have no fear that that would be the result. The decree at present is in favour of the liquidator and Mr Carmont, but the defender, on paying, would be entitled to get a discharge from the company as well. If that were not given him he would enforce it by suspending a charge on the decree.

LORD KINNEAR—I am of the same opinion. The power to amend records is both by the inveterate practice of the Court and by statute conditional on the fact that such amendment is necessary to raise the true question at issue between the parties. This case has got out of shape by the fault of the agents of both parties, but the result is that the pursuer has obtained a decree from the Sheriff which is quite in accordance with the rights of parties as disclosed on record and by the statements of counsel at the Bar. If this decree were set aside the pursuer could raise the same question in a new record framed to avoid the errors in the present record, and the only result would be to arrive at the same conclusion by a more regular course. I agree that if there were any fear of the company making a second claim and of the defender having to pay twice over it would be out of the question to affirm the Sheriff's interlocutor, but there is no such danger. The liquidator has sued as liquidator for the company, and whatever he recovers must be applied for behoof of the company. The defect of title is thus purely technical, and there is no substance in the objection to it. For the liquidator is entitled to sue for the company—indeed, he is the only person that can sue, only in doing so he must sue in name of the company and not solely in his own name.

LORD SALVESEN—I entirely agree. I would only add that I am afraid that the argument submitted has made it apparent that there is a defect in the recent Act of Sederunt with regard to the amendment of a defective instance, as the Act according to its terms applies only to proceedings initiated in the Court of Session. That fortunately does not matter much now, since in the recent Sheriff Courts Act there is a similar provision with regard to actions commenced in the lower Courts.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Respondent) — Hamilton. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender (Appellant) —Morison, K.C.—Garson. Agents—Webster, Will, & Company, S.S.C.

Wednesday, October 28.

FIRST DIVISION.

MAGISTRATES OF THE BURGH OF BARONY OF KIRKINTILLOCH *v.* TOWN COUNCIL OF KIRKINTILLOCH.

Burgh—Burgh of Barony—Transference of Burgh Property—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *secs.* 22 *and* 35—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 20 *and* 27 (2)—*Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 8 *and* 33.

An ancient burgh of barony adopted the General Police and Improvement (Scotland) Act of 1862, and appointed Police Commssioners, who in 1892 became, under the Burgh Police (Scotland) Act of that year, the Police Commissioners of the burgh, and thereafter, by virtue of the Town Councils (Scotland) Act 1900, the Town Council of the burgh.

In a special case between the magistrates of the burgh of barony and the town council, relating to the property of the old burgh of barony, *held* (1) that as the magistrates elected under the set of the burgh had been swept away by the statutes of 1892 and 1900, the magistrates elected under these statutes were now the only municipal authorities, and that, accordingly, the property fell to be held and administered by them; (2) that it was no longer competent for any magistrates and councillors to be elected or hold office in the burgh otherwise than under and in accordance with the provisions of the Town Councils (Scotland) Act 1900; and (3) that the question whether the property was to be administered for behoof of those resident within the area of the burgh of barony, or within that of the municipal burgh, could not, in the absence of proper contradictors, be determined.

Commissioners of Blairgowrie, November 5, 1901, 4 F. 72, 39 S.L.R. 67, *followed.*

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), enacts—section 22—"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 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; and in all cases where this Act shall be adopted in whole or in part, such adoption shall not free or relieve the magistrates and council or commissioners of police of any burgh from any obligations incumbent on them at the date of such adoption; and all such obligations, together with the powers of assessment and other faculties therewith connected, shall remain in full force as if this Act had not been adopted."

Section 35—"If such resolution (*i.e.*, as provided for in the Act) shall be to adopt this Act in whole, any General or Local Police Act in operation within such burgh shall be repealed, ..."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), enacts—section 20—"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 commissioners 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. And where by any Act of Parliament any powers and duties are conferred or imposed upon the commissioners under the General Police Acts, such powers and duties shall now be vested in and discharged by the commissioners under this Act."

Section 27, sub-section (2)—"Nothing contained in this Act shall affect the patrimonial rights of any body of feuars at the passing of this Act administered by the town council of any burgh or barony."

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), enacts—sec. 8—"In any burgh the whole rights, powers, authorities, duties, liabilities, debts, officers and servants (*a*) of commissioners under the Burgh Police (Scotland) Act 1892, . . . and the whole lands, works, and other assets vested in them respectively, shall, in so far as this has not already been effected, be transferred to, imposed on, and vested in the town council. . . ."

Section 33—"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."

On March 19, 1908, the Magistrates and Town Council of the Burgh of Barony of Kirkintilloch, *first parties*, and the Provost, Magistrates, and Councillors of the Burgh of Kirkintilloch, *second parties*, presented a special case for the determination of certain questions relating to the property of the old burgh of barony of Kirkintilloch.

The following *narrative* is taken from the opinion of the Lord President—"The Burgh of Kirkintilloch was erected into a burgh of barony under an ancient charter which is no longer extant, but the terms of which may be gathered from the charter in 1670, by which William, Earl of Wigtown, granted the lands therein specified to certain burgesses and provided for the set of the burgh. For many years thereafter the affairs of the burgh of barony were attended to by the magistrates elected under the provisions of that set. It seems to be the case that some of the lands disponed passed in private property to certain of the burgesses, but a portion has survived as a sort of public fund, namely, a town hall and other subjects of the annual value of £89, certain casualties, and some small pieces of ground. The present case is brought with reference to this property, the first parties being a body styling themselves the Magistrates and Town Council of the Burgh of Barony of Kirkintilloch, and the second parties the Municipal Authorities of the Burgh of Kirkintilloch under the Burgh Police Acts."

The *questions of law* were—"(1) Are the first parties entitled to continue to hold and administer the property vested in them as the bailies and councillors elected under the charters of the burgh of barony of Kirkintilloch? or Does the said property fall to be held and administered by the second parties? (2) In the event of the second alternative of the foregoing question being answered in the affirmative, does the said property fall to be held and administered by the second parties for behoof of the area embraced within the burgh of barony? or Does the said property fall to be held and administered by the second parties for behoof only of the area of the burgh of barony embraced within the municipal burgh? (3) Is it competent for any magistrates and councillors in future to continue to hold office or to be elected under the said charters of the burgh of barony of Kirkintilloch? or, Have the first parties been superseded to all intents and purposes by the second parties, and is it no longer competent for any magistrates and councillors to be elected or hold office in the burgh of Kirkintilloch otherwise than under and in accordance with the provisions of the Town Councils (Scotland) Act 1900?"

The first parties *maintained* that the said property had not been transferred to the

second parties by the operation of statute, that it still remained vested in them, and that accordingly they were entitled to continue to hold and administer it. The second parties, on the other hand, maintained that under the Burghs Police (Scotland) Act 1833 (3 and 4 Will. IV, c. 46), the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), and the Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), they constituted the Town Council of the burgh of Kirkintilloch in the sense of the Town Councils (Scotland) Act 1900, and that as such they had superseded the Town Council elected under the charters of the burgh of barony of Kirkintilloch; that they were vested in and entitled to administer for behoof of the municipal burgh of Kirkintilloch the whole funds and property under the charge of the first parties as the Town Council of the burgh of barony under the said charters, and that it was not competent in future for any town council to be elected under the foresaid charters or otherwise than in accordance with the Town Councils (Scotland) Act 1900.

Argued for the first parties—The property of the burgh of barony was not transferred under the Burghs Police Act 1833 (3 and 4 Will. IV, cap. 46) when it was adopted in 1836. That Act only gave the Magistrates acting under the Act jurisdiction within a prescribed area, but it did not transfer the property. That remained in the bailies of the burgh of barony. The subsequent Acts of 1862, 1892, and 1900 (*cit. supra*) dealt only with the property vested in the then existing Commissioners of Police, and did not affect the property held by the officials of the old burgh of barony. *Esto* that the Act of 1900 had adopted the definition of burgh contained in the Act of 1892 which included burgh of barony, it did not wipe out the old burgh of barony or its bailies. Both were still in existence. Reference was made to *Commissioners of Blairgowrie*, November 5, 1901, 4 F. 72, 39 S.L.R. 67, and *Burgh of Leslie* v. *Archibald and Others*, March 4, 1904, 41 S.L.R. 482.

Counsel for the second parties were not called on.

Lord President—[*After narrating the facts, supra*]—The first question in the case is—"Are the first parties entitled to continue to hold and administer the property vested in them as the bailies and councillors elected under the charters of the burgh of barony of Kirkintilloch, or does the said property fall to be held and administered by the second parties?" We have had some argument as to the effect of the 22nd section of the General Police and Improvement (Scotland) Act 1862 in transferring the property from the first to the second parties, but I confess that my difficulty arises at an earlier stage. The real question in this case is not so much as to the transference of the property, but rather as to the continued existence of the the first parties. I cannot see that the first parties have now any real existence, for it seems to me that they have been swept away by force of statute. The Burgh Police Act of 1892 applies to all burghs, including burghs of barony, and the Town Councils Act of 1900 provides that the magistrates in these burghs are to be elected in a certain manner. From this it follows, in my opinion, that the magistrates so elected are now the only municipal authorities, and that the magistrates elected under the set of the burgh are no longer in existence as municipal authorities, and cannot therefore hold and administer the property in question. Accordingly we shall answer the second branch of the first question in the affirmative. I may add that this is in accordance with the decision of this Court in *Commissioners of Blairgowrie*, a case which is in no way distinguishable from the present.

The second question put to the Court is—"In the event of the second alternative of the foregoing question being answered in the affirmative, does the said property fall to be held and administered by the second parties for behoof of the area embraced within the burgh of barony, or does the said property fall to be held and administered by the second parties for behoof only of the area of the burgh of barony embraced within the municipal burgh?" I do not think it is possible for us to answer this question, seeing that there are no proper contradictors before us. The effect of substituting the new body of magistrates for the old is that the former hold and administer the property as the municipal authority. It may be, however, that the older body held property as trustees for private persons, and if this be so, then the rights of these persons are saved under sec. 27 of the Act of 1892. But the remedy in case of infringement of these rights must be sought in the manner provided by that section, and questions of private right cannot be determined in this special case.

Apart from these questions of private right there might be questions of a public nature as to the administration of property within the boundaries of the older burgh, as, for example, in the case of a burgess resident within the area of the older burgh but outside the area of the newer municipality being refused admittance to the public hall. I cannot conceive of such a case actually arising. But in any event such a question could be determined only if someone came forward stating that he would be injured by what the Council proposed to do; and there is nothing of this kind in the present case.

The third question goes with the first question.

Lord Kinnear—The first question is governed by the decision in *Commissioners of Blairgowrie*, and Mr Horne did not, I think, dispute the applicability of that case. Now if the first question be answered in accordance with that decision, there remain only certain speculative questions as to how difficulties with regard to the administration of the property are to be met by the only municipal authorities now in existence

—namely, the second parties. I agree that we have neither proper contradictors before us nor *termini habiles* for deciding these questions. We shall decide those questions when they arise and are brought before us by proper parties, but it is quite uncertain whether they will ever arise in practice.

LORD MACKENZIE — I am of the same opinion.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court answered the second alternative of the first question in the affirmative, and the second alternative of the third question in the affirmative; refused to answer the second question in either of its alternatives; and decerned.

Counsel for First Parties—Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for Second Parties—Wilson, K.C.—Chree. Agents—Patrick & James, S.S.C.

Thursday, October 29.

FIRST DIVISION.

[Lord Johnston, Ordinary.

EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED *v.* COURTENAY.

Recompense—Operations by A in suo Taken Advantage of by B—Alleged Honourable Understanding that B was to Pay for Operations — Competency of Claiming Recompense from B—Circumstances in which a Claim for Recompense Properly Arises.

A tramway company, who were in course of cabling their system, let to A the sole right of advertising on their cars, under specific provisions as to the mode in which A should affix the advertisements. The company built their new cars with a fillet arrangement on the inside of the window frames, and with wooden boards round the outsides of the roofs, both of which were utilised by A for affixing his advertisements. The company subsequently raised an action against A for the cost of the fillets and boards, alleging that A had promised to pay for them, and alternatively claimed a sum as "recompense." The alleged promise to pay on the part of A was not established. *Held—rev.* judgment of Lord Ordinary (Johnston)—that as the fillets and boards remained the property of the pursuers, and were at least as much for their benefit as that of the defender, they had not lost anything thereby, and consequently were not entitled to recompense.

Observations (*per* Lord President) on law of recompense.

On 29th May 1907 the Edinburgh and District Tramways Company, Limited, brought an action against J. W. Courtenay, advertising contractor, Norfolk Street, London, and 34 St Andrew Square, Edinburgh, for decree (1) that the defender was bound to pay to the pursuer the cost—£279, 7s. 6d.—of the beadings or frames fitted to the windows of their cable cars for enclosing advertisements, or (2), alternatively, for the sum of £130 as recompense for their use, (3) that he was bound to pay to them the cost—£856, 2s. 6d,—of the wooden boards affixed to the handrails on the outside of the cars, to which the enamelled iron plates containing his advertisements were attached, or (4), alternatively, for the sum of £390 as recompense for their use.

The following *narrative* is taken from the opinion of the Lord President—"The pursuers here are the Edinburgh and District Tramways Company, and the defender is an advertising contractor. The Edinburgh Tramways Company are the successors of the Edinburgh Northern Tramways Company, and the defender had in the early days of the tramway enterprise a contract for advertising upon the tramway cars. Eventually he entered into a standing contract, which was dated in January and February 1898, under which the parties still are. That contract provided that the defender should have the exclusive right of advertising upon the cars for a fixed yearly rent, and it made particular stipulations as to what portions of the cars the defender was entitled to cover with his advertisements. The advertising was to be done partly on the windows and partly on the railings at the sides and top of the car, and there were minute stipulations as to the sort of advertisement that could be there displayed. I do not mean the character of the advertisements as advertisements, but I mean the method by which the lettering was to be devised, and in particular it was, among other things, stipulated that the advertisements on the top on the outside should be printed on wooden boards or on enamelled iron plates attached to wooden boards affixed to the supports of the handrail and to the gate panels respectively, and were not to be above a certain size. Just previous to this contract there was a transition state in the history of the tramways. The company were the successors of the Northern Tramways Company, and were running as such what I may call the original line of cable tramways in Edinburgh. They were also the successors of the other Tramways Company, which had originally been a horse company, and the whole system was in process of being cabled. Accordingly in connection with that a great many new cars were being ordered by the Tramways Company. Now when these new cars were turned out they were rather different in shape and size from the old cars, and in particular they had round them at the top a board which fulfilled the useful purpose of being what some of the witnesses called a decency board, and also no doubt served purposes of safety, because it would prevent a child slipping through the somewhat