to all ratepayers. The question remains, Have the pursuers right as individual ratepayers to the remedy they crave?

Second, that they do not limit their conclusions to the year 1911-12, and *quo modo constat* that they will be ratepayers in any subsequent year?

To that I think it is a sufficient answer both that *pluris petitio* will not in itself destroy their title to sue, and that as proprietors, if they have an interest to obtain this declarator regarding the year 1911-12, they have also an interest in respect of their properties to obtain it regarding future years, as the intended action of the Town Council affects the value of their properties.

Third, that as they have paid their assessments and do not in this action raise any question of repetition, they do not show any patrimonial interest. The money, his Lordship assumes, is ingathered and in the coffers of the burgh. If the pursuers succeed in their action it will remain there as the fruits of an assessment regularly imposed and paid. The pursuers do not ask any of it back. The result of the excess assessment, if the pursuers are right, may diminish the assessment next year. But *quo modo constat* that the pursuers will have any interest in that year?

This view appears to me to be too narrow. Not only have the pursuers as proprietors an interest in respect of their properties, but I think as ratepayers they have an interest in the administration of a burgh fund to which they have contributed. Admittedly they have an interest to avoid the contribution, and could have effected this by suspension. Equally I think they have an interest to prevent the misapplication of their contribution, and can effect this by interdict, which may conveniently, in accordance with our practice, be prefaced by declarator. And it must be remembered that the assessment was a general assessment, not restricted to the particular object to which part of it is proposed to be applied, and that therefore it was not necessarily known to them at the date of assessment that they were to be over-assessed for an improper object, nor is it clear that they could be heard to stay the levying of a general assessment *ex facie* legal because a portion of it was threatened to be devoted to an illegal object. It appears to me that the conclusions of the summons include the really appropriate remedy, which is to stay the application of the assessment levied to the illegal purpose to which it is proposed to be diverted, and to that probably our decree may be conveniently restricted.

The Lord Ordinary has held himself bound by the case of *Ewing, supra*. But I do not think that that judgment has any real application. The illegality complained of was indeed the same as here, but the form of action was, as your Lordship has shown, wholly different. If after they have obtained their declarator and interdict in this case the pursuers find themselves obliged to take steps to compel the refunding of moneys illegally paid away, which I can hardly anticipate, they may find difficulty in the judgment in *Ewing's* case, though I do not think that it is difficulty which will pass the wit of counsel to surmount. But the judgment is no obstacle to the remedy which they seek at present.

Moreover, the value of *Ewing's* case as an authority is a good deal detracted from by the fact that the Lord Chancellor, under misapprehension, bases his judgment upon certain cases which had to do with maladministration of common good and similar funds, which according to our law can only be challenged by the Crown—*Conn* v. *Magistrates of Renfrew* (8 F. 905).

For these reasons I think that the Lord Ordinary's judgment falls to be recalled.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 10th April 1912]: Repel the whole pleas-in-law for the defenders: Find that the defenders have no power and are not entitled at common law or under statute to levy or exact any rates in the burgh of Falkirk from the pursuers to be applied directly or indirectly in or towards payment in whole or in part of any expenses incurred by the Provost, Magistrates, and Councillors of the burgh of Falkirk in the unsuccessful promotion of the Provisional Order referred to on record, and continue the case: Find the pursuers entitled to their whole expenses, and remit the account thereof," &c.

Counsel for Pursuers—Constable, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders—Dean of Faculty (Scott Dickson, K.C.)—Hon. W. Watson. Agents—Macpherson & Mackay, S.S.C.

Saturday, July 13.

FIRST DIVISION.

[Lord Cullen, Ordinary.

FARQUHAR & GILL *v.* ABERDEEN MAGISTRATES.

Process—Title to Sue—Burgh—Rates and Assessments—Parliamentary Expenses.

The town council of a burgh, having unsuccessfully promoted a Provisional Order and Private Bill for a new water supply, included one-half of the promotion expenses in the annual budget of the burgh water department.

Held, on a note of suspension and interdict brought by certain water ratepayers, that the complainers had a title to sue.

Burgh—Rates and Assessments—Ultra vires—Parliamentary Expenses—Aberdeen Police and Water-works Act 1862 (25 *and* 26 *Vict. cap. cciii*)—*Aberdeen Corporation Water Act* 1885 (48 *and* 49 *Vict. cap. cxxiii*), *sections* 35, 36, 42, 43—*Public*

Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*a*).

Held that it was *ultra vires* of the Town Council of Aberdeen to impose, under its local water Acts, any assessment or levy any rates for the purpose of applying the proceeds thereof towards the promotion expenses of an unsuccessful Provisional Order and Private Bill for a new water supply.

The Aberdeen Corporation Water Act 1885 (48 and 49 Vict. cap. cxxiii), which amended the Aberdeen Police and Water-works Act 1862 (25 and 26 Vict. cap. cciii) and subsequent relative Acts, enacts—Section 35—"The Town Council . . . are hereby authorised . . . once in every year to estimate and fix the amount of money necessary to be levied for the purpose of defraying the costs and expenses of the Water Department for and during the year then current. . . ." Section 36—"The estimate to be made up in manner before provided shall be submitted to and considered by the Town Council at a meeting to be held as soon as conveniently may be after they shall have obtained a copy of the valuation roll for the year then current, and at such meeting, or any adjournment thereof, the Town Council may, and they are hereby authorised and required, in order to raise such a sum of money as, along with the public water rate after mentioned and other water revenues of the Town Council, shall be sufficient for the purposes aforesaid annually to impose, assess, and levy a rate to be called 'The Domestic Water Rate,' upon and from the occupiers of all dwelling-houses, and of such parts of all shops and buildings as may be used as dwelling-houses, within the city, according to the yearly value thereof as entered in the valuation roll for the year then current." Section 42—"If in any year the revenue of the Water Department shall be more than sufficient for all the purposes to which it is applicable, the Town Council shall, and they are hereby required to, carry the surplus to the credit of the account for the following year in reduction of the estimate of money required for such year; and when a deficiency occurs in one year it shall be provided for in the estimate and by assessment in the next year; and the Town Council shall, as nearly as possible, so regulate the domestic water rate that it may, one year with another, produce the amount of water required. . . ." Section 43—"The rates and charges levied under . . . this Act and the other income of the Water Department shall be applied in manner following . . . First—In defraying the expenses of the management and maintenance of the water undertaking . . . the annual costs, charges, and expenses of providing and supplying water. . . . Second—In payment of the interest of money borrowed under the authority of the recited Acts and of this Act, in connection with the water undertaking. Third—In payment of the sum by the recited Acts, and this Act, directed to be set apart as a sinking fund in connection with the water undertaking. Lastly—In payment of such portion of the cost of enlarging or increasing and renewing and from time to time extending the works, mains, and pipes as the Town Council shall think it reasonable to charge against the revenue for the year, and of any other necessary annual expenditure."

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), enacts—Section 1—"When 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—(*a*) The action . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . ."

Messrs Farquhar & Gill, manufacturers, St Paul Street, Aberdeen, and certain other retepayers in Aberdeen, *complainers*, presented an action of suspension and interdict against the Lord Provost, Magistrates, and Town Council of the City of Aberdeen, *respondents*, whereby they craved the Court "to suspend the proceedings complained of and to interdict, prohibit, and discharge the respondents from laying any assessment upon or levying or exacting any rates or charges from the complainers or other ratepayers or contributors to the water revenue of the respondents in the district over which the respondents have powers of assessment under the Aberdeen Police and Water-works Act 1862, and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of any costs incurred by the respondents or others in connection with an application made by them in the session of 1910 to the Secretary for Scotland, under the Private Legislation Procedure (Scotland) Act 1899, for a Provisional Order to authorise them to obtain a new supply of water from the river Avon, or in connection with a Private Bill promoted by the respondents in Parliament in the said session of 1910 for the same purpose; or alternatively to interdict, prohibit, and discharge the respondents from applying any part of the rates and charges which may be levied and collected by them for the purpose of the said water revenue during the assessment year 1911-12, directly or indirectly, towards payment in whole or in part of the aforesaid costs; or to do otherwise in the premises as to your Lordships shall seem proper."

The complainers averred—"(Stat. 4) In the session of 1910 the respondents by a majority of 19 to 13 resolved to make application, and thereafter did make application, to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act 1899, for a Provisional Order to

authorise them to obtain a new supply of water from the river Avon in Banffshire. . . . The Chairman of Committees of the House of Lords and the Chairman of Ways and Means in the House of Commons, . . . after hearing parties, reported to the Secretary for Scotland that the application should not proceed by way of Provisional Order. The respondents then proceeded by way of Private Bill and promoted the Aberdeen Corporation Water Bill 1910. . . . The said Bill came before a Select Committee of the House of Lords, who decided that it was not expedient that the Bill should proceed. The respondents incurred great expense in connection with promoting the said Bill in Parliament. The total amount of the said expenses is believed to be £15,521, 6s. 5d. . . . (Stat. 5) . . . The complainers have reason to believe, and they aver, that the respondents or a majority of their number have included in the estimates of the expenditure of the Water Department for the current year ending 15th May 1912 the sum of £7760, being one-half of the said expenses incurred by the respondents in connection with the promotion of the said Provisional Order and Bill. The complainers further believe and aver that the respondents have, for the purpose of meeting the said estimated expenditure of the Water Department, resolved to impose a public water rate of 1¼d. per £1. . . . Explained that there is no warrant either in the before-mentioned statutes or otherwise for any specific item of expenditure being charged against any specific item of revenue, and that it is *ultra vires* of the respondents to do so. The whole water revenue, from whatever source it is derived, constitutes trust money in the hands of the respondents to be administered by them for the statutory trust purposes. The respondents have been able to debit the said sum of £7760 in the estimated expenditure of the current year without increasing their rates or charges only in consequence of the fact that the payment to Sinking Fund in the current year has fallen to £8770, this being the last instalment as against about £20,000 in previous years. The result of debiting the said sum of £7760 to the expenditure of the current year is thus to deprive the ratepayers of the benefit which would otherwise have resulted to them in the form of decreased rates and charges in consequence of the large diminution in the contribution to Sinking Fund for the current year. . . . (Stat. 7) The complainers are, in consequence of the illegal action of the respondents as above set forth, in danger of being charged excessive water rates, and the present suspension has accordingly been rendered necessary. All of the complainers, as owners of heritable property, are liable to pay the public water rate. The complainer Robert Moir Williamson is also liable to pay the domestic water rate. The complainers Farquhar & Gill and the Aberdeen Lime Company, Limited, are consumers of water for other than domestic purposes, and pay the meter rates charged by the respondents under section 20 of the said Act of 1885."

The respondents averred—"(Ans. 5) . . . Explained that the respondents, while including the said sum of £7760 in the expenditure for the current year, have not increased the public water rate, the domestic water rate, or the rates and charges for supplies of water for other than domestic purposes."

The complainers pleaded—"(3) It being *ultra vires* of the respondents under the statutes libelled to levy any assessments or exact any rates or charges to be applied in payment of the expense of promoting the Aberdeen Corporation Water Bill 1910, or alternatively to apply any rates or charges levied and collected by them under the said statutes in payment of the said expense, the complainers are entitled to interdict in terms of one or other alternative of the prayer of the note."

The respondent pleaded—"(1) The action is excluded in respect of the provisions of the Public Authorities Protection Act 1893. (2) The complainers having neither title nor interest to insist in the present action, the note should be refused. (4) The expenditure in connection with the promotion of the Provisional Order and Private Bill having been incurred by the respondents in good faith in the execution of their statutory duties, the note should be refused. (6) The assessment, and the rates and charges referred to, and the application of the proceeds thereof being according to law, the note should be refused."

On 10th April 1912 the Lord Ordinary (CULLEN) sustained the second plea-in-law for the respondents and refused the prayer of the note.

Opinion. — "This case raises substantially the same question as that which has come before me for determination in the case of the *County Council of the County of Stirling and Others* v. *The Provost, Magistrates, and Councillors of the Burgh of Falkirk.* I accordingly refer *brevitatis causa* to my opinion in the latter case. In accordance with it, I am of opinion that the defenders' second plea-in-law falls to be sustained and the note refused. While this is so, I am equally of opinion that the defenders' unsuccessful essay to obtain an extension of their existing powers under the Aberdeen Police and Water-works Act 1862, and subsequent and amending Acts administered by them, mentioned on record, does not form a purpose under these Acts for the expense of which they are entitled to exercise the powers of assessment which the Acts confer on them."

The complainers reclaimed, and argued—The Lord Ordinary's interlocutor ought to be recalled. The expenses of the Bill should have been paid out of the existing "common good," and not out of the ratepayers' pockets. The complainers had a most direct patrimonial interest, and the analogy of *Ewing* v. *Glasgow Commissioners of Police*, January 19, 1837, 15 S. 389, was inapplicable; in that case the action was one of reduction and repetition, and

not, as here, of suspension and interdict. The present case was directly governed by *Cowan & Mackenzie* v. *Law*, March 8, 1872, 10 Macph. 578, 9 S.L.R. 341. *Eadie* v. *Glasgow Corporation*, 1908 S.C. 207, 45 S.L.R. 171, was also referred to.

The respondents argued—The wrong, if any, had been done, and the remedy of suspension and interdict came too late. The interdict here sought was unqualified in point of time and should be refused—*Steuart* v. *Parochial Board of Keith*, October 16, 1869, 8 Macph. 26, *per* Lord Benholme, at p. 30, 7 S.L.R. 3. The wrongful act complained of consisted in paying the expenses out of the burgh funds, and that was done more than six months before this note was presented; the respondents were therefore protected by the Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1 (*a*). No action lay against persons who were responsible for making the payments—*Spittal* v. *Corporation of Glasgow*, June 17, 1904, 6 F. 828, 41 S.L.R. 629; *Christie* v. *Corporation of Glasgow*, May 31, 1899, 36 S.L.R. 694; *Earl of Harrington* v. *Corporation of Derby*, [1905] 1 Ch. 205. The case of *Cowan* (*sup. cit.*) did not rule here, for in that case the action was brought before the funds were encroached on, and the case of *Ewing*, *sup. cit.*, was not founded on. *Attorney-General* v. *West Ham Corporation*, [1910] 2 Ch. 560, and *Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050, 16 S.L.R. 619, were referred to.

At advising—

Lord Mackenzie—This case is really *a fortiori* of the case of the *County Council of Stirling and Others* v. *Burgh of Falkirk*, which was disposed of yesterday. It raises a question whether the Magistrates of Aberdeen are entitled to impose and levy rates under the powers of assessment which they have under the Aberdeen Police and Water-works Act 1862 and Acts amending the same, in order to meet the expenses—which amount to £15,581, 6s. 5d. —which were incurred by them in an unsuccessful attempt to obtain an extension of their existing powers under the Water-works Act of 1862, the proceedings having been first by Provisional Order, and then by a private Bill.

The complainers have presented a note of suspension and interdict in general terms. The rates have not been paid—the assessments were laid on but the rates were not levied, and the reclaimers describe themselves as being all owners of heritable property liable to pay the public water rate; Williamson is liable to pay the domestic water rate, and Farquhar & Gill are consumers of water for other than domestic purposes (they describe their interest in statement 7).

The same argument was submitted here that was submitted in the *Falkirk* case in regard to the point that the costs have all been paid. No doubt the costs were paid to the original creditors, as is set out in the pleadings, by 1st March 1911, but, for the reasons that have been already given in the *Falkirk* case, I do not think that that can affect the right of the complainers to have the remedy that they ask.

It was not until September that the respondents resolved out of what fund this money should be taken. They had a meeting on the 1st September 1911, when it was resolved to impose the assessments for domestic water rate at a particular rate to the different classes of proprietors, and to provide for the supply of water for other than domestic purposes at the table of rates fixed in a previous year. Then on the 4th September the resolution was considered by the respondents and adopted by them. And the case made by the complainers—and about which there is no doubt—is that, in the estimate of the expenditure of the Water Department for the year ending 15th May 1912, the sum of £7760, being one-half of the expenses incurred by the respondents in connection with the promotion of the Provisional Order and the Bill, was provided for, and in the appendix with which we have been furnished, the way in which the budget is made up is perfectly clear.

I should notice in passing a point which is made by the respondents in Ans. 5, that by including this sum of £7760 in the expenditure for the current year the respondents have not increased the public water rate, the domestic water rate, or the rates and charges for the supply of water for other than domestic purposes. The broad fact, however, remains, that the expenditure which was budgetted for in the year 1911-12 by the respondents amounts to the sum of £34,385—that is the expenditure that they have got to find revenue to meet; and accordingly they impose their charges in order to make up that figure. But for the charge, which it is said is illegal, of £7760, their budget would only have required to be for a sum of £26,625. That would have been the figure which would have been required to have been made up out of revenue.

In these circumstances it appears to me that the complainers have a direct patrimonial interest to say that "but for your illegal charge, what we would have been called upon to make up would have been less by £7760." It is out of the question I think for the respondents to contend that they can apply the revenue they get from water sold to this illegal charge, and then say to those who are ratepayers under the public and domestic water rates that their rates are not going to be raised, and therefore they cannot complain. I think that is a way of dealing with the budget to which no countenance can be given.

The position, therefore, is that in September the respondents resolved to meet the expenses, in what, it is said, is an illegal manner. In October the interdict was applied for. It appears to me that the case of *Cowan*, 10 Macph. 578, is a direct authority for what is asked by the complainers here. It was argued by the Dean of Faculty that in the case of *Cowan* the costs had not been paid. For the reasons already explained I do not think that that

makes any difference. Another point was taken—that in *Cowan's* case the question of title was not raised, and that the case of *Ewing* was not cited. Also for the reasons already explained, that can make no difference in the present case. Then it was suggested that in *Cowan's* case the pleadings showed that it was the individual wrongdoers and not the trustees who were sued. I think it is quite plain from the report and from the pleadings that in that case the Court considered they were interdicting the trustees from laying on assessments and from levying rates.

The only point argued upon the merits of the case was one on the terms of the statute—that this was, under section 43, only an extension of existing works. I think, when the circumstances of the scheme are examined, it will be found that that argument is untenable.

Therefore I think that the complainers have a title, and, on the merits, that the respondents have no defence.

It is right to notice one point which was pressed, which is this, that the respondents are here protected by the provisions of the Public Authorities Protection Act of 1893. That Act protects persons who are acting in the execution of a statutory or other public duty to this extent, that proceedings must be brought within six months next after the act or neglect or default complained of. I do not think it is necessary to go into the question whether the provisions of that Act apply to such a case as we are dealing with here. The conclusive answer is that it is impossible to say that there was any act to which the complainers could have objected until the resolution of the Town Council in September. The contrary argument was that the wrong was done when the expenses were paid. In my opinion the wrong was done in September, because until that date the complainers could not be certiorated whether or not the respondents were going to take the necessary amount out of the common good. Accordingly on the question of date I think that any argument founded upon the Public Authorities Protection Act fails.

I propose to your Lordships that the same course should be followed here as was followed in the case of *Falkirk*. This is an application for interdict, and, of course, to put the respondents under interdict forthwith would be a stringent remedy. In order that the respondents may consider their position I would suggest that an interlocutor should be pronounced repelling the whole pleas-in law for the respondents; finding that they are not entitled to impose any assessment or levy or exact any rates upon the complainers under the Aberdeen Water-works Act 1862 and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of the costs incurred by the Lord Provost, Magistrates, and Town Council of the Royal Burgh of Aberdeen in connection with the application made by them in Session 1910 to the Secretary for Scotland, under the Private Legislation Procedure (Scotland) Act 1899, for a Provisional Order to enable them to obtain a new supply of water from the river Avon and in connection with the promotion of a Private Bill in the same session for the same purpose; and continuing the cause.

LORD PRESIDENT—I agree. I hope in this case there can be no difficulty, because we are given to understand that there is common good from which the money can be taken. I should like to add this—I do not understand how the Public Authorities Protection Act can ever be prayed in aid in a question of interdict, because I take it the Court can only give interdict against what is a continuing wrong.

LORD KINNEAR—I concur.

LORD PRESIDENT—LORD JOHNSTON also concurs.

The Court recalled the interlocutor of the Lord Ordinary and repelled the respondents' pleas-in-law.

Counsel for Complainers — Moncrieff, K.C.—Lippe. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Counsel for Respondents — Dean of Faculty (Dickson, K.C.)—Chree, K.C. — Mercer. Agents — Gordon, Falconer, & Fairweather, W.S.

Tuesday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

MACPHERSON & COMPANY *v.* INLAND REVENUE.

Revenue—Income Tax—Person not Resident in United Kingdom—Trade Exercised in United Kingdom—Commission Agency — Agent in United Kingdom Selling Goods for Foreign Principal—Income Tax Acts 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 41, *and* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Sched. D.*

The Income Tax Act 1842, sec. 41 (as amended by the Income Tax Act 1853, sec. 5), enacts—"Any person not resident in [the United Kingdom], whether a subject of Her Majesty or not, shall be chargeable in the name of . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in [the United Kingdom] and in the actual receipt thereof. . . ."

The Income Tax Act 1853, sec. 2, Sched. D, imposes income tax, *inter alia*, "For or in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . any profession, trade, employment, or vocation exercised within the United Kingdom. . . ."