whose evidence may be taken on commission for the purposes of said trial. That the present application has been duly intimated to the Keeper of the Register of Deeds."

Counsel for the petitioner moved the Court to grant the prayer of the petition, and cited in support of the production before Commissioners, C.A.S., B, ii, 4; *Mansfield* v. *Stuart*, (1840) 2 D. 1235. On the previous suggestion of the Court the petitioner's law agents had consulted the Keeper of the Register of Deeds, who informed them that there was a precedent for the exhibition of such deeds before a commissioner—the case of *Smith's Trustees* (not reported), —in which the First Division had granted warrant to that effect on 27th May 1909.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Hamilton. Agents —Lindsay, Howe, & Company, W.S.

Thursday, November 16.

COURT OF SEVEN JUDGES.

DUNDEE COMBINATION PARISH COUNCIL *v.* SECRETARY FOR SCOTLAND AND OTHERS.

Local Government—Parish—Poor—Alteration of Boundaries—Adjustment of Liabilities—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 51—*Local Government (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 46.

A burgh annexed certain portions of an adjoining parish. The annexed portions were disjoined from the country parish and conjoined with the burgh parish, which was made liable for the paupers having their settlement by birth or residence in the annexed portions, 13 in number. The total number of paupers of the country parish prior to severance was 35, and according to assessed rental the share of the burden of maintaining these falling to the portions annexed was 22 out of 35. The Secretary for Scotland, having been asked to adjust liabilities between the country parish and the burgh parish under the Local Government (Scotland) Act 1889, section 51, and 1894, section 46, ordained the latter to pay the former a sum calculated as the present capital cost of maintaining the 9 additional paupers, *i.e.*, over and above the 13 transferred. The burgh parish challenged this as *ultra vires*, being as alleged a compensation for loss of assessable area. *Held* (*diss.* Lords Salvesen and Guthrie) that the Secretary for Scotland had acted *intra vires*. *Authorities* examined.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 51 enacts—"*Alterations of Boundaries, Simplification of Areas, &c., by Provisional Order.*—On the representation of a county council or of a town council the Secretary for Scotland may at any time after the expiry of the powers of the Boundary Commissioners by order provide for all or any of the following things:— . . . (*f*) For the proper adjustment and distribution of the powers, properties, liabilities, debts, officers and servants of any local authority consequential on any consolidation, alteration of boundaries, or other act done in pursuance of this section. . . .'

The Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 46, enacts—"*Additional Powers to Alter Parish Areas* —An order of the Secretary for Scotland, under section 51 of the principal Act [*sup.*], for altering the boundaries of any parish or for uniting several parishes or parts of parishes into one parish by the creation of a new parish or otherwise, or annexing one or more of such parishes or parts of parishes to a larger parish or for dividing any parish or for uniting any sub-division of a parish with any other parish, shall have effect for all purposes, whether county council, justice, sheriff, militia, parochial board, parish council, school board, local authority, or other, save as hereinafter provided . . . . . In addition to the provisions of the principal Act any such order may be made on the representation of a parochial board or parish council, or the commissioners of a police burgh, or a school board. . . ."

The Dundee Combination Parish Council, *pursuers*, brought an action against, first, the Secretary for Scotland, and second, the Parish Council of the Parish of Mains and Strathmartine, *defenders*, to reduce an Adjustment Order of the first-named defender which purported to adjust liabilities between the pursuers and the second-named defenders and ordained the former to pay the latter £622.

The Adjustment Order was—"Whereas by the Order of the Secretary for Scotland published in the *Edinburgh Gazette* of the 7th March 1913 (No. XLVIII), the portions of the parish of Mains and Strathmartine, which by the Dundee Extension and Improvement Act 1892, and the Dundee Corporation Order Confirmation Act 1907, were respectively annexed to the City and Royal Burgh of Dundee, were transferred to the Dundee Combination Parish:

"And whereas all questions of adjustment consequential on the said Order were expressly reserved:

"And whereas the Parish Council of the Parish of Mains and Strathmartine has made a representation to me that I should, under section 51 of the Local Government (Scotland) Act 1889, and section 46 of the Local Government (Scotland) Act 1894, issue an Order for the adjustment of the liabilities of the said Dundee Combination Parish and the said Parish of Mains and Strathmartine:

"And whereas I am of opinion that it is expedient to give effect to the said representation:

"Now therefore I, the Right Honourable Thomas M'Kinnon Wood, His Majesty's Secretary for Scotland, do in virtue of the powers conferred upon the Secretary for

Scotland by the Local Government (Scotland) Acts order as follows:—

"The Parish Council of the Dundee Combination Parish shall pay the Parish Council of the Parish of Mains and Strathmartine the sum of £622 as ascertained in the manner shown in the annexed schedule, with interest thereon at the rate of 5 per cent. per annum from the date of this Order until it is paid.

"Given under my hand and seal of office at Whitehall this 24th day of May 1915.

"T. M'KINNON WOOD,
"His Majesty's Secretary for Scotland.

"I.—Claim of the Parish Council of Mains and Strathmartine against the Parish Council of the Dundee Combination Parish in respect of Paupers.

1. Mean number of paupers chargeable to the parish of Mains and Strathmartine in 1912-13 35
2. Proportion of paupers effeiring to the transferred area according to rental 22
3. Number of Mains and Strathmartine paupers for whose maintenance the Dundee Combination Parish has become responsible, *i.e.* birth or settlement 13
4. Number of paupers in respect of whom increased liability attaches to the parish of Mains and Strathmartine through the operation of the Secretary for Scotland's Order No. xlviii 9

Mean annual cost of the maintenance of a pauper in the parish of Mains and Strathmartine . . . £18 15 0

Cost of maintenance of nine paupers for seven years calculated on the assumption that 1/7th of the number disappear from the roll each year . . £675 0 0

"II.—Counterclaim by the Parish Council of the Dundee Combination Parish.

Value of property belonging to the parish of Mains and Strathmartine. £85 10 0

Proportionate part thereof effeiring according to rental to the portion of the parish of Mains and Strathmartine transferred to the Dundee Combination Parish £53 0 0

ABSTRACT.

Amount due to the Parish Council of Mains and Strathmartine by the Parish Council of Dundee Combination Parish £675 0 0

Amount due to the Parish Council of Dundee Combination Parish by the Parish Council of Mains and Strathmartine £53 0 0

Balance in favour of the Parish Council of Mains and Strathmartine . . . . £622 0 0"

The pursuers pleaded—"In respect that it was *ultra vires* of the first-named defender to issue the Order now sought to be reduced, decree of reduction should be pronounced as concluded for."

The Lord Ordinary (DEWAR) having repelled the pursuers' plea-in-law dismissed the action on 11th December 1915.

The *facts* of the case were set forth in his opinion.

Opinion.—"The question for decision in this case is whether an Order issued by the Secretary for Scotland on 24th May 1915, with a view to adjusting liability for the maintenance of paupers between two parishes consequent on the alteration of parish boundaries, is *ultra vires* of the powers conferred upon him by the Local Government (Scotland) Acts.

"The pursuers, who seek reduction of the Order, are the Dundee Combination Parish Council, and the defenders are (1) the Secretary for Scotland and (2) the Parish Council of Mains and Strathmartine.

"The circumstances in which the said Order was issued are these—Certain portions of the parish of Mains and Strathmartine were annexed under statutory powers to the royal burgh of Dundee, and by an Order issued by the Secretary for Scotland on 3rd March 1913 these portions were transferred to the Dundee combination parish.

"By that Order it was, *inter alia*, ordered that—'The Dundee Combination Parish Council shall assume responsibility for and shall relieve the Parish Council of Mains and Strathmartine of all advances which the latter body may be called upon to make for or on account of any pauper whose claim is derived (1) from birth in the transferred area prior to the 15th day of May 1913, or (2) from residence for the statutory period in the transferred area prior to the 15th day of May 1913.' It was further provided that—'. . . all questions of adjustment consequent on the alteration of boundaries hereby made are expressly reserved.'

"Some time after this Order was issued the defenders lodged with the Secretary for Scotland certain claims against the pursuers in respect of the alteration of their parish boundaries, and in particular claims in respect of liability to maintain paupers, and they asked the Secretary for Scotland to adjust these claims under the powers conferred on him by sections 49 and 51 of the Local Government (Scotland) Act 1889 and section 46 of the Local Government (Scotland) Act 1894.

"After correspondence with parties, and having considered the claims, he issued on 24th May 1915 the Order now complained of. By that Order the pursuers are ordained to pay to the defenders, the Parish Council of the parish of Mains and Strathmartine, the sum of £622 as ascertained in the manner shown in a schedule annexed to the Order.

"It appears from the schedule that the number of paupers for whose maintenance the pursuers had become liable under the Order dated 3rd March 1913, that is to say, the number whose claim was derived from birth or residence in the transferred area, is 13. But the proportion effeiring to the transferred area calculated according to rental is 22. The Secretary for Scotland apparently regarded rental as the true basis on which to adjust the pursuers' liability, and he accordingly ordered them to pay to the defenders a sum which represented the cost of maintenance of 9 paupers for seven years, calculated on the assumption that 1-7th of the number disappear from the roll every year.

"The powers under which the Secretary for Scotland proceeded are contained in Section 51 of the Local Government (Scotland) Act 1889. That clause enables him to provide—'For proper adjustment and distribution of the powers, property, liabilities, debts, officers, and servants of any local authority consequent on any consolidation, alteration of boundaries, or other act done in pursuance of this section.'

"Both parties admit (1) that this section empowers the Secretary for Scotland to adjust existing liabilities between the two parishes, and (2) that it does not empower him to order payment of compensation in respect of loss of rating area in consequence of the alteration of parish boundaries. And the only question in dispute is whether the Order complained of is really an adjustment of existing liabilities or whether it must be regarded as an award of compensation for the loss of rating area.

"The pursuers contend that it is the latter. They say that their liability for the maintenance of paupers was properly adjusted under the Order issued on 3rd March 1913, by which they were ordered to maintain all paupers whose claim is derived from birth or residence in the transferred area; and that in the second Order the Secretary for Scotland had taken rental into account, and ordered them to pay a sum of money which was in effect compensation to the defenders for the loss of the area which had been annexed by the pursuers, and they referred me to the cases of *Caterham Urban Council*, (1904) A.C. 171, and *West Hartlepool Corporation*, (1907) A.C. 246.

"The defenders, on the other hand, maintain that the Order is a proper adjustment of the liabilities of the two parishes for the paupers chargeable at the date of the transference; that it adjusts the liability between the parishes in proportion to the respective rateable values of the transferred portion and the remaining portion, and proceeds [on the principle followed in all similar cases by the Secretary for Scotland and his predecessors in office.

"I am of opinion that the defenders' contention is right.

"I have not been able to derive much assistance from the *Caterham* and *West Hartlepool* cases because all they decided was that on a construction of certain statutory provisions when boundaries were altered no compensation was due for any loss of revenue from the transferred area. That question is not in dispute here. The Secretary for Scotland was not asked to award compensation for the loss of rating area. He was asked to decide what proportion of the paupers the pursuers ought to maintain in consequence of the alteration of boundaries. I think that was a matter he had power to adjust. The obligation to maintain paupers is clearly an existing liability within the meaning of the section. The pursuers, indeed, do not dispute that. They acknowledge that they are liable for the maintenance of a certain proportion, and that the Secretary for Scotland had power to adjust the number at thirteen. They do not therefore appear to dispute that he had power to adjust liabilities, and their argument really is that he has adjusted upon a wrong principle and reached a wrong conclusion, that he ought not to have taken into account the rateable value of the area transferred. But that appears to me to be a matter entirely within the province of the Secretary for Scotland. I have no power to review his decision, or to consider what elements were taken into consideration in reaching it. All I can decide is, whether there were existing liabilities which he had statutory power to adjust, and I am of opinion that there were.

"I accordingly repel the pursuers' plea-in-law and dismiss the action."

The reclaiming note was heard by a Court of Seven Judges.

The reclaimers argued—The Local Government (Adjustments) Scotland Act 1914 (4 and 5 Geo. V, cap. 74) conferred on the Secretary for Scotland power which might have justified the Order in question. He did not, however, have the power prior to the date of that Act, which, coming as it did after the Order had been issued, was too late to affect it, not being retrospective, and was out of consideration save as proving he had not at the time the power. His powers then were limited to those conferred by the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 51, and the Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 46. By his Order the Secretary for Scotland did not adjust an existing liability, but gave compensation for loss of assessable area, and practically called on the reclaimers to pay twice over. The liability for the paupers was not an unconstituted debt. It was constituted and could be apportioned. It was contracted. The relation to a pauper was a liability imposed by law. The moment the question of rental was touched on one entered into questions of loss of rating area. Counsel referred to the following cases—*Urban District Council of Caterham* v. *Rural District Council of Godstone*, 1904 A.C. 171; *Corporation of West Hartlepool* v. *Durham County Council*, 1907 A.C. 246 (*per* L.C. Loreburn at p. 249); *County Council of Midlothian* v. *Musselburgh*, 1911 S.C. 463 (*per* Lord President Dunedin at p. 472), 48 S.L.R. 335.

The respondents argued—In the present case rental only came under consideration for the purpose of making a division of the existing liabilities. In practice there was always a constant succession of new paupers, a fresh liability was continually arising. That fresh liability was not dealt with. Only those paupers who were in existence at the date of the Order were contemplated, and not those who came into being subsequent to the annexation. At the moment of the severance of a part of a parish it might so happen that an unduly small number of the existing paupers of the whole parish had their settlement from birth or residence in the severed portion. It might be that the severed portion never produced many paupers, still its burden was a rateable contribution for all in the parish. The Order

was therefore necessary in order to transfer the proper share of the burden. The *Caterham* and *Hartlepool* cases (*cit.*). were only concerned with loss of rating area. The Secretary for Scotland's course of action was justified by the decision in *Inspector of Galashiels* v. *Inspector of Melrose*, 1894, 21 R. 391, 31 S.L.R. 318. The reclaimers challenged the mode and not the fairness of the thing, namely, the result of the calculation. It could not be said that the mode altered the result. It was the principle that mattered.

At advising—

LORD PRESIDENT—The method adopted by the Secretary for Scotland in making an adjustment of the existing liability for the maintenance of paupers in consequence of the annexation of a portion of one parish to another parish is challenged as *ultra vires*. In my judgment the challenge fails.

By an Order dated in March 1913 a portion of the parish of Mains and Strathmartine was annexed to the parish of Dundee. At the date of the annexation there was an existing liability on Mains and Strathmartine for the maintenance of certain paupers, and it became the duty of the Secretary for Scotland under the Local Government Acts to make an adjustment of that existing liability between the two parishes.

He proceeded thus—First he ascertained the total extent of the liability of Mains and Strathmartine for the maintenance of these paupers. He found it to be 35 paupers. He then proceeded to estimate the proportion of the burden effeiring to the annexed portion of Mains and Strathmartine, and he ascertained that it was 22 paupers. He might then have proceeded to estimate the precise extent in money of that burden of maintenance of paupers. But he did not. He earmarked 13 of the 22 paupers, on the ground that they had been born or had acquired a residential settlement in the annexed portion of Mains and Strathmartine prior to 15th May 1913, and he ordered the parish of Dundee to maintain these 13 paupers. He did not earmark the 9 paupers remaining, but by a method unchallenged he ascertained that the cost of their maintenance would be £622.

The only step in the proceedings I have detailed which is now questioned is that by which the Secretary for Scotland ascertained the proportion of the burden of maintaining the paupers effeiring to the annexed portion of Mains and Strathmartine. It appears that it was ascertained by a comparison of the total assessable rental of the parish with the assessable rental of the portion annexed. In my judgment that was the correct method. It was, indeed, so far as I can see the only method by which an equitable adjustment of the existing liability could be made. But my opinion is of no moment whatever, because it was for the Secretary for Scotland, and for him alone, to consider the method by which this existing burden of maintenance of paupers should be adjusted. It lay within his province exclusively; it does not lie within ours.

It was contended that the method which he adopted was equivalent to an award of compensation to the parish of Mains and Strathmartine for being deprived of a valuable assessable area. In my opinion it was nothing of the kind. The Secretary for Scotland awarded no money to Mains and Strathmartine for the loss of a valuable assessable area. That loss still remains, and we were told that it is a very serious loss. What Mains and Strathmartine was relieved of by the Order of the Secretary for Scotland was the existing liability to maintain paupers then on its roll. Of that liability the effect of the Order is to relieve Mains and Strathmartine.

Accordingly I am of opinion that the Order was *intra vires*, and therefore the interlocutor of the Lord Ordinary ought to be sustained.

LORD JUSTICE-CLERK—I accept the Lord Ordinary's statement of the facts which give occasion to the question which we have to determine.

That question depends on the interpretation of certain provisions in the Local Government (Scotland) Act 1889, and especially sections 49 and 51 of that statute.

The construction of that statute as to matters very closely associated with the point which we have now to deal with has been the subject of judicial consideration by the Court of Session on more than one occasion.

It seems to me that the determination of the dispute between the parties depends on the meaning we are to give to the terms "adjust" and "liabilities."

The pursuers contend that under the statute no power is given to award compensation to one local authority against another for loss of rating area in respect of any alteration of boundaries. This is not disputed by either of the defenders, and I am clear no such compensation could be given unless expressly authorised by Parliament, and it is not suggested that in the present case any such authorisation has been given.

Power is given by the statute of 1889 to provide for "the adjustment and disposal of the property, debts, and liabilities of the various authorities affected by the Order" —section 49—and "for the proper adjustment and distribution of the . . . liabilities, debts . . . of any local authority consequential on any . . . alteration of boundaries" —section 51 (*f*).

The "liability" which is here in question is the necessity of providing for certain paupers who in 1913, when the boundaries were altered, were actually chargeable to the parish of Mains and Strathmartine. The charges for these paupers still remain as a burden on the restricted parish of Mains and Strathmartine—*Galashiels* v. *Melrose*, 19 R. 758.

Is such a charge a "liability" in the sense of sections 49 and 51? In my opinion it is.

Is it subject to "adjustment" in the sense of the statute? In my opinion it is.

Both of these questions seem to be concluded by the *Galashiels* cases, 19 R. 758 and 21 R. 391, which I do not think have been overruled.

But it is said that the Secretary for Scotland by the Order which is now challenged has not "adjusted liabilities" but has given compensation for loss of rating area. If he has I agree that he has done what is illegal. But in my opinion he has done nothing of the kind. He does not profess to have done so. On the contrary he professes merely to adjust and distribute an existing liability. In my opinion the burden he was called upon to deal with was an existing liability—he was asked to adjust and distribute it—he may have been and in my view he was asked to do a great deal more, but in the Order which is now challenged he has done no more than adjust and distribute said liability.

The English cases of *Caterham* and *West Hartlepool* were strongly pressed upon us.

These cases had to deal with the construction of an English statute, and in my opinion dealt only, so far as judicial determination in the House of Lords goes, with the question whether under the English statute compensation for loss of rating area could be granted. In both cases it was decided that such compensation could not be given. Of course I must accept that determination as correct, but, further, I respectfully assent to the reasoning on which the conclusion was reached.

I do not, however, regard these decisions of the House of Lords on the English statute as in any way trenching on the authority or soundness of the two Scottish cases as to the interpretation of the Scottish statute, which is what we are now concerned with. Lord Robertson was one of the noble Lords who took part in deciding the cases of *Caterham* and *West Hartlepool*, and as Lord President he was a member of the Court which decided the *Galashiels* cases on the interpretation of the statute, which as Lord Advocate he was responsible for.

The cases of *Caterham* and *West Hartlepool* have been considered in the Court of Session in the case of *Midlothian County Council*, 1911 S.C. 463. There the Lord President (Lord Dunedin) said of the *Caterham* case—"That case decided one thing, and one thing only. It decided that you cannot have a claim based simply upon the loss of a profitable district. You cannot have a claim because your territory has been made less rich in the way of providing assessments than before." And he referred to the *West Hartlepool* case as "really only a legitimate sequel to the *Caterham* case." I respectfully agree with Lord Dunedin as to these English cases.

Lord Kinnear concurred in the judgment in the second *Galashiels* case, and he concurred with the Lord President in the *Midlothian* case. I cannot regard these two English cases, dealing with a different statute and with a different question, as materially affecting the import of the *Galashiels* cases.

In my opinion the reasoning of the Judges in the *Galashiels* and *Midlothian* cases, and the conclusions there arrived at, support the view taken by the Lord Ordinary in the present case; the *Caterham* and *West Hartlepool* cases do not displace the Scottish judgments, and the reclaiming note should therefore, in my opinion, be refused.

LORD DUNDAS—I am of the same opinion. I think the interlocutor reclaimed against is right, and ought to be adhered to. The pursuers seek to reduce the Order of 24th May 1915 upon the ground that the Secretary for Scotland has thereby awarded compensation to Mains for loss of rateable area. He has not, in my judgment, done so, nor in any way proceeded *ultra vires* in making the Order.

It was decided by the first *Galashiels* case (*Galashiels* v. *Melrose*, 1892, 19 R. 758) that the transfer by the Commissioners of part of a parish to another parish has no effect on parochial settlements acquired prior to its date either by birth or residence in the part of the parish which has been so transferred. Apart, therefore, from subsequent adjustment, Mains would have had to continue to maintain all the paupers who had settlements at the date of the transfer in the area transferred to Dundee as well as in the remaining parish of Mains. But it was laid down by the second *Galashiels* case (*Galashiels* v. *Melrose*, 1894, 21 R. 391) that it was competent for the Commissioners, failing agreement between the parishes, to put upon the enlarged parish, as matter of adjustment of liability, the burden of maintaining the paupers who had prior to the transference acquired settlements in the transferred area. Accordingly it is admitted that the Secretary for Scotland acted *intra vires* when by his Order of 3rd March 1913, against which no challenge is directed, he imposed upon Dundee the responsibility of future maintenance of the paupers having settlements in the transferred area at the date of transfer. The pursuers' attack is against the Order of 24th May 1915 only. Now the Secretary for Scotland in making that Order seems to have had regard to the fact that there was an existing liability—by law attaching to the restricted area of Mains (see first *Galashiels* case)—for the maintenance of all the paupers in every part of the old undivided parish. He proceeded to adjust that liability—in other words, to apportion as between the two authorities the shares in which they ought justly to bear that burden respectively. That he had power to do so seems to be recognised by the second *Galashiels* case, and to be matter of admission in the present case. But what is alleged against him is that in working out his adjustment he has proceeded upon a wrong principle, and has laid on Dundee a larger proportion of the common burden than it would have had to bear if he had measured its share by the number of paupers (as was done in the second *Galashiels* case) having settlements in the transferred area. But I know of no law or authority constraining the Secretary for Scotland, acting as arbiter, to adopt this particular measure, and no other. What he did seems to have been fair and equitable, and I do not see that it was *ultra vires*. The gravamen of the pursuers' charge is that the Secretary for Scotland

has estimated the proportion of pauper properly effeiring to the transferred area "according to rental." Other methods might, no doubt, have been resorted to; *e.g.* the superficial area, or the population, of the transferred district. But to say that the Secretary in adjusting the liability and apportioning the burden had recourse to the basis of rental is a very different thing from affirming that he has by his Order awarded compensation for loss of rateable area. It seems to me clear that he has not done anything of the kind. The English cases of *Caterham* ([1904] A.C. 171) and *West Hartlepool* ([1907] A.C. 246) have therefore in my judgment no bearing upon the case before us, for, as Lord Dunedin pointed out (in *Midlothian County Council*, 1911 S.C. 427), the *Caterham* case "decided one thing and one thing only. It decided that you cannot have a claim based simply upon the loss of a profitable district. You cannot have a claim because your territory has been made less rich in the way of providing assessments than before;" and "the *West Hartlepool* case is really only a legitimate sequel to the *Caterham* case." It was frankly conceded by the pursuers' counsel that these two decisions in the House of Lords had in no way overruled or impaired the authority of the *Galashiels* cases. For these reasons, I do not think there is any good ground for reducing the Order. It would be unfortunate if we were constrained to do so; because the Order seems to be in itself a perfectly fair and reasonable one, and would, I apprehend, have been (even if the pursuers' construction of its import were correct) quite within the Secretary for Scotland's powers under the recent Act 4 and 5 Geo. V. cap. 74, which, however, does not apply to this case.

LORD JOHNSTON—I have come to the conclusion that the Lord Ordinary's judgment is sound, and the only hesitation I have experienced is as to whether I ought to add anything to his very clearly expressed note.

By virtue of his powers under the Local Government Act 1889, section 51, the Secretary for Scotland has taken a portion of Mains and Strathmartine parish and added it to the Dundee Combination parish. The portion so added is comparatively smaller in area, is more highly valued, that is has a higher assessable valuation, and at the same time from its character is productive of a smaller annual average of paupers than is the portion of the parish of Mains which is left, and which for the future will constitute the parish of Mains and Strathmartine.

At the date (3rd March 1913) of the Secretary for Scotland's Order above referred to the whole of the parish of Mains and every part of it was liable for all the paupers chargeable who had at the time a settlement by birth or residence within its bounds. The mean or average number chargeable in the year just prior to the date of the Order was 35. But of these only 13 on the same average, if the basis of apportionment be area, effeired by birth or residence to the portion of the parish disjoined, and the remaining 22 to the residue of the parish of Mains, that is, to the truncated parish now the parish of Mains and Strathmartine, whereas if the basis of apportionment be valuation or assessability the figures are, as it happens, exactly reversed—22 and 13.

By his Order of 3rd March 1913 the Secretary for Scotland transferred the liability for the 13 paupers who had a settlement in the portion of Mains to be annexed to Dundee to the Dundee Combination parish. But at the same time he declared that "all questions of adjustment consequent on the alterations of boundaries hereby made are expressly reserved."

Under the same section of the Act of 1889 the Secretary for Scotland had power by Order to provide for the proper adjustment and distribution, *inter alia*, of the "liabilities" of any local authority "consequential on any alteration of the boundaries." And the parish of Mains, not satisfied that the transfer of the liability for the 13 paupers above referred to by the Order of 3rd March 1913 was exhaustive of their claim to relief of liability, applied to the Secretary for Scotland for a further adjustment. I cannot say that the terms of their application by any means meet the situation created by the Secretary for Scotland's Order of 3rd March 1913. They are at once too wide, and had they been given effect to as stated might have afforded some ground for the objection now formulated by Dundee, and they were at the same time too narrow to admit of their obtaining a larger measure of adjustment, for which at least very plausible grounds might have been stated. But this Court is not concerned with the terms of application by the parish of Mains. It is only concerned with what the Secretary for Scotland has done.

He has issued a further Order on 24th May 1913 giving effect to the representation of the parish of Mains, thus—"The Parish Council of Dundee Combination parish shall pay the Parish Council of parish of Mains and Strathmartine the sum of £622 as ascertained in the annexed schedule, with interest,"&c. Had he not disclosed the method of ascertainment nothing could have been said. By fixing on the terms of the schedule Dundee Combination parish have thought fit to try to set aside what must, I think, be thought a very reasonable and moderate award. They plead that the award is *ultra vires* in respect that it does not provide for the adjustment of existing liabilities but orders a payment of the nature of compensation on account of loss of rates, or comparative increase of burden, or on account of a loss which the parish of Mains and Strathmartine apprehend that they may suffer consequent upon the alteration of boundaries. But we received no explanation of any of these grounds of objection by reference to the schedule. And the reason was, I have no doubt, that none was possible. In point of fact the schedule has only to be examined to see that there is no question of loss of rates or of rateable area or of increase of burden, but merely one of loss which Mains and Strathmartine not *may* but *will* and *does* suffer by the alteration of boundaries, by reason that the rate-

payers of the diminished parish must be rated more highly than before to meet the share of existing liabilities left by the Order of 3rd March 1913 upon their shoulders, and which prior to the disjunction were existing liabilities of the whole ratepayers in the undivided parish.

Analysing the schedule, the mean number of paupers chargeable to the parish of Mains and Strathmartine for the year prior to the alteration of boundaries was 35. Of these 13 derived their claim from birth or residence in the disjoined portion of the parish. For these Dundee Combination is, under the award of 3rd March 1913, in future liable, and of liability for them the diminished parish of Mains is relieved. The remaining 22 must for the future be maintained by the diminished parish of Mains. But at the date of the Order the liability of the ratepayers within the disjoined area was to be assessed for the relief of 22 and not of 13, for that happens to be the ratio of the valuation or assessability of the disjoined area and the remainder of the parish. It is just possible that the recurrence of the figure 22 to represent two different things has confused the Parish Council of Dundee Combination and prevented them appreciating the method of the Secretary for Scotland's schedule. Now the liability is a present liability, and it is as clear as can be that the liabilities of the local authorities consequential on the alteration of boundaries are not adjusted unless the Dundee Combination not only take over the 13 paupers actually settled in the disjoined area, but also undertake in some form or another to meet the liability for 9 more—that is, for the difference between 22 and 13. The mean annual cost of a pauper being ascertained at £18, 15s., and the mean length of a pauper's chargeability at seven years, the total cost beyond their due proportion of this liability is not £18, 15s. × 9 × 7 or £1181, 5s., but that sum discounted so to speak by assuming that one-seventh of the 9 paupers drop off each year, whereby that sum of £1181, 5s. is reduced to £675. If anything was required to emphasise the fact that it is an existing liability which is being adjusted this final calculation would surely do so. Of course the result is arrived at on the very ordinary basis of an average from previous experience, and may in the event turn out somewhat too much or somewhat too little. But the method is one which the Secretary for Scotland was certainly justified in adopting.

The case of *Caterham* v. *Godstone*, [1904] A.C. 171, is not apposite as an authority in the present, as the claim was not in respect of liabilities but a loss of rateable area. But the reasoning of the learned Lords entirely supports the view which I have ventured to present. The *Musselburgh* case in this Division, 1911 S.C. 463, on the other hand, dealt with a question of liabilities, and is therefore an authority entirely in point.

As I have indicated already, I am by no means clear that this award is wholly exhaustive of the claims of Mains and Strathmartine, for at the date of the Order of disjunction there was on the original parish not only an ascertained liability for existing paupers presently chargeable, but a contingent liability for paupers who had already a settlement by birth or residence in the parish, but who had not yet though they may become in future chargeable—quite a different thing from a liability for all future paupers. It is for this reason that I think Dundee Combination has little just reason for crying out at the Secretary for Scotland's award, which they question, but with which Mains and Strathmartine are satisfied.

LORD SALVESEN—By the Order which is sought to be reduced His Majesty's Secretary for Scotland ordained the pursuers to pay to the Parish Council of the parish of Mains and Strathmartine the sum of £622 as ascertained in the manner shown in an annexed schedule. From this schedule it appears that the average number of paupers chargeable to the latter parish in the year prior to the date when a portion of it was annexed to Dundee Combination parish was 35, and that the number of paupers effeiring to the transferred area according to rental was 22. Thirteen of these have, according to the first Order of 3rd March 1913, become from its date chargeable to the pursuers in respect of their birth or residence in the transferred area, leaving 9 to be provided for by the parish of Mains and Strathmartine, who were formerly maintained out of the rates derived from the annexed area. It is calculated that one-seventh of the paupers disappear annually from the roll, and the sum awarded is reached by multiplying the mean annual cost of the maintenance of a pauper by seven.

We have no jurisdiction to review the Order upon its merits, and so far as I can see there is no ground for adverse criticism from this point of view. On the contrary, I think it plain that the transference of the most profitable part of the parish of Mains and Strathmartine to the pursuers' Combination will in all probability involve a serious hardship to the ratepayers of the remaining area, even on the assumption that the Order challenged is valid. The hardship will be all the greater if we are compelled to hold that the award of £622 in favour of Mains and Strathmartine cannot be sustained.

The Order under reduction bears to proceed under section 51 of the Local Government (Scotland) Act 1889 and section 46 of the Local Government Act 1894. Under these two sections the Secretary for Scotland is empowered to provide for, *inter alia*, "the proper adjustment and distribution of the powers, properties, liabilities, debts, . . . of any local authority consequential on any consolidation, alteration of boundaries, or other act done in pursuance of this section." The pursuers contended that what the Order has done is to make an award of compensation in respect of the loss of a rating area and that such an award is *ultra vires*. The defenders, on the other hand, say that all that has been effected is a proper adjustment of liabilities. If the former is the true effect of the Order, it was, as I understood the argument, conceded

that it must be declared invalid; if the latter, then the Order cannot be challenged.

In determining this question I think it is legitimate to consider the claim made by Mains and Strathmartine. After pointing out in the claim lodged by their solicitor—which takes the form of a letter—that the effect of the first Order was to give the Dundee Combination the most desirable part of the parish, they go on to say that the true effect, unless provision is made against it, will be to double the present poor rate in the remaining area, and suggests that an annual sum should be awarded to that parish in mitigation of this hardship, either in perpetuity or in any event for not less than seven years. This, however—the letter proceeds—"would be exceeding meagre compensation to Mains and Strathmartine for the dismemberment of the parish and the loss of rating rights in the part disjoined." Having considered the letter for a year the Scottish Office wrote on 8th April 1914 intimating how they proposed to deal with the different heads of claims. The letter contains the following sentence—"As regards the first head of the claim the Secretary for Scotland is prepared to take into account any immediate increase of burden which the parish of Mains and Strathmartine may have incurred in respect that the transferred area carried with it a less proportion of paupers according to valuation than the remainder of the parish. The principle of the calculation which is proposed to be made is that followed in the enclosed specimen Order—that is to say, so far as the paupers transferred in respect of the area added to Dundee are fewer than those effeiring to the area in proportion to its valuation, the parish of Mains and Strathmartine will be held entitled to compensation based on a hypothetical seven years' average life of the excess number of paupers." Representations were made by both parties, but on 26th May 1915 the Scottish Office intimated that the Secretary for Scotland had not seen any reason to revise the decision communicated in a letter of 14th December — which has not been printed, but proceeded apparently on the same lines as laid down in the earlier letter—and that he had accordingly made the Order now complained of. It embodies the principles laid down in the passage from the letter of 8th April 1914 above quoted.

In my opinion the sum of £622 ordered to be paid by the one parish to the other was neither more nor less than an award of compensation in respect of the loss of the transferred area, the rates derived from which had been in the past more than sufficient for the maintenance of paupers who had a settlement by birth or residence in it. I cannot look upon it as an adjustment of liabilities. In the case of the *Midlothian County Council*, 1911 S.C. 463, Lord President Dunedin figured certain concrete cases which would fall under the phrase "adjustment of liabilities." One of the cases so figured was that expenditure had been incurred and met by means of a loan, which expenditure had enured to the benefit of the whole area and was not represented by any tangible asset. In such a case he said that the proportional division of the liability between the transferred area and the area remaining would be eminently fair. It must be noted, however, that he was dealing with an existing liability in the shape of debt, which would have to be met by the local authority that had incurred it, and not with the future maintenance of paupers, which is the case we are dealing with here; and in commenting on the case of the *Caterham Urban Council* he said—"Anyone who reads the judgment carefully will see that the word 'liabilities' in this connection means debt of some sort which is exigible for what has already been done. It does not mean liability which in one sense may be said to be present because it is presently existing, but in another sense is really a future liability. . . . Of course the County Council is under a present liability to maintain its roads, but that is not the class of liability which is meant to be dealt with by adjustment, because although in that sense it is a present liability it is really a future liability. It is a liability which will recur year by year as the roads want mending. That would be exactly within the *Caterham* case."

I am quite unable to distinguish the liability for the maintenance of existing paupers from the maintenance of existing roads, and if so the decision in the *Midlothian County Council* is a clear authority to the effect that an award of money to one parish at the expense of the other for the maintenance of its paupers is not an adjustment of their respective liabilities but is an award of compensation. It is true that in the case of the *Inspector of Galashiels*, 21 R. 391, an Order which was substantially on the same lines as the two Orders of 3rd March 1913 and 24th May 1915 taken together, was brought under the notice of the Court. The only part of that Order, however, which was challenged was the part which corresponds to head 2 of the Order of 3rd March 1913, which the pursuers accept. No question was raised as to the second part of the Order, by which the parish of Melrose was ordained to pay a diminishing annual sum for twelve years after the date of the Order to the parish of Galashiels. The decision was not referred to in the argument in the *Midlothian County Council* case, nor was it before the House of Lords either in the *Caterham* case or in the later case of *West Hartlepool Corporation*, [1907] A.C. 246. There is therefore in my view no obstacle to our applying the principles laid down by the House of Lords in the two cases referred to.

It is satisfactory to know that a case of hardship such as will be imposed upon Mains and Strathmartine, if my view is sound, cannot arise where the alteration of boundaries takes place subsequent to 28th August 1914, for by an Act (4 and 5 Geo. V, cap. 74) which bears that date express provision has been made for the very case we have before us. By the first section of that Act it is provided that "on any adjustment under section 50 or section 51 of the Local

Government (Scotland) Act 1889, or section 46 of the Local Government (Scotland) Act 1894, provision shall be made for the payment to any authority of such sum as seems equitable, in accordance with the rules contained in the schedule to this Act, in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that authority as a consequence of any alteration of boundaries"; and the schedule states that regard shall be had to (*a*) the difference between the burden on the ratepayers of an area in respect of which an alteration of boundaries has taken place in meeting the cost of executing any of their duties and the burden on the ratepayers which would properly have been incurred by the authority in meeting such cost had no alteration of boundaries taken place. By rule 2 the sum payable to any authority in respect of any increase of burden must not exceed the average annual increase of burden multiplied by 15. The passing of this Act, however, may be taken to show that similar powers did not exist under existing legislation. What the Secretary for Scotland has done has really been to apply this Act to a case which is excluded from its operation. On the whole, therefore, I have come to the conclusion, although I confess with regret, that the pursuers are entitled to decree in terms of the conclusions of their summons.

LORD MACKENZIE—I agree with the conclusion reached by the Lord Ordinary. I do not think the Secretary for Scotland acted *ultra vires*, because as I construe the Order it made provision for the adjustment of existing liability, and did not award compensation for the loss of assessable area.

Fortunately the question discussed has now become purely academic in consequence of the operation of supervening legislation.

LORD GUTHRIE — The Lord Ordinary, dealing with the Secretary for Scotland's Order of 24th May 1915, part of which is in question in this case, says—"I have no power . . . to consider what elements are taken into consideration in reaching it." I cannot agree with him in view of the terms of the Order and the documents which are referred to in it.

As in the second *Galashiels* case, 21 R. 391, the part of the Order dealing with the payment of money from the enlarged parish to the diminished parish in connection with paupers might have been so expressed as to afford no clue to the grounds on which the Order was made. That cannot be said here. The Order, taken along with the "claim," which is incorporated by reference, seems to me frankly to disclose that the sum of £622 in question in this case is ordered to be paid by the Dundee Combination parish, the enlarged parish, to the parish of Mains and Strathmartine, the diminished parish, on the sole ground of the loss of assessable area. If I am right in this it is not necessary to consider whether there are not other and statutory grounds on which the same or another sum might have been lawfully ordered to be paid in connection with paupers by the enlarged to the diminished parish.

The original Order of 3rd May 1913 does not seem to affect the question. Clause 3 runs thus—"(3) All questions of adjustment consequent on the alteration of boundaries hereby made are expressly reserved." This clause is not limited to matters connected with paupers, and was necessary in any case.

The claim which has been sustained is made up on the basis first of making the Dundee Combination parish responsible for the paupers effeiring by birth or settlement to the part of the parish of Mains and Strathmartine, which has been annexed to the Dundee Combination Parish, namely, 13 out of 35. This is in accordance with the decision in the second *Galashiels* case above referred to, and is not challenged. But the claim proceeds to make a demand in respect of 9 paupers, on the ground that in the past the severed portion's rates not only yielded sufficient to maintain the 13 paupers with whose support that portion is now saddled, but also 9 of the paupers whose whole maintenance will now fall on the diminished parish. That is to say, the diminished parish is seeking to make up a loss which she will suffer from the loss of area which she has hitherto been able to assess. That appears to me to be ordering compensation for loss of assessable area, and if so it is admitted that to that extent the Order cannot stand. Compensation for loss of assessable area was asked by the letter from the Parish Council of Mains and Strathmartine to the Secretary for Scotland, dated 9th May 1913. The principle was accepted by the Secretary for Scotland, as I read Mr Lamb's letter, 8th April 1914, which deals with the sum now in question, not as an adjustment of an existing liability but as payment by way of "compensation." It is not suggested that between the date of that letter and the date of the Order in question any new view was taken of the question by the Secretary for Scotland. The Order merely gives effect to the scheme for providing what is called in the Scottish Office letter "compensation."

But it is said that the sum in question was not given as compensation for the loss of assessable area. As I understood it was not denied that if the sum had been ordered to be paid annually in perpetuity, or if a lump sum had been given to represent such a permanent annual payment, it must have been disallowed as compensation for loss of assessable area. Except on one footing I am unable to see how the duration of the payment can affect the grounds on which it was given. But it was suggested from the Bench that as the 13 paupers effeiring to the annexed portion are actual individuals whose names could be given, so names could also be put on the excess 9. I rather think the Secretary for Scotland has proceeded on this view. But the parties were agreed that this could not be done, the 9 paupers being an average calculation, not of selected individuals but of hypothetical paupers, regardless of the length of life or the possible depauperisation of individuals. During the

seven years there would certainly be some and possibly many individual changes. If it were attempted to individualise the 9, one or more would cease to be paupers before the expiry of the seven years. His place would be taken by another; and I am unable to see how the liability to maintain that latter person, who did not or might not have become a pauper till after the date of the Order could be an existing liability at the date of the Order. But if I am wrong in this the liability to maintain paupers will always exist, and I see no reason why a perpetual payment should not be ordered, and yet I understood it to be admitted that such an order could not stand.

I cannot distinguish this case from the cases of *Caterham*, [1904] A.C. 171, and *West Hartlepool*, [1907] A.C. 246, referred to by the Lord Ordinary. The *Caterham* case overruled two cases which, as Lord Robertson explains, were decided on the erroneous view that where the Legislature ordered adjustment of liabilities under the English Local Government Act of 1888 it intended to maintain the former balance of rates. In both the *Caterham* case and the *West Hartlepool* case the question of the maintenance of roads and bridges was involved. I am unable to distinguish that question from the present question of the maintenance of paupers. But in the *West Hartlepool* case not only did the question arise in connection with liability for roads and bridges, none of which were in the severed portion, there were also counter-claims in respect of children in district school reformatories, all of which reformatories were in the severed portion; and it was held that under an adjustment clause which I cannot distinguish from clause 51 of the Local Government (Scotland) Act 1889 any payment in respect of these reformatory children would be in the nature of compensation for loss of assessable area, for which there was no statutory warrant.

But it is said that in the *Caterham* case and *West Hartlepool* case the objectionable orders involved a perpetual liability, whereas in this case the liability is to terminate with the assumed death or cessation of pauperism of an assumed average number of paupers, and that in the present case there is an existing liability at the time of severance which could not be maintained in regard to the orders in the *Caterham* and *West Hartlepool* cases. In the latter case it does not appear whether the demand in respect of reformatory children was perpetual or was framed as in the present case. The smallness of the sum asked as compensation suggests that it did not represent a permanent payment. If that were so, then this case is *a fortiori* of the *West Hartlepool* case. Dealing with reformatory school children, who are sentenced by magistrates for a definite number of years, a certain number of individual children could be selected, in regard to whose unexpired sentences it might well have been argued that an obligation of maintenance had been undertaken by the individual area on their reception into the reformatory, and thus a liability incurred which would be a proper subject for adjustment. This view is not open when dealing with the rope-of-sand class of persons who are constantly shifting from self-support to pauperism. But in any case the reasoning of the noble and learned Lords seems to me as applicable to the one case as to the other, both involving although in different degrees payment of compensation for loss of assessable area.

The two cases of *Galashiels* do not seem to me to affect the present question. Admittedly the first does not. At first sight the second appears to do so. But it will be found that the only question raised for decision in that case related to the first branch of the Order, which ordained the increased parish to assume responsibility for paupers effeiring by birth or settlement to the portion annexed to it. The second branch of the Order, the only one which might have raised for decision the question involved in the present case, was not challenged. In addition, as already pointed out, no indication was given in the Order or in any document embodied in it of the way in which or the grounds on which the sums ordered to be paid were arrived at.

The Court adhered

Counsel for the Reclaimers—Sandeman, K.C. — Lippe. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent, the Secretary for Scotland—Solicitor-General (Morison, K.C.) — Pitman. Agent — George Inglis, S.S.C.

Counsel for the Respondents, the Parish Council of Mains and Strathmartine—C. H. Brown. Agents—Warden & Grant, S.S.C.

Tuesday, December 19.

SECOND DIVISION.

BRODIE-INNES *v.* BROWN AND ANOTHER.

Landlord and Tenant—Arbitration—Outgoing—Compensation for Unexhausted Improvements—Powers of Arbiter—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 1 (1), *and First Schedule, Part iii.*

The proprietor of an estate let a farm by a lease which provided, *inter alia*, that the tenant was to farm the whole land according to the rules of good husbandry. On the termination of the tenancy the tenant claimed compensation for unexhausted improvements, and, *inter alia*, for the increased fertility of the farm due to "continuous good farming." *Held* that the arbiter in granting an award for "continuous good farming" had acted *ultra vires*, it not being an improvement specified in the schedule to the Agricultural Holdings (Scotland) Act 1908, and that averments to the effect that such award was for the unexhausted value of manures and feeding-stuffs purchased and applied prior to those which had been vouched,