There was not here an original quarry on the spot where the accident happened, but that portion of the hole had been made since the road was first used. Lastly, I cannot fail to notice that this was not the first accident that had happened, and the defenders had thus the advantage of a warning.

On the question of damages, Murray for the defenders moved the Court to reduce them to £80, the original amount fixed by the Sheriff-Substitute's interlocutor. Brand for the pursuer argued that the question of damages should really be judged by the light of the medical evidence, and that this justified the Sheriff in giving £150.

Lord Justice-Clerk—We are entitled in fixing the amount of damages to take into consideration the whole circumstances of the case—the nature and extent of the negligence and everything else. I think the Sheriff-Substitute was right.

The Court sustained the appeal to the effect of altering the amount of the damages to £80, and *quoad ultra* dismissed it with expenses.

Counsel for Pursuer (Respondent)—Brand—Dickson. Agents—Wright & Johnston, Solicitors.

Counsel for Defenders (Appellants)—Robertson—Murray. Agents—J. & A. Hastie, S.S.C.

Tuesday, June 17.

SECOND DIVISION.

[Lord Craighill, Ordinary.

THE WATERWORKS COMMISSIONERS OF PERTH *v.* M'DONALD AND OTHERS.

Public Officers—Expenses of Opposing Bill in Parliament—Perth Water Act 1829 (10 *Geo. IV. c.* 103)—*Perth Water Act* 1877 (40 *and* 41 *Vict. c.* 161).

The waterworks commissioners of a burgh appointed under a statute dated in 1829 opposed unsuccessfully a bill in Parliament by which their trust was abolished and a new body of commissioners appointed with a view to increasing the water supply and providing funds for that purpose by assessment. The old commissioners had been authorised by a resolution of a public meeting if necessary to oppose the bill, and they also by means of voting papers had ascertained that the ratepapers were adverse to it. *Held* that the old commissioners were not entitled either under their statutory provisions or at common law to charge any portion of the expenditure they incurred in their opposition against funds in their hands raised under their statutory powers of assessment, and that they were bound to account for the same to the newly-appointed Commissioners.

Statute 35 *and* 36 *Vict. c.* 91—*Application of Act to Scotland.*

Observations, per the Lord Justice-Clerk (Moncreiff), on the practice and mode of preparing bills in Parliament under English forms which are intended to apply to Scotland.

This was an action raised by the Waterworks Commissioners of Perth (under the Perth Water Act 1877) against Archibald M'Donald and others, Commissioners for supplying Perth with water (under the 1829 Act), and the conclusion of the summons was for count and reckoning under the following circumstances:—In 1829 the Act 10 Geo. IV. cap. 103, was passed, entitled "An Act for supplying the city of Perth and suburbs and vicinity thereof with water," the object of which was to bring a sufficient supply of water into Perth, and to provide adequate funds for that purpose by an assessment upon the inhabitants. By the 5th section the permanent constitution of the board was determined, there being six Commissioners by virtue of their public offices, and twelve Commissioners elected, two of them by each of the six wards into which the town was divided for the purposes of the Act. The Act authorised the Commissioners acting under it to take lands and water, and to execute works in the manner and within limits specified. Power was also given to raise such sums as the Commissioners should deem sufficient to carry out the purposes of the Act by assessment on the owners and occupiers in possession of lands, tenements, and heritages within the city and suburbs. The 49th section provided that the Commissioners "shall have power, and are hereby authorised and empowered, to impose and levy, or cause to be levied, the assessments hereinbefore authorised . . . . . so and to such extent as thereby to raise a yearly revenue or income sufficient and adequate to defray the annual expense attending the establishment, supporting the works and erections thereof, and carrying into effect the purposes of this Act." The 62d section enacted "that the expenses of preparing, applying for, and obtaining this Act, as well as the carrying it into effect, shall be a burden upon the assessments hereby authorised."

The Act of 1829 continued in force unaltered until 2d August 1877, when the Perth Water Act 1877 (40 and 41 Vict. cap. 161) received the royal assent. It was set forth in the preamble of that Act, *inter alia*, that since the passing of the Act of 1829 the city of Perth had greatly increased in extent; that it was expedient that a further supply of water should be afforded and placed under the control and management of the Commissioners incorporated by the new Act, and that the undertaking of the Commissioners of 1829, and their whole rights and privileges, lands, buildings, reservoirs, works, and other property should be transferred to and vested in the new Commissioners. By section 30 it was provided that from and after the passing of the Act the Commissioners under the Act of 1829 should go out of office, and their whole powers, duties, and functions should cease and determine. The 40th section provided that "all resolutions of the existing Commissioners (*i.e.*, of the Commissioners under the statute of 1829), or of any duly authorised committee thereof, shall, so far as the same are applicable and remain in force, continue to be operative, and shall apply to the Commissioners, and to the officers and servants of the Commissioners, until duly revoked or altered by the Commissioners or under their

authority;" and the 41st section provided that, "notwithstanding the passing of this Act, everything heretofore done, suffered, and confirmed respectively under or by virtue of the Act of 1829, or otherwise relating to the existing Commissioners, shall be as valid as if this Act had not been passed, and this Act shall accordingly be subject and without prejudice to everything so done, suffered, and confirmed respectively, and to all rights, liabilities, claims, and demands, present or future, which, if this Act had not been passed, would be incident to or consequent on anything so done, suffered, and confirmed respectively; and with respect to all things so done, suffered, and confirmed respectively, and to all such rights, liabilities, claims, and demands, the Commissioners shall to all intents represent the existing Commissioners, and the generality of this provision shall not be deemed to be restricted by any other of the provisions of this Act." The Commissioners were further declared to be a body corporate under the name and style of "The Waterworks Commissioners of Perth." And certain parties, who were the pursuers in this action, were nominated the first Commissioners for executing and carrying into effect the purposes of the Act until the first election of Commissioners. It was further provided that the water undertaking of the Commissioners under the Act of 1829, including lands, buildings, reservoirs, mains, pipes, rights, and water-plant, stock in hand, and property of every description, stores, machinery, arrears of water-rates, water-rents or charges, and all other property, heritable and moveable, real and personal, relating to or arising out of the water undertaking of the said Commissioners, with the whole powers, rights, and privileges belonging to such Commissioners in relation thereto, should belong to the Commissioners under the Act of 1877, subject to any mortgages, charges, encumbrances, debts, and liabilities to which the then existing water undertaking and water-works, with their appurtenances, or the lands on which they are erected, were or might be liable. All debts and money due from or to the Commissioners under the Act of 1829, or any person on their behalf, were to be payable to or paid by or to the Commissioners under the Act of 1877.

The pursuers averred that there was a large balance due to them by the former Commissioners, while the defenders refused to account save upon the footing of their being entitled to claim credit for—(1) A sum of £350, paid by them towards outlays in connection with the opposition made by them in Parliament to the passing of the new Act; and (2) A sum of £742, 1s., claimed by Mr Alexander Wilson, solicitor, Perth, for the balance of his account in connection with the opposition, after deducting the payment of £350. At a meeting of the pursuers in committee, held on 19th October 1877, they proceeded to consider the accounts of the late Water Commissioners, and recommended the present commission in the meantime to object to the said accounts in so far as the sum of £350 is charged therein, and to repudiate all liability for the expenses in connection with the opposing of the new Act. The defenders stated that they did not admit liability for Mr Wilson's claim of £742, 1s., but they considered that the pursuers were the proper parties to try the question, and were bound to relieve them of all claim at Mr Wilson's instance. They also averred that the opposition made in Parliament by the Commissioners acting under the Statute of 1829 to the passing of the 1877 Act was made justifiably and in good faith, and that the expense thereof formed a proper charge against the funds of the trust. One of the purposes of the new bill was the entire abolition of the trust created by the Waterworks Act of 1829. The expense incurred by the old Commissioners was in defence of the existence of the trust under their charge, and of the trust-rights vested in them by the Statute of 1829; and further, they said that the Act of 1877 was promoted privately contrary to the wish of the majority of the inhabitants, as shown by (1) a public meeting on 12th December 1876, where a resolution was passed unanimously authorising the 1829 Statute Water Commissioners, as trustees administering the Water Act, "to watch the bill threatened to be introduced into Parliament this session, and if necessary to oppose the same;" and by (2) the result of steps taken by the old Commissioners by means of voting-papers to ascertain whether the ratepayers were satisfied with the existing water supply and opposed to or in favour of the bill. These voting-papers were transmitted through the Post-office to, in all, about 4974 persons, being the whole Parliamentary electors, and also the female owners or tenants of properties valued at above £3 on the valuation roll. The voting-papers contained two questions, viz., "(1) Are you satisfied with your present supply of water?" and (2) "Are you opposed to the bill for an extension of the water supply promoted in Parliament this session by the committee of citizens?" The number of citizens who answered the first question in the affirmative was 2932, in the negative 354. The number who answered the second question in the affirmative was 2733, in the negative 496. These figures led the old Commissioners to believe that the course they were following in opposing the bill was not only agreeable to the community but entirely in accordance with its wishes. The £350 was expended under these circumstances, but other sums, amounting to £900, were also expended and paid by public subscription.

The defenders further set forth the Act 35 and 36 Vict. cap. 91, (which they averred applied to Scotland), section 2 of which provided that "when, in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local or personal bill or bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund or burgh rate, or other the public funds or rates under the control of such governing body, to the payment of the costs and expenses attending the same; . . . . provided that nothing in this Act contained shall authorise any governing body to promote any bill in Parliament for the establishment of any gas or water-works to compete with any existing gas or water company established under any Act of Parliament; provided that no powers contained in this clause shall apply in any case where the promotion of or opposition to a bill by a governing body has been decided by

a committee of either House of Parliament to be unreasonable or vexatious." The opposition made by the Commissioners under the 1829 Act to the bill of 1877 was not held by a committee of either House to be unreasonable or vexatious.

The pursuers denied that the expenditure had been incurred in terms of this Act.

The defenders pleaded *inter alia*—"(2) The foresaid expenditure of £350 by the Commissioners under the 1829 statute having been incurred by them *bona fide*, in defence of their trust, and in accordance with the desire of the ratepayers, they are entitled to credit for the same in accounting to the pursuers. (3) The pursuers are, in the circumstances above set forth, bound to relieve the defenders of the foresaid claim at Mr Wilson's instance."

The Lord Ordinary (CRAIGHILL) pronounced an interlocutor finding, in the first place, "as matter of fact—(1) That in 1829 an Act of Parliament was passed for supplying the city of Perth and suburbs and vicinity thereof with water; (2) that the Board of Commissioners appointed for carrying the provisions of this Act into operation were those specified in the condescendence, and the defenders called in the present action were the Commissioners under said Act during the year 1877, when it was 'in part repealed, and the undertaking of the then existing Commissioners, and their whole rights, privileges, lands, buildings, reservoirs, works, and other property, were transferred to and vested' in the pursuers by the Act 40 and 41 Vict. cap. 161; (3) that from the time when the works authorised by said Act of 1829 were completed, the water supply of Perth and suburbs and vicinity thereof, as defined by said statute, was provided by the Commissioners appointed under that Act, the cost being defrayed by a statutory assessment imposed upon the ratepayers; (4) that the purposes of said assessment are set forth in section 49 of the said Act of 1829 by which the Commissioners are authorised to raise 'a yearly revenue or income sufficient and adequate to defray the annual expense attending the establishment, supporting the works, erections and appurtenances thereof, and carrying into effect the purposes of this Act; to satisfy and pay the interest of the sum originally expended in procuring this Act, forming the reservoirs, pits, tanks, wells, erections, and machinery necessary, providing and laying pipes, and other works and operations by this Act authorised, and to provide a surplus or sinking fund of such an extent as may be estimated to be sufficient to liquidate the whole debt incurred for the purposes of this Act within a period not less than thirty years nor more than fifty years from the commencement of this Act;' (5) that prior to 1877 the existing arrangements for supplying Perth and suburbs and vicinity with water under the provisions of said Act of 1829 were considered by many of the inhabitants to be insufficient and unsatisfactory—the statutory limits, for one thing, having come, from the enlargement of the town, to be only a part of the area occupied by the population; and in consequence members of the community of Perth, entertaining this opinion, took in that year measures in the usual way for obtaining the sanction of Parliament to the changes they considered necessary for increasing the supply of water and widening the area within which it was to be furnished, as well as for so re-constructing the Board of Commissioners as to render it according to their anticipations more efficient for the purposes to be accomplished; and in particular they brought before Parliament a bill which in the session of 1877 was passed into law, and became the Act 40 and 41 Vict. c. 161; (6) that others of the inhabitants were hostile to the proposed changes, and their views on this subject having been adopted by the defenders, the latter in the persuasion that it was for the interest of the public they should so act, appeared before Parliament and opposed the passing of the said bill; (7) that in prosecution of this opposition an account was incurred by the defenders to Mr Alexander Wilson, solicitor in Perth, a portion of which—that is to say, the sum of £350, for which they claim credit in accounting with the pursuers—has been paid; and of liability for the remainder of which—that is to say, for the sum of £742, 1s. still unpaid—they claim to be relieved by the pursuers; and (8) that the defenders' opposition to the said bill, by the prosecution of which the said expenses were incurred, was not within the purposes for which the said Act of 1829 was passed, and was not incidental to any of those purposes: In the second place, as matter of law—(1) that the assessments levied by the defenders could not and cannot lawfully be charged with the said expenses which are here the subject of contention between the pursuers and the defenders; and (2) that as a consequence the defenders, in accounting with the pursuers, are entitled neither to be credited with the said sum of £350 nor to be relieved of liability for £742, 1s., the remainder of the expenses of their opposition to the bill which passed into law, and is now the Act 40 and 41 Vict. c. 161: Therefore repels the pleas stated for the defenders," &c.

"*Note.*—The Lord Ordinary thinks that the present case is ruled by the decision of *Wakefield* v. *Commissioners of Supply of the County of Renfrew*, Nov. 28, 1878, 16 Scot. Law Rep. 183, and by the authorities cited by Lord Curriehill in support of his judgment in that case. To sustain the defences would, in the opinion of the Lord Ordinary, be to sanction the view that statutory Commissioners appointed for specified public purposes are entitled at the expense of the ratepayers to oppose in Parliament any measure which may be brought forward for the purpose of extending the benefits for the promotion of which they were established. Persons who happen to be in the position of the defenders may as individuals take any part they please in supporting or opposing changes desired by other members of the community, but they are not entitled to fight the battle thus waged with means levied by assessment from the ratepayers. There is one way the unsoundness of the defender's contention is made strikingly manifest. The Act of 1877, like similar statutes, provides that the expenses of obtaining it should be defrayed out of assessments levied under its authority; and were the defences which have here been urged to be sustained, the consequence would be, not merely that the expenses of obtaining the statute of 1877, but a large proportion of the expenses incurred by the opponents of the bill which was passed into law would also be thrown upon the community. The Lord Ordinary cannot think that for this result there is warrant either in the Act of 1829 or in that of 1877, or on any principle or authority which can reasonably be applied to the circumstances of the case.

"The provisions of the Act 35 and 36 Vict. cap. 91, which are set forth by the defenders on the record, were not referred to at the debate; and the Lord Ordinary has therefore assumed that it is not now intended that these should be urged as grounds of defence."

The defenders reclaimed, and argued that their expenditure in opposing the bill had been incurred *bona fide* to protect the trust of which they were the statutory guardians. They also maintained that they were entitled to act as they had done owing to the expressed support of a large majority of those persons who were taxed. The decision in *Wakefield* did not apply, because in that case the Commissioners of Supply were not within their statutory powers. Here the Act of 1872 (35 and 36 Vict. c. 91), sec. 2, applied, and was founded on to support the contention of the defenders.

The pursuers replied, that even if the Act of 1872 applied to Scotland, which was very doubtful, the defenders were not within it. The case of *Wakefield* was truly on all fours with the present. These Commissioners, who were acting as such for the benefit of the public, were not entitled to fight against legislation proposed for the advantage or increased advantage of the public. They might no doubt if they wished do so as individuals, but they could not do so as trustees, using the public funds for that purpose.

Authorities—*Wakefield* v. *Commissioners of Supply of Renfrewshire*, Nov. 28, 1878, 16 Scot. Law Rep. 183; *The Queen* v. *The Mayor of Sheffield*, June 1871, 6 L.R., Q.B. 652; *The Queen* v. *The Norfolk Commissioners of Sewers* (and Lord Campbell there), 20 L.J., Q.B. 121; *Trustees of Mackintosh Fund* v. *Mackintosh*, June 30, 1852, 14 D. 928; *Cowan and Mackenzie* v. *Law* (Edinburgh Water Bill), March 8, 1872, 10 M. 578; *Brighton* v. *North*, Feb. 13, 1847, 16 L.J. (Chan.) 255.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—When the expenses which are the subject of this action were incurred there was, and still is, in operation a statute regulating the manner in which water commissioners in the position of the defenders might render such expenditure a charge on the rates under their administration. The statute is the 35th and 36th Vict. c. 91, and if it extends to Scotland its provisions are conclusive in this dispute. The Lord Ordinary says in his note that it was not founded on in defence to this action. I do not well see how it could be, for the defenders did not adopt any part of the procedure which is required by the statute before such outlay can become chargeable; and therefore if the statute extends to Scotland the defence must fail. Now, there are no words excluding Scotland from its provisions. Ireland is specially excluded; and the statute deals with interests which are the same on either side of the border. The only reason for supposing that it was not meant to extend to Scotland is that it is drawn with such exclusive reference to English legislation and English institutions and procedure that, although it would be easy enough to find equivalents in our own usages for these English requisites, it would be difficult, if not impossible, to follow out in Scotland the precise injunctions of the Act. It is not the part of the Judge to criticise the Acts of the Legislature, but I do not, I think, transgress due limits if I say that it is unfortunate that our public bodies and our courts of law should be put to solve questions such as these, when a little ordinary care and inquiry on the part of those by whom such English Acts are framed would prevent them from arising. There were only two courses which ought to have been followed—either to introduce a clause excluding Scotland, or to have provided proper machinery for its operation in Scotland. I incline to the opinion that the statute applies to Scotland, because its object is general, and there are no words to exclude, and no reason for excluding, Scotland from its operation, although I see great difficulties in the way of its practical application.

I am glad, however, to be saved the necessity of placing my judgment on this ground, as, apart from the statute, I am of opinion that the judgment of the Lord Ordinary is well founded.

The real principle which lies at the foundation of all the decisions which have taken place on this much controverted subject is to be found in the solution in each case of the question whether the promotion of or the opposition to the Parliamentary proposal was a fair and reasonable act of administration on the part of the governing body. This question is not solved by saying that these commissioners were not appointed for the purpose of promoting or opposing bills in Parliament. Neither were they appointed for the purpose of pursuing or defending actions in courts of law; yet it may be their right, and is often their duty, to use either remedy in defence or prosecution of the objects of their trust. Such proceedings are not the objects of the trust, but are or may be important or essential modes of due administration, and whether, in any given case such acts amount to fair and reasonable administration depends on the circumstances in which they take place. But one or two general considerations have entered largely into the decisions to which we have been referred, and are manifestly reasonable in themselves.

In the first place, it is not within the power of such governing bodies to promote bills in Parliament for enlarging their powers, for such a proceeding is avowedly beyond the existing limits of their trust, however beneficial the proposal may be for the public interest. This was decided in the case of *Cowan* v. *Mackenzie*, has been recognised in the decisions in England, and is a rule equally sound and salutary. But a different result might be arrived at if the object of the application to Parliament were to remove obscurities in construction or practical difficulties in administration.

Secondly, it has been decided that where the governing body has opposed Parliamentary propositions, the cost of doing so may in some cases be charged on the funds under their administration. Thus in the case of *Brighton*, water commissioners were found entitled to charge against their rates the cost of a successful opposition to a drainage scheme which had a tendency to injure their works; and I apprehend the same principle would apply to all similar proceedings taken in resistance to measures plainly at variance with the due and proper discharge of their duty or the integrity of their property or privileges. But there is a manifest distinction here between action taken by third parties for their own benefit

and in an interest adverse to the trust, and measures promoted by those interested in the trust, for its extinction and improvement, and still more, measures of public legislation. It is only in the general case to the first class that this principle applies. In regard to public legislation, as in the case of the *Renfrewshire Road Trustees*, I doubt if the governing body are entitled in any case to charge such expenses on their funds, as they have no power or function in their trust capacity to interfere with such matters; and when the proposal originates from within, the ratepayers should be left to maintain their own interest in their own way and at their own expense; nor is it any concern of the governing body to interfere between the ratepayers and Parliament. It is no part of their trust administration.

Lastly, much, if not all, depends on the result of the Parliamentary proceedings. It will be very difficult to show that opposition to a measure which Parliament has declared to be beneficial was due administration of the trust. This may not be conclusive, as success may not be conclusive the other way; but the verdict of the Legislature is an important and formidable factor in the result.

Applying these principles to the present case, I am very clearly of opinion that the intervention of the commissioners in this Parliamentary contest was in no sense whatever administration of the trust committed to them. The ratepayers should have been left to fight their own battle, and there was neither propriety or expediency in the course pursued by the commissioners. If the ratepayers had been unanimous they would have paid exactly the same sum for these Parliamentary charges as that which the defenders proposed to lay on them in the shape of rates. If they were not unanimous, I see no ground for making any of the ratepayers liable for the expense of the opposition—and the unsuccessful opposition—to their own measure. Parliament has pronounced the opposition to be ill-founded, and we must hold that it was not an act of due administration to engage in it.

Lord Ormidale—The question raised for determination in this case is one of interest and importance, but not, I think, attended with any serious difficulty in the circumstances which here occur.

By section 31 of the Perth Water Act of 1877 it is enacted that the water undertaking of the Commissioners under the prior Act of 1829, with all the property of every description, including water-rates, held by them, should belong to and be vested in the pursuers as Commissioners under the existing Act of 1877. The pursuers have accordingly brought the present action against the Commissioners under the Act of 1829 (the defenders), concluding that they should account for such property and rates. The defenders, while they do not dispute their liability to account, plead that they are entitled to retain or be allowed in the accounting £1500 of expenses said to have been incurred by them in opposing the pursuers' Act of 1877. In considering whether this claim on the part of the defenders is well or ill founded, it is important to keep in view what were the objects of the Act of 1877, and these are sufficiently indicated in the preamble of that Act, It bears, *inter alia*, that—[*narrates preamble ut supra*]. Nothing could apparently be less objectionable than such an Act; and it is difficult to understand why the defenders should have opposed it in Parliament, for it is undoubted that the inhabitants of Perth had greatly increased since 1829, and that the water supply as authorised by the Act of that year was quite inadequate.

Accordingly, all they say in support of the opposition is to be found in the vague and general allegation made by them in their statement of facts, to the effect that "the opposition which was made in Parliament by the Commissioners acting under the Statute of 1829 to the passing of the 1877 Act was made by them justifiably and in good faith, and the expense thereof formed and forms a proper charge against the funds of the trust. One of the purposes of the new bill was the entire abolition of the trust created by the Water-works Act of 1829. The expense incurred by the old Commissioners in the said opposition was incurred in defence of the existence of the trust under their charge and of the trust rights then vested in them by the Statute of 1829." Such being the only ground of opposition the defenders had to the new Act, the true purpose of which was to make up the deficient supply of water, and to authorise what was necessary to accomplish that object, it is not surprising that the opposition should have proved ineffectual. But nevertheless the defenders argued that their claim for the expenses incurred by them in support of that opposition ought to be allowed, as being covered, if not by the express terms, by at least the fair intention and application of the pursuers' Act of 1877.

Now, I cannot see how it can well be said that the expenses in question fall within the purposes of the pursuers' Act as these are set out in the 49th section thereof, which is quoted in the Lord Ordinary's interlocutor. The purposes are—1st, payment of the annual expenses of the existing establishment, and carrying into effect the existing Act; 2d, payment of the interest of the sum originally expended in procuring the existing Act, and erecting and forming the new water-works; and 3d, the creation of a sinking fund sufficient for liquidating the whole debt incurred under the Act within a given number of years. I am unable to understand how it is possible by any admissible construction to hold that the £1500 of expenses in question can be said to fall within any of these purposes. They cannot in any correct sense be said to be part of the annual expense of the existing establishment, or of the original expense of its construction, or of the contemplated sinking fund. All this I apprehend to be clear. And it is equally clear, I think, that the expenses in question cannot be held part of the expense of procuring the existing Act, seeing that they were incurred in an unsuccessful attempt to prevent its being passed at all. Under none, therefore, of the statutory objects or purposes of the pursuers' Act can it be held that the defenders' claim falls. It is certainly not covered by the express language of the Act, and the defenders themselves, as I understood their argument, did not maintain this. Their contention rather was that it was covered by the general principle or law of trusts, whereby the costs of defending its interests and estate from encroachment, injury, or destruction, is always legitimate expenditure. I quite appreciate a contention of this kind, and can very well understand that it might, in many supposable in-

stances be unanswerable, as incidental to the administration of all such undertakings as the pursuers'. If, for example, an attempt were made by any party to encroach upon the pursuers' water-works, or to appropriate any part of their property, it would not only be right, but the duty of the pursuers, as the statutory Commissioners in charge of the works and property, by all legal means in their power to oppose and defeat such an attempt, and to charge the expenses which they might incur in doing so against the trust estate. Or, if the water-works in question were in danger by flood or any other natural cause, it would also be the right and duty of the Commissioners to protect and secure them at the expense of the undertaking, and to apply the rates in payment of such expense. And I can likewise understand that circumstances might occur when it would be the right and duty of the administrators of an estate, whether acting under a private or a statutory trust, at the expense of that estate to defend it against any attempt to encroach upon it or otherwise to injuriously affect it, even although such attempt were made under the form of action in a court of law, or under the form of a bill in Parliament, as in the case of *Brighton* v. *North* (16 L.J., Eq. 255). In that case it would appear to have been held that the statutory commissioners for maintaining the embankments of a river were entitled to apply the funds under their charge in opposing a Bill in Parliament which if passed would have the effect of injuring these embankments. The case of *The Queen* v. *The Commissioners of Sewers of the County of Norfolk*, 21 L.J., Q.B. 121 was of the same description. And the *dictum* of Lord Commissioner Rolfe in *The Attorney General* v. *Andrews*, January 24, 1850, 2 Macn. and Gordon 225, did not go beyond the principle illustrated by these cases. The present case however is manifestly and essentially different. Here the bill, the opposition to which in Parliament occasioned the expenses which are now the subject of contention, had for its object, as I have shown, not to defeat or obstruct the objects of the former Act, but rather to obtain the necessary powers for carrying these objects into effect in such a way as the increase of the population in Perth and the consequent defective supply of water rendered necessary if not indispensable. It appears to me therefore that the recent cases of *Cowan and Mackenzie* v. *Law and Others*, March 8, 1872, 10 M. 578, decided in this Court, and of *The Queen* v. *The Mayor and Town Council of Sheffield*, June 1, 1871 (L.R, 6 Q.B. 652), decided in England, have a much more important bearing on the present than the English ones referred to. The former, although it related to the expense of promoting instead of opposing a bill in Parliament, which was thrown out as uncalled for, is very valuable in reference to the question to be decided here, inasmuch as it contains a full and careful exposition of the authorities and principles applicable to the whole subject, and shows unmistakeably, I think, that the present claim of the defenders ought not to be sustained. The other case, of *The Queen* v. *The Mayor and Council of Norfolk*, is indeed a direct authority to the effect that expenses incurred partly in Parliament and partly in a court of law cannot in the general case, or in such circumstances as the present, be paid or allowed out of funds held and regulated by statute, unless expressly warranted by the statute. And here it may be asked, Why, if the defenders ever considered they had a just claim to the expenses in question, did they not get Parliament to authorise the Commissioners under the new Act to allow them? I do not know whether the defenders asked for such authority or not, but it is certain they did not obtain it.

The only other point which it is necessary to notice is that arising under the Act 35 and 36 Vict. c. 91, as referred to by the defenders in their statement of facts. It may be doubted, however, whether that Act, having regard to its phraseology, and the procedure to which it refers, is applicable at all to Scotland. If it is—and I am disposed to concur with your Lordship in thinking that it is, keeping in view that Scotland is not expressly excepted from its operation although Ireland is—it seems to be conclusive against the defenders, for it is not said, and it is not the fact, that the conditions of that Act have been complied with by them. They cannot, therefore, take any benefit from it. But the very circumstance that such an Act contains conditions which must be complied with in England before any claim such as the present can in any circumstances be sustained is very significant, and goes far of itself to satisfy me that it ought not here to be allowed. But, independently of that and the other considerations to which I have already referred, I am disposed to think it enough that the opposition, for the expenses of which the defenders' claim is now made, was disregarded in Parliament presumably because it was ill founded. That the defenders should, notwithstanding, be allowed such expenses appears to me to be against reason and good sense, and is, so far as I am aware, unsupported by any precedent or other authority.

I am therefore very clearly of opinion that the Lord Ordinary's interlocutor reclaimed against is right and ought to be adhered to.

Lord Gifford—This case raises several questions of importance and nicety.

I shall first consider the case as at common-law under the successive statutes passed "for supplying the city of Perth and suburbs and vicinity thereof with water," and then I will consider the effect, if any, of the general statute of 1872 (35 and 36 Vict. cap. 91), including the question whether that statute is applicable to Scotland.

Now, apart from this last statute, and considering the question at common law, and looking only to the terms of the Perth Water Acts, I am of opinion that the defenders, the Commissioners under the earlier Act of 1829, are not entitled to charge against the rates and funds in their hands the expenses of the Parliamentary opposition which they offered to the Bill of 1877, which bill in that Session was passed into law and became the Perth Water Act 1877 (40 and 41 Vict. cap. 161).

I think the true question is (apart from the Act of 1872)—Were the expenses of opposing the Bill of 1877 part of the proper trust expenses which the defenders as Commissioners under the Act of 1829 incurred as such in the due and proper discharge of their duty as entrusted with the execution of the Act of 1829? It is the same question, though put in different words, as if I were to ask—Was it within the fair purposes, express or implied, of the Act of 1829 that the Commissioners thereby appointed should oppose in Parliament

the Bill of 1877? If it was, then the trust funds under the Act of 1829 are liable for the expense. If it was not, then the trustees under the Act of 1829 have gone outside of their trust, and outside the fair and reasonable administration thereof, in opposing the new Bill, and are not entitled to charge the trust funds with the expenses of such opposition.

I use the word "trust," because I think that the question is really one of trust law, the Water Commissioners being neither more nor less than statutory trustees entrusted with certain funds raised by rates or otherwise for certain purposes fixed by the statute, which may be called the statutory trust purposes. Now, it is one of the fixed and elementary rules of trust that the trust funds can only be applied to trust purposes, or to necessary expenses fairly relative thereto, and to nothing else, and the real difficulty in cases like the present is to determine whether the Act of the Trustees which has occasioned the expense is or is not fairly and reasonably within the purposes of the trust.

Now, the purposes of a trust are to be gathered, and in the general case gathered exclusively, from the terms of the trust-deed, and when the trust is a statutory one I think the purposes of the trust are to be found in the statute or statutes by which it is created. The purposes may be either expressed or implied, and very often a liberal interpretation will be given in interpreting a statute according to its object and intention. Still in a statutory as in a private trust the trust funds will be misapplied unless it can be shown that they have been applied to what on a fair or even liberal reading of the Act are really trust purposes.

Now, I am of opinion that it was no part of the purpose of the Act of 1829 to oppose or resist what was really the Extension Act of 1877. The purpose of the Act of 1829 was to supply the City of Perth, with the then "suburbs and vicinity thereof," with water, and everything that was necessary for this end the Commissioners might fairly do under the statute, and in particular they might execute, preserve, and protect the works authorised by the statute. But when the city of Perth or its suburbs and vicinity, &c., had in the course of time, being nearly 50 years from 1829 to 1877, greatly extended, I do not think it was any part of the duty of the old Water Trust to oppose its extension, or to oppose the increase or amendment of the water supply, or to oppose the reconstitution of the trust or its adaptation to an extended population. No doubt there might be differences of opinion as to where or how a new water supply was to be obtained, or as to how the new trust should be constituted or the Commissioners elected, but these were questions for the community of Perth, and not for the old Water Commissioners as such. As citizens the old Commissioners might either favour or oppose the new proposals—as Commissioners I think they were bound to be neutral, for I think it was no part of the statutory duty of the old Commissioners either to resist all improvement or to dictate or determine what the improvement should be. It appears to me that just as the citizens who promoted the Bill of 1877 acted upon their own responsibility and at their own cost in promoting it, so opposition to that bill should have been left to private citizens as such, and not taken up by the public Water Trust and at the expense of a general assessment.

It might have been otherwise if the new bill had proposed to establish a rival water company within the same district, leaving the old Water Trust still subsisting; or if the new proposal had been, without interfering with the existing trust, to tamper with or destroy the sources of the existing water supply, then, on the principle that every trust is bound to protect its own property, the Parliamentary opposition might have been justified. But no case of this kind is made or attempted to be made by the defenders. The objection to the new bill was not that the water supply would be injured or destroyed, but rather that it would be unduly extended and increased—that new districts would enjoy the benefits of pure water—and, above all, that the mode of electing Commissioners would involve a radical change, and I think a popularisation or increase of the democratic element in the constitution of the trust. I do not think that any of these grounds could justify the old Commissioners in applying the public trust funds to resist the extension and improvement of the trust. Certainly those who thought that the new proposals were inexpedient were well entitled to resist them, but then that resistance must not be at the public expense, for if the citizens or residents or ratepayers are divided as to how improvements are to be carried out, it would be unfair to one or other of the sections to fight them at their own—that is at the general—expense.

Reading the two Acts—the Act of 1829, and the Act of 1877, which superseded it—I am unable to say, allowing every latitude for wide or favourable interpretation, that it was one of the purposes, or within the purposes, of the Act of 1829 to resist and oppose the Act of 1877, and I therefore concur in the result reached by the Lord Ordinary.

It was suggested that the Act of 1877 actually extinguishes and sweeps away the Water Trust of 1829, or at least absorbs it in a new creation, and that by the law of self preservation every trust is entitled, if not bound, to preserve and protect its own existence. The argument is ingenious but unsound, for the purpose of the trust is the benefit of the community or of the public who are to be supplied with water, and not the benefit of the mere administrators or commissioners, or of the officials whom the trust requires. As individuals, if paid, they might have claims for compensation, but as trustees they are mere creatures of the statute, who, unlike persons or individuals, have really no interest in their own existence—at least it appears to me that they are not entitled, unless they have some better ground, to defend their mere official existence at the expense of the trust. A statutory trust or institution is not created merely that it may act as an obstruction to future improvements.

The remaining question relates to the nature of the Statute 35 and 36 Vict. cap. 91. This question was not argued at all before the Lord Ordinary, and was rather shortly and summarily dealt with at the hearing before this Division. I think, however, that in no view does it affect the result at which, in accordance with the Lord Ordinary, I have arrived, otherwise I certainly should have desiderated further argument.

At this bar, in opposition to their own statement on record, the defenders maintained that

the Act in question did not apply to Scotland, and therefore had no bearing on the present case. I can only say that I would require a good deal more argument than I have yet heard before I could agree in this result. The statute bears to apply to the whole United Kingdom except Ireland, and the special exception of Ireland—Ireland only—carries the strongest implication that Scotland is included. Then the evil which the Act professes to remedy, and the circumstances in which it was to apply, arise in Scotland as much as in England, and although English phraseology is used to some extent, and reference made to English officials and English machinery—and this happens not unfrequently in Imperial statutes which are undoubtedly of application in all parts of the United Kingdom—my impression is, and I do not think it necessary to state it higher than an impression, that the statute is applicable to Scotland.

But whether applicable to Scotland or not, I do not think that the Act is conclusive of the present questions, and at all events it will not avail the defenders or be of any assistance to them in support of their pleas. If the Act does apply to Scotland, then the defenders have not availed themselves of its provisions, and cannot take any benefit by its enactments, and the presumption would be very strong against them that they had no other case. On the other hand, if the Act does not apply to Scotland, then the case must be decided at common law, and I have already explained that so viewing the case I am adverse to the defender's pleas. I am for adhering to the judgment of the Lord Ordinary.

The Court adhered.

Counsel for Pursuers (Respondents)—Dean of Faculty (Fraser)—J. P. B. Robertson. Agent—John Galletly, S.S.C.

Counsel for Defenders — (Reclaimers) Lord Advocate (Watson)—Trayner—Rhind. Agents—Begg & Murray, Solicitors.

Thursday, June 19.

SECOND DIVISION.

[Sheriff of Forfar.

CLERK *v.* PETRIE.

Reparation—Injury to Person—Duty of Drivers.

In an action of damages for injury to person by being knocked down by a dogcart, facts which *held* on a proof to infer no contributory negligence; and *observations per* the Lord Justice-Clerk (Moncreiff) and Lord Gifford on the duties of drivers.

The pursuer in this case, Mrs Clerk, was an old woman of about ninety-four years of age. On the afternoon of Tuesday, 30th April 1878, she was crossing the street in front of her house, and in the centre of it (it was about 30 feet wide) she was struck and knocked down by a dogcart driven by the defender Alexander Petrie, and seriously injured. It was broad daylight at the time of the occurrence, and there was nothing to intercept the defender's view of the pursuer. He averred that he did not see her till he was within 10 or 12 yards, that he cried out to her, but that she was too deaf to hear him, and that he pulled up as quickly as he could, but not quickly enough to prevent her being knocked down. He further averred that her own negligence in not keeping a sufficient look-out contributed to the cause of the accident. The Sheriff-Substitute (Robertson) after a proof assoilzied the defender. On appeal the Sheriff (Maitland Heriot) reversed, and gave decree for £25. He added the following note, which sufficiently gives the import of the proof:—

"*Note.*—This case is one of considerable difficulty, in consequence of the pursuer herself being to some extent to blame for what took place.

"The accident happened in a wide street in Arbroath in broad daylight, while no one else was in the street near the pursuer. The defender admittedly saw the pursuer moving slowly across the street when he was 10 or 12 yards off, and yet he allowed the shaft of his conveyance to knock her over. He might have observed that she had not heard his cry, and the Sheriff fails to see why he did not at once pull up his horse entirely, or at least turn it aside so as to have passed behind her. Without imputing any very great blame to the defender, his fault—and it is a common one with drivers generally—was in proceeding on the assumption that the pursuer was a person of ordinary hearing and intelligence, and able in a moment to jump aside out of his way. Unfortunately, not being quick either in hearing or in stepping, she was injured. Although there was no evil intention on the defender's part, still it appears to the Sheriff that he was culpable in not driving more carefully than he did. But the difficulty in the case arises on the point of contributory negligence. Was the pursuer not also to blame in respect that she failed to look down Keptie Street before proceeding to cross the street. She herself admits she forgot to do this. Had she done so, no doubt the accident might not have happened. Was her forgetfulness in this respect—arising perhaps from defect of memory—so 'recklessly imprudent' as to liberate the defender. Or suppose she had looked and seen him coming along at the rate of five or six miles an hour, was she very culpable in proceeding to cross when she knew that all drivers are bound to be careful and cautious, and that she could not have supposed that anyone would ever drive over an old woman walking at a snail's pace.

"No doubt the looking in all directions before crossing a street is always a wise precaution, but the Sheriff is very doubtful if all people are bound to look four ways before proceeding to cross a street. On the contrary, the Sheriff is of opinion that drivers must make way for foot-passengers. Were drivers not bound to do so, few people would be safe. Surely the old and the young, the lame, the deaf, and the blind, not to speak of philosophers and learned men lost in deep thought, are entitled to the free use of the streets, and drivers must be taught that they drive over any one at their peril. They are bound to have their horses always well in hand, and be able at once to pull up or turn aside when necessary. It