been practically useless. He has allowed copies of precognitions and correspondence to enable counsel to watch effectively. It would have been impossible to watch effectively if counsel had not known the case which had to be met; and therefore what has been said about copies of precognitions and correspondence ought not, in my view, to outweigh the conclusion at which the Auditor has arrived that these were necessary and fair charges in the circumstances, and should be allowed.

I also agree as to the separate point of the mode of dealing with the expenses of witnesses who were not examined. I do not know what would be the use of a public officer, such as the Auditor of Court, if he could not be entrusted with the duty of ascertaining and deciding, with the aid of information supplied by the agents of the parties who are present before him, such questions as this which depend on the circumstances in which certain charges were made. I have never understood that it was the business of this Court, on objections to the Auditor's report, to go into matters of detail and an investigation of minute questions of fact. I have always understood that the sole ground of appeal is some question of principle. There is no such question here, and I am satisfied that the Auditor has applied his mind to the matter, and has reached a perfectly fair result.

LORD LOW—I am of the same opinion.

The Court approved of the Auditor's report on the accounts and repelled the objections.

Counsel for the Pursuers (Objectors)—Cooper, K.C.—Garson. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders—M'Clure, K.C.—Jameson. Agents—Melville & Lindesay, W.S. (for Thoms' Trustee)—Simpson & Marwick, W.S. (for Burgh of Kirkwall and Others.)

Friday, January 11.

SECOND DIVISION.

SOMMERVILLE & SON, LIMITED *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

(*Ante*, 42 S.L.R. 410, and 43 S.L.R. 843.)

Expenses—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*) *—Motion for Expenses in Outer House as between Agent and Client only Made after Judgment of House of Lords—Too Late.*

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61) provides as follows—Section 1. "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:— . . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

In an action against certain Water Trustees incorporated by Act of Parliament, the defenders were successful in the Outer House, and obtained an award of expenses in ordinary form. The Inner House having recalled the Lord Ordinary's interlocutor the defenders appealed to the House of Lords, who restored the interlocutor of the Lord Ordinary. No motion was made by the defenders either in the Outer or Inner Houses or the House of Lords that their expenses should be taxed as between agent and client under the Public Authorities Protection Act 1893, but when the judgment of the House was being finally adjusted by the Appeal Committee the defenders made this motion. The Appeal Committee having intimated that this question fell to be decided in the Court of Session on the petition to apply the judgment of the House of Lords, *held* that the defenders' claim (restricted by them to Outer House expenses) was excluded by their omission to make their motion before the Lord Ordinary, or, at all events, by their failure to reclaim against, or to intimate in the Inner House their dissatisfaction with, that part of the Lord Ordinary's interlocutor which allowed them expenses only on the ordinary scale.

On 14th April 1903 William Sommerville & Son, Limited, brought an action of declarator and interdict against the Edinburgh and District Water Trustees. The action proceeded in the first instance before LORD LOW, who after proof on 13th July 1904 pronounced the following interlocutor—"The Lord Ordinary having considered the whole cause, assoilzies the defenders from the conclusions of the summons and decerns: Finds the defenders entitled to expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report."

The pursuers reclaimed, and on 10th March 1905 this interlocutor was pronounced by their Lordships of the Second Division—"The Lords having heard counsel for the parties on the reclaiming note for the pursuers against the interlocutor of Lord Low, dated 13th July 1904, Recal the said interlocutor reclaimed against: Find the defenders liable to the pursuers in damages, and assess the same at the sum of two thousand pounds (£2000) sterling, for which decern: Find the defenders liable in expenses, and remit the same to the Auditor to tax and to report."

Against this judgment the defenders appealed to the House of Lords, who sus-

tained the appeal, pronouncing upon 23rd July 1906 the following judgment—"... It is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King assembled that the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the 10th day of March 1905, complained of in the said appeal, be and the same is hereby reversed, and that the interlocutor of the Lord Ordinary there, of the 13th day of July 1904, thereby recalled, be and the same is hereby restored: And it is further ordered that the respondents do pay or cause to be paid to the said appellants the costs of the action in the Court of Session, and also the costs incurred by them in respect of the said appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: And it is further ordered that the said cause be and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment."

Neither in the Outer House, nor in the Second Division, nor in the House of Lords was any reference made to the Public Authorities Protection Act 1893, or any request made by the successful parties that expenses should be taxed as between agent and client. Before, however, the judgment of the House of Lords was actually issued, the parties' agents appeared before the Appeal Committee, and the defenders moved that their account of expenses should be taxed as between agent and client under sec. 1 (*b*) of the Public Authorities Protection Act 1893. The Appeal Committee indicated their opinion that the appropriate time to make the motion was when the case came before the Court of Session on a petition to apply the judgment of the House of Lords.

Accordingly in December 1906, the Edinburgh and District Water Trustees presented a petition, the prayer of which was in the following terms—"May it therefore please your Lordships to apply the above judgment of the House of Lords, and to assoilzie the defenders from the conclusions of the summons and to decern; and further, to find the pursuers liable to the defenders in the expenses incurred by them in the Court of Session, including the expenses of this application; to allow an account thereof to be lodged, and to remit the same to the Auditor of Court to tax and to report, to direct the Auditor of Court to tax the said account of expenses in accordance with the provisions of the Public Authorities Protection Act 1893, sec. 1 (*b*), and to decern for the taxed amount of said account; or to do further or otherwise in the premises as to your Lordships may seem just."

Counsel for the petitioner appeared and restricted the prayer to the expenses of the Outer House, arguing—They had obtained a "judgment" in their favour, and were thus *ipso facto* and automatically entitled to expenses as between agent and client, the provision in the Act being peremptory—*Christie* v. *Corporation of City of Glasgow and Others*, May 31, 1899, 36 S.L.R. 694; *M'Fadzean* v. *Corporation of Glasgow*, January 30, 1903, 40 S.L.R. 339. Accordingly, even on the view that the "judgment" which they had was the "judgment" of the Lord Ordinary and not of the House of Lords, there was no force in the objection that the motion was too late, for no motion at all was required. But as a matter of fact their judgment was the "judgment" of the House of Lords, and their motion had been made at the earliest opportunity. Their opponent's argument postulated the necessity of special averments and a special plea as to expenses, which would be a complete innovation.

Argued for the pursuers—The motion was too late. The Act did not in any way affect the ordinary rules and practice of the Court governing expenses—*Bostock* v. *Ramsey Urban District Council*, [1900] 2 Q.B. 616. It accordingly did not derogate from the well-established rule that all questions as to expenses must be raised at the time of judgment, not subsequently—*Aird and Others* v. *Tarbert School Board and Others*, November 1, 1906, 44 S.L.R. 26; *Magistrates of Arbroath* v. *Dickson*, March 19, 1872, 10 Macph. 630, 9 S.L.R. 389—nor did it debar the Court from refusing, in its discretion, to allow any expenses—*Bostock, supra*. The "judgment" in this instance was the judgment of the Lord Ordinary, and it was now impossible to say what his decision would have been, or how he would have dealt with expenses had the question been brought before him. The pursuers might have argued, and the Lord Ordinary might have held, that the defenders were not a body of persons entitled to the privileges conferred by the Act. The matter was settled by the *Magistrates of Aberchirder* v. *Banff District Committee*, March 3, 1906, 8 R. 571, 43 S.L.R. 409, which was exactly in point. The following cases were also referred to by parties during the debate—*Young* v. *North British Railway Co.*, March 8, 1888, 15 R. (H.L.) 32; *Whitehead & Morton* v. *Cullen*, January 11, 1861, 23 D. 265; *Fielden* v. *Morley Corporation*, [1900] A.C. 133: *Jeremiah Ambler & Sons, Limited* v. *Bradford Corporation*, [1902] 2 Ch. 585; and Macqueen's Appellate Jurisdiction, p. 33.

LORD JUSTICE-CLERK—Whatever may be the right of public bodies as regards expenses, any expenses to which they may have claim can only be obtained by a proper application to the Court in regular course. Now, it is a well-settled rule of procedure that any question which is to be raised as to expenses must be raised at the time of judgment, and cannot be brought up at a later date where there has been no judicial reservation. The Act of Parliament by which public bodies can be awarded expenses as between agent and client does not interfere with the exercise of the discretion of the Court in dealing with expenses. It has been distinctly held in the case of *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q.B. 616, that the clause of the Act does not debar the Court from con-

sidering questions of expenses. The Court may, in its discretion, allow full or modified expenses or refuse to allow any expenses. The rule as regards expenses generally being as above stated, it seems to me clear that a party who desires to take advantage of the Act of Parliament by obtaining a judgment of expenses as between agent and client, is to make his motion for such a judgment at the time at which he must claim expenses generally. The Court is entitled to have everything before it as regards expenses at the proper time for dealing with expenses, viz., when judgment *in causa* is given.

As the case is at present before us, it relates to expenses in the Outer House for proof, &c. These expenses were disposed of by the Lord Ordinary without any motion being made to him to give any other order than an order for expenses in due course. What his judgment would have been on the general question of expenses had any motion on the statute been made in his Court we do not know. Further, no such question was raised in the Inner House when the case was brought there on reclaiming note.

In these circumstances my opinion is very decided that it is not competent to raise any such question now.

LORD KYLLACHY—In this case I am of opinion that, the question being *ex concessis* confined to the expenses of the proof and the other expenses incurred in the Outer House, the defenders' claim to have these expenses taxed as between agent and client is, according to our practice, excluded by their omission to make a motion to that effect before the Lord Ordinary, and, at all events, by their failure to reclaim against, or to intimate at the debate in the Inner House that they complained of, that part of the Lord Ordinary's interlocutor which allowed them only expenses on the usual scale. I would only add that I see no reason to doubt the soundness of the judgment of the First Division in the case of *Magistrates of Aberchirder*, 1906, 8 F. 571, or to differ from the construction of the statute which was there expressed.

LORD LOW—I am of the same opinion. This is an exceptionally clear case, because the question whether the defenders are entitled to the privilege given by the Public Authorities Protection Act 1893, section 1 (*b*), was not raised at any stage of the case until final judgment had been pronounced in the House of Lords, it having been apparently mooted for the first time before the Appeal Committee when, I understand, the order of the House of Lords was being adjusted.

Now, it is to be remembered that questions of considerable difficulty, and necessitating argument and consideration, may arise as to whether defenders claiming this privilege fall within the category of public authorities to which it was meant to apply. I think that it would be contrary to all principle to allow such a question to be raised for the first time after final judgment in the case, and when nothing remained to be done but taxation of accounts.

LORD STORMONTH DARLING concurred.

The Court refused the prayer of the petition in so far as it craved that the Auditor of Court should be directed to tax the defenders' account of expenses as between agent and client.

Counsel for Pursuers—Dickson, K.C.—Blackburn, K.C.—Bramwell. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defenders—Clyde, K.C.—R. S. Brown. Agents—Millar, Robson, & M'Lean, W.S.

Friday, January 11.

SECOND DIVISION.

COLQUHOUN'S TRUSTEES *v.* COLQUHOUN.

Succession—Thellusson Act 1800 (39 *and* 40 *Geo. III, cap.* 98)*—Accumulations—Portions for Children—Section* 2.

A testator by his trust-disposition and settlement directed his trustees to accumulate the revenue of his estates for twenty years, and thereafter, with the capital and accumulations, to purchase land and settle it in fee-simple upon the representative of the family then in possession of the family estates, or failing such a representative, upon his own nearest heir whomsoever. By a subsequent codicil he directed his trustees, in certain events, which happened, instead of accumulating the revenue to pay it to A during all the years of her life, and by yet another codicil he directed them to retain out of the revenue, and to invest along with accruing income, £1000 annually for the behoof of B and C, A's daughters, equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor, and, in the event of A's dying or marrying again, to continue to do so until there was accumulated a sum of £10,000, with a declaration that the same should be payable to B and C on their mother's death, provided they had attained the age of 21 or had married.

Held, in a special case, presented 21 years after the death of the testator, that the accumulation fell to be continued until the death or second marriage of A, it being a "provision for raising portions" for children of a person taking an interest under the will, and accordingly excepted by section 2 from the prohibition against accumulation imposed by the Thellusson Act.

By the Act 39 and 40 Geo. III (1800), cap. 98, commonly known as the Thellusson Act, it is enacted "that no person or persons shall