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

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Council of the burgh under the Town Councils (Scotland) Act 1900; (5) as to whether the charters above mentioned were superseded by the Act of 1892; and (6) as to whether the Town Council under the charters is superseded by the Burgh Police Act of 1892 or the Town Councils Act 1900, and the present Commissioners substituted for it.

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

The Court pronounced the following interlocutor:—

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

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

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

Tuesday, October 29.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* HARVEY'S TRUSTEES.

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

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

absolute gift to his sister the estate-duty paid upon the share in question had not been paid as upon "settled property," that consequently the provisions of section 5 (2) did not apply, and that the marriage-contract trustees were liable.

The Finance Act 1894 enacts as follows: — Section 5 (2) — "If estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property." Section 5 (1)—"Where property in respect of which estate-duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(*a*) a further estate-duty (called settlement estate-duty), on the principal value of the settled property shall be leviable at the rate hereinafter specified except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased, but(*b*) during the continuance of the settlement the settlement estate-duty shall not be payable more than once."

Dr Thomas Harvey and Mrs Rebecca Harvey, his wife, on 23rd December 1853 executed a postnuptial contract of marriage, whereby, *inter alia*, the wife assigned and conveyed to the trustees named the whole means and estate, heritable and moveable, real and personal, then owing and belonging to her or which might be owing and belonging to her at the time of her decease, or to which she might acquire right during the marriage, with full power and authority to uplift, receive, and discharge the estate and effects thus conveyed. It was declared that the said estate and effects and proceeds thereof should be held and applied by the trustees for behoof of the spouses during the subsistence of the marriage and the survivor of them in liferent, and for behoof of Mrs Harvey's children in fee, each of the spouses having *stante matrimonio* a right to one-half of the income of the estate and effects conveyed.

On 14th February 1897 Mrs Harvey's brother Barnett Harvey, distiller at Yoker, died leaving a trust-disposition and settlement dated 3rd August 1866, whereby he directed his trustees, *inter alia*, in the last place, to hold and apply, pay, divide, and convey the whole rest, residue, and remainder of his means and estate, heritable and moveable, real and personal, and the produce thereof, equally to and among such of his brothers and sisters as might be alive at the time of his death, and the lawful issue of such of them as might have predeceased leaving issue, who should succeed equally to the share or shares which would have fallen to the respective parents had they been in life. His trustees paid estate-duty on the whole of his property which had passed. Mrs Harvey's share of residue amounted to £26,800, and was paid over by the testamentary trustees to her postnuptial marriage-contract trustees, who gave a discharge therefor in the ordinary course.

On 29th September 1899 Mrs Harvey died survived by her husband and by children of the marriage. Her husband died on 5th January 1901.

On 12th April 1901 an action was raised by the Lord Advocate on behalf of the Commissioners of Inland Revenue against the marriage-contract trustees to ordain them to pay estate-duty in respect of one-half of the trust funds held by the trustees under the contract as they stood at the time of her death, including the amount derived from Barnett Harvey's estate. The marriage-contract trustees lodged defences, and maintained that the sum acquired by Mrs Harvey as a residuary legatee under her brother's settlement ought not to be reckoned as part of the estate liable to estate-duty on her death, because estate-duty was paid at her brother's death on the whole of his property.

The pursuer pleaded—"(1) Under the provisions of the Finance Act 1894 estate-duty is due in respect of the trust funds liferented by Mrs Harvey, and deemed to have passed on her death."

The defenders pleaded—"(1) On a sound construction of the Finance Act 1894, and particularly section 5 sub-section (2), the defenders are entitled to exemption from the estate-duty claimed."

The Lord Ordinary (STORMONTH DARLING) on 17th July 1901 pronounced an interlocutor in which he repelled the pleas of the defenders; found the pursuer entitled to estate-duty as claimed; appointed the defenders to lodge an account; and granted leave to reclaim.

Opinion.—"The only answer made by the defenders to this demand for estate-duty, as exigible on the death of Mrs Harvey in September 1899, is founded on sec. 5 (2) of the Finance Act of 1894. That section provides (taking it shortly) that if estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not be payable in respect thereof until the death of a person competent to dispose of such property.

"Now, the property to which the claim relates is settled property, for it was settled by the postnuptial contract of Dr and Mrs Harvey in December 1853, in trust for behoof of the spouses, and the survivor in liferent, and of their children in fee. No estate-duty has yet been paid in respect of it as settled property, for Mrs Harvey was the first of the spouses to die. But on the death of Mr Barnett Harvey, a brother of Mrs Harvey, on 14th February 1897, she succeeded as absolute fiar under his will to a share of his residue amounting to £26,800, which was carried to her marriage-contract trustees by the conveyance of *acquirenda* in the marriage-contract, and it now forms by much the greater part of the marriage-contract funds. Estate-duty was paid on

the whole property left by Mr Barnett Harvey, and this, the defenders say, satisfies the provisions of section 5 (2). It was estate-duty paid in respect of a portion of the settled property subsequent to the date of the settlement, for it was paid in 1897, and the date of the settlement was 1853. True the property was not settled by the will of Mr Barnett Harvey, for he left it absolutely to his sister without any settlement, but it was settled, they say, by the combined effect of his will and the marriage-contract, and it fell at the moment of his death under the marriage-contract trust as effectually as if he had himself created the settlement.

"The fallacy of this argument is, I think, that it ignores the double operation which took place on the death of Mr Barnett Harvey. The share of his residue bequeathed to Mrs Harvey became by virtue of his will her absolute property, and if it had not become her absolute property it would not have passed under the clause of *acquirenda*. No doubt her prior obligation at once attached to it and carried it off to her trustees as creditors in that obligation. The ultimate effect as regards the beneficiaries may have been the same as if Mr Barnett Harvey had created the settlement. But the effect on the rights of the Crown is altogether different. The estate-duty which the Crown received was not paid 'in respect of any settled property,' but in respect of property which, so far as the testator is concerned, was not settled. Accordingly the Crown is not said on his death to have claimed or received settlement estate-duty, which no doubt would have been claimable if the property had been settled by his will. It must be remembered that the whole language of the Finance Act, when it speaks of estate-duty, has reference to the death of some person as the *punctum temporis* on which property passes. The fair meaning of section 5 (2), I think, is that when estate-duty has once been paid under a settlement it shall not be paid again until the death of some person who can dispose of it as he pleases. The settlement may either be the work of the person whose death gives rise to the claim, or it may have been created by the prior disposition of somebody else, but in that case the terms of the disposition must have been such as to pass the property on the death giving rise to the claim. Here the disposition creating the settlement, *i.e.* the marriage-contract, did not and could not profess to pass any property on the death of Mr Barnett Harvey.

"I shall therefore find the Crown entitled to estate-duty, and appoint the defenders to lodge an account."

The defenders reclaimed, and argued—Mrs Harvey's interest in her brother's estate clearly came within the exemption from estate-duty granted by section 5 (2) of the Finance Act. It was settled property according to the definition, and estate-duty had been paid upon it since the date of the settlement. These were the only requisites to entitle to exemption, and they were both present here. It was not provided that the payment of estate-duty must have been made in respect of the death of the settler, and it was not admissible to read this condition into the clause. In this respect section 5 (2) was in marked contrast to section 5 (1). The policy of the Act was the enfranchisement of the estate after the first payment of estate-duty, and in no event could double estate-duty be claimed—*Priestly* [1901], A.C. 208; *Doddington* [1897], 2 Q.B., 373. It might be said that if it were settled estate settlement estate-duty would have been paid upon it as in *Wilson* v. *Maryon Wilson*, 1900, L.R. 1 Ch. 565; but that duty had never been asked, and the fact of its not having been paid could not subject the estate to a double estate-duty. The only thing which could disentitle to the exemption was that the party interested in the fund should have had a power of disposal over it, but Mrs Harvey never had such a power, as all estate was immediately carried to the marriage-contract trustees—*Simson's Trustees* v. *Brown*, 17 R. 581, 27 S.L.R. 472.

Counsel for the respondent were not called upen.

At advising—

LORD PRESIDENT—The question in this case is whether the Crown is in respect of the death of Mrs Rebecca Harvey entitled to estate-duty on one-half of the trust funds held by the defenders under a postnuptial contract of marriage entered into by her husband Dr Harvey and her. It does not appear exactly when Dr Harvey and Mrs Harvey were married, but they entered into the postnuptial contract in December 1853. It does not appear whether Mrs Harvey was at that time possessed of any means, but she did not then possess the property in respect of which the present claim is made. That property came to her under the testamentary settlement of her brother Mr Barnett Harvey, who died on 14th February 1897.

By the postnuptial contract of Dr and Mrs Harvey any property which Mrs Harvey might thereafter acquire was assigned to the trustees under the contract for the purposes of it, and accordingly when Mr Barnett Harvey died any benefit which she took under his will passed to these trustees for the purposes of the contract. It is stated in the condescendence that the money which Mrs Harvey received under her brother's testamentary settlement amounted to £26,800. This sum having passed to the trustees under the marriage-contract, is now administered by them for the purposes of it.

Under these circumstances the question arises whether the claim for duty now made by the Crown is excluded by section 5, subsection 2, of the Finance Act 1894, which relates to settled property. That subsection provides that "If estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof until the death of a

person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." It is clear that the testamentary settlement of Mr Barnett Harvey was not a settlement within the meaning of section 5, sub-section 2, of the Finance Act, because that settlement contained no limitations whatever as regards the estate bequeathed to Mrs Harvey—it passed to her in fee-simple. Accordingly the testamentary settlement could not make it settled property, and if it was not settled property it could not be predicated of it that estate-duty had been paid in respect of it as settled property. Estate-duty, it is true, has been paid in respect of the property which Mrs Harvey's brother left, but that was not settled property. This being so, the exemption from further duty, so long as the settlement continues, cannot apply.

This being so, the argument which the trustees use is of a somewhat singular character. While admitting that the testator did not make this settled property, they say that long prior to the testator's death the marriage-contract of Dr and Mrs Harvey made it settled property by anticipation. They contend that the property, going directly from the administrators of the estate of Mr Barnett Harvey to the marriage-contract trustees, passed as settled property. This view could only be sustained by holding that the assignment by anticipation in the postnuptial contract of Dr and Mrs Harvey settled, in the sense of the Finance Acts, any property which might happen to fall under it from any source whatever, and this was not, in my judgment, its effect. It therefore seems to me to be clear that this property never was in such a position that sub-section 2 of section 5 could apply to it.

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

Lord Adam—Although this is a Revenue case, and such cases are very often difficult, I confess I have not been able to see any difficulty in it. I think it is a clear case on the grounds your Lordship has stated. It is not disputed, and cannot be disputed here, that this estate is settled under the postnuptial contract of Dr and Mrs Harvey. That is the instrument that settles this estate, and if that is so, estate-duty has never been paid upon it; I think that is quite clear. The only estate-duty paid in this case was paid under Mr Barnett Harvey's will, and that was paid in respect of the transference of his property to the disponees and legatees under his settlement.

Now, it is, I think, idle to say that this estate was settled estate under his will. It was certainly not settled under his will, because by his will he gave it absolutely to his sister to do as she liked with. I think it was an astonishing thing to say that this brother settled his estate upon his sister and her husband in liferent and so forth. So far as we can see, he may never have known, and probably never knew of the marriage-contract in question, but whether he did or did not know appears to me to be utterly immaterial. This money might have come from a stranger, who might not have known that Mrs Harvey had a marriage-contract at all.

Then if this is not settled estate under Mr Barnett Harvey's will, the only estate-duty that has been paid has been paid under and in respect of that will, and I cannot see how it is possible to say that this comes under sub-section 2 of section 5 of the Finance Act, which assumes and makes it a condition that estate-duty has already been paid in respect of settled property. Unless you can show that estate-duty has been paid, this property does not come under that section. It appears to me clear that no estate-duty-has been paid on this estate, and therefore I think the Lord Ordinary is perfectly right.

Lord M'Laren—This is probably a very suitable case for trial, because the language of the Finance Act is extremely general, and it may well be that administrators of estates find it necessary for their own exoneration when a demand is made for payment to ascertain whether they are really bound to pay. I must say, however, that the opinion of the Lord Ordinary, in my judgment, has not been displaced by the excellent argument that was addressed to us. The point is extremely simple. Mrs Harvey in relation to her marriage—I think it was after her marriage—entered into a settlement of the usual kind by giving her estate, including property acquired and to be acquired, to trustees for the spouses and the survivor in liferent and the children in fee. After the execution of this deed Mrs Harvey's brother died and left her a share of his fortune absolutely. The assignation contained in the contract of marriage took effect upon that bequest, and Mr Barnett Harvey's executors having had intimation or private knowledge, which is the same in legal effect, that his married sister's estate was settled, they in a due course of administration paid the money to the marriage-contract trustees instead of paying it to Mrs Harvey herself. Nobody can doubt that this was the proper course of administration. Now, the question is, whether estate-duty is payable on Mrs Harvey's death. I look first at the exception which is founded on by the defenders. The exception is in section 5, sub-section 2—"If estate-duty has already been paid in respect of any settled property since the date of the settlement, the estate-duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." Now, the theory of this clause is very evident. It is, that whenever property comes to be held by someone who has the unqualified power of disposal it is no longer

to be treated as settled estate. The property may for convenience be held by trustees for such a person, but if the trustees have not the power to prevent him from disposing of his rights as he pleases it is not in any true sense of the word settled property, and therefore on his death a new duty becomes payable. So long as the person holding right under the settlement is not competent to dispose of the estate, he is not to be considered owner in the sense of the Estate-Duty Act; he has merely a limited right, and if the estate has already paid duty it is not to be again chargeable on the death of someone who has had only a limited interest. That being the case, if Mrs Harvey's money, instead of being her own property settled by her own desire under her marriage-contract, had come to her under the will of someone who had settled it, and estate-duty had been paid in respect of this settled estate, the present claim could probably not be maintained. The question is different in the case of a marriage-settlement where the settlement is the act of the person herself. The whole of the money in respect of which duty is now claimed was Mrs Harvey's money which she voluntarily settled. That applies to the money that came from her brother just as much as to what she had in her own right at the time of her marriage.

I do not mean to introduce matter of speculation or surmise into my opinion, and it does not signify in the least whether Mr Barnett Harvey when he made his will knew that his sister's estate was settled by marriage-contract. Very probably he knew, but whether he knew or not, the terms of his will show that he intended his sister to take as large an interest in his succession as the law would allow. So far as regards the gift from him to her, it was a gift in fee, and accordingly estate-duty was paid upon it without objection by Mr Barnett Harvey's trustees. Although estate-duty has been paid under Mr Barnett Harvey's will, it has never yet been paid under Mrs Harvey's marriage settlement, and in my opinion it is now for the first time payable upon Mrs Harvey's death.

LORD KINNEAR was absent.

The Court adhered to the interlocutor reclaimed against, and of new appointed the defenders to lodge an account.

Counsel for the Pursuer and Respondent—Dundas, K.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Lorimer. Agent—W. Kinniburgh Morton, S.S.C.

Thursday, October 31.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON *v.* NORTH OF SCOTLAND BANK, LIMITED.

Bank—Retention—Deposit-Receipt Payable to A or B—Retention by Bank for Debt Due by A.

A deposit-receipt was granted by a bank to A and B "payable to either or the survivor of them." On B presenting the receipt payment was refused, on the ground that A was largely indebted to the bank; that the money truly belonged to A; and that the bank was entitled to retain the sum due under the deposit-receipt in security of the debt due by A. In an action by B, with the concurrence of A, *held*, after a proof before answer (*affirming* the judgment of Lord Kincairney, Ordinary) that the obligation undertaken by the bank was to pay to either party in the absence of notice from either to the contrary, and that they were not entitled in a question with B to retain the sum due under the receipt in security of a claim against A, whether it had or had not been established that the money was the property of A.

The following narrative of the facts in this case, with the averments and pleas of parties, is taken from the opinion of the Lord Ordinary (Kincairney):—"This is an action against the North of Scotland Bank, Limited, for payment of £96, 8s. 5d. contained in a deposit-receipt dated 4th August 1887, granted by the bank, which is thus expressed—'Received from Miss Agnes Fyfe and Mr Charles Fyfe Anderson, Comerton, Leuchars (payable to either or the survivor of them), £96, 8s. 5d. sterling, which is placed to their credit on deposit-receipt with the North of Scotland, Bank, Limited.' The action is raised by Anderson with consent of Miss Fyfe. They are mother and son.

"The bank resists the action, and has averred that the money in the deposit-receipt belongs wholly to Miss Fyfe, and that she is co-obligant with her brother William Fyfe in a bond for a cash-credit opened by William Fyfe with the bank, and also in a promissory-note to the bank by William Fyfe and her, a debt, I understand, due by William Fyfe.

"The sums due to the bank under the bond and note greatly exceed the sum sued for.

"The pursuer, on the other hand, avers that the sum in the deposit-receipt consisted in part of savings out of sums which Miss Fyfe had received for the aliment of her son, the pursuer, from his father, and otherwise of joint-savings by Miss Fyfe and the pursuer, and that Miss Fyfe had made a donation of the deposit-receipt to the pursuer so far as the contents