Thursday, June 7.

SECOND DIVISION.

[Sheriff Court at Paisley.

CONN *v.* BURGH OF RENFREW.

Burgh—Common Good—Administration—Proposal by Town Council to Pay Out of Common Good Expenses of Opposing Parliamentary Bill—Title of Burgess to Object—Burgh Police (Scotland) Act 1903 (3 *Ed. VII, c.* 33); *Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. c.* 49); *Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 50); *Municipal Corporations (Borough Funds) Act* 1872 (35 *and* 36 *Vict. c.* 91).

The common good of a royal burgh being corporate property falls as such to be administered by the town council as the executive of the corporation, and having been originally derived from the Crown, the title to complain of any misapplication of it is vested exclusively in the Crown, and no action at law directed against the council's administration is competent at the instance of any individual burgess or burgesses (unless he or they can allege a patrimonial interest distinct from his or their interest as members of the community) except in so far as certain limited rights of intervention have been conferred by various statutes now consolidated in the Town Councils (Scotland) Act 1900. In particular, the Burgh Police (Scotland) Act 1903, the Local Government (Scotland) Act 1889, the Municipal Corporations (Borough Funds) Act 1872, do not affect the law which regulates the right of burghs to deal with the common good, or the manner of their doing so.

An individual burgess *held* not entitled to object to a town council defraying the expense of opposing a bill in Parliament out of the "common good." *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C., *followed.*

Burgh—Municipal Corporations (Borough Funds) Act 1872 (35 *and* 36 *Vict. cap.* 91).

The question of the applicability of the above Act to Scotland *raised* but *not decided.*

The Burgh Police (Scotland) Act 1903 (3 Ed. VII, cap. 33), section 55, provides—"Without prejudice to any powers possessed by them under the existing law, the town council of a burgh shall, subject to the like conditions, have the like powers of opposing bills or provisional orders as are conferred upon county councils by section 56 of the Local Government (Scotland) Act 1889 as read with the Private Legislation Procedure (Scotland) Act 1899, and any expenses incurred by them in any year in the exercise of the last-mentioned powers may be defrayed in whole or in part from any assessment or from any two or more separate assessments levied by them in such year or in the following year, all as the town council may determine. Provided that any ratepayer who is entitled to an exemption from any assessment leviable by the town council may appeal to the Secretary for Scotland against any such determination, and his decision shall be final. . . ."

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 56, provides—"The council of a county shall have the same powers of opposing bills in Parliament, and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the county, as are conferred by the Act of the thirty-fifth and thirty-sixth years of Her present Majesty, chapter ninety-one; and, subject as hereinafter provided, the provisions of that Act shall extend to a county council as if such council were included in the expression 'governing body' and the county were the district in the said Act mentioned: Provided that (*a*) no consent of owners and ratepayers shall be required for any proceedings under this section; (*b*) this section shall not empower a county council to promote any bill in Parliament or to incur or charge any expense in relation thereto, save only a bill for confirming a provisional order made under or in pursuance of the provisions of any Act of Parliament; (*c*) the consent of the Secretary for Scotland shall be substituted for the consent of the Secretary of State or Local Government Board."

The Municipal Corporations (Borough Funds) Act 1872 (35 and 36 Vict. cap. 91), sec. 2, provides—"When in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund, borough rate, or other the public funds or rates under the control of such governing body, to the payment of the costs and expenses attending the same, and when there are several funds or rates under the control of the governing body, such governing body shall determine out of which fund or funds, rate or rates, such expense shall be payable and in what proportions. . . ."

Section 4—"No expense in relation to promoting or opposing any Bill or Bills in Parliament shall be charged as aforesaid, unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body at a meeting of the governing body, after ten clear days' notice by public advertisement of such meeting and of the purpose thereof in some local newspaper published or circulating in the district, such notice to be in addition to the ordinary notices required for summoning such meeting, nor unless such resolution shall have been published twice in some newspaper or newspapers circulating in the district, and shall have received, in respect of matters within the

jurisdiction of the Local Government Board the approval of such Board, and in respect of other matters the approval of one of Her Majesty's Secretaries of State; and in case of the promotion of a Bill in Parliament, no further expense shall be incurred or charged as aforesaid after the deposit of the Bill, unless the propriety of such promotion shall be confirmed by such absolute majority at a further special meeting to be held in pursuance of a similar notice not less than fourteen days after the deposit of the Bill in Parliament. Provided further, that no expense in promoting or opposing any Bill in Parliament shall be charged as aforesaid unless such promotion or opposition shall have had the consent of the owners and ratepayers of that district to be expressed by resolution in the manner provided in the Local Government Act (1858) for the adoption of that Act."

Section 5—"The approval of the Local Government Board or one of her Majesty's Principal Secretaries of State, as the case may be, shall not be given to any such resolution as aforesaid until the expiration of seven days after the second publication thereof as provided by this Act, and in the meantime any ratepayer within the district of the governing body may give notice in writing to the Local Government Board or Secretary of State objecting to such approval."

The Renfrew Police and Improvement Act 1855 provides, section 17—"That if and when the general assessments, other than private and district assessments, authorised to be levied under the said recited Act and this Act, shall exceed in any year the sum of sixpence in the pound, but not otherwise, and if the burgh shall be at the same time possessed of any free income arising from the common good thereof, after deduction of the interest of any debt which the burgh may owe, and also the necessary annual outgoings of the burgh, there shall be annually contributed, in the events aforesaid, from the said free income, such a reasonable proportion towards the purposes of this and the said recited Act as the Town Council of the burgh, having due regard to the extinction of the capital of such debt, shall think just . . ."

The Town Council of Renfrew took steps to oppose a Bill introduced into the House of Commons, under the title of 'An Act to Amend the Constitution of the Trustees of the Clyde Navigation and for Other Purposes.' The Town Council of Renfrew were trustees of Renfrew Harbour, and their opposition to the Bill was based upon the fact that under it the Burgh of Renfrew had no representative upon the Clyde Navigation Trust, and the object of their action was to obtain, if possible, some suitable representation.

The Town Council proposed to defray the expenses of the opposition of the Bill out of the common good of the burgh.

John M. Conn, 72 Fulbar Street, Renfrew, an inhabitant and ratepayer in the burgh, thereupon brought a petition in the Sheriff Court of Renfrew at Paisley against the Provost, Magistrates, and Councillors of the Royal Burgh of Renfrew, praying the Court "to interdict the defenders from paying out of or charging to, or proceeding to pay out of or charging to, the common good account of the Burgh of Renfrew, or from paying out of or charging to, or proceeding to pay out of or charging to, any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, in pursuance of resolutions alleged to have been passed at special private meetings of the Town Council of the Burgh of Renfrew, held within the Council Chambers on 6th and 12th April 1905, or one or other of them, to the effect that the Bill after mentioned should be opposed by them in Parliament unless due representation be granted to them on the public body known as the Trustees of the Clyde Navigation, any sum or sums for the purpose of being applied towards the costs and expenses attending the opposing by defenders in Parliament a Bill introduced therein entituled 'An Act to Amend the Constitution of the Trustees of the Clyde Navigation, and for Other Purposes,' until the defenders shall have complied with the terms and provisions of (1) the Municipal Corporations (Borough Funds) Act 1872; (2) the Local Government (Scotland) Act 1889; and (3) the Burgh Police (Scotland) Act 1903, or obtained the approval of the Secretary for Scotland to said resolutions in terms of said Acts, and to grant interim interdict and to find the defenders liable in expenses."

[The defenders had never proposed and did not propose to pay any part of the expenses out of rates or assessments. The only question, therefore, dealt with in the case came to be that connected with the "common good."]

The pursuer averred *inter alia*—"(Cond. 10) It is a condition-precedent to the defenders charging any burgh funds under their control with the costs and expenses attending the opposition to any bill in Parliament, or to the prosecution of any proceedings necessary for the protection of the interests of the inhabitants of Renfrew, and in particular the Bill which the defenders are opposing as above condescended on, that they should comply with the Municipal Corporations (Burgh Funds) Act 1872, the Local Government (Scotland) Act 1889, and the Burgh Police (Scotland) Act 1903. This the defenders have failed to do, and it is illegal and *ultra vires* of the defenders to pay out of or charge, or proceed to pay out of or proceed to charge, as they intend to do, any burgh funds under their control with such costs and expenses until they have so complied with the provisions of said Acts, and in consequence of the defenders' illegal proceedings the pursuer is prevented from exercising his statutory rights, and will suffer material loss in consequence of increased taxation consequent on defenders' action, the general assessments being already 1s. 1½d. per £. (Cond. 11) The defenders are not entitled under these statutes or any other statute, nor at common law, to pay out of or charge to, or proceed to pay

out of or proceed to charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, with the costs and expenses attending the opposition in Parliament to said Bill, except subject to the regulations contained in the statutes referred to in the immediately preceding article, and with the consent foresaid. No rights, powers, or privileges of the defenders are attacked or threatened by the promotion of the said Bill for reconstitution of the Clyde Trust, nor will any alteration in the constitution thereof affect Renfrew. . . ."

In their answers the defenders stated, *inter alia*—"(Ans. 9) Admitted that the defenders . . . have resolved to oppose said Bill in the House of Commons, and to pay expenses incurred by them out of the common good of the burgh. . . . Explained that the defenders have adopted in connection with said resolution the same procedure which has been adopted by them and all other burghs administering a common good from time immemorial. In particular, in 1879, 1892, 1899, and 1902, the defenders or their predecessors in office have spent money out of the common good in connection with the promotion of Bills relating to the harbour of Renfrew, and that after adoption of the same procedure as has been adopted in the present case. The defenders are satisfied after the most careful consideration of the question that it is material to the general interests of the Burgh of Renfrew that they should be represented upon the Clyde Navigation Trust, and it is believed that this is the general opinion of the vast majority of the ratepayers. Such representation will, it is thought, most likely be secured by following the course resolved upon. The pursuer has no interests whatever to object to the action of the defenders."

The pursuer stated, *inter alia*, the following pleas—"(1) The defenders not being entitled in terms of either the Municipal Corporations (Borough Funds) Act 1872, the Local Government (Scotland) Act 1889, the Burgh Police (Scotland) Act 1903, or any other Act, to pay out of or charge to or proceed to pay out of or charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, the costs and expenses or any part thereof of opposing the said Bill, except subject to the regulations contained in said statutes, and after having the approval of the Secretary for Scotland to any resolutions passed by them, and not having complied with or observed said regulations or obtained said approval, the pursuer is entitled to interdict as craved with expenses. (2) The defenders not being entitled to pay out of or charge to or proceed to pay out of or charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, the costs and expenses or any part thereof of opposing the said Bill, the pursuer is entitled to interdict as craved."

The defender stated, *inter alia*, the following plea—"(3) The action ought to be dismissed in respect that the pursuer has no title, *separatim* no interest, to challenge the defenders' administration of the common good."

On 23rd May 1905 the Sheriff-Substitute (LYELL) pronounced the following interlocutor:—". . . Finds that the pursuer has set forth no title or interest to sue the present action: Therefore dismisses the same. . . ."

Note.—"In this action the pursuer asks that the Provost, Magistrates, and Town Councillors of Renfrew should be interdicted from charging to the common good of the burgh or from charging to the assessments to be levied by them within the burgh the expenses to be incurred by the defenders in opposing before Parliament a Bill entitled 'An Act to amend the Constitution of the Trustees of the Clyde Navigation, and for Other Purposes,' until the defenders shall have complied with the provisions of certain Acts of Parliament enumerated in the prayer of the petition. The only title that the pursuer sets forth on record is that he is an inhabitant of the Burgh of Renfrew, and that he will be 'injuriously affected' by the actings of the defenders. The injury which he says he will suffer comes, shortly stated, to this, that the burgh rates will be raised, or if the payment is made out of the common good there will be less money capable of being applied from that fund to the reduction of the rates. In other words the pursuer appears as champion of the community, asking nothing for himself that he does not demand for the whole body of ratepayers in Renfrew. It is hardly matter for argument at this time of day that such an interest as that gives no title to a pursuer to bring this kind of action. I have had occasion to express my views at length upon this very subject in the case of *Mackenzie* v. *The School Board of Renfrew*, being No. $\frac{102}{1903}$ of the ordinary cases in this Court, to which views I still adhere, and I cannot do better than quote from the note of the Sheriff his opinion on the matter, with which opinion I entirely agree—'The cases of *Ewing* and *Morrison*, both decided in the House of Lords in 1839, are direct and, as I think, standing authorities for the proposition that at common law a ratepayer as such has no title to maintain an action against a public body for alleged illegal application of funds, but in order to qualify a title must distinctly allege personal patrimonial injury, and ask a judgment which will have the effect of redressing the injury done him. And one can readily see the propriety of such a rule for I can imagine nothing more calculated to paralyse the action of a public body, to which large powers of administration and management have been delegated, than to know that they are liable to be brought into Court at the instance of any ratepayer who takes it into his head that a particular resolution or act of management, though it in no way affects him patrimonially, is not strictly legal.'

"*Ewing's* case (15 S. 389, and 1 M'L. & R. 847) seems to me to be absolutely in point here. In that case the Glasgow Police Commissioners had spent police funds in opposing a water company's Bill, and the prayer there was to have them ordained 'to repeat and pay back' the money 'into the funds of the said police establishment;' and Lord Medwyn's opinion in 15 S., at p. 397, is instructive. He says—'Parties may object to an illegal tax so far as regards their own portion of it. They cannot appear for the community or other ratepayers.'

"At common law, then, the pursuer has no title, having set forth no interest but that of a ratepayer, and cases such as *Cowan*, 10 Macph. 578, and *Wakefield*, 6 R. 259, have no application to a case such as this where the defenders are not a body of trustees entrusted with funds to be used for a particular specified purpose, but the Town Council of a Burgh clothed with large discretionary powers of management and administration. But it was argued that the effect of the provisions of sections 91 to 96 of the Town Council's Act of 1900 is to abrogate the law of *Ewing* and kindred cases. On the contrary, however, I think these provisions have nothing whatever to do with the point I am here considering. They simply provide for accounts being properly kept and audited, and allow a dissatisfied ratepayer a certain appeal to the Sheriff. That appeal was held by the Court in *Heddle's* case, 25 R. 801, to be competent to a ratepayer though he could aver no patrimonial interest. But it was so held merely because the statute founded on specially authorises such a course. No one suggested that an individual ratepayer has such a right at common law; and no such provision allowing an appeal in certain circumstances and under certain conditions can possibly be founded on as an authority for the bringing of an action for interdict or repayment by a person who, according to well-established law, has no title or interest to bring such an action. I need only further say that, even had the pursuer's title been good, I very much doubt the relevancy of his averments, and the competency, or at least the convenience, of trying such questions as he endeavours to raise in a summary process of interdict in the Sheriff Court."

The pursuer appealed to the Sheriff. On 26th June 1905 the interim Sheriff (LEES) pronounced an interlocutor adhering to the interlocutor of the Sheriff-Substitute.

Note.—"In dealing with a petition for interdict it is necessary to notice precisely what is asked and on what grounds. Here the petitioner asks the Court to interdict the Town Council of Renfrew from paying their expenses of opposing a recent Clyde Trust Bill out of any of the burgh assessments, or out of the burgh public funds, or out of the common good, till they comply with three specified statutes or obtain the approval of the Secretary of Scotland. From the terms of the condescendence and of the pleas-in-law it is plain that the pursuer means that the approval of the Scotch Secretary must be got in addition and not as an alternative to compliance with the requirements of the three statutes.

"The need to bring the action is based on the averment that the defenders at a certain meeting resolved to pay the above-mentioned expenses out of the common good or the burgh rates. The defenders say they never proposed to pay these expenses out of the rates, and as the copy of their minutes, produced by the pursuer, confirms what the defenders state, interdict on that ground cannot be given, for a court does not interdict people from doing what has never been threatened to be done.

"Now, the three statutes I have mentioned are of importance to the pursuer's case in this way, that the latest of them—the Burgh Police Act of 1903—allows a town council to pay the expenses of opposing a Parliamentary Bill out of the rates, after complying with certain provisions which are a safeguard to the ratepayers against improper application of the rates, and which give any dissatisfied ratepayer an opportunity of being heard before approval so to apply the rates is given.

"If, therefore, the Town Council had been proposing to pay these expenses out of the rates, the pursuer would have been in a position to complain that the defenders were evading the opportunity given of protecting himself by the Act of 1903, taken in conjunction with the two earlier statutes embodied in it. But then the complete reply is that, as has been pointed out, the defenders are not proposing to pay the expenses out of the rates, and the combination of the three statutes does not deal with the common good. In taking their expenses out of the common good the defenders cannot be called on to comply with the provisions of three statutes, two of which at least have nothing to do with it.

"But the pursuer contends that at common law he has a right to challenge this interference with the common good, while on the other hand the defenders say that at common law they were acting within their rights. Perhaps the defenders are right, but I think it would be improper of me to express any opinion.

"The pursuer's contention has been discussed by the learned Sheriff-Substitute with considerable fulness, and as I entirely concur with the views he has expressed, little remains to be said. At common law the pursuer of an interdict must set forth both a title and an interest to sue. Now the title and interest that the pursuer here avers are that he is a ratepayer, and that unless the defenders are stopped he will be 'injuriously affected, . . . and will suffer material loss in consequence of increased taxation.' This is somewhat vague; but it was explained in argument that under the 17th section of the Renfrew Police Act of 1855 it is provided that whenever the police rates exceed sixpence in the pound a reasonable contribution may be made to them from the income of the common good. In this way the pursuer says that if the capital of the common good is lessened, the chance of a contribution towards the police rates

is diminished, and thus the rates in some future year may, and probably will, be higher than they would otherwise have been.

"But this is a contention that has again and again been held as only supplying a ground of loss which is too remote and indirect to be able to be taken into consideration. The loss founded on must be direct patrimonial loss, which will appreciably affect the complainer. I do not think that the case of *Russell* v. *Magistrates of Hamilton*, 25 R. 350, is in conflict with these views. There the pursuers of the interdict had a *locus standi* to complain, as they were already objectors to the granting of the Provisional Order, as a step to which the inquiry of which they complained was about to be held.

"On the whole case I therefore think that the Sheriff-Substitute did right to refuse the interdict asked.

"I should perhaps allude to the plea of no jurisdiction which the defenders mentioned but did not venture to press. Considering the frequent occasions in which recent statutes direct the local courts to give protection to aggrieved ratepayers, it would seem anachronous to hold they were powerless in such a matter as this."

The pursuer appealed to the Court of Session, and argued—The defenders' proposal to pay expenses out of the common good was illegal, they not having complied with the necessary statutory provisions contained in the Municipal Corporations (Borough Funds) Act 1872, and also the Local Government (Scotland) Act 1889 and the Burgh Police (Scotland) Act 1903. The Act of 1872 applied to Scotland—*see* section 11 (special provision that it shall not apply to Ireland or London)—*Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050, at 1055 and 1059, 16 S.L.R. 619; *Leith Dock Commissioners* v. *Magistrates of Leith*, November 30, 1897, 25 R. 126, at 132 and 139, 35 S.L.R. 132. But even on the assumption that the defenders' proposals transgressed no general statutory rules, they at anyrate violated the Special Act applicable to the burgh of Renfrew, viz., the Renfrew Police Act 1855, sec. 17. Further and lastly, they were objectionable at common law inasmuch as the defenders, being trustees of the common good, could only legally apply it to trust purposes, which the present was not—*Queen* v. *Mayor of Sheffield*, L.R., 6 Q.B. 652. As to the pursuer's title to sue, an express title was conferred on him by the Act of 1872, sec. 5, and at common law his title was at least as good as those of the pursuers in *Wakefield* v. *Commissioners of Supply of Renfrew*, November 29, 1878, 6 R. 259, 16 S.L.R. 183, and *Cowan & Mackenzie* v. *Law*, March 8, 1872, 10 Macph. 578, 9 S.L.R. 341.

Argued for the defenders—The pursuer's case on record was founded on three statutes. Of these the Acts of 1903 and 1889 applied only to rates and had no bearing on the "common good," and the Act of 1872 did not apply to Scotland—*vide* the terminology &c. of the Act and the opinions delivered in the House of Lords in *Magistrates of Leith* v. *Leith Dock Commissioners*, July 25, 1889, 1 F. (H.L.) 65, 36 S.L.R. 956, but reported on this point only in Constable's Provisional Orders, p. 107; *vide* also *Fordyce* v. *Bridges*, February 23, 1847, 6 Bell's Appeals, p. 1. Assuming, however, that the Act did apply to Scotland, it was an Act whose object was to enlarge and not to curtail the powers of magistrates, and could not therefore apply to the "common good," which was not a "borough fund," with which alone it dealt. At common law the pursuer had no title to sue—Erskine, i, 4, 23; *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C.; *Ewing* v. *Glasgow Commissioners of Police*, January 19, 1837, 15 S. 389, *aff.* August 16, 1839, M'L. and Rob. 847; *Paterson, &c.* v. *Magistrates of St Andrews, &c.*, July 12, 1881, 8 R. (H.L.) 117, at 122, 18 S.L.R. 728; *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9. R. (H.L.) 91, at 95, 19 S.L.R. 893; *vide* also Acts 1491, c. 36; 1593, c. 185. If he had a grievance a remedy was provided by the Town Councils (Scotland) Act 1900, secs. 91 to 99, especially 96.

LORD KYLLACHY—In this case I agree with the Sheriffs, and, speaking generally, with their reasons. As they rightly point out, the question is not as to the respondents' power to assess for the expenses in controversy, but as to their common law power to pay the same out of their common good. It appears to me that this being conceded, it is in itself conclusive against the appellant's action as laid. For, as expressed both in the petition and in the pleadings, the complainer's case is rested entirely upon certain provisions of the Burgh Police Act of 1903, or at least upon that statute read in connection with two previous statutes to which it makes reference for certain purposes. And it appears when examined that the statute in question (that of 1903) has nothing whatever to do with the administration of the common good of royal burghs. In point of fact it refers to all burghs, royal, parliamentary, or police; and the particular provisions founded on relate simply to a special power of assessment conferred with respect to a certain kind of expenditure—a power which the Act confers under certain conditions as to procedure, but which is expressly declared to be without prejudice to all powers already existing, including of course all powers possessed by royal burghs with respect to the application of their common good.

It may, however, be undesirable to dispose of the case upon the ground merely of defects in the pleadings — defects which might possibly be obviated by amendment. And, accordingly, it may be as well to consider generally, as the Sheriffs have done, the merits of the pursuer's complaint as applied to the proposed expenditure from the common good, and in particular the appellant's title to interdict that expenditure.

Now, apart from statute (and apart of course also from special conditions attaching by charter or usage), the legal position

of the common good of a royal burgh does not seem to be doubtful.

In the first place, the common good is corporate property, and falls as such to be administered by the Town Council as the executive of the corporation, and applied by them for the benefit of the community, in such manner as, using a reasonable judgment, they think proper.

In the next place, however, the corporate property having been derived from the Crown, and the Crown possessing over it a right of oversight and control, it has always been recognised that the Crown may at any time intervene to prevent or redress any abuse or malversation on the part of the Town Council.

Lastly, the Crown having this right, and perhaps duty, it has always been held by consequence that the Crown's title to intervene is exclusive. In other words, no action at law directed against the Council's administration is competent at the instance of any individual burgess or body of burgesses. This last proposition is laid down very distinctly by Erskine (i, iv. 23), where he explains, *inter alia*, that the "maladministration of borough revenues is to be considered rather as a matter of public government than the subject of a popular action in a court of law; and therefore no private burgess or number of burgesses seem entitled to such action against their magistrates." And the same doctrine has more than once received judicial recognition, particularly in the case of *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C., a case referred to in Lord Ivory's note to the passage I have just quoted. The case of *Ewing* v. *Glasgow Commissioners of Police*, 1837, 15 S. 389, *aff.* (H.L.) 1839, M'L. & R. 847, referred to by the Sheriff, went perhaps a step further, for it seems to have extended the principle to the case of police funds which, although the produce of an assessment, were in the administration of the Town Council as police commissioners. How far that extension was justifiable has sometimes been doubted. But it has never been doubted (speaking always apart from statute) that the title to complain of misapplication of the common good of a Royal Burgh is vested exclusively in the Crown.

By statute, however, checks upon the Town Council's powers have from time to time been introduced, and incidentally to those checks certain limited rights of intervention have been conferred on individual burgesses or classes of burgesses. The series of statutes is as follows:—1491, cap. 36; 1535, cap. 26; 1593, cap. 185; 1693, cap. 28; 3 Geo. IV, cap. 91 (1822); 63 and 64 Vict. c. 49 (1900).

For the present purpose, however, it is enough to note (1) that as early as the Act 1535, cap. 26, Royal Burghs were required to bring annually into Exchequer an account of the revenues of their Burghs "that the 'Lords Auditours' may judge whether they have been properly expended;" and the Act further contains a provision that fourteen days' notice shall be given in order that "all concerned may come and impugn the same if that is desired;" (2) that this enactment was continued in an expanded form by the Act 3 Geo. IV, cap. 91, which regulated the whole matter until the recent Act of 1900, and which provided (sec. 3) that after production of the annual account as therein mentioned, it should be competent to any *three* or more burgesses of a burgh to make complaint in writing to the Barons of Exchequer in Scotland, who should proceed to determine the same in a summary manner; (3) that the whole matter is now regulated by the said Act of 1900 (63 and 64 Vict. ch. 49), which repealing the Act last mentioned, makes careful provisions for the publication and audit of all burgh accounts, including those of Royal Burghs, and also for the intervention of any ratepayer or elector who may be dissatisfied with any account or any item in it, such intervention being by application to the Sheriff, as therein provided, with a right of appeal as in ordinary actions in the Sheriff Court.

It can hardly, therefore, be said that the administration of the common good in Royal Burghs is not now effectually supervised, or that individual burgesses are without remedy if they desire to raise a question as to the lawfulness of any particular expenditure. This, of course, however, only tends to emphasise the incompetency of the action which is now before us.

I have only to add that I have not overlooked the appellant's separate argument upon the Burgh Funds Act of 1872 (35 and 36 Vict. cap. 91). Apart from the question whether that Act applies to Scotland, which is by no means clear, it seems to me a sufficient answer that, like the Act of 1903, the Act of 1872 is an enabling, and not a restricting Act, and that it contains, like the former Act, an express provision that its powers shall be without prejudice to any powers already possessed by any public authority. As to the Renfrew Police Act of 1855, on which the appellant's counsel also founded a separate argument, I can only say that I agree with the Sheriffs that it has no bearing on the present case.

On the whole, therefore, I am of opinion that we should adhere to the judgment of the Sheriff.

LORD STORMONTH DARLING—I am quite satisfied with the Sheriff's mode of disposing of this case. In particular the interim Sheriff (Lees) is quite right in pointing out that, as shown by their minutes, the Town Council never proposed to pay the expenses of opposing the Clyde Trust Bill out of the rates, and therefore that the only interdict that could be asked is an interdict against their paying these expenses out of the common good of the burgh. That is qualified in the petition by this, that they shall not do so until they shall have complied with the provisions of three specified statutes regulating procedure. Now, waiving for the moment the question whether the first of these statutes, the Municipal Corporations (Borough Funds) Act 1872, applies to Scotland at all, and conceding for the sake of argument that it does, the ques-

tion comes to be, do these three statutes taken together alter the law regulating the right of Scottish royal burghs to deal with their common good or their manner of doing so?

I do not suppose that anybody will question the law upon this matter as stated by Lord Watson in the case of *Grahame* v. *Magistrates of Kirkcaldy*, 9 R. (H.L.) 95—"As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes, but no member of the community has a title to call the respondents to account generally for their maladministration of the common good of the burgh. The respondents are not answerable for their administration of the burgh property, as if they were trustees for the community. Except in so far as its actings may interfere with the personal uses which an inhabitant is entitled to make of the burgh property, the corporation is only accountable to the Crown for its administration of that property. The law is so stated by Mr Erskine (book i, tit. 4, sec. 23), and was affirmed by the Court in the case of *Mollison* v. *Magistrates of Inverury*." Lord Watson used this language in 1882, ten years after the passing of the Municipal Corporations Act. There is not a hint in his Lordship's judgment that the law as he stated it was altered or in any way affected by the passing of that Act, and that is not to be wondered at when you find that the Act itself is an enabling one and contains a clause (section 8) providing that "nothing in this Act shall extend or be construed . . . to take away or diminish any rights or powers now possessed or enjoyed by any governing body." I therefore arrive at the conclusion that the rights of the town council of a Scots royal burgh to deal with their common good for proper burgh purposes has all along stood as it did in Erskine's day, and that it cannot be challenged at the suit of an individual inhabitant unless he can allege a patrimonial interest of his own distinct from his interest as a member of the community.

It is true and is admitted by the defenders that their ministerial duty as regards all corporate property (common good included) was prescribed in 1900 by the Town Councils (Scotland) Act of that year, which enacted (secs. 91–9) that yearly accounts should be made out and audited, and that any "ratepayer or elector" who is dissatisfied with the account or any item therein may complain against the same by petition to the Sheriff within a specified time. But this, of course, is not a proceeding of that kind. Neither does it seem to me that the local Act of 1855 helps the pursuer's case. Section 17 provides, in the event of the general assessments for any year exceeding sixpence in the £ but not otherwise, for a contribution from the free income of the common good towards the expenditure of the burgh, and for the decision by the Sheriff of any question as to the amount of the contribution. But that procedure can only take place when a question is raised by six or more inhabitants rated for assessment of premises above a certain value, and they require the decision of the Sheriff by notice in writing. No such procedure has here been taken.

LORD LOW—It seems to me that there are several grounds, any one of which would be sufficient for the decision of this case.

In the first place, I think that the Sheriff was justified in throwing the action out upon the question of title. It is not, perhaps, very easy to reconcile all the cases relating to the right of a ratepayer to challenge the administration of public funds, but there is one authoritative decision which is precisely applicable to the present case. I refer to the case of the *Burgesses of Inverury* v. *The Magistrates*, 14th December 1820, F.C.

In that case several burgesses of Inverury brought an action against the magistrates, charging them with gross mismanagement of the burgh property, and specifying particular instances where the burgh funds had been "either shamefully misapplied, or not at all accounted for." The summons concluded for decree against the magistrates ordaining them to restore certain specified sums to the credit of the burgh, and also for a general accounting.

The Court held, in the first place, that the burgesses had no title to sue, seeing that "they asked no judgment available to themselves, but complained merely of acts done to the prejudice of the burgh." The Court further held that the action was incompetent, the Court of Session having no general jurisdiction in relation to burgh accounts or the management of burgh revenues, and the distinction which had been drawn in an earlier case between a general accounting and an action based upon specific acts of alleged malversation, was held not to be well founded.

The case of *Inverury* has always been regarded as an authoritative judgment, and it has been referred to with approval in the House of Lords first by the Lord Chancellor in the case of *Ewing* (1 M'L. & R. 847), and afterwards by Lord Watson in *Grahame*, 1882, 9 R. (H.L.) 91, at p. 95.

I am therefore of opinion that the plea that the pursuer has no title or interest to sue was properly sustained by the Sheriffs.

Even, however, if it should be held that the pursuer has a title to sue, I think that he must fail upon the merits of the case.

It seems to me that the only question which is properly raised in the petition is whether the defenders were entitled to apply funds administered by them in payment of the expenses of opposing a Bill in Parliament without adopting the procedure provided by the 55th section of the Burgh Police Act 1903. The pursuer founds both in the prayer of the petition and in the condescendence upon three statutes taken together, these statutes being the Municipal Corporations Act 1872, the Local Government Act 1889, and the Burgh Police Act 1903. By the 55th section of the last named Act it is provided that the

Town Council of a burgh shall have the like powers of opposing bills or provisional orders as are conferred upon County Councils by the Local Government Act, and the latter Act in turn incorporates by reference certain provisions of the Municipal Corporations Act 1872.

By the 55th section of the Act of 1903, therefore, the three Acts are combined, and in order to ascertain the procedure to be followed they must be read together; and it seems to me that that is plainly what is referred to in the prayer of the petition. When the petition was brought it appears that the pursuer understood that the defenders proposed to defray the expenses of opposing the bill both out of the assessments and out of the common good. If that had been the case the pursuer would have been right in founding upon the 55th section of the Act of 1903 in so far as the assessments were concerned. It turns out, however, that the defenders do not propose, and never have proposed, to defray the expenses out of the assessments but out of the common good, and seeing that the Act of 1903 refers to assessments only and does not in any way affect the right of a Town Council to deal with the common good, it is clear that the provisions of the 55th section have no application to the case as it now stands.

That also is sufficient for the disposal of the case as laid, but there was another ground upon which the pursuer anxiously contended that he was entitled to decree, and upon which (although it is not raised upon record) it may be desirable that we should express our opinion.

It was contended that, at all events, the defenders were bound to adopt the procedure directed by the Municipal Corporations Act of 1872. Now it may be that the language of the 2nd section of that Act is wide enough to include the common good of a burgh; but in the first place, the Act is an enabling Act conferring upon what is called the "governing body" powers which it did not previously possess; and in the second place, the 8th section expressly saves "any rights or powers now possessed or enjoyed by any governing body." If, therefore, the Town Council of a royal burgh have otherwise power to apply the common good to such a purpose as that in question, they do not require to take advantage of the powers conferred by the statute. Now, no authority was cited, nor indeed was any serious argument submitted to us, to the effect that it is incompetent for a Town Council acting in good faith to defray out of the common good the expenses of opposing a Bill in Parliament, which in their judgment is prejudicial to the interests of the burgh. In my opinion it is competent for the Town Council so to apply the common good, and I have nothing to add to the exposition of the law which has been given by Lord Kyllachy.

I therefore concur in the view that the action should be dismissed.

LORD KYLLACHY — I should perhaps explain that I entirely concur with the concluding sentences of Lord Low's opinion.

LORD JUSTICE-CLERK—I have no hesitation in concurring with your Lordships in throwing out the action on the ground of want of title. I cannot see any reasonable ground upon which the title of the pursuer could be maintained on principle, and in view of the decisions already pronounced, I consider that that question is foreclosed.

I am glad, however, that your Lordships have dealt with the case on the merits on the assumption of a title to sue. I entirely concur in what has been said by your Lordships on that matter.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for Appellant—Hunter, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents—Blackburn—Hon. Wm. Watson. Agents—Dundas & Wilson, C.S.

HOUSE OF LORDS.

Friday, March 30.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Macnaghten and Robertson.)

BROWN *v.* JOHN HASTIE & COMPANY, LIMITED.

(In the Court of Session, November 8, 1904, reported 42 S.L.R. 52, and 7 F. 97.)

Patent—Patents for Inventions—Master Patent or merely Patent for Mechanical Arrangement—Claim—Infringement.

A patent, the object of which was "the prevention of leakage of steam in steering and the like engines by the introduction into the steam feed-pipe of a casing which contains a cut-off valve, operated from and acting in unison with the controlling valve of the steering or like engine," claimed—"In connection with the valves of steering and like engines, fitting in a passage or casing through which the steam enters the controlling valve casing, a double beat or equivalent valve having opposite inclines acted on by counterpart inclines moving with the controlling valve, the parts being arranged and operating substantially as and for the purposes hereinbefore described."

The owner of the patent maintained that it was a master or pioneer patent, no means up to its date having been invented for preventing the leakage of steam in steering engines, and sought to have declared as infringements later patents having the same object and using a cut-off valve, which valve, however, was operated by a different mechanical device.