COURT OF SESSION.

Wednesday, November 14.

FIRST DIVISION.

MACONOCHIE WELWOOD *v.* COUNTY COUNCIL OF MID-LOTHIAN.

Contract—County Council—Special Water Supply District—Agreement to Include Within Special Water District Lands Situated Outside it—Construction.

A proprietor whose lands lay outside a special water supply district agreed to give a wayleave for the pipes, and in return the local authority undertook to allow him, at any time he might think expedient to call upon them, "to include the lands of H. and W. . . . to be connected with the special water supply district, and to be assessed therefor at the same rate as the property already included in that district," provided that the proprietor should lay the connecting pipes at his own expense. Having laid the connecting pipes, the proprietor obtained a supply of water from the local authority, and paid the assessment levied upon ratepayers within the special water district for one year. Thereafter, thinking the rate excessive, he disconnected the pipes, and refused to pay any further assessments. The local authority maintained that the proprietor, having once exercised his option under the contract, continued liable for the special water assessment, whether he took advantage of the supply or not.

Held, on a construction of the contract, that the proprietor having ceased to use the water supply, was not liable for the assessment.

Observed that construed literally the contract was *ultra vires* of the local authority, as they had no power to include within the special water supply district lands lying outside it.

The County Council of Mid-Lothian in 1892 formed a new water supply district for Ratho, and applied to John Allan Maconochie Welwood, of Meadowbank, for wayleave for pipes which they were anxious to lay through a portion of his lands. All of these lands were without the water district area. An agreement was entered into between Mr Maconochie Welwood, of the first part, and the County Council of Mid-Lothian, of the second part, under which the first party agreed to give the wayleave required free of charge, and it was provided—"(*Second*) In consideration of said wayleave the said local authority shall be bound (1) to allow the first party or his successors in the said estate, to take free of charge from the said pipe as it passes through Overton farm on the said estate of Meadowbank, at such points as he or his foresaids may find most convenient, a supply of water to said farm, farm-steading, and house; and (2) to allow the said first party and his foresaids at any time he or they may think expedient to call upon the said local authority to do so, to include the lands of Humbie and Whitehill on the said estate of Meadowbank, the property of the first party, to be connected with the special water supply district, and to be assessed therefor at the same rate as the property already included in that district. (*Third*) The said local authority will provide and lay free of charge the pipes necessary for supplying the said farm, farm-steading, and house of Overton, and the said first party or his foresaids will provide and lay the pipes necessary for taking the said supply of water from the main pipe to the said farms and lands of Humbie and Whitehill, the connection with the main pipe being made at the sight of the engineer of the local authority, and the said farms and lands of Humbie and Whitehill will be included in the said special water supply district, and be subject to the same rates and assessments as the other ratepayers therein."

The first party exercised the right conferred upon him, had his lands of Humbie and Whitehill connected (at his own expense) with the water supply, and paid the assessment for the year 1893-94 at the same rate as if he had been a ratepayer within the district. Thereafter, as the assessment appeared to him to be excessive, and he had found a water supply within his own lands, he disconnected the pipes to Humbie and Whitehill at his own expense, and intimated that he would not require water any longer, and would not pay any further assessment after Whitsunday 1894.

The County Council maintained that upon a sound construction of the said agreement, which regulated the legal rights and relations of the parties, the bargain between them was that the second party should be bound, upon the requisition of the first party, to allow him to connect the lands of Humbie and Whitehill with the said special water supply district, upon the footing of the said lands being in such case assessed at the same rate as the property already included in the district, and that the first party having elected to avail himself of the privilege of connecting his said lands with the said water supply, became thereby liable in assessment in respect of the same upon the footing above indicated, and could not thereafter, without the consent of the second party, escape liability for such assessment, whether or not he might find it convenient for his own purposes to continue to avail himself of the said supply of water."

A special case was accordingly presented by Mr Maconochie Welwood, of the first part, and the County Council of Mid-Lothian, of the second part, in order to obtain the opinion of the Court upon, *inter alia*, the following question—"Is the second party entitled to assess the lands of Humbie and Whitehill in all time coming for any period after Whitsunday 1894 for payment of the same rates and assessments for water supply

as are payable by the ratepayers in the Ratho special water supply district, although no water supply is taken for the said lands from the district?"

Argued for first party—(1) On a just construction of the agreement he obtained a privilege in return for the wayleave, which he granted. There was no obligation on him to take water, or to continue to take it, after he had once done so. All expense incurred had been borne by him. It would be inequitable to say that he who had granted a favour was to be bound to pay an annual assessment for what he did not want and did not use. That was a sufficient reason for answering the first question in the negative; but if necessary he would argue (2) that this was a contract which, if construed literally, was beyond the statutory powers of the second party to implement. They could not include lands beyond the water district within that district, and had no power to levy assessments upon anyone not within the area. The first party could not insist upon the supply of water which was dedicated to those within the area, he could not be made to take it, and he could not be assessed for it. While he got it he had to pay fer it but that was all.

Argued for second party—There was no question here of *ultra vires*. The contract was entered into before the water district was formed, and it was formed under burden of this agreement. It was not for the first party to plead *ultra vires*. The contract, which had been acted upon was not to be construed as making an impossible agreement. The first party had asked to be treated as a ratepayer within the district; he had got what he asked, and he could not withdraw any more than any other ratepayer. If the agreement had meant that he was only to pay so long as he took the water, it would have said so.

At advising—

LORD M'LAREN—This special case raises a question as to the construction of an agreement between Mr Maconochie Welwood and the local authority of the water supply district of the parish of Ratho. The pipe for conveying the water to the district passes through this gentleman's estate, and the substance of the agreement (which was afterwards reduced to writing) was that, in exchange for the wayleave which the local authority acquired, they agreed to give Mr Maconochie Welwood a supply of water free of charge for one of his farms (Overton) by a pipe which they laid at their own expense, and also engaged on his demand to give him a supply of water for another farm (Humbie), by a pipe which he was to lay down at his expense, and for which he was to pay by a rate laid upon the value of the farm as if it had been included in the water district. Mr Maconochie Welwood claimed the water privilege, and a pipe was laid to the second-mentioned farm at his expense. He paid the water-rate for one year, but, finding that he could obtain water on his own land, he disconnected the pipe and gave notice that he would no longer take or pay for the water. The question then is, whether the proprietor, having once exercised his election, is liable to pay water-rate, or a sum equivalent to water-rate, in all time coming. The clause in the agreement is expressed as follows:—"To allow the said first party and his foresaids at any time he or they may think expedient to call upon the said local authority to do so, to include the lands of Humbie and Whitehill on the said estate of Meadowbank, the property of the first party, to be connected with the special water supply district and to be assessed therefor at the same rate as the property already included in that district." If the contract were unambiguous, and plainly put the proprietor under an obligation to pay water-rate in perpetuity, it must of course receive effect even although the proprietor had no need for the supply, and did not in fact receive benefit from it. But the clause is somewhat obscure, and it is hardly possible to give it any meaning without putting a forced construction on its language for the purpose of making the obligation agree with the probable intention of the parties. Without dwelling on obvious faults of expression, it may be noticed that according to the letter of the clause, the lands in question were to be included within the water-district, and the proprietor was to be assessed as a ratepayer. But the local authority had no power by their own act to extend the area of their district, or to make Mr Maconochie Welwood a ratepayer. Accordingly their claim is not to hold him liable as a ratepayer, but only to recover from him, under the supposed obligatory words of the agreement, a sum equal to what he would be liable to pay if the lands in question were annexed to the water district. The local authority cannot found on the letter of the agreement, because they have not the power to bring the lands within the district, and they can only reach their conclusion by the aid of a construction based on presumed intention.

Now, if we are to look to presumed or probable intention to construe one of the elements of the clause, I think we cannot stop there, but must consider the meaning of the whole clause from the same point of view, and so regarding it I think the probabilities of the case are all in favour of the construction for which the proprietor contends. The one thing which the local authority wanted was a wayleave; they were not making any claim to include these lands within the water-district. But instead of offering payment in money they proposed to give certain water-privileges in exchange for the wayleave, and I think that the right to take a supply of water for the lands of Humbie at the specified rate was part of the payment, or value in exchange, which the local authority gave for the wayleave, that this was meant to be a benefit to the proprietor, and that it was not intended to put him under any obligation, except the obligation to pay

for the water which he should receive. It is, I think, highly improbable that a proprietor, who was giving a right to use his lands, should mean to come under a perpetual obligation to pay for water which he did not require, but very natural that he should stipulate for the right to purchase a supply as and when he might require it. It is true that on a very strict reading of the clause the proprietor is to declare his election once for all, but then it is admitted that the clause stands in need of construction; and, in holding that the election may be to take the water for a limited time, we are not doing more violence to the language of the clause than we necessarily do when we read the proposition to bring the lands within the district as importing that the proprietor is to pay for the water although his lands are not and cannot be brought within the district by agreement.

It is, I think, consistent with the true agreement between the parties that Mr Maconochie Welwood, having ceased to take the supply which it was open to him to take, is not bound to pay water-rate, and I propose that we should answer the first question in the negative. It is then unnecessary to consider the second question.

LORD ADAM—The County Council of Mid-Lothian, as the local authority, in order to get water for a water supply for Ratho, had to go a considerable distance and to lay pipes from the place where they obtained the water to the supply district. They desired to lay the pipes through Mr Maconochie Welwood's property for about a mile, and of course they required to obtain wayleave, and in consideration for this wayleave they entered into an agreement with Mr Maconochie Welwood. Under it they were to supply one farm, Overton, at their own charges, and two others upon Mr Maconochie forming the connection and paying for the water. In order to fulfil the agreement they did not require to make their pipes deviate from the direct line; all they had to do was to give Mr Maconochie Welwood leave to take water. The agreement was just this —That in consideration of a right of passage the County Council were to give Mr Maconochie Welwood water in one case, and to allow him to take it in the other, he paying for the water so taken at the same rate as persons actually within the supply district. Mr Maconochie Welwood exercised the option given him, and made the necessary connections at his own expense and without any cost to the County Council. He paid the assessment charged for one year, but finding this expensive, and getting water more conveniently elsewhere, he disconnected the pipes and refused to pay the assessment in future. The question we are asked to determine is not well expressed, for it is, whether the County Council is entitled to assess for all time coming. It may be they are not entitled to assess at all, but the real question we have to decide is, whether Mr Maconochie Welwood, having once exercised his option and taken water, is in all future time to be compelled to take water, or whether he takes it or not is to be charged as if he took it.

The agreement comes to this, that the County Council are to allow Mr Maconochie Welwood at any time to include Humbie and Whitehill in the water district. I do not see how it is possible for the County Council to allow these lands which lie outside the district to be included within it, and they have no power to assess anyone outside the district. We must therefore construe this somewhat ill-expressed agreement. The County Council allows Mr Maconochie Welwood to do something. They are to give him a privilege and a permission if he asks for it, but I cannot see how what is only a privilege and a permission can be turned into an obligation, and how Mr Maconochie Welwood can be compelled to exercise his right of option. I can see how, if the circumstances had been different, an obligation might have been constituted; for example, if a deviation of the pipes had been made to oblige Mr Maconochie Welwood, or if expense had been incurred by the County Council, that might have raised the presumption that, if Mr Maconochie Welwood once exercised his privilege at the expense of the County Council, that would show a permanent arrangement. But there is nothing of that sort here, because the whole expenses have been incurred by Mr Maconochie Welwood himself. I can see no reason therefore for saying that he must continue to pay the assessment, and I concur with Lord M'Laren in thinking that the first question should be answered in the negative.

LORD KINNEAR—I have come to the same conclusion. The only stipulations in the contract by which it is alleged that a perpetual obligation has been imposed upon the first party are those set out in the articles of the agreement referred to, by which it is provided, in terms which are varied in the different clauses, but are in effect the same, that the first party may have his lands of Humbie and Whitehill included within the water district. Now, I quite agree that it is not in the power of the local authority to give effect to that stipulation if literally construed. They may within their powers make a personal contract between themselves on the one hand, and Mr Maconochie Welwood on the other, but they cannot include within the water district lands lying outside it, or make the owners and occupiers of such lands for the time being ratepayers. But that is what they undertake to do if the agreement is construed literally, and the only question they put to the Court is, whether they have done that effectually. They aver that they gave notice of assessment to Mr Maconochie Welwood and his tenants on the lands, and they justify that proceeding by the inclusion of the lands within the water area, and that is set out as the state

of facts on which the question arises. They ask in law, not whether the County Council has a personal claim against Mr Maconochie Welwood under a contract, but whether they can assess the lands in all time coming. I have no difficulty in answering that question in the negative apart altogether from the views expressed by Lord M'Laren and Lord Adam. An agreement to do what is legally impossible is void, and that seems to me a sufficient ground for determining the case. It is said that the impossibility of literally fulfilling the agreement is a material element in construing the contract, and for giving it a reasonable construction, because the parties to it cannot be held to have contracted to do what was impossible. If its construction were open I should concur with the opinions expressed by your Lordships. But the point really raised by the only question put to us in the special case is, whether the stipulation read literally, that the lands in question are included in the water district is good or bad? I think it is ineffectual.

LORD PRESIDENT concurred.

The Court answered the question in the negative.

Counsel for the First Party — Graham Murray, Q.C. — Maconochie. Agents — Maconochie & Hare, W.S.

Counsel for the Second Party—Dundas—Cullen. Agent—J. H. Balfour Melville, W.S.

Friday, November 23.

FIRST DIVISION.

SCOTTISH EQUITABLE LIFE SOCIETY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Conveyance on Sale — Stamp Act 1891 (54 *and* 55 *Vict. c.* 39), *sec.* 57.

Sec. 57 of the Stamp Act 1891 provides that, "Where any property is conveyed to any person in consideration, wholly or in any part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

A debtor having granted a trust-disposition for behoof of his creditors, which incorporated the provisions of the Bankruptcy Acts, one of the creditors, who held a bond and disposition in security granted by the debtor, valued his security at £9500, being less than the amount of his claim. The trustee under the trust-deed accepted this valuation as correct, and executed an instrument whereby he renounced his whole reversionary interest in the security subjects, and all right of redemption thereof competent to him, and disponed the subjects to the creditor.

Held that this instrument satisfied the description in the above section and was chargeable with *ad valorem* stamp duty on the sum of £9500.

The First Schedule of the Stamp Act 1891 provides for the payment of *ad valorem* stamp duty according to a scale there given, upon every "conveyance or transfer on sale of any property (except such stock as aforesaid)." It also provides—"Conveyance or transfer of any kind not hereinbefore described, 10s." Section 54 of the same Act provides—"For the purposes of this Act, the expression 'conveyance on sale includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction." Section 57 provides—"Where any property is conveyed to any person in consideration, wholly or in any part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty." Section 62 provides—"Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property: Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s."

The late James Yeaman, Merchant, Dundee, died indebted to the Scottish Equitable Life Assurance Society in the sum of £20,000, conform to bond and disposition in security granted by him in their favour in the year 1881. In 1885 Yeaman granted a trust-disposition for behoof of his creditors. By the end of 1893 the trustee under the trust-disposition had, by the sale of some of the security-subjects, reduced the sum due under the bond to £10,971, 15s. 7d., with interest from Whitsunday 1893. The trustee having thereafter intimated to the creditors on the estate that he intended to divide the same, the said Society lodged a claim for this amount under deduction of £9500, being the value put by them upon the security subjects which they still held. The trustee admitted the claim and the correctness of the valuation.

Upon 22nd November 1893 he executed an instrument in favour of the Society,