

as if there had been no marriage-contract at all. It is disposed of by will. After the will a child is born. The question is whether the birth revokes the will so far as concerns the house. And it appears to me that where the history and legal effect of the two deeds are understood, marriage-contract does not enter into the question at all. The question is, did the birth of the child revoke his will? and the marriage-contract does not affect that question, because it contains nothing to set up the will as against the revocation created by the child's father. The fact that it confers a liferent of the house in Rosebery Crescent, leaving the fee at the absolute disposal of the husband, is nothing to the purpose, because that is just the condition which would have arisen if there had been no marriage-contract at all, except of course in so far as regards the liferent. But the grant of liferent by contract, although it may burden a fee destined to another by will, neither confirms nor revokes that destination. Therefore it seems to me that there is nothing to exclude the operation of the presumption.

The only other point which was pressed, and which I do not desire to omit from consideration, is whether the son, in a question as to the house in Rosebery Crescent, is not sufficiently provided for already by the marriage-contract. Now, whether the son was amply provided for in the father's opinion or not I do not know, and I decline to speculate, because we have no expression of the father's opinion before us. But it appears to be altogether immaterial to the question. We cannot infer from any other provisions that the father set up this will as against this child. The case of *Stewart Gordon*, in which it was held that other provisions in favour of the child whose birth was said to have revoked the will might be taken into account as a material consideration, was a very different one from this. The true ground of judgment in that case, as I read it, was that the mother, on the eve of the birth of her child, looking forward to that event, recognised by a writing under her hand a previous will which she had executed. That was held to be an action on her part sufficient to set up the will as against the effect of the *conditio*. That seems to me to have been a perfectly reasonable inference, because if the lady, knowing that she had made a will, and looking forward to the birth of a child, nevertheless announced, not in so many words but by clear implication, that she desired it to stand, I do not think that that affects in any way the application of the general rule. I agree that we should answer the question as Lord M'Laren proposes.

LORD PRESIDENT—I am entirely of the same opinion.

LORD ADAM was absent.

The Court answered the first alternative question in the affirmative.

Counsel for the First Party—Pitman—Lee. Agents — Pearson, Robertson, & Finlay, W.S.

Counsel for the Second Parties—Blackburn — Pearson. Agents — Kinmont & Maxwell, W.S.

Friday, March 4.

## OUTER HOUSE.

[Lord Low.]

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF LESLIE *v.* ARCHIBALD AND OTHERS.

*Burgh—Burgh of Barony—Transference of Burgh Property to Statutory Municipal Authorities—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), secs. 22, 26, and 41—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 20, 23, 24, and 25—Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), secs. 8 and 33.*

The town of Leslie was by ancient charters, dating from 1457 to 1627, erected into a Burgh of Barony, with power to elect a council. A council had regularly been elected down to the present time. In 1865 the householders of the burgh adopted the General Police and Improvement (Scotland) Act 1862 and elected Commissioners of Police in the manner provided by sec. 41.

*Held (1)—following Commissioners of Blairgowrie*, 4 F. 72, 39 S.L.R. 67—that the property of the burgh was in 1865 transferred to the Police Commissioners by sec. 22 of the Act of 1862, and was now vested in the present Provost, Magistrates, and Councillors of the burgh, the successors of the commissioners under the provisions of the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900; (2) that the Barony Council had been superseded by the present Provost, Magistrates, and Councillors of the burgh; (3) but that with regard to certain property, such as the commonry of the Burgh of Barony, in which the feuars of the Burgh of Barony had exclusive rights, the Provost, Magistrates, and Councillors were bound, with certain trifling exceptions, to hold and apply it for behoof solely of the inhabitants of that part of the modern and extended burgh which corresponded with the old Burgh of Barony.

The pursuers in this action were the Provost, Magistrates, and Councillors of the burgh of Leslie, acting under and in terms of the Town Councils (Scotland) Act 1900, and the defenders were the Council of the Burgh of Barony. The pursuers sought declarator "that the whole subjects, lands, and other properties, heritable and moveable, funds, customs, properties, rights,

privileges, and others, belonging to the Burgh of Barony of Leslie, are vested in and belong to the pursuers and their successors in office as the Provost, Magistrates, and Councillors of the Burgh of Leslie . . . that the defenders and all others claiming to be councillors of the said burgh by virtue of the charters mentioned in the summons, or in any other way, are no longer entitled to any part or share in the management or administration of the affairs of the community, or in the management or administration of the said subjects, lands, and other properties, funds, customs, and others belonging to the community, and that their whole duties, powers, functions, and privileges, as representing the community or burgesses thereof or as Magistrates, Councillors, or office-bearers thereof, have ceased and determined, and that it is now incompetent and illegal to constitute, appoint, or elect any Magistrates, Councillors, or other officers for the said burgh otherwise than in accordance with the provisions of the Town Council (Scotland) Act 1900: And that the pursuers have now the only good and undoubted title to possess, manage, and administer the said subjects, lands, and other property, heritable and moveable, funds, customs, properties, rights, privileges, and others of whatever kind, for behoof of the burgh and community of Leslie, as fully and freely as the same were or might have been possessed, managed, and administered by the defenders or other persons claiming to be the Town Council of the Burgh of Barony of Leslie prior to the adoption by the said burgh of the General Police and Improvement (Scotland) Act 1862." . . .

By Crown charter under the Great Seal, granted by King James the Second, dated 21st March 1457, the town of Leslie was created into a free burgh of barony with a grant of market and fair and the customary rights of free trading. By charter dated 10th July 1539, in favour of George third Earl of Rothes, King James the Fifth ratified the creation of Leslie into a burgh of barony, and in addition to the rights of trade given by the charter of 1457 conferred upon the burgh the power of electing yearly bailies and other officers necessary for its government. By charter dated 8th Decem-ber 1514, George third Earl of Rothes feued a portion of his lands in specified lots to certain feuars, who became the burgesses of Leslie. On the narrative that sasine had not been taken upon the last-mentioned charter, John fifth Earl of Rothes granted a feu charter, dated 3rd October 1627, in favour of the inhabitants of the burgh of Leslie, therein named, of certain specific feus, including the portions feued by the feu charter of 1514, and he conferred upon the said feuars all the privileges of burgesses of a burgh of barony, and, in particular, decerned and ordained the inhabitants and community of the burgh to have power of creating their bailies, treasurer, officers, sergeants, and free burgesses of the said Burgh of Barony. The disponees under the charter were infeft for their respective rights and interests, conform to instrument

of sasine dated 5th October 1627, and registered in the Register of Sasines for the county of Fife and Kinross at Cryle the 18th day of November 1627. From a very early date the inhabitants of the burgh, acting under these charters, have been in the habit of electing a council of seventeen inhabitants for the management of the affairs of the burgh, the last election having been held on 24th October 1901, when the defenders to the present action were elected.

In 1865 the householders of Leslie adopted the General Police and Improvement (Scotland) Act 1862.

Section 41 of that Act provided that in burghs of regality or barony having magistrates and councils, the householders might vest such magistrates and councils with the office of commissioners for executing the Act, or might elect commissioners. The householders of Leslie adopted the latter alternative and elected commissioners. Sections 22 and 26 deal with the question of property, and are as follows:—Sec. 22—"Notwithstanding anything in this Act in the contrary implied or expressed, and whether this clause be adopted by any burgh or not, it is hereby enacted that in all cases where the management of the police affairs of any burgh is transferred from any existing commissioners of police or other persons to the magistrates and council of such burgh, or to commissioners elected under this Act, the whole lands, heritages, assessments, claims, demands, and effects of every kind belonging to or vested in the commissioners of police or other persons from whom such management is so transferred, or in any person on their behalf, and all powers, rights, and privileges conferred on or vested in such commissioners of police or other persons by any Act of Parliament, in so far as not inconsistent with the provisions of this Act, shall be and are hereby transferred to and vested in the magistrates and council or commissioners to whom such management is so transferred, who shall be liable for the whole debts and obligations of the commissioners of police or other persons from whom such management is transferred, and in all cases where this Act shall be adopted in whole or in part such adoption shall not free or redeem the magistrates and council or commissioners of police of any part from any obligations incumbent on them at the date of such adoption, and all such obligations, together with the powers of assessment and other faculties therewith connected, shall remain in full force as if this Act had not been adopted." Sec. 26—"The monies arising from the assessments hereby authorised to be levied, and all other property acquired by the commissioners in pursuance of the powers hereby granted, shall be and the same are hereby vested in the commissioners and their successors for the uses and purposes mentioned in this Act, and for no other purpose whatever."

By virtue of the Burgh Police (Scotland) Act 1892, sections 20, 23, 24, and 25, the commissioners of the General Police and

Improvement (Scotland) Act of 1862 became the police commissioners under the Act of 1892, and their election has regularly taken place under the provisions of the statute. Section 20 deals with the question of property, and is as follows:—"In all cases where the management for the purposes of this Act of any burgh is by the application of this Act transferred from any existing commissioners of police or other persons acting under any of the general Police Acts or any local Police Act to commissioners under this Act, the whole lands, heritages, assessments, claims, demands, and effects of every kind belonging to or vested in the commissioners of police or other persons from whom such management is so transferred, or in any person on their behalf, and all powers, rights, and privileges conferred on or vested in such commissioners of police or other persons by any Act of Parliament, charter, or writing, in so far as not inconsistent with the provisions of this Act, shall be and are hereby transferred to and vested in the commissioners under this Act, and they shall be liable for the whole debts and obligations of the commissioners of police or other persons from whom such management is transferred. . . . And where by any Act of Parliament any powers and duties are conferred or imposed upon the commissioners under the General Police Acts, such powers and duties shall now be vested in and discharged by the commissioners under this Act."

By the Town Council (Scotland) Act 1900, section 8, it is provided that "the whole rights, powers, authorities, duties, liabilities, debts, . . . of (a) commissioners under the Burgh Police (Scotland) Act 1892, . . . and the whole lands, works, and other assets vested in them . . . be transferred to, imposed on, and vested in the town council." By section 33 it is provided—"The existing town council or commissioners and magistrates of every burgh shall be the town council and magistrates under this Act, and the existing commissioners of a police burgh shall individually be the councillors thereof, but their retirement and the filling up of vacancies shall be regulated by this Act."

The property belonging to the Burgh of Barony was the following, as set forth in a joint-minute of admissions—" (1) Certain common lands (hereafter referred to as 'the commonity') extending to 30 acres or thereby. (2) Arable lands extending to 12 acres or thereby. (3) Feu-duties arising from portions of the aforesaid commonity which have from time to time been feued. (4) Rent of stances used at the annual spring market. (5) Rents for accesses from private gardens in the new town to the commonity. (6) Buildings of the Town Hall. (7) Twenty shares of the Leslie Joint-Stock Water Company. (8) A legacy of £500 left by the late Robert Miller, Esquire. (9) Various charters, written documents, books, accounts, plans, and various other effects and moveables. All the above are hereinafter specially described and dealt with:

"The said commonity is not described in

the burgh charters but is described in an early minute book of the Burgh of Barony, the minute being signed by the granter of said charter, the Earl of Rothes, and the Bailies. The commonity was possessed by the community of the Burgh of Barony at the time the before-mentioned charter was granted in 1627, if not earlier, and the boundaries of the commonity have from time to time been altered. The said commonity has been from time immemorial used solely for the following purposes, viz.—For grazing cows, casting feal and divot by the feuars of the Burgh of Barony, as a bleaching green, and for recreation generally, subject to the regulation and control of the Barony Town Council. Feuars of the Burgh of Barony of Leslie had and have the exclusive right of pasturing cows on the commonity, each feuar holding one rood being entitled to graze one cow. Tenants of feuars have also from time immemorial been allowed to graze cows on the commonity, but only on payment of grass mail. Several feuars at the present time pasture cows on the commonity, and from time immemorial the feuars have exercised this right. Such right is a valuable privilege and is considered to enhance the value of the feuars' properties. The Barony Council have let the pasturage to persons who are not feuars or tenants of feuars and charged a rent therefor. The annual value of the commonity may be taken to be about £50 yearly, and the average rental received during the past three years from the commonity has been £10.

"The before mentioned arable land extending to 12 acres or thereby is held upon written titles. The said arable land now held by the Burgh of Barony was not part of the original grant, but was acquired by contracts of excambion at various times from the Countess of Rothes and others in exchange for portions of the commonity alienated in lieu thereof. The said excambied lands are declared in the titles thereof to be held by the disponees for themselves and behalf of the hail community of the said baron burgh as a part of the common lands of Leslie, and for the benefit of the feuars of Leslie, in the same way as they had previously held the other common lands. Said lands are let at the yearly rent of £22.

"The feu-duties referred to consist of the duties payable by certain vassals in respect of portions of the commonity which have been feued out by the Burgh of Barony from time to time. In particular (1) Feu-duty amounting to £4 payable by the Leslie Gas Company for a half acre or thereby of commonity feued to them. (2) Feu-duty of 5s. payable by the Leslie Water Company, now by the Leslie Town Council, for ground occupied as a site of a house used by the company. (3) Feu-duty payable for Croft Cottage, which is built on part of the commonity, and the amount of which feu-duty is determined by the fiars prices for the year. The amount for the past year was 17s. 6d. (4) Feu-duty for houses at Croft, built on a portion of said

commonly and now held by Miss Mary Hardie, the amount of the feu-duty being determined by the fiars price for the year. The amount for the past year was 7s. 6½d. (5) The feu-duty for the site of the old Green Inn belonging to the Honourable George Waldegrave Leslie, built upon part of the commonly, and the amount of which feu-duty is determined by the fiars prices for the year. The amount for the past year was £1, 11s. 4d.

"The stances are let to stall-holders, showmen, and others at the annual fair or market held in Leslie in April of each year and at other times. The said accesses from private gardens in the New Town to the commonly are charged for at the rate of 1s. to 2s. 6d. each yearly, but the privilege is granted to the feuars of the Old Town without charge. The rents payable by such stall-holders on the average amount to £12, 10s. and for such accesses to £2, 10s. yearly.

"The buildings of the Town Hall were erected in the year 1872 at a total cost of £954, 0s. 8d. The site for the Town Hall was granted by Mr Andrew Wyllie of Prinlaws in exchange for ground granted by the Barony Council to him for the purpose of widening the public footpath leading along the main street to his works at Prinlaws. The said Andrew Wyllie also granted free of charge the whinstone of which the hall is built. The subscriptions were raised from the community of Leslie generally, other natives of the town who had left, and several gentlemen in the neighbourhood. The Barony Council possessed a hall previous to the erection of the present building. The old hall was sold for £100, and the price thereby received from the sale was applied *pro tanto* in meeting the cost of the new hall. In order to complete the building the sum of £600 was borrowed under a bond and disposition in security, but of this sum £100 were repaid by the Barony Council prior to the bazaar after mentioned. In 1895 a public bazaar was held, and contributions towards the bazaar were given from the public of Leslie and neighbourhood, and the bazaar realised £415 or thereby. The balance of the sum required to pay off the bond was contributed by Mr James Smith of Dhuloch, near Inverkeithing, who was at one time a papermaker in Leslie. The Barony Council promoted the movement for erecting the Town Hall and also promoted the bazaar. The title is taken in name of the Town Council of the Burgh of Barony of Leslie. The hall has been used since its erection for public meetings, political, social and religious, also for entertainments. The pursuers and all others excepting the Barony Council paid a rent for the use of the hall when required. In particular, the pursuers pay a rent of £2, 10s. per annum for the Police Court held within an ante-room of the hall. The administration of the hall has hitherto been and presently is in the hands of the Barony Council. No. 15 of process is a correct copy of the title on which the said hall is held. The revenue derived from the use of the hall has

amounted on an average for the last five years to £50 annually.

"The shares of the Leslie Joint-Stock Water Company stood in name of the magistrates of the Burgh of Barony of Leslie. The said shares were granted to the said magistrates as a consideration by the company for leave to erect a water tank on part of the property belonging to the Burgh of Barony, and also as a consideration for the right of wayleave through the said commonly. The whole undertaking of the Water Company has now been purchased by the Town Council of the Burgh of Leslie and the shareholders have been repaid the full value of their shares. The sum received by the Barony Council in payment of the shares held by them amounted to £45. The income derived from said shares amounted on an average for the past five years to £1, 10s. annually.

"The legacy of £500 referred to was bequeathed to the Magistrates or Bailies and Councillors for the time being, in Leslie, in the year 1898, by the late Robert Miller Esquire, Edinburgh, a native of the Burgh Barony, the income to be used for improving the amenity of the town, or for improving the common, or for any other purposes the Magistrates and Bailies or Town Councillors might consider best for general good of the public of the said town. The legacy is burdened with and subject to a liferent, and no income has yet been received from this source.

"On or about the 29th September 1865 the householders of Leslie adopted the provisions of the General Police and Improvement (Scotland) Act 1862. Police Commissioners were duly elected in terms of the provisions of the said Act down to 1893, when the election duly took place under the Burgh Police (Scotland) Act 1892, and after 1903 under the Town Councils (Scotland) Act 1900. The original Burgh of Barony erected by the charters was mainly but not wholly within the limits of the police boundaries of the burgh fixed by the Sheriff in 1865. The boundaries of the police burgh were extended in the year 1887, and include the district known as Mansfield. The only portion of the Burgh of Barony property outwith the police boundaries is the arable land extending to 12 acres or thereby. The said arable land was, as already mentioned, acquired by excambion in lieu of portions of the commonly which have been alienated, and which portions so alienated were partly outwith the boundaries of the police burgh. A plan is produced showing the boundaries of the police burgh as extended, and also showing the area of the 'Old Town' as the Burgh of Barony is locally designed.

"The population of the said police burgh, according to the last census, was 2164, of which the population of the 'Old Town' or Burgh of Barony is estimated at one-half.

"The whole revenues derived from the Burgh of Barony, amounting in all to £115 per annum or thereby, exclusive of the income to be derived from said legacy of £500, have been and are administered

by the Barony Council. These revenues have never been administered by the Barony Council on behalf of the general community of Leslie. The police burgh of Leslie, as will be seen from the aforesaid map, is not conterminous with the Burgh of Barony. A large portion of the police burgh known as the 'New Town' is outwith and quite distinct from the Burgh of Barony. Amongst the distinctive features of the Burgh of Barony is the tenure of property there held of the Rothés estate. In the Burgh of Barony property is held by feudal tenure, whilst in the New Town property held from said estate is leasehold. No portion of the revenues of the Burgh of Barony has ever been applied for the benefit of the community of the New Town. These revenues have from time immemorial been applied for the benefit of the community of the Old Town only. In particular, said revenues have been applied to the following purposes, viz.—(1) For the administration of the Burgh of Barony—*e.g.*, salaries of officials, election and such-like expenses. (2) For payment of rates, taxes, and public and parochial burdens, and upkeep of the various properties. (3) For improving the amenity of the Burgh of Barony, draining the common, erecting and maintaining seats on common, repairing footpaths on common, &c. A very large sum has also been spent in renovating and maintaining the Town Hall. Prior to 1895 a large portion of the income was utilised to meet the interest upon the Town Hall debt. Since then surplus income has mainly been accumulated and expended upon draining the Common and improving the Town Hall."

The pursuers contended that by virtue of the various Acts set forth they had taken the place of the Barony Council; that the whole of the property of the Burgh of Barony had vested in them, and that they were entitled to apply it for the purposes of the extended Burgh of Leslie as it now existed.

The defenders contended that they were entitled to retain and administer the whole property, and claimed further as feuars to have a private and patrimonial right in the property and the revenues of the Burgh of Barony. They founded on the 27th section of the Burgh Police (Scotland) Act 1892, which provides for the saving of patrimonial rights, and is as follows:—“(1) When by the operation of this Act the right to elect the municipal authority is transferred and taken away from the existing body of electors, and any dispute arises as to whether any right or privilege exercised by all or any of such is a public or a private and patrimonial right, such dispute shall be decided by the Sheriff, but an appeal shall lie to the Court of Session; (2) Nothing contained in this Act shall affect the patrimonial rights of any body of feuars at the passing of this Act administered by the town council of any burgh or barony.”

LORD LOW—“The first question in this case is whether, when the General Police

Act of 1862 was adopted by the Burgh of Barony of Leslie in 1865, the funds and property which were then held by the Bailies and Council of the burgh were transferred to the Commissioners of Police by virtue of the provisions of section 22 of the Act.

“I am of opinion that I must regard that question as being settled in the affirmative, so far as I am concerned, by the judgment of the First Division in the *Blairgowrie* case (4 F. p. 72). I have examined the papers in that case, and I do not find any substantial distinction between the position of the burgh of Blairgowrie and that of Leslie.

“It was also held in the *Blairgowrie* case that the charters of the Burgh of Barony were superseded by the Burgh Police Act of 1892 and the Town Councils Act 1900, and that the commissioners under these Acts were substituted for the Barony Town Council.

“I must accordingly hold (1) that the funds and property held by the Barony Council in 1865 were transferred to the Commissioners of Police who were then elected, and are now vested in the pursuers; and (2) that the Barony Council has been superseded by the pursuers.

“The question remains—For what purposes were the Commissioners of Police entitled to hold the funds and property transferred to them by the 22nd section of the Act of 1862, and for what purpose do the pursuers now hold them?”

“That is a question which the Act of 1862 seems to me to leave in considerable doubt. The 22nd section simply provides that the transfer shall take place, and says nothing about the purposes for which the transferred property and funds are to be applied. Then the 66th section, which deals with the application of funds and property vested in the commissioners, seems to me, if read strictly, not to include property transferred by the 22nd section. It merely provides that all moneys arising from assessments ‘and all other property acquired by the commissioners in pursuance of the powers hereby granted’ shall be vested in the commissioners ‘for the uses and purposes mentioned in this Act and for no other purposes whatever.’ Now, property belonging to a barony council and transferred to the commissioners by the 22nd section could not be accurately described as acquired by the commissioners in pursuance of powers granted by the Act, having been transferred by the Act itself.

“Therefore, although I do not find anything in the Act which indicates the intention that the Commissioners should hold money or property for any other purposes than those of the Act, I do not think that there is anything which, as regards the property transferred by the 22nd section, actually prohibits their doing so. I confess that I should have inferred from the language used in the 22nd section that what was contemplated was the transfer from one body of police managers to another of property which had been held and used for police purposes only. The judgment in the *Blairgowrie* case, however, shows that the

enactment is not so limited, and that being the case I do not think that there is anything in the Act which compels me to hold that the Police Commissioners were required or empowered to use for the purposes of the Act only transferred property which had been acquired and held for other purposes altogether.

"It is therefore necessary to see what was the nature of the property which was transferred from the Barony Council of Leslie to the Commissioners of Police. The most important was the burgh commonty, the value of which was about £50 a-year. In the minute of admissions it is stated—'The said commonty has from time immemorial been used solely for the following purposes, viz.—For grazing cows, casting feal and divot by the feuars of the Burgh of Barony, as a bleaching green, and for recreation generally, subject to the regulation and control of the Barony Town Council. Feuars of the Burgh of Barony of Leslie had and have the exclusive right of pasturing cows on the commonty, each feu holding one rood being entitled to graze one cow. . . . Such right is a valuable privilege, and is considered to enhance the value of the feuars' properties.'

"The Barony Council also held twelve acres of arable land which were acquired by excambion for a portion of the commonty. In the titles it is declared that the lands shall be held on behalf 'of the hail community of the said Baron Burgh as a part of the common lands of Leslie, and for the benefit of the feuars of Leslie' in the same way as the common lands had previously been held.

"Now, the summons concludes for declarator that the whole property 'belonging to the Burgh of Barony of Leslie' is vested in and belongs to the pursuers, and that the latter are entitled to possess and administer the property 'for behoof of the burgh and community of Leslie as fully and freely as the same were or might have been possessed, managed, and administered by the Town Council of the Burgh of Barony of Leslie prior to the adoption by the said Burgh of Barony of Leslie of the General Police and Improvement (Scotland) Act 1862.'

"Assuming that I am right in holding that the property was transferred to the Commissioners of Police when the General Police Act was adopted, I think that it is plain that the pursuers are entitled to possess and administer the property as fully and freely as it was possessed and administered by the Barony Council. The important question, however, arises upon the claim of the pursuers to administer the property 'for behoof of the burgh and community of Leslie.' The existing burgh of Leslie, of which the pursuers are the Provost, Magistrates, and Councillors, is a police burgh, which includes the Burgh of Barony and a great deal more. In fact, the map which has been produced shows that the existing burgh is, roughly speaking, twice the extent of the Burgh of Barony. The pursuers, however, maintain that they are entitled to administer the property of the

Burgh of Barony for behoof of the whole police burgh and the community thereof, and that they are entitled, and therefore bound, to treat the property as being vested in them for the purposes of the Police Acts.

"In so far as regards the commonty and excambed lands, I do not think that that claim can be sustained. It proceeds upon the view that the property was transferred by the 22nd section of the Act of 1862 to the Police Commissioners for the purposes of that Act, and for no other purpose. I have already pointed out that the Act does not in terms make any such provision, but that, on the contrary, there is no direct enactment as to the purposes for which the transferred property shall be held by the commissioners. And in the absence of enactment I do not think that it is possible to read the Act of 1862 as taking away from the feuars of the Burgh of Barony their rights in and to the commonty of the Burgh, and as throwing that commonty into a common fund for the police purposes of a different community and a different area.

"I am therefore of opinion that if the Police Commissioners elected under the Act of 1862 had actually obtained possession of the commonty they would have been bound to hold it for the same uses as those for which it had been held by the Barony Council from time immemorial, and to continue to the feuars of the Burgh of Barony their exclusive rights of grazing and of casting feal and divot, subject to regulation and control by the Commissioners.

"I also think that the excambed lands must be treated just as if they were part of the commonty. I have already pointed out that under the titles the Council held them 'for behoof of the hail community of the Baron Burgh as part of the common lands of Leslie,' and I do not think that the Act of 1862 authorised the Police Commissioners to hold them for any other purpose. To have done so would have been not only to transfer a trust-estate to a new body of trustees, but to alter the trust. That I take it could not be done except by express enactment.

"If that would have been the position of the Commissioners under the Act of 1862, it is not, I understand, disputed that the pursuers are in the same position.

"I may here say that in so far as the commonty has been used for the purposes of recreation it has evidently been open to the whole community, and not confined to inhabitants of the old burgh; and in that respect (and there may be other uses in the same position, such as bleaching clothes) of course no limitation can be put upon the administrative powers of the pursuers.

"The commonty and the excambed lands yield a certain amount of revenue. The latter are let at a yearly rent of £22. In regard to the commonty proper, it appears that the whole of the common is not required for the grazing of the cows of those feuars who exercise the privilege, and accordingly the Barony Council have been in the habit of letting a part of the common

and it is stated that the yearly rent derived therefrom has in recent years been £10. Then a few small pieces of the common have been feued (although under what circumstances does not appear) at feu-duties amounting in all to £7.

"The Council also received a number of small payments (amounting in all to £2, 10s. yearly) in consideration of their allowing owners of houses outside of the Burgh of Barony to make accesses from their gardens to the commony.

"The Council also held certain shares in the Leslie Water Company. These shares had been allotted to the Council in respect that they had allowed the Water Company to erect a tank upon the common, and had also given a way-leave through the common. The Water Company's undertaking has now been acquired by the pursuers, who bought out the shareholders and paid to the Barony Council for the shares held by them the sum of £45.

"The revenue from the sources which I have detailed amounts (including interest upon the price of shares in the Water Company) to some £43. That revenue arises directly or indirectly from the commony, because it is composed of rents paid for grazing on the commony, rents of lands excambed for a part of the commony, feu-duties for feus of parts of the commony, and payments made in respect of rights or privileges in regard to the commony.

"The Barony Council were also possessed of certain market stances (which I suppose were originally connected with the grant of market and fair conferred upon the Burgh by an ancient charter), which they let to stall-holders and showmen at the annual fair which is held in Leslie, and the average amount derived therefrom is £12, 10s. a-year.

"I think that the market stances were very much in the same position as the commony. Both formed part of the common good of the Burgh of Barony, and I do not think that the market stances any more than the commony became part of the general police fund of the police burgh.

"I also think that the revenue of and connected with the commony, and derived from the market stances, must be in the same position as these subjects themselves.

"The Barony Council are also vested in the Town Hall of the burgh. As the hall was not built until the year 1872 it could not have been transferred to the Commissioners of Police in 1865. It was erected at a cost of over £950, of which £100 was contributed by the Barony Council (that sum being the price at which they sold an old hall belonging to them), and the remainder was ultimately raised by the proceeds of a bazaar and by voluntary contributions. It is plain that the Town Hall was intended for the whole police burgh, and not for the Burgh of Barony alone, and therefore I think that the pursuers are entitled to have it declared that it is vested in them for behoof of the community without any limitation.

"Further, the Barony Council held a sum of £500, which a gentleman of the

name of Miller, who appears to have died in 1898, directed his testamentary trustees in the trust-disposition and settlement left by him to pay to 'the Magistrates or Bailies and the Town Council for the time being of Leslie, Fifeshire, in trust for improving the amenity of the town or for improving the common, or any other purpose the said Magistrates or Bailies and the Town Council may consider best for the general good of the public of the said town.'

"It is plain, and indeed is not disputed, that the pursuers are now the persons, and the only persons, answering the description of the trustees to whom the legacy is bequeathed, and that they are entitled to obtain possession thereof. They of course will hold it as trustees for the purposes directed in Mr Miller's trust-disposition and settlement. What is the best way of carrying out the testator's wishes will be for them to consider, and I do not think that it is possible for me to do more in this action than to find that the sum falls to be held by the pursuers as trustees for the purposes directed by the testator."

His Lordship pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons, subject, however, to the findings and declarations following, namely—First, that the commony of the Burgh of Barony of Leslie; the arable lands held by the Bailies and Council of the said Burgh of Barony; the mid-superiority of the feus which have been granted of portions of said commony; the market stances of the said burgh belonging to the said Bailies and Council; and the sum of £45, being the price paid to the said Bailies and Council by the pursuers for the shares held by the former in the Leslie Joint-Stock Water Company; and also the rents, feu-duties, interest, and other payments derived or to be derived from or in connection with the said subjects, shall be held and applied by the pursuers for behoof of the feuars and inhabitants of the said Burgh of Barony alone, in accordance with immemorial usage, and for no other purpose except in so far as the said commony has been used by the inhabitants of the police burgh of Leslie, whether resident within the limits of the Burgh of Barony or not, for recreation or other purposes: And secondly, that the legacy of £500 bequeathed to the Magistrates, Bailies, and Town Council of Leslie by the deceased Robert Miller, Esquire, of No. 6 Chester Street, Edinburgh, shall be held by the pursuers as trustees of the said sum, and applied by them for the purposes specified by the said Robert Miller in his trust-disposition and settlement and for no other purpose; and decerns: Further, but subject to the before-written findings and declarations, decerns and ordains the defenders to deliver up to the pursuers the whole title-deeds, writs, charters, plans, minutes, minute books, records, accounts, account books, and in general all documents of whatever nature in their posses-

sion in any way relating to the property or affairs of the said burgh of Leslie, and to cede possession of the whole heritable subjects belonging to the said burgh or the community thereof to the pursuers, in order that the pursuers may enter thereto and possess the same in terms of the foregoing findings and declarations in all time coming; prohibits and discharges the defenders from interrupting, interfering with, troubling, or molesting the pursuers or their successors in the said property, possession or administration of the same, as foresaid in all time coming; decerns and ordains the defenders to lodge an account of their intrusions with the said property or any part thereof: Finds neither party entitled to expenses, and grants leave to reclaim."

Counsel for the Pursuers—Campbell, K.C.  
—Sandeman. Agent—W. J. Lewis, S.S.C.

Counsel for the Defenders—Guthrie, K.C.  
—Anderson. Agents—Fletcher & Morton,  
W.S.

Thursday, May 12.

## SECOND DIVISION.

[Lord Pearson, Ordinary.]

### WOOD v. WOOD'S TRUSTEES.

*Expenses—Action in which Expenses Found Due Followed by Separate Action to Recover Amount.*

*Held* that the rule is absolute that as between parties to an action all questions of expenses must be determined in the action in which the expenses are incurred.

James Wood, cab-driver, 4 Murdoch Terrace, Edinburgh, and another, raised an action against the trustees of the deceased John Wood, 2 Sciennes Hill, Edinburgh, in which the pursuers sought to recover a sum of £218, being expenses to which they had been found entitled in an action of count, reckoning, and payment at their instance against the same defenders.

In the action of count and reckoning referred to, an interlocutor was pronounced on 9th January 1902 by which, *inter alia*, the pursuers were found entitled to expenses, but they never obtained decree for the taxed amount thereof, having failed to lodge their accounts.

That action was finally disposed of on 1st July 1903.

The present action was raised in August 1903.

On 23rd December 1903 the Lord Ordinary (PEARSON) dismissed the action as incompetent.

*Opinion.*—"The pursuers are sons of the deceased John Wood, and the defenders are the trustees under John Wood's will. The claim in this action is for payment of a sum of £218, 8s. 2d., being the expenses to which it is said the present pursuers were found entitled in a previous action of count and reckoning at their instance against the same defenders.

"In that previous action the pursuers, by interlocutor of 9th January 1902, were found 'entitled to expenses generally down to 18th June 1901,' other than certain expenses there mentioned; and, on the other hand, the defenders were found entitled to certain expenses. Accounts of these expenses were allowed to be lodged, and a remit was made to the Auditor to tax and report. The defenders lodged the account of their expenses, and the Auditor's report thereon was approved, subject to certain objections stated by the defenders. The pursuers, however, failed to lodge their account of expenses; and after repeated enrolments by the defenders to have them ordained to do so, a state showing the interim division of the trust estate among the beneficiaries was prepared, irrespective of the pursuers' claim for expenses. That state was approved by interlocutor of 18th February 1903, which also fixed the balances due by the defenders to the two pursuers, and decerned therefor. On a reclaiming-note by the pursuers, this interlocutor was affirmed; and I understand it has since been extracted, on the footing that it exhausted the cause.

"The pursuers now bring this action in order to have effect given to the finding of expenses in their favour contained in the interlocutor of 9th January 1902. They produce an account of these expenses; and they desire now to have it remitted to the Auditor for taxation. In other words, they propose now, in a separate action, to take up the incidental procedure in the action of count and reckoning at the point where it was left through the unexplained default of themselves or their law-agent. I have not to consider whether it might have been possible to resuscitate that action so as to give effect to the claim, for the discussion before me proceeded distinctly upon the footing that it is now too late to do so, and that a separate action was necessary.

"I think the pursuers' demand is quite out of the question. It furnishes a strong illustration of the propriety of what I have always understood to be a rule of practice, that, as between the parties themselves, all questions of expenses must be determined in the action in which the expenses are incurred. There may be apparent exceptions, but none of them touches the present case, and, indeed, I know of no exception to the rule as I have stated it. Even if, as being a rule of practice, it were capable of being relaxed, this is certainly not a case for relaxing it.

"It is suggested that after all the liability was determined in the previous action by the finding in the pursuers' favour, and that the present claim is merely for decree conform, or for constitution of the debt. In my opinion it cannot accurately be so described, but even if it could, I should desiderate some authority on or practice in support of the pursuers' contention as applied to a matter of expenses.

"It may seem hard that the pursuers should lose the right to recover so large an account as appears to have been incurred. But it has been lost through default. If it