limitation that rules of construction are only guides to the discovery of testamentary intention, I confess it seems to me to be very desirable that as far as possible the interpretation of words of destination should be subjected to fixed rules. The rule laid down in *Hay's Trustees* is to this effect—where a testator makes a gift of a sum of money or a share of residue to a person named and his heirs, without specifying more particularly the time or event on which the conditional institution is to come into effect, the provision in favour of heirs is presumed to be inserted to prevent a lapse through the death of the legatee in the lifetime of the testator, and the legacy accordingly vests in the legatee or his heirs, as the case may be, *a morte testatoris*. It is no doubt possible that a testator should intend to keep open the vesting for the benefit of the legatee's heirs to a later period, *e.g.*, to the period of distribution. But in such a case I should expect the intention to be clearly expressed.

In the absence of expressions pointing to a postponement of vesting, I should not infer that a gift expressed to be in favour of a legatee and his heirs amounted to a contingent destination—a destination conditional on the legatee surviving an event certain to happen. I do not understand that the case of *Hay's Trustees* introduced any new principle or rule of construction into this branch of the law. There are at least three previous decisions to the same effect, viz., *Elliot* v. *Bowhill*, 11 Macph. 735; *Ross's Trustees*, 12 R. 378, and though less directly bearing on the point, Lord Colonsay's judgment in *Carleton* v. *Thomson*, 5 Macph. (H.L.) 151. I do not overlook the distinction that in these cases the persons conditionally instituted are the "issue" or "children" of the *nominatim* legatees; but in my view the distinction is immaterial, because the reasons which determine the vesting of a gift—notwithstanding the fact that issue are included as objects of the gift—are equally applicable to the case of a destination in favour of heirs. I mean there is no reason for supposing that the heirs of a legatee are a more favoured class than issue or children.

The only other distinction between the present case and that of *Hay* is the distinction depending on the use of "or" in place of "and." Now, for the purposes of a conditional institution, whether taking effect at the testator's death or at a later period, I should say that "or" is the more appropriate word, because conditional institution is always alternative. I think that in the case of *Hay's Trustees* we construed the destination to Charles Crawford Hay and his heirs as equivalent to a destination to him or his heirs; that is, we held it to be a conditional institution, but limited to the event of Mr Crawford Hay dying in the testator's lifetime. If this be so, the suggested distinction has no substance in it.

I may add, that although not much was said in the arguments about the more recent cases, it is within my recollection that the principle of the decision in *Hay's Trustees* has been recognised and acted on in more than one case that has come before this Division as at present constituted. I am for adhering to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—J. Reid. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders—W. Campbell. Agent—Thomas White, S.S.C.

Friday, March 18.

WHOLE COURT.

[Lord Kyllachy, Ordinary.

MACARTHUR *v.* COUNTY COUNCIL OF ARGYLL.

County Council — Parliamentary Burgh — County General Assessment — Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 11, 12, 13, 14, 26, 27, 60, 66, *and* 105—*County General Assessment Act* 1868 (31 *and* 32 *Vict. cap.* 82), *secs.* 1, 2, 3, and 4.

Held, by a majority of the Whole Court (*diss.* Lord Justice-Clerk, Lord Young, Lord Trayner, and Lord Moncreiff), that a county council has no power to impose any rate upon lands and heritages situated within a parliamentary burgh lying within the county.

Police Commissioners of Oban v. *County Council of Argyllshire*, March 9, 1894, 21 R. 644, *overruled.*

Burgh of Galashiels v. *County Council of Selkirk*, June 18, 1896, 23 R. 818, *approved* and *followed.*

Res judicata.

In 1893 the Oban Police Commissioners raised an action of declarator against the County Council of Argyll to have it found that the defenders had no power to levy or enforce payment of county general assessment upon lands and heritages within the burgh of Oban. The defenders in this action were assoilzied. Thereafter an owner and occupier of heritages situated within the burgh, who had been a police commissioner at the date when the former action was brought, having been assessed by the county council for county general assessment as such owner and occupier, brought a suspension and interdict against the County Council of Argyll, to interdict and prohibit the County Council from levying or enforcing payment of any assessment upon any lands or heritages situated within the burgh of Oban.

Held, by Lord Kyllachy (Ordinary), that the previous decision was not *res judicata*. The question on the merits was on reclaiming-note submitted to

the Whole Court, the Second Division intimating that they did not propose to submit the plea of *res judicata* to the consideration of the consulted Judges.

This was an action of suspension and interdict brought by Alexander MacArthur, solicitor and bank agent, Oban, in the county of Argyll, against the County Council of the County of Argyll. The complainer prayed the Court to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents from levying or enforcing payment of any assessment upon any property within the parliamentary burgh of Oban, and in particular to interdict, prohibit, and discharge the respondents from levying or enforcing payment of certain assessments for county general assessment, for the year from Whitsunday 1896 to Whitsunday 1897, on certain properties owned or occupied by the complainer, and situated within the parliamentary burgh of Oban.

The complainer had received notices from the respondents intimating that the County Council had imposed the assessments referred to in the prayer of the note. The respondents had for some years imposed in each year a county general assessment of varying amount upon the heritages within the parliamentary burgh of Oban, and they maintained their right to do so. The complainer, on the contrary, maintained that they were not entitled to levy county general assessment, nor to levy any assessment, on property within the parliamentary burgh of Oban.

In May 1893 an action was brought in the Court of Session by Martin Brydon Lawrence, clerk to and as representing the Police Commissioners (of whom the complainer was one) of the burgh of Oban, to have it declared that the respondents were not entitled to levy county general assessment on property within the burgh of Oban, and for interdict against their doing so in all time coming. This action was defended by the respondents, and on 9th March 1894 the Second Division of the Court of Session pronounced judgment thereon, and assoilzied the respondents from the conclusions of the action. The case is reported as *Police Commissioners of Oban* v. *County Council of Argyllshire*, 21 R. 644, and 31 S.L.R. 510. The assessment which the complainer now sought to interdict was the same as that which in that action the respondents were found entitled to impose.

On 18th June 1896 the First Division of the Court of Session pronounced judgment in a case between the County Council of Selkirk and the burgh of Galashiels (reported 23 R. 818 and 33 S.L.R. 622), in which it was found that the County Council had no power to levy assessments on property within a parliamentary burgh. The complainer on 10th August 1896 wrote a letter to the County Clerk of Argyllshire directing attention to this decision, and pointing out that it followed from it that the respondents had no power to assess property within the parliamentary burgh of Oban. Notwithstanding this judgment, the respondents laid on and threatened to enforce payment of an assessment on all property within the parliamentary burgh of Oban for county general assessment, under the Act 31 and 32 Vict. cap. 82, and they maintained a right to do so. In these circumstances the present application was presented by the complainer.

The respondents averred—"(Ans. 1) . . . Explained that from time immemorial the said burgh has been assessed for rogue-money, and since 1868, when county general assessment came in place of rogue-money, has been assessed for such county general assessment. The burgh of Oban participates in the benefits derived from the application of the said assessment. The said assessment is, *inter alia*, applied to meet the expenses of the court-houses, the salaries of the procurators-fiscal of the Justice of the Peace and Sheriff Courts, the court officials, the officers appointed under the Weights and Measures Act 1878, and the superannuation of the prison officials. The parliamentary burgh of Oban, as part of the county, has the use of the court-houses, of the prisons, and of the services of the procurators-fiscal, court officials, and prison officials. (Ans. 3) The said judgment (that is to say, the judgment in the case of the *Burgh of Galashiels* v. *County Council of Selkirk*, June 18, 1896, 23 R. 818, and 33 S.L.R. 622) and letter are referred to for their terms. Explained that the facts of the case referred to differ from those of the present case. In particular, the burgh of Galashiels maintained at its own expense a separate police force, while Oban has no such separate police force, but for that purpose forms a part of the county." They also referred to the case of *Police Commissioners of Oban* v. *County Council of Argyllshire*, and maintained that the same question as was now sought to be raised was determined judicially in that action.

With reference to the decision in the case of *Police Commissioners of Oban* v. *County Council of Argyllshire*, the complainer averred as follows:—"With reference to the statement in answer, it is explained that the complainer was no party to the action referred to, and the said action related to the assessments of a different year from that now in question. The grounds on which the present application has been presented were not pleaded in said action, or at least were not prominently brought under the notice of the Court, and no judgment was pronounced thereon."

The complainer pleaded, *inter alia*—"(1) The assessments complained of being *ultra vires* of the respondents in respect (1st) that they have no power to assess under the Act 31 and 32 Vict. cap. 82, or to levy a county general assessment or any other assessment than the consolidated rate authorised by the Local Government (Scotland) Act 1889; (2nd) that they have no power to levy any assessment on property within the parliamentary burgh of Oban, the complainer is entitled to suspension and interdict as craved, with expenses."

The respondents pleaded—"(1) The complainer's averments are irrelevant. (2) *Res judicata.* (3) The assessment complained of being validly and legally imposed, the note should be refused, with expenses."

The Disarming Act 1724 (11 Geo. I. cap. 26), section 12, which conferred power upon the freeholders of the shire to assess for "rogue money" enacts as follows:—"And whereas, for want of a sufficient fund for defraying the charges of apprehending criminals in North Britain, and of subsisting them when apprehended until prosecution, and of carrying on the necessary prosecutions against them, it often happens that criminals there escape the punishment due to their offences: For preventing of which inconvenience for the future, be it enacted by the authority aforesaid, that it shall and may be lawful to and for the freeholders of every shire, county, or district in North Britain to assess the several shires or stewartries where their estates lie, at their meetings at any of the head courts, yearly, in such sums as they shall judge reasonable and sufficient for the purposes aforesaid; and that such moneys so from time to time to be assessed shall be collected, received, and accounted for by such person and persons, and in such manner as such freeholders shall from time to time appoint, and shall be applied for defraying the charges of apprehending of criminals and of subsisting of them in prison until prosecution, and of prosecuting such criminals for their several offences by due course of law, and to and for no other use or purpose whatsoever."

By the Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV. cap. 65), section 44, the assessment, collection, and management of "rogue money" was transferred from the freeholders to the Commissioners of Supply.

The County General Assessment Act 1868 (31 and 32 Vict. cap. 82) enacts as follows:—"Whereas it is expedient to abolish the power of levying the assessment known as 'rogue money,' and in lieu thereof to confer upon the commissioners of supply of counties in Scotland the power of levying a 'county general assessment:' 'Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

"1. This Act may be cited for all purposes as the 'County General Assessment (Scotland) Act 1868.'

"2. From and after the passing of this Act, it shall no longer be lawful for the commissioners of supply of counties in Scotland to impose or levy the rate or assessment heretofore known as 'rogue money;' provided always, that nothing herein contained shall prejudice the right of the said commissioners to recover any rogue money which may have been imposed before the passing hereof.

"3. The following salaries, fees, outlays, and expenses, viz., (1) The salaries or fees of clerks, treasurers, collectors, auditors, and other officials necessarily employed in conducting the affairs of each county, together with the necessary outlays of such officials, in so far as not covered by their salaries or fees; (2) The salaries or fees and necessary outlays of procurators fiscal in the Sheriff and Justice of Peace Courts, and clerks of Justice of Peace Court, in so far as such salaries, fees, and outlays are at present in use to be paid by each county; (3) The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals; (4) The expenses connected with the upholding, repairing, enlarging, renting, furnishing, insuring, lighting, cleaning, or warming any courthouse or any buildings belonging to or occupied for the purposes of such county, and all taxes, rates, and assessments legally chargeable thereon; (5) The expenses connected with the holding of the Court for striking the fiars prices for such county, in so far as the said expenses have hitherto been defrayed by such county, together with a fee of three guineas to each of such professional accountants, not exceeding two, and a fee of one guinea to each of such other persons, not exceeding six, as shall be summoned by the Sheriff as witnesses at such Court, as such fees shall be certified under the hand of the Sheriff; (6) All expenses occasioned by damage done to property within the county by tumultuous or riotous assemblies, and all expenses properly incurred in the prevention of riots; (7) All expenses or payments presently directed by any Act of Parliament to be defrayed out of the 'rogue money;' in so far as any of such salaries, fees, outlays, and expenses are not by law or usage payable or provided from other funds than those raised by the commissioners of supply, may be defrayed by the said commissioners out of the 'county general assessment,' to be made and levied by them in terms of this Act.

"4. It shall be lawful for the commissioners of supply of every county in Scotland once in each year to impose an assessment for the purposes of this Act, to be called the 'County General Assessment,' upon all lands and heritages within such county according to the yearly value thereof as established by the valuation roll for the year (commencing at Whitsunday) in which such assessment is imposed."

The remainder of this section, and also sections 5 (power to relieve in case of poverty), 6 (dealing with detached parts of counties), 7 (recovery), 8 (incorporation of commissioners of supply), and 9 (audit), were repealed by the Local Government (Scotland) Act 1889.

Section 10, which was not repealed, enacts as follows—"Nothing herein contained shall confer on the commissioners of supply of any county the right to levy assessments under this Act on any lands or heritages upon which it is not now competent for the commissioners of supply of such county to levy rogue money, nor shall anything herein contained prejudice the right now possessed by any other body

than the commissioners of supply to levy rogue money under or in virtue of any law or custom now in force, but such right shall continue as heretofore."

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) enacts, *inter alia*, as follows—"11. Subject to the provisions of this Act there shall be transferred to and vested in the council of each county, on and after the appointed day, or at such times as are in this Act in that behalf respectively specified—(1) The whole powers and duties of the commissioners of supply, save as hereinafter mentioned; (2) The whole powers and duties of the county road trustees; (3) The whole powers and duties of the local authority of the county under the Contagious Diseases (Animals) Acts and the Destructive Insects Act 1877; (4) The whole powers and duties of the local authorities under the Public Health Acts of parishes so far as within the county (excluding burghs and police burghs); and (5) The administrative powers and duties of the justices of the peace of the county in general or special or quarter sessions assembled in respect of the several matters following, namely—(i.) The execution as local authority of the Acts relating to gas meters, to explosive substances, to weights and measures, to habitual drunkards, and to wild birds; (ii.) The appointment of visitors of public, private, or district lunatic asylums; and (iii.) The registration of rules of scientific societies under the Act of the session of the sixth and seventh years of the reign of Her present Majesty, chapter thirty-six: "All powers and duties of the justices of the peace not transferred by this Act to the county council shall be reserved to and transacted by such justices in the same manner, so far as circumstances admit, as if this Act had not passed. The provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties by this Act transferred, or regulating the proceedings under any such Act, shall remain in full force and effect except in so far as they are repealed by or are inconsistent with the provisions of this Act.

"12. (1) Notwithstanding the transference in the immediately preceding section mentioned, all enactments in regard to the constitution, qualification, admission, and making up lists of commissioners of supply shall continue in force, and all existing commissioners of supply shall continue to hold office so long as they retain their qualifications under the said enactments; but, save for the purposes in this Act expressly mentioned, every reference in any Act of Parliament, scheme, order, deed, or instrument to commissioners of supply, or to their convener, shall be read and construed as referring to the county council or councillors, or to the convener of the county elected under this Act; Provided also that the County General Assessment (Scotland) Act 1868 shall be repealed after the words 'such assessment is imposed' in the fourth section thereof to the end of section nine of the Act.

"13. Where a burgh or police burgh contains a population of less than 7000, then on and after the appointed day all powers, duties, and liabilities of the magistrates and council or police commissioners of such burgh or police burgh (if any) in relation to the raising, management, and maintenance of a police force (hereinafter referred to as the administration of the police) shall cease, and subject to the provisions of this Act as to the existing members of the police force, the county council shall have the same powers and duties and shall have transferred to it the same liabilities as regards the administration of police within such burgh or police burgh as they have in any other part of the county." . . .

Section 14 transfers the administration of the Contagious Diseases and Destructive Insects Acts in burghs with a population under 7000 to the county council.

"26. (1) On and after the appointed day all debts and liabilities of any authority whose powers and duties are transferred by or in pursuance of this Act to the county council of a county shall become debts and liabilities of such council, and shall, subject to the provisions of this Act, be defrayed by them out of the like funds out of which they would have been defrayed if this Act had not passed. (2) All receipts of the county council from whatever source shall be carried to the county fund, and all payments shall be made in the first instance out of that fund. Such receipts shall be paid into an incorporated or joint stock bank (including any branch thereof) for that purpose appointed by the county council, and such payments shall be made by cheques drawn, as in this Act provided, upon such bank. (3) In this Act 'general county purposes' means all purposes for which the county council are for the time being authorised by law to incur any expenditure, with the exception of (1) the management and maintenance of highways, (2) the administration of the laws relating to public health, and (3) any special purpose in respect of which the county has been or may be divided into divisions or districts under the provisions of any general or local Act of Parliament or of this Act. (4) If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owners consolidated rate and the occupiers consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county, or, in the case of expenditure for the management and maintenance of highways, the administration of the laws relating to public health, or other special purpose as herein before mentioned, upon all rateable property within the several districts or parishes of the county, as the case may be, in the manner and subject to the conditions in this Act provided. (5) The county council shall keep such accounts of the county fund, and of the sums raised by rates, as will prevent a rate being applied to any purpose to which it is not properly applicable. (6) The finance committee of the county council appointed under this Act

shall prepare annually estimates of the receipts and expenses of the county fund and of the sums required to be raised to meet the deficiency of such fund for the expenditure chargeable thereon.

Rating.—Consolidation of Rates.

"27. (1) The county council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund in respect of each branch of expenditure subject to its control, or for which it is responsible in whole or in part, and such rate shall be imposed upon all lands and heritages within the county, except that the rate for the management and maintenance of highways, the administration of the laws relating to public health, and any other special purpose as hereinbefore mentioned, shall be imposed upon all lands and heritages within each division or district or parish, as the case may be. The rate in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act. The rate necessary in respect of any branch or branches of expenditure for which no provision is made as last mentioned shall be imposed as a general purposes rate under this Act. (2) Subject to the provisions hereinafter contained the rates shall be equally divided between owners and occupiers, and the sum of all the rates so fixed and divided shall, as affecting owners and occupiers respectively, constitute the owners consolidated rate and the occupiers consolidated rate, as the case may be, in respect of the lands and heritages situated therein. (3) The consolidated rates shall be imposed upon lands and heritages according to the annual value thereof as appearing on the valuation roll, but subject always to the provisions of the Public Health (Scotland) Act 1867 in regard to all assessments leviable under that Act."

60. In order to give effect to the provisions contained in sections 13 and 14 of this Act with respect to the burghs and police burghs therein referred to, the following further provisions shall have effect:— . . . "(3) Every such burgh shall contribute to the county fund in aid of the expenditure thereout for the administration ef the police and the Contagious Diseases (Animals) Acts, or for the latter purpose only, as the case may be. (4) For the purpose of every such contribution the rateable property of the burgh, as appearing on the valuation roll of the burgh, shall be included in the rateable property of the county, and the item of the consolidated rates applicable to the expenditure in the immediately preceding sub-section mentioned shall be ascertained and fixed accordingly as if such burgh were one of the parishes in the county; but the amount of the contribution apportioned to the burgh shall not be assessed by the county council on the several lands and heritages in such burgh, but shall be paid by the town council out of the police assessment, or if there is no police assessment, out of any other assessment imposed and levied therein, or out of the common good of such burgh."

"62. The following provisions shall be made with respect to the levy of the consolidated rates, that is to say— . . . (2) The demand note shall set forth the several branches of expenditure in respect of which the consolidated rates are imposed and the amount in the pound applicable to each several branch, and shall state the amount to be paid by the person named in the note, and the manner and time of appealing against and paying such amount, and such other particulars as shall be prescribed." Sub-section 5 confers powers for enforcing "the rates by this Act authorised to be imposed by the county council of any county," and further provides that "all rates imposed under any powers transferred or conferred by this Act" shall be preferable debts.

"66. The county council annually, and not later than the month of October in each year, shall cause a requisition to be sent to the town council of any burgh, requiring them to pay the sum or sums which under the provisions of this Act they are liable to contribute to the county fund in aid of the expenditure thereout for the purposes set forth in the requisition; and the town council shall, on or before the fifteenth day of January next ensuing, pay to the county council the said sum or sums without any deduction whatever.

"105. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say, the expression 'county' means a county exclusive of any burgh wholly or partly situate therein, and does not include a county of a city. The expression 'burgh' means any royal or parliamentary burgh. The expression 'police burgh' means a populous place, the boundaries whereof have been fixed and ascertained under the provisions of the General Police and Improvement (Scotland) Act 1862, or of the Act first therein recited, or under the provisions of any local Act."

On 10th March 1897 the Lord Ordinary (KYLLACHY), after hearing counsel in the Procedure Roll, issued the following interlocutor:— "In respect the cause is ruled by the recent judgment of the First Division in the case of *The Burgh of Galashiels* v. *The County Council of Selkirk*, 23 R. 818, sustains the reasons of suspension, and interdicts, prohibits, and discharges in terms of the prayer of the note, and decerns: Finds the complainer entitled to expenses," &c.

Opinion.—"In this case I do not see my way to sustain the respondents' plea of *res judicata*. It is clear enough that the question is the same as that which was decided in 1893 by the Second Division of the Court. But the complainer here is a different person from the pursuer in that case, and he sues as proprietor of different subjects, and as having a separate, if not different, pecuniary interest in the subject-matter of

the suit. I am not prepared, in these circumstances, to assimilate the case to that of a public action (*e.g.*, a right-of-way) fairly tried by members of the public, and proposed to be tried over again by other members, or to the perhaps cognate case of a question affecting the administration of the funds of a society sought to be tried as against the managers, first by one member of the society, and then afterwards by another. This last was the case of *Gray* v. *M'Hardy*, 24 D. 1043, which was perhaps the most apposite of the respondents' authorities. But it cannot, I think, be affirmed generally that because two persons contest on the same ground, but each for his separate interest, claims of debt, having the same basis and made by the same creditor, but made against each debtor separately, the parties to the two suits can be held to be the same parties in the sense necessary to support the plea of *res judicata*. A common interest in a common subject-matter is, I incline to think, a different thing from identity of position with regard to two separate claims of debt. I am disposed therefore to hold that the question raised by this suspension is still open.

"But the difficulty remains that, holding the question open, it has been the subject of what I am unable to view otherwise than as two conflicting judgments of the two Divisions of the Court. In 1893 the Second Division of the Court having, it seems, fully in view the whole provisions of the Local Government Act of 1889, and in particular the provisions of the 26th and 27th sections of that Act, appears to have held that, in respect of the 11th and 12th sections of the Act, and of the unrepealed clauses of the previous Act of 1868, the county council has still right to levy general county assessments (*i.e.*, rogue money) within parliamentary burghs — such as Oban—notwithstanding that such burghs are outwith the area of the council's general powers of assessment.

"On the other hand, in 1896 the First Division of the Court, having, it appears, fully in view this previous judgment, appears to have held that the matter was exclusively regulated by the 26th and 27th sections of the Act of 1889, and that under those sections and the general scheme of the Act any assessment proposed by the county council within parliamentary burghs within the county was illegal.

"It would not, I consider, be proper that—sitting here in the Outer House—I should attempt to weigh or to criticise the grounds of these admittedly conflicting judgments. It seems to me that the better and proper course is that I should take what I understand is a not unusual course, viz., to follow the later judgment. I propose accordingly to do so without expressing any view of my own."

The respondents reclaimed.

After hearing counsel, their Lordships of the Second Division, by interlocutor dated 12th June 1897, "in respect of the novelty and importance of the question involved," ordered minutes of debate to be boxed to all the Judges, in order to the opinion of the whole Judges being obtained on the question raised by the record.

It was subsequently intimated to the parties that it was not intended to remit the plea of *res judicata* to the whole Court.

The argument sufficiently appears from the opinions of the Judges.

The following opinions were returned by the consulted Judges:—

LORD PRESIDENT—The present question admits of decision on what, in my opinion, is a clear ground, viz., that the county council has no right to impose any rate upon lands and heritages within a parliamentary burgh.

The theory upon which alone the assessment in dispute can be supported is, that the county council derives its power of rating directly from the rating clauses of all the several Acts administered by its predecessors, the various authorities whose powers are transferred by the general transfer clause, viz., section 11. In my opinion this is a mistake. It would, of course, have been quite possible for Parliament to have transferred the powers generally and have left the matter there. This, however, is not what is done. Sections 26 and 27 are entirely inconsistent with this course. Stated generally, the effect of those sections is to establish one county fund, into which all receipts go, and to authorise the county council, if the county fund is insufficient to meet the expenditure, to levy rates to meet the deficiency. Sections 26 and 27, with the ancillary section 62, form a complete and exhaustive statement of the powers of the county council to assess. It cannot be doubted, to take the matter now in dispute, that the sums raised for the purposes of the County General Assessment Act go into the general county fund, and that thus their amount enters the account, which shows, or does not show, a deficiency in the county fund; or that the purposes of the County General Assessment Act are assessed for under section 27; or that the expenditure provided for under the county general assessment is part of the expenditure the branches of which are set forth in the demand note under section 62. It thus appears that the Act of 1889 provides a system of rating and powers of rating which are complete and self-contained; and section 27 states the area within which the rates are to be imposed.

Now, when one turns back to section 11 to see whether the establishment of the new powers described and limited in sections 26 and 27 is at all inconsistent with the terms of that earlier section, one is met with the first words of that section, "Subject to the provisions of this Act." Section 11, be it observed, is a general clause of transfer, not solely or even specifically dealing with rates. Accordingly, if in the sequel we have found that new powers of rating are conferred, the true inference is that the old powers of rating are, it is true,

transferred, but are transmuted, and are to be exercised in the manner and under the limitations which are directly provided. This view derives confirmation from the words in section 27, that the rate "in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act, shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act."

It may be observed in passing that the fact that the assessing power in the Act of 1868 is left standing, while other parts of it are repealed, is not only consistent with the scheme of the Act of 1889, as thus explained, but essential to it. To have repealed the general power of imposing assessment in the Act of 1868 would have been to leave no assessing power to transfer and transmute, and would have logically led to the extinction, by repeal, of every one of the numerous powers of assessment which existed in the various bodies whose powers are transferred to the county council.

There is, however, another test of the soundness of the proposition that no rate can be laid on by the county council except under the limitation of area stated in section 27. The contrary contention necessarily implies that each one of the rates levied by the several predecessors of the county council may be levied by the county council *modo et forma* as by their predecessors. If this were so, then no rate would fall under sections 26 and 27 except what is called the general purposes rate provided at the end of 27 (1). All such theories are inconsistent with the direct provisions of the sections referred to.

The attempt has been made to evade the definition of "county" as excluding parliamentary burghs, by saying that this definition is inconsistent with the context. Now, it is necessary to observe what this means. What it cannot mean is that the word "county" in section 27, having one and the same meaning for all purposes of that section, the context demonstrates that meaning to be "county including parliamentary burgh." The reason why this will not do is, that it is quite certain that, if the Acts under which the predecessors of the county council assessed, form the criterion of the meaning of county in section 27, some of them point to the exclusion of parliamentary burghs, exactly as much and in the same way as the County General Assessment Act is supposed to point to their inclusion. Accordingly, what the reclaimers must mean is that this word "county" in section 27 is to be read as being a flexible term having several different meanings — meaning one thing or the other according as it is applied to each of the several assessments not named but included in the general words which form the context. But the fact that the levy of one of the rates may be to some slight extent circumscribed by the application of the definition in the interpretation clause, does not create a repugnancy, unless there be definite evidence that the Legislature intended the opposite. The words "within the county," if read as excluding parliamentary burghs, are consistent with the context, using that word in its ordinary sense. They are consistent also with the scheme, plainly expounded in sections 26 and 27, of one authority levying the rates as a consolidated rate. They are inconsistent only with the preconceived idea, for which no support can be found in the Act of 1889, that the county council is to rate for what is called in the Act each "branch of expenditure" exactly as did their predecessors. That the introduction of the simpler and more uniform system may involve incidentally some loss of rates is very possible, and presents no idea which repels the intelligence, or constitutes a repugnancy. Yet no better argument than this is offered for denying effect to the plain language of the statute.

Nor can it omitted from observation that the deliberate intention of the statute to fence off the county council from all right to levy rates within royal and parliamentary burghs is strikingly illustrated in section 60. In the case there dealt with it is intended to make a burgh contribute to the county fund. The simplest plan would have been to let the county council rate the lands and heritages within the burgh. This the Legislature carefully avoids. Having put the valuation roll of the burgh in the hands of the county council in order to fix the contribution of the burgh, it takes it away when the stage of rating is reached. The county council does not rate for the sum fixed as the amount of the burgh's contribution sum, but requisitions the town council for it, and the town council rates the lands and heritages within the burgh.

My opinion is that the Lord Ordinary's interlocutor should be adhered to, with the omission of the words "in respect the cause is ruled by the recent judgment of the First Division in the case of *The Burgh of Galashiels* v. *The County Council of Selkirk* (23 R. 818)."

I have intentionally limited this opinion to the one ground of judgment stated in the opening sentence, this being a question about lands and heritages within a parliamentary burgh. But it may be right to add (1) that I adhere to my judgment in the *Galashiels* case, and (2) that, while I have assumed that the county general assessment was leviable before 1889 on lands and heritages within parliamentary burghs, the point is far from clear, and the dubiety of the language of the Act of 1868 may furnish an additional reason for believing that the doubt was ended in 1889.

LORD ADAM—I concur in the opinion of the Lord President.

LORD M'LAREN—The question is, whether a county council is entitled to levy county general assessment on the owners or occupiers of property in a royal or parliamentary burgh? In considering this question, I am unable to give any weight to the

argument founded on the 11th section of the Local Government Act 1889, whereby the powers and duties of the pre-existing county authorities are transferred to and vested in the county councils.

In my opinion it is an established constitutional principle that taxing powers are not given by implication, but only by a proper money clause following on a vote of the House of Commons. The 11th section is not a "money clause," and it is only necessary to read it to see that it confers no powers of taxation. As a matter of fact, the taxing powers of county councils are given by the 27th section of the statute.

Again, I think it is not a legitimate inference that the county council must or ought to have the power of assessing royal and parliamentary burghs because their predecessors in title had, or are supposed to have had, this power. It may very well be that when Parliament was establishing a new system of government for counties, the opportunity was taken to enlarge the powers of the new county authority in some directions and to diminish them in other directions. There is also the possibility that there has been an omission to provide for the case of a contribution by burghs towards general county expenditure. In either case it is beyond the province of a court of law to supply by analogy, construction, or other logical process the power of taxation which Parliament has not in fact given.

The whole question, in my opinion, turns on the first paragraph of the 105th section, which defines the expression "county" to mean a county exclusive of any burgh wholly or partly situate therein; the word "burgh" being further defined as meaning any royal or parliamentary burgh. These definitions are, it is true, accompanied by the qualification, "if not inconsistent with the context." Turning now to the 27th section, which empowers the county council to "fix" and "impose" the consolidated rates, I ask, is there anything in the text of this section which is inconsistent with the limitation of the taxing power of the county council to the landward part of the county exclusive of any contained royal or parliamentary burgh? I find no such inconsistency. There is, I shall assume, an inconsistency between the taxing powers of the old county authorities and the taxing powers of the county council. But there is no inconsistency between the text of the 27th section and the definitions of "county" and "burgh" which are given in the 105th section. Royal or parliamentary burghs are not named or referred to in the 27th section, and the section, as I read it, is a clear and carefully expressed grant of rating powers to county councils, applicable to the territory over which their administrative authority extends, and in no way implying or suggesting that royal or parliamentary burghs are to come within the scope of its provisions.

It is noticeable that in the one case where it is intended that such burghs should pay for the protection which they are to receive through the county administration, the mode of payment is by way of contribution of a sum of money out of burgh funds, and not by empowering the county council to assess the burgh. I refer to the provisions of the 60th section regarding police. If it had been intended that the burghs should pay for the benefits they receive from what is called county general expenditure, I should expect to find a corresponding provision directing a contribution from burgh funds towards this object. The absence of such a provision proves to my mind that it was not intended that burghs should contribute, either directly or indirectly, towards county general expenditure. When it is considered that under the Local Government Act 1889, a very large contribution is made by the Exchequer in aid of other branches of county expenditure, there is nothing improbable or unreasonable in the supposition that, as a condition of receiving this benefit the counties were intended to take upon themselves the whole burden of county general expenditure.

I may say also that in my apprehension it would not be according to the spirit and policy of the Local Government Act 1889, that a county council should have the power of levying assessments within royal and parliamentary burghs. It is only necessary to read the 4th section of the Act to see that taxation and representation were intended to be correlative. It is provided in that section that every police burgh shall be an electoral division, or shall be divided into two or more electoral divisions. The reason of this is, of course, that the inhabitants of police burghs are to be assessed by the county council. But observe what follows in the last paragraph of this enactment: "Provided always that if any police burgh or other electoral division shall, after the passing of this Act, be annexed to or included within the boundaries of any burgh (*i.e.*, any royal or parliamentary burgh), the councillor or councillors for such police burgh or electoral division shall, from and after the date when such annexation or inclusion takes effect, cease to hold office, and the number of the councillors for the county shall be reduced accordingly." Why should an electoral division be disfranchised because of its annexation to a royal or parliamentary burgh, if it was to continue to be subject to county taxation? Or rather, is it not plain that the reason for the disfranchisement is, that by annexation to such a burgh the electoral division would be exempt from county taxation, and would therefore be no longer entitled to representation on the county council?

I desire to add that I concur in the reasoning and conclusions of the Lord President on the question submitted to us.

LORD KINNEAR—I concur in the opinion of the Lord President.

LORD KYLLACHY—I concur in the opinion of the Lord President, and I desire to add that I do so having fully in view the difficulties which may be involved with respect to the incidence of that part of the consoli-

dated rate which consists of police assessment (1) in the case of royal or parliamentary burghs having a population of over 7090 and not having a police force of their own; and (2) in the case of police burghs having a population of over 7000 and having a police force of their own. Whatever may be the solution of these difficulties, I do not see my way to any other construction of the Local Government Act of 1889 than that maintained by the complainers.

LORD KINCAIRNEY—I concur substantially in the opinion of the Lord President, but am not prepared to affirm that there may not possibly be exceptional circumstances in which a county council might impose a rate on property in a parliamentary burgh, as in the cases referred to in section 97 of the Local Government Act. The point has not arisen for argument. No such exceptional circumstances are said to occur in this case. The petition prays for interdict against all assessments, but the argument has been almost confined to the county general assessment. The application of it, however, appears to be general, and I agree that the Lord Ordinary's interlocutor, which grants interdict in general terms, should be affirmed. The question, however, has appeared to me somewhat perplexing, owing to the apparent repugnancy between section 11 on the one hand, and sections 26 and 27 on the other; and to the difficulty of holding that the property in the burgh of Oban, and in parliamentary burghs generally, has been relieved from the county general assessment, and perhaps from other rates, without the repeal of the statutes which imposed them.

If the County General Assessment Act 1868 (31 and 32 Vict. cap. 82) did not authorise the imposition of the county general assessment in parliamentary burghs there would be no question about that rate. It would then be impossible to maintain that the Local Government Act authorised it. But I incline to the opinion that the County General Assessment Act did authorise that rate, because it contains no such clear limitation of the meaning of the word "county" as to exclude parliamentary burghs, and because such burghs were certainly included in the word as used in the County Police Act (20 and 21 Vict. c. 72), part of which is incorporated in the County General Assessment Act, section 6. At all events, I assume that this is so, and on that assumption the 11th section of the Local Government Act does seem at first sight to transfer to the county council the power to impose the county general assessment on the property in such a parliamentary burgh as Oban; whereas the 26th and 27th section appears to confine the general powers of assessment of the county council to the lands in the county, expressly excluding parliamentary burghs like Oban by force of the interpretation clause.

This apparently direct conflict is avoided by the words "subject to the provisions of this Act," which introduce the 11th section, and also by the introductory words in the interpretation clause, section 105, "if not inconsistent with the context," which are general words referring to all the terms interpreted. But for these saving clauses the conflict between the two sections would have been absolute, and it would have been necessary to choose between them. But these words make both clauses open to construction and susceptible of reconciliation; and I have little hesitation in coming to the conclusion that sections 26 and 27 must prevail. Section 11 purports to transfer certain powers of taxation to the county council, but the transfer is subject to the provisions of the Local Government Act, and modifications as to the application of these powers of assessment are quite consistent with the section. It is certain that the powers of assessment of the county council are not simply the aggregate of the powers of the various assessing bodies whose powers are transferred. For example, the county council has power to impose a rate for general purposes, which is novel (section 27); and it also has power, which the commissioners of supply had not, to impose police taxes on police burghs—perhaps on all police burghs—but certainly on police burghs the population of which is less than 7000 (section 13). That is to say, the area over which the police tax is to be imposed by the county council is different from the area on which it was levied by the commissioners of supply.

But I think that the construction of sections 26 and 27 must be much more strict. In these sections all the powers of assessment of the county council are contained either expressly or by reference. The 11th section contains no power of assessment additional to them. And these sections explicitly confine the powers of assessment to the county. *Prima facie* that, of course, means the county as defined in the interpretation clause—that is to say, the county excluding royal or parliamentary burghs; and if one should substitute that phrase for the word county in sections 26 and 27, I apprehend that the area of assessment would be thereby fixed beyond any question that no doubt could be raised on account of section 11, and that the consequent relief of parliamentary burghs from taxation could not raise any question of construction. But it is said that in this particular clause the meaning "inclusive of parliamentary burghs" must be put on the word county, because otherwise it would be inconsistent with the context. But that appears to me a totally illegitimate method of construction. It is impossible to suppose that the interpretation clause meant that county should mean county exclusive of parliamentary burghs, or county inclusive of parliamentary burghs according to the context; or in like manner that burgh should mean parliamentary burgh, or police burgh, or royal burgh, according to the context. Such a use of an interpretation clause would reduce both the interpretation clause and the statute to a manifest absurdity. There is nothing in the use of the word county in sections 26

and 27 inconsistent with any provision in these sections, or in any part of the Act. A modification of other provisions of the Act, which are expressly said to be subject to modification, may be involved, but that is not inconsistency. The idea that the word county is used in the Act in this loose and indiscriminate manner is the more inadmissible when it is considered that it is probably the most important term in the Act that the exclusion of parliamentary burghs from the general scope of the Act is one of its most marked features, and that one of its leading characteristics is that it devolves the management and taxation of the county on councillors elected by its inhabitants. I think that this view derives considerable confirmation from section 60, as explained by the Lord President.

I do not know why parliamentary burghs have been relieved from this tax as they seem to be; but I think it illegitimate to assume that the result is due to an oversight, and involves an injustice which ought, if possible, to be prevented. I assume, on the contrary, that the result was intended, and that there were in the view of the Legislature sufficient reasons for it. But I admit that I should have expected that the imposition of this tax on parliamentary burghs would have been expressly repealed; and the absence of an express repeal appears to me to give rise to a real difficulty, which, however, is not sufficient to warrant a departure from the statutory construction of the word county.

LORD STORMONTH DARLING — I concur with the Lord President.

LORD PEARSON—I concur in the opinion of the Lord President.

At advising—

LORD JUSTICE-CLERK—The Local Government Act of 1889 was intended primarily to remove the control of county affairs from the authority which up to that time had held the management of these, and to vest it in a new body popularly elected. One of the departments of county business which was so removed by the Act was that for which the funds were provided by the county general assessment levied under the County General Assessment Act of 1868. That Act was passed for the purpose of abolishing the then existing mode of raising the requisite funds for certain county purposes, which had been levied by a rate which was known as "rogue money." The purposes to which the new assessment was to be applied were all specified in the Act, and were all of them purposes by which the whole county was benefited, and included within them the main purposes for which rogue money was raised. This is clearly shown by section 3 of the Act. The Act by exclusion in section 10 defined the area of assessment. Burghs having under Act of Parliament a separate police force from the county were exempted. Royal burghs were also excluded by necessary implication, as the levy of rogue money by the county had never extended to them, they having had a rogue money assessment laid on within their own bounds. On the passing of the Act of 1868, and from that time until 1889, the assessment was laid upon all lands and heritages within the county—that is, it was laid upon the same area from which the county authority had exacted rogue money, including all burghs which were not royal and had not a police force of their own. It is now maintained for the first time that there was no power after 1868 in the authority which previously had assessed for rogue money to levy the county general assessment from that part of the county included in parliamentary burghs, whether these were royal burghs or maintained their own police force or not. That is to say, that the area of assessment was contracted so as to throw the whole assessment upon the rest of the county, although no change was made in the area over which the county required to make the expenditure necessary to meet the charges which formerly had been defrayed from the rogue money. This idea does not seem ever to have occurred to those who were being taxed in parliamentary burghs. If any plausible argument could be stated for that contention, it is scarcely conceivable that it should not have been brought forward by any one of the numerous parliamentary burghs, large and small, which were then, in even larger numbers than now, dotted over the country. The proposition is in itself sufficiently startling. It would be strange if the creation or abolition of a parliamentary burgh should by mere inference alter its position as regards local taxation, the funds necessary for the local purposes being in no way affected by the change, and the administration as regards the purposes for which the fund was raised being exactly as before. On this view, any extension of a parliamentary burgh by which a highly rented area was added to the burgh would take away the revenue of that area from the county funds, while in no way relieving the county of the always increasing expense caused by the extension of town population within the county. On the other hand, in the case of a parliamentary burgh being abolished, and the burgh thrown into the county parliamentary area, such a burgh, if not a royal burgh, would thus have become liable to be rated for county general assessment, for which *ex hypothesi* it was not liable as a parliamentary burgh, although the change made in no way affected the conditions relating to the services for which the taxation was exacted, but only affected the right to return a separate member to Parliament. It is difficult to see why electoral division should decide the question of liability for, or exemption from, taxation in regard to matters having nothing to do with parliamentary representation. The mere suggestion of such a thing savours of the grotesque. Further, that a burgh which is increasing in population, and thus necessarily causing increase in the expenditure for those departments which were paid for out of the county general assessment, while their inhabitants contributed nothing to it, would be an

anomaly not to be accepted unless clear enacting words made its acceptance unavoidable. The county authority was bound to provide certain things necessary for the due administration of the county in "apprehending, subsisting, prosecuting, and punishing criminals," and other cognate departments, and it would appear to savour of injustice that a rapidly increasing burgh population, which is entitled to demand a relatively increased service, and thus necessarily causes increased expenditure, should benefit by it without contributing to it, thus increasing the burden thrown upon the rest of the county area in which population and rental may be stationary or diminishing. Of course, if an injustice so plain is inflicted by Act of Parliament, it must be submitted to until remedied by the Legislature, but any reasonable reading of a statute must be preferred to one causing such anomaly. But statutory enactment must be clear and unambiguous to justify it being interpreted to the effect of inflicting such injustice. In this particular case the interpretation which would inflict the injustice was never even supposed to be a possible one by those interested.

None of the consulted Judges have accepted the argument of the complainer to the effect that Oban was not liable for county general assessment under the Act of 1868, the Lord President, and those who concur with him, suggesting only that there is doubt upon the matter, and that this "may be an additional reason for believing that the doubt was ended in 1889." I will only say upon that suggestion that if the doubt did occur to anyone, it is strange that no direct words of enactment were used in 1889 to place the doubt at rest. For it is an undoubted fact that so little was the matter made clear by the new Act, that it was a considerable time before the idea occurred to anyone that the Act of 1889 had ended a doubt, which doubt had never been propounded during the twenty years during which the Act of 1868 had been in force. And this point on the Act of 1868 was not contested till a late stage of the present case. Even in 1897 it is an afterthought. How the new Act can have been intended in one of its provisions to "place a doubt at rest" which had never existed it is difficult to conceive. Lord M'Laren and Lord Kyllachy, who gave separate opinions, do not notice this branch of the complainer's case at all, and Lord Kincairney is of opinion that under the Act of 1868 the county general assessment was properly levied on parliamentary burghs.

None of the consulted Judges take notice of the contention of the complainer, that as the data for assessment were to be obtained from the valuation roll, this could not be done as regards lands and heritages in a parliamentary burgh, as these would not be found in the county valuation roll. I think it only necessary to say that, in my view, there is no basis for this argument. All lands and heritages in the country are valued in the valuation roll, and for the purpose of ascertaining rental for assessment it matters not whether they are entered in a county or a burgh valuation roll. The Act of 1868 accordingly refers only to the "valuation roll," without saying "of the county." The materials for the assessment are to be found in the valuation roll in which these lands are entered, and it is of no consequence in what sections the valuation is tabulated. The argument further raised, that if the valuation roll is not limited to the county valuation roll, then royal burghs would be included, is fallacious, for section 10 prohibits any extension of the area beyond that for which the county authority had assessed for rogue money, and as already pointed out the county had never assessed any royal burgh for rogue money.

I therefore do not consider it necessary to notice this point further, and shall assume that the proposition must be accepted that, at the time of the passing of the Act of 1889, Oban, although a parliamentary burgh, was liable to be assessed, as Oban certainly was assessed without objection for more than twenty years under the Act of 1868.

If as I think the Act of 1868 is, as regards the funds to be raised by assessment for its purposes, still on the statute book, it follows that parliamentary burghs still fall to be assessed, unless some statutory provision practically repeals part of the Act of 1868, and limits the area so as to exclude them from the operation of that earlier Act of Parliament. Now, on turning to the Act of 1889, which is said to have this effect, I find that while it repeals certain clauses of the older Act, it leaves the assessing clause and the purposes clause standing, thus retaining for the new statutory council the source of revenue, and imposing upon it the duties which formerly attached to the county authority under the older Act. I keep fully in view that section 11 of the Act of 1889, which transfers the powers and duties, declares that this is done "subject to the provisions of this Act," to which great importance is attached by the complainer and the consulted Judges. But I do not think that these words can be said to do more than express what is necessarily implied whenever a new statute deals with an old one. The old one must continue to be operative subject to that which is later, that is to say, anything in the new Act which is plainly inconsistent with any part of the old remaining operative must be given effect to, to the setting aside of what is contained in the old. The new, if it be definite and plain, must prevail over the old, with which it is at variance. This section 11 does certainly not in itself make any change inconsistent with the old Act. And I think that is sufficient to meet the point raised by Lord M'Laren upon this clause. It is not contended that it is a "money clause;" it is only a clause altering an administrating body. It does not in its terms affect any matter of rates or rateable areas. It only transfers the powers, duties, and rights of one official body to a new statutory body. Neither do clauses 26 and 27, whatever else they may do, alter by

enactment the rating powers conferred by the Act of 1868. In none of the enacting clauses is any change made by express words or implication. As Lord M'Laren says in his opinion, "The whole question turns on the first paragraph of the 105th section, which defines the expression 'county.'" If this be so, then the whole matter is narrowed down to a very simple and very clear issue. Does a statute which expresses the intention of the Legislature in all its enacting clauses that the rating powers of a previous statute shall continue to be exercised, effect, by the operation of an interpretation clause interpreting a term, an important and serious change in the area of assessment for a particular service, amounting to a substantial repeal in measure of what has been by the same Act declared still to form part of the statute law? It certainly is a new thing for the Legislature to do—to cut down the powers of a specific enactment in such a manner. I cannot accept the idea that in such a question an interpretation clause is to be held conclusive. I do not think it must be necessarily held to be so, even if expressed in general terms, if giving that effect to it would produce a repugnancy, as in this case I hold that it would, and would create an anomalous and unjust shifting of the burden of taxation without any apparent reason. But even if it were to be held that an interpretation clause can produce so wide-reaching an effect where it appeared to be inconsistent with the purposes of a statutory enactment, it is, as I think, only giving fair and reasonable effect to the proviso which says that the words interpreted are to receive the interpretation given only if it be "not inconsistent with the context." I consider it to be inconsistent with the context as contained in section 11 (which of necessity includes a reading in of the retained clauses of the Act of 1868) to hold the area of assessment under the former Act to have been substantially changed, so as to alter the incidence of burdens on the community the taxation of which is being dealt with, and so as to relieve now—and from time to time, in cases which will or may occur—some parts of the community from rating, throwing an additional load of taxation on the other parts, the service obtained by both in return for the rates being exactly as before. No reason, even plausible, can be suggested for such a change. It cannot have been before the Legislature as a thing to be considered, for no one when the Act was being passed, or for some considerable time afterwards, seems to have had an idea that such a result was to follow. And it is not credible that, if such a change had been intended, it would have been left to be spelled out of an interpretation clause. Considering that the change involves, as I have already pointed out, a substantial injustice, by throwing the whole taxation for a general benefit on a part of the community to be benefited, I think it is not straining of the proviso to hold that, notwithstanding the interpretation clause, the word "county," when this particular taxation is referred to, is not a new area, but is the same area as it was under the Act for the purposes of which the taxation has still to be levied.

But then it is maintained—and this is the main ground on which the Lord President and the consulted Judges proceed—that the Act of 1889, as the Lord President expresses it, "provides a system of rating and powers of rating which are self-contained," and that by clauses 26 and 27, which provide for the levy of consolidated rates, the Legislature showed a "deliberate intention to fence off the county council from all right to levy rates within royal and parliamentary burghs." In passing, it may be said that this is probably the first time in which the Legislature, having, as is assumed, deliberately intended to prohibit a public body from doing what was done by its predecessors in office in exactly the same circumstances, has not expressed its intention in the form of enactment, but left it to inference from the words of an interpretation clause, for it is only by the aid of that clause that the proposition becomes statable. But disregarding this peculiarity of the view maintained, I cannot agree with the opinion that sections 26 and 27 have the important bearing on this case which the consulted Judges attribute to them. These clauses appear to me to relate practically to collection of the moneys necessary for fulfilling the functions committed to the county council, and not to be rating clauses in any true sense, except in so far as in section 27 a special rate with a new name is authorised to meet contingencies. This of itself is a somewhat curious thing to be found in a clause which is said to put an end to rating for particular purposes, for it, *per expressum*, establishes a new and separate rate which may be assessed. The purpose of section 27 appears to me to provide a convenient and cheap mode of gathering in a number of separate rates at one time. The statute guards with anxious care against any rating in lump for all purposes. It directs that the accounts are to be such that each branch of expenditure may be kept separate, and the rate required to meet it ascertained and fixed, and when levied so kept that it shall only be applied to the statutory purpose for which it is authorised to be levied. Further, while all rates are to be levied at once in the form of a consolidated rate, the demand-note is to specify the amount of each rate, so that the taxpayer may know what are the specific rates he is to be called upon to pay under each head. In short, what is called the consolidated rate is not a rate resolved on by the county council, but is simply a summation of the various separate rates which they have resolved to impose under each branch of their powers. So clearly is this the case, that when there is county expenditure which they have no power to levy for under any of the statutes under which they have the power of the old county authority committed to them, a power is given to impose a new rate called general purposes rate, which is to be added to the column of separate rates in

the demand-note before the sum in simple addition is gone through which brings out the consolidated rate to be uplifted from the individual ratepayer. Thus I hold it to be clear that the power to rate for all purposes under previously existing statutes is to be found in these statutes, and not in sections 26 and 27 of the Act of 1889. I should have held this as a necessary inference from the mode of rating described, but the Act itself says in express words that "The rate in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as inconsistent with the provisions of this Act." Thus each old rate remains, and the old powers for exacting it remain, although the detail work of collection is regulated by the simple process of putting all the rates in one demand-note, thus making up a consolidated rate. Even after the rates have been collected in that form, the receipts require to be duly entered in separate accounts for each rate. If, then, the rate for the purposes of the Act of 1868 is to be imposed under the powers of that Act, must not the power to levy on the same area continue? The Act of 1889 refers to the other Act for the powers, &c., and says, in effect, that they shall still be in force. In these circumstances I cannot hold that any of these powers to which I have referred are taken away by an implication from the interpretation clause. I hold that, as the Act of 1868 is still in force, the power to rate under it for the purposes of it is still in force, and that there is nothing in the enactments of the Act of 1889 to take away that power in whole or in part.

It only remains to notice an argument founded on the enactment in section 60, that in the case of burghs under 7000 inhabitants, which by the Act of 1889 are deprived of the power to maintain a police force of their own, the sum of contribution to the county fund for their share of police establishment expenses is to be assessed upon them in lump, leaving them to raise and defray the amount as they see fit out of their police assessment, if they have one, or out of any other assessment which they levy, or if they have a common good, to pay it out of that fund, if so advised. This is said to indicate the deliberate intention of the Legislature to fence off the county council from all right to levy any rate on burghs. It seems a sufficient answer to say that the Legislature thought proper in this imposition of a new assessment of burghs, which before had provided their own police, not to hamper them in that matter by giving the county the right to exact the amount by a separately levied rate, the doing of which might dislocate their financial arrangements within the burgh without any practical reason for doing so. It is easy to see that there may have been good ground for this, as it might be most convenient for the burgh to meet the charge made against them out of the same funds and by the same machinery by which they had met the cost when they had themselves to provide the service. For example, in a burgh where the police expense had been met out of the common good, it might have been a hardship to exact the sum required from the individual inhabitants by a rate, and other illustrations might easily be suggested. That seems to me to have been quite sufficient ground for the Legislature leaving the burgh to find the money for this new exaction on the part of the county authority, which was authorised for the first time by the Act of 1889. But in this case it is not a new but an old rate that is in question, which had always been imposed and exacted by the county authority, and which there could be no emerging administrative inconvenience in continuing. I am unable to see any deliberation to put an end to this rate, such as is supposed to be found by implication in section 60, which dealt with new exactions only. And I cannot understand why, if such a deliberate intention existed, it found no direct expression in enacting clauses relating to the matter in regard to which it is suggested that it was harboured.

On these grounds I cannot concur in the judgment which falls to be pronounced in accordance with the opinions of the consulted Judges.

LORD YOUNG—Parliamentary burghs of the class and character of Oban and Galashiels are numerous enough, populous enough, and the rateable property within their bounds valuable enough, to make the question whether they are subject to or exempt from county taxes one of public importance—indeed, a public question. As matter of fact, these burghs were for a long period prior to the passing of the Local Government (Scotland) Act 1889 taxed exactly as were the landward parts of counties and the towns and villages therein which were not royal or police burghs, and the idea never occurred, or at least found expression, that injustice was thereby done to them, or that there was any reason for relieving them of taxation, necessarily, of course, at the expense of the other portions of the counties in which they were situated. That they did not participate in the benefits of the expenditure to meet which the taxes were imposed would have been a reason had the fact been so; but it was not, and no other reason occurred, or at least (as I have said) was ever expressed. The equality of taxation corresponding with the equality of benefit in the expenditure of its produce was satisfactory to all parties interested, and no complaint or expression of desire for a change was ever heard.

The question now before us is, whether, nevertheless, the Local Government (Scotland) Act 1889 made a change. The *prima facie* improbability that it did, or, at all events, that a change was intended when there was no complaint or expression of desire for a change, was increased by the fact that for some years after the passing of the Act it did not occur to anyone that

any change had been made. It is a fact that for a considerable time after 1889 the parliamentary burghs were taxed by the county councils exactly as they had been before by the commissioners of supply, no one interested imagining that a change had been made where none had been desired by anyone, or the slightest hint of intention to make it given by anyone. Accordingly, when in the year 1893 it occurred to someone that the Act of 1889 was capable of a construction which would effect this change, although no one had desired it or even thought of it, and although no reason for it was suggested, we in this Division, where the question arose, had to consider and determine whether or not this was the true construction of the Act. We were, I think, all of opinion that the change suggested could not have been intended—and that for reasons obvious enough from what I have said—and that a construction of the language of the Act which should lead to a result which we thought was not intended, and could not have been intelligently intended, was to be avoided if reasonably possible. We thought that it was reasonably possible, although thoroughly appreciating the difficulty, especially that arising from the definition of the term "county." We decided the case before us accordingly. The Judges of the First Division took a distinctly different view in the subsequent case of *Galashiels*, and the opinion of the large majority of the consulted Judges in this case favours their view. I appreciate the grounds of their opinion, although still disposed to avoid a result which, I think, could not possibly have been intelligently meant, by construing the Act of 1889 as we did in the case of *The Police Commissioners of Oban*, March 9, 1894 (21 R. 644). The same question arose before the First Division in the case of *Galashiels*, and was otherwise decided. This led quite intelligibly to the question being again raised, as it is in the case now before us. I have already said that the question is distinctly a public question. The Act of 1889 is a public Act relating to the taxation of every county in Scotland. I should think, therefore, that it is a proper one for the consideration of the Government. The Act was introduced and carried through Parliament by the Government of the day, and the distinguished statesmen by whom the measure was prepared, and under whose guidance it was carried through Parliament, probably know what was intended to be done in the matter now in question, and I venture to think that the matter ought to be made clear to the public by the Legislature. The statute as it stands is far from clear, and the doubts as to its import and meaning ought to be removed, not by a court of law at the expense of litigants, but by Parliament itself. If it was intended by Parliament to relieve parliamentary burghs at the cost of the other parts of the counties in which they are situated, this intention must necessarily have effect. With the opinions before me of so large a majority of the Judges, I do not feel it incumbent on me, or that it would serve any useful purpose for me, to enter upon a critical examination of the language of the Act.

LORD TRAYNER—The question in this case is, Can the County Council of Argyllshire competently levy a county general assessment on the lands and heritages in the burgh of Oban? It is maintained by the burgh of Oban that they cannot, (1) because they have no power to levy any assessment beyond an assessment for consolidated rates, and (2) because the burgh of Oban is by statute excluded from the area upon which such consolidated rates may be levied.

In dealing with these questions I start with the fact that prior to the year 1868 the burgh of Oban was assessable and assessed for rogue money. But in that year an Act was passed by which the assessment known as "rogue money" was abolished, "and in lieu thereof" power was conferred upon the commissioners of supply to levy a "county general assessment." The purposes to which that county general assessment were to be applied (as specified in the statute) undoubtedly covered the charges which up to that time had been defrayed out of rogue money. The power of assessing conferred on the commissioners of supply was set forth in clause 4 of the Act, and its terms are important. They are, "It shall be lawful for the commissioners of supply of every county in Scotland once in each year to impose an assessment for the purposes of this Act, to be called the "county general assessment," upon all lands and heritages within such county, according to the yearly value thereof as established by the valuation roll for the year (commencing at Whitsunday) in which such assessment is imposed." The word "county," occurring twice in the clause just quoted, is not defined or limited in any way in the Act. It must therefore mean the county in its entirety; and *all* lands and heritages within it are to be assessed. The lands and heritages situated in Oban, being within the county of Argyll, were therefore subject to this assessment. This appears to me to be the plain result of the statutory provision; and it was recognised to be the result by the burgh of Oban, which was assessed in respect thereof, and paid the assessment down to a period subsequent to 1889. Now, unless that Act has been repealed, the whole lands and heritages within the county of Argyll are still subject to the assessment. That power of assessment has not been directly repealed, and it is of significance to remark that, except the clause conferring the power to assess, and the clause directing the purposes to which the assessment is to be applied, the Act of 1868 has been repealed. I take it, therefore, that the power of assessment was intentionally continued by the Legislature when dealing by way of repeal with the other provisions of that Act.

So matters stood until the passing of the Local Government (Scotland) Act of 1889,

which, *inter alia*, repealed partially the Act of 1868. It is upon the construction of the Act of 1889 that the decision of the questions to be determined turns, and on which the two objections maintained by the burgh of Oban, which I stated at the outset of my opinion, are based. I turn therefore now to the Act of 1889 to see whether these objections are well founded. By the 11th section of that Act it is provided that, "subject to the provisions of this Act, there shall be transferred to and vested in the council of each county . . . the whole powers and duties of the commissioners of supply." Accordingly, there was thus transferred to the county council the power and duty of levying the "county general assessment," as provided for in the Act of 1868. I do not fail to observe that this clause commences with the words, "subject to the provisions of this Act." Everything in the Act — powers, duties, responsibilities, rights—are all subject to the provisions of the Act, and therefore if "the provisions of this Act" restrict, limit, or abrogate any of the powers conferred in any previous statute, of course effect must be given to any such provision. The words with which the clause commences, however, do not seem to me of much importance, because they throw no light on the construction of this Act, and do not give any aid towards answering the question, whether the "provisions of this Act" do make an alteration on the powers conferred by the Act of 1868, and that is the question with which the Court is now chiefly concerned. Lord M'Laren is of opinion that no weight can be given to the "argument founded on the 11th section," because that section is not a taxing clause. I am not aware that it has been maintained that the 11th section is a taxing clause, and I am sure no one questions the very familiar constitutional principle to which his Lordship refers. But the 11th section has a bearing upon the argument notwithstanding, which is entitled to consideration and weight. The taxing clause is to be found in the Act of 1868, and the effect of section 11 is to transfer from one public body to another the power of levying and applying the tax so already constitutionally authorised. Such a transfer did not need to be carried out by a "money clause."

The 26th section provides (sub-section 1) that "all debts and liabilities of any authority whose powers and duties are transferred by or in pursuance of this Act to the county council" shall become the debts and liabilities of the council, and shall "be defrayed by them out of the like funds out of which they would have been defrayed if this Act had not passed." Now, prior to the Act of 1889 being passed, one of the liabilities of the commissioners of supply was the liability to provide for "the expenses incurred in searching for, apprehending, subsisting, prosecuting or punishing criminals" (Act of 1868, section 3, sub-section 3), and these expenses were paid out of the county general assessment, which the Act of 1868 authorised the commissioners of supply to levy. The liability for these expenses is now a liability on the county council. How are these expenses to be met? "Out of the like funds out of which they would have been defrayed if this Act had not been passed." If the Act of 1889 had not been passed these expenses would have been defrayed out of the county general assessment; and accordingly out of such an assessment they must now be defrayed. But how can they, if the county council has no power to levy such an assessment? If the county council has no power to levy such an assessment, there is now no power in any other authority to levy it. And (if the contention on this head by the burgh of Oban be sustained) the county council will be in this position — it will have a statutory liability to defray certain expenses and no fund out of which to defray them.

The view has been maintained (and was received with favour in the *Galashiels* case) that the county council cannot levy county general assessment, because by the Act of 1889 the only thing the county council is entitled to impose or levy is a consolidated rate under the authority of sections 26 and 27. I venture, with deference, to think this view a mistaken one. The consolidated rate or rates are only consolidated in the sense that all the several rates hitherto levied by several authorities for several purposes are now to be levied by the one authority and in one *cumulo* sum. But these several rates are to be kept distinct and separate, even in the "demand note" issued by the county council to the persons who have to pay the rates (section 62). Not only so, but these rates when collected are still to be kept separate from each other, for it is provided, section 26 (5), "that the county council shall keep such accounts of the county fund (into which all assessments are to be paid) and of the sums raised by rates as will prevent a rate being applied to any purpose to which it is not properly applicable." Clearly showing, as I think, that the county council shall be entitled to levy separate rates (although all enumerated in the one demand note), of which they must keep separate accounts. Now, under what authority are these separate rates to be levied? Not under the 26th or 27th section of the Act of 1889; but under the Act (authorising these assessments) in force when the Act of 1889 was passed. What else is the meaning of section 27, which provides that the rate "in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act."

The assessing clauses (sections 26 and 27) of the Act of 1889 deserve, however, a little more attention. Under section 26 there is no power to levy what may be called a new assessment. It is an assessment authorised only where the county fund is insufficient to meet the expenditure for the year—and the county fund consists, at least partly, of the rates authorised to be raised under the previously existing Acts. In this view the

assessment authorised by section 26 may fairly be regarded as a supplementary assessment. If so, then the supplementary assessment would surely be levied, unless that was distinctly forbidden, on the same subjects and over the same area as the assessment which it was intended to supplement. But section 27 authorises a new or additional assessment. It provides that "the rate necessary in respect of any branch or branches of expenditure for which no provision is made, as last mentioned" (that is, not made under an Act of Parliament "in force at the passing of this Act"), "shall be imposed as a general purpose rate under this Act." Now, I take it that the expense of subsisting, apprehending, and prosecuting criminals in the burgh of Oban is a branch of expenditure for which the County Council of Argyll is bound to provide. If provision is made for defraying this expenditure by an existing Act of Parliament, the County Council must levy an assessment under the Act which authorises it; if not, they must levy it under the power conferred by section 27, which I have just quoted. Accordingly, if the Act of 1868 authorises an assessment to be levied for this purpose on the burgh of Oban, the assessment will be laid on in respect of that authority; but if that authority no longer exists (whether by repeal, actual or inferential), the assessment must be laid on under section 27. In either case, the County Council must assess to meet this branch of expenditure—it is their right and duty to do so. But that is just what the burgh of Oban contends that the County Council has no right to do. Further, the assessment authorised to be imposed by section 27 is to be imposed as a "general purposes rate," to meet a "general county purpose" (section 26, 3). Is it not reasonable to suppose that a general county purpose, of which the whole county has the benefit, would naturally be met by an assessment on the county generally rather than only on a part of it?

There remains the question (I think the only question really in the case) whether by the Act of 1889 the burgh of Oban is excluded from the area upon the lands and heritages in which the County General Assessment can be imposed. This question is, I think, attended with considerable difficulty, and I am not able to regard its solution as so easy or obvious as some of my brethren do.

The interpretation clause (section 105) of the Act provides that the expression "county" means a county exclusive of any "burgh wholly or partly situate therein," and that "burgh" includes "parliamentary burgh." The argument founded upon this clause is, of course, plain enough. If "county" does not include but excludes "parliamentary burgh," then Oban is not included *quoad hoc* in the county of Argyll. And I confess I see no answer to this argument if the interpretation of the expression "county" is, by the language of the statute, made absolute and necessary in every case. But this cannot be said, for the clause (section 105) limits the interpretation there given to the cases where such interpretation is "not inconsistent with the context." It appears to me that an interpretation of "county" which would exclude "parliamentary burgh" in the present case would be inconsistent with several provisions of the Act.

1. The assessing clause in the Act of 1868 is transferred to the county council without any limitation or restriction. As I have already observed, under that clause the whole county was assessable, the burgh of Oban included, and that assessing power was reserved *ex proposito* when the remainder of the Act was repealed. I think it more reasonable to read the interpretation clause in the Act of 1889 as subordinate to the assessing clause of the Act of 1868 than to read it as repealing that clause to any extent. It is an interpretation clause only, not a repealing clause, at least in intention.

2. By section 27 of the Act of 1889 it is provided that rates imposed by the county council in virtue of the provisions of any Act in force before the passing thereof (*i.e.*, the passing of the 1889 Act) shall be deemed "to be imposed under the powers and subject to the provisions of that Act." Now, if the County General Assessment is imposed by the County Council under the provisions of the Act of 1868, it must be imposed on all lands and heritages within the county, Oban included. For the Act of 1868 does not exclude "burgh" from "county," and does not authorise the commissioners of supply to impose the assessment on part of the lands and heritages in the county only. The County Council has no other or different duty or right in that matter than the commissioners of supply. The rights and duties of the one have been merely transferred to the other, not diminished nor enlarged.

3. The County Council are undoubtedly responsible for the charges "incurred in searching for, apprehending, subsisting, prosecuting or punishing criminals" in the burgh of Oban, and these are to be defrayed (Act of 1889, section 26) "out of the like funds out of which they would have been defrayed if this Act had not been passed." These expenses were formerly defrayed out of an assessment levied, *inter alia*, upon the lands and heritages in Oban. How can these charges be defrayed out of the like funds (that is, out of funds procured from the same source) if no such funds are obtained by assessment from Oban? This leads me to remark that it cannot have been one of the purposes of the Act of 1889—there is nothing in the Act itself to countenance such an idea—to relieve Oban of charges fairly imposed upon and borne by that burgh, at the expense of other parts of the county of Argyll. But that is the necessary result of the construction now to be put upon the Act—a construction which results in an injustice—an injustice not confined to the county of Argyll, nor in it merely in connection with the burgh of Oban. This, too, is to be done, not because of any

substantive provision made by the Legislature, but because of the words in an interpretation clause. That a certain construction of a statute results in hardship, inconvenience, or inequity is of itself no reason for rejecting that construction, if that construction is necessary. But a construction involving such consequences will not be readily adopted if another construction is possible.

4. The Act of 1889 (section 26) authorises the county council, if the county fund is insufficient to meet the expenditure, to levy a rate for general county purposes "upon all rateable property in the county." I think the word "county" must here be read as meaning the whole county, not only because the words "general county purposes" point to this, but because the same clause makes a distinction between what may be levied on the county and what may only be levied on a particular district or parish—that is, a particular part of the county. But "general county purposes means all purposes for which the county council are for the time being authorised by law to incur any expenditure." Now, the expenditure necessary in connection with the apprehending, subsisting and prosecuting criminals is an expenditure which the county council is authorised to incur. It is, therefore, one of the "general county purposes" for which "all rateable property in the county" may be assessed.

For the reasons I have stated I am unable to concur in the interlocutor under review. I think (1) that the County Council are bound to provide for the apprehending, subsisting, prosecuting, and punishing criminals in the burgh of Oban; (2) that the expenditure therewith connected must be defrayed out of the County General Assessment, being the fund out of which it was defrayed before and at the passing of the Act of 1889; (3) that the County Council have the right and duty to levy that assessment under the Act of 1868, or under section 27 of the Act of 1889; and (4) that, whether levied under the one Act or the other, it falls to be levied on all lands and heritages in the county, including the burgh of Oban.

It follows that, in my opinion, the reasons of suspension should be repelled.

Lord Moncreiff—Now that we have had the advantage of considering the written pleadings and the opinions of the consulted Judges, I think that the most formidable, if not the only serious argument, for the burgh of Oban is that on which the Lord President mainly rests his opinion—namely, that the County Council has no right to impose any rate on lands and heritages within a parliamentary burgh. This argument rests upon the assumption that the powers of assessment possessed by the County Council depend entirely upon the rating clause of the statute, viz., section 27, that under that section they are only empowered to impose a rate upon lands and heritages within the county, and that in terms of the interpretation clause, section 105, the expression "county" as used in section 27 does not include parliamentary burghs.

That is an extremely simple ground of decision, and it is pressed home with great force in the Lord President's opinion. If the construction which he adopts is the clear and unambiguous construction of the clause, it must receive effect, whatever we may think was intended in regard to the continuance within parliamentary burghs of assessment under the County General Assessment Act. But if, on the other hand, the clause is ambiguous, and the expression "county" does not, in regard to every rate, necessarily mean county exclusive of parliamentary burghs, it is legitimate to examine the rest of the Act and the history of the rate in order to ascertain what meaning is to be attached to the word in connection with the rate in question.

I am of opinion that the word "county," as used in section 27 (1) has not a fixed and inflexible meaning, and that in applying that section to the assessment with which we have to deal, viz., the County General Assessment, "county" does include a parliamentary burgh in the position of the burgh of Oban, which has less than 7000 inhabitants and does not maintain a police force of its own.

The Local Government (Scotland) Act of 1889 does not introduce new rates or taxes, unless it be the general purposes rate (section 27 (1)). Its leading object is to concentrate the administration of a number of county trusts in the hands of a single administrative body; and in order to effect this it transfers to the county council bodily the powers, duties, and liabilities which had previously been vested in a number of administrative bodies — commissioners of supply, county road trustees, and others (section 11). No doubt under the Statute certain duties are transferred from the burghs to the new county authority, and certain modifications and alterations are made as to the imposition and incidence of certain rates; but where such alterations are intended to be made they are made by express and detailed enactment and not left to inference. From all this I infer that where no more is said in regard to any particular statutory trust than that it is transferred from the old to the new statutory authority, any assessment authorised by the statute in question falls to be levied upon the same parties and within the same area as before.

When we examine the provisions of the statute which affect the county general assessment we find no indication of any intention to alter the area of assessment. On the contrary, apart from the complainer's interpretation of the word county as used in section 27, I think it is perfectly clear that it is intended that the county general assessment shall be levied within the same area as before. Neither is the county general assessment dealt with in any exceptional manner, because we find throughout the statute, and indeed in section 27 (1) itself, anxious provision made for keeping separate and distinct the rates

authorised by the various statutes, the powers, duties, and liabilities under which are transferred to the county council. For the purpose of showing that to interpret the word "county," as used in section 27, as the complainer does, would be "inconsistent with the context," I shall examine shortly certain provisions of the statute which affect the transfer to the county council of the power to assess for county general assessment and other statutory rates.

When the case was sent to the whole Court, I understood that the only question submitted for consideration was whether the liability of the burgh of Oban to be assessed for county general assessment was taken away by the Local Government Act of 1889. In the debate before this Division it was conceded that until the passing of that Act Oban was liable to be assessed under the County General Assessment Act of 1868. The word "county" is not in that statute limited by definition; it is used in the widest sense. The complainer, however, now for the first time maintains that while Oban was liable to be assessed for rogue money until its abolition in 1868, it never was liable to be assessed for county general assessment under that Act.

Oban is a parliamentary burgh having less than 7000 inhabitants, and it does not maintain a police force of its own. It was, therefore, undoubtedly liable to be assessed for rogue money until 1868. In my opinion the Act of 1868 did not free it from liability. No doubt rogue money was abolished, but the rate which the commissioners of supply were authorised to impose under that statute is expressly declared both in the title and the preamble of the Act to be in lieu of rogue money. It also appears from section 10 of the Act that the imposition of the county general assessment is co-extensive as regards area with the imposition of rogue money. Plainly the new assessment was to all effects substituted for rogue money.

Coming now to the Act of 1889, the only effect of that statute, in my opinion, upon the imposition of county general assessment is to transfer the power to levy it and the corresponding duties and liabilities from the commissioners of supply to the county council. This is done by the general words of section 11 (1), and it is to be observed that the repeal by section 12 (1) of part of the County General Assessment Act of 1868 leaves untouched the assessing clause (section 4) of that statute, and also section 10, which defines the area of assessment as co-extensive with that in which rogue money used to be levied.

These are the only provisions of the statute which deal specially with the right to levy county general assessment. They vest in the new statutory authority the right to levy that assessment precisely as it stood vested in the commissioners of supply. In subsequent sections of the statute alterations are introduced in connection with the transfer to the county council of powers, duties, and liabilities under other trusts, but there is no modification or restriction in connection with the county general assessment.

It is said that the county council are only empowered to impose a consolidated rate, and that it is not permissible to split up the rate and impose part of it only; that therefore where any area within the county, such as a parliamentary burgh, is not liable to be assessed for the whole of the consolidated rates, it cannot be assessed for any part of them. I do not think that we are driven to that conclusion. What are called consolidated rates are simply an amalgamation of a number of distinct and separable rates which, although they are collected together, are separately levied under the provisions of the respective Acts of Parliament which authorise their imposition, and are set forth separately in the demand notes sent to the persons by whom they are to be paid. In support of this view I may refer to the following clauses. Section 26, sub-section (1), provides:—"On and after the appointed day all debts and liabilities of any authority whose powers and duties are transferred by or in pursuance of this Act to the county council of a county shall become debts and liabilities of such council, and shall, subject to the provisions of this Act, be defrayed by them out of the like funds out of which they would have been defrayed if this Act had not passed." And sub-section (5) of the same section provides:—"The county council shall keep such accounts of the county fund, and of the sums raised by rates, as will prevent a rate being applied to any purpose to which it is not properly applicable."

And section 27 (1) contains this provision:—"The rate in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act."

Section 60, sub-section (4), speaks of "the item of the consolidated rates"; and section 60, sub-section (2), provides that the demand-note "shall set forth the several branches of expenditure in respect of which the consolidated rates were imposed, and the amount in the pound applicable to each several branch."

It is demonstrated in the case for the respondents that there is no practical difficulty in laying on and collecting the rate within burgh.

I say no more upon this objection, because I do not think that so much stress is now laid on it as was done in the Galashiels case (*Burgh of Galashiels* v. *County Council of Selkirk*, 23 R. 818).

Weight is naturally attached to the provisions of the 60th section of the statute, which provides that although royal and parliamentary burghs are bound to contribute to the county fund in aid of the expenditure of the administration of the Police and Contagious Diseases (Animals) Acts, the power of assessing within burghs for the purposes of such contribution is not conferred upon the county council, it being

left to the burghs to provide for it out of such assessments or funds as they think fit. I feel the weight of this illustration; but I do not think that it is by any means conclusive in favour of the complainer. Section 60 is introduced in order to give effect to the provisions of sections 13 and 14 of the Act. By section 13, burghs containing population of less than 7000 are deprived of the power of raising and maintaining a police force of their own. That section, therefore, effected a transfer not from one county authority to another, but from such burghs to the county; and all that section 60 does is to leave it to the burgh authorities to defray their share of the expense in the manner most convenient to themselves. In the case of the county general assessment no change was made in regard to its imposition except that it fell to be imposed by a different county authority, and therefore there was no necessity for any special provision as to the proportion of the assessment to be borne by the burghs.

The conclusion drawn by the complainer from the terms of the 60th section is that the scheme of the statute is that the county council shall in no case have the power of directly levying an assessment within a burgh even where expenditure by which the burgh benefits has to be defrayed out of the county fund. That conclusion is not in my opinion warranted by the terms of the 60th section, and cannot be reconciled with certain features of the scheme of the statute which are too strongly marked to be seriously disputed.

In the first place, it is clearly and necessarily intended that the county council shall have the means of defraying all the expenditure which they are bound to make under the various trusts devolved upon them by the statute. If they do not under any one of the statutes which they are bound to administer possess full power of meeting any branch or branches of expenditure which requires to be made it is provided (section 27 (1)) that "the rate necessary in respect of any branch or branches of expenditure for which no provision is made as last mentioned"—that is, under the special statute—"shall be imposed as a general purposes rate under this Act."

Secondly, it is an essential part of the scheme of the statute that if a burgh benefits by expenditure on its behalf made by the county council, it shall pay for it; it shall not obtain the benefit at the expense of the rest of the county. The anxious provisions made in section 60 sufficiently establish this; and there is no trace in any part of the statute of an intention that a burgh shall obtain the benefit of such expenditure for nothing. In short, the proper proportion of all expenditure made by the county council is to be borne by each part of the county, including burghs, for the benefit of which the expenditure is made.

Now, it is not disputed that under the County General Assessment Act the County Council, coming in place of the commissioners of supply, are bound to make the expenditure necessary for the purposes of that statute, and in part at least for the benefit of the burgh of Oban. How are they to be reimbursed for the expenditure made for the benefit of Oban; The scheme of the statute is that they shall be reimbursed. Out of what fund is it to come? The natural and appropriate fund is, as I have said, the county general assessment, which expressly makes provision to meet such expenditure. It is not necessary to have recourse to the general purposes rate. But if the complainer is right as to the interpretation of the word "county" in the earlier part of section 27 (1), the County General Assessment Act, as modified by the Act of 1889, does not now make any provision for the burgh's contribution to meet that expenditure. If so, the county council is authorised by the concluding part of section 27 (1) to meet such a deficiency out of the general purposes rate, unless we are again to be met with the objection that the general purposes rate cannot be levied within a parliamentary burgh even for the purpose of defraying expenditure made for the benefit of the burgh. There is great force in Lord Trayner's view that, looking to the character of the general purposes rate and the definition of "general county purposes" in section 26 (3), "county" in connection with that rate must be read in its widest sense, or at least as co-extensive with the area for the benefit of which the rate is laid on. If the expenditure can neither be met out of the county general assessment nor out of the general purposes rate, we have the anomaly, for which there is no parallel in the statute and no ground in equity, of the county council being obliged to make expenditure for the benefit of a burgh at the expense of the rest of the county. And this leads me back to the conclusion that the area within which the county general assessment is to be levied is not altered by the statute of 1889.

I would only add that if the word "county" is in this case to be construed in a restricted sense in favour of parliamentary burghs in the position of the burgh of Oban, the result may be far-reaching; because such burghs may escape assessment by receiving benefits at the expense of the rest of the county under other statutes. If, for example, the population of Oban comes to be over 7000, and it does not choose to establish a police force of its own, it will obtain the services of the county police for nothing, as sections 13 and 60 only apply to burghs with a population of under 7000.

On the whole matter, I think that there are sufficient grounds to be found in the statute for holding that to attach to the word "county," as used in section 27, the inflexible meaning contended for, would be "inconsistent with the context." Section 27 (1) deals with the imposition of consolidated rates made up, as I have explained, of a number of distinct rates, the incidence of which is not uniform, and which are still deemed to be imposed under the powers and subject to the provisions of the special statutes; and the particular rate

in question, the county general assessment, is levied under a statute which hitherto had authorised its imposition within parliamentary burghs in the position of Oban. In my opinion it would be "inconsistent with the context," meaning thereby with the terms of this very sub-section read in the light of the clauses which I have quoted, to construe the word "county" in such a way as to operate a virtual abolition of the power to levy county general assessment within a parliamentary burgh without making any provision for a contribution by the burgh.

On these grounds I respectfully differ from the consulted Judges, and hold that the suspension should be refused.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause with the opinions of the consulted Judges, in conformity with the opinions of the majority of the whole Judges of the Court, Adhere to the interlocutor of Lord Kyllachy dated 10th March 1897 reclaimed against by the respondents, with the omission of the words 'in respect the cause is ruled by the recent judgment of the First Division in the case of the *Burgh of Galashiels* v. *The County Council of Selkirk* (23 R. 818),' and decern: Find the complainer entitled to additional expenses," &c.

Counsel for the Respondents and Reclaimers—Shaw, Q.C.—Graham Stewart. Agents—M'Neill & Sime, W.S.

Counsel for the Complainer and Respondent—Salvesen—Abel. Agents—Gill & Pringle, W.S.

Friday, March 18.

FIRST DIVISION.

KINMOND'S TRUSTEES *v.* MESS.

Succession—Power of Appointment—Discretionary Power of Trustees to Invest for Behoof of Fiars—Repugnancy.

A truster bequeathed a legacy to his niece, with the proviso that "This legacy may be paid to" her husband, "or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." He further provided that the legacies "shall become payable to the legatees" only after his own death and that of his widow, and that the issue of any of the legatees predeceasing the longest liver of himself and his wife, "shall succeed to their parents' share in equal portions," while the share of any predeceasing without issue was to fall into residue.

The truster's niece survived him but predeceased his widow, leaving two sons, one of whom was of unsound mind, while the estates of the other were sequestrated. After the death of the truster's widow, the trustees, in exercise of the discretion given by the truster, executed a minute by which they restricted the right of the sons to an alimentary liferent of their shares of the legacy, with power of testamentary disposal.

Held that the sons took a right which was independent of their mother's contingent interest, and was not affected by the trustee's discretionary power, and that accordingly the trustees were bound to pay over the legacy to the sons' representatives.

Opinion (*per* Lord M'Laren) that even if the right were subject to this power, it was impossible, seeing that a full right of fee was conferred upon the sons, without ulterior destination, to protect it against creditors, or against their own voluntary acts.

Mr Alexander Kinmond died on 5th January 1872, leaving a trust-disposition and settlement dated 30th August 1867, whereby he disponed his whole estate to trustees.

The trust-disposition, after making provision for the truster's widow and appointing various special legacies, contained the following clause—"*In the fifth place*, I hereby make the following legacies:—To the foresaid Thomas Kidd Kinmond, my nephew, I legate and bequeath the sum of four thousand pounds: *Item*—To Mrs Ann Kinmond or Cairncross, daughter of the late Andrew Kinmond, merchant in Dundee, the sum of fifteen hundred pounds; this legacy may be paid to Henry Cairncross, husband of the said Ann Kinmond, or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." Various legacies to other nephews and nieces of the truster were bequeathed under this head of the deed, and the clause proceeded as follows—"Declaring that the legacies contained in this clause shall become payable to the legatees only after my death and after the death of the said Mrs Jane Wedderburn Jolly or Kinmond as my widow; also declaring that the lawful issue of any of said legatees predeceasing the longest liver of me and my said wife shall succeed to their parents' share in equal portions; and also that the share of any of them who may predecease me and my said wife without lawful issue shall fall into the residue of my trust-estate: Declaring further that all the legacies herein conceived in favour of females shall not be subject to the *jus mariti* of any husband or husbands to whom they may be married, and that their own personal receipts shall be a sufficient discharge to my trustees therefor, minors always excepted." By the sixth clause the truster provided for the event of the estate proving insufficient to meet the debts, legacies, &c., and proceeded—"And in the event of my said estate being more than sufficient for all the purposes herein specified, then and in that case the legacies to my nephews and nieces and their lawful issue shall be increased proportionally to their respective amounts so as to exhaust the estate, with power to my said trustees