

It is said that, so far back as 21st August 1843, Dr Fletcher gave Mr Graham authority to raise money to pay these premiums; and that if Mr Graham had borrowed the amount, and paid the lender the yearly interest of the sum so borrowed, he would have been entitled to charge Dr Fletcher with interest on that payment. The inference drawn is that Mr Graham, or his representative, should be placed now in the same position as if such borrowing had taken place.

I consider this inference to be illogical. If Mr Graham had borrowed the amount of the premiums, and paid the interest of the sum he borrowed to the lender, he would have been undoubtedly entitled to charge Dr Fletcher, with interest (that is, simple interest, at 5 per cent.) on the amount so paid: but purely in the character of a cash payment, made on account of Dr Fletcher. He would not in that case have had any interest at all to charge on the capital sum represented by the premium, because this he had not advanced. But matters were entirely changed when Mr Graham, in place of borrowing from a third party, took himself the creditor's place, and lent the capital. He then became simply creditor, entitled to the ordinary rights of such, and no more. The interest on the advance was not then a cash payment made for Dr Fletcher out of Mr Graham's pocket. It was the current unpaid interest on a creditor's advance. In the case of borrowing from a third party, the creditor who lent the money would not have been entitled to claim compound interest; and as little, I think, could Mr Graham when taking the creditor's place. The same principle exactly, which would give Mr Graham if advancing interest to a third party lender right to charge interest, but only simple interest on the advance, limits his claim to simple interest when his actual cash advance is of the capital sum of the premium.

It was contended that Mr Graham, or his representatives, are entitled to full indemnification for the loss of the money advanced by him. I think that this is simply to place his claim for interest under another name, without altering the nature of the case. Mr Graham was no doubt entitled to full legal indemnity; but the indemnity which the law grants to a creditor advancing money is, except in certain special cases, simple interest at 5 per cent., and this is, in such a case, full indemnity in the eye of law. I see nothing abstractly inequitable in the claim, considered in itself. The only objection to it is that the law does not allow it. The case not being one resting for an exception either on contract or usage, Mr Graham was just a creditor making a loan of money; and no further interest can be charged than is allowed to any such creditor.

In so finding, I think the question before us is exhausted. No other mode of calculating interest except that of yearly accumulation at 5 per cent. has been submitted by the pursuer.

LORD DEAS—I concur in holding that in this case no sufficient grounds have been made out for annual accumulations. There may be a little of equity in favour of the claim, but if I were to go into the circumstances I might find equities on both sides.

LORD PRESIDENT—I concur with Lord Kinloch. I can find neither principle nor authority to support the finding in the Lord Ordinary's interlocutor.

The judgment of the Court was that the Lord

Ordinary's interlocutor of 7th July be recalled in so far as it found the pursuers entitled to compound interest; *quoad ultra* that it be adhered to; that the interlocutor of 12th July be recalled, and in place thereof the defenders be ordained to make payment of the sum of £1688 to the pursuers. and that the defenders be found entitled to expenses from date of interlocutor reclaimed against, and the pursuers to three-fourths of previous expenses.

Agent for Reclaimers and Defenders—James Macknight, W.S.

Agents for Respondents and Pursuers—A. & A. Campbell, W.S.

Tuesday, December 20.

NICOL AND OTHERS v. THE TOWN COUNCIL
OF ABERDEEN.

Jurisdiction—Corporation—Personal Exception—Homologation. A Town Council having by a majority determined upon the purchase of certain lands lying adjacent to the town, partly as a judicious and profitable speculation, but more particularly with a view to control the feuing plan, and carry out certain improvements in the locality by throwing a bridge across the river, &c., for the general good of the community, a suspension and interdict against their proceeding to complete the purchase, by performing their part of the agreement entered into with the seller, was brought by the opposing minority in the council.—*Held* (1), That this Court has undoubted jurisdiction to interpose for the control of a town council, or other such public body, when their proceedings are either in excess of their powers, or are manifestly opposed to the real interest of the community which they represent. (2) That such town council has very ample powers and discretion in the management of the affairs of the community, and it requires a very exceptional case, and a gross abuse of that discretion, to warrant this Court in interfering. (3) That admittedly there was here no excess of power, and that the circumstances were such that the Court had not the same opportunity of judging of the expediency of the transaction in question as the town council, and that the town council had so judged in the fair exercise of their discretion, and the Court could not therefore interfere.

Farther, where the transaction in question was the purchase of one-half *pro indiviso* of a property, with the avowed intention of afterwards acquiring the other half *pro indiviso*, and where a member of the council who was materially interested in this second half was present and voted, as necessary to make up a quorum at the meeting of town council at which the purchase of the first half of said property was determined upon, and the offer of the seller accepted—*Held* that approbatory and confirmatory acts of the town council at ensuing meetings, at which the said interested person was not present, obviated any objection which might have been taken on the ground of his presence at the first meeting, and that it was not therefore necessary to decide its effect upon the original transaction.

Observed that its effect was rather to render the transaction voidable than absolutely void.

This was a suspension and interdict brought on 17th June 1869 by Alexander Nicol, the then Lord Provost of Aberdeen, and certain other members of the Town Council of that city, against certain others, the remaining members, being a majority of the said Town Council, and against the said Town Council of the city of Aberdeen itself, as representing the community thereof. The prayer of this note of suspension and interdict craved their Lordships to interdict, prohibit, and discharge "the said respondents from applying the funds of the corporation of the city of Aberdeen, or from applying any monies to be raised on the credit of the said corporation, or of its revenues, by bond, bill, banker's advance, or otherwise, in or towards the purchase of that one-half *pro indiviso* appertaining to George Milne of Kinaldie, of all and whole the estate of Torry Farm, lying in the county of Kincardine, and near to the said city; and also to interdict, prohibit, and discharge the said respondents from granting or accepting any deed, or executing any act of council binding, or purporting to bind, the said corporation to acquire the said *pro indiviso* half of the said estate of Torry Farm; and in general, from proceeding further in relation to the purchase thereof."

Interim interdict was granted, and a record made up, stating the reasons of suspension, and answers thereto. From the statements of the complainers it appeared that Torry Farm estate is a small property lying on the opposite side of the Dee to Aberdeen, and cut off by the river from any direct communication with the town. The property of the estate is divided into two equal *pro indiviso* shares, the one-half belonging to George Milne, Esq. of Kinaldie, the other half being held by different parties in trust for Sir Alexander Anderson, as after mentioned. That certain members of the Town Council, who are among the present respondents, formed the purpose of purchasing the estate of Torry Farm for the city of Aberdeen, and that upon 4th January 1869 notice of a motion was given in the Town Council "for the appointment of a committee to enter into negotiations with the proprietors of Torry Farm estate, for the purpose of ascertaining at what price it might be acquired by the Town Council; to consider the propriety of constructing a bridge across a new channel of the Dee in the line of Market Street, and the means which may be made available for this object; and to consider what portion of the *solum* of the river to be reclaimed ought to be retained in the hands of the Town Council." This committee was appointed, and a special meeting of Council was held upon 22d April to receive their report, and also an opposite statement made by the Lord Provost and certain other members of Council.

The report of the said committee was to the effect, generally, that, according to the measurements of the Ordnance Survey, the estate consists of 209½ acres arable (of which 4½ acres are claimed by the Harbour Commissioners as part of the original foreshore made up by them), 6½ acres woods, braes, and occupation roads, and 3½ acres of pasturage. There is, besides, the Midchingle Inch, 16½ acres; but it is claimed by the Harbour Commissioners, as well as by the proprietors of Torry Farm. The gross annual rental of the estate is £800, and deducting public burdens, the net rental is £747, 15s. 7d. One-half of the estate is owned by George Milne, Esq. of Kinaldie, and

the Northern Assurance Company holds an absolute disposition of the other half of the estate *pro indiviso*, in security of certain advances made by that company to Sir Alexander Anderson, formerly Provost of Aberdeen. The reversion, after satisfying these advances, has been assigned to certain persons named in the report as trustees, one of whom is William Leslie, Esq., a member of the Town Council and one of the respondents. It was further stated that Mr Milne had offered to sell his *pro indiviso* half of the estate for £16,000, and Mr Francis Edmond, the agent for the parties interested in the other half, had stated that they were disposed to join in a sale, but did "not think it expedient in the circumstances to make an offer." It was further stated in the report that it would be necessary for the Aberdeen Harbour Commissioners, under the provisions of their Act of 1868, to purchase at least 25 acres of the arable land for the new docks, in addition to the piece of land in dispute. The report also showed that the transaction would involve a small present loss, but a very considerable prospective gain to the town. But that "the diversion of the river, the construction of a bridge, and the purchase of Torry Farm estate are so intimately connected, and depended so much the one upon the other, that it is very obvious they ought to form part of one scheme, or at least be carried out simultaneously;" and they proposed that the sum of £12,500 should be obtained from Sir Alexander Hay's mortification for maintaining the Bridge of Don (a trust in the hands of the Town Council), for the erection of the bridge, and that by an application to Parliament next session.

On the other hand, the Lord Provost, in his statement, pointed out that the purchase would occasion a heavy annual loss; that the above prices must be borrowed by the treasury of the city, which is already deeply in debt; that the chances of obtaining an Act of Parliament to deal with the Bridge of Don Trust were very uncertain; that the consequence of failure to obtain the Act would be very serious; that there was a fallacy in the committee's estimate of the surplus on the treasury accounts; that there were impending claims and probable losses which had not been taken into account by them; that there had been no valuation by practical men obtained by the committee; and that there was nothing to justify the purchase of the first half of the estate at the rate of £32,000, the sellers' price; that the estate, so recently as 1864, had been valued by a practical valuator for the Harbour Commissioners at only £22,400, since which the rent of a field of clay on the property had been restricted to the extent of £70 yearly, which, at twenty years' purchase, is equivalent to a reduction of that valuation to the extent of £1400; that the estate, in fact, was not worth the price proposed to be given for it; and that the purchase of the property, without any means of paying for it, was calculated seriously to embarrass the affairs of the city.

The resolutions proposed by Mr Barclay, the convener of the above-mentioned committee, were as follows:—"That, subject to the approval by a head court of the citizens, the Town Council resolve—1st. To accept the half of Torry Farm estate at the price of £16,000, as offered by George Milne, Esq. of Kinaldie. 2d. To offer the same sum for the other half of the estate to its proprietors. 3d. That, should the whole of Torry Farm estate be acquired by the town, the Council promote a bill in Parliament next session for the con-

struction of a bridge across the proposed new channel of the river Dee, and the application of £12,500 (or such other sum as the Council may hereafter determine) of the sum standing at the credit of the Bridge of Don Fund, to the construction of said bridge. That a head court of the citizens be called for the purpose of considering and determining as to these proposals." These were carried at the meeting of 22d April by a majority of 10 to 8, Mr William Leslie being absent from the meeting. The Lord Provost was requested to call a head court or public meeting of the citizens, to be held on 27th April. Such a meeting was accordingly held of the said date, the Lord Provost being in the chair; but the proceedings appear to have been of a disorderly character, both parties in the Town Council giving a different account of them, and presenting separate minutes of the proceedings to be recorded at the following meeting of the Town Council.

At this meeting of the Town Council, which was held upon May 3, Mr Leslie was present, and there were laid before the Council two letters from Mr Milne of Kinaldie, the first dated 27th April, addressed to the town-clerk, intimating that the Harbour Commissioners had that day served on him a statutory notice to treat for the purchase of 31½ acres of Torry Farm; that "it has thereby become impossible to carry out in its entirety my offer to the Town Council, which consequently must be held as fallen from. I am, however, still willing to negotiate arrangements with the Town Council which may give effect to my offer in an altered form." There was also read another letter from Mr Milne, dated 30th April, offering to sell his *pro indiviso* half of Torry Farm, excluding 31½ acres taken by the Harbour Commissioners under a statutory notice, and including in the sale his rights of compensation, and all his other rights under the notice, and that for £16,000, the entry to be at Whitsunday 1869. The offer to be binding on him if accepted on or before the 5th day of May, and the price to be payable at the same term. It was thereon agreed to hold a meeting of the Council on May 5th to consider this offer and the resolutions thereon, of which notice was given. The resolutions proposed at the meeting of the 5th May by Mr Barclay, the convener of the former committee, were—*First*, "That the Town Council accept the half of Torry Farm estate at the price of £16,000, and on the terms and conditions offered by George Milne, Esq. of Kinaldie, in letter of 30th April 1869." *Second*, "That the same price, terms, and conditions be offered to the proprietors of the other half." *Third*, "That it be remitted to the Torry Estate and Bridge Committee to conclude the purchase with Mr Milne of his half of Torry estate, to enter into negotiations for the purchase of the other half with its proprietors, to arrange for payment of the estate when purchased, and generally to take such steps as may be necessary for carrying out the preceding resolutions of the Town Council." The Lord Provost and those members who agreed with him absented themselves from the meeting, the Lord Provost sending a written protest. At the commencement of this meeting of Council only nine members were present, whereas ten are necessary to form a quorum. In order to form such quorum, Mr William Leslie was sent for, and came to make up the number, and his name appears in the minutes of the sederunt. The minutes bear that Mr

Barclay's first resolution was unanimously agreed to; "and, on the motion of Mr Barclay, the town-clerk was instructed to accept the offer of Mr Milne accordingly." The second resolution was then agreed to, "Mr Leslie stating that he declined to take any part in the proceedings of the Council in reference to this motion." The third resolution having been agreed to, Mr Leslie repeated his statement that he declined to take any part in the matter. The minute then proceeds thus:—"Thereafter, on the motion of Mr Barclay, seconded by Bailie Fraser, the Council authorised the city treasurer and town-clerk to subscribe and execute, on behalf of the Council, such documents as may be necessary for carrying out the above resolutions of the Town Council, and instructed the treasurer and clerk accordingly." The complainants specially averred that "Mr William Leslie, a member of Council present at the meeting at which the above resolutions were agreed to, and whose presence was necessary to constitute a quorum of the Council, was and is disqualified by personal interest from taking part in the said proceedings. In particular, Mr Leslie is a director (and, it is understood, a considerable shareholder) of the Northern Assurance Company, who are *pro indiviso* proprietors of one half of Torry Farm under an absolute conveyance, but really in trust for a debt due to them by Sir Alexander Anderson, advocate in Aberdeen. There are securities preferable to theirs to the extent of £11,000 over Anderson's half of the property. Their claims against Anderson are nearly £20,000, to meet which they have railway stocks and life policies conveyed to them, besides the half of these lands; but in consequence of a large decrease of value of the railway stocks there would be a deficiency, unless a considerably larger sum could be obtained for the lands than the complainants consider to be their value. But if £16,000 were obtained, it is believed that there would be a small surplus after satisfying the debt in full. The directors of the Northern Assurance Company have thus material interest in raising the price of the whole estate of Torry Farm. The act of the Town Council in buying Mr Milne's half of the property at £16,000 will have the effect of raising the price of the other half. Indeed, the complainants believe that the holding by a Town Council of an undivided half of such an estate, with the declared purpose of turning the whole to account for building, must almost necessarily involve their buying the other half at the holder's own price. Apart from his interest as a director and shareholder of the Northern Assurance Company, Mr Leslie individually has a direct interest in obtaining the highest possible price for these lands. He is one of twelve gentlemen who became bound as cautioners for Sir Alexander Anderson to the extent of £1000 each, and for whose relief Sir Alexander conveyed his reversionary interest in Torry Farm, after all other claims upon it had been satisfied. Mr Leslie and his friends have thus a personal interest in raising the price of the estate, so as to produce a reversion, after satisfying the Northern Assurance Company's claims."

At the next ordinary meeting of Council, held on June 7, the contract of sale of Mr Milne's *pro indiviso* half of Torry Farm, signed by him, was laid before the Council, and Mr Barclay moved that it be approved of and confirmed, and that the Council agree to conclude the purchase on the terms and conditions of the contract, and authorise

and direct Bailie Robert Urquhart, in place of the city treasurer, and the town-clerk, for and on behalf of the Town Council, to sign said contract, and expedite all necessary deeds for the transaction being fully carried through.

This was agreed to after a motion had been carried suspending the standing orders of the Council. At an adjourned meeting of the Council, held on June 14th, a motion "that the contract of sale between the Town Council and Mr Milne for the purchase of his half of Torry Farm be forthwith delivered, and that the purchase be fully carried through," was agreed to, the Lord Provost and minority dissenting and protesting. At neither of these meetings of 7th and 14th June was Mr Leslie present.

The complainers then went into a long account of the financial condition of the city, with a view of showing that the corporation were not financially in a position to enter into any transaction such as that in question, beneficially for the interests of the community.

They pleaded *inter alia*—“(1) The purchase sought to be interdicted is illegal, in respect that Mr William Leslie, a member of the Town Council, was and is personally interested in the estate, his individual interest being opposed to that of the corporation. (2) Specially, Mr Leslie having been present at the meeting at which the purchase was resolved on, and his presence being necessary to form a quorum, the contract is affected by his personal disqualification. (3) The purchase in question not being a purchase for the purpose of investment, but being to be made with borrowed money, and for the purpose of a building speculation, it is not a transaction within the powers of a municipal corporation, and it is specially objectionable as being the purchase of a *pro indiviso* interest in an estate.”

The respondents, on the other hand, stated that—“By an Act of last session of Parliament (1868) obtained by the Commissioners of the Harbour of Aberdeen, they (the Commissioners) were authorised to make a diversion of the river Dee, and to extend and improve the harbour and works connected therewith. The diversion of the river, and the new harbour works, or part thereof, are to be formed upon the lands of Torry Farm, lying to the south of and immediately adjoining the harbour of Aberdeen. For some years it has been apparent in Aberdeen that the increase in its shipping trade and population would necessitate an extension of the harbour, and of the accommodation both for the purposes of houses and works, and that from their position the lands of Torry Farm were best adapted, and would most likely be appropriated for these purposes. These lands, which extend to about 219 acres, besides about 22 acres, the ownership of which is disputed, were purchased in the year 1859 by Sir Alexander Anderson, George Milne, Esq. of Kinaldie, and John Blaikie, Esq., advocate in Aberdeen, jointly, for £15,000; and in the same year Mr Blaikie sold his interest to his co-proprietors for £1000 of premium. The purchase was made in anticipation of the property being very soon required for harbour and building purposes. In the year 1864 the Town Council of Aberdeen took into consideration the propriety of purchasing Torry Farm, and they made enquiry as to the terms upon which the lands would be sold. In consequence of those enquiries, an offer was made by the proprietors to sell the lands to the town for £28,000, but before

the Council had time fully to consider it, the offer was withdrawn. The Town Council, however, always kept in view the possibility of acquiring the said lands, and a large number of the citizens were in favour of the purchase.” Accordingly, upon 1st February 1869, the subject was brought up before the Town Council by Mr Barclay as narrated by the complainers, and the proceedings followed thereon as described by them.

The respondents farther stated, as their reasons for entering into the transaction, that they believed and averred “that the purchase which they have already made of Mr Milne's *pro indiviso* half of the lands of Torry is a prudent and judicious act of administration, both financially and as regards the laying out and disposal of the ground, so as to secure its being laid out for such purposes, and upon such plans as shall be most beneficial to the community and the city, and thereby avoid difficulties and inconveniences which have in recent years been felt in Aberdeen owing to the irregular manner in which ground in the city has been built upon and occupied. There is at present, and has for some time been, such inadequacy of house accommodation, and such a want of building-ground on the east side of Aberdeen, and also on the south side of the city, where Torry Farm is situated, that there is great necessity for something being done to remedy this state of matters. The most likely and the only mode of effecting this which has been suggested, is the building of a bridge across the river Dee, near the foot of Market Street, so as to bring the lands of Torry Farm into direct communication with the centre of the city. They are already connected with the city by a bridge across the Dee, but it is situated too far to the west for the desired object. One of the resolutions which was proposed and carried at the meeting of the Town Council on 22d April 1869, and at the head court of citizens on the 27th of that month, was in the following terms:—“(3) That should the whole of Torry Farm estate be acquired by the town, the Council promote a bill in Parliament next session for the construction of a bridge across the proposed new channel of the river Dee, and the application of £12,500 (or such other sum as the Council may hereafter determine) of the sum standing at the credit of the Bridge of Don Fund, to the construction of said bridge.” The nett stock of the said fund amounted at 30th September 1868 to £22,352, 12s. 2d., from which, had the whole lands of Torry Farm been acquired by the Town Council, it was proposed, with the authority of Parliament, to withdraw £12,500 for the building of a bridge across the Dee, which is of such importance to the city of Aberdeen, in connection with the increase in its shipping trade and population, that it cannot be much, if any, longer delayed; and its accomplishment would be highly beneficial to, and would greatly enhance the value of the lands of Torry Farm. In thus investing money in the purchase of land, the Town Council of Aberdeen have been simply following out and continuing a practice which they and their predecessors have always observed. They have from time to time, during the last two centuries, purchased and invested in land, to the great benefit of the corporate funds and of the community. The same course has been followed in Edinburgh and other burghs.”

With reference to the allegations in the suspender's statement with regard to the respondent Mr William Leslie having a personal interest in

the lands of Torry Farm, the respondents made several explanations, but their statements did not materially differ from those of the complainers, except as to occurrences which took place after the date of the meetings in question, and which have therefore little bearing on the present question. They concluded by stating that the suspenders, on caution, having obtained interim interdict, the respondents were prevented from paying Mr Milne the price, and from carrying out the contract of sale. In consequence, Mr Milne protested that he was free from the purchase, and was free to re-sell the property; and he has since sold his *pro indiviso* half to Mr Edmond for £16,000, being the same price which the respondents had agreed to give for it.

The respondents pleaded *inter alia*—“(4) The purchase of Torry Farm being in all respects valid and unexceptionable, and having been deliberately carried out and completed, it is incompetent to interfere therewith. (5) *Separatim*, the purchase being a proper, prudent, and advantageous one, the Court, supposing enquiry competent, should not interfere therewith. (6) Mr Leslie having no interest in the subject purchased, his presence at the meetings of Council was unobjectionable, even supposing that he had an interest in the other *pro indiviso* half. (8) The purchase having been made, approved, and completed, and the contract of sale signed at legal meetings of the Council at which Mr Leslie was not present, the objections to him are entirely irrelevant.”

On 18th May 1870 the Lord Ordinary (JERVIS-WOODS), on the motion of the complainers, allowed the parties a proof of their respective documents on record.

Against this interlocutor, allowing a proof, the respondents reclaimed.

SHAND, WATSON and MACDONALD for them.

SOLICITOR-GENERAL, M'LAREN, and BALFOUR for the complainers.

At advising—

The LORD PRESIDENT—The object of this proceeding by way of suspension and interdict is to prevent the Magistrates and Town Council of Aberdeen from carrying through a transaction for the purchase of a piece of land on the opposite side of the Dee from Aberdeen, called Torry Farm, or rather, more properly speaking, for the purchase of one-half *pro indiviso* of that subject. The grounds upon which the complainers support their case are, in the first place, that the resolution of the Town Council to enter into this transaction was carried by a majority of one—at least I think it was only a majority of one; but that is of little consequence, for it is said that one of the persons who was present at the meeting, and who was necessary to make a quorum, was disqualified from acting as a member of the Town Council with reference to that transaction. The second ground is that the transaction itself is one which the Town Council of Aberdeen is not entitled to enter into as a proper act of administration. Now, with regard to the first of these objections, it appears to me that the interest which Mr Leslie is alleged to have in this subject is not a very direct one, although it is certainly an intelligible interest. He is not proprietor, either in whole or in part, of the half *pro indiviso* which the Town are proceeding to purchase, neither is he interested as a creditor, or indeed in any other way, in that half of the estate; but it is said that he is interested in the other half *pro indiviso* of the same

estate, and that in two ways; The Northern Assurance Company are postponed creditors upon that other half *pro indiviso* of the Torry Farm, and Mr Leslie is a shareholder and director of the Northern Assurance Company. Again, he is one of twelve gentlemen who became bound as cautioners for the proprietor of that other half of Torry Farm, and they have a conveyance in relief of their cautionary obligation of his reversionary interest. So that in short he (Mr Leslie) is interested as a member of a Company which is a postponed creditor upon that other half, and he is also interested as one of twelve gentlemen who are creditors behind that postponed creditor in any reversion there may be. I do not think it necessary in the circumstances of this case to determine whether that is such an interest as would disqualify Mr Leslie from acting as a member of the Town Council in disposing of this matter, because, assuming that it is such an interest, and assuming that the resolution arrived at, at the meeting at which Mr Leslie was present and voted, and where his presence was necessary to make a quorum—assuming that the resolution of that meeting was objectionable—it is at least sufficiently clear that Mr Leslie's presence and acting did not make that transaction absolutely void. On the contrary, it was a transaction that was capable of being confirmed by another meeting of Town Council where a sufficient majority was present, and where Mr Leslie did not take part in the proceedings, and accordingly it was so confirmed. The previous resolution, which had been come to at the meeting where Mr Leslie was present and voted, was come to on 5th May; and we find that on 7th June thereafter another meeting of Town Council was held, and there was laid before the meeting an extended contract of sale, between Mr Milne of Kinaldie and the Town Council of his half *pro indiviso* of Torry Farm Estate. [His Lordship then read the minute of Council with regard to that transaction, including the terms of Mr Barclay's motion, and proceeded]—That resolution was carried by the majority of a meeting at which Mr Leslie was not even present. It appears to me, therefore, that the objection founded upon Mr Leslie's interest or supposed interest in the subject of the contract is completely removed by that confirmation. But then it is said that this is an improper transaction altogether for a municipal corporation to enter into, and if it was not absolutely and at once beyond their powers, it is at all events a matter in which they ought to be controlled by the interposition of this Court, and prevented from coming to a decision, upon the ground that the transaction is plainly an inexpedient and improper one for the benefit of the community, and such as no municipal council should embark in. Undoubtedly that raises a question of very great importance. It is no doubt in the jurisdiction of this Court to interfere and control the proceedings of a municipal council upon sufficient ground—upon the ground either that there is plain excess of power on the part of the Council, or upon the ground that what they are proceeding to do is plainly against the interests of the community which they represent; but where there is no excess of legal power it certainly requires a very strong case to induce the Court to interfere with the discretion which the law invests in the municipal council in the first instance. The objection of excess of power I do not understand to be seriously insisted on here. I do not think it can be maintained as

an abstract proposition that the Town Council is not entitled to buy a *pro indiviso* share of that estate. It would be a perfectly expedient purchase in some circumstances, and there is, so far as I can see, nothing illegal in such a purchase in itself. No doubt it may be very inexpedient; it may be so obviously and perfectly inexpedient—it may be so plainly done not in the interests of the community or for the purpose of furthering the interests of the community, but for some other and unworthy purpose, that this Court would be called upon to interfere to prevent it; and the question is whether we have evidence before us to justify such allegations as these. Now, in this case I think it is pretty well ascertained—for we have a good deal of information before us—that this Torry Farm is situated certainly very close to the town of Aberdeen, but at the same time separated from it by the river Dee; and while I daresay, if the river had not been there, the ground of Torry Farm would have long ago been built upon, the building is not likely to proceed very fast, unless there be a bridge thrown across the Dee at this point, which does not exist at present. But although that obstacle exists to the extension of the town in that direction, I think it is not difficult to believe that some time or other, and probably at no very distant date, the prosperous and increasing town of Aberdeen will force its way across the river some way or other, and that this ground will be occupied by buildings, and one cannot but see that the purchase of land so situated is not merely a natural proceeding upon the part of the municipal corporation, but one that, in ordinary circumstances, is highly expedient. It gives them an opportunity, which is by no means undesirable, of controlling and regulating the extending buildings of the town; and even in a sanitary point of view, apart from the interests of taste and architecture, that may be a very important power of control for the municipal corporation to possess. In short, no one I think can doubt that the purchase of land in the immediate vicinity of a town is a very natural and a very expedient proceeding upon the part of the administrators of the burgh. But it is said that they have got no money, and that, apart from everything else, it is a mere purchase of land on speculation, and therefore a very improper proceeding. Now, I certainly am quite prepared to admit that a purchase of land with borrowed money is anything but an expedient proceeding in the ordinary case. Nothing can be more ruinous than that generally turns out to be; but is that the state of the fact here? I think not. The town of Aberdeen may not at this moment be in possession of ready money sufficient to pay for the purchase which they propose to make—that is to say, they have not got the money in bank—but I do not think that is any objection, either to the principles of finance on which they proceed in the administration of their affairs or to the completion of this purchase. It is a very bad plan indeed to keep money in bank. There cannot be a worse investment for money. It is next worst to keeping it locked up in a box; and, therefore, every prudent man and every prudent corporation invests his or their money in some better way than by leaving it in his or their bank account. It is not pretended that there are not resources at the command of this corporation quite sufficient to justify them in making the purchase, or that they cannot realise investments, which they may not think so beneficial as this, and convert the money now invested

in other ways into an investment in the purchase of this subject. Therefore, so far as the finance is concerned, I do not see any objection at all to the proceeding. It is not a speculative purchase in the sense that they are going to borrow money for the purpose of making the purchase, and trust to the value of the subject being so great that the annual produce of the subject will be more than sufficient to keep down the interest upon the borrowed money. It is not a proceeding of that kind at all. On the contrary, it is a mere proposal to convert one investment into another, which may, no doubt, as in most cases it does, necessitate the borrowing in the meantime, perhaps for a single term, of the price or sum required for the purchase, until the other securities can be realised; but that is mere matter of temporary financing, and has nothing to do with the permanent nature of the investment. It is said, further, that it is a very improvident thing in the circumstances to buy only one-half of this subject when they cannot acquire the other. Now, that depends upon circumstances very much, and circumstances which certainly the Town Council of Aberdeen are very much better qualified to judge of than we are from their local knowledge. If they are not likely to acquire the other half of the subject and that upon reasonable terms, it cannot be very desirable to acquire this one; but how is it possible to make it a subject of discussion in the Court whether another subject or the other half of a subject is likely to be acquired on reasonable terms? That is not a thing which we can judge of at all, nor is it a subject that parties can discuss openly, because it would at once in most cases put an end to their chance of acquiring the subject on reasonable terms if it were made a topic of open discussion in a court of justice. If they cannot acquire the other half of the subject upon reasonable terms, what is the alternative? Nothing very ruinous, surely, unless the present purchase is a very bad bargain, because at the worst they have got the subject to sell again. If their project fails—if they cannot carry out what is conceded to be their object eventually, of acquiring the whole of Torry Farm—why, they can sell off again that one-half which they have bought; and so no great harm would be done. The only remaining topic that was enlarged upon in support of this objection, so far as I recollect, was the impossibility of connecting this Torry Farm land with the town of Aberdeen by means of a bridge; and the allegation that this was absolutely necessary in order to make the land available for building purposes. Whether that be so or not it is very difficult for us to determine. One would say that ground just upon the other side of the harbour must be very important ground, even supposing no bridge were built across the river; but, on the other hand, if to make this ground available for building purposes, or for any other purposes in connection with the town of Aberdeen, a bridge is necessary, I should be disposed to say that a bridge probably will be built. Whether the project which is shadowed forth in this record, of applying the unappropriated surplus of the Don Bridge Trust to build a bridge over the Dee, shall receive the sanction of Parliament, and be carried out or not, it is needless to speculate. It may or may not be; but, at all events, it is surely not a very improbable thing that, if to bring this ground into connection with the town of Aberdeen for any beneficial purpose a bridge must be built, a bridge will in time be built. Therefore, I confess I do not see any

reason at all for interfering with the proceedings of the Town Council with respect to this transaction. As I said before, in the absence of any clear ground of excess of power, I think it requires a very strong case indeed to justify the interposition of the Court to prevent the administrators of the burgh from carrying through such a transaction, seeing that they deem it to be beneficial to the burgh. Upon the whole matter, therefore, I am for repelling the reasons of suspension.

LORD DEAS—This property of Torry Farm belongs, *pro indiviso*, to Sir Alexander Anderson and Mr Milne, Sir Alexander's half being now vested in trustees for his creditors. It appears that a number at least of the members of the Town Council of Aberdeen were desirous of acquiring that property for the community. It is situated near the Harbour, and immediately on the other side of the Dee, and they seem to have thought that in course of time, by throwing a bridge across the Dee, buildings of great value might be erected on this property, and a great improvement effected to the town of Aberdeen, where building ground in other directions is said to be very difficult to get. It is plain enough that their object was to acquire both the *pro indiviso* halves of the property, and that to get the one half without the other would not have at all suited their purpose, but would, on the contrary, have been very inexpedient. I certainly think it would have been desirable in these circumstances if they could have so arranged as to get an offer of both halves at once. That would have been much the safest way to proceed; but it does not appear that they were able to affect that; they got, however, an offer from Mr Milne of his *pro indiviso* half at the price of £16,000; and those gentlemen of the Council who were promoting this scheme were very desirous that that offer should be accepted. A meeting was held on 5th May 1869 to consider as to the acceptance of that offer, and it appears clearly enough that the presence of Mr Leslie at that meeting was necessary to constitute a quorum. No objection was taken that Mr Leslie was disqualified from either voting upon that matter or being present to form a quorum; but if it were necessary to discuss that objection, I confess I think it would be a very formidable one. The way in which Mr Leslie was situated was, as your Lordship has explained, that he was a partner of the Northern Assurance Company, who were postponed creditors of Sir Alexander Anderson to the extent of about £20,000. They held an absolute conveyance of his *pro indiviso* half of this property in security of that debt, and there were debts preferably secured to others to the extent of £11,000. It appears sufficiently clear that unless Sir Alexander Anderson's *pro indiviso* half of this property was sold to great advantage, the Northern Assurance Company would not get full payment of their postponed debt. Moreover, it appears that Mr Leslie and other twelve gentlemen were cautioners for Sir Alexander Anderson, each to the extent of £1000, and that Mr Leslie had no reasonable chance of getting relieved of that cautionary obligation unless Sir Alexander Anderson's *pro indiviso* half of that property was sold to great advantage, and that a less price than that which was proposed to be paid to Mr Milne would not suffice to pay the Northern Assurance Company and to relieve Mr Leslie of that cautionary obligation. Now it is quite true that the property to be sold was not the *pro indiviso*

half in which Mr Leslie was directly interested—as it may be said, a sort of proprietor. He was not in the position of a party selling for himself, but I would be very doubtful whether his interest was not even stronger than if he had been in that position. I say it may be very doubtful whether the interest he had was not greater with reference to Mr Milne's *pro indiviso* half than it would have been if the town had been purchasing Sir Alexander Anderson's half, because the object of the town plainly being to have both halves—their whole purpose being in this position that it would be defeated if they did not get both halves—by Mr Leslie becoming a party to enabling them to carry through the purchase of Mr Milne's *pro indiviso* half, he put them in the position that they must almost of necessity acquire the other. He obtained, therefore, a screw over them with reference to the price which they would be obliged to pay for the other half; and that gave him, I think, a considerably stronger interest in this matter than if the sale had been of Sir Alexander's half. I am not suggesting in the slightest degree that Mr Leslie acted from any motive of that kind. I do not believe he did; but the law does not inquire into the motive. It is enough that the interest exists, and that in some cases at least, and with some men, such considerations may be a motive. Upon this footing, I think, with reference to Corporations and Town Councils in particular, the law sets itself very strongly against allowing anybody who has an interest of that kind to take part in such transactions. All I say about that is, that if it were necessary to determine that, I think the objection would be very formidable, although not in the least impugning the honour or honesty or proper motives of Mr Leslie, which I am quite satisfied were all pure; but I agree with your Lordship that it is not necessary here to decide that question. Because, assuming that the acceptance of Mr Milne's offer by that meeting on 5th May is to go for nothing, which I think would be the result if the objection were sustained, it appears to me, as it does to your Lordship, that enough follows after that to make a binding transaction, if the town had the power to enter into this transaction at all. Mr Milne had made a formal offer of his half to the Town Council, which only wanted their acceptance. Now, supposing the acceptance of 5th May put aside altogether, Mr Milne signed a regular and formal contract of sale on the 3d June, and the Town Council held a meeting at which it is not disputed there was a full quorum upon the 7th June. At that meeting they resolved to go on with and carry through the transaction, and accordingly, on the 7th June, by authority of the Town Council, Bailie Urquhart and Mr Angus, the Town Clerk, signed the contract of sale on behalf of the town. Now, it appears to me that, assuming the Town Council to have the power to go into this sort of transaction, there was there a completed contract between them and Mr Milne for the sale of that *pro indiviso* half of this property. There was there a full and completed contract, supposing the proceedings of the meeting of 5th May to be altogether laid out of view. That being so, the only other question is, whether this is a kind of transaction that it was within the power of the Town Council to go into; or whether, supposing it to be abstractly within their power, it is such a gross abuse of their discretion as the managers for the community, that we are to refuse to allow it to take

effect. Now here, I think, there may be a great deal said upon both sides. It may turn out—I hope it will turn out—a very great improvement for the town of Aberdeen; while it may turn out very much the reverse in respect of the obstacles that may occur to getting the other half of this property, or to getting the money to build this bridge; but altogether it is just what may be called a very great speculation, which may turn out to be exceedingly advantageous to the town, or considerably the reverse. But then I agree with your Lordship that it is not shown, and it cannot be shown beforehand, to be a transaction so totally disadvantageous to the town—such a gross abuse of the power and discretion of the magistrates, who are undoubtedly entitled and bound among other things to look to the improvement of the city, and to the general trade and commerce of the town, and to go into certain speculations, if they may be so called, or certain transactions, in consequence of the probability that, besides not being a loss to the funds of the community, they may prove a great advantage to the increasing wealth and commerce of the town. I think they are quite entitled to look to all these consequences; and, whether they are right or wrong in their views about that, I see no reason to suspect them of any bad faith, or to doubt that they are acting according to the best of their judgment for the good of the town and of the community. That being so, I am disposed to agree with your Lordship that it is not for us to interfere. They may be taking a certain risk upon themselves. We cannot relieve them of that; but I am of opinion with your Lordship that this is not a kind of transaction that we ought to interfere to stop. Upon these grounds, I agree with your Lordship that the reasons of suspension ought to be repelled.

LORD ARDMILLAN—The position of Mr Leslie, with reference to the resolution of 5th May, is certainly a peculiar one. I am of opinion that he must be viewed as taking part in that meeting. He was present; his presence was necessary to the constitution of the meeting, because he was necessary to form a quorum; and he did take part in the carrying of one of the resolutions that were then adopted; therefore I think he must be held as a party to the whole meeting. I am next of opinion that he, being interested in a twofold manner, both as a partner of the Northern Assurance Company and as one of the cautioners of Sir Alexander Anderson in the other *pro indiviso* half of this subject, that was an interest which might very well, as matter of discretion, have prevented him from taking any part in that meeting. I think it unfortunate that he should have done so. I have no doubt that he acted from the most upright motives. I do not suggest the least impropriety of intention on his part, but his position was one which, if it had occurred to his mind, to think well of it, might very properly have kept him away, because he was not only interested in a half, but what he was interested in was a *pro indiviso* half, which in law extends over every portion of the whole subject. Therefore, without imputing anything at all wrong to Mr Leslie, with regard to his intentions in this procedure, I must say that I think a serious objection arises from his voting on this occasion, but the whole effect of it is that the proceeding is reducible, and that it might have been set aside by an action to reduce it. Even if we were to give to the objection the fullest effect, the resolution

is not necessarily void, but voidable. But, after that, we have two opportunities given to the Town Council of Aberdeen to consider the matter in absence of Mr Leslie—one on the 7th and the other on the 14th of June. On the first of these occasions a resolution was carried by a majority—Mr Leslie not being present—to the effect that the purchase of one half of Torry Farm from Mr Milne be approved of and confirmed, and the Council agreed to conclude the purchase, and the contract of sale was then and there signed by Baillie Urquhart and the Town Clerk. On the 14th June, at the next meeting, a motion was made and carried that the contract be forthwith delivered, and that the transaction be fully carried through. Now these resolutions were agreed to by the Town Council after the previous resolution was come to, but without direct reference to it. They were quite independent resolutions, and would have stood, and they are indications of the mind of the Town Council on the subject, even supposing the resolutions agreed to at the meeting when Mr Leslie was present to be out of the way. Therefore, I think that that objection, although it would have been an objection of considerable weight if it had become necessary to dispose of it, does not now prevent us from proceeding to the consideration of this second question—namely, whether the transaction ultimately agreed to by the Council was one which we are called on to interfere with, and put an end to. Now, it is only in a very exceptional case that this Court should interfere with the proceedings of a corporation in such a matter. I am of opinion that there are no sufficient grounds for the interposition of the Court in this case. We are not called on to say whether the transaction was judicious or not, or to say whether a speculation of this particular kind was a correct and proper proceeding on the part of the Council. The materials for forming a judgment on either of these questions are not, in my opinion, available to the Court to any extent which would entitle us to come to a conclusion in the matter. There is necessarily a very wide discretion left on such a point with a corporation, and when in the exercise of that discretion they proceed we cannot interfere, except on the strongest grounds—where it is instructed that they had gone altogether beyond their power, and against the interests of the community. I cannot say that they seem to have done so here. There may be reasons—and reasons which we have not the means of forming an opinion upon—which induced the Town Council to take this step; and I am very much against any attempt by this Court to interfere needlessly, or interfere readily with the exercise of the discretion which the law gives to these municipal bodies. It is, I think, a general and a wise rule in such matters, that wherever the law has placed a wide discretion in a particular body, the presumed honest exercise of that discretion must *prima facie* exclude the interference of the Court. We do not rashly interfere with the proceedings of trustees if they are entrusted with a wide discretion—except a strong case is made out; and I do not think there are any sufficient grounds for interference with the proceedings of this Town Council.

LORD KINLOCH—The only question brought before us by this suspension regards the one-half *pro indiviso* of the estate of Torry Farm, belonging to Mr George Milne, and alleged to have been bought from him by the Town Council of Aberdeen. Any

other topics are merely incidental. The question is, whether we shall interdict the completion of the purchase by the Town Council of Mr Milne's half of Torry Farm?

The main ground on which we are asked to interfere lies in an alleged disqualification on the part of Mr William Leslie, one of the Town Council, to take part in the proceedings of the Council relative to the purchase. It is said that Mr Leslie is a creditor over the other *pro indiviso* half of Torry Farm, originally belonging to Sir Alexander Anderson; and that his interest as such creditor is to obtain as high a price as possible for that other half. He is, therefore, it is said, materially concerned in the sale of Mr Milne's half, which cannot but affect the disposal of the other half of the estate. In consequence of this interest, it is maintained that he was excluded from voting on the proposal to buy Mr Milne's half; and without his vote it is said there was no valid Act of Council.

I am of opinion that this reason for granting the interest is insufficient. I am not prepared to hold the alleged interest in Mr Leslie, as creditor over the other half of the property, to be an interest of that direct and immediate character which excluded him from voting in this matter. But I am clearly of opinion that, even if this objection invalidated the vote of the meeting at which Mr Leslie was present, it was quite competent to the Town Council to confirm the sale by an after resolution free from this objection; and I think the Council did so.

The only other ground of suspension which I have felt myself called on to consider is, that the proposed purchase is so grossly inexpedient and improper as to call on the Court to interdict it. I have no doubt of the competency of the Court not merely to control such acts of a Town Council as are *ultra vires* in respect of intrinsic illegality, but also such as are so manifestly inexpedient and improper as to go beyond the bounds of fair administration. The case, however, must be a very clear and strong one to warrant the interposition of the Court. With the discretion of the Town Council, when acting within the bounds of administration, the Court is not entitled to interfere.

I cannot say that the proposed purchase produces in my mind a vivid impression of prudence and sagacity. This purchase of land on the other side of the Dee was only part of a scheme depending for its completion, first, on the acquisition of the other half of the ground; and, secondly, on obtaining Parliamentary authority for building a bridge across the Dee, by means of funds diverted from another Bridge Trust. The other half of the ground has, it is said, been offered to Mr Francis Edmond for himself, or for behoof of the creditors of Sir Alexander Anderson; and is, for the time at least, gone out of the power of the corporation. The proposed Act of Parliament, to obtain which naturally formed the first step in the proceedings, is still in the clouds. If all this is so, nothing seems to be gained by carrying through the purchase, except to make the Town of Aberdeen partners with Mr Francis Edmond in a property on the other side of the Dee. The Town Council's own committee reports that, in the first instance, there will be an annual loss on the transaction, "which loss," it is added with some *naïveté*, "would, of course, be extinguished by an increasing rental of the estate." I suspect that, if I had been in the Town Council, my vote would have been with the minority. But the proverbial acuteness of the lo-

cality is perhaps too great for any more southern apprehension. Nothing, at all events, is before us except the purchase of this half of Torry Farm, as to the futurities of which I do not feel myself so competent to decide as men on the spot. The purchase is of ground in the neighbourhood of the town, and so not unnaturally falls within the scope of the magistrates' operations. We must hold the price to be a fair one; as on a contingent sale to Mr Edmond, contingent, that is to say, on the Town Council not carrying through the transaction, the same price is given. Although, in the first instance, the money to pay for the purchase is to be borrowed from the town's bankers, it is plain that there are abundant funds on other investments to pay for the purchase. In this condition of things I do not feel warranted, on any ideas of my own, in interfering with the administration of the council, for which they, and not I, are responsible.

I am of opinion that the case, as it stands, affords sufficient materials for a decision to this effect: and that no facts necessary for a judgment require to be investigated. In the whole circumstances, I think the note of suspension and interdict should be refused.

The note of suspension and interdict was therefore unanimously refused by the Court.

Agents for Complainers—W. & J. J. Saunders, S.S.C.

Agent for Respondents—T. J. Gordon, W.S.

Tuesday, December 20.

MILNE (HALL'S TRUSTEE) v. BOOKER & CO.

Sale—Bankrupt—Rejection—Stoppage in transitu.
Notice. A merchant purchased a cargo of timber at sea, to be paid for according to measurement; after the arrival of the vessel, but before the cargo was fully discharged and measured, he found that he was insolvent; he did not stop the unloading, but, after it was completed, and the timber for the most part lying on the quay, he wrote to the sellers informing of his circumstances, and they immediately presented a petition to the Sheriff for interdict against his taking possession of the timber,—*Held* that this letter was a rejection of the timber, and the steps taken by the sellers rescinded the contract. *Observed* that there would be great difficulty in bringing the case under the head of stoppage *in transitu*, as there was no notice to a custodian.

This was an appeal from the Sheriff-court of Aberdeenshire. The circumstances were as follows:—On 17th November 1869, Messrs Booker & Co., merchants, Liverpool, sold to Messrs Hall & Co., Aberdeen, the cargo of timber on board the Sir Colin Campbell, which had arrived the day before from Demerara, and they directed the vessel to proceed to Aberdeen. The price was £5, 15s. per load, to be measured and delivered at Aberdeen. The Sir Colin arrived there on 26th Nov., and the unloading was begun next day, and on 7th December the measurement began to be made, and both unloading and measurement were completed on 16th December. The measurement was, according to custom, done at the sellers' expense, and by a licensed measurer. In the unloading and laying out of the timber on the quay for measure-