished.

William Marshall Cazalet and others, owners of the s.s. "Cronstadt," *pursuers*, brought an action in the Sheriff Court at Glasgow against Morris & Company, merchants, 204 St Vincent Street, Glasgow, charterers of that vessel, *defenders*, for a sum of £285 with interest in name of demurrage, and a further sum of £240, 13s. 9d. for lighterage and other expenses.

The *charter-party* provided — "*Esparto Charter-Party.*—. . . . The cargo to be brought alongside the ship at loading and taken from off the quay at port of discharge at the merchant's risk and expense, and in accordance with custom of respective ports.

"The ship to be loaded at the rate of 150 tons per working day, weather permitting, Sundays and holidays excepted, and to be discharged—after obtaining the usual quay discharging berth—at the rate of 150 tons per like working day, Sundays and holidays excepted. . . . . .

"Demurrage over and above the said lying days at forty pounds sterling per day. . . . . .

"Charterers and owners not to be responsible for any loss, damage, or delay directly or indirectly caused by or arising from strikes, lock-outs, labour disturbances, trade disputes, or anything done in contemplation or furtherance thereof, whether the owners or charterers be parties thereto or not.

"The act of God, perils of the sea, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

"Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager.

"Ship has liberty to call at any port in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life and property.

"Charterers have liberty to ship a full reasonable deckload at their risk from all causes, but quantity at captain's decision, and captain to take all reasonable care of same, and to supply any available covers."