retain the estate in their own hands, but that is certainly not the truster's intention, because, as we have seen, he has directed the fee of his estate to be distributed as soon as the youngest of his immediate children had attained twenty-one, so that it would be impossible for the trustees to fulfil such a direction. It is clear that the truster did not overlook the case of grandchildren in making his settlement, and that they are specially named when they are intended to take any benefit as appears from the next clause, which relates to the disposal of the fee of his estate, by which in that case the issue of children are specially substituted in place of their predeceasing parents.

I am of opinion, therefore, that the trustees are directed to pay the income in question to the truster's immediate children only, and that they are neither bound nor entitled to pay any of it to grandchildren or anyone claiming in their right, and therefore that the third and fourth questions must be answered in the negative.

In my opinion the fifth question must also be answered in the negative. There is no direction to accumulate, and, as I have said, the trustees are bound to pay the income of the estate to the immediate children of the truster alive at the time.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the first, third, fourth, and fifth questions in the negative.

Counsel for the First Parties — Sym. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Second Party—Dundas—W. Thomson. Agent—A. G. G. Asher, W.S.

Counsel for the Third Party — Craigie. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Fourth Parties — Kennedy — Constable. Agents — Macgregor & Stewart, S.S.C.

Thursday, June 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

COUNTY COUNCIL OF SELKIRK *v.* BURGH OF GALASHIELS.

Local Government—General County Assessment—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 26 (*sub-sec.* 4) 27, *and* 105.

Held that a county council has no power to levy the County General Assessment upon lands and heritages in royal or parliamentary burghs within the county.

Police Commissioners of Oban v. *County Council of Argyllshire*, March 9, 1894, 21 R. 644, 510, *commented on.*

By the Local Government (Scotland) Act 1889, it is, *inter alia*, enacted as follows, sec. 26, sub-sec. 4—"If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owner's consolidated rate, and the occupier's consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county, or, in the case of expenditure for the management and maintenance of highways, the administration of the laws relating to public health, or other special purpose as hereinbefore mentioned, upon all rateable property within the several districts or parishes of the county as the case may be, in the manner and subject to the conditions in this Act provided."

Sec. 27, sub-sec. 1—"The county council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund in respect of each branch of expenditure subject to its control, or for which it is responsible in whole or in part, and such rate shall be imposed upon all lands and heritages within the county, except that the rate for the management and maintenance of highways, the administration of the laws relating to public health, and any other special purpose as hereinbefore mentioned, shall be imposed upon all lands and heritages within each division, or district, or parish, as the case may be. The rate in respect of each branch of expenditure, for which provision is made under an Act of Parliament in force at the passing of this Act, shall be deemed to be imposed under the powers, and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act. The rate necessary in respect of any branch or branches of expenditure for which no provision is made, as last mentioned, shall be imposed as a general purposes rate under this Act."

Sec. 105—"In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them—that is to say, the expression 'county' means a county exclusive of any burgh wholly or partly situate therein, and does not include a county of a city. The expression 'burgh' means any royal or parliamentary burgh."

On 18th November 1895 the Corporation of the burgh of Galashiels raised an action against the County Council of Selkirk for declarator that "the defenders are not entitled to levy County General Assessment on lands and heritages belonging to the pursuers lying within the boundaries of the said burgh of Galashiels."

The burgh of Galashiels adopted the Police Act of 1850, and maintains a police establishment. It is also a parliamentary burgh, and has a population of about 18,000.

The pursuers pleaded—"(1) In respect the lands and heritages belonging to the pursuers within the burgh of Galashiels do not

form part of the assessable area from which the defenders are empowered to levy County General Assessment, the pursuers are entitled to decree of declarator as concluded for."

The defenders maintained that as successors of the Commissioners of Supply, under the 11th section of the Local Government Act, they were entitled to impose this assessment on lands within the burgh.

On 11th March 1896 the Lord Ordinary (KINCAIRNEY) granted decree in terms of the conclusions of the summons.

Opinion.—"This is an action by the Corporation of the burgh of Galashiels against the County Council of the county of Selkirk, in which Galashiels is situated, and the question raised is whether the county council is entitled to levy the tax known as County General Assessment on lands within the burgh, this particular case relating of course directly only to subjects belonging to the burgh.

"The question has already been decided in favour of Galashiels in an action raised before Lord Low. Lord Low's judgment is dated 23rd February 1892. It was not taken to review, and is not reported in the ordinary reports. I was furnished with a print of his judgment, and referred to a report of the case in the Poor Law Magazine for 1892, p. 204.

"A similar question has since been raised between the Police Commissioners of Oban and the County Council of Argyllshire, in a case also called before Lord Low, who decided that the County General Assessment for Argyllshire was not leviable on lands in the burgh of Oban. But that interlocutor was recalled by the Second Division, and the case was decided in favour of the county council—reported 9th March 1894, 21 R. 644, and more fully in 31 S.L.R. 510. I am bound to follow that judgment, and to hold it as correcting Lord Low's interlocutor in the Oban case. It has been maintained by the County Council of Selkirk that that judgment overrules the judgment of Lord Low in the action between the present parties; and that in respect of it judgment should be given in favour of the defenders, the County Council of Selkirk. *Res judicata* is not pleaded.

"It is certainly true that Lord Low's grounds of judgment in the Galashiels case were, to a certain extent, the same as his grounds of judgment in the Oban case, with which the Second Division did not concur. Such grounds of judgment were no doubt applicable to both cases; and, as I am precluded from founding on those grounds of judgment which were common to both cases, the argument was stated on the footing that these grounds for a judgment in favour of Galashiels could not be re-opened before me, and they were not argued—the pursuers of course reserving right to re-open them if the case should go further.

"I am, however, of opinion that the case of Oban differs in an essential particular from this case, a difference clearly expressed in the judgment in the Inner House; and that Lord Low's judgment in the previous case was well founded and may be supported in complete consistency with the judgment in the Oban case. That essential difference is, that Galashiels is a police burgh under a Police Act, which maintains a police of its own out of a burgh police assessment, which was not the case with Oban. The facts that the population of Galashiels is above 7000, and of Oban under 7000, are of importance in regard to certain provisions in the Local Goverment Act. The ground on which I reach a conclusion in favour of Galashiels may be narrow, but I think the point reasonably clear.

"The powers of assessment of the county council depend, of course, primarily on the Local Government Act 1889 (52 and 53 Vict. cap. 50). By section 27 of that Act the county council is empowered to fix the rate of assessment in respect of each branch of expenditure, and to impose the rate upon 'all lands and heritages within the county,' with certain exceptions which do not affect this case. By section 105, the expression county is defined to mean 'a county exclusive of any burgh,' and the term burgh is defined to mean any royal or parliamentary burgh, which interpretation of the word 'burgh' comprehends Galashiels being a police burgh. Hence it appears to be clear enough that section 27 of the Local Government Act does not authorise the assessment in question on property within the burgh of Galashiels. I do not pursue this point further, because I did not understand that the defenders maintained that they could rest their power to assess on that section, or on any new powers of assessment conferred by the Local Government Act. They rested their case on section 11 of the Act, whereby the powers of the commissioners of supply are transferred to the county council, and whereby it is declared that 'the provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties' transferred shall remain in full force and effect so far as not repealed by or inconsistent with' the Act.

"That clause they say carries the question back to the County General Assessment Act 1868 (31 and 32 Vict., cap. 82), whereby the commissioners of supply are empowered to impose the County General Assessment, which is the assessment now in question. That statute is in part repealed by section 12 of the Local Government Act, but the assessing clauses are not repealed. The defenders therefore, as I understand, maintain that the question depends on the County General Assessment Act; and, in any case, I am of opinion that it does.

"That statute abolishes 'rogue money,' and imposes the County General Assessment 'in lieu thereof,' and it provides, section 10, that 'nothing herein contained shall confer on the commissioners of supply of any county the right to levy assessments under this Act on any lands or heritages, upon which it is not now competent for the commissioners of supply to levy rogue money.'

"It is therefore perfectly plain that if in 1868 the commissioners of supply were

not entitled to levy rogue money on lands within the burgh of Galashiels, then they were not empowered, and are not now entitled to levy County General Assessment on lands within the burgh; and the converse is also obvious, that if they were entitled to levy rogue money on the lands in the burgh, then they were authorised to levy County General Assessment. I do not know that the pursuers would admit that, even if that power was conferred on the commissioners of supply, it is now resident in the county council. My impression is that it would be; but I do not require to determine that question, because I am of opinion that in 1868 the commissioners of supply were not entitled to levy rogue money within the burgh.

"Liability to be assessed for rogue money thus becomes the test of liability for the general county assessment, and it is therefore necessary to consider the statute in regard to rogue money.

"Rogue money was first imposed by the Disarming Act 11 George I., cap. 26, by which the freeholders of 'every shire, county, or district' were empowered to assess the several shires and stewartries, where their estates lay, in sums to be applied in defraying the charges attending the apprehension, subsistence, and prosecution of criminals. I do not know when this assessment first received the name of rogue money, but the power to levy it was transferred, under that name, from the freeholders to the commissioners of supply in 1832 by the Reform Act (2 and 3 Wm. IV., cap. 65), sec. 44.

"The first General Police Act for burghs was 3 and 4 Wm. IV., cap. 46, 1833, but it contains no reference to rogue money or county police assessment.

"The Act 2 and 3 Vict., cap. 65, 1839, proceeds on a narrative of the Disarming Act, 11 George I., cap. 26, and of the Reform Act, and sets forth that the rogue money had hitherto been raised by assessment on the valued rent, and that it was expedient to authorise the commissioners of supply, if they thought fit, to extend the purposes of that assessment, and to adopt other modes of assessment. The Act therefore empowered the commissioners of supply to make an additional assessment 'for establishing and maintaining an efficient constabulary and police force,' and for other purposes; and the Act declared that this additional assessment should be deemed and taken to be and should be levied and collected as part of the rogue money. It was further provided that 'the rogue money and additional assessments to be so assessed and collected shall be applied for the purposes of the said herein recited Act of His Majesty King George the First, and of this Act, and to no other purposes.' It is to be noticed that the Act does not only provide that the additional assessment should be levied and collected with the rogue money, but that it should be taken to be part of the rogue money, and that the rogue money and additional assessment—or rather the whole rogue money—should be applied to the same purposes; and these, if not wholly, yet in part, were undoubtedly police purposes. There were not two taxes levied under this Act, but only one, namely, the augmented rogue money, which thus became the county police assessment.

"It was provided by section 3 that 'the said commissioners shall not be entitled, for the purposes of this Act, to assess any lands, houses, or other heritages situated within the boundaries of any royal burgh, or to assess any lands, houses, or other heritages within the boundaries of any burgh or town which either has a Police Act, or which has taken the benefit of' the Act 3 and 4 William IV. cap. 46.

"The General Police Act 1850 (13 and 14 Vict. cap. 33), section 376, provides 'that no burgh in which a police is maintained by assessment upon such burgh, under the provisions of this Act, shall be liable for any assessment for the police purposes of the county in which such burgh is situated, anything in any Act or Acts of Parliament to the contrary notwithstanding.'

"Now, it is averred and admitted that in 1850 Galashiels adopted this Police Act, and has since maintained a police within the burgh.

"At that time Galashiels was situated partly in Selkirk and partly in Roxburgh; and it is clear that at that date it became exempt from any assessment for the police purposes of either of these counties. What then was the assessment for police purposes in counties at that date? It could be nothing but the augmented rogue money. It is not said that there was any other county police assessment, or any county police assessment which was not rogue money. If that be true, the important conclusion is reached by inferences which seem otherwise inevitable, that no rogue money was leviable on land in the burgh of Galashiels, after it had adopted the Police Act of 1850 and undertaken the provision of its own police.

"By the County Police Act of 1857 (20 and 21 Vict. cap. 72), the Act 2 and 3 Vict. cap. 65, was repealed, and as a consequence the additional assessment thereby authorised necessarily fell. But the whole of the rogue money was not thereby abolished, but only a part of it. The rest of it—that is to say, the original rogue money—remained, as is clear, could there be any doubt about it, from section 32. It may be that thereafter the rogue money could only be applied to the purposes specified in the Disarming Act, but there certainly is nothing in this County Police Act which can be supposed to reimpose it on a police burgh with a police of its own. The 29th section authorises an assessment on heritages within a county. But it appears from the interpretation clause that a burgh such as Galashiels was certainly not included in the word 'county,' as used in the County Police Act.

"The Police Act of 1850 was repealed by the Act 25 and 26 Vict. cap. 101, section 1, but burghs which had adopted the Act were excepted from the operation of this repeal. That Act, so far as regarded Gala-

shiels, stood operative and unrepealed in 1868, when the General County Assessment Act was passed, and therefore at that date rogue money was not leviable out of land in the burgh of Galashiels, and therefore the general county assessment was not imposed on it.

"Other arguments were stated on behalf of the burgh of Galashiels; such as, that, as it was not represented in the county council, it was presumably not subject to their power of assessment; and that the opposite view involved a double assessment of the lands in the burgh. It appears to me, however, simpler and safer to proceed on the plain words of the various statutes than on presumptions and inferential arguments; and, so far as I am able to see, they determine the question very clearly in favour of the pursuers. I am therefore of opinion that decree must be pronounced as concluded for."

The defenders reclaimed, and argued—The case was ruled by that of *Oban Police Commissioners* v. *County Council of Argyllshire*, where the very point in dispute was settled. Under the older Acts this assessment was leviable. There was no exemption from it conferred by the Local Government Act upon burghs in express terms, and the Court would be slow to recognise such an exemption as being conferred by implication. On the contrary, by the 11th section all the powers of the commissioners of supply, which included the power to make this assessment, were conferred on the county council, while in the 27th section certain rates were to be imposed upon the whole county, and were "to be deemed to be imposed" under the older Acts. But under these older Acts the defenders' predecessors had assessed burghs, and accordingly the defenders were entitled to. The definition clause perhaps seemed to limit the assessable area, but there were saving words in it, viz., "if not inconsistent with the context," which prevented the clause from being conclusive against the defenders' contention.

Argued for respondents—The defenders had no power under the assessing clauses of the Local Government Act to assess a parliamentary burgh. The territorial area assessable was clearly defined by the assessing sections read along with section 105, the defining section, and from it parliamentary burghs were expressly excluded. The defenders had no other powers of assessing except under these sections. It was true that under section 11 the defenders had their predecessors' powers transferred to them, but these powers were also transformed, and they were bound under section 33 to consolidate the rates. They now proposed to cross the burgh boundary, pick out one of the items from their consolidated rate, and assess the burgh for it with the aid of the burgh valuation roll. They had absolutely no authority for such a proceeding. In the *Oban* case the assessing clauses of the Local Government Act had not been brought before the Court or the decision would have been different. The present point had been rightly decided by Lord Low in the case of *The Burgh of Galashiels* v. *Selkirk County Council*, quoted by the Lord Ordinary.

At advising—

LORD PRESIDENT—The question in this case is whether the County Council of Selkirk are entitled to levy certain rates on lands and heritages situated within the burgh of Galashiels. The first plea for the pursuers is as follows:—"In respect the lands and heritages belonging to the pursuers within the burgh of Galashiels do not form part of the assessable area from which the defenders are empowered to levy County General Assessment, the pursuers are entitled to decree of declarator as concluded for." And the decree of declarator sought is "that the defenders are not entitled to levy County General Assessment on lands and heritages belonging to the pursuers lying within the boundaries of the said burgh of Galashiels."

Now, the question is thus of the right of this County Council to levy assessment within the burgh of Galashiels; and primarily, that question undoubtedly must be determined by a reference to the assessing powers of the County Council. Now, those are contained in the Local Government Act of 1889, and in particular in sections 26 and 27. Up to this point in that statute your Lordships will have observed that what has in the main been done is that the powers and duties generally of the various county bodies are now gathered together and placed in the sole hands of the county council, and the county council in the appropriately ample terms of transference have a title fortified by the assertion that they are to enjoy all the rights and be subject to all the duties of their predecessors.

Had matters rested upon these words of the transfer, conjecture might have arisen as to the mode in which the massed powers of assessment would be exercised. The Legislature, however, leaves in no haze or doubt what the powers of assessment are to be, because in the 26th section and in sub-section 4 they state expressly what, and what alone, is to be legal:—"If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owner's consolidated rate and the occupier's consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county." Then in the more executive clause, section 27, it is provided:—"That the county council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency;" "and such rate shall be imposed upon all lands and heritages within the county." There are various provisions made as to the mode and form in which this is to be done, but those sections constitute the sole right of the county council to levy rates at all.

Now, you have observed that there is an express provision not merely as to the rate

which is to be levied, but also as to the assessable area. The property to be rated is all lands and heritages within the county. Now, when we turn to section 105 we find, in perfectly unambiguous terms, the interpretation of the word "county." "The expression 'county' means a county exclusive of any burgh wholly or partly situate therein." And the next interpretation is—"The expression 'burgh' means any royal or parliamentary burgh." Now, putting these two things together, it seems to me as clear as anything can be that the County Council of Selkirk has a power of levying a consolidated rate upon all the county, excluding the Parliamentary Burgh of Galashiels. If you put the two things together there is no escape from that conclusion; and accordingly I asked—"How can this assessment be justified? Is it not open to the objection that it is an assessment upon lands and heritages which do not form part of the assessable area?"

The argument in support of this power is presented in a somewhat singular form. If you turn to those sections authorising assessments you find that all that the county council can do is to impose a consolidated rate. They are, it is true, to inform their constituents, the ratepayers, of the details of the purposes which require that aggregate amount, and that is to be set out in the notice-paper. But, not the less for that, is the assessing power to be found in the 26th and 27th sections of the Act of 1889, and not in the assessing clauses of the old statutes which gave the transferred powers to the predecessors of the county council.

A sharp test of the validity of the defenders' contention is afforded by this question—What rate do you propose to impose upon the lands and heritages within the burgh of Galashiels? They could not face up to the proposition that they were going to impose all their county rates upon the burgh of Galashiels in the form of the consolidated rate; and, if not, that must mean that they are going to lay a part upon it.

I find from the frame of the summons and the expression of the plea, that the threat which is made by the defenders in this action is to impose a County General Assessment. In their resolution I see they resolve, having regard to a certain judgment to which I shall presently refer, that "a County General Assessment" be levied from the burgh of Galashiels as part of the county. That means that they are going to exercise, not their own powers of assessment, but the powers of assessment which existed in their deceased predecessors. In short, they are going to revive a power which existed in certain persons who exercised some of their powers, and they are going, under pretence, observe, of their authority as a county council, to levy a rate which is entirely unsupported by any clause of the Local Government Act.

Now, that threat or resolution seems to have governed the expression of the summons, and accordingly the proposition we are asked to affirm is that the defenders are not entitled to levy County General Assessments on lands and heritages belonging to the pursuers lying within the burgh of Galashiels. I am quite prepared to affirm that proposition. But I would have gone further, because I would have been prepared to affirm that they are not entitled to levy any assessment on lands and heritages within the burgh of Galashiels. But the limitation in the summons brings to light one of the salient fallacies of the defenders' position, and discloses the double illegality of the proposed rate—it would be levied outwith the assessable area, and the rate itself would be illegal even within it.

Now, I have treated the matter upon one ground, and one only. I am prepared to sustain the definite and sharp rule of law which is put forward in the first plea of the pursuers, that they are not within the assessable area. But we have been told that to adopt that ground of judgment would be to go against a decision by the Second Division of this Court in the case of *Oban*. Now, it is quite true that in that case the Second Division held that lands within the burgh of Oban were liable to the assessments of the County Council. But when that case is cited it must be as an authority on the proposition of law on which we were asked to give judgment. Now, I cannot find in the reported opinions of the learned Judges any reference at all to the assessing sections (26 and 27) of the Local Government Act 1889, or to a comparison with them of the interpretation of the word "county" contained in section 105. A number of other topics are discussed, none of which seem to me to be necessary for our present decision, and accordingly on the expressed opinions of the Judges I am saying nothing which is in the least degree adverse to them. It is true that the Lord Justice-Clerk remarks that he has been unable to find in the Local Government Act anything to alter the situation from what it was under the Act of 1868; but then I do not think that his Lordship is considering this salient and preliminary question upon which my judgment is based, because if it had been under his observation he would most certainly have discussed and disposed of it. Therefore while feeling myself entirely free from authority upon this subject, and considering the question to be a very sharp and very plain one, I am in favour of affirming the interlocutor of the Lord Ordinary.

I desire to express no opinion at all on any of the grounds of judgment which his Lordship has adopted, but I may remark that I think he has been led into those circuitous methods of dealing with the case by some apprehension as to how far he was bound by the decision in the *Oban* case.

LORD ADAM—I concur. For my part I think this case is quite clear upon the point of law on which your Lordship proposes to decide it. I think it is clear from the Act of 1889 that the area within which alone this assessment can be levied is the county, excluding the burgh of Galashiels. The next point I think is equally clear,

that the only assessment is for consolidated rate and for nothing else. There is no authority that I can see to assess the burgh of Galashiels or any other burgh within the county for anything but the whole consolidated rate, and that is not what is proposed to be done. The County Council here are seeking to impose a special assessment upon the burgh of Galashiels. I agree with your Lordships that the Lord Ordinary's interlocutor should be affirmed.

LORD M'LAREN—I think it is demonstratively clear that the county councils constituted by the Local Government Act of 1889 have no authority to impose assessments or rates within any royal or parliamentary burgh in Scotland.

Were it not that there has been some contrariety of opinion in the construction of these assessing clauses, I should have been content to express my concurrence in the grounds of judgment expressed by your Lordships. I do not know that I can add anything, but my opinion is rested mainly on this, that I hold that all the powers of assessment, which were vested in the county authorities prior to 1889 came to an end on the passing of the Local Government Act of that year. The powers have necessarily ceased because the assessing authorities no longer exist; and it follows that rates authorised to be levied by Act of Parliament previous to 1889 only exist in so far as the rating powers are continued or are incorporated by reference under the provisions of the Local Government Act. Now, the most important provision as to rating is the 27th section, which authorises the imposition of a consolidated rate upon owners and a consolidated rate on occupiers. In giving this power reference is made to previous legislation on the subject of county finance, as the measure of the powers of the county council in regard to all partial rates or elements of the consolidated rate, which are not specially regulated by the Local Government Act itself. The county council at the same time is empowered to include in the consolidated rate an allowance for general purposes. Now, it appears to me that no authority is given to a county council for levying anything but a consolidated rate, and that rate must be the same rate for every part of the county, except in so far as district taxation is authorised by Act of Parliament.

As regards those subjects of county taxation, which apply equally to all parts of the county, this part of the consolidated rate would, of course, be the same throughout the county. But it is recognised that, with reference to roads and public health and other purposes of a more local character, the consolidated rate may vary for different districts of the county, because it is to include such assessments for those more limited purposes as were authorised by existing legislation.

When we come to consider what is the area of taxation, the answer is given by the 26th section, that the rate is limited in amount to what is necessary to make up the deficiency in the county fund, and is limited geographically to rateable property within the county. As your Lordship has pointed out, the word "county" is clearly and sharply defined in the definition clause, and it is perfectly clear that the Legislature did not include the area of any royal or parliamentary burgh within the area of county taxation, because such burghs are excluded from the conception of a county as existing for the purposes of this Act.

Having regard to views that have been expressed elsewhere, I do not wish to express a definite opinion as to whether the County General Assessment was ever properly chargeable within the areas of royal and parliamentary burghs. If it was so charged, the case is an exception to the policy of modern legislation, which has been to recognise the autonomy of municipal corporations in regard to local taxation. If such anomalies did exist, they have been removed by the Local Government Act of 1889, which provides with regard to the more important class of burghs—those which either had an ancient constitution, or, on account of their importance, had been allowed a separate representation in Parliament—that they are not to be subject to the government or the assessing powers of the county councils.

On another ground I think that the defence to this action of declarator must fail because there is no authority in the Local Government Act for laying on a County General Assessment in contra-distinction to a consolidated rate. The only way in which burghs could be made liable to the County General Assessment (which came in place of rogue money) would be by laying on the burghs so much of the entire consolidated county rate as is universally applicable to owners within the county. But it was not contended that royal and parliamentary burghs were universally liable to county taxation, and on this ground also my opinion is that the pursuers are entitled to decree of declarator.

I concur with your Lordships in thinking that the attention of the Judges who decided the *Oban* case had not been prominently called to the new departure in regard to financial powers which is taken in the Local Government Act of 1889, because the discussion of the subject which we find in the opinions of the Lord Justice-Clerk and Lord Trayner is chiefly directed to the argument upon the older statutes.

I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR — I am of the same opinion. I think the burgh of Galashiels is not within the assessable area over which the powers of the county council to levy rates extend. The 26th section, when it is read along with the interpretation clause, defines the assessable area in language that seems to me to be too clear to raise any question of construction, because it authorises the county council to levy a consolidated rate or consolidated rates upon all rateable property in the county excluding

royal and parliamentary burghs. I agree, therefore, with the main ground of judgment upon which your Lordships proceed; and I agree also with the second ground that the county council being authorised to levy a consolidated rate, is not entitled to break up the rate for the purpose of levying an assessment for one particular purpose upon a parliamentary burgh which for the purpose of all other assessments is beyond the assessable area. I think the statute authorises a county council to levy a consolidated rate within a definite area, and no other rate.

The Court adhered.

Counsel for the Pursuers—Balfour, Q.C. —W. Campbell. Agent — Richard Lees, Solicitor.

Counsel for the Defenders—Asher, Q.C.— J. Reid. Agents—Mylne & Campbell, W.S.

HOUSE OF LORDS.

Friday, May 15.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Shand, and Lord Davey.)

LADY CONSTANCE MACKENZIE *v.* DUKE OF SUTHERLAND'S TRUSTEES AND OTHERS.

(*Ante*, vol. xxxii. p. 641, and 22 R. p. 839.)

Succession—Trust-Disposition—Construction—Heirs-Female.

It is a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language, are not to be controlled or qualified by a recital or narrative of intention.

A granted a trust-disposition, whereby, "in order to make and secure additional provision for" his second son, "and the other heirs of entail succeeding to him in the lands and estate of Cromartie, to enable them to support the dignity and title of Earl of Cromartie," he conveyed a number of securities to trustees, and directed them after his death to pay the free annual proceeds of the trust funds to his second son and the heirs-male of his body, whom failing to certain substitutes, "whom failing to the heirs-female of the body" of the said second son.

The truster's second son was survived by two daughters, of whom the elder succeeded to the earldom of Cromartie.

Held (*rev.* the judgment of the Second Division) that the expression "heirs-female," not being ambiguous, could not be controlled or qualified by the narrative of intention, and that the two daughters were entitled, equally between them, to the income of the trust fund.

The case is reported *ante*, vol. xxxii., p. 641, and 22 R. p. 839.

Lady Constance Mackenzie appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, it appears to me that this case is susceptible of a very short solution. I simply look at the deed itself, and I find that the provisions for the beneficiaries intended by this deed are satisfied by the persons claiming now as heirs-female. I really have great difficulty in saying more than that, because if the language of the instrument itself is sufficiently clear as to the beneficiaries pointed to, as I think it is, and if the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified, or modified by the initial statement of what the motive of the author of the deed was. It would, to my mind, be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made. I should say that even if there were some contradiction between what was done and the supposed purpose. But here it is very obvious to remark that the purpose or the motive which the maker of the deed prescribes to himself is to some extent satisfied by what he does, and I can only say, speaking with the utmost respect to the learned Judges who expressed a different view, that I am unable to comprehend how that purpose could alter the natural and ordinary effect of the words used in the instrument.

My Lords, for these reasons I move your Lordships that the judgment of the Court below be reversed, and that the appeal be allowed.

LORD WATSON—My Lords, I have come without any difficulty to the same conclusion.

These ladies are heirs-female, and they are also heirs-portioners. Heirs-portioners who are heirs-female take, according to the law of Scotland, as a class. The destination or gift to them contained in this trust-deed, if it were a destination or a gift of land, would be quite effectual to give them a *pro indiviso* right in the land, each taking an equal share, and I have heard nothing suggested to the effect that when there is a gift of property to the same class in plain unambiguous terms it should have the least different effect. There can be no reason for its receiving a different effect in such a case unless it be upon a principle which I have never yet heard suggested in the law