I am therefore not prepared to sanction the pursuer's proposal. The interlocutor of the Sheriff-Substitute, which has been adhered to by the Sheriff, seems to me to dispose of the case in a perfectly satisfactory manner.

The other Judges concurred.

The Court accordingly refused the appeal, with expenses.

Counsel for the respondent pointed out that the Sheriff had merely affirmed the interlocutor of the Sheriff-Substitute, without saying anything about the expense of the appeal in the Sheriff-court.

LORD DEAS—I think we have had occasion before now to observe that such an interlocutor ought to be understood to carry the expenses of the appeal. If the point has not been previously reported, it should be reported now.

Agents for Appellant—Philip, Laing, & Monro, W.S.
Agent for Respondent—William Officer, S.S.C.

Thursday, March 7.

SECOND DIVISION.

SPECIAL CASE—ROOPE AND BALL.

Legacy—Clause of Survivance—Vesting.

A. died leaving a trust-disposition to trustees, with directions that they should hold his whole means and estate for the liferent use of his wife, and on her death, after paying certain legacies, to pay over the residue among their nieces "equally among them and the survivor of them." One of the nieces predeceased the widow. *Held* that her share had not vested in her, and could not be claimed by her representatives.

The late John Strang, LL.D., Chamberlain of the city of Glasgow, by his trust-disposition, dated 30th May 1863, and codicil, dated 5th December 1863, conveyed to the parties therein named the whole estate, heritable and moveable, which should belong to him at the time of his death, as trustees for the purposes therein written; and by the said codicil he made certain additional bequests, and gave some directions to his trustees. The truster, by the said trust-deed, directed his trustees to hold the whole residue of his means and estate, heritable and moveable, for the liferent use and behoof of his wife, Elizabeth Anderson, and to pay the whole free annual produce of said residue to her during her life; on the death of his wife to pay certain legacies; and, lastly, to pay and divide the residue of his whole means and estate to and among his three nieces, Elizabeth Machen or Roope, daughter of Mrs Ramsay Strang or Machen, his sister, and Mary and Elizabeth Knox, daughters of Mrs Isabella Strang or Knox, now deceased, also his sister, and that equally among them, and the survivors of them, share and share alike. Mrs Isabella Strang or Knox was the wife of Edmond Dalrymple Hesketh Knox.

Dr Strang died on 23d December 1863, survived by his wife and by Mrs Elizabeth Roope, Mary Knox, and Elizabeth Knox, who is now the wife of William Clare Ball. Mrs Strang enjoyed the liferent of the residue, and died on 9th August 1871, survived by Mrs Roope and by the said Elizabeth Knox, now Mrs Ball. Mary Knox died unmarried and intestate on 18th December 1868. Mary Knox's domicile at the time of her death was in Ireland, and, according to the law of that country, her father, the said Edmond Dalrymple Hesketh Knox, was entitled to her whole personal estate.

With reference to the foregoing facts, the parties respectively requested the opinion and judgment of the Court on the following question:—

"Whether the said Mary Knox, at the time of her death, had a vested right and interest, to the extent of one-third, in the residue of the estate of the said Dr John Strang?"

The clause in the deed upon which the question principally turned was as follows:—"and *Lastly*, I direct said trustees to pay and divide the residue of my whole means and estate to and among my three nieces, Elizabeth Machen or Roope, daughter of the said Ramsay Strang or Machen, and Mary and Elizabeth Knox, daughters of the said Isabella Strang or Knox, and that equally among them and the survivors of them, share and share alike, but not subject to the *jus mariti* of any of their husbands, or to the debts or deeds or the diligence of the creditors of any of said husbands."

MILLAR, Q.C., and KEIR for Mrs Elizabeth Machen or Roope.

WATSON, for Mr Ball, as administrator for the Rev. E. D. H. Knox.

The Court unanimously answered the question in the negative, being of opinion that the vesting was postponed until the death of the liferentrix, and that, as Mary Knox had predeceased before that event, her representatives could claim no share in the residue of Dr Strang.

Agents—John Auld, W.S., and Melville & Lindsay, W.S.

Friday, March 8.

FIRST DIVISION.

CHARLES COWAN AND COLIN MACKENZIE *v.* LORD PROVOST LAW AND OTHERS (TRUSTEES UNDER THE EDINBURGH AND DISTRICT WATERWORKS ACT, 1869).

Interdict—Trustees, Powers of Statutory—Expenses of unsuccessfully promoting a Bill in Parliament—Edinburgh and District Waterworks Act, 1869—*Waterworks Clauses Act*, 1847 (10 *and* 11 *Vict., c.* 17).

Interdict granted (*diss.* Lord Deas) at the instance of two ratepayers within the district over which the trustees acting under the Edinburgh and District Waterworks Act, 1869, have power to levy assessments, against the said trustees applying the trust-funds in their hands in payment of the costs incurred by them in an unsuccessful application to Parliament for powers to bring in a supply of water from new sources, or levying assessments for the purpose of paying such costs.

This was a note of suspension and interdict presented in July 1871 by Mr Charles Cowan of Logan House, and Mr Colin Mackenzie, W.S., two of the ratepayers within the district over which the Edinburgh and District Water Trustees have power to levy assessments.

The respondents were the whole body of Trustees acting under the Edinburgh and District Water-

works Act, 1869, at the time the note was presented, with their clerk and treasurer.

The prayer of the note was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of, to interdict, prohibit, and discharge the respondents from applying the trust-funds in their hands, or any part thereof, in payment of any costs incurred by them or others in promoting a bill in the Parliament of 1870-71, for the purpose of obtaining statutory authority to bring in a supply of water to Edinburgh, Leith, and Portobello, from St Mary's Loch; and further, to interdict, prohibit, and discharge the respondents from borrowing money, and from laying any assessment upon, or levying or exacting any rates from, the complainers or the other ratepayers in the district over which the respondents have powers of assessment under the Edinburgh and District Waterworks Act, 1869, for the purpose of paying in whole or in part such costs as aforesaid; and further, in the event of the said respondents, or any of them, entering appearance and opposing the granting of the prayer of this Note of Suspension and Interdict, to find such of the respondents liable in expenses; or to do otherwise in the premises as to your Lordships shall seem proper."

The facts, which will appear more fully from Lord Gifford's Note, were shortly, as follows:—

Prior to 15th May 1871 the supply of water to Edinburgh and district was furnished by a joint-stock company, incorporated by Act of Parliament, and having statutory powers to levy rates. The Company was originally incorporated by 59 Geo. III. c. 116, and during its existence five bills were from time to time obtained by it from Parliament for bringing in additional supplies of water from new sources.

In the session 1868–9 the Corporations of Edinburgh, Leith, and Portobello introduced a bill into Parliament for the purpose of transferring the undertaking of the Water Company to public trustees, to be elected by the Corporations, and for powers to bring in water from St Mary's Loch. The latter part of the bill was thrown out on account of non-compliance with standing orders, but the bill, so far as concerned the transfer of the undertaking, passed into law, under the title of the "Edinburgh and District Waterworks Act, 1869." The present respondents were duly elected under this statute.

After examining various sources of supply, the respondents decided in favour of St Mary's Loch, and in the session of 1870–1 they, or the majority of them, promoted a bill before Parliament for obtaining powers to bring in water to Edinburgh and district from St Mary's Loch. The bill was opposed, on various grounds, by a number of ratepayers, who claimed to be the great majority of the community, and a very heavy expenditure was incurred in promoting the bill. The preamble of the bill, after being found proven by a Committee of the House of Commons, was found not proven by a Committee of the House of Lords, who issued the following deliverance:—

"This case being a very important one apparently, the Committee have thought it right to put in writing their opinion, and the reasons for coming to it. The Committee are of opinion that it is not expedient to proceed further with the bill. They hold that with better care and regulation as regards waste, and with increased storage for the utilization of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs; and they hold further that they cannot sanction so large an expenditure of money, which appears not to be required at present."

The present question turned upon a construction of the Act of 1869, and the previous statutes obtained by the Water Company. The "Waterworks Clauses Act, 1867," is incorporated with the Act of 1869, with the exception of all provisions with respect to the construction of water-works.

The respondents pleaded—"The present note of suspension and interdict ought to be refused, with expenses, in respect that the acts and proceedings of the Trustees to the expenses of which it has reference—(1) Were necessary and proper in the due administration of the trust now vested in the respondents. (2) Were not only in furtherance of the main purpose of that trust, but necessary to its attainment. (3) Were done and carried on *bona fide*, and were within the statutory powers of the respondents."

On 31st August 1871 the Lord Ordinary on the Bills (MURE) passed the note, on caution, and granted interdict in somewhat qualified terms, omitting that part of the prayer which sought to interdict the laying on of the assessment, and confining it to an interdict against exacting payment of the rates.

On 5th December 1871 LORD GIFFORD, before whom the case was enrolled, pronounced the following interlocutor:—

"Recals the interdict granted *ad interim* by the interlocutor of 31st August 1871: Suspends the proceedings complained of, interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension: Declares this interdict, now granted, to be perpetual, and decerns: Finds the suspenders entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report.

"*Note.*—This is a very important case, involving large sums, and the decision of which adversely to the respondents may give rise to serious questions of personal responsibility.

"The case is also one of very general interest as affecting the duties, powers, and responsibilities of public and statutory trustees. The entire *bona fides* of the respondents in their whole actings was very strongly pressed on the Lord Ordinary, but he has not been able to find that mere *bona fides* on the part of the Trustees is sufficient to exclude consideration of the great question, Whether the costs and expenses of promoting the bill to obtain a supply of water from St Mary's Loch are or are not to be defrayed from the statutory funds in the hands of the respondents, as Trustees under the Edinburgh District Waterworks Act of 1869?

"The respondents in the present case are the Trustees under the Act of 1869—the whole body as a Corporation, without any distinction of minority or majority—the statutory trust which, though fluctuating in its members, is permanent in its constitution, appears as respondents, and the question is competently raised by two ratepayers within the district, Whether the costs of promoting the bill, which was lost by the decision of the House of Lords' Committee last session of Parliament, can be lawfully defrayed out of the assessments which the Trustees are authorised to levy? This question the Lord Ordinary is bound to decide, apart altogether from the ulterior question, upon whom those costs, or any part of them, will

fall, in the event of its being found that they are not chargeable against the assessments.

"The Lord Ordinary has given the question raised in this action the most careful consideration in his power. In his view, it turns entirely upon the construction, meaning, and effect of the statutes held by the respondents, including not only their own Act of 1869, and the statutes incorporated therewith, but also the whole series of prior Acts which were obtained by 'The Edinburgh Water Company,' in whose right and place the Trustees now stand. These Acts are very voluminous, and it is not easy to determine the exact import and effect of many of their provisions.

"On the whole, and after the best consideration in his power, the Lord Ordinary has come to the conclusion that the costs of St Mary's Loch bill, promoted in last session of Parliament, do not constitute a proper charge against the assessments levied or to be levied by the respondents. He has come to this conclusion, however, not without great hesitation and difficulty, and, he is free to add, not without regret and reluctance; but he has felt himself bound to apply a strict rule, which, although it may often be productive of hardship, and may be so in the present case, is still, he thinks, upon the whole, salutary and beneficial.

"In the debate before the Lord Ordinary there was not much conflict between the parties as to the *general principle* or the *general rule of law* applicable to cases like the present—the great contest and the great difficulty arises in the application of an admitted principle to the peculiar circumstances of the present case—to the position of the respondents as trustees, and to the duties incumbent upon them as such.

"In general, it may be said that trust-funds can only be applied to trust purposes; that in every case the powers of trustees are limited by the constitution of the trust; and that they cannot divert the trust-funds, or any part thereof, to purposes either opposed to or different from the purposes for which the trust was created. Of this principle there are multitudes of illustrations, applicable to every different kind of trust, but it is always in each case a question—What is the real purpose of the trust, and what are the powers incidental thereto, which are either expressly or by implication vested in the trustees? and to determine this question, the nature, constitution, and circumstances of each particular trust must be looked to; and, as these vary in each case, the general principle will vary in its application.

"In all cases, besides the powers *expressly* conferred upon trustees, there are many powers which are held as *implied*, and which, from their nature and variety, must almost necessarily be left to implication, and the real difficulty often is to draw the line, and determine the limit of these implied powers; and when the power claimed and exercised by trustees is peculiar or abnormal in its character, the difficulty is greatly enhanced, and a very careful consideration may be required to determine whether it is or is not fairly within the trust.

"Now, the promoting or opposing a bill in Parliament may be said to be in some respects an extraordinary act on the part of trustees. Not that it is an uncommon or unusual thing for trustees to do, for trustees of various descriptions both promote and oppose bills in Parliament every day, but the procuring of *new legislation*, or of powers which the Legislature alone can give, is not, in general, an object for which a trust is constituted; and unless there be express power to go to Parliament, it will require in general a pretty strong implication to justify trustees in doing so at the expense of the trust.

"When the object of the bill promoted by the trustees is to obtain an increase or alteration of *their own powers*, or to change or subvert their own constitution, a strong case must be made out before the expense of such an unsuccessful attempt can be charged against the proper trust-funds. For it can never be presumed that trustees are appointed for the very purpose of altering, amending, or it may be entirely subverting, their own powers and constitution. This point will be afterwards noticed, when considering the special nature of the respondents' trust.

"It may be useful, before adverting to the specialties of the present case, to consider a few of the leading cases which have been decided relative to the powers of trustees to promote or oppose Parliamentary measures. These cases are referred to merely as illustrations of the general principle above stated, and which the Lord Ordinary thinks must regulate the present question.

"In the *Attorney-General* v. *The Guardians of the Poor of Southampton*, May 23, 1849 (18 Law Jour., Chancr. 393), the Guardians of the Poor of Southampton applied for an Act of Parliament to vary the mode of assessment, and to authorise the rates on small rents under £12 to be levied from owners instead of occupiers. The bill was lost, and the Court held that the Guardians could not charge the cost thereof against the poor-rates under their charge.

"In the *Attorney-General* v. *Andrews*, Jan. 24, 1850 (19 L.J., Chancr. 197), the Commissioners of Waterworks of Southampton applied for a new Act for extending their powers. Twenty of the Commissioners were in favour of promoting the Act, and only two opposed it. The Court held that, although the new Act might be very desirable, the costs of promoting it could not be defrayed out of existing rates. This is a strong case; for the existing Act empowered the Commissioners 'to increase the supply of water by such means as they should think proper, and to do and execute all such matters and things as should be necessary for that purpose.'

"*Attorney-General* v. *Liverpool* (1 Myl. & Craig, 171; 7 L.J., Chancr. 51).

"*Attorney-General* v. *Norwich* (16 Simon. 225).

"*Stevens* v. *South Devon Railway Company* (Jan. 16, 1851, 20 Law Jour., Chancr. 491).

"In *Taylor* v. *Chichester Railway Company*, June 24, 1867 (Law Reports 2, Exchequer 357), a railway company, in order to buy off opposition to an Extension Act, agreed to pay a landowner £2000. The Act passed, but made no provision for this payment. Held by Exchequer Chamber that the £2000 could not be paid from the funds of the company.

"*Myles* v. *M'Ewen*, Jan. 13, 1855, 18 D. 205. Here the Commissioners of Police for Dundee applied for an Act to prolong their powers. The Act was opposed, and after incurring about £1000 of expenses, was abandoned, and the General Act adopted by a majority of householders. The Court held that, although the Commissioners had applied for the Act *in optima fide*, the expense could not be charged against the police funds.

"See *Brown* v. *Adam*, Feb. 19, 1848, 10 D. 744.

"*M'Lean* v. *Macintosh*, June 30, 1852, 14 D. 928. Here the Magistrates of Inverness, who were trus-

tees of the Mackintosh Educational Fund, applied for an Act to unite the fund with the funds of the Inverness Academy under a joint trust. The bill was opposed, and the Committee of the House of Lords gave an adverse opinion, whereupon it was abandoned. Held that, although the expense of opposing the bill had protected the trust-funds, they could not be charged against these funds.

"*Brighton* v. *North*, Feb. 13, 1847 (16 L.J., Chan. 255). Here the Trustees of the banks of the River Ouse were found entitled to the costs of opposing a bill which would have injured the river's banks, the Lord Chancellor Cottenham explaining that every trustee is entitled to the fair expense of defending the trust property.

"The same principle was recognised in *Campbell, Petitioner*, Jan. 12, 1847, 9 D. 397; *Mill* v. *Fraser*, Nov. 25, 1859, 22 D. 33; *Regina* v. *Norfolk Commissioners of Sewers*, 20 L. J., 2 B. 121; *Vance* v. *East Lancashire Railway*, 3 K. and J. 50.

"There are various other cases, most of which will be found referred to in the judgments above quoted.

"The principle fairly to be gathered from these cases appears to be, that in each case it must be shown that the Parliamentary costs were incurred in the exercise of powers either expressly or by clear implication conferred upon the trustees. It seems, further, that the expense of opposing a bill will be more easily admitted as a charge upon the trust-funds than the expense of promoting a bill—at least where the opposition to the bill is for the purpose of protecting the trust-estate.

"Applying these principles to the present case, the Lord Ordinary thinks, on a consideration of the whole statutes held by the respondents, that the respondents' trust was not constituted or created for the purposes of obtaining new or additional supplies of water, that is, new sources of supply, but solely for the purpose of administering the existing supply, that is, the supplies and sources of supply which by the statutes are now vested in the respondents. He has consequently felt himself compelled to disallow as a charge against the trust, that is, against the assessments which the respondents levy, the costs of the unsuccessful measure which the respondents promoted in last session of Parliament.

"Avoiding all detail, and all minute criticism of clauses, the Lord Ordinary will shortly indicate the grounds upon which his opinion rests.

"(1) The Act of 1869, under which the respondents are incorporated, does not by any express provision authorise them either to bring in new sources of supply or to make application to Parliament for powers to do so.

"Of course, this is by no means conclusive, for in such a trust many powers must be *implied*; but it is, to say the least, very remarkable that, if, as was contended, one of the *primary duties* of the trust was to get more water, not one word about this should be contained in the statute. The getting additional supplies, or the obtaining of statutory powers to do so, were and are very important matters, involving very large costs and expenses; and if it was intended that the Trustees should either get new supplies or apply for powers to get them, it is natural to expect that this would be specially provided for in their Acts. But neither in the Act of 1869, nor in any of the statutes incorporated therewith, nor in any of the Acts of the old Company, is there any provision authorising the course which the Trustees have recently adopted. The preliminary expenses of obtaining a new Act may often be, and in the present case are, very large. Surveys by engineers, and estimates for works more than forty miles long, and of great magnitude, had to be obtained. Numerous conflicting interests had to be provided for, preparations had to be made for opposition, which was sure to be offered, and an expensive Parliamentary contest had to be engaged in. It is strong to hold that all this is to be held as authorised merely by implication, when a single clause or a single sentence in the Act of 1869 would have removed all doubt, and all difficulty. In this respect, the case of the present respondents is much weaker than that of the *Southampton Water Trustees*, for in that case these trustees had general powers to *increase* the supply of water.

(2) The respondents' Act of 1869 does not even narrate that the supplies or sources of supply thereby vested in the respondents were insufficient or inadequate, or that it was expedient to get farther or additional supplies. Some such narrative as this would have been natural if the intention of the Legislature had been that the Trustees should set about getting new supplies, and preparing and promoting bills for that purpose.

"The absence of any allusion to the deficiency of supply is the more remarkable, when it is remembered that the bill of 1869 originally contained powers to bring in St Mary's Loch, and that that part of the bill contained an inductive clause that more water was needed; and it is to be noticed that in all the previous Acts of the old Company, whenever powers were granted to bring in new springs, the statutes themselves narrate the necessity or expediency of new supplies.

"(3) It is true that there are some expressions in the Act of 1869 which might point to additional supplies. For example, the title of the Act bears *inter alia* to be 'for supplying water.' The inductive clause of the Act bears that 'the supply of water should be provided by' the Trustees, &c. These expressions, however, are ambiguous. They may mean either 'supplying' and providing *from existing sources* handed over to the Trustees, or from *new sources* not yet obtained, and the Lord Ordinary thinks, on a purview of the whole statutes, that the former meaning is that truly intended. It is thought that an ambiguous expression must be interpreted by the unambiguous parts of the statute.

"(4) The vesting clauses of the statute are confined to the estates, subjects, and sources of supply which belonged to the old Company, and it is one of the inductive clauses of the statute that it is expedient to transfer the old undertaking to a new and a public trust. Indeed, the statute expressly refers to the provisions which the old Acts contain for this purpose, and states that the said provisions were 'unsuited to existing circumstances,' and the fair reading of all the statutes seems to be that the old undertaking is simply to be placed under new and better management. Additional powers, no doubt, may be and are expressly conferred upon the new Trustees, but all this is only for the administration and management of *the old estate*.

"(5) And this leads to the remark that the old Water Company had no express power by any of their statutes to promote bills in Parliament, or to get up schemes for obtaining new sources of supply, and no such power seems to be implied in any of the old Acts.

"It is true that the old Company had occasion

to come very frequently (six or seven times) to Parliament, and on several of these occasions got powers to bring in new supplies, and it was very ingeniously urged that the new trust will just have to follow the same course. But all the old Company's Acts specially provide for the costs thereof. It rather appears to be a begging of the question to argue, that if the old Company had lost any of its bills the expenses thereof would have been a good charge against opposing or objecting shareholders. The Lord Ordinary thinks that if any such question had arisen, protesting shareholders might have successfully resisted payment from their funds of the cost of promoting abortive bills brought in by the directors or their majority. Such question would be very similar to that now raised, and there is abundant authority for holding that the directors of a railway, or other statutory company, cannot charge against resisting shareholders the expense of unsuccessful attempts to promote new and different lines of railway.

"Indeed, the principle restraining directors or trustees from going beyond the powers of their Act, or charter, or contract, is in general of clearer application in the case of a private company than in that of a public trust. It is easily conceiveable that a person might be willing to take shares in a company for bringing in the Crawley springs, who might shrink from taking shares in a company for bringing in St Mary's Loch, and it would be most unjust if money subscribed for a limited purpose should be diverted, in order to involve the subscriber in the responsibilities of a different and, it may be, gigantic and hazardous undertaking.

"(6) The respondents, by their statutes, have no power to make new works for bringing in new supplies, but have merely power to make and maintain works for distributing the existing supplies.

"The 'Waterworks Clauses Act' of 1847 is incorporated with the respondents' Act of 1869, but there is specially *excepted 'all provisions with respect to the construction of waterworks.'* Nothing could more strongly show that the respondents are not to bring in new supplies, than that they have no power to make new works for any such purpose. It was said that the construction clauses of the Act of 1847 were not applicable, and that therefore they are excepted. But if this were the only reason, other or substitutional powers would be given. But no such powers are conferred at all, and the inference is irresistible, that it was the existing sources of supply, and not new sources, which the statutory trust is to manage and administer.

"(7) The same result follows from a consideration of the *funds* which the respondents are authorised to raise. These funds consist of—first, sums which the Trustees may borrow; and second, sums which they may raise by assessment. The borrowing powers are conferred by § 79, but moneys borrowed are only applicable to three purposes—first, the mortgage debt of the old Company, and the sums payable to the old Company; second, the expense of renewing 'main pipes and conduits;' and third, the expense of laying 'additional service-pipes.' It was conceded in argument, and seems pretty clear, that the respondents could not apply moneys borrowed either towards bringing in new supplies of water—that is, supplies from new sources—or towards the expense of bills promoted for that purpose.

The only other funds at the disposal of the respondents are the annual rates and assessments which are authorised by § 65 and following sections. Now, these assessments are only applicable to *annual charges and expenses*, or, as it is expressed in the Act itself, to sums "*chargeable against revenue.*' But the expense of a new Act for bringing in St Mary's Loch, and of all the engineering and other surveys necessary, can hardly be said to be a proper or equitable charge against *revenue*. If the Act had passed, these would have been a charge against capital. They would have been part of the expense of the new supply, just as much as the reservoirs or embankments necessary for bringing in that supply, and it would be rather hard to assess the ratepayers of any one year for the costs and expenses of a measure intended to serve all time coming.

"In the bill promoted there was a special clause authorising the expenses of the Act to be paid either out of the rates or out of moneys borrowed. The Lord Ordinary does not attach much importance to this clause, although in some of the decided cases it was founded on as a reason for disallowing the costs of an unsuccessful Act. But it seems a fair subject for consideration whether, apart from any special clause, the costs of an Act, if obtained, or of a bill unsuccessfully promoted, form a charge against capital or against revenue,

"Great stress was laid by the respondents upon the very broad terms of the 65th section, defining the purposes to which the annual assessments are applicable, and no doubt the enumeration is very wide and comprehensive. It must be borne in mind, however, that the costs now in question do not fall under any of the heads specially mentioned in the 65th clause, and general expressions, such as 'other out-goings and charges' and 'other charges and expenses,' must always be interpreted with reference to the charges and expenses specially enumerated.

"But besides this, the general question always returns—Are the expenses now claimed *authorised* by the Act, either expressly or by implication, for no generality of expression occurring in a clause like the 65th can ever authorise the Trustees to divert the trust-funds to purposes not authorised by the statute.

"(8) One great difficulty—indeed, it may be said, *the* great difficulty in the case, arises from the duties imposed on the Trustees by statute, and the penalties to which the Trustees or the trust-funds may be subjected for failure to discharge these duties.

"By section 35th of the Waterworks Clauses Act, the respondents are bound to keep in the pipes a sufficient supply of water '*constantly laid on under pressure*,' and to lay down pipes to every district within the limits of the Act, provided an undertaking is given to pay, for three years, rates not less than 1-10th of the expense; and by sections 36 and 43 penalties are imposed for failure or neglect to supply water or to lay down such pipes.

"The force of these clauses is intensified by the provision in section 4 of the respondents' Act of 1869, that no penalties shall attach for a period of five years from the vesting of the undertaking in the present respondents,—that is, for five years from Whitsunday 1870.

"The Lord Ordinary feels that these clauses do create great difficulty and embarrassment. They raise a very powerful argument in favour of the respondents, and they merit the closest and most anxious consideration.

"Taking everything into view, however, the Lord Ordinary has come to think that all these clauses must be held to be conditional, and as having reference to the estate and supply at the command of the respondents. The duty on the respondents as *public trustees* must be measured by the means at their disposal. They can only discharge the duty in reference to the estate with which they are vested. This is expressed in clauses 36, 42, and 43 of the Waterworks Act, exempting from duty or from penalty when the undertakers are prevented from giving the supply by frost, unusual drought, or other unavoidable cause or accident;' and although it was urged that the expression 'other cause,' when interpreted in reference to the preceding words, will not include permanent deficiency in the sources of supply, the Lord Ordinary thinks this would be too rigid a construction when applied to the circumstances of the case. The penalties are imposed in the event of '*neglect or refusal*' to supply, and it is thought that there can be no neglect or refusal when the statutory means, with which alone the respondents have to do, prove insufficient.

"It would be a very startling thing to hold that the penalties referred to, which, in their original intention, were directed against *private companies*, which of course must see to their supply before they undertake statutory duties, apply absolutely and unqualifiedly to a *public trust* like the present. For the result would be, that, in the event of a permanent inadequacy in the source of supply—an event which is said to have occurred—*every ratepayer*, without exception, would be entitled to penalties, and as the penalties can only be paid out of the rates, all the ratepayers would be assessed to pay penalties to themselves so far as the rates would go. The Lord Ordinary is not prepared to adopt an interpretation which would lead to this result.

"Still further, on the respondents' own showing, they have only five years given them to procure an Act and bring in large additional supplies. But two years have already elapsed, and it is easily conceivable that other three years may pass without the respondents being able to obtain a bill. They may fail in other Parliaments as they failed in the last one, and even when an Act is got, time will be needed to bring in the water; so that, without the least fault on the part of the respondents, the five years might easily elapse without their having the means of avoiding the penalties. It would be a strong thing to hold that penalties are imposed upon a *public trust*, or rather upon the *public*, unless statutory powers are obtained, which powers the Legislature, in its wisdom, may not see fit to grant.

"Without in the least disguising the difficulty, therefore, the Lord Ordinary feels himself compelled to interpret the penalty clauses as only applying to the case of the trustees failing or neglecting to use the means at their disposal.

"This view is confirmed by other clauses, which in quite absolute and general terms impose upon the respondents the duty of supplying, for certain maximum rates, water to shipping, water to brewers, distillers, and manufacturers, and water for working machinery, and water for fountains and ornamental purposes. There is no condition expressed, the duty is in terms absolute, and a brewer or manufacturer tendering the maximum rate would have action to compel supply. But the Lord Ordinary thinks that the condition must always be held implied 'if there be sufficient water for such purposes.' The trustees are surely not bound to go to Parliament merely to get water to play in fountains, or to drive machines, and this seems to be inferred from the expression in the 63d section, that water for shipping, manufacturers, machinery, and fountains, is to be given after the trustees have supplied, from time to time, persons requiring water for dwelling-houses, shops, and offices. The idea of postponement in the order of supply implies possible deficiency, and it seems only fair that this condition should be held to run through the whole enactments.

"The period of five years allowed by section 4 may possibly have reference to the *prevention of waste* by the respondents. By the Waterworks Act the respondents have very large powers to check and prevent waste. The House of Lords, in throwing ont the bill last session, gave their reason, thus: —'They hold that, with better care and regulation as regards waste, and with increased storage for the utilization of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs.' In the opinion of the Committee of the House of Lords, therefore, if waste is prevented, there will be ample supply, and it is not an unreasonable interpretation of § 4 of the Act of 1869, that five years were allowed for the adoption of those measures which would make *existing sources* of supply ample and sufficient.

"(9) On looking at the bill promoted by the respondents, the Lord Ordinary observes that, among numerous new powers, power was asked to impose new and additional assessments. It is an additional reason for holding the promotion of such an Act to be *ultra vires* of the respondents, that they were seeking to impose *new assessments*. The Lord Ordinary cannot hold that the Act of 1869, which empowered a limited and fixed assessment, authorised the Trustees to use these assessments for the purpose of getting power to lay on extra assessments. This would be assessing the inhabitants for the purpose of getting authority to assess them still farther. It is thought that something very express would be required to authorise this.

"Indeed, this is just a special illustration of the general principle already alluded to, that *in dubio* trustees can never be held empowered to apply trust-funds for altering, enlarging, or overturning their own constitution.

"The Lord Ordinary will conclude with one general observation. It was strongly urged upon him that it was extremely expedient that a public body of trustees like the respondents should be invested with the power of seeking out new sources of supply of water, and of obtaining Acts to bring in new supplies therefrom. To this it is a sufficient reply that no such power has been conferred upon the present respondents, and that a power so great should not be held as conferred, except by express legislative provision.

"But the Lord Ordinary doubts extremely the expediency of vesting such powers in a public trust. The recent contest affords a very strong illustration of the hardships to which such powers might lead. A very large section of the community, claiming to be the great majority, opposed the bill promoted by the respondents, and what the respondents now seek is, that these opponents shall not only be left to pay the whole expenses of their successful opposition, but shall, in addition, be assessed in order to defray the expense of promoting the very measure which they defeated. Strong reasons of ex-

pediency might easily be urged why the expense of legislative proceedings and legislative contests should not be provided for by anticipation, but should be left to the Legislature itself, and to the public spirit and personal responsibility of the promoters.

"The Lord Ordinary's judgment, however, is not rested on grounds of expediency, but on a special consideration of the respondents' statutes. The grounds of the Lord Ordinary's judgment would not in the least apply to bills promoted by Town Councils, or by other bodies who hold funds dedicated to general or public purposes. All he has decided is, that the assessments imposed by the respondents are not applicable to promoting bills in Parliament for obtaining water from St Mary's Loch."

The respondents (with a few exceptions) reclaimed.

WATSON and ASHER for them.

SOLICITOR-GENERAL and MACDONALD in support of Lord Gifford's interlocutor.

The argument submitted for the reclaimers may be gathered from the opinion of Lord Deas.

At advising—

LORD KINLOCH—This case appears at first sight as if it occupied a somewhat wide field. In reality it lies within a very narrow compass. The necessity of much enlargement is greatly obviated by the able and elaborate exposition given in the Note of the Lord Ordinary, in whose views I generally concur. I have arrived at the same conclusion with his Lordship, and this without much difficulty.

The facts of the case do not require any lengthened detail. Anterior to the passing of the Act 32 and 33 Vict. c. 144, which bears date 26th July 1869, the supply of water to Edinburgh and the adjacent districts was afforded by a joint-stock company, incorporated by Act of Parliament, and having power to levy statutory rates. On the date last mentioned an Act of Parliament was passed, constituting a statutory trust for this purpose. The Act proceeded on the preamble that "it is expedient that the supply of water to the said city of Edinburgh, town and port of Leith, and town of Portobello, and places adjacent, should be provided by, and placed under the control, regulation, and management of trustees, as representing, and for and in behalf of the communities of the said city, port, and towns and places adjacent, and that the undertaking of the company of proprietors of the Edinburgh Water Company, and their whole rights and privileges, lands, buildings, streams, reservoirs, water, and other property, should be vested in said trustees." Certain statutory trustees were accordingly appointed, and by section 20 of the Act it is declared—"On the 15th of May 1870 the undertaking of the Company, and the whole powers, rights and privileges, lands, buildings, streams, reservoirs, water, and other property of the Company, shall be transferred to, and become vested in the trustees, subject to the payment of the preferable annuities, and the burdens, debts, and obligations of the Company other than those attaching to revenue, and the several sums payable by the trustees to the Company, as after specified, and subject also to all obligations and restrictions whatsoever, to which the Company may then be subject, under any of its recited Acts, or otherwise."

In proceeding to administer the trust constituted by this statute, it occurred to a majority of these trustees that it would be expedient to bring in an additional supply of water from St Mary's Loch, about 40 *miles distant*; as also to make various alterations in the constitution of the trust and powers of the trustees. This they could not do of their own authority: and they proceeded to promote a bill in Parliament for effecting the proposed object. This bill comprehended, in the outset, new enactments, as to the constitution of the trust, and mode of election of the trustees. It gave power to bring in water from St Mary's Loch, and certain places adjacent, "and to enter upon, and compulsorily take and use such of the lands, lochs, water, and other property delineated in the plans, and referred to in the book of reference, as shall be necessary for that purpose, with such lands and property so delineated and referred to as may be submerged by the operations of the trustees." It gave authority to execute very extensive works, with a great variety of incident powers. It introduced new enactments as to the mode of supplying the water, and authorised new descriptions of assessment. It gave additional powers to borrow; and authorised the creation of a sinking fund to pay off the debt so contracted. It is impossible to deny that a great change was proposed to be effected by this proposed Act, both in the character and extent of the supply of water, and also in the constitution and powers of the trust.

This bill was opposed by a large body of the inhabitants of Edinburgh and its vicinity. It passed the House of Commons, but was thrown out in the House of Lords, on the following report by the committee on the bill:—"The Committee are of opinion that it is not expedient to proceed further with the bill. They hold that, with better care and regulation as regards waste, and with increased storage for the utilization of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs; and they hold further that they cannot sanction so large an expenditure of money, which appears not to be required at present."

The question is now raised, whether the trustees are entitled to provide for the expenses of this abortive bill by assessing the inhabitants, under their statute of 1869? The point is brought to issue by a note of suspension and interdict, presented by two ratepayers, who pray the Court "to interdict, prohibit, and discharge the respondents from applying the trust-funds in their hands, or any part thereof, in payment of any costs incurred by them, or others, in promoting a bill in the Parliament of 1870–71, for the purpose of obtaining statutory authority to bring in a supply of water to Edinburgh, Leith, and Portobello, from St Mary's Loch; and further, to interdict, prohibit, and discharge the respondents from borrowing money, and from levying any assessment upon, or levying or exacting any rates from, the complainers, or the other ratepayers in the districts over which the respondents have powers of assessment under the Edinburgh and District Waterworks Act, 1869, for the purpose of paying, in whole or in part, such costs, as aforesaid."

This question as to the power of assessment is convertible with this other—Whether, under their statute of 1869, on any case arising making the course expedient, the trustees possessed authority to go to Parliament for new or varied powers, at the cost of the funds of the trust? If such authority was possessed, the expenses even of an abortive bill will properly be claimed out of the trust-funds.

If no such authority was possessed, the trust-funds cannot be saddled with the costs of the proceeding. The question before the Court is therefore, Whether, under the Act 1869, the Trustees possessed authority to promote a bill in Parliament for obtaining additional and varied powers, at the expense of the trust-funds? There is no other question than this.

I am very clearly of opinion in the negative. I think it is a rule applicable to all trusts, without any exception, that the funds of the trust are alone applicable to the purposes of the trust; and that these funds cannot be legitimately applied in the acquisition of new or varied powers. The acquisition of such powers may be often of the highest importance, and such as may legitimately invoke the pecuniary aid of those beneficially interested. To apply to those so interested, to the effect of their paying or securing the necessary funds, is the natural and legitimate course. But to take from the funds of the trust in order, not to execute the existing trust, but to make a new and different one, is contrary to the very idea of a trust. Of course Parliament always can, and generally will, give power in a successful Act to raise the funds necessary for obtaining it. The very circumstance that this is done is strongly indicative of the impossibility of so applying trust-funds without express legislative sanction. The present question regards the costs of an abortive bill for obtaining additional powers. As to these, I am clearly of opinion that, unless some exception from the general rule can be established, the trust-funds cannot be employed to defray them. I think that this inference is as clear as the general proposition, that the funds of a trust cannot be employed except for the purposes of the trust; and is just that proposition in different words.

The respondents scarcely ventured to dispute the general doctrine. They endeavoured to avoid its force by the plea that the Act of 1869 must be held to have given power to go to Parliament, if not expressly, yet by fair and reasonable implication. This plea must now be considered.

Express power it seems utterly out of the question to maintain. There can be nowhere a clause pointed out by which such power is conferred. The last clause in the statute provides "that all costs, charges, and expenses, incurred preparatory to, and in applying for and obtaining and passing this Act, or in any way incidental thereto, shall be paid by the Trustees out of the rates to be levied by them under the authority of this Act, and other resources of the trust, or monies to be borrowed on the security of the same." The expenses of the then passed bill are thus given out of the rates by the clause in question. But the clause does not include,—and so may be held directly to exclude—the expenses of any other bill. It does not say "the expenses of this Act, and of any other bill promoted by the Trustees in the proper administration of the trust." Yet nothing short of this would give the express authority in question.

The respondents claimed to possess this authority under the 65th clause of the Act 1869, which bears—"The trustees shall, and they are hereby authorised and required, once in every year, to estimate and fix the amount of money necessary to be levied for the purpose of defraying the cost, charges, and expenses of supplying the said city, towns, port, and district with water for and during the year then current, under which shall be comprehended the payment of the annuities, interest of any money to be borrowed under the provisions of this Act, expenses of management, maintenance of works, repairs, materials, wages, taxes, and other outgoings and charges; and the payment of the sum required to be annually set apart for a sinking fund, as hereinafter provided, together with the expense of distributing supplies of water, and all other charges and expenses, in so far as the Trustees may consider the same to be fairly and equitably chargeable against revenue." But this clause is still as far as ever from any express reference to the costs of Parliamentary action. In its direct expressions it plainly refers to the ordinary expenses of carrying on the trust. The respondents chiefly rested on the phrase "other outgoings and charges." But to comprehend the costs of the St Mary's Loch Bill amongst "other outgoings and charges" is simply to beg the question at issue. They are not so included except by the assumption of the respondents that they are so. Clearly, they are not included expressly; and so the respondents are thrown back on implication, and nothing else, in defence of their claim.

With regard to the alleged implication, I doubt altogether whether such powers as those in question can ever relevantly be alleged to be given by implication. The reason is, that however implication may extend the powers and purposes of a trust, it cannot be held to comprehend a right to obtain new powers for new purposes, for this is not to execute the actual trust, but to create a new one. Authority to create a new trust cannot, from the very nature of the case, arise out of implication. It is something wholly beyond the scope of the trust, and so cannot be implied from anything contained in it. Nothing, as I think, short of express authority, would warrant the Trustees in not merely executing the trust, but taking proceedings to extend or alter it. This appears to me almost self-evident.

But I would now add that I see no ground whatever for deducing the alleged authority from any fair or reasonable implication. It was said that the previously existing Water Company had frequently gone to Parliament to obtain extended powers, and therefore the Water Trustees must be held to have been authorised to do the same, particularly as by clause 96 of the Act 1869, it is declared—"All the powers conferred upon the Company by the recited Acts, or any other Act with reference to their undertaking, in so far as not repealed or superseded by this Act, or not superseded by the Acts incorporated therewith, shall and may be exercised and enforced by the Trustees in the same way and manner, and as fully in every respect as the same may be exercised or enforced by the Company." But it is mere fallacy to infer from this any right to go to Parliament for increased powers at the cost of the trust-funds. The statute undoubtedly gives to the Trustees all the powers and privileges vested in the prior Water Company, and, amongst others, the powers and privileges derived from statutory authority. But these only comprehended the powers and privileges actually vested in the Company at the time of the transference of their undertaking. The right to go to Parliament for additional powers was not conferred by any of their Acts, and arose from an entirely different source. There was no right in the Company to go to Parliament except what the shareholders of the Company might confer. Any directors going without this authority would have had a very sorry claim for their costs against re-

calcitrating shareholders. With such authority, however, they might undoubtedly have gone. In the case of the Water Trustees there is no such source of authority as was constituted by the body of shareholders in the prior Company. The Trustees must act of themselves; and must find their authority in the statute under which they act exclusively. Any implication out of the position or proceedings of the prior Company is plainly inapplicable, and inadmissible.

The respondents, however, derived an additional implication from a supposed obligation lying on them to afford a full and adequate supply of water, and, as inferred from this, a correlative power to go to Parliament for additional powers, if this should be necessary towards obtaining that supply. This formed the most feasible, if not the only feasible, argument presented by the respondents.

The argument, it must be observed, was mainly rested on clauses which occur, not in their own Act of 1869, but in the General Waterworks Clauses Acts of 1847 and 1863. By the 35th and 36th clauses of the former of these Acts there is a general obligation laid on the undertakers of any scheme for supplying water to a town to keep in their pipes "a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Acts;" and certain penalties for failure are enacted, estimated at so much a-day till the supply is given. By the fourth clause of the Act of 1869, these Waterworks Clauses Acts of 1847 and 1863 are incorporated with the statute, "except the provisions with respect to the construction of water-works:"—a somewhat significant exception. The respondents plead that by this incorporated enactment they were bound, under penalties, to furnish a full and adequate supply of water. And they jump at once to the inference that this obligation necessarily implies a power to go to Parliament to secure the supply, if not otherwise attainable. By the same fourth clause they are declared exempt from penalties for five years after the commencement of their administration. This exemption the respondents turn into an argument in their own favour, contending that the exemption was specially intended to give them time to obtain the needful Parliamentary authority.

There can be no doubt that the clauses in the General Waterworks Acts are applicable to the case of the respondents. But the question which arises is, What is the meaning of these clauses? And in solving that question it is of some consequence that the clauses occur in statutes having no special application to the case of Edinburgh, but a universal application to every case of water supply to a town sanctioned by Parliament; for the meaning to be put on the clauses must be such as will be universally applicable. Now, I cannot come to the conclusion that in every case of a water supply to a town there is an obligation on the trustees or undertakers, under sanction of a penalty, to afford, in all circumstances whatever, a full and sufficient supply of water. The only rational construction to be put on the clause is to hold the obligation to lie to the extent to which the statute affords the means of fulfilling it. In other words, the trustees or undertakers are liable, under a penalty, to utilize to the utmost the means put within their power. It is very reasonable so to hold. Generally speaking, the provisions of the special Acts are so calculated as to be in fair probability effectual to afford at the time a sufficient supply to the particular town concerned. The obligatory clauses take therefore, naturally, somewhat of a general form. But it is impossible, consistently with reason, to hold that they go farther than to oblige the undertakers to do the very best they can with the sources of supply put within their power. Nothing can be more extravagant than to suppose an obligation where it cannot be fulfilled, unless it be the conception that the redress is to go, under pressure of a daily current penalty, to a Parliament from which there is no certainty of obtaining the requisite powers. The statutes are reasonably satisfied by supposing an obligation to do all which can be done with the means of supply given. But to hold that in every case, and in all circumstances whatever, there lies an obligation to give a full and adequate supply, and to deduce from this, as a necessary inference, a discretionary power to the undertakers to go to Parliament at the expense of the trust-funds, with whatever scheme they consider fitting, is about as wide a jump in logic as I remember to have come across my notice. I cannot take such a leap.

The Lord Ordinary presents an argument of great weight for holding that the respondents had their whole rights of administration confined to the springs and other sources of supply possessed by the prior Water Company at the time of the transference of the undertaking, and that they had no concern with the acquisition of any additional supply. Speaking generally, and with regard to the primary design of the Act 1869, I concur in the Lord Ordinary's views. At the same time, I do not think it necessary to the determination of the present case to pronounce that the Trustees were excluded from obtaining additional sources of supply where the acquisition of these did not require Parliamentary authority, as, for instance, by voluntary contract with a landholder for payment of an annual consideration out of the rates. There is a great difference between making a voluntary contract in the course of administration, and making application to Parliament for compulsory powers. I desire not to preclude such a question. I equally desire not to prejudge it. I reserve my opinion on the point. I notice it now merely to say that in place of going on the assumption that the Trustees were absolutely precluded in all circumstances, and by whatever mode, from obtaining additional sources of supply, I prefer resting my opinion on the broad general rule applicable to all trusts, statutory or private, that the Trustees have no power to prosecute parliamentary action for obtaining new or varied powers at the cost of the trust-funds. The application of this principle seems to me sufficient for the determination of the present case.

It appears to me that this principle is not only sound in itself, but stands expressly sanctioned by the authorities. I refer to the cases quoted in the Lord Ordinary's Note, which exhibit the principle recognised and acted on in the Courts of England and Scotland equally. I do not think it necessary to enter into the details of the cases. I would only particularly refer to the case of the *Attorney General* v. *Andrews*, Jan. 24, 1850, 19 Law Jour. Chancery, p. 197, as especially applicable, in respect of being a case as to a water supply authorised by Act of Parliament. In that case there was a Parliamentary Commission appointed for the supply of water to the town of Southampton. The Commission had very extensive powers conferred on them, for the report bears that they were

not only empowered to maintain the existing water-works, but "to build, erect, construct, and maintain such other reservoirs or water-works in the said common as might be necessary or convenient, and as the said Commissioners should think proper for furnishing an additional supply of water, and from time to time to alter, repair, or discontinue the same works or any of them, and to substitute others in their stead; and generally, to do and execute all other matters and things necessary or convenient for constructing, continuing, maintaining, altering, repairing, or using the said works." There seems no reason to doubt that, under this statute, the Commissioners were entitled to make voluntary contracts for increased supplies within the parliamentary sphere. But the Commissioners, just as here, thought they would go to Parliament for an act to give them power to obtain supplies from a greater distance, not contemplated in their statute, and also to extend their sphere of administration and assessment. An injunction was applied for in Chancery to restrain them from "paying, or authorising or causing to be paid any monies, being part of, or arising, or to arise, from rates levied under or by virtue of the said in part recited Act, in or towards the expenses incurred or to be incurred, in or about the promoting or prosecuting the said Act of Parliament or connected therewith." The injunction was granted. The Vice-Chancellor Shadwell said—"This appears to me one of the simplest of cases." And again, "It appears to me that until Parliament has sanctioned the procuring water by the new means proposed, the Commissioners have no power to apply, for the purpose of obtaining a new Act, these rates which, by the existing Act, are only applicable in a particular manner." This authority is direct and conclusive. On such a point the legal principle is identical at both ends of the Island.

There has been much said as to the inexpediency of those vested with a public trust for the supply of water to a large town like Edinburgh being held destitute of power to go to Parliament to obtain authority for acquiring additional supplies. This would not, in any view, be sufficient ground for a judicial determination. But it must not be forgotten that there would be at least as great inexpediency in giving to such a public body the discretionary power of prosecuting every theory which, in however good faith, they may unwisely and dogmatically maintain, at the cost of the funds under their charge. It is probably on the whole safer, and more advantageous, to throw them, for the cost of any scheme for extending or varying their powers, on the voluntary assistance of those beneficially interested. The public will seldom go long, or go far wrong in a matter closely affecting their interests. There is infinite advantage in possessing a clearly settled rule for the guidance of trustees, public or private, in preference to every case being a matter of speculation or caprice, and unprofitable public strife.

I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Ardmillan—I have very carefully considered the important questions here raised, and the able and ample arguments by which the pleas of both parties have been supported. I cannot say that I have found the question free from difficulty. But I have, at the close of an anxious study of the statutes, and of the law applicable to statutory trusts, arrived at the same conclusion as the Lord Ordinary, and very much on the same grounds as those explained in his Lordship's Note. I do not intend to state at any length the course of thought and reasoning which has led me to this opinion. The elaborate Note of the Lord Ordinary, and the opinion now given by Lord Kinloch, renders such explanation unnecessary. The general rule, that the promoters of an unsuccessful bill must pay their own costs, is abundantly clear. In the case of a private company or private parties presenting and promoting a bill in Parliament, this is, I think, beyond doubt. But it is said that a different rule is to be applied, because the respondents are trustees under a public statutory trust, and were acting in what they considered the exercise of their powers, and the discharge of their duties as trustees.

The bill for bringing in water from St Mary's Loch is said to have been introduced and promoted under the powers of the trust. There is certainly no express statutory bestowal or acknowledgment of these powers. Neither in the Act of 1869, nor in any of the preceding Acts, is there any recognition of the power or the duty of applying as trustees to Parliament for statutory enactment to enable them to bring in new, distinct, and additional supplies of water. If the respondents had succeeded last year, they might, and indeed they would, have got a clause empowering them to lay the costs of obtaining the Act on the funds of the Trust, or to charge them against the assessments levied, or to be levied. But, since the bill was thrown out, and since no direction or arrangement for meeting the costs was sanctioned by Parliament, the question arises—By what warrant can the costs of the unsuccessful bill be charged on the trust-funds?

There is no express warrant of Parliament for it. That indeed has scarcely been contended. I must add, that I think there is no implied warrant for the expenditure in any of the Acts of Parliement. It is here that the difficulty of the case arises, for I am not prepared to say that statutory authority for expenditure by the Trustees cannot possibly be implied. But it cannot be easily implied—the implication must be clear. I am of opinion that there is no implication in these Acts so clear as to be safely relied on. The scope and measure of the trust must be found in the statutes. If the respondents went beyond the measure of the trust, and expended money in the attempt to obtain an object which, however desirable, was not within the scope of the trust, and not comprehended in the purposes of the trust, then it is not within the trust, or within the statute creating the trust, that they can find a warrant for the expenditure, and the character of statutory trustees cannot, in that case, create an exception to the general rule—that the promoters of an unsuccessful bill must meet the costs. Where there is no trust, that is the rule. Where the trust powers and purposes have been exceeded, the excess is not protected by the trust, and the same rule applies.

Now, I am unable to avoid the conclusion, that the respondents have definite and limited duties and powers. They are trustees for the right management and distribution of the supplies, and sources of supply, of water, vested in them by statute, and not for the purpose of acquiring new sources of supply. Throughout the whole series of statutes, the word "supply" means the supply which by the existing Acts, and from the existing sources, the Water Company, and then the Trustees,

are empowered and bound to administer and distribute. This supply must be well stored, well guarded, well managed, and well and fairly distributed. To prevent neglect, or carelessness, or unskilfulness, or unfairness, in these respects, there are penalties; but there are, in my opinion, no penalties for failure to supply water when there is no water to give, and yet no neglect of duty. There are no penalties for failure to bring in additional water from new sources of supply, nor comprehended in any of the statutes. The argument that the Trustees were entitled to go to Parliament at the cost of the trust, in order to avoid these penalties, is not well founded.

The clauses relating to the borrowing of money on mortgage, and to the disposal of sums raised by assessments, do not support the respondents' claim. They may afford means of meeting or of recovering payment of legal charges, but they cannot create or sustain the legality of the charge. Unless the acquiring new sources of supply had really been within the contemplation and provision of the empowering and directing clauses, it could scarcely be expected that the clauses in regard to borrowing on mortgages, or in regard to assessments, should have been framed to reach the costs of an unsuccessful attempt to acquire such new sources. I am of opinion that the Act did not contemplate such proceedings; and therefore I am of opinion that no warrant to assess for such costs, or to apply assessments to payment of such costs, can be found in these clauses.

But, it is said that, even assuming the absence of any warrant in the statutes to support the respondents' plea, still the costs were incurred in the *bona fide* attempt to increase the supply of water, and to promote thereby the general purposes of the trust.

I do not doubt that the respondents meant, according to their judgment, to discharge what they thought their duty, and to act under what they thought their powers, and to meet an unusual exigency by an unusual effort. I attribute to them no bad faith, or bad motive; but something more than good intention is required to sustain a proposal to assess the citizens of Edinburgh for payment of the costs of a proceeding to which a large proportion of those citizens were strongly opposed, and for which no statutory warrant can be shown.

I need only mention, without explaining, the authorities, English and Scottish, referred to by the Lord Ordinary. These instruct that trust-funds can only be applied to trust purposes; and in a statutory trust the purposes and powers of the trust must be found within the statutes. The rule which I deduce from these authorities is, that the costs of Parliamentary procedure cannot be charged against a public trust where they are not incurred in the fulfilment of the declared or clearly implied purposes of the trust, or in the exercise of powers conferred expressly or by clear implication on the Trustees. The decision of Lord Chancellor Cottenham in the case of *Brighton* v. *North*, Feb. 13, 1847, that trustees are entitled to the fair expense of defending the trust-estate by opposing a bill which would have led to injury to the trust-estate, is a reasonable qualification, but not an exception to the rule. That qualification is not, however, applicable here. The opposing a measure tending to injure the trust is a very different proceeding from that with which we are now dealing. I shall add no more. I quite appreciate and feel the force of the suggestion, that it is hard to throw the burden of these costs on the Trustees. It is so. I regret that no arrangement has been made, and that we are under the necessity of deciding the point. But, on the other hand, surely it would be hard if those who have voluntarily paid the cost of their successful opposition to this bill were now assessed for payment of the cost of its unsuccessful prosecution. I feel that I have no other alternative, in accordance with my view of the statutes, and of the legal principles applicable to public trusts, than to express my concurrence in the opinion of Lord Kinloch and the Lord Ordinary.

Lord Deas said that for the purposes of this case it was not necessary to go far back into the history of the water supply of Edinburgh. There had been a variety of Acts of Parliament passed, from time to time, incorporating a water company, with certain powers for the purpose of supplying water to the city, the shareholders of the company being entitled to the profit, if any, arising from what he might call the business of the company; and, on the other hand, an assessment was laid on the inhabitants on account of the water supplied to them. In 1868 or 1869 a bill had been promoted to create a public trust, and to transfer to that trust the undertaking of the Water Company, and at the same time to bring in an additional supply of water from St Mary's Loch. This last portion of the bill had been struck out, it was said, in consequence of failure to comply with the standing orders. That bill had narrated, in its preamble, that the present supply of water was totally inadequate for the rapidly increasing population. That part of the preamble had been necessarily struck out along with the clauses which provided for the introduction of St Mary's Loch water. The bill resulted in the statute of 1869, 32 and 33 Vict. c. 144, which transferred the undertaking of the Water Company to the Trustees, but which, of course, did not confer the compulsory powers of taking land, &c., which would have been appropriate only if a particular scheme for obtaining water had been sanctioned. It was proper, however, to observe that the bill, as it originally stood, narrating the inadequacy of the present supply, and proposing to add to it from St Mary's Loch, had been promoted by the three Corporations of Edinburgh, Leith, and Portobello,—the whole members of which Corporations were elected by the ratepayers, and may, in that sense, be regarded as their representatives. The same three Corporations were authorised, by the statute of 1869, to appoint, and did appoint, the Trustees, who then introduced a separate bill to bring in the water of St Mary's Loch, upon the preamble, that, whereas the present supply of water to the city, and to Leith, Portobello, and places adjacent, was inadequate and insufficient for the wants of the present and rapidly increasing population, and that it was necessary that a sufficient supply of pure and wholesome water should be furnished to the inhabitants, it would be of advantage if the Trustees were authorised to introduce such additional supply of water from St Mary's Loch, and powers given them to execute the necessary works, &c. The House of Commons held the preamble to be proved, and passed the bill. The House of Lords held that the preamble was not proved; and the question now to be decided by this Court was, Can the expenses of promoting that bill be taken out of the rates?

He (Lord Deas) did not apprehend that there was any difference of opinion among them (the Judges) as to the law applicable to such a question; unless, indeed, Lord Kinloch meant to say that no implication, however strong, in the terms of the Act would warrant going to Parliament for compulsory powers to carry out the objects of the Act; which would be a doctrine inconsistent with the rule of construing all such trusts so as to give fair effect to the intention of the Legislature, just as, in private trusts, fair effect is given to the intention of the granter by holding powers, such as a power of sale, to be implied, although not expressed, if necessary for the extrication of the purposes of the trust, of which we have instances in the cases of *Erskine's Trustees* v. *Wemyss*, May 13, 1829, F.C. and 4 S. and D. 772; *M'Kinnon*, Dec. 4, 1838, F.C. and 1 D. 153; *Henderson* v. *Somerville*, June 22, 1841, 3 D. 1049, &c.

The law applicable to such a question as the present he (Lord Deas) understood to be, that if the Trustees were applying for powers either inconsistent with the purposes of the statute, or not fairly contemplated by the statute, they went to Parliament at their own risk as regarded expenses; but, on the other hand, that if, according to a fair and reasonable construction of their Act of Parliament—taking into consideration the circumstances in which it was passed—it appeared to have been contemplated, although not expressly said, that additional water was to be brought in, then the Trustees were entitled to go to Parliament for those compulsory powers without which they could not carry into effect that contemplated purpose of bringing in more water, and if they did so in good faith they were entitled to lay the expenses on the rates, whether the application was successful or not.

That was a mode of stating the law to which he did not suppose their Lordships would object, and which was in accordance with all the authorities cited in the able Note of the Lord Ordinary. As regarded the matter of good faith, Mr Macdonald, for the complainers, had conceded that point, in the present case, in favour of the Trustees, not very heartily, certainly, but still it was conceded; and whether it had been conceded or not, he (Lord Deas) saw no reason for any doubt about it. Whatever the quality of the water of St Mary's Loch had been—however undoubted its quality and abundant its quantity—the ratepayers would not all have been agreed as to the propriety of bringing it in. There would always have been two classes of the community—one looking mainly to their own pockets in the present generation, and thinking that the next generation should provide for itself; the other class, taking a more liberal and patriotic view,—that we should do something for our descendants as well as for ourselves, as our forefathers did, or ought to have done, for us. According to the difference of minds in this respect, although there had been no uneasy feeling (as undoubtedly there was) about the quality of the water—although St Mary's Loch had been full to the brim of water equal to the best water of the Pentland Hills, there would, he had no doubt, still have been a formidable division among the ratepayers for and against the scheme. There was nothing, however, he thought, in the mere extent or cost of the scheme which could be held to infer *mala fides*, or such palpable extravagance as ought to affect the present question of Parliamentary expenses. Nor was it difficult to believe that the Trustees were themselves satisfied with the quality of the water. The fact that the House of Commons, upon evidence led, and in the face of opposition, had passed the bill, was of itself pretty conclusive upon both these points.

The question the Court had, therefore, to consider was, Whether the Act, fairly read, and looking to the real evidence afforded by the circumstances in which it was applied for and obtained, did or did not contemplate that an additional supply of water was to be brought into the city? If it did, he could have no doubt that the Trustees were entitled to go to Parliament to get these compulsory powers, without which they could not expect to get that additional supply; and, although they might fail in the particular scheme, that ought not to prevent the expenses from coming out of the rates.

He (Lord Deas) agreed in the law laid down by the Lord Ordinary. He also agreed with him that there was no dispute here about the general law or general principle applicable to such cases, and that the only question was (as the Lord Ordinary fairly puts it), "What is the real purpose of the trust, and what are the powers incidental thereto, which are either expressly or by implication vested in the Trustees?"

If what the trustees here did was done in accordance with the real purpose, or one of the real purposes, of their trust, and with the powers conferred on them by implication, although not expressly set forth or specified, then the rule of law was with them. If not, then it was against them.

Or to apply the Lord Ordinary's test in still more direct words to the case in hand: If it was the real purpose of this trust, or one of its real purposes, that an additional supply of water should be obtained from new sources, then the law was with them. If not, it was against them.

He (Lord Deas) was humbly of opinion that, upon a fair and reasonable construction of this Act of Parliament, the real purpose he had just stated was sufficiently apparent. In this, and this only, he differed from the Lord Ordinary; for, if this was conceded, it would not, he thought, be disputed, and obviously would not have been so by the Lord Ordinary, that the power to do what was necessary to carry out that purpose was necessarily implied. He (Lord Deas) would now proceed to deal with this question of construction in the first instance, at all events, on the strictest principle that could possibly be applied, namely, by confining attention to what appeared on the face of the Act itself.

In reading the Act, however, it must, of course, be read (in terms of § 4) with the whole clauses of the General Waterworks Act of 1847 incorporated into it, so far as the special Act does not expressly except or exclude them, which it does only as regards clauses which were not appropriate where, a specific scheme not being sanctioned, compulsory powers to take land, &c., would have been out of place. The fact of these particular clauses not being incorporated in the Act raised therefore no presumption that Parliament did not contemplate the bringing in of a separate bill under which the St Mary's Loch scheme, or any other scheme, might be deliberately considered.

With this explanation, the title and preamble of the special Act require attention. The title of the Act is, "An Act to create and incorporate a Public Trust for supplying water to the city of Edinburgh," &c., and "to transfer to the Trust the undertaking and powers of the Edinburgh Water Company, and for other purposes." This title, it will be observed, consists of two parts. If the existing supply of

water had been deemed sufficient for the greatly extended distribution contemplated by the Act, then although the words "for supplying water," &c., had been omitted, the title in its continuous form would nevertheless have been complete, and would have stood thus—"An Act to create and incorporate a Public Trust, and to transfer to that Trust the undertaking and powers of the Edinburgh Water Company, and for other purposes." Then the preamble, after narrating the previous Acts "for more effectually supplying the city of Edinburgh and places adjacent with water," &c., bears, "Whereas it is expedient that the supply of water to the said city of Edinburgh, town and port of Leith, and town of Portobello and places adjacent should be provided by and placed under the control, regulation, and management of Trustees," and that the undertaking, &c., of the Water Company should be vested in them. Here again words are used, and still more emphatic words than in the title, unnecessary to express the meaning, if that meaning was what it is now said to be. For besides affirming the expediency of transferring to the Trustees the undertaking, &c., of the Water Company, and placing that undertaking, &c., under the control, regulation, and management of the Trustees, it is expressly affirmed to be expedient that the supply of water to Edinburgh, Leith, Portobello, and places adjacent, "*should be provided by*" the Trustees. It could in no proper sense be said that the water was to be provided by the Trustees, if they were merely to distribute the water which had been provided by the Water Company. Nor would it be easy to reconcile an affirmation of the expediency of such distribution of the existing supply with the obligation imposed by the Act (§ 61) to give every owner and occupier "a sufficient supply of water for domestic purposes," unless it was assumed that the population had neither increased nor was likely to increase, or that the existing supply was largely superabundant.

Before examining, however, the enactments in the Special Act, it is necessary to attend to the enactments in the General Waterworks Act of 1847, in connection with § 4 of the Special Act, which incorporates these enactments into the Special Act, subject to a proviso that the penalties in the General Act shall not attach to the Trustees for five years after the undertaking vests in them under the Special Act.

Section 35 of the General Waterworks Act bears —"The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." That, surely, was a very different thing from distributing among the citizens such a supply as they might happen to have been previously provided with. As respects what Lord Kinloch says, that the effect of these clauses is much weakened or done away with by their general application to all such undertakings, he (Lord Deas) thought it most natural and expedient, where powers were given which virtually excluded competition, that there should be some obligation to provide such a supply of pure and wholesome water as should be reasonably sufficient for the domestic use of the whole inhabitants, who were, on their part, bound to accept of and pay for that supply. There was no hardship in this, because if a certain fixed supply was considered sufficient for the particular town or district, it was easy to introduce, into the Special Act, a declaration that the supply thereby definitely provided for should be deemed sufficient to satisfy the provisions of the General Waterworks Act. As to the question of penalties, it might very well be that reasons for non-liability might readily be found, and easily accepted, but what he was dealing with at present was, whether there was not a duty imposed of providing an adequate supply of water, whatever might be said against liability for penalties, if parties could show that they were not in a position in which they could fulfil that duty. The Lord Ordinary says that they might go to Parliament again and again and not get the powers. If they had done that it might be a very good reason for excusing them from the penalties, but if they did not make the attempt their position might be very different, and it was not easy to see how that went to show that according to a fair construction of the Act, it did not contemplate the bringing in of an additional supply of water. The same clause goes on to say —"And such supply shall be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the said limits, unless it be provided by the Special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure; and the undertakers shall cause pipes to be laid down and water to be brought to every part of the town and district within the limits of the Special Act, whereto they shall be required by as many owners or occupiers, ' as that the aggregate water-rate shall be not less than a specified proportion of the expense of laying the pipes. Following up this, it is provided by section 36 that if for twenty-eight days after a demand in writing "the undertakers shall refuse or neglect to lay down pipes in the manner hereinbefore described, and to provide such supply as aforesaid, or as provided by the Special Act, they shall forfeit to each such owner or occupier the amount of the rate," and the sum of 40s. for each day of failure or neglect, provided always "that the undertakers shall not be liable to any penalty for not supplying water if the want of such supply shall ensue from frost, unusual drought, or other unavoidable cause or accident." He then quoted sect. 42, which obliges the undertakers to provide for extinguishing fires, and sect. 43, which bears that if they neglect to keep their pipes charged under pressure, "or neglect or refuse to furnish to any owner or occupier entitled under this or the Special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of £10," and to the additional forfeiture therein mentioned. He also quoted sect. 53, which bears—"Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the Special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate in respect thereof according to the provisions of this and the Special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

They must now look to the clauses in the Special Act, and before recurring to sect. 4, which is one of great importance, his Lordship wished to call attention to the following sections:—The 25th section subjects the trustees "to all obligations and restrictions whatsoever" to which the Water Com-

pany would have been subject. Section 56 bears—"The Trustees may from time to time extend the existing works, mains, and pipes of the company, or any additional mains and pipes that may hereafter be constructed and laid by the Trustees, whenever it shall be necessary for the purpose of supplying water to the inhabitants within the limits of this Act." The 60th section bears—"The limits of this Act for the compulsory supply of water by the Trustees shall comprise and include the city of Edinburgh, town of Leith, including the port thereof, and town of Portobello, and the limits last above described shall be termed the limits of compulsory supply." The 61st section enacts that "the Trustees shall cause pipes to be laid in so far as this may not have been already done, and water to be brought throughout all the streets within the limits of compulsory supply, and shall furnish to every owner or occupier," &c., by pipes to be provided and maintained by him, "a sufficient supply of water for domestic purposes." Under these clauses, his Lordship observed, and the clauses for exacting corresponding rates, the obligations were correlative on the Trustees to provide, and the owners and occupiers to accept, or pay for the water within certain limits, which were therefore described as the limits of compulsory supply.

His Lordship then quoted sections 65 and 79 as to expenditure and borrowing money, and observed that these clauses did not appear to him to create the difficulty suggested by the Lord Ordinary and his Lordship in the chair, that there was no fund out of which the expenses now in dispute (if in themselves otherwise chargeable) could be paid. For, while section 65 provides for fixing an annual rate to cover the costs and expenses therein mentioned, "and all other charges and expenses, in so far as the Trustees may consider the same to be fairly and equitably chargeable against revenue," this must be read along with section 71, which provides that "the Trustees may assess and levy the said domestic water rate prospectively, in order to raise money to pay charges and expenses to be incurred thereafter, or retrospectively, in order to raise money to pay charges and expenses already incurred." Assuming then that the expenses now in dispute were lawfully incurred, and that the Trustees were to think the same fairly and equitably chargeable against revenue, there seems nothing to prevent them from so assessing and levying the rate under section 71 as to provide for these expenses. The Lord Ordinary observes that such expenses "can hardly be said to be a proper or equitable charge against revenue;" and he adds, "If the Act had passed these would have been a charge against capital." But neither of these observations can be held to have much, or indeed any force. The burden would not necessarily be laid on any one year, but might be spread over a period of years. And, in place of the Legislature deeming it unequitable to charge such expenses against revenue, the Act of 1869, sect. 100, confers upon the Trustees the option of paying the expenses of obtaining that Act either "out of the rates to be levied by them under the authority of this Act and other revenues of the trust, or moneys to be borrowed on the security of the same." There is no room for concluding therefore that, if the abortive Act had passed, the expenses of obtaining it would have been made a charge against capital. Nor can it be deemed unequitable to charge such expenses against revenue in place of against capital, while the very Act now being construed imports that, if chargeable at all, they may equitably be charged against either. There seems in no view, therefore, any difficulty in finding a fund out of which to pay the disputed expenses if duly incurred for behoof of the Trust; for the Trustees may, in that view, assess and levy the water-rate so as to cover them under section 71, which section the Lord Ordinary seemed to have overlooked.

To recur now to section 4 of the Special Act, which, after incorporating the Waterworks Acts, as already mentioned, bears—"Provided always that the Trustees shall not be bound to have the water constantly laid on under pressure, and that no penalty under the said incorporated Acts, in respect of the supply, shall attach to the Trustees for a period of five years from the vesting of the undertaking in the Trustees under this Act,"—the question naturally occurs, what was the meaning or object of this proviso?

It is clear enough on the face of this proviso—(1) That, had it not been inserted in the Act, the Trustees might have been subjected in penalties under the Waterworks Clauses Act within the five years. (2) That these penalties were penalties connected with the supply of water. (3) That the Trustees will become liable to these penalties on the expiry of the five years, if something shall not have been done which was contemplated to be done within that period. The important question occurs, What that something is?

If it be an additional supply of water, the inference is irresistible that the Act contemplated that the Trustees were to bring in an additional supply. And the inference upon that again is equally irresistible, that it would be their duty to go to Parliament for the necessary compulsory powers.

It has been suggested that the five years may have been allowed for taking measures to prevent waste and provide additional storage. There is no probability in that view. The Water Company had all the powers to check waste which the Trustees have, and a deep personal interest to use these powers, and to economise the water, if that could be accomplished, by additional storage; for the profits or loss affected the individual pockets of the shareholders, whereas the Trustees have only the motive of public duty to induce them to economise.

The obligation laid on the Trustees (sect. 61 of the Special Act) is to cause "water to be brought throughout all the streets within the limits of compulsory supply," and to "furnish to every owner or occupier of every house or part of a house a sufficient supply of water for domestic purposes;" and the consequences of failure to do this, are, by sections 36 and 43 of the Waterworks Clauses Act, liability to a penalty of £10 and forfeiture of the rate, together with 40s. for every day of failure to every person who has paid or tendered the rate.

These are obviously the penalties from which the Trustees are to be exempted for five years and which they are to be liable to thereafter; and it seems extravagant to suppose that they are to be so liable unless they shall find means by additional storage, and preventing waste of the existing supply, to send throughout all the streets, building and to be built, within the compulsory limits, sufficient water for the domestic purposes of every owner or occupier of every house or part of a house, erecting or to be erected, and at same time to leave those who have the water already in possession of an equally adequate supply.

On the other hand, if the object was to allow five years for obtaining the sanction of Parliament,

after deliberate inquiry and consideration, to a scheme for an adequate additional supply of water, there was nothing unreasonable in the position in which the Trustees were to be placed after the lapse of five years, for that position would then just be the same with the position in which the Legislature, for sanitary and other salutary purposes, had placed all undertakers for supplying towns with water by the provisions of the Water Clauses Act.

The 35th section of the Water Clauses Act bears, it has been seen, that "the undertakers shall provide, and keep in the pipes to be laid down by them, a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act," who become bound, as therein mentioned, to pay the rate; such supply to be constantly laid on at a pressure to reach the tops of the highest houses, unless there be a dispensation with such pressure in the Special Act. The penalties provided by §§ 61, 36, and 43, already noticed, are applicable to all such undertakers, and not unreasonably so: for the policy of the Water Clauses Act is obviously to compel the undertakers to satisfy the Legislature before obtaining their Special Act, that the supply proposed in that Special Act will be a full supply, and in that case, a clause in that Act may fairly be asked and conceded to the effect that the stipulated supply, when brought in, shall be held to satisfy the requirements of the Water Clauses Act.

Accordingly, in the Edinburgh Water Company's special Acts, passed subsequent to the General Water Clauses Act of April 1847, clauses were inserted, obviously with the purpose of limiting the operation of the General Act by specifying the things which, when done, were to be held to satisfy its requirements (*vide* § 46 of the Act of July 1847—the preamble of the Act of 1853—and §§ 78, 79, and 112 of the Act of 1856). There was no suspensive clause in any of these special Acts similar to that which is found in § 4 of the Special Act of 1869. On the other hand, there is in that Act of 1869 no explanatory or limiting clause with reference to the requirements of the Water Clauses Act of 1847. The appropriate place for this last would be in an Act, if it shall be obtained, conferring compulsory powers to procure the desiderated additional supply of water.

His Lordship, however, had to repeat the remark he had already indicated, that, whether the risk of penalties being rigidly exacted from the Trustees, after the lapse of five years, was greater or less, that did not affect the question whether the five years were not allowed to enable them to go to Parliament and bring in more water. He thought that, construing the suspensive clause along with the whole other enactments, no other conclusion could fairly and legitimately be drawn than that such was the object of the clause. And if this were so, the Trustees could surely not be personally liable, without relief against the trust-funds, for expenses incurred in *bona fide* doing what it would have been a breach of their duty not to have done.

It would thus be seen that he (Lord Deas) did not call in question the rule of law that if Trustees went to Parliament for powers to change the purposes of the trust, or powers to do something not fairly within the contemplation of the trust, they went at their own risk as regarded expenses. Neither did he impugn the authority of any of the numerous cases cited. He rested his opinion on a sound and reasonable construction of this particular Act of Parliament, namely, the Trust Act of 1869, including the statutory enactments incorporated with and referred to in it. None of the cases cited conflicted with the judgment he was disposed to pronounce in this case. The only one which at first sight might seem to do so was the one singled out by his Lordship in the chair, viz., the *Attorney-General* v. *Andrews*, Jan. 24, 1849, 19 Law Jour., Chancery, 197. But that case was quite different from this. The Act constituting the trust there proceeded, as the Vice-Chancellor pointed out, on "a recital that it had been ascertained that an abundant supply of water may be readily procured by boring in the common near Southampton." All the operations for obtaining the anticipated supply of water were, by the express terms of the Act, confined to the common; and what was more vital to the question, the only assessment authorised was an assessment on the *occupiers* of messuage tenements, &c., rated to and paying poor-rates "within the said town of Southampton." What the Commissioners proposed was to promote, at the expense of the existing ratepayers, a bill in Parliament for the construction of extensive additional works, and "to take water from certain lands and springs in the parishes of North and South Stonehaven, and from the river Itchen navigation in the county of Southampton, and from other places;" and to ordain "the *owners* of all rateable property within the limits of the said bill to be rated to, and to pay all rates authorised to be levied under, the said recited Act or the proposed bill, instead of the *occupiers* thereof." That was truly a proposal to obtain one Act to overturn another. Not only was the expressly defined area of Southampton Common to be extended over certain parishes, but the constituency was to be entirely changed. The money of the existing ratepayers was to be used for promoting a bill under which they were no longer to exist and to have a voice as ratepayers. The Commissioners would have had a better set of debtors, but the substituted ratepayers (the landlords) would no doubt have contrived to make their tenants bear the burden as before in the shape of increased rents. At all events, it was not contended that the things proposed to be done by the one Act were within the contemplation of the other. On the contrary, they were palpably quite opposed to it, and inferred the rescinding of some of its most vital enactments.

Having pointed out that the Southampton case was no precedent for the present case, his Lordship continued as follows:—I have said that I rest my opinion on the construction of the Act of Parliament, because that is a clearly judicial ground which seems to me sufficient. But if I were to go into the real evidence afforded by the surrounding facts and circumstances—and I will not undertake to say that these are altogether irrelevant—I should find nothing but confirmation of the views I have stated.

We see from the Water Company's Acts, recited in the preamble of the Act we are now dealing with of 1869, that for more than a century past an additional supply of water had, from time to time, been required for the city of Edinburgh and places adjacent, on account of the constantly increasing population—the necessity for such additional supply recurring latterly every few years. It is not alleged that the city has ceased to extend and the population to increase since the date of the Water Company's last Act in July 1863. The fact is

notoriously otherwise, for we cannot drive round this city, with our eyes open, without seeing whole streets springing up, like mushrooms, in every direction, with a rapidity quite unprecedented. Neither can we help knowing that almost every season, there have been periods during which the supply of water was short and intermittent—even in the class of houses which we ourselves inhabit, provided as these are with numerous cisterns—which makes it not difficult to believe the statement in the record, of which we have had no denial, that the poorer classes of the inhabitants had been suffering greatly for some years from want of water, and that it was the failure of the Water Company, as proved before Parliament, to bring in more water, which led to the company being superseded by the Act of 1869. That the water, never at any time superabundant, could be and can continue to be introduced into all the new streets and houses erected, and being erected, without encroaching on the supply of those who previously enjoyed it, is plainly a physical impossibility. The Water Company undoubtedly did much for the city. I can myself remember, when I first attended college, some half a century ago, frequently seeing, in crossing the High Street, a crowd of people who had stood there all night round a solitary well near the Cross, waiting their turn to get a pitcherful of water. But increasing luxury renders it a very different thing to supply water to the city now from what it was then. Bath-rooms and water-closets were little known in those days, and altogether unknown at a somewhat earlier period. For instance, although Heriot Row was, from the first, one of the choicest streets in the new town, there was not a water-closet in it when it was built in the early part of this century, whereas there is now not a house in it without them, and in the house I occupy in that street there are eight or nine. I need not add that no new buildings are now erected without them, and still less need I add that without an abundant supply of water they had better not be there. Doubtless this, among other considerations, applicable to towns and cities generally, goes to account for the policy of the Water Clauses Act of 1847, requiring that the water shall be constantly kept under pressure so as to reach the top storey of the highest houses, and that every house within the limits shall have a sufficient supply for domestic purposes.

Lord Kinloch has referred in his opinion to the terms of the deliverance of the Committee of the House of Lords, which is quoted and relied on by the complainers in the record. But that deliverance has, of course, no judicial authority. Two branches of the Legislature came to opposite results, and we cannot weigh the one against the other, without having before us the evidence on which they proceeded. That would be going into too wide a field. It is stated in the record that the complainers did not dispute in Parliament the necessity for bringing in more water, but alleged that it could be got from other sources preferable to St Mary's Loch. I doubt the relevancy of that allegation in the record, although there has been no denial of it; but if it be true, it would seem to follow that, as the leading opponents of that bill have now got themselves, as we all know, elected Trustees, and in command of a majority, they must either go to Parliament, at their own risk as to expenses, to get their own scheme sanctioned, or occupy a somewhat uneasy position, which will not become improved when the suspensive period of five years expires.

It has been suggested by Lord Kinloch that additional sources of supply may be got by voluntary contract of purchase and sale. I do not see how that can be done consistently with your Lordship's proposed judgment. If the Trustees could not go to Parliament at the expense of the trust for compulsory powers to purchase, they certainly cannot use the funds of the trust for the voluntary purchase of property which, in that view, their statute does not authorise them to acquire.

But, while I notice these considerations on both sides, I rest my opinion, as I have said, upon the fair and reasonable construction of the statute, and that construction leads me to the result that the Trustees were entitled to go to Parliament as they did, and that, although their scheme was not sanctioned, they are legally entitled to lay the expenses so incurred upon the rates.

Lord President—This is a question which depends upon a rule in law which is almost a self-evident proposition—namely, that trust-funds cannot be lawfully used or expended except for trust-purposes. As the Lord Ordinary has very well said, the difficulty does not lie in ascertaining the true nature of the rule, but in its application to the circumstances of particular cases. There is another rule in the law of trusts which I think also very important to be observed, and which I think is just as clear and well founded as the other, and that is, that the purposes of the trust and the powers of the trustees are to be found, in the case of private trusts, only in the deed or deeds constituting the trust, and, in the case of public trusts, only in the Act or Acts of Parliament constituting or affecting the trust. Here we have only one Act of Parliament to deal with, for this is a new trust, created for the first time in the year 1869, and, with the exception of the statute passed in that year, we have no other in which we can seek for either the purposes or powers of the Trustees. The question is, whether the promotion of the bill of 1871 is one of the purposes of the trust created by the Act of 1869? It is said, and, as I think, justly said, that the powers of trustees, whether private trustees or statutory, may be either expressly stated or implied; but it depends a good deal upon the nature of the power claimed whether it can be held to be implied, and it depends still more upon the nature of the power claimed what is necessary to create sufficient implication. There are several powers which are very easily implied in the case of all trusts—powers which, though not expressed, are absolutely necessary for the administration, the ordinary personal administration, of every trust. There are other powers, again, which it would be very difficult to imply, and which can hardly be held to belong to trustees unless expressly conferred. These may be said to be among the essentials of particular trusts. Now, the question here comes to be, What is the nature of the power claimed in the present case in view of these general rules? It is said that the Act of 1869 has conferred upon the Trustees, among other powers, the power of bringing in water from a new source of supply, or at least of applying to Parliament for the necessary powers to enable them to do so. I confess I would expect so important a power as that to be expressly given, and yet I think it is conceded on all hands that it is not expressly given. But it is contended that it is given by

clear implication; and, without admitting that that would be sufficient, I proceed to consider whether there is any foundation for such an implication in the Act of 1869.

My brother Lord Deas has called attention to the title and the preamble of the statute, which I also think very important. The title of the statute is—"An Act to create and incorporate a Public Trust for supplying Water to the City of Edinburgh, town and port of Leith, town of Portobello, and districts, and places adjacent, to transfer to the Trust the undertaking and powers of the Edinburgh Water Company, and for other purposes." The preamble, again, says that "it is expedient that the supply of water to the city of Edinburgh, town and port of Leith, town of Portobello, and places adjacent, and other places named, should be provided by and placed under the control, regulation, and management of Trustees, as representing and for and in behalf of the community of the said city, port and towns, and places adjacent, and that the undertaking of the Company of proprietors of the Edinburgh Water Company, and their whole rights, privileges, lands, buildings, streams, reservoirs, water, and other property should be vested in the said Trustees." The portion of the preamble that my brother Lord Deas remarked upon particularly was that which relates to the constitution of the trust, and he seemed to think that the trust could hardly be constituted for the purpose of supplying a large district and a large city with water without the powers being given to add and increase the supply according to circumstances. It would be a very extraordinary thing certainly to constitute a trust to supply water, without giving it the powers to supply water or putting into its hands the existing supply; but in the portion of the preamble to which he referred there is nothing indicated except the expediency of constituting a public trust for this public purpose, and we have to look to the second part of the title and the preamble for the purpose of seeing how Parliament intended to give the power to the trust to make such a supply, and that is by transferring and vesting in them the existing undertaking of the Edinburgh Water Company. The title and the preamble of the statute, to my mind, speak in very intelligible language, and seem to indicate very strongly that the purpose of this statute is to substitute for the private company a public trust to carry on the undertaking which had previously been carried on by a company of proprietors for their own purposes.

In perfect accordance with this view of the scope and object of the Act of Parliament, I think we shall find all the different sections run. The property vested in the Trustees is exclusively the undertaking of the old company. That is made very distinct, indeed, by the 20th clause of the statute, which explains and describes very fully the whole estate which is to be vested in the Company, and the whole power generally which they are to exercise, and these are the estate of the old Company and the powers which belonged to it. In subsequent sections, such as the 56th and 57th, power is expressly given to extend the existing works, mains, and pipes of the Company, or any additional mains and pipes that may be constructed and laid by the Trustees, whenever it shall be necessary for the purpose of supplying water to the inhabitants within the limits of this Act; and, in addition to maintaining the public wells now maintained, they are authorised also to maintain a sufficient number of wells, fountains, and standpipes from which the poorest class of the inhabitants should be permitted to draw water for domestic purposes, and for such purposes only, and shall keep them at all times charged with water—a most important and necessary requirement. The Act implies, of course, that with a rapid extension of the population, where new streets are coming into existence year after year, requiring an extension of mains and pipes, there should be additiona wells for the poorer classes. I need not go through the other clauses of the statute, because I do not think it is alleged that there is in any of them anything to imply a power in the Trustees, without any additional Parliamentary authority, to acquire property or extend their operations in the way of bringing in additional sources of supply. That is not contemplated certainly in any of the clauses. It is suggested, indeed, that there was a known inadequacy in the supply. It must have been in the mind of the Legislature in constituting this trust that additional water must be brought in some time or other. That is very possible, and I shall deal with it hereafter. But the question is only this, whether this trust contains within itself the power to bring in an additional supply from a new source, and whether the Trustees, acting under this limited trust, with funds at their disposal for meeting specific purposes, can themselves go, at the expense of the trust, to obtain sufficient powers. Upon this question, which is really the only one before us, there are two sections of the statute which appear to me to be of paramount importance, and these are the sections which relate to the application of the funds of the trust—the capital and the revenue. The 79th clause empowers the Trustees to borrow money, and it distinctly specifies for what purposes the borrowed money is to be applied:—"It shall be lawful for the Trustees, for payment from time to time of the mortgage debt of the Company, and the several sums payable by the Trustees to the Company, as hereinbefore provided, with the expense of renewing mainpipes aud conduits, and of laying additional service pipes, if it shall be found necessary to incur such expense, to borrow on mortgage any sum not exceeding £220,000." There is a specific application provided for the money that the Trustees are empowered to borrow. It can be applied for the payment of the mortgage debt of the Company, which, we are informed, extended to £133,000; "of the several sums payable by the Trustees to the Company as hereinbefore provided"—that is, by section 22—and these sums, we are informed, amounted to upwards of £20,000, "or to the expense of renewing main pipes and conduits, and laying additional service pipes." There is no other purpose specified, and there are no general words in this clause that can enable the Trustees to apply any part of their borrowed money to any purpose not there specified. It humbly appears to me that if the Trustees had power to charge against the trust-funds the expense of unsuccessfully promoting the bill of 1871, it would form a proper charge against capital; and therefore the fund out of which it can be paid is this very capital fund, which is provided by the 79th section. But let us see whether, even upon the assumption that it might naturally form a charge against revenue, there is any room for applying any of the sums arising from rates to such a purpose as this. The application of the money received from rates is provided for by the 65th clause. "The Trustees are authorised and

required, once in every year, to estimate and fix the amount of money necessary to be levied for the purpose of defraying the cost, charges, and expenses of supplying the said city, towns, port, and district with water for and during the year the current, under which shall be comprehended the payment of the annuities, interest of any money to be borrowed under the provisions of this Act, expenses of management, maintenance of works, repairs, materials, wages, taxes, and other outgoings and charges, and the payment of the sum required to be annually set apart for a sinking fund as hereinafter provided, together with the expense of distributing supplies of water, and all other charges and expenses, in so far as the Trustees may consider the same to be fairly and equitably chargeable against revenue." Nothing, therefore, it is plain, under this clause, can be charged against the money raised from rates, except what is properly chargeable against revenue. All these things are specified. The enumeration, no doubt, is not an exhaustive one, because, although there are a great many particulars specified, there are those general words superadded, "other outgoings and charges;" but I need hardly say that it is a fixed principle of construction that where such general words follow a particular specification they can only embrace outgoings and charges in accordance with the particulars specified. No extraordinary expenditure, therefore, and no expenditure made once for all and for the general purposes connected with the trust—such as the purposes for which the borrowed money is applicable—could ever be lawfully chargeable under the 65th section against revenue. The 71st section has been referred to by Lord Deas in connection with this, and it seems to me in entire harmony with what I have said. The Trustees are there authorised to anticipate revenue or to anticipate expenditure, and that is quite necessary in the administration of any trust, because it may happen that the estimate that is made under the 65th section, or the budget of the year, may turn out to be to a certain extent inaccurate and fallacious, and it becomes necessary to supplement it by some additional estimate in a subsequent year; or if the trustees may think that the estimate of the present year may be taken as a moderate one, and that next year they may be put to much extra cost that may be chargeable against revenue, for the purpose of meeting it they are authorised to make the estimates for the current year larger than what is necessary for the expense of the current year. But it does not alter the nature of the purposes for which the money is to go. They are still proper charges, which can only be made against revenue. The result of that seems to be, that the Trustees have not in their hands any funds, either capital or revenue, that are not specifically appropriated, and certainly no part of them is specifically appropriated to the promotion of bills in Parliament. There is nothing in either of these clauses which can convey the slightest countenance to such an idea. The scope, therefore, of this Act of Parliament, in precise accordance with its title and preamble, leads me to the conclusion that there is no ground whatever for the implication that the Trustees are expected to increase the supply of water to the city and district by bringing in water from new sources. It may be that it is contemplated and expected that that will be done. There are ways and means of doing it. But these Trustees, as trustees, cannot do a single act or apply a single penny of money except in precise accordance with their Act and constitution.

There is an argument, however, founded upon the incorporation with this statute of certain clauses of the Waterworks Act, and this is an argument which deserves careful consideration. The fourth section of this statute is the incorporating clause, and I think it is in its language very instructive:—"The Waterworks Clauses Acts 1847 and 1863, except the provisions with respect to the construction of waterworks, and with respect to the amount of profit to be received by the undertakers, when the waterworks are carried on for their benefit, and except as regards any matter or thing otherwise provided for in this Act, shall be incorporated with this Act and applied to the waterworks, lands, hereditaments, rights, easements, credits, and effects hereby vested in the Trustees, or in, over, or upon which the Trustees have, by this Act, any power or right; and the words 'lands' and 'streams' used therein shall mean the lands and streams by this Act vested in the Trustees, or over or in which the Trustees have, by this Act, any power or right; and the expression 'the undertaking' used therein shall mean the undertaking and works of the Company by this Act vested in the Trustees, provided always the Trustees shall not be bound to have water constantly laid on under pressure, and that no penalty under the said incorporated Acts in respect of the supply shall attach to the Trustees for a period of five years from the vesting of the undertaking in the Trustees under this Act." Now, it is not merely an extension of the clauses of the Waterworks Acts, in respect to their construction, that appears to be worthy of observation, but still more a provision that the clauses of the Waterworks Act shall apply to no estate, or works, or stream, or water except those which are hereby vested in the Trustees—that is, the undertaking of the old Company, and nothing else. So that nothing else is brought by the operation of this Act within the administration of the Trustees but what is pointed out by these clauses. Now, with that light, let us see what is the meaning of the clauses so incorporated that they can be applied to this particular trust. The most important, and the only ones that are really worthy of special reference, are 35, 36, and 43 of the Act of 1847. The 35th section requires that a constant supply of water shall be kept for domestic purposes at high pressure. The 36th provides a penalty for neglect to lay pipes for the supply of water for domestic uses, and the 43d provides a penalty for refusal to fix and maintain fire-plugs, or for occasional failure of supply of water. Now, to consider the meaning of these clauses, in the first place, apart from the special Act in which they are incorporated. Does this mean that all water companies and all statutory trustees for the supply of water are bound, where the supply is not perfectly adequate, to go to Parliament for fresh powers? Because, according to the argument on this clause, that must be the meaning? My brother Lord Deas says you may separate the penalties from the obligation. The penalties may not be enforceable in particular circumstances, and there may be plenty of excuses for preventing a party from being liable in penalties though there may have been a violation of duty. Is every statutory body of public trustees charged with the supply of water, and every private company charged with a similar duty, guilty of a breach of duty for every day it delays going to

Parliament to get an additional supply of water where the supply of the town is not fully adequate? I cannot conceive the possibility of such a construction being put upon this clause, even apart from what is contained in the Special Act. For the result would be that a body of statutory trustees with certain limited powers, are to be driven by penalties—for the penalties undoubtedly come in here as a sanction—whether they may excuse themselves from their liability to penalties or not—to proceed to Parliament for the purpose of extending their own powers. A much more reasonable construction, as it appears to me, of these clauses is, that the Trustees, or a company, as the case may be, shall be bound to use the supply they have to the fullest extent it can be made available for the purpose of fulfilling what is desired by this clause—a constant supply of water for domestic and other purposes; and this is strongly confirmed by examination of the special language of these clauses. The penalties are not imposed for failure. There is no such language. The penalty does not attach to failure; the penalty only attaches to refusal or neglect. But there can be no statutory neglect to perform a duty which the Trustees cannot perform, and which, under the constitution of their trust, they have no means of performing. It is refusal or neglect alone that is to be visited with penalties. As I said before, there is neither refusal nor neglect if the Trustees do all that their powers enable them to do. The matter becomes even more clear when we deal with these clauses as applicable to the Act of 1869, and with the language of the 4th section of that Act, incorporating these clauses, because it then becomes clear that these clauses are intended to have operation and effect only as applicable to the undertaking vested in the Trustees by the statute of 1869, namely, the undertaking of the Company as transferred by that Act. Although I think it very desirable to examine that argument minutely, when it comes to be examined it is really of no weight at all.

The result therefore, I think, is clear enough, that the Trustees have no power vested in them to increase their supply by bringing in water from new sources, or of going to Parliament for the purpose of obtaining powers to enable them to do so. And while they have no power conferred upon them to do that, they have no funds in their hands which can be lawfully applied to such a purpose, because every shilling of the funds they have is specifically appropriated. But the question is asked, If that be so, and if the rule of law applicable to such a trust is so strict in its application, how is an adequate supply to be got?—how are the powers to be obtained from Parliament for the purpose of bringing in an additional supply of water? The people of Edinburgh, or any other city similarly circumstanced, are placed in this unhappy predicament, that they can never have such a supply, because no body can go to Parliament except at its own risk or cost. I do not suppose the people of Edinburgh will be placed in any more unfortunate position than the people of Southampton were by a similar decision, to the effect that the Water Trustees could not apply any of the funds in their hands for the purpose of promoting a bill in Parliament for obtaining an additional supply. The case was decided in the year 1850, and it was by no means the first of a long series of cases to the same effect, and I am not aware that any practical inconvenience has ever been found to result from the existence of this rule, for this very plain reason, that no party can approach Parliament except at his own risk in the way of expense, and those who obtained the Act of 1869 incurred that risk, and every party who goes to Parliament to get an Act constituting such a trust for the first time incurs that risk, and every statute obtained for the first time to supply a town with water is obtained at this risk. Was there any difficulty in getting such Acts, or getting them charged against the community? None whatever. But these parties must be careful to go to Parliament with such a scheme as is likely to obtain the sanction of Parliament, and as much as possible to disarm opposition in the community they represent. And if they take these precautionary measures, they will not only obtain their Act, but obtain it with a clause authorising them to charge the expense of obtaining it against the funds raised under its authority. It is in that way that all such Acts are obtained—that all persons who go to Parliament for powers, whether for the first time or for the purpose of increasing or enlarging the powers already conferred, invariably go with this risk—that if they fail in obtaining the Act they must themselves pay their own costs. I confess I do not view the operation of the rule of law leading to results of this kind with apprehension. On the contrary, I think it is most salutory indeed, and absolutely indispensable to prevent abuse.

In common with all your Lordships, I have given to the promoters of this bill, the Trustees under the Act of 1869, credit for perfect good faith, and I say that by no means as an unmeaning phrase. I say it in the same sense as it was said at the bar; and I cannot agree with Lord Deas that the counsel for the suspenders made that admission unwillingly. It seems to me he made it cheerfully and sincerely; but while giving them credit for good faith in all that they have done, I still am bound to come to the conclusion that they have done what they were not, as Trustees, entitled to do. In saying that they were actuated by good faith, I take it for granted not only that they believed it was a scheme for the public benefit, but I mean also this, that I think they undoubtedly believed that, even if unsuccessful in their application to Parliament, they would be entitled to charge the expenses against the community. But, most unfortunately, they were either not advised at all, or they were very ill advised. If they were not advised, and if they did not take legal advice before acting upon this assumption, it is much to be regretted, because, undoubtedly, the result has been to place them in that position. But I am afraid none of these considerations can influence us in the slightest degree in our decision—that the promotion of the bill of 1871 was not one of the purposes of the trust created by the Act of 1869.

The Court adhered, with additional expenses.

Agents for Complainers—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Respondents—J. D. Marwick, S.S.C.