defender's witnesses, Alexander Findlay, John Smith, Ann Smith or Badenoch, and William Johnstone, as corroborated by the written evidence, the Lord Ordinary is of opinion that enough has been established to support the defence.

"If the Lord Ordinary is right in his view of the facts—if he is correct in holding that the defender and his authors have for forty years, or time immemorial, possessed and enjoyed the salmon fishings *ex adverso* of his barony lands, under grants or charters from the Crown of these lands, with parts and pertinents and fishings—it follows in law that the present action is not maintainable against the defender, and that he has been rightly assoilzied therefrom.

(Intd.) "R. M'F."

Agent for the Crown—Donald Horne, W.S.

Agents for the Earl of Seafield—Mackenzie, Innes, & Logan, W.S.

Tuesday, May 22.

FIRST DIVISION.

PROUDFOOT *v.* LECKY (*ante*, vol. i., p. 240).

Expenses. In an action of damages for wrongous dismissal of a servant, in which the jury found for the pursuer, with one farthing damages, neither party found entitled to expenses.

This case was tried before Lord Barcaple and a jury, on the 23d, 24th, and 26th March 1866. The question was whether the pursuer had been wrongfully and illegally dismissed from the service of the defender, to his loss, injury, and damage. The defender pleaded justification. The jury found for the pursuer—damages one farthing.

A. MONCRIEFF moved the Court to apply the verdict of the jury, and in terms thereof to decern against the defender, with expenses.

PATTISON (with him the LORD ADVOCATE) opposed the motion for expenses, on the ground that the verdict of the jury substantially represented the amount of patrimonial loss incurred by the pursuer, and was not intended as a vindication of his character. He cited Paterson *v.* Ronald, January 31, 1820, 2 Murray's Reports, 188; and Paterson *v.* Walker, November 29, 1848, 11 D. 167.

A. MONCRIEFF (with him GIFFORD) argued that the case was assimilated in principle to cases of slander, in which nominal damages carried expenses; and in support of this quoted Balfour *v.* Wallace, December 3, 1853, 16 D. 110; Ross *v.* Macvean, June 2, 1860, 22 D. 1144; and Borthwick *v.* Gilkison, November 21, 1863, 2 M'Ph. 125.

The Court refused the motion. In the case of Borthwick, malice had been found by the jury. There was nothing of the sort here.

Agents for the Pursuer -- Wilson, Burn, & Gloag, W.S.

Agent for the Defender—R. P. Stevenson, S.S.C.

MACDONALD'S TRUSTEES *v.* MUNRO, *et e contra* (*ante*, vol. i., p. 259).

Expenses—The pursuers of an action who succeeded before a jury to the extent of one-half of their claim, found entitled to expenses.

These are counter actions betwixt the trustees of the late Captain Ronald Macdonald, who resided in Portobello, and Archibald Innes Munro, who was the deceased's servant. In the one action the trustees claimed payment from Munro of £600, being the contents of four bank cheques which he had uplifted from bank for his late master and failed to account for. In the other action, Munro claimed payment from the trustees of a legacy of £100 bequeathed to him in Captain Macdonald's will, and of a sum of wages due to him.

The first action was tried before the Lord President and a jury in April. The question submitted to the jury was limited to two of the cheques which were for £200 each. They jury returned a verdict for the pursuers for £200.

In the other action the only defence insisted in by the trustee was that Munro was in possession of funds belonging to them more than sufficient to pay the legacy and wages which he claimed.

The COURT to-day conjoined the actions, applied the verdict of the jury, and decerned against Munro for £200, under deduction of the sums claimed by him in the action at his own instance. In regard to expenses,

The LORD PRESIDENT said—Thes two cases stand in different positions. In regard to the first which I tried, I have looked at my notes of the evidence, and it appears to me that the defender Munro must be found liable in expenses. I take into consideration the whole evidence, the demand for explanations made by the trustees before the litigation commence, Munro's refusal to give them, the nature of his defence, and of the evidence by which it was supported. The defender had the means of giving the information which the trustees asked, and he should have given it. His own evidence does not seem from the result to have been at all satisfactory to the jury. In the other action the sums sued for were admittedly due, but the trustees contended that Munro was liable to them in a larger sum. In this they have proved to be right. Their action was first raised. If Munro had given an account in regard to the money drawn from bank, I think it is pretty clear that there would have been no litigation. The fair result is therefore, that in the second action neither party should be found entitled to expenses.

The other Judges concurred, and the trustees were found entitled to expenses in the action at their instance, and in the other neither party was found entitled to expenses.

Counsel for the Trustees—Mr Clark and Mr Shand. Agent—Mr J. T. Mowbray, W.S.

Counsel for Munro—Mr Gifford and Mr Deas. Agent—Mr John Robertson, S.S.C.

PATERSON *v.* THE PORTOBELLO TOWN HALL COMPANY (LIMITED).

Lease—Public Officer—Conflicting Interest. Commissioners of Police having entered into a lease with a Joint-Stock Company of which some of them were directors, held that the lease was not illegal. Case distinguished from Blaikie *v.* Aberdeen Railway Company.

This action is raised at the instance of Alexander Paterson, clerk to and representing the Magistrates and Town Council of Portobello, as Commissioners of Police of the burgh of Portobello, against the Portobello Town Hall Company (Limited), and concludes for reduction of, *First*, a pretended tack bearing to be entered into between the defenders and the then Magistrates and Council of Portobello as Commissioners of Police for the burgh of Portobello, and bearing to be dated the 10th and 12th days of February 1863, whereby the defenders are said to have let to the said Magistrates and Council of Portobello, as Commissioners foresaid, and their successors in office, certain parts and portions, therein specified, of a large building in the High Street of Portobello therein described, and

that for the space and payment of the rent therein mentioned; *Second*, pretended duplicate of said tack, bearing to be between the same parties and of the date foresaid.

The grounds on which it was sought to reduce the tack, so far as now disposed of, are expressed in the pursuer's 1st and 2d pleas in law, which are in the following terms:—1. The agreement between the Commissioners of Police of Portobello and the promoters of the Town Hall Company, for a lease of the premises in question, was illegal and contrary to law, and inept and ineffectual, in respect that at the time of said agreement the Provost and Bailies, and a majority of the Commissioners of Police, were promoters of the said Town Hall Company, and members of the provisional committee of said projected company. 2. The tack and duplicate tack called for are null and void and reducible, in respect that it was illegal in the Provost of Portobello and the other Commissioners of Police to enter into or be parties to such contract of agreement, while the Provost was chairman of, and he and the other Commissioners of Police, or a majority of their number, or any of them, were directors of the Town Hall Company, or were interested as members of the provisional committee, or as promoters, or shareholders, or otherwise, in the said undertaking.

The defenders pleaded, *inter alia*,—1. The grounds of reduction set forth on the record are insufficient in law. 5. The lease under reduction being the only legal evidence of the final contract between the parties, is not reducible as being contrary to or inconsistent with the previous negotiations between the parties. 7. The pursuer's first and second pleas in law are excluded by the 40th section of the General Police Act, 13 and 14 Vict. cap. 33.

The Lord Ordinary (Jerviswoode) appointed the pursuer to lodge such issue or issues as he may be advised, for the trial of the cause. There was annexed to his interlocutor the following

"*Note.*—This case presents features of a peculiar character, which have given occasion to a full and most anxious discussion before the Lord Ordinary, which had relation mainly to the questions raised under the first and second pleas stated on record, on the part of the pursuer, and to those pleas for the defenders, and more especially the 5th and 7th, which run counter to them.

"It seemed to be the desire of both parties that the Lord Ordinary should at once deal with the questions of law raised under the pleas to which he has adverted, and during the debate it did appear to him that such a course might here possibly be competent and advisable. But having since endeavoured to devote his best attention to the consideration of the whole matter, he has come to a different conclusion, and is of opinion that he ought not to proceed to judgment, even on the pleas which were argued before him, while the facts remain unascertained, and while it is still open to proceed to probation.

"The Lord Ordinary, with a view to bring this matter to a point, and to enable the parties to obtain the opinion of the Court, if thought advisable, in regard to it, has pronounced an order for issues in the usual form, which, if parties differ as to their terms, may be made subject of report in ordinary form.

"The more important of the matters of fact on which the parties here differ, and which, as it appears to the Lord Ordinary, require to be ascertained before judgment, are those which relate to the constitution of the agreement between the pursuer on the one hand, and the promoters, ultimately the members of the Town-Hall Company, on the other.

"It is maintained on the part of the former, under their first plea in law, that the agreement there referred to was illegal, in respect that the majority of the Commissioners of Police were promoters of the Town Hall Company before its actual formation. Their second plea in law is directed against the legality of the tack, as actually completed, while the Provost and other Commissioners of Police were directors, or otherwise interested as members of the Town Hall Company after its formation.

"These pleas are, in part at least, met by the defenders by an argument, rested on their fifth plea, to the effect that the lease itself, as the only legal evidence of the contract between the parties, is not reducible as being contrary to, or inconsistent with, the previous negotiations between the parties.

"But does the pursuer assent finally to deal with the questions here raised, on the footing as thus stated on the part of the defenders? Assuredly not.

"To ascertain the position which the pursuer here maintains it is necessary only to refer to his statements on record, from the first down to and inclusive of the 20th article of the revised condescendence on his behalf. From these statements it will be seen that the pursuer alleges that the transaction in relation to the erection of the Town Hall—the extent of accommodation—and in truth the *real arrangement* between the parties, was *concluded* in October 1861, while it is an ascertained and admitted fact that the Town Hall Company was not legally constituted as such until the month of December following.

"Accordingly, the defenders plead, and strongly maintain, that the lease entered into between the Company on the one hand, and the Commissioners on the other, affords the *only* evidence of the final contract, and is not reducible as being contrary to or inconsistent with the previous negotiations; while the fifth plea in law for the pursuer is to the effect that the lease is 'null and reducible, as being contrary to and in violation of the previous agreement of parties, and as having been obtained by fraud on the part of the Town Hall Company and their directors, taking advantage of their position as Commissioners of Police at the time.'

"In this state of the record, and while probation is open, would it be right that the Lord Ordinary should proceed to judgment on the pleas, to which he has referred, as having been discussed before him? He thinks otherwise; and all his experience tends to support the conclusion that it is his duty to have the facts ascertained in some form before the important questions of law which are here raised be dealt with at all.

"It may be right that the Lord Ordinary, before closing the present explanation of the course he has now taken, should refer briefly to the seventh plea in law for the defenders, under which it has been maintained before him that the first and second pleas in law for the pursuer are excluded by the terms of the exception contained in the 40th sec. of the Act of 13 and 14 Vict. cap. 33.

"The Lord Ordinary has not thought it expedient to deal with that plea *in hoc statu*, but it may be right that he should state his opinion that the clause cannot be pleaded so high as to *exclude* inquiry into the matters to which the said pleas for the pursuer relate."

The pursuer reclaimed, and argued that he was entitled without any inquiry to decree of reduction in respect of his first and second pleas in law. The parties lodged the following minute:—

"Pattison, for pursuer, and Nevay, for defenders, consented that the documents, in so far as consisting of principals, be held as genuine and authentic; and in so far as consisting of copies or extracts, be held as equivalent to principals; and they renounce probation in so far as relating to the pleas in law for the pursuers.

The Court appointed the parties mutually to lodge cases on the whole cause.

MOIR and PATTISON, for the pursuer, argued—The lease in question proceeded on the narrative that the Portobello Town Hall Company being in the course of erecting a large building in the High Street of Portobello, to be used partly as a public hall, and partly for other purposes, to be called and known by the name of the Portobello Town Hall, *had agreed* with the said Commissoners of Police, to let to them the parts of said building therein mentioned, to be occupied as council and police chambers, cells, and other purposes connected with the police establisment and the administration of the public affairs of the burgh; and the lease further bears that the Portobello Town Hall Company let to the Magistrates and Town Council of Portobello, and their successors in office, the parts and portions of the said building therein specified, and that for a space of fifteen years from and after the term of Whitsunday 1863. On the other part, the Commissioners by the said lease are said to bind and oblige themselves and their successors in office to pay to the Portobello Town Hall Company the sum of £80 sterling yearly, of rent or tack duty. The rent and the duration of the lease are exactly those which were specified in the correspondence which had passed between the parties. It was in respect of the agreement then made for a lease of that duration, and at that rent, that those terms were embodied in the lease. The lease bore to be in implement of that agreement. The validity of the lease, therefore, depends entirely upon the validity of the agreement, in pursuance of which it was entered into. If the agreement was contrary to law, the mere signing of the lease will not make it legal. If the agreement was not binding upon the Commissioners of Police as a body at the time it was entered into, no subsequent change in the constituent members of that body would make it so. *E converso*, if the agreement was legal and effectual at the time it was entered into, to bind the Commissoners of Police, no change in the constituent members of that body would relieve them of that liability. The validity and legal efficacy of the lease therefore depend upon the character of the agreement. The defenders say that there was no concluded agreement in October 1861, because the company not being then formed could not be bound by an agreement entered into before its formation. The fact that the company was not incorporated until December 1861, does not affect either the completeness or the validity and efficacy of the agreement. It is quite settled that the committee for promoting a joint-stock company may enter into valid agreements, which will bind the company, provided the agreement relates to matters which were intended to subserve, and did subserve, the accomplishment of the ends and objects of the company when incorporated. (Mags. of Helensburgh *v.* Caledonian Railway Company, 2d Dec. 1852, 15 D. 148, and cases there referred to.) Such an agreement will be binding upon the company, if it be of a nature which the company itself, when incorporated, could enter into. In this case the agreement was of this nature. In Oct. 1861, the entire body of Commissioners except one were active and leading promoters of the intended company. As Commissioners of Police they were entrusted with the interests of Portobello, they owed duties of a *fiduciary nature* to the community of Portobello, and they were bound by their office to make the best possible bargain that they could for the benefit of the burgh. On the other hand, the interest which the same individuals had in the promotion and the success of this joint-stock Company led them in an entirely opposite direction, and necessarily would induce them to get the highest possible rent from the Commissioners, on the most favourable terms for the company, and for the smallest expenditure of the company's capital upon the building, while the knowledge which they had of the Commissioners' affairs gave them the greatest advantage in promoting the interests of the company. In this state of matters, they fall directly within the rule and principle of the case of Blaikie *v.* the Aberdeen Railway Company (House of Lords, 20th July 1854, 1 Macqueen, 461), and the series of cases upon which that decision proceeded. That rule is laid down by the Lord Chancellor in the case of Blaikie, in these words:—"It is a rule of universal application, that no one having duties to discharge of a fiduciary nature may be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into." Again, he says, "It may sometimes happen that the terms in which a trustee has dealt or attempted to deal with the estate or interest of those for whom he i trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still, *so inflexible is the rule that no inquiry on that subject is permitted.*" And again—"It is true that the questions have generally arisen in agreements for purchase or leases of land, and not, as here, in a contract of mercantile character; but this can make no difference in principle. *The inability to contract* depends not on the subject-matter of the agreement, but on the *fiduciary character of the contracting party*; and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than of an agent or trustee employed in selling or letting lands." The principle upon which the fiduciary character creates in him who has it an inability to contract, is founded not only upon the impossibility of a person in that situation to deal fairly where his duties call him in one direction, and his interests in another; but also upon the ground that the law will not allow such a person to make use of the knowledge which his position gives him in regard to the affairs of his principal, so as to contract in regard thereto either with himself as individual, *or as agent, or representing a third party with whom he is connected.* The cases in which the rule has been applied are not confined to the case of agreement between trustees on the one hand, and the same persons as individuals on the other. The principle is of universal application. It includes the case not only of trustees or of such managers as the Commissioners of Police, but it extends to

directors of a joint-stock company, law agents, counsel, stockbrokers, and all others to whom the interests of others are committed, and who stand in a confidential relationship towards the principals, and act *in any fiduciary capacity* which imposes upon them the obligation of obtaining the best terms for their principal, or which has enabled them to acquire a knowledge of the affairs of the principal.—White and Tudor's Leading Cases, vol. i., p. 130, et seq. After the formation of the joint stock company in December 1861, the Provost and one of the Bailies of Portobello were directors of the Town Hall Company, and the Provost was *chairman of these directors*, as well as *chairman of the Board of Commissioners*. The Provost, as chairman of the directors, had a duty to perform to the Town Hall Company of a fiduciary nature, which was in direct conflict with, and opposition to, the duty which he had to perform to the town and community of Portobello. As Provost and Commissioner of Police of Portobello, and as chairman of the commissioners, his duty led directly in the opposite direction—to get the largest amount of accommodation for the least possible rent. There was therefore a clear and unmistakeable *conflict of duties*. Assuming a desire to perform both his duties, it is impossible that they could be both performed by the same individual. But, further, not only were the duties conflicting, so that it was impossible for them both to be performed faithfully by the same person, but the personal interest of that person would necessarily lead him to give more attention to the duties to the one set of principals than to the other. He had a pecuniary interest to promote the prosperity of the Town Hall Company. He had no such interest as a Commisioner of Police. In addition to this, he had, as Commissioner of Police for Portobello, and chairman of the Commissioners, knowledge and information of which it was impossible that he could divest himself when he came to address himself to the performance of those duties which were incumbent upon him towards the Town Hall Company as their director and chairman. He could thus use, or was under the temptation of using, that knowledge against the interest of those for the protection of whose interests he had acquired it. It is no doubt true that the rule, as generally stated, is applicable to the cases where the obligations that the fiduciary character imposes come into conflict with the *personal interests* of the individual who holds that character, and that the case of Blaikie and most of the others which have occurred are cases of that description. But the principle upon which those decisions have proceeded is equally applicable to cases where there is a *conflict of duties*, and where the personal interest is not the disturbing element. The object of the rule is to protect the interests of persons, no matter whether individuals or corporate bodies, whose affairs are managed by others for them, who are bound to them in duties of a fiduciary nature. Accordingly, the cases have not been confined to those where the *individual* interest of the person having the fiduciary character was the disturbing element. On the contrary, in one important case, decided by Lord Chancellor Eldon (*Ex parte* Bennet, 4th—11th Feb. 1805; 10th Vesey's Chan. Rep., p. 380), it was ruled that the solicitor to a commission of bankruptcy could not, *as agent for another person*, purchase the bankrupt estate, and that one of the *commissioners* could not, *as agent for another person*, make such a purchase. It is not correct to say that the judgment of the House of Lords in Blaikie's case settled that a party having the position of chairman of directors of a public company, when he transacts in that character, does so *solely as a trustee* for his company, and not for his individual interest. Nothing of the kind was there decided, nor was it even held as matter of fact that Mr Blaikie was, on the railway company's side of the contract, held as contracting, not for his own individual interest as a partner of the railway company, but *solely* as a trustee on behalf of the company. That question was not raised. All that was held in that case in regard to Mr Blaikie's position with the railway company was that Mr Blaikie, as chairman of the directors, *owed duties to the railway company of a fiduciary nature*, and was therefore in the position to which the rule applied. Neither did the decision affirm that in every case where a person holds a character or position as trustee, director, or otherwise, in respect of which he owes duties of a fiduciary nature to others, he has not, and cannot have, any personal interest in the matters which he may transact in the character or position so held by him. With regard to the doctrine in question, it is a mistake to say that in England it is in conflict with the common law, and that it is only applied in the Equity Courts as an *extraordinary remedy in the administration of trusts*. Neither do the difficulties or anomalies which the defenders suggest as possible to arise from the application of the principle to private trusts create any difficulty even if their possibility were admitted. For it is no objection to the soundness of a legal principle or to its application that it may in some exceptional cases apparently operate injustice. This must happen in the application of every general principle. Neither is there force in the argument of the defenders *ab inconvenienti* of the rule, as applicable to contracts between or with such trustees as they designate "of a more public character." The defenders assume that the pursuer's action rests solely upon the authority of Blaikie's case, and that the whole doctrine is to be looked for within the four corners of Blaikie's case, and nowhere else. This is an entire mistake. Blaikie's case is undoubtedly very important and valuable as an illustration of the principle which was there applied. But the principle does not rest upon that case, and the rule is not confined to the precise circumstances of that case. It was established long before; and it is of general application. There is no such distinction between the two cases as that supposed by the defenders. The contract was there made with the firm of Blaikie Brothers. That firm was as much a separate *persona* in law from the individuals composing it as the Town Hall Company is a separate person in law from the individual shareholders. It is a fallacy to say that, in reference to the rule of law founded on by the pursuer, and the considerations on which it is based, the position of Provost Home, as director and chairman of the directors of the Town Hall Company, is the same with that of any shareholder. He holds the position of manager, or one of the managers, of the company, and as such he is identified with all the acts of that body of directors. He is thus a principal party to the making of the contract on both sides, besides being interested in it as a shareholder.

But the defenders plead that the operation of the rule founded on by the pursuer is excluded by the 40th sec. of the General Police Act, 13 and 14 Vict., c. 33. It enacts, "That no commissioner shall, directly or indirectly, derive any emolument or profit from any business or work of any descrip-

tion performed or to be performed by him under this Act; nor shall any commissioner be capable (while he holds office as such commissioner) of enjoying any office of profit to be created or established by virtue of this Act, or while he has any share or interest in any contract relating to the execution thereof; nor be capable of standing as a candidate for any such office, or be a competitor for any such contract, save and except contracts entered into with any chartered or joint-stock Company of which such commissioner may be a partner." The only effect of this exception is to do away, in regard to such contracts, with the incapacity previously declared, of both holding office as commissioner and being a competitor for contracts relating to the execution of the Act. It only applies to limit the operation of the prohibition as to contracts. And there is only one prohibition regarding them. The only effect of the exception therefore is to permit a commissioner to compete for contracts of the excepted kind. The effect merely is to say that the circumstance of a commissioner being a partner of a joint-stock company with which a contract has been entered into shall not disqualify him from being a commissioner or impose upon him the necessity of vacating office. And this satisfies the whole words, and is the whole intendment, of the clause. But, besides, the exception—be its effect what it may—does not apply either in its letter or spirit to such an agreement as that which forms the subject-matter of the present action. For the commissioners in the present case were not merely partners of the joint-stock company with which the lease was entered into; but they were the directors or managers of the joint-stock company, or the active and leading promoters of it, by whom and with whom—while they at the same time held the office of commissioners—the whole terms of the contract were arranged. In whichever character they may be held to have entered into the contract, they were truly *agents* for and represented the Town Hall Company in doing so.

NEVAY, for the defenders, argued—The question is, whether the present case comes within the scope of the principles enunciated in the case of Blaikie. There are in the circumstances of the two cases important points of dissimilarity, if not of contrast. In the one case, the trustee was dealing with himself as an individual for his own personal profit, and in the ordinary course of his own private business. In the present case it is a body of trustees that contracts with another body of trustees, a circumstance which, *prima facie* at least, at once distinguishes this from Blaikie's case in its most essential feature. It is impossible to maintain that in this case the Commissioners of Police, as trustees for the community of Portobello, were dealing with any one of their own number as an individual, or that, on the other hand, any one of the Commissioners in his individual capacity was dealing with the Commissioners for his own personal and individual profit. If Blaikie's case, therefore, can be regarded at all as a precedent, it can only be to show that the pursuer's case wants the very element which is essential to its success. The very ground-work of his case is, that Provost Home, as chairman of the directors (and being also a shareholder) of the Town Hall Company, was dealing for his own individual interest. But the judgment of the House of Lords in Blaikie's case settled this, that a party having the position of chairman of directors (who necessarily is a shareholder) of a public company, is a trustee for the company, and that when he transacts in that character he does so solely as a trustee for his company, and not for his individual interest. On the other hand it is quite true that Provost Home had, as a shareholder of the Town Hall Company, a personal interest in the subject-matter of the contract between the Company and the Police Commissioners. But can the principle laid down by the House of Lords reach such a case as this? It is a principle so rigorous and inflexible that it admits of no inquiry as to the fairness or unfairness of the transaction. That is a principle which in the commerce of the world, and according to the ordinary principles of jurisprudence, should not be readily or liberally extended in its application. It must suffer limitation somewhere; and even within the apparent scope of its operation there may be exceptional cases where its application might produce greater mischiefs and inconveniences than those it was intended to remedy or prevent. The principle of Blaikie's case cannot be applied to cases of contract between two bodies of private trustees, where one or more of the trustees may have personal interest in the subject-matter of the contract; because the application of the principle blindly and indiscriminately to such cases might produce greater mischiefs than the principle was intended to prevent or remedy. No two railway companies or banking companies, or other public trading companies, acting through directors, could make an effectual contract with each other, however important and necessary, if it chanced that a director of the one company was also a director, or even a shareholder, in the other. Private trustees could not keep a bank account, or give a bond of credit to, or borrow money from a public banking company, if one of the trustees happened to be a director or shareholder of the bank. If the principle can be applied to the present case, it must annul all contracts for the lighting of railway stations, or contracts with municipal corporations for the lighting or cleaning of towns, or supplying them with water. It is plain that if Blaikie had only been a shareholder of the railway company, he could not have stood towards them in the relation of a trustee. As a shareholder he had no trust duties to discharge to the company. As a shareholder he could not contract on behalf of the company. If, therefore, he had been only a shareholder the question decided in his case could never have arisen. The contract in that case would have been simply one between two trading bodies, the one a public company and the other a private firm, of both of which Blaikie was a partner, with this difference, that he could and did contract on behalf of the private firm, but could not and did not contract on behalf of the public company. The Town Hall Company is the legal person on whose behalf this contract was made. The company cannot be identified with any individual partner, nor any individual partner with the company, nor any one partner with another. Yet the opposite of all these conditions were just those on which the reasoning in Blaikie's case proceeded. The principle of Blaikie's case, and of the leading case of the York Buildings Company *v.* Mackenzie, 3 Paton's Appeal Cases, p. 579, was simply this, that no one in the position of a trustee could purchase any part of the trust-estate, or transact with himself individually for his individual or personal interest, in relation to the trust-estate; a principle grounded on a consideration of the policy of preventing a conflict of duty with private interest. In all the cases relied upon by the pursuer the challenging party was not any one of a body of trustees with whom the illegal contract was

said to have been made, or the trustees themselves as a body, but the party whose interests were improperly dealt with. In the one class of cases it is the beneficiary as against the trustee; in another, it is the principal as against the agent; while in Blaikie's case it was not the directors but the company itself as against the contracting director. It is plain that if in the latter case the assembled shareholders had unanimously agreed to hold by the contract, the directors could have had no power to challenge it. It was truly, therefore, the shareholders who were suing, not in the name of or through the directors, but by themselves, under their legal designation of the Aberdeen Railway Company. The consideration therefore arises, whether the Police Commissioners, who are here truly the pursuers, can maintain this action to reduce a contract admittedly made by themselves. There is no averment that the beneficiaries, being the community of Portobello, are dissatisfied with the contract; or, at all events, there is no member of the community of Portobello seeking to set it aside.

In the *second* place, the contract in this case is protected by the General Police Act, 13 and 14 Victoria, cap. 33, which was adopted by the burgh of Portobello in 1851. In sec. 40 there are certain things which are prohibited; and there are certain other things which are specially exempted from the prohibition. The things prohibited to a commissioner, and which shall be held illegal are, in substance and meaning, these:—1. The receiving of any remuneration for any business or work done by him under the Act. 2. The holding of any salaried office under the Act, or of any share or interest in any contract relating to the execution of the Act. 3. Being a competitor for any salaried office under the Act, or for any contract relating to the execution of the Act. The intention was to exclude a commissioner in his private capacity, as a merchant, tradesman, or otherwise, from being a party, for his own profit, to any contract with the commissioners, relating to the execution of the Act. If that is the true meaning of the enactment with regard to the exclusion of a commissioner from contracts, the meaning of the exception in the enactment of "contracts entered into with any chartered or joint-stock company, of which such commissioner may be a partner," is obvious. Whatever contracts it is incompetent for a commissioner individually to enter into with the commissioners may yet be competently entered into by him as a partner of any chartered or joint-stock company. In other words, the Act plainly legalises contracts between the commissioners and such companies, although any or all of the commissioners may be partners of such companies, and gives its sanction to the common law principle with regard to the things not prohibited, and bears out and confirms the distinction which has been maintained in the argument for the defenders on the common law doctrine.

At advising—

Lord Curriehill—It is of importance to keep in view who are the parties to this case, and what is the subject of the litigation. The pursuers are the Magistrates and Town Council of Portobello, as Commissioners of Police; the defenders are the Portobello Town Hall Company (Limited)—a joint-stock company. There are no individuals called as partners of that company, but just the company itself. The action concludes for the reduction of a lease which had been granted by the defenders to the pursuers of certain portions of a large building in the High Stteet of Portobello. The grounds of reduction are numerous; two of them are stated generally in the first and second pleas in law, and the others are in the six subsequent pleas. The Lord Ordinary, before whom the case came, thought it was one for inquiry, and he pronounced an interlocutor on the 28th February 1865, appointing the pursuer to lodge within eight days such issue or issues as he might be advised for the trial of the case. The pursuer thought there were sufficient grounds for deciding the case without going into an inquiry, and he accordingly lodged a reclaiming note, which was now before the Court, in which he asked the Court to recall that interlocutor and sustain his first and second pleas in law, repel the defences, and reduce the lease. With the view of obtaining judgment on that question, the parties lodged a joint-minute consenting that the documents lodged should be held as genuine, and renouncing probation in so far as related to the first and second pleas in law of the pursuer. Parties were heard at great length upon these pleas, and the Court pronounced an interlocutor appointing them to lodge cases on the whole cause. That interlocutor did not recall the Lord Ordinary's interlocutor, but appointed the case to be argued as it then stood. The cases contain very full argument on the first and second pleas in law for the pursuer, and upon the seventh plea in law stated for the defenders, which was supposed to afford an answer to the first and second pleas for the pursuer. I have considered the cases with all the attention in my power, and upon the question—the only question which was embraced in them—I have been able to come to a decided opinion. The first of these pleas in law was this—"The agreement between the Commissioners of Police of Portobello and the promoters of the Town Hall Company for a lease of the premises in question was illegal and contrary to law, and inept and ineffectual, in respect that at the time of the said agreement the Provost and Bailies of Portobello, and a majority of the Commissioners of Police, were promoters of the said Town Hall Company, and members of the Provisional Committee of said projected company." This agreement related to a transaction said to have been entered into in the year 1861, and before this joint-stock company was formed, for it was not constituted until 20th December 1861. Now, if that agreement had been concluded and acted upon, and had been the subject of reduction in this case, I am not prepared to say what opinion I would have formed regarding it. But it was not the subject of this action; it is not before us. There was no reduction of it sought, and therefore I abstain from saying anything on what would have been the merits of that agreement if it had been the subject of the case. The second plea in law was the important one, and it was in these terms:—"The tack and duplicate tack called for are null and void and reducible, in respect that it was illegal in the Provost of Portobello and the other Commissioners of Police, to enter into or be parties to such contract or agreement while the Provost was chairman, and he and the other Commissioners of Police, or a majority of their number, or any of them, were directors of the Town Hall Company, or were interested as members of the Provisional Committee, or as promoters, or shareholders, or otherwise, in the said undertaking." The grounds upon which this plea was maintained might be stated shortly thus: That the defenders being functionaries of a public body, entrusted with the management of it, were placed in a *fiduciary* character in behalf of that body, and had

no power to enter into contracts with themselves regarding the affairs of that public body. He thought that was the principle upon which this lease was challenged; and in support of it reference was made to the well-known case of Blaikie *v.* Aberdeen Railway Company, which was decided in the House of Lords, and in which that principle was affirmed. If the case depended upon that principle I would be of opinion that the contract now under challenge would be null and void. But the answer which is made to that challenge is, that the Provost and certain of the Magistrates of Portobello were no doubt Commissioners of Police, and were in that respect acting in a *fiduciary* character, yet they did not transact with themselves as individuals. The party with whom they transacted, and with whom they entered into this contract of lease, was a joint-stock company in its corporate capacity; and the question came to be this, whether that principle to which I have alluded was sufficient ground for annulling a contract, however fair it might be, however useful it might be—without any inquiry into the merits themselves—whether all such contracts between the functionaries of a public body like the Commissioners of Police, or any joint-stock company in which they or any of them were partners or functionaries, were by law null and void, without any inquiry whatever into the merits or demerits of the contract. After giving the case every consideration in my power, I think the answer made by the defenders is a good one. I think it would be a most extraordinary state in which this country would be placed if it were law that no public body could enter into a contract with any joint-stock company whatsoever—however useful, however fair, such contract might be—if it happened that any of its functionaries were also directors, or any of them partners, of that joint-stock company. I need not enlarge upon that. The business of the country could not proceed. I think the principle does not apply here, because these functionaries were not dealing with themselves individually; they were dealing with a body under a separate management, and the principle was altogether inapplicable. There remained behind allegations which deserved most serious consideration. On these the Lord Ordinary had given no opinion, but had ordered inquiry. And if the Court refuses this reclaiming-note, as I think it ought to be refused, the case will be cleared for such inquiries. There was a good deal of argument on the seventh plea-in-law of the defenders, that the pursuer's first and second pleas-in-law are excluded by the 40th section of the General Police Act, 13 and 14 Vict., cap. 33. I think, however, that common law itself is sufficient to decide the question, and I go entirely upon it. On these grounds I think that the reclaiming-note should be refused, and that the Lord Ordinary's interlocutor snould be affirmed.

The other Judges concurred, and the reclaiming-note was refused, with expenses.

Agent for Pursuer—R. Pasley Stevenson, S.S.C.
Agent for Defenders—J. Knox Crawford, S.S.C.

Wednesday, May 23.

LORD ADVOCATE *v.* MACLEAN.

Property — Foreshore — Barony Title — Parts and Pertinents — Prescriptive Possession. In an action to have it declared that the foreshore between high and low water-mark belonged to the Crown *jure coronæ*, and formed part of its hereditary revenues, which was defended by a proprietor whose lands were adjacent to the shore, on the ground that he had possessed it during the prescriptive period under a barony title with a clause of parts and pertinents—*Held* that this defence was valid to exclude the Crown's rights, and that it had been established.

This action was raised on behalf of the Crown by the Lord Advocate, as representing the Commissioners of Woods and Forests, to have it found and declared "that the soil and ground of the coasts and shores of the sea round Scotland, below high water-mark of ordinary spring-tides, as far as the same have not been granted to any of our subjects by charter or otherwise, belong to us *jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland; that it should be found and declared that the soil and ground of the shore of the sea below high water-mark of ordinary spring tides, *ex adverso* of the lands of Ardgour, lying within the Sheriffdom of Argyle, the property of the said Alexander Maclean, belong exclusively to us." The case arose in connection with a pier or jetty which Colonel Maclean wished to erect on the foreshore at Corran Ferry, with the view of improving and giving access to his estate. Colonel Maclean had obtained the sanction of the Admiralty to make the erection, but he was then called upon by the Crown to take a conveyance from the Crown as proprietor of the foreshore of that part of it which was required for the proposed pier. Colonel Maclean having declined to do that, this action of declarator was brought. In defence, Colonel Maclean maintained the following pleas:—(1) "The *solum* of the shore, subject to the right of the Crown, as trustees for public uses, being carried by the defender's titles as part and pertinent of his estate, the action is unfounded, and he should be assoilzied from its conclusions. (2) The *solum* of the shore having been possessed by the defender and his predecessors for time immemorial on a prescriptive title, as part and pertinent of his estate, the right thereto alleged on the part of the Crown is unfounded."

A proof of possession was allowed by the Lord Ordinary, the import of which, as admitted in argument by the Crown, was that the defender had during the prescriptive period exercised various acts upon the shore, such as beaching and unloading vessels upon it, collecting seaware, taking gravel and stones, pasturing cattle, and digging for clay.

The LORD ADVOCATE, the SOLICITOR-GENERAL, and T. IVORY, for the Crown, argued—The Crown has a proprietary right in the foreshore. The shore is a pertinent of the sea and not of the land—it is a separate estate from the land altogether—and as the king is *dominus* of the sea, his sovereignty extends over the shore also. Therefore, unless the shore is specially conveyed, it remains the property of the Crown. It cannot be carried along with the adjacent lands by a clause of parts and pertinents, because it is not a pertinent of the land but of the sea. It is not disputed that the defender has exercised various acts upon the shore during the prescriptive period, but those do not constitute legal possession, upon which a title can be prescribed—they were not acts of possession by which all others were excluded — they merely amount to exercise of rights of servitude, which can not confer rights of property.

The following authorities were relied upon by the pursuer:—Balfour's Practicks, p. 626; Bell's Principles, 1st edit., sec. 641; last edit., sec. 641-643; sec. 739; sec. 746, Duff's Feudal Con-