entitled to three-eighths of the profits and was interested in the audit, did not ask to be furnished with the agreement giving Mr Teacher his rights, the contents of which might materially affect his audit. But I do not feel at liberty to question Mr Gairdner's positive statement that he did not know of the agreement, and that he would have audited differently if he had done so.

The condescendence contains numerous and detailed charges of fraud against the respondent. The Lord Ordinary and the learned Judges in the Inner House were of opinion that these charges had entirely failed. The charges were repeated at the bar of this House, but I believe all your Lordships agree on this point with the Courts below. On one point only, that relating to Rucker's debt, the Lord President, while negativing any fraudulent intention on the rospondent's part, expressed an opinion adverse to him on the merits. As the accounts have to be taken I will not express any opinion on this or any other point arising on the accounts. I will only say that in my opinion each question should be considered by the auditor on its merits, and unprejudiced by any judicial dictum.

There only remains the question of damages for the breach by the respondent of his agreement not to withdraw his capital. It is admitted, and indeed appears on the face of the accounts, that the respondent did withdraw large sums for the purposes of employing them in other businesses carried on by him. The learned Dean of Faculty claimed to follow these sums, and sought to make the respondent account to the appellants for the profits derived by the use of them. The contention was a novelty, unsupported by either authority or principle. The money withdrawn was not Mr Teacher's in any sense, and he had no interest in it except to have it employed in the respondent's timber business. But his representatives are entitled to damages for the loss he sustained by the respondent's breach of the agreement so to employ it. There is evidence that money could at that time be profitably employed, say at 8 per cent. per annum in the timber business. But there is no evidence of any business being lost by the respondent, or of his being unable to tender for any contract from want of capital, and there is some affirmative evidence to the contrary. It also appears that the capital withdrawn was to some extent (at any rate) replaced for the purpose of trading by money borrowed from the bank, and interest at 5 per cent. was allowed on the money withdrawn, and the like rate only paid on the money so borrowed. This was of course wrong on the respondent's part, as it exposed Mr Teacher's loan to unnecessary risk, but his loan has now been paid in full, and the only element of damage is the loss of profit or income. On the whole, taking all these circumstances into consideration, I am unable to say that the appellants have made out to my satisfaction that Mr Teacher suffered any larger damages by the respondent's breach of his agreement than the sum which has been awarded to them by the Court of Session. I concur in the order which has been proposed by my noble and learned friend on the Woolsack.

Ordered that the interlocutor of the First Division, dated 25th February 1898, be reversed except (1) in so far as it recals the interlocutor of the Lord Ordinary dated 28th May 1897; and (2) in so far as it decerns against the defender for payment to the pursuer of £250 sterling of damages: That it be found and declared that the audits made by Mr Charles D. Gairdner for the year ending upon the 30th day of April in the years 1890, 1891, 1892, and 1893, and the relative certificates granted by his firm, were not made or granted in accordance with the terms of the minute of agreement dated 11th April 1889: That subject to that finding and declaration the clause be remitted to the Court of Session with directions (1) To take an account in terms of the said minute of agreement of the net profits of the firm of Calder & Company for the year ending 30th April 1890, and for the four following years; (2) To assoilzie the respondent (defender) from the whole conclusions of the summons, in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the respondent: That it be declared that neither of the parties be entitled to decree for the expenses of process incurred in the Court of Session, and that the respondent do pay to the appellants their costs of this appeal.

Counsel for the Appellant — Dean of Faculty (Asher, Q.C.) — H. Johnston. Agents—A. & W. Beveridge, for Carmichael & Miller, W.S.

Counsel for the Respondents — J. B. Balfour, Q.C.—Salvesen. Agents—Hollams, Sons, Coward, & Hawksley, for Alex. Morison, S.S.C.

Tuesday, July 25.

(Before the Lord Chancellor (Halsbury), Lord Shand, and Lord Davey.)

MAGISTRATES OF LEITH *v.* LEITH DOCK COMMISSIONERS.

(*Ante*, Nov. 30, 1897, vol. xxxv., p. 132, and 25 R. 126.)

Burgh — Assessment — Ultra vires — Costs of Opposing Bill in Parliament—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 95.

The Public Health (Scotland) Act 1867, by section 95, authorises the local authority to impose assessments for the expenses incurred by them "in executing this Act."

The Magistrates of Edinburgh introduced into Parliament a bill, the purpose of which, *inter alia*, was to have the burgh of Leith amalgamated with

and made part of the city of Edinburgh. The Magistrates and Council of Leith successfully opposed the amalgamation. *Held* (*aff.* the judgment of the Second Division) that they were not entitled to charge the expenses incurred by them in opposing the amalgamation upon the assessment levied by them as Local Authority under the Public Health Act —*Attorney-General* v. *Mayor of Brecon*, L.R., 10 C.D. 204, *approved and distinguished.*

The case is reported *ante, ut supra.* The Magistrates of Leith appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I have had an opportunity of reading the judgment written by one of my noble and learned friends (Lord Watson), and I am quite prepared to assent to it. The only reason why I wish to say something further is, that some of the learned Judges below have made comments upon a decision of Sir George Jessel. As I agree with that decision I have thought it right to say that in my opinion a broad distinction exists between the case which the learned Judges in the Court below had to deal with and the case which Sir George Jessel had to deal with. It is one thing to be entitled to defend your own municipality out of your own funds, and it is another thing to apply to that purpose funds which are confided to you for a totally different purpose. It seems to me that that establishes the whole difference here: and while I entirely agree with Sir George Jessel, and protest against the weight of his authority being in any degree shaken or moved by the judgment which your Lordships are about to pronounce, I am content in this particular case to affirm the judgment of the Court below because in my view the distinction which I have pointed out exists between the cases, and therefore the judgment of the Court below is one with which I am able to agree.

LORD WATSON (*read by Lord Davey*)—The appellants, the Magistrates and Council of Leith, are a very ancient corporation. Besides the ordinary legal powers which attach to them as the municipality of the burgh, they have been entrusted by the Legislature with the execution of a variety of statutory trusts. They are Commissioners for executing the provisions of the Burgh Police (Scotland) Act 1892; they are also the local authority within the burgh for executing the provisions of the Roads and Bridges (Scotland) Act 1878; the Public Health (Scotland) Act 1867, and Acts explaining and amending the same; the Housing of the Working Classes Acts 1890-96; the Valuation of Lands (Scotland) Act; the Registration of Voters (Scotland) Act; the Registration of Births (Scotland) Act; the Public Parks (Scotland) Act; the Cattle Diseases (Scotland) Act; and for assessing within Leith for the purposes of the Water of Leith Purification and Sewerage Act 1889.

Besides levying assessments in virtue of their statutory powers, the appellants, as corporation of the burgh, are the owners of heritable property of the annual value of £35, and of the estimated capital of £845. They have also a right to receive, in perpetuity, from the respondents, the Commissioners for the Docks and Harbour of Leith, an annual payment of £500, less income-tax. That charge, which was imposed upon the respondents by a Docks and Harbours Act of 1847, is payable in lieu of certain rates formerly due to the burghal Corporation of Leith out of the rates levied at the harbour of Leith, which were commuted at the sum of £500 a year by the Edinburgh and Leith Agreement Act 1838. The Act of 1838 provided that the commuted sum should be "applicable and applied to the municipal and civil and other purposes of the said town, as its own proper estate, funds, and effects," and by the Harbour Act of 1847 it was declared that the annuity of £500 should be "applied and administered by the said Magistrates and Council to and for such and the like purposes as the said customs, rates, imposts, and market dues hereby abolished were applicable and applied."

The respondents, who are the complainers in this action, are the statutory trustees of the harbour and docks of Leith. They are liable to be assessed by the appellants for the purposes of the Public Health (Scotland) Act; but they are by statute exempt from the burgh general assessments, and also from assessment under the Roads and Bridges Act 1878, and the Water of Leith Purification and Sewerage Act 1889. The assessment imposed under the Public Health Act is leviable from owners and occupiers in equal proportions.

In the parliamentary session of 1896 the municipal corporation of the city of Edinburgh promoted a bill, the main object of which was to extend the boundaries and jurisdiction of the city by the amalgamation with the city of the burghs of Leith and Portobello. The effect of the bill, if it had become law, would have been to terminate the existence ,and to put an end to all the powers, duties, and privileges of the municipal corporation of Leith. It was proposed that the burghal territory of Leith and Portobello should form part of an enlarged district subject to the government of the new and extended corporation of the city of Edinburgh; and that all the statutory powers and trusts previously exercised by the Magistrates and Council of Leith and Portobello should be transferred in bulk to, and should be administered by the new municipality.

The bill became law in so far as it related to the burgh of Portobello. It was, not unnaturally, keenly opposed by the appellants, and ultimately, with the exception of certain provisions which do not appear to me to be material to the present question, it was thrown out in so far as it concerned the burgh of Leith and its municipality, which has since continued to enjoy its civic status and to administer all its statutory trusts.

The appellants in their opposition to the bill, which was conducted by the Magis-

trates and Town Council in their municipal character, incurred costs to the amount of about £3500. The appellants, at a statutory meeting held by them in the month of October 1896, resolved to charge the rates leviable within the burgh of Leith under the Public Health Acts with an amount sufficient for payment of their parliamentary expenses. They accordingly proceeded to include the sum of £703, 9s. 1d., being one-fifth of the amount, in the assessment under the Public Health Acts for the year 1896–7, leaving the balance of £2813, 16s. 4d. remaining "to be assessed for in the four succeeding years, conform to resolution of council of date 6th October 1896."

The respondents, on the 6th November 1896, presented the note of suspension and interdict with which these proceedings commenced, which was passed with answers for the appellants on the 18th November 1896. The note craved the Court to interdict and prohibit the appellants from proceeding to carry the aforesaid resolution into effect and from levying, under or in virtue of the Public Health Acts any rate or assessment on the properties of the respondents within the burgh of Leith to be applied directly or indirectly in or towards payment, in whole or in part, of the expenses incurred by the appellants in or connected with the opposition by them to or in connection with the bill promoted by the corporation of Edinburgh in the session of Parliament 1896 for the extension of the boundaries of the said city and the amalgamation of the burghs of Leith and Portobello therewith, or in or towards payment of money borrowed or to be borrowed by them for the purpose of paying the said expenses.

The Lord Ordinary (Pearson) having closed the record upon the note and answers and heard the parties, on the 16th July 1897 pronounced an interlocutor suspending the proceedings complained of, and interdicting, prohibiting, and discharging the present appellants from imposing and levying and from proceeding to carry out a resolution to impose and levy on the complainers "any rate or assessment on the properties within the said burgh, or on any rental or valuation thereof, to be applied directly or indirectly in or towards payment in whole or in part of the expenses incurred by the respondents (appellants) in or connected with opposition by them to or in connection with the bill promoted by the corporation of the city of Edinburgh . . . or in or towards payment of money borrowed or to be borrowed by them for the purpose of paying said expenses." A reclaiming-note was presented to the Second Division by the appellants, when the Court, consisting of the Lord Justice-Clerk (Macdonald), Lord Trayner, and Lord Moncreiff, refused the note and adhered to the interlocutor of the Lord Ordinary.

The appellants in their legal capacity as the municipality of the burgh of Leith, constitute a corporation or person capable of holding heritable and personal estate, and of contracting debts and obligations, quite independently of the position which they occupy as trustees for the execution of various legal powers under the authority of Parliament. It was held by the First Division of the Court in *Wotherspoon & Hope* v. *Magistrates of Linlithgow* (4 Sess. Ca., 3rd series, p. 348), that a burgh, as a legal person, is liable at the instance of a qualified creditor to sequestration under the provisions of the Bankruptcy (Scotland) Act 1856. Under that process the whole property of the burgh, so far as alienable, vests in the trustee in the sequestration, who distributes it among creditors according to their respective rights. But the right of the trustee in the sequestration does not extend to such statutory trusts as are created by the Public Health Acts, or to the statutory power of imposing and levying rates, which remain vested, notwithstanding the sequestration, in the municipal corporators of the burgh. It had been held in *Hogan* v. *Wilson and Magistrates of Musselburgh* (15 Sess. Ca., 2nd series, p. 417), that under the Scotch Bankruptcy Acts prior to 1856 a burgh could not be made notour bankrupt; but the Court of Session had finally decided that it was competent to award sequestration in the usual form of the burgh estate, and to appoint a judicial factor. See *Black* (*Judicial Factor*) v. *Burgh of Lochmaben* (14 Sess. Ca., 1st Series, p. 1056).

I am not surprised that in the present case the learned Judges of the Court of Session, finding the appellants possessed of burgh property sufficient, or nearly sufficient, to meet their obligations, should have declined to allow them to select a particular one of the statutory trusts administered by them, and to apply the moneys of the ratepayers for the purpose of discharging the debts of the burgh. It appears to me to be out of the question to say that heritable property to the value of upwards of £800, and a perpetual annuity of £500, are insufficient to enable the owners to provide for a debt of £3500. It, on the other hand, does not appear, and it has not even been pleaded in the appellants' case, that the burgh property in question has been so dedicated as to be in whole or in part inalienable. The annuity of £500 was declared by the Edinburgh and Leith Agreement Act of 1838 to be applicable to "the municipal and civil and other purposes of the said town (Leith) as its own proper estate, funds, and effects." The appellants have not shown that the property in question is devoted inalienably to other purposes than payment of their debt; and I do not think that the considerations which led to the decision of *Magistrates of Lochmaben* (4 Sess. Ca., 2nd series, 16), and *Kerr* v. *Magistrates of Linlithgow* (3 Sess. Ca., 3rd series, 370), have any application to the present case.

The authorities relied on by the appellants were English, and, what to my mind is of more of importance, they all related to cases where the municipal corporation had appeared in their character of trustees to defend the interests of a statutory trust which had been assailed. I have certainly no repugnance to the equitable doctrine

that a trustee who honestly acts in defence of the trust which he administers ought to be kept *indemnis* out of the funds of the trust; but no English or other authority has been cited to us in which a trustee who has incurred costs in defending himself or his own interest has been found entitled to recoup himself out of the pocket of a *cestui qui* trust. In the present case the bill promoted by the corporation of the city of Edinburgh aimed at the destruction of the municipal corporation of Leith. It had not for its object the destruction, alteration, or impairment of any one of the numerous statutory trusts administered by the Leith corporation beyond the abolition of the latter body. If that object were effected the ratepayers would have remained in the same position under the management of the extended corporation, in the election of which they would have had a voice.

I am, on these grounds, of opinion that the interlocutor appealed from ought to be affirmed, with costs.

Lord Davey — Speaking for myself, I so entirely concur in the judgment which I have just read of my noble and learned friend Lord Watson, that I do not intend to trouble your Lordships at any length.

I only desire to make one observation. I do not understand my noble and learned friend to have said anything in the judgment which I have read to impugn the correctness and authority of the decision of Sir George Jessel in the case of the *Attorney-General* v. *The Mayor of Brecon*, in the cases to which that decision is applicable. This case, in my opinion, differs in essential particulars from the *Brecon* case. In that case the question was whether the corporation could pay the expenses of resisting an attack upon their corporate privileges and duties out of the borough fund. In this case it is not disputed that the Corporation of Leith might lawfully defend themselves against an attack upon their existence out of their proper funds. Lord Moncreiff put the question thus in the Court of Session: "The true question which we have to decide," he says, "is not whether the respondents were entitled to defend their corporate existence, but whether the expenses of their opposition are to come out of this particular fund."

Therefore the question is whether the Corporation of Leith can lawfully charge the expenses of resisting the bill of the Corporation of Edinburgh on the rates leviable by them under the Public Health Act, which they administer for the purposes of that Act independently of their ordinary right, privileges, and duties. I am of opinion that they cannot, and therefore I concur in the judgment which has been proposed.

Lord Shand—Your Lordships are about to affirm the decision of the Second Division of the Court of Session, which again unanimously affirmed the judgment of the Lord Ordinary, and as I concur in the views expressed by my noble and learned friend Lord Watson I shall content myself by making a very few observations.

Whether it would have been possible for the appellants, whose existence as a Town Council was threatened by the bill which they successfully opposed, to have made some division of the expenses incurred, and to have framed a scheme of allocation and equitable distribution of these expenses or part of these expenses by requiring contributions by way of assessment from each of the various funds which they are entitled to raise in respect of the different trusts they administer, and in this way to impose an assessment to a small extent under the Public Health Act, as well as an assessment on funds of the other trusts and of the corporation, it is not necessary to consider. I quite agree that there is no possible ground on which it can be successfully maintained that the whole assessment can be levied under the Public Health Statute. The existence of the burgh was at stake, for its absorption into Edinburgh was proposed, and I see no reason to doubt that the appellants are entitled to be indemnified out of the capital funds of the burgh for the costs incurred in resisting that proposal. I concur, however, in thinking that the appellants were not entitled to impose a rate under the Public Health Act alone for that object, for those costs, if they could be said to be to some extent incidental to the carrying out of the purposes of that Act, were so to a small extent only—and while agreeing with the views of my noble and learned friend and of your Lordships, I may add that Lord Trayner has stated shortly and clearly the grounds on which I am ready to rest my decision.

Appeal *dismissed* with costs.

Counsel for the Appellants—J. B. Balfour, Q.C.—Cripps, Q.C. Agents—John Kennedy, for Irons, Roberts, & Company, S.S.C.

Counsel for the Respondents — Guthrie, Q.C.—J. D. Sym. Agents — Martin & Leslie, for Torry & Sym, W.S.

Tuesday, July 25.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Shand, and Davey).

BOWMAN *v.* BOWMAN'S TRUSTEES.

(*Ante*, March 18, 1898, vol. xxxv. p. 608, and 25 R. 811.)

Succession—Vesting—Survivorship—Postponed Period of Distribution—Power of Trustees to Postpone Period of Distribution Indefinitely

A truster, who was a partner in a firm of coalmasters, gave his trustees power by his trust-disposition and settlement to represent him in the firm, and also to be parties to any new lease which the firm might enter into, and thus to continue the partnership indefinitely.