

LORD PRESIDENT—It appears to me that the case of *White v. Magistrates of Rutherglen* (24 R. 446) is not an authority for the proposition that under no circumstances can or should expenses be awarded to the persons who have successfully resisted an application of this kind. A similar application was made by the burgh of Clydebank in 1890, and it was successfully resisted, the petition having been refused by Sheriff Blair in 1891, and the persons (or the interests) who were then successful have had to defend themselves again. I think it is not doubtful that the Court has power to award expenses, and that this is a clear case for awarding them to the successful objectors. Serious oppression might result if suburban owners or rural administrative bodies could be called upon to defend themselves again and again at their own expense from such applications by a wealthy burgh. Whether this is a litigation or an administrative proceeding, the unsuccessful applicants should, in the circumstances of the present case, pay the expenses of the parties whom they convened and who have successfully defended themselves. I propose that the burgh of Clydebank should be found liable in expenses to the objectors both here and before the Sheriff.

LORD ADAM concurred.

LORD M'LAREN—My only doubt is whether, seeing that this is a statutory proceeding, our jurisdiction extends to the awarding of expenses incurred in the inferior Court. That is a question on the terms of the statute, and it is never safe to express an opinion on the construction of a statute without having it read and hearing argument on it. As this point was not taken, I do not need to consider it for the purposes of the case. As to the expenses in this Court, I concur in the most unqualified sense that the objectors should be found entitled to them.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

“Recal the deliverance of the Sheriff dated 18th April 1901: Grant the prayer of the petition, and decern: Find the petitioners entitled to the expenses incurred by them in the proceedings before the Sheriff and in this Court, and remit,” &c.

Counsel for the County Council of Dumbartonshire (Respondents and Petitioners)—Jameson, K.C.—Horne. Agent—A. S. Douglas, W.S.

Counsel for the Commissioners of Clydebank (Petitioners and Respondents)—Salvesen, K.C.—Munro. Agents—Douglas & Miller, W.S.

Tuesday, November 5.

FIRST DIVISION.

THE COMMISSIONERS OF THE BURGH OF BLAIRGOWRIE AND OTHERS, PETITIONERS.

Burgh—Burgh of Barony—Town Council—Police Commissioners—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), sec. 22—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 23, 24, and 25—Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), secs. 8 and 33.

B. was a burgh of barony constituted under charters which provided for the appointment of a town council. The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101) was adopted in the burgh, and separate commissioners were elected under that Act, the town council under the charters remaining unaffected. After the passing of the Burgh Police (Scotland) Act 1892, one-third of the commissioners elected under the Act of 1862 retired in November 1893, and one-third in each succeeding year, but an entirely new election of commissioners did not take place. On a petition presented under section 17 of the Act of 1892 and section 113 of the Town Councils (Scotland) Act 1900, held (1) that the commissioners under the Act of 1862 became the commissioners under the Act of 1892 in terms of sections 23 and 24 of the latter Act, and that, as the burgh in question was one to which the provisions of section 24 and not the provisions of section 25 were applicable, it was not necessary to hold an entirely new election after the passing of the Act of 1892; (2) that the property held by the town council under the charter passed under section 22 of the Act of 1862 to the commissioners under that Act, and so passed to the commissioners under the Act of 1892; (3) that the commissioners under the Act of 1892 now constituted the town council of the burgh in the sense of the Town Councils (Scotland) Act 1900; (4) that the charters and the town council under them had been superseded by the Act of 1892 or the Act of 1900; (5) that it would not be competent in future to elect any town council under the charters, or otherwise than in accordance with the Act of 1900; and interlocutor pronounced on the petition *finding and declaring* accordingly.

The General Police and Improvement (Scotland) Act 1862, section 22, enacts as follows:—“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 the 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."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts—Section 4 (4), Burgh when used alone, unless otherwise expressed or inconsistent with the context, shall include . . . burgh of barony. Section 23. In any burgh having magistrates or a magistrate, and councillors, or other municipal authority under whatever name at the commencement of this Act—(1) The magistrates or magistrate and councillors or other municipal authority shall, subject to the provisions of the immediately succeeding sections, be the commissioners under this Act—provided that where there are already police commissioners under any general or local Police Act, such police commissioners shall be the commissioners under this Act until the first annual election of magistrates and councillors, or other municipal authority, after the commencement of this Act. (2) After the commencement of this Act—[Then follow provisions as to burghs of a class to which Blairgowrie did not belong]—(b) In all other burghs the magistrates and councillors or commissioners shall be elected under the provisions of the two immediately succeeding sections, as the case may be. Section 24. In burghs wholly or partly administered under any general or local Police Act, the commissioners and magistrates at the commencement of this Act shall continue to hold and exercise their office, and to perform all the duties appertaining thereto till their successors are appointed under this Act, and the order of the retirement of such commissioners shall be the same as if this Act had not been passed; but as vacancies occur the election of their successors shall take place under this Act. . . . Section 25. In burghs other than those referred to in the immediately preceding section, an election of commissioners shall take place as soon as may be after the commencement of the Act.

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49) provides in section 8 for the transference of the whole rights, liabilities, debts, and assets of, *inter alia*, commissioners under the Burgh Police (Scotland) Act 1892, in any burgh, to the town council; and section 33 enacts—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.

Blairgowrie was a burgh of barony constituted under a charter granted by Colonel Allan Macpherson of Blairgowrie, dated 15th December 1809, in favour of the feuars, long leaseholders, and other burgesses. The charter also provided for the appointment of a bailie and four councillors, with a clerk and treasurer. Certain alterations were made in the constitution of the burgh by charters of extension granted by two subsequent superiors on 23rd February 1829 and 10th September 1873 respectively. It had been the practice down to the present time to elect a Town Council under these charters, and the present Council so elected consisted of one senior bailie and two junior bailies and nine other councillors. The property of the burgh of barony, which consisted of the Town House, the market-place, with right to collect certain small burgh customs, the public steelyard, &c., was vested in the Town Council elected under these charters, and had been administered by them down to the present time.

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101) made provision for its adoption in such burghs as Blairgowrie, and the Act was in 1876 duly adopted in that burgh, and separate Commissioners were elected under that Act, the Barony Town Council under the charters remaining unaffected.

By section 29 of the Burgh Police (Scotland) Act 1892 it is enacted that "in burghs where the population is less than ten thousand the number of Commissioners shall be nine, unless on application to the sheriff he shall see cause to fix the number at twelve." The population of Blairgowrie being under ten thousand, application was made by the then existing Commissioners to the Sheriff, who fixed the number of Commissioners under the new Act of 1892 at twelve. One-third of these fell to retire annually.

In November 1893, being the date of the first annual election after the Act of 1892 came into force, four Commissioners, being one-third of their whole number, retired on the assumption that the Commissioners under the Act of 1862 became the Commissioners under the said Act of 1892. The places of those retiring Commissioners were filled by an election of four persons under the said Act of 1892, but an entirely new election of the whole body of Commissioners did not take place.

After the passing of the Town Councils (Scotland) Act 1900 doubts arose as to (1) whether the Police Commissioners of the burgh under the Act of 1862 became the Commissioners of the burgh under the Act of 1892; (2) whether the property in right of the Town Council under the charters vested in the Commissioners under the Act of 1892; (3) whether an entirely new election of Commissioners should have taken place on the occasion of the first annual

election of Commissioners after the passing of the Act of 1892; (4) whether in the existing circumstances the present Police Commissioners became the Town Council of the burgh under the Town Councils (Scotland) Act 1900; (5) whether the charters were superseded by the Act of 1892; and (6) whether the Town Council under the charters of the burgh was superseded by the Burgh Police Act 1892 or the Town Councils (Scotland) Act 1900, and the present Commissioners substituted therefor.

On 20th February 1901 the Commissioners of the Burgh of Blairgowrie presented a petition under the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900, in which they prayed the Court "(1) to find and declare that the present Commissioners of the Burgh of Blairgowrie became the Commissioners under the Burgh Police (Scotland) Act 1892, and that they now constitute the Town Council of the burgh in the sense of the Town Councils (Scotland) Act 1900, and that as such they have superseded the Town Council elected under the charters of the burgh, and are vested in and are entitled to administer the whole funds and property under the charge both of the present Commissioners and of the said Town Council of the burgh under said charters, and that it is not competent in future to elect any Town Council under the foresaid charters, or otherwise than in accordance with the Town Councils (Scotland) Act 1900."

On 14th May 1901 the Court remitted to Mr J. Edward Graham, Advocate, and in obedience to that remit Mr Graham reported, *inter alia*, as follows—"It seems to be the intention of the Act of 1892 that in a burgh of barony like Blairgowrie, where there were in 1892 both Police Commissioners and a Town Council, such separate bodies should be merged into one, and the first question raised in the present petition is, Was it intended that the Police Commissioners appointed under the Act of 1862 should be the Commissioners under the Act of 1892, and should come in the place of and supersede the Barony Town Council, or was it intended that the Barony Town Council should be the Commissioners under the Act of 1892, and should supersede and come in the place of the Commissioners appointed under the Act of 1862? The former is one of the contentions of the petitioners. As they state that the Barony Town Council dispute their contentions, I thought it proper to inform the said Council that, though they had not lodged answers, I should be glad to hear from them the grounds on which they dispute the contentions of the petitioners. I have had an interview with the Clerk of the Barony Town Council, and find that they admit the facts stated in the petition to be correct. But they consider the questions of law to be not free from doubt, and while not desiring to oppose, they do not feel justified in acquiescing in the contentions of the petitioners without your Lordships' authority. The argument against the petitioners is that section 23 of the Act

of 1892 says that the 'magistrates and councillors, or other municipal authority,' shall be the Commissioners under the Act, and that although that is followed by a proviso that in a burgh like Blairgowrie the Police Commissioners shall be the Commissioners under the Act, their powers are only to endure till 'the first annual election of magistrates and councillors, or other municipal authority, after the commencement of this Act.' It is contended that the words 'magistrates and councillors or other municipal authority' do not include Police Commissioners, and that an election of magistrates and councillors should therefore have been held under section 25 'as soon as may be after the commencement of the Act' (*i.e.*, 15th May 1893), when the electors would have had an opportunity, if so advised, of electing the members of the Barony Town Council to be the Commissioners under the Act of 1892. All the Commissioners appointed under the Act of 1862 would then have ceased to exist, and the twelve new Commissioners might have been the same persons as the twelve who constitute the Barony Town Council. Instead of this only one-third of the Commissioners under the Act of 1862 retired in November 1893, and one-third in each succeeding year, as provided by section 24. The result was to make it impossible for the Barony Town Council to become the Commissioners under the Act of 1892 and to continue in office at least four of the Commissioners appointed under the Act of 1862 up to November 1895.

"It is contended that section 24 of the Act of 1892 applies only to burghs constituted police burghs under the Acts of 1850 and 1862, and not to burghs of barony having a prior independent existence. But the words 'partly administered' under a Police Act in section 24, seem specially meant for a case such as Blairgowrie, and it humbly appears to me that the proper procedure was adopted by the retirement of one-third of the existing Commissioners in November 1893 and of one-third in each succeeding year."

On the question whether the property of the Barony Town Council was vested in the Commissioners under the Act of 1892. Mr Graham reported as follows:—"Section 20 of the Act of 1892 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 commis-

sioners 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.' It is clear that this section transfers the property and the powers and duties of the Commissioners under the Act of 1862, but no mention is made of such a body as a barony town council. Section 42 provides that certain municipal and police jurisdictions and powers in burghs are to be transferred to 'the provost, magistrates, and town council or commissioners,' but there is no reference to property. . . . If the property of the Barony Town Council was not transferred under the Act of 1892 it is not transferred under the Act of 1900. . . . On this question of the transference of the property of the Barony Town Council, it is proper to call your Lordships' attention to the case of the *Magistrates of Peterhead v. Governors of Merchant Maiden Hospital*, November 20, 1840, 3 D. 99. That case, though falling under a different Act of Parliament and different charters, resembles the present in many points, and it was held that the property had not been transferred."

The reporter then dealt with the nature of the property belonging to the Barony Town Council, the source from which it came, and the titles under which it was held, the conveyances being "to the Bailie and Council of the Burgh of Barony of Blairgowrie and their successors in office."

The reporter also pointed out that the petitioners asked not for an order, as provided by section 17 of the 1892 Act, but for a declarator, and expressed a doubt whether the terms of section 17 were wide enough to cover such an interlocutor.

At the hearing on the petition and report, argued for the petitioners—(1) There was no warrant in sections 24 and 25 of the Burgh Police Act 1892 for the contention that all the Town Councillors should have retired before May 1893. (2) The reporter's view was wrong as to the effect of section 20 of the Act of 1892. The reference in that section to lands, &c., belonging to "other persons," and the rights conferred on "other persons by any charter or writing" clearly embraced a body such as the Barony Town Council, and section 42, which the reporter referred to, strengthened that contention. Even if the property had not been transferred, the Barony Town Council could not administer it, and the question came to be one of formal title, and the original conveyances to the Town Council were to them "and their successors in office." The case of the *Magistrates of Peterhead v. Governors of Merchant Maiden Hospital*, *ut supra*, did not apply. (3) Under section 17 of the Act of 1892, and section 113 of the Act of 1900, the Court might pronounce any order, and the petition competently prayed the Court to pronounce a declarator.

Counsel for the feudal superior maintained that in the event of the Court holding that the property of the Barony Town Council was transferred, but not under the Acts of Parliament, it should be declared

to be transferred subject to existing restrictions and liabilities.

At advising the opinion of the Court was delivered by

LORD PRESIDENT—This is a petition at the instance of the Commissioners of the burgh of Blairgowrie under the Burgh Police (Scotland) Act 1892, now stated to be acting as the Town Council of the burgh in virtue of the Town Councils (Scotland) Act 1900—the Town-Clerk and seven electors or householders within the burgh—in the sense of the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900.

The first and leading alternative of the prayer is for a finding and declaration that the present Commissioners of the burgh of Blairgowrie became the Commissioners under the Burgh Police (Scotland) Act 1892, that they now constitute the Town Council of the burgh in the sense of the Town Councils (Scotland) Act 1900, and that as such they have superseded the Town Council elected under the charters mentioned in the petition, and are vested in and are entitled to administer the whole funds and property under the charge both of the present Commissioners and of the Town Council of the burgh under the charters mentioned, and that it is not competent in future to elect any town council under the foresaid charters, or otherwise than in accordance with the Town Councils (Scotland) Act 1900.

[After narrating the facts *ut supra*, and after quoting section 22 of the *General Police and Improvement (Scotland) Act 1862*, his Lordship proceeded]—It appears to us that under this provision the property which was, as already mentioned, vested in the Barony Town Council, was transferred to the Commissioners appointed under the Act of 1862, although in point of fact the Barony Town Council have continued to administer that property subsequent as well as prior to the passing of the Act of 1862.

The petition proceeds upon the assumption that the property in question was not transferred to the Police Commissioners under the Act of 1862, but that it still remained vested in the Barony Town Council. We think, however, that this is a mistaken assumption, and that the difficulties arising from it do not really exist.

After the passing of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), four Commissioners, being one-third of their whole number, retired on the assumption that the Commissioners under the Act of 1862 became the Commissioners under the Act of 1892, and the places of the retiring Commissioners were filled by the election of four persons under the Act of 1892, but an entirely new election of the whole body of Commissioners did not take place. One-third of the Commissioners have since then annually retired, the number being occasionally increased by casual vacancies, and their places have been supplied under the provisions of the Act of 1892.

The Town Councils Act 1900 came into operation on 1st January 1901, and reference may be made to sections 8 and 33 of that Act. By section 113 it is, *inter alia*, provided that where either difficulty or dubiety exists as to the procedure to be followed in any case, it shall be lawful for the Town Council, or seven electors or householders within the burgh, or for the returning officer at any election, or the town-clerk, to present a petition in manner provided in section 17 of the Burgh Police (Scotland) Act 1892, and that the same procedure shall follow upon the petition, and that the court to whom it is presented shall have the same powers as are provided by the said section in regard to applications presented thereunder.

It is stated in the petition that doubts have arisen (1) as to whether the Police Commissioners of the burgh under the Act of 1862 became the Commissioners of the burgh under the Act of 1892; (2) as to whether the property which was or had originally been vested in the Town Council under the charters is now vested in the Commissioners under the Act of 1892; (3) as to whether an entirely new election of the Commissioners should have taken place on the occasion of the first annual election of the Commissioners after the passing of the Act of 1892; (4) as to whether the present Police Commissioners became the Town Council of the burgh under the Town Councils (Scotland) Act 1900; (5) as to whether the charters above mentioned were superseded by the Act of 1892; and (6) as to whether the Town Council under the charters is superseded by the Burgh Police Act of 1892 or the Town Councils Act 1900, and the present Commissioners substituted for it.

Upon these questions we are of opinion (1) That the Police Commissioners of the burgh under the Act of 1862 became the Commissioners of the burgh under the Act of 1892; and (2) that the property originally held by the Town Council under the charters vested in the Commissioners under the Act of 1892. As has been already stated, we consider that that property vested in the Commissioners under the Act of 1862 by force of section 22 of that Act, and that it passed to the Commissioners under the Act of 1892 in virtue of the provisions of that Act. With respect to question (3) we are of opinion that it was not necessary that an entirely new election of Commissioners should take place on the occasion of the first annual election of Commissioners after the passing of the Act of 1892, and with respect to the 4th question we think that the present Police Commissioners became the Town Council of the burgh under the Town Councils (Scotland) Act 1900. We consider that the proper answer to questions (5) and (6) is that the charters and the Town Council under them are superseded by the Burgh Police Act 1892, or by the Town Councils (Scotland) Act 1900, and the present Commissioners effectually substituted for that Town Council. An interlocutor will be pronounced giving effect to these views.

The Court pronounced the following interlocutor:—

“Find and declare that the present Commissioners of the Burgh of Blairgowrie became the Commissioners under the Burgh Police (Scotland) Act 1892, and now constitute the Town Council of the burgh in the sense of the Town Councils (Scotland) Act 1900, and that as such they have superseded the Town Council elected under the charters of said burgh, dated 5th December 1809, 23rd February 1829, and 10th September 1873; that they are vested in and entitled to administer the whole funds and property under the charge both of the present Commissioners and of the Town Council of the burgh under the said charters, and that it is not competent in future to elect any Town Council under the fore-said charters, or otherwise than in accordance with the Town Councils (Scotland) Act 1900,” &c.

Counsel for the Petitioners—Craigie.
Agent—Robert Stewart, S.S.C.

Counsel for the Feudal Superior—Pitman.
Agents—Scott Moncrieff & Trail, W.S.

Tuesday, October 29.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

LORD ADVOCATE v. HARVEY'S TRUSTEES.

*Revenue — Estate-Duty — Exemption —
“Settled Property”—Legacy to Deceased
Carried to Trustees by Her Prior Con-
tract — “Person Competent to Dispose”
— Finance Act 1894 (57 and 58 Vict. c.
30), sec. 5 (2).*

By a postnuptial contract of marriage the wife conveyed her *acquiritenda* to trustees for behoof of herself and her husband and the survivor in life-rent and her children in fee. Thereafter a brother of the wife died leaving a settlement whereby he bequeathed a share of residue to her absolutely. This share was paid by his testamentary trustees to the marriage-contract trustees. The brother's testamentary trustees had paid estate-duty upon the amount of the share as passing on his decease. Upon the decease of the wife the marriage-contract trustees maintained that they were not liable for any estate-duty in respect of this share, upon the ground that it was settled property upon which estate-duty had been paid since the date of the settlement, and that consequently, under section 5 (2) of the Finance Act 1894, it was entitled to exemption from any further payment on the death of the wife, who was not a person “competent to dispose” of it. *Held* that as the bequest by the brother was an