

"and," which in that connection is the precise equivalent of "whom failing." The first branch, on the failure of all the heirs previously named and the heirs-male of their bodies, calls to the succession the heir in possession for the time being under the entail of Highfield. That is the only designation given of the substitute called, and it is obvious that since the disentail of Highfield the substitution has become void, because there can be no heir answering the description. If that had been the last substitution contained in the trust-deed, the validity of the claim now made by the appellant would have been beyond question. But it is followed by another substitution, which brings in *per aversionem* "the other heirs-substitute in the said entail in the order set down in said entail successively." That description brings into the Newmore line of succession, by reference, the heirs named in the entail of Highfield other than those who have already failed or other than an heir of entail in possession of Highfield who may have already succeeded to Newmore under the entail directed by the testator. It is not made a condition of the right conferred on these substitutes that an heir in possession under the entail of Highfield shall previously have succeeded under the entail of Newmore, nor is it made a condition of their right that at the time when the succession opens to them they must be in possession of Highfield as heirs of tailzie. All that an heir claiming under the last branch of the trust-destination now requires to show is that he possesses the character of an heir-substitute designated in the deed of entail under which Highfield was held at the date of the trust-deed, and that the heirs called in priority to him by the Highfield entail have failed. The effect of that construction, as was pointed out by the appellant's counsel, is to bring in under the last an heir who would have taken under the preceding substitution if the entail of Highfield had not been extinguished; but that is a result which appears to me inevitably to follow from the language used by the testator.

For these reasons, I am of opinion that, although the substitution of an heir in possession of Highfield has become ineffectual, there still remains a valid substitution of the heirs called by the Highfield deed of entail; and that the judgment of the Court below must therefore be affirmed.

**LORD ASHBOURNE**—My Lords, I entirely concur in the opinion expressed by my noble and learned friend Lord Watson, which I have had an opportunity of reading and considering.

**LORD MACNAGHTEN**—My Lords, I am of the same opinion.

**LORD SHAND**—My Lords, I also have had a similar opportunity and I entirely concur in the opinion and in the reasons which my noble and learned friend has given for the affirmance of the judgment of the Court below.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellant—Lord Advocate Balfour, Q.C.—D. F. Sir Charles Pearson, Q.C. Agents—Loch & Company—Dundas & Wilson, C.S.

Counsel for the Respondent—Asher, Q.C.—C. S. Dickson. Agents—A. & W. Beveridge—Hamilton, Kinnear, & Beatson, W.S.

## COURT OF SESSION.

Friday, May 31.

### FIRST DIVISION.

[Court of Exchequer.]

#### COUNTY COUNCIL OF LANARK v. COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp-Duty—Exemption—Local Authority—Bond by County Council—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), secs. 11 and 17—Lanarkshire (Middle Ward District) Water Act 1892 (55 and 56 Vict. cap. 169)—Public Health (Scotland Act 1867 (30 and 31 Vict. cap. 101), sec. 120.*

Section 11 of the Local Government Act of 1889 transferred to the council of each county the whole powers and duties of local authorities under the Public Health Acts of parishes within the county (excluding burghs and police burghs). Section 17 provided that for the purposes of administration of the laws relating to public health each county should be divided into districts, and that for each district there should be a district committee which should be the local authority under the Public Health Acts and as such should have within the district all the powers and duties transferred to the county council with respect to the administration of the laws relating to public health, subject *inter alia* to the provision that a district committee should have no power of raising money by rate or loan. Powers of rating and borrowing are conferred by the Act upon the county councils.

Section 120 of the Public Health Act of 1867 provides that bonds and other writings granted by or to local authorities under the Act shall be exempt from stamp duty.

*Held* (1) that for borrowing purposes the County Council is the local authority within each county under the Public Health Acts, and therefore that a bond granted by a county council for money borrowed by it for public health purposes was exempt from stamp duty; and (2) that, where a Special Act transferred the administration of a water supply district to the district committee of the county council, and provided that the county council should have the power of borrowing for the pur-

poses of the water supply, the county council was for borrowing purposes the local authority within the district, and therefore that a bond granted by it for money borrowed for the purposes of the water supply was exempt from stamp-duty.

On 24th January 1894 the County Council of Lanark presented to the Commissioners of Inland Revenue two instruments which had been executed by them, and desired to have the opinion of the Commissioners as to the stamp-duty with which they were chargeable.

The first of the instruments bore that the County Council of Lanark having resolved to borrow the sum of £3422 "under the powers contained in the Public Health (Scotland) Act 1867, section 86, and Acts amending the same, for the purpose of defraying the expense of works in connection with the Larkhall Special Drainage District . . . and on security of the after-mentioned assessments," . . . had borrowed the sum of £1000 from John Craig, Esq., and assigned to him the assessments in security for repayment of this sum.

The second instrument bore that the County Council of Lanark, "considering that by the Lanarkshire (Middle Ward District) Water Act 1892, hereafter referred to as the Special Act, the District Committee of the Middle Ward of the County of Lanark, the local Authority under the Public Health Acts for the district of the Middle Ward of the said county in terms of the Local Government (Scotland) Act 1889, are authorised to make and maintain the works described in the Special Act . . . and that we are by the Special Act authorised on the requisition of the said District Committee, with the consent of the Standing-Joint Committee of the said county . . . in addition to the powers conferred by the Public Health Acts, to borrow money on the security of the assessments by the Special Act authorised, and that on the requisition of the said District Committee" . . . had borrowed the sum of £1000 from Andrew Baillie Esq., and assigned to him the assessments above mentioned in security for repayment.

The Commissioners in each case were of opinion that the instrument was chargeable with the *ad valorem* duty applicable to a mortgage for £1000, viz., £1, 5s., and at the request of the County Council cases were stated for the opinion of the Court of Exchequer, the question in each case being "Whether the said instrument is liable to be assessed and charged with the said *ad valorem* mortgage-duty, or whether it is exempt from duty in terms of section 120 of the Public Health (Scotland) Act 1867?"

By section 120 of the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101) it is provided that "all bonds, assignations, conveyances, instruments, agreements, receipts, or other writings made or granted by or in favour of the local authority under this Act, shall be exempt from all stamp duties."

Section 11 of the Local Government Act

of 1889 (52 and 53 Vict. cap. 50) provides:— "Subject to the provisions of this Act there shall be transferred to and vested in the council of each county . . . (4) The whole powers and duties of local authorities under the Public Health Acts of parishes, so far as within the county (excluding burghs and police burghs). . . The provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties by this Act transferred, or regulating the proceedings under any such Act, shall remain in full force and effect, except in so far as they are repealed by or are inconsistent with the provisions of this Act." Section 17 provides:—"With respect to the transference to the county council of the powers and duties of certain local authorities under the Public Health Acts, the following provisions shall have effect:—

(1) For the purposes of the administration of the laws relating to public health, the county shall, except as hereinafter provided, be divided into districts in the manner provided in this Act, and there shall be a district committee for each such district constituted as provided in this Act. (2) A district committee shall, subject to the provisions of this Act, be the local authority under the Public Health Act, and as such shall have and may exercise within its district all the powers and duties, and be subject to all the liabilities transferred to or conferred on the county council with respect to the administration of the laws relating to public health, except those relating to medical officers or sanitary inspectors for the county, and subject to the provisions following—(a) A district committee shall have no power of raising money by rate or loan. . . (4) The sums necessary to meet any deficiency in respect of the expenditure under the Public Health Acts within any district shall be levied by the county council by a rate imposed on all lands and heritages within such district." . . . Section 67 provides— "(1) The county council may from time to time, with the consent in writing (signed by two members and the county clerk) of the standing-joint committee appointed in pursuance of this Act, borrow on the security of any rate leviable by the council under or in pursuance of this Act or of any other Act, such sums as may be required for the following purposes, or any of them—that is to say (a) For any purpose for which any authority whose powers and duties are by or in pursuance of this Act transferred to the county council were, at the passing of this Act, authorised to borrow." . . . Section 73 of the Act provides that (1) a county council "shall not delegate any power of raising money by rate or loan." . . .

Section 5 of the Public Health (Scotland) Amendment Act 1891 (54 and 55 Vict. cap. 52), provides—"The county council as the local authority may in addition to the powers conferred by section 89 (6) of the Public Health (Scotland) Act 1867, borrow money for the purposes therein set forth on the security of the assessments hereby authorised, and may assign the said assessments and the general assessments that may be imposed under the said Act or any

of them in security of the money to be so borrowed."

The Lanarkshire (Middle Ward District) Water Act, 1892, proceeding upon the preamble that "Whereas the District Committee of the Middle Ward of the County of Lanark, hereinafter called the District Committee, are the Local Authority under the Public Health (Scotland) Acts for the District of the Middle Ward of the County of Lanark . . . in terms of the Local Government (Scotland) Act, 1889: And whereas under the provisions of the Public Health (Scotland) Act, 1867, certain portions of the County of Lanark were formed into special water supply districts and are now comprehended in the Middle Ward District administered by the District Committee: And whereas it is expedient that from and after the passing of this Act the said special water supply districts should, subject to such conditions as are in this Act contained, cease to exist as special water supply districts, and to be assessed for the purposes of water supply separately from other parts of the Middle Ward District: And whereas it is expedient that the County Council of the County of Lanark should be authorised and required to levy assessments in respect of the water-works and water supply by this Act authorised in the manner provided by this Act, and to borrow on the security of such assessments such moneys as may be necessary for the purposes of this Act: And whereas the objects of this Act cannot be effected without the authority of Parliament"—provided by section 4 and following sections that the district committee should have power to make and maintain the special water supply works specified. Section 23 abolished the special water supply districts mentioned in the preamble. Section 61 provided—"The county Council on the requisition of the district committee may, with the consent of the standing-joint committee, in addition to the powers conferred by the Public Health (Scotland) Acts, borrow money for the purposes of this Act on the security of the assessments by this Act authorised, and may assign the said assessments and the general assessments which may be imposed under the said Act, or any of them in security of the money so borrowed."

Argued for the Commissioners—(1) Section 11 of the Local Government Act of 1889 must not be read alone as regards the powers transferred, but in connection with section 17, sub-section 2, which showed that the district committee was the local authority, and took the place of the parochial board. The sub-section went on to say that the district committee should have no power to borrow, and by section 73 the county council was forbidden to delegate its borrowing powers, so the statutory exemption could not apply to a situation such as this where the real local authority had no power to borrow. It only applied to bonds made or executed by the local authority, and therefore did not apply here. (2) In the case of the second instrument, where a private Act had been required for

a special purpose, which, according to the preamble of the Act, "cannot be effected without the authority of Parliament," the case was even stronger against treating the county council as the "local authority" in accordance with the terms of the exemption. It was in virtue of this Special Act that the county council were borrowing, and it was not right to import into that Act a general statutory exemption such as this.

The County Council were not called upon.

At advising—

LORD PRESIDENT—I think the question here has been wrongly decided by the Commissioners in both cases.

I shall follow the order taken by the Solicitor-General, because the case dated May 27th is the simpler. Now, the view of the Commissioners seems to have been that, for the purposes of borrowing, the county council are not the local authority under the Public Health Act, and therefore do not enjoy the exemption which is conferred by section 120 of the Public Health Act. In that I think they are wrong. It is quite true that for certain purposes the district committee, by virtue of section 17, sub-section 2, of the Act of 1889, bears the title and exercises some of the powers which formerly were in the local authority under the Public Health Act; but then that does not abate the general provision which precedes the one I have referred to in the Act of 1889—it is section 11, subsection 4—by which the whole powers and duties—and that includes immunities—of the local authority under the Public Health Act are transferred to the county council. Now, to what extent and effect does section 17 counteract or evacuate that general transference of the powers of the local authority to the county council? It seems to me that the district committee enjoys the title of the local authority solely for the limited functions which it has to perform. Those functions are of the highest importance, and they include executive and coercive powers in regard to public health. Accordingly, in order to give a formal title to the district committee to exercise those very sweeping powers, they are vested in the style of the local authority. But then on the other hand section 11 remains unimpaired so far as the residue of the powers of the local authority is concerned, and although it does not in words call the county council the local authority, yet by conferring on it all the powers of the local authority it makes it the local authority, and it remains the local authority, subject to the statutory delegation of certain powers to the district committee, which *quoad* those powers is the local authority also.

I think that it is clear upon the consecutive reading of the various clauses of the Act of 1889, and the system there set up, that that statute makes the county council the local authority so far as this matter of borrowing is concerned, it having a sole jurisdiction in the matter of borrowing and in the matter of levying assessments. Then it

seems that the Act of 1891 is, from the expression of its 5th clause, [a very conclusive authority upon this question. Parliament in the Act of 1889 asserted in so many words that in the matter of borrowing the county council was the local authority. Section 5 of the Act of 1891 begins thus—"The county council as the local authority may in addition to the powers conferred by section 80 (6) of the Public Health (Scotland) Act 1867 borrow money" as follows—that is to say, it says "The county council as the local authority has already powers of borrowing; we give it more." The Commissioners in the decision which is appealed against have gain-said that statement, and denied the express declaration of Parliament that the County Council in this matter are the Local Authority. I am therefore for reversing the first decision.

The second case is a little more complicated, but not much. It stands thus. The powers exercised are borrowing powers for the purposes of water supply, which again are purposes of the Public Health Act. It is true that the power of borrowing is in this instance primarily conferred upon the County Council by a local Act, but why? Merely because, in the history of the administration of the Act of 1867 there had been set up in this part of Lanarkshire certain special water supply districts. Now, those districts are always set up as a sort of exception from, or an excrescence upon, the normal system of administration of the Public Health Act. Under the Act of 1867 the normal system is that each parish has its own water supply that provides for the wants of the district comprised within the parish; but where there are exceptional geographical conditions or conditions of population, the Sheriff is to set up special districts, each of which may include part of one parish or parts of several parishes, and those districts form separately governed and administered water districts. Now, that system had been found to be inconvenient in this part of Lanarkshire, and an Act of Parliament has been passed which has the effect of dissolving special water supply districts. The result is that the Act delivers back to the district committees, which are the lawful successors of the parochial boards, merely what had been diverted from those parochial boards by the formation of the special water supply districts. In short, the Act simplifies the administration of the Public Health Act, and brings it back to its normal type. I cannot conjecture how that can be said to place borrowing powers outside the operation of the Public Health Act. I think, therefore, here again that the County Council are acting as the local authority, and are recognised by Parliament as the local authority in the matter of borrowing in this case as in the previous one; and accordingly in this case again I think the decision must be reversed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court reversed the determinations of the Commissioners.

Counsel for the County Council of Lanark—Ure—Anderson. Agents—Bruce & Kerr, W.S.

Counsel for Commissioners of Inland Revenue—Sol.-Gen. Shaw, Q.C.—A. J. Young. Agent—The Solicitor of Inland Revenue.

Friday, May 24.

## SECOND DIVISION.

[Lord Wellwood, Ordinary.

TULLOH'S TRUSTEES v. COLES.

*Husband and Wife—Parent and Child—Evidence—Presumption—Pater est quem nuptiæ demonstrant.*

Evidence upon which the Court held that the presumption *pater est quem nuptiæ demonstrant* had been rebutted.

*Proof—Competency—Letters of Person not Examined Admitted as Evidence.*

In an action raising the question of the legitimacy of children born *stante matrimonio*, in which the mother appeared as a defender but was not examined as a witness by any of the parties to the cause, held that letters, which were admitted to have been written by her and received by those to whom they were written at or about the dates they bore, were admissible in evidence.

By the settlement of Robert Tulloh of Burgie, who died on 17th June 1841, the trustees were directed to pay the free annual income of that estate to his eldest son Alexander, and in the event of Alexander dying leaving lawful heirs to dispose the estate to his lawful heir. In the event of his not leaving heirs of his body alive at his death, they were directed after certain destinations, which failed, to make over the estate to the truster's daughter Mrs Coles and her heirs and assignees whomsoever.

Alexander Tulloh died on 24th March 1890.

In November 1893 Mrs Coles raised an action of multiplepounding and exoneration in name of the trustees under the settlement of Robert Tulloh in order to determine who was entitled to the estate of Burgie. She herself claimed the estate on the ground that Alexander Tulloh had died without leaving heirs of his body. Competing claims were lodged by Mrs Homer and Miss Ward, who claimed the estate as heirs-portioners of Alexander Tulloh, the former representing herself to be his daughter, and the latter the child of a deceased daughter Mrs Ward. Mrs Tulloh, the wife of Alexander Tulloh, put in a riding claim, claiming, as mother of Mrs Homer and grandmother of Miss Ward, to be ranked on the fund *in medio* to a reasonable alimentary provision. Mrs Coles