really defeat the purpose of getting the warrant, but there are many instances where it would not; and I would add one word upon the distinction which has been referred to by your Lordship between diligences which are said to be of right and those which are said to be *periculo petentis*. A warrant to bring back furniture such as this is, I think, in one sense obtained *periculo petentis*, but in another it might not be. If notice had been given, and if the respondent had been heard upon the propriety or not of granting the warrant, and after discussion the Sheriff had granted it, then, with the possible exception of its being shown afterwards that an absolutely untrue statement was made to the Sheriff, which misled him, I do not think it would be possible to say that that diligence was wrongous, even although circumstances which afterwards emerged might show that it need not have been granted. But if a person chooses to take such a *festinum remedium* as necessitates his getting a warrant of this sort without any notice being given to the opposite party, then I think the diligence is *periculo petentis*.

I think there was a motion made before us that this matter should be inquired into by means of proof rather than a jury trial. If the matter really depended upon law, I should be inclined to give effect to that; but in this discussion on relevancy, taken along with the documents, we have really been forced to give a judgment upon the law of the matter, and there is but little left except the question of damages; therefore I think it ought to go to a jury.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —Morison, K.C.—Paton. Agents—Gill & Pringle, W.S.

Counsel for the Defender and Reclaimer — M'Lennan, K.C. — Mercer. Agents — Cumming & Duff, S.S.C.

Saturday, January 28.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

MIDLOTHIAN COUNTY COUNCIL *v.* BURGH OF MUSSELBURGH.

Local Government—Burgh—County—Extension of Burgh Boundaries—Inclusion of Part of County—Adjustment of Liabilities—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 50), *sec.* 50—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *sec.* 96—*Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act* 1909 (9 *Edw. VII, c. xcviii*), *sec.* 18.

The Local Government (Scotland) Act 1889, sec. 50, makes provision, where there has been an alteration of boundaries between any councils or other authorities, for "an adjustment of property and liabilities"; where this cannot be effected by agreement the Sheriff acts as arbiter between a burgh and a county council under the Burgh Police (Scotland) Act 1903, sec. 96. In a case where a burgh's boundaries had been extended the county claimed such proportion of the existing debts as the valuation of the portion of territory taken bore to the whole territory for which the debts had been incurred. The Sheriff as arbiter refused the claim on the ground that it was for compensation for loss of assessable area, and he stated a case. *Held* that the arbiter had erred, and case remitted back to him to consider the various items whether they were for adjustment or not.

"Liabilities" means debt of some sort which is exigible for what has already been done, not a liability such as that for road maintenance, which, though in a sense presently existing, is really for the future. "Where you have got, first of all, an existing debt, the first thing you have to consider is in respect of what was that debt incurred? And then if you find that it was incurred in the creation of some sort of property, the next thing you have to consider is whose property is that now going to be? And according to the way in which these facts emerge, so I think would be the decision as to an adjustment of liability"—*per* the Lord President.

Caterham Urban Council v. *Godstone Rural Council*, [1904] A.C. 171, and *Inverness County Council* v. *Burgh of Inverness*, 1909 S.C. 386, 46 S.L.R. 305, *distinguished.*

Process—Local Government—Extension of Burgh—Adjustment of Financial Liabilities—Claim for Adjustment—Initial Writ—Form of Crave—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 50.

Part of a county having been disjoined and annexed to a burgh, the county council brought an action against the magistrates of the burgh for payment of such proportion of the county debt as the rateable value of the severed area bore to the rateable value of the territory for which the debt had been incurred. The crave of the initial writ was framed as a crave for a sum due and indebted.

Held that the form of crave was inappropriate, the application being, under the Local Government (Scotland) Act 1889, sec. 50, one to the Sheriff as arbiter for an adjustment (if any) of financial liabilities, and not one for payment of a debt.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), enacts—Sec. 50—"*Adjustment of Property and Liabilities*—(1) Any councils and other authorities

affected by this Act, or by any order or other thing made or done in pursuance of this Act, may, from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement so far as affected by this Act, or such order or thing, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment. (2) In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners. (3) The Commissioners when making an adjustment under this Act shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly, and further, the Commissioners may state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses. . . ."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33) enacts—Sec. 96—"*Adjustment with County in case of New Burghs or Extension of Boundaries*—On the formation of any new burgh or extension of the boundaries of any existing burgh, section 50 of the Local Government (Scotland) Act 1889, relating to the adjustment of property and liabilities consequential on an alteration of boundaries, shall apply as if in lieu of that Act, and the Boundary Commissioners, the Burgh Police Acts, and the Sheriff (not being a Sheriff-Substitute) were respectively mentioned therein: Provided that nothing herein contained shall require the Sheriff to entertain any application made after the expiry of one year from the date when such formation or extension takes effect."

The Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act 1909 (9 Edw. VII, c. xcviii), enacts—Sec. 18—"*Adjustment of Indebtedness between Town Council and County Council.*—Section 50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, shall apply and have effect on the extension of the boundaries of the burgh by this order."

This was a Special Case stated by the Sheriff of the Lothians and Peebles (MACONOCHIE), as arbiter under the Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act 1909.

The Case, which was the sequel of an action (afterwards conjoined with it) at the instance of the County Council of Mid-Lothian against the Magistrates of the Burgh of Musselburgh, was as follows—"In April 1909 the boundaries of the burgh of Musselburgh were extended so as to include a portion of the county of Mid-Lothian, situated within the Lasswade district of the county, conform to Provisional Order confirmed by the Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act 1909. The annexed area extended to about 200 acres of the annual value of £6414, 9s., the area of the whole county being 220,652 acres of the annual value of £770,501, 2s. 11d., and the area of the said Lasswade district being 52,304 acres of the annual value of £197,830, 11s. 3d. . . . The Burgh of Musselburgh and the County Council of Mid-Lothian not having come to any agreement with regard to the adjustment of claims arising out of the extension, the latter on 17th March 1910 presented an initial writ to me craving decree for payment by the said burgh of the sum of £539, 11s. 10d. Thereafter on 12th April 1910 the County Council lodged a condescendence, and on 26th April 1910 the said burgh lodged defences, and the record on the initial writ, condescendence, and defences was closed on 9th May 1910. The record and interlocutor pronounced by me in the proceedings are printed in the appendix hereto and are held part of this Special Case. Of the said sum of £539, 11s. 10d., £539, 10s. 3d. is a sum bearing the same proportion to the total of various loans raised by the Council Council, so far as outstanding at the date of the extension, as the rental of the annexed area bears to the rental of the county or district of the county for the purposes of which the sums were borrowed. These purposes include general county purposes (including loan for building the county buildings); police purposes (chiefly incurred for police stations); public health purposes (chiefly incurred for hospitals); roads (consisting of loans for bridges and roadmen's houses in the Lasswade district of the county); and two small loans for Inveresk Special Lighting District and Inveresk Special Water District, of which districts the area of the county annexed to Musselburgh formed a part. There were no public buildings or works within the area annexed of which the cost had been defrayed out of the said loans, excepting to the trifling extent for which the burgh admitted liability. The balance of 1s. 7d. is interest. When borrowing the principal sums (repayable principal and interest by annual instalments) the County Council granted bonds or mortgages which assigned in security to the lenders the assessments leviable by the County Council on said county and district respectively, and they maintained that the area annexed to Musselburgh was

liable at the date of annexation for the *pro rata* share of the said loans now claimed from the burgh. The burgh contended, on the other hand, that the debts were not *pro rata* debts of the area annexed, and that no adjustment of the debts required to be made excepting so far as they admitted liability as before mentioned, and that no part of the property or works in respect of which the loans were raised was included in the area annexed to the burgh except to the extent for which they admitted liability. The question whether the County Council were entitled to recover the said sum was debated before me on 30th May 1910, and at the debate it was suggested that in view of the importance of the case and of the somewhat varying decisions in other Sheriff Courts I should before giving judgment state a Special Case for the opinion of the Court of Session. I thought it right, however, to give judgment before stating a case, and this I did on the 2nd June 1910. In my interlocutor I assoilzied the defenders from the pursuers' claim so far as the same was not admitted by the defenders, granted decree for the admitted sums, and found the defenders entitled to expenses. Thereafter at the request of the unsuccessful party, namely, the County Council, I agreed, on the 14th June 1910, to state this case. My opinion on the question at issue between the parties is given at length in the note appended to my interlocutor of the 2nd June 1910. . . ."

The *question of law* was—"Whether on a sound construction of the relative statutes the Mid-Lothian County Council having, prior to the date of annexation, raised loans for the purposes of the said county and of the Lasswade district thereof respectively, and having assigned in security of these loans the rates of the said county and district respectively, are entitled on the annexation by the said burgh of an area forming part of the said county and district to payment from the said burgh of a proportion of the unpaid balance of the said loans corresponding to the proportion which the valuation of the area annexed bears to the valuation of the total original area of the said county and district."

With reference to the loans for which liability was disputed, viz.—those for general county purposes, police purposes, public health purposes, and road—the defender made on record the following averments—"(Ans. 4) The loans raised by the pursuers for general purposes amounted *in cumulo* to £33,885, 19s. 11d., whereof £6724, 2s. 6d. have been paid off, of which amount the area disjoined from the county and added to the burgh has paid its full share. It is not suggested that the burgh of Musselburgh should retain any share, right, or interest in the county buildings. These buildings are not more than sufficient for the county purposes. In less than twenty years they will be free of debt and they will last for a very long period thereafter. The defenders could only be held liable in a proportion of the cost of the county buildings if they were to retain a share and interest in them. The pursuers' claim under this head is denied. (Ans. 5) The loans raised by the pursuers for police purposes are understood to be exclusively for police stations. None of such stations is within the area disjoined from the county and annexed to the burgh, and the burgh has no right share or interest in them. The burgh police force is a separate or independent force from the county—at all events as regards finances. The police force of the burgh and the county is consolidated in terms of certain agreements under the Police Acts. The burgh will, from the date of passing the order, be responsible for the whole policing of the area added to the burgh, the population of which is rapidly increasing, and the county are thereby relieved of the expenses of policing said area, and there is no part of the debts which affects in any way the said disjoined area. Although the largest of the police debts was borrowed so recently as 25th June 1909, and no part of it has been paid off, one-fourth of the whole police debts has been paid off and the county authorities have had the benefit of the contributions towards these payments by the area disjoined from the county. The liability of the defenders for any part of this debt is denied. (Ans. 6) The purposes for which loans were raised by the pursuers for public health purposes within the Lasswade district of the county are understood to be entirely for hospitals and a disenfector. Since the passing of the Extension Order the county have been entirely relieved from treating cases of infectious diseases from the area annexed to the burgh, and as the population in said district is rapidly increasing, its inclusion in the burgh boundary is of manifest advantage to the county. The defenders deny all liability for any proportion of the debt outstanding for public health purposes. (Ans. 7) The principal loan for road purposes within the Lasswade district of the county is a sum of £4022, raised ten years ago for the purpose of erecting or re-erecting a bridge called 'Shank's Bridge' in a remote district of the county, and the sum of £1139, 11s. 4d. has been paid towards the amount of the loan, of which the area annexed to the burgh has borne its full proportion. The other road loans are understood to be for roadmen's houses, none of which are in or even in near proximity to the area disjoined from the county. These houses are necessary for the districts in which they are situated, but could be of no benefit or advantage to the area annexed to the burgh. Liability for the whole of the claim under this head is denied by the defenders."

The pursuers pleaded—"(1) In terms of the statutes above libelled, the defenders are liable in payment to the pursuers of the various sums above condescended on. (2) The defenders being justly indebted and resting-owing to the pursuers the sum sued for, the pursuers are entitled to decree therefor with interest and expenses as craved."

The defenders pleaded—"(1) On a sound construction of the statutes libelled, the defenders are not liable in payment of

the sums sued for except so far as admitted, and they should be assoilzied, with expenses."

On 2nd June 1910 the Sheriff assoilzied the defenders from the conclusions of the action in so far as the sums therein sued for were not admitted, and *quoad ultra* granted decree as craved.

Note.—"This case raises a question of the interpretation of section 50 of the Local Government (Scotland) Act 1889, which has never been directly decided. There are, however, dicta in two cases, one in the Court of Session and one in the House of Lords, where the section of the English Local Government Act 1888 corresponding to and in my opinion, so far as this question is concerned, indistinguishable from the 50th section of the Scots Act was under consideration to which I shall have to allude afterwards. Meanwhile it is necessary to state shortly the nature of the claim made by the pursuers. In 1909, in virtue of the Musselburgh Corporation Extension of Boundaries Provisional Order a portion of ground amounting to about 200 acres was disjoined from the county and annexed to the burgh. By section 18 of the Order, section 50 of the Local Government Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, was declared to apply to the extension of the boundaries of the burgh under the Order. The parties having failed to come to an agreement as to the adjustment of property, debts, liabilities, and financial relations between them, the County Council have craved me as arbiter acting under the above Acts to adjust the claims between them and the burgh. The parties are agreed that the figures given in the condescendence annexed to the initial writ and the statement of the various loans raised by the pursuers are correct, so I do not require to do more than to explain generally the nature of the claims advanced. The pursuers aver that they have in past years raised loans (1) for general county purposes; (2) for county police purposes; (3) for public health purposes; and (4) for roads in the Lasswade district; that on these loans, which are repayable at definite dates, there is a balance outstanding, and that the proportion of these balances outstanding which are applicable to the area annexed amount to the four sums with which I deal in the first branch of the interlocutor.

"The pursuers further claim four small sums, but as liability for these was not disputed (or more correctly as the defenders have agreed to pay these sums) I need not allude to them further.

"In these circumstances the pursuers claim payment of the whole of the sums sued for, while the defenders deny liability altogether. There is no question raised (as is fully explained in the pleadings) as to adjustment of the cost of buildings such as hospitals, police offices, and so on which the burgh might get along with the area of land under the Extension Order or in which it retains any right of use though situated outside the annexed area, there being in point of fact no such buildings on the annexed area. The sole question for determination thus is whether the County Council having raised loans relying on the area taken being assessable for payment of its share of the debts according to rental, they are entitled to payment from the burgh of the unpaid balance of the annexed area's share. Stated in that way it certainly seems hard that the county having raised loans which it considered necessary in the interests of an undivided whole, and presumably having expended part of these loans on the area now taken from it, should have to repay the unpaid balance of the whole loan out of assessments levied on a restricted area, but the area having been taken under the sanction of Parliament only such adjustment of financial relations as is sanctioned by the Legislature can be made. It is common ground between the parties that the loss of part of a rate-producing area cannot in itself support a claim for an adjustment of property, income, debts, liabilities, &c., on the ground that if the division of the area had not been made the annexed portion would have been in future available for assessment to the undivided area from which it was taken. As pointed out by Lord Halsbury, L.C., in *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A.C. 171, the word 'adjustment' as distinguished from 'compensation' means a division of existing assets, while 'compensation' would quite rightly be interpreted to mean the loss of some right to obtain income by rating or of some area which would furnish the right to get income. The question then is—Is such an adjustment as the County Council claim here in truth an attempt to get compensation for the loss of an assessable area, or is it a *bona fide* adjustment on division of existing assets? In answering that question I think that certain dicta of Lord Mackenzie in the case of *Inverness County Council* v. *Inverness Burgh*, 1909 S.C. 86, 46 S.L.R. 305 (which appear to have met with the approval of their Lordships who decided the case in the Inner House) are very valuable. The actual decision in that case does not touch the present case, but Lord Mackenzie points out that it was there argued that certain burdens, viz., loans such as we have here for general county, police, and public health purposes, 'were inherent in the transferred area.' In answer to that argument his Lordship said—'The loans in question were effected by the pursuers upon the security of the rates leviable by them within the area comprised for the time being within the county, and no real security affecting any part of the transferred area was constituted by any of the mortgages or bonds and assignations in security above referred to. An examination of the statute makes this clear.' The result of this and of the examination of the statutes which his Lordship proceeded to make would appear to be that the liability for repayment of the loans in question is not a liability inherent to the area taken by Musselburgh, but a liability of the appropriate rates of the county

taken as a whole, and that the security which the lenders agreed to take was not the security of each individual rateable subject in the county as it existed at the date when the loan was granted, but the security of the assessments which might be made yearly under the sanction of Parliament on an area which Parliament had the power to restrict at any time. If that be so, it seems to me necessarily to follow that what the County Council are asking for is, to use the words of Lord Davey in the *Caterham* case regarding the claim of *Godstone*, not an adjustment in the ordinary sense of that word of 'common property or liabilities, or of any reciprocal liabilities,' of the two parties to that case, but compensation for a loss which they (*Godstone Rural Council*) apprehend they will suffer.' The County Council here apprehend that they will lose the power of raising assessments during the remaining years during which repayment falls to be made, and what they ask seems to me to be practically compensation for that future loss, and such compensation it is not permissible for me to give. Stress was laid by the Solicitor-General on behalf of the County Council on certain dicta of their Lordships in the House of Lords in the *Caterham* case. It is no doubt said there that where there are 'existing liabilities' and where previously the two areas—the area which is annexing property and the area which is losing it—'possessed property,' there must be some method of adjusting the division of the liabilities and property which each possessed prior to the separation, but after carefully reading the judgment of their Lordships I think that what they alluded to was in Lord Davey's words 'common property or liabilities or any reciprocal liabilities,' and as the Lord Chancellor said in speaking of the division of the property of the parties, 'the buildings for example, the workhouses for the administration of the poor law,' and I might add as further examples police offices and hospitals. The allocation of the value of rights in these if one party lost and the other gained an exclusive or partial right of use of them would be a proper subject for adjustment, as would be the liability for the loans which were raised for their building and maintenance, but as I have said there is no case made for such adjustment in the present case. Whether if a road had been made entirely within the annexed area, and expense had been incurred in clearing away houses and so on, the road could be looked upon as property, the cost of which should be 'adjusted,' there is no need for me to consider, as no such case is made on record. On these grounds I have come to the conclusion, though not without difficulty, that the defenders must be assoilzied from such of the claims of the pursuers as have not been admitted."

The Special Case and the action were heard together on 13th and 14th December 1910.

Argued for the County Council (pursuers)—(1) *As to Competency*—The case was competent, for the arbiter was entitled to state a case for the opinion of the Court—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), sec. 50. Similar cases had been entertained in England—*e.g.*, *Buckinghamshire County Council and Hertfordshire County Council*, [1899] 1 Q.B. 515; *in re Rochdale Union and Haslingden Union*, [1899] 1 Q.B. 540. The reason why an action in ordinary form had been raised was that both parties wished a decerniture, and the only way they could obtain such a decree was by initial writ—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), secs. 3 (*k*), 39, and First Schedule, Rule 1. See also *Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130, 20 S.L.R. 92. (2) *On the Merits*—The pursuers were entitled to an adjustment of financial liabilities existing at the date of severance. The Sheriff had misapplied the case of *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A.C. 171. That case was inapplicable, as the question there was whether the county was entitled to compensation for the loss of assessable area, and not, as here, to an adjustment of existing financial relations. Nor was that case an authority for the Sheriff's view that where no property was taken over no adjustment of liability fell to be made—See Lord Davey's opinion at pp. 174-5. The liabilities sought to be adjusted were such as the Act contemplated—*West Hartlepool Corporation* v. *Durham County Council*, [1907] A.C. 246; *County Council of Stirlingshire* v. *Magistrates of Grangemouth* (1906), 22 S.L. Rev. 215. The dicta of Lord Mackenzie (Ordinary) in *Inverness County Council* v. *Inverness Burgh*, 1909 S.C. 386, 46 S.L.R. 305, relied on by the Sheriff, were not in point. The case ought therefore to be sent back to the Sheriff to make the adjustment craved.

Argued for the Burgh of Musselburgh (defenders)—(1) The case was incompetent, for the process was either an arbitration, in which case the arbiter having pronounced judgment was final, or it was an ordinary petitory action in which review was by way of appeal. (2) The Sheriff was right in holding that there were no liabilities before him for adjustment, for those in question were not such as the Act contemplated, and there could be no claim for the loss of assessable area—*Caterham* case (*cit. sup.*); *Inverness* case (*cit. sup.*) The annexed area was in future to be subject to the liabilities of the burgh, and ought not to be made subject to those of the county as well.

At advising—

LORD PRESIDENT—This is a Special Case stated by the Sheriff of the Lothians and Peebles, who has acted as arbiter in respect of that position being conferred upon him by the 18th section of a Provisional Order which was confirmed by the Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act 1909. Section 18 of the Provisional Order incorporated section 50 of the Local Govern-

ment (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903. Under the combined provisions of these statutes when there is, as here, an extension of municipal and police boundaries of the burgh, which, of course, means that territory which was formerly in the county is incorporated in the burgh—then in default of an agreement the Sheriff, in the words of the Local Government Act 1889, may act as a single arbiter to arrange for the adjustment of any "debts, liabilities, or financial relations, and may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties and for payment by either party . . . in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use," and so on; and he is also allowed as arbiter to "state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses."

Now while this is a Special Case, the matter, as I shall have afterwards to point out, has been thrown into some confusion by the form of process which all the parties here have thought fit to adopt, but for the moment I will pass from that and go to the merits of the matter.

The view of the County Council of Midlothian, who are the movers in the matter, was a very simple one. They found themselves at the time of the transfer saddled with certain debts in respect of sums which had been borrowed upon the security of the rates. They were debts which were repayable by instalments, and to a very large extent the original debts had been wiped off, but there were still certain remaining debts consisting of so much principal still due and payable by instalments, and their view was that they were entitled as matter of right to have it declared that the Musselburgh authorities should be liable for such proportions of these debts as the rateable value of the territory transferred and taken over bore to the rateable value of the whole territory in the county. The crave of the County Council is framed upon these lines, and upon these lines alone.

Now the Sheriff has decided against the County Council, and he has, as shown by his note, done so upon one ground and one ground alone, namely, that he has thought himself bound by the *Caterham Urban Council* case decided in the House of Lords. According to his view that case, and also some words of Lord Mackenzie as Lord Ordinary in the case of the *Inverness County Council* v. *Burgh of Inverness*, 1909 S.C. 386, barred his way. Of course if that is right there is nothing more to be said.

I am unable to agree with the learned Sheriff on that matter. I do not think the *Caterham* case decides what he says it has decided, and I think he has been misled by the words which Lord Mackenzie used, which were perfectly appropriate to the case in which they were used, but which do not seem to me to have any application to the present case.

I take, first, the words of Lord Mackenzie in the case of *Inverness County Council* v. *Burgh of Inverness*. In that case there had been an extension of the burgh boundaries, but it was not a matter done by a special Provisional Order. It was done under the provisions of the Burgh Police (Scotland) Act of 1892, and that Act did not incorporate that provision of the Local Government Act of 1889, which for such purposes was afterwards incorporated by the Burgh Police Act of 1903. Accordingly the decision in that case cannot in any sense be regarded as determining the present question. There was there no application to a Sheriff as arbiter, for no arbitration existed or could be called into effect, but an action of declarator was raised. It was sought to have it declared that by the mere fact of transference of an area there was necessarily also a transference of liability—that is to say, that the debts which had been incurred by the Inverness County Council were debts which adhered to each portion of the territory of that authority, and that consequently when the territory of the authority became divided into parts it only needed to be made clear by declarator that a just proportion of that debt which originally affected the whole territory of the County Council adhered to the portion transferred to the burgh of Inverness. Now it was in combating that proposition that Lord Mackenzie made use of these words—"The loans in question were effected by the pursuers upon the security of the rates leviable by them within the area comprised for the time being within the county, . . . and no real security affecting any part of the transferred area was constituted by any of the mortgages or bonds and assignations in security above referred to." That, if I may say so, was a very good answer to the argument that was being brought forward, but of course it really does not and necessarily cannot have any application to what is the true meaning of the clause of the Act of Parliament which I have read; and that it cannot be conclusive upon that matter, I think, results from this consideration, that if that was the only criterion, namely, to see whether there was a real security affecting the area transferred, there never would be any question of liability to be decided upon at all in such cases. The Act of Parliament which says you are to regulate liability presumably meant something. Well, I know of no liability under which a county or burgh authority can be which affects each portion of the ground in the same sense as, for instance, the liability to pay feu-duty to a superior affects the whole of a feu. There is no such thing. Loans that are got by local authorities are not real burdens in any sense upon the territory under their control; they are eventually payable only through the power of rating. It would be nothing to the purpose to point out that

conceivably there might be a real security over, say, a town hall, because there again there would be nothing left to do in the way of adjusting that liability, for so far as the real security is concerned, that would always stay with the town hall. According as the town hall was in the one territory or the other, the liability would be determined so far as constituted by a real security, and it could not be adjusted. And so I think it is clear that if the Act of Parliament means anything when it speaks about the adjustment of liabilities, it must mean liabilities of the sort which local authorities come under. In considering what these liabilities are I now come to the case of the *Caterham Urban Council* (1904, A.C. 171). I think that case decided one thing, and one thing only. It decided that you cannot have a claim simply based upon the loss of a profitable district. You cannot have a claim because your territory has been made less rich in the way of providing assessments than before. But while your Lordships make that quite clear, they again and again refer to the possibility of there being a liability. For instance, Lord Davey says this—"It must be admitted, I think, that the property, debts, or liabilities to be retained or transferred must mean existing property or debts or a liability actually incurred, and the expression 'financial relations,' I think, also refers to any reciprocal financial obligations which the undivided district and the severed portion may have already incurred towards each other." And in the same way Lord James says—"Both of these words 'income' and 'liabilities' must be read as referring to ascertained and existing income and liabilities, and cannot be held to include the mere liability to be rated as if the order of division had not been made." Now that being the decision in that case, anyone who reads the judgment carefully will see that the word "liabilities" in this connection means debt of some sort which is exigible for what has already been done. It does not mean a liability which in one sense may be said to be present because it is presently existing but in another sense is really a future liability. Mr Cooper argued that there is really no difference between the one class of liability for what has already been done, and the other, such as the liability to maintain roads. Of course the County Council is under a present liability to maintain its roads, but that is not the class of liability which is meant to be dealt with by "adjustment," because although in that sense it is a present liability, it is really a future liability. It is a liability which will recur year by year as the roads want mending. That would be exactly within the *Caterham* case, but where you have a debt presently exigible, even although by the terms of the contract under which it is constituted it may be payable by instalments, it seems to me that it is a liability which under this clause may be adjusted. Now I say very carefully "*may* be adjusted," because it need not be adjusted—that is for the arbiter to consider. But before I pass to that I ought to say in a single word that the other case in the House of Lords to which we were referred, the *West Hartlepool* case (1907, A.C. 246) is really only a legitimate sequel to the *Caterham* case, because there what was asked for was not a contribution to a presently existing debt, but was a contribution to a future liability treated as present, of exactly the kind I have referred to, because it was urged—"Our roads have been in use to cost us so much; we are under a present liability to maintain the roads; therefore we ask you to give us a contribution towards what we must pay in the future." In that case the House of Lords took the same view as to the true meaning of the word "liabilities" as they took in the *Caterham* case.

Now having so explained what I think is the truth of the matter, I come to the application of it to the present case. It is not for me to decide the matter upon the merits—that is for the Sheriff. But I am sure we are entitled to tell the Sheriff that he need not have stopped as he did stop thinking himself bound by the *Caterham* case. I think he is not. But, on the other hand, I do not think it is for us to tell the Sheriff precisely what he is to do, though one may indicate the sort of considerations which he may have before his mind.

It seems to me that where you have got, first of all, an existing debt, the first thing you have got to consider is, in respect of what was that debt incurred? And then if you find that it was incurred in the creation of some sort of property, the next thing you have to consider is, whose property is that going to be? and according to the way in which these facts emerge, so I think would be the decision as to an adjustment of liability. I do not want to take a specific instance here at all, because, as I say, that would be really doing what I think the Sheriff ought to do. But I can take what I should think a simple case at each end of the scale. Supposing there is a debt which has been incurred in respect of the provision of a building, which building is either going to remain with the county or be transferred to the burgh as the case may be, and the whole benefit of the building in the future is either to be with the county or the burgh, I think it would be pretty clear that the liability for the debt in respect of that building ought either to remain with or be transferred to the party who is going to have the whole benefit of it. On the other hand, suppose there had been an expenditure in the past the cause for which had, so to speak, entirely disappeared. Let me put the case which I put, I think, in argument. Suppose there had been an outbreak of plague, and an extraordinary loan had had to be raised for the purposes of public health. I am not saying such a thing can be done by way of loan, for one would have to look through the Public Health Acts to see if an expenditure of that kind could be met by way of loan, but for the purpose of my illustration I will assume it could be. That was an expenditure which at the time it was made enured to the

benefit of the whole county, and at the time of the supposed transference there is nothing that represents it except the maintained health of the whole county. There is nothing to be transferred. In a case like that I would say that a proportional division of the liability would be eminently fair. I have taken now an extreme case at each end of the scale. Each case must be considered on its merits by the Sheriff and not by this Court.

Now coming to the form of process, I think we ought to send the matter back to the Sheriff. It is impossible to answer the question as put, because it only puts the question presented by the crave of the County Council, and I think that the Sheriff really was led or misled into the form of his question by the initial mistake which was made by the County Council in the form of their crave. The whole process seems to me wrong from beginning to end. The initial writ is framed as if it were a claim for debt, with a record and pleas-in-law. But the application is an application to a Sheriff as an arbiter to "adjust"; it is not a claim of debt. Even if the Sheriff had adjusted, I do not think his finding should necessarily have been one of payment at all, although for an adjustment of a trifling character it might be the easiest way to say that the one party had better pay the other. Supposing there was a certain debt for which there was liability for, say, five years to come, I think it would be a perfectly competent thing to say that during the five years to come the one party was to bear so much of it and the other the balance, without requiring a present capital payment by the one to the other. All that is, I think, in the hands of the arbiter; but to make an application as an application for a payment of money is, I think, quite out of the question. The process here being in a state of confusion, as I have said, I think the only course open to the Court is to send the case back to the Sheriff for further consideration with the opinions we have expressed, and not to answer the question as put but to tell the parties really to ignore the decree. They may just as well ignore it, because there is no authority for it, and I cannot understand why it was ever asked. That was the initial fault. The second fault of the case as presented was this—the whole theory, and the only theory put forward for the County Council, was simply to say, "Here is a debt; pay the proportion of it which corresponds to your valuation;" and as a matter of fact they did not even say what the debt was incurred for. It is possible to find out from the record, because the answers throw a good deal of light upon that matter, but so far as the case put by the County Council is concerned they say nothing but that it is a debt. I think, however, in the opinion I have delivered, there is sufficient to guide the parties in what they really have to do, and I therefore think your Lordships should send the case back to the Sheriff to proceed as accords.

LORD KINNEAR—I agree with your Lordship for the reasons stated.

LORD JOHNSTON—That the procedure in this case is out of shape from beginning to end I agree with your Lordship, and have nothing to add to what your Lordship has said. But I also agree that the mistakes in this respect of the parties and of the Sheriff should not be allowed to prevent this Court, in order to effect what the statute intended, sending the case back to the Sheriff with instructions as to what he should have done and should now do.

The learned Sheriff has, I think, for the reasons explained by your Lordship, been misled by a misunderstanding and misapplication of two cases, viz., the *Inverness* case in Scotland, 1909 S.C. 386, and the *Caterham* case in England (1904), A.C. 171.

This case arises in connection with an extension of a burgh under the Act of 1903. That Act provides for adjustment between the two areas concerned, not for compensation. There are here certain debts, which are liabilities of the undivided area. They are transferred by operation of the Musselburgh Corporation Provisional Order 1909 to the diminished county, and a claim for their adjustment, which may be by payment either agreed on or as determined by an arbiter, is exactly the sort of claim which the statute contemplates. Take the case of roads, as an example, each area will for the future maintain its own roads, and apply its own assessments to that purpose. But with regard to liabilities already incurred and still current the case is different. While the creditors may have to look to the diminished county only, the county has I think an undoubted right to adjustment between it and the area it loses, in the manner provided by the statute. This is not compensation for loss of assessable area as the Sheriff thinks. But it does not follow that the adjustment is to be merely an apportionment *pro rata* according to valuation or assessability as the county's claim and the Sheriff's question assumes. That may be—I think it is—the *prima facie* result. But there may be countervailing considerations to which the Sheriff as arbiter is entitled to give weight. For instance, the result of the liability may be the creation of property which the one area retains, and in which the other area loses all right and interest—the considerations *hinc inde* are for the Sheriff. To illustrate what I mean, take once more the case of the roads. The area added to Musselburgh had as much interest in Shank's Bridge as say the parish of Ratho, but the bridge is not so much a piece of property as an integral part of the road system, and I see no *prima facie* injustice therefore in that case in an adjustment on the footing of a *pro rata* apportionment of debt incurred. But take an old toll-house, or a surfaceman's cottage, or take the case of police stations. Debt incurred for their building has created property of a different class. That property must be retained by the area in which the houses or stations are

situated. That involved a consideration counter to mere *pro rata* apportionment. Yet the reply may conceivably be that a particular house or station, situated in the severed area, would not have been required if the severed area had not at the date of erection, been part of the county, and that the property in such house or station is of no use to the area severed except as an asset to realise. But all such questions are for the Sheriff as arbiter. And I think therefore that the case should be sent back to him, not with a mere yea or nay to his question, but with findings or instructions.

LORD MACKENZIE gave no opinion, his Lordship not having heard the case.

The Court refused to answer the question of law as stated in the case, remitted the cause to the Sheriff as arbiter to allow parties to readjust their pleadings and to proceed as accords, and found no expenses due to or by either party in respect of the stated case.

Counsel for the County Council of Midlothian (Pursuers)—Wilson, K.C.—Pitman. Agent—James A. B. Horn, S.S.C.

Counsel for the Burgh of Musselburgh (Defenders)—Cooper, K.C.—D. P. Fleming. Agents—W. & W. Saunders, S.S.C.

Tuesday, December 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WESTER MOFFAT COLLIERY COMPANY, LIMITED *v.* A. JEFFREY & COMPANY.

Principal and Agent — Party Ordering Goods through Agent—Liability to Principal for Price.

The M. Colliery Company, Limited, which had been incorporated on 2nd March 1908 to acquire the business of a firm, the M Colliery Company, brought an action in September 1908 against J. & Company for the price of certain parcels of coal which they had sold them in March, April, and May 1908, through the agency of F. J. & Company maintained that they had not dealt with the pursuers nor ordered from them the goods the price of which was sued for. They admitted that they had got delivery of the coals in question, but maintained that in the purchase thereof they had dealt with F as a principal, and not as the pursuer's agent. It was proved that prior to February 1908 the defenders had bought coals from F., which he had obtained from the M. Colliery Company, of which firm he was a partner; that F. had bought coal from the defenders; that in the months of March, April, and May 1908 the defenders continued to order coals from F. The defenders' witnesses deponed that F had represented to them that the course of dealing which had prevailed between him and the defenders prior to the incorporation of the company was being continued, and that the defenders had ordered the coal from him with the object of wiping out the balance due by him to them. It was not proved that F. had any authority from the pursuers to make such representation. On the contrary, it appeared that the pursuers posted to the defenders invoices in their own name for the coal, that they rendered them accounts therefor, that they wrote them letters demanding payment, and that neither the invoices nor accounts were repudiated by the defenders so far as the pursuers were concerned. There was, moreover, no evidence to show that F. had acquired the property in the coals in question from the pursuers, and sold them again to the defenders, or that the pursuers ever claimed the price from F.

Held that the defenders, having in the circumstances set forth bought the coals from the pursuers, were liable to them in the price thereof.

The Wester Moffat Colliery Company, Limited, brought an action in the Sheriff Court at Glasgow against A. Jeffrey & Company, coal merchants, Glasgow, for payment of the sum of £53, 7s. 11d., being the price of certain coals "sold and delivered by the pursuers to the defenders" during the months of March, April, and May 1908. They averred that Messrs William Forbes & Company, coal merchants, Glasgow, had acted as their agents in the sale of the coals to the defenders. The defenders averred that the goods in question had been ordered by them from Messrs Forbes & Company as principals, and that they had not dealt with the pursuers.

The Sheriff-Substitute (BOYD) allowed a proof, which disclosed that prior to March 1908 there had been a series of transactions between the defenders and William Forbes & Company, of which firm William Forbes was the sole partner. On these transactions Forbes & Company were due the defenders £71, 1s. 1d. The coal which Forbes & Company supplied to the defenders was procured from the Wester Moffat Colliery Company, of which Forbes was also a partner. In February 1908 the Wester Moffat Colliery Company was wound up, and its business transferred to the Wester Moffat Colliery Company, Limited, which was incorporated on 2nd March 1908. William Forbes owned 1000 shares in the new company, or about one-eighth of the share capital. The defenders were aware of the formation of the new company. In March, April, and May 1908 the defenders continued to order coals from Forbes, though they did not supply him with any after February. The invoices sent to the defenders prior to 2nd March were, *mutatis mutandis*, in the same terms