

—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

wide bars, and would also prevent persons putting out their foot *per incuriam* and getting it caught by passing tramway cars. These new cars also had what I may call a fillet at the top of the window neatly dividing off precisely the amount of space which was to be dedicated to advertising purposes and allowing the advertisement in the window—the glass bearing the advertisement—to be affixed by a simple process of nailing a small beading to the fillet.

“Now the present action is raised by the Edinburgh Tramways Company in 1907 for the additional cost of these boards upon the outside and this fillet arrangement upon the window.”

The agreement, *inter alia*, provided—“(First) the second party’s right to place advertisements on the first party’s cars and buses shall be and is hereby limited (1) to the inside of the side windows of the first party’s cars and buses on a space  $6\frac{1}{2}$  inches in depth measured from the top of such windows to the upper edge of the beading after mentioned; (2) to the handrails at the sides and ends of the roofs of the cars; (3) to the gate panels; and (4) to one window at opposite ends on each side of the cars for temporary bill advertisements only; all other spaces on the cars are hereby expressly reserved to the first party, who shall have right to place traffic notices only thereon, but not so as to obscure any advertisements of the second party, whose right of advertising shall be exclusive. (Second) The advertisements on the inside of the windows, excepting the temporary bill advertisements, shall be on coloured glass or gelatine transparencies, or such other substances as may from time to time be sanctioned by the first party, and shall be enclosed by a beading of such width and design as may be approved by the first party. The space on each pane may also be divided vertically into two equal portions by a similar beading. The glass transparency or other substance on which the advertisements are placed may be attached to the window frames of the cars or buses, but so as not to injure the wood, iron, glass, or paint work of the cars or buses, or to cause noise or vibration, or in any way interfere with the comfort of the passengers. (Third) The advertisements to be placed outside the cars and buses, including those on the gate panels, shall be painted 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, which boards duly painted or boards and plates shall be supplied by the second party, and shall not extend longitudinally beyond the handrails or downwards beyond the upper edge of the car roofs, and shall be so placed as to leave a clear space of not less than  $2\frac{1}{2}$  inches below the upper handrail. Such boards or places shall be maintained in proper condition and repair by the second party at the sight and to the satisfaction of the first party’s general manager for the time being, and in the event of the second party failing so to maintain them the first party shall be entitled to do so,

and to recover from the second party the expense thereof, as the same may be instructed by a writing under the hand of their general manager. . . . (Seventh) Nothing contained in these presents shall prejudice or interfere with the right of the first party to build cars of a different type from those at present run by them or under order, and in the event of the advertising spaces on any cars to be built by or for the first party in future being different from or less than those hereby let to the second party, the second party shall have no claim against the first party in respect of such difference or diminution.”

From the correspondence it appeared that the defender had repudiated liability for the cost of the frames and boards in 1900 and 1901, when he was first called on to pay for them; that on 29th October 1901, while again repudiating liability, he offered £72, 10s. “in full settlement of all claims,” and that after receipt of this offer, which was not accepted, the pursuers did not communicate with him further on the subject till February 1907, when they sent him an account amounting to £1095, 10s. for frames and boards on 171 cars.

On 18th December 1907 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor:—“(1) Decerns against the defender for payment to the pursuers of the sum of £169, 17s. 6d. sterling, with interest thereon at the rate concluded for from the date of citation till payment, in full of the sum sued for in the first conclusion of the summons; (2) decerns against the defender for payment to the pursuers of the sum of £427, 10s. sterling, with interest thereon at the rate concluded for from the date of citation till payment in full of the sum sued for in the third conclusion of the summons.” &c.

*Opinion.*—“. . . [After narrating the circumstances and stating his reasons for holding that the pursuers were not entitled to a judgment in their favour based upon contract, his Lordship proceeded—] . . . But the circumstances which I have already narrated very clearly show the *bona fide* belief, not I think without justification, on which the company’s manager acted in making the provision, which by the contract Mr Courtenay must have done himself, for the putting up of Mr Courtenay’s advertisements, and lay ample foundation for a claim of recompense. Now Mr Courtenay has made no difficulty all the time about using the appliances provided for him, and in my opinion very much to his advantage. Mr Courtenay now advances two propositions:—

“First, that what he calls ‘decency’ boards are an integral part of every tramway car, and that in all his similar contracts in England, and he has many, he has been allowed by companies and corporations to make use of them for affixing to them his advertisement plates without any charge instead of being required to put up additional boards of his own. I do not think that concessions made to him by the parties to other contracts have any bearing on the question, and I do think that the

history of the contracts with the builders shows that these boards were not in the present case ordered as an integral part of the cars but were specially ordered for advertising purposes, though I think that it must be admitted that if there had been no question of advertisements something in the way of weather boards, though not necessarily of the same kind or in the same form, would ultimately have been adopted by the company.

"Second, that if he had been told at the beginning that he was going to be made to pay for what he describes as an integral part of the cars he would never have used these 'decency boards,' but would have hung over the side his old horse car boards altered where necessary to suit the purpose. This I must take leave to do more than doubt. Mr Courtenay is a keen man of business, quite alive to his own interests. He had not only to develop but to maintain his business. I gather from him that that development has not been so satisfactory as he could have wished, or quite corresponding to the great increase in the area for advertising afforded him both by the largely increased number of cars and the great extension of the tramway lines, and he rather hints that he has had hard work to maintain his business. But if this be so, I cannot give credit to Mr Courtenay that he would have maintained far less developed his business if he had continued to use the sort of sandwich board system on which he displayed his advertisements on the old horse cars. In a case of this sort I cannot put aside my own personal knowledge and observation. In making use of it I am not using any knowledge which is peculiar to myself and so making myself a witness, but merely declining to lay aside what is common knowledge to all residents in this city, viz., the knowledge that Mr Courtenay's advertising medium on the cars which have been put on the route since the commencement of his agreement is a very different thing from that which was afforded him by his former method of advertising on the old horse cars. No one can look at the cars as they at present run without seeing, as is indeed proved to be the case, that they are more than half as big again as the old cars, and that the mode by which Mr Courtenay is enabled to exhibit his advertisements is incomparably more attractive to the public and *pari ratione* must be so also to his customers. To this as an ordinary business conclusion one cannot help attributing much of the retention, if not development, of Mr Courtenay's business. I have come therefore to the opinion that Mr Courtenay has had and accepted a substantial benefit from expenditure of the company *bona fide* made on his account, though not capable of being charged against him as matter of contract, and that he must recompense the company accordingly. What that recompense should be is somewhat of a jury question, but giving the best consideration to the circumstances which I can, I think that a fair assessment would be £2, 10s. a car, on the footing that Mr Courtenay

has the free use of the advertising boards for the remainder of his lease, but that the company maintain them, and are entitled to retain them for what they are then worth as their property at the conclusion of Mr Courtenay's agreement. I have taken a good many different matters into consideration in coming to that conclusion. While I discard Mr Drysdale's evidence as to cost, as Mr Drysdale betrayed unusually openly that he had come not to give evidence but to support a case, and the evidence of his colleague who came to support him must fall with his, I think there is a good deal to suggest that the work was gone about by the Tramway Company's builders with some unnecessary expense. The company, their manager, and their builders were all I think actuated by the laudable motive of making their new cars in all their details, so far as articles of that description can be so made, to do justice to the concession or lease which they had obtained. And in dealing with Mr Courtenay allowance must be made for this in arriving at the cost, which is one item in the estimation of recompense. Recompense, indeed, does not depend on the cost to the party claiming recompense but on the *quantum lucratus* of the party owing it. But the latter cannot be determined without having some idea of the value of the article for the supply or use of which recompense is claimed. I also have in view, on the one hand, that Mr Courtenay has already had a good many years' use of the boards in question free of expense, and on the other hand that for what they may be worth at the end of seventeen years they will remain with the company. It was suggested to me that I might fix an annual percentage upon cost, but I think it better for all concerned to name a slump sum, and remove once for all this bone of contention between parties who have still a good many years to live together.

"Now as regards the internal framing for the transparent advertisements the matter is somewhat different. I do not think that the company's manager can maintain anything of the nature of an agreement with regard to these, and I think that he somewhat impulsively took it for granted that the understanding which he believed in would cover these internal frames as ancillary to the more important external advertising boards. But they were definitely ordered as extras at a price of £1, 17s. 6d. in the case of one set of cars and of an indefinite portion of £7, 10s. in the case of the others, and they have been used without scruple or objection by Mr Courtenay. But while the case for the company is weaker in one respect in regard to the internal frames it is stronger in another. It cannot be suggested that Mr Courtenay could by any possibility have used anything old belonging to him in these new cars for his transparencies. The circumstances were quite different. He had now to deal with three windows fully forty-eight inches wide against double the number of windows only twenty-six inches wide, and the simple method of fixing his adver-

tisements in the old cars could not have been adopted in the new. Mr Courtenay is not justified in asserting that any part of the new framing for his advertisements is part of the structure of the car. A passage in Mr Pitcairn's evidence which at first sight appears to admit that it is so is, I think, attributable to a misunderstanding of the question put to him. Mr Pitcairn is evidently speaking of the true window frame, and not of the detachable advertisement frame. Now the word 'beading' used in the agreement, cannot, I think, have its restricted technical meaning in joinery, but must be held to cover what is necessary to fix and enclose the advertisements. For it must be noted that they are to be 'enclosed,' and that could not possibly be done at any rate at the lower edge by a mere beading proper. I think, therefore, that something of the nature of what was actually done was reasonably necessary and could have been demanded under the contract, the approval of the company to the method adopted being required. While therefore I think, as in the previous matter, that the company, for the same reason, have, quite properly from their own point of view, supplied Mr Courtenay with rather better provision for his advertisements than he need have supplied himself, something a good deal more, and costing more, than what he and his witnesses speak to, was needed. Though as in the previous matter dealt with there is no case on contract, I think there is equally here a case on recompense, and taking the whole circumstances into consideration, I think a fair estimate of the recompense would be 22s. 6d. per car on the same conditions of the article being maintained by and left to the company at the conclusion of Mr Courtenay's agreement.

"If the parties supply me with the figures I shall give decree accordingly, and as Mr Courtenay has wholly resisted payment he must pay the expenses of his unsuccessful defence."

The defender reclaimed.

[At the hearing on the reclaiming note counsel for the respondents admitted that there was no proof of any contract as to the cost of supplying the frames and boards. He stated that his case rested on an "honourable understanding" between the parties that Courtenay was to pay for the frames and boards in question.]

Argued for reclaimer—There was no proof of such understanding on the reclaimer's part; the sole question therefore was whether he was liable in recompense. No claim for recompense could arise where, as here, the operations in respect of which it was claimed, were made *in suo*—*Buchanan v. Stewart*, November 10, 1874, 2 R. 78, 12 S.L.R. 43; *Stewart v. Stewart*, November 8, 1878, 6 R. 145, 16 S.L.R. 72. The respondents had supplied the frames and boards for their own convenience. In face of the correspondence the claim now made should be repelled.

Argued for respondents—The Lord Ordinary was right. *Esto* that there was no

proof of contract, there was an honourable understanding proved between the reclaimer and the respondents' manager that the reclaimer would pay for the frames and boards, and the respondents had incurred expense on the faith of it. In these circumstances, having acted in good faith, they were entitled to recompense—*Ersk. Inst. iii, 1, 11*; *Bell's Prin. 538*. The respondents' frames and boards had been taken advantage of and there ought to be a fair return for their use—*Landless v. Wilson*, December 15, 1880, 8 R. 289, per Lord Shand at 293, 18 S.L.R. 206. [The Lord President referred to *Rankin v. Wither*, May 26 1886, 13 R. 903, 23 S.L.R. 629.]

At advising—

LORD PRESIDENT—[*After narrating the facts, supra*—It (*the present action*) was originally rested upon an averred agreement said to have been entered into between Mr Pitcairn, the General Manager of the Tramway Company, and the defender, under which agreement, as alleged, the defender had promised to pay for these outside boards and for the fillets. The Lord Ordinary has found, and I think he is clearly right, that no such agreement was proved. It is not at all likely that there should be such an agreement when soon after its alleged date we find the formal agreement containing such minute stipulations and yet making no mention of this matter. There is no writing, and even Mr Pitcairn himself in his evidence really does not face up to anything like a proof of the agreement. Counsel for the pursuers felt that they really could not waste your Lordships' time by trying to maintain that the agreement had been proved. Accordingly, any so-called agreement goes by the board. But then, say the pursuers, and here the Lord Ordinary has been with them, we are entitled to something in the name of recompense. The Lord Ordinary has allowed a certain sum in name of recompense. There is the initial difficulty in the Lord Ordinary's interlocutor, that he has allowed more in the name of recompense than is concluded for in the conclusions of the summons. I merely mention that, because in the view I take it does not matter. But the claim has been allowed upon principle. I have been entirely unable to see that there is room here for a claim under any such head whatsoever. The sort of way in which it is pleaded is this. It is admitted that there was no agreement to this effect, but it is said that there was an honourable understanding. I really do not understand in law what an honourable understanding is. It is either an agreement, or it is not. But of course I can understand that there may have been a mistaken but still *bona fide* idea upon the pursuers' part as represented by Mr Pitcairn that they had made a bargain which in fact they had not, and upon that of course Mr Pitcairn may have taken certain steps. The steps he is said to have taken are that he ordered these boards and fillets. Taking it at that I still fail to see how there is any claim for recompense.

I do not think it is possible—it certainly would not be easy—but I do not think it is possible to frame a definition of recompense which shall by itself in terms at once include all classes of cases which fall within the doctrine and at the same time successfully exclude those which do not. A very much greater framer of definitions than any of us can hope to be—Mr George Joseph Bell—tried it, and I am afraid that he failed, because there is no question that the definition of “recompense” in Bell’s “Principles” will not do. I took the trouble to look through the old editions to see where exactly it came in. It is not exactly as it is in the first edition, but it appears under “ameliorations” in the second edition, and I think if one could have got Mr Bell back again to ask him, that he would not have been very pleased with his own definition, because in the second edition and in the later editions he makes a start with what he calls “exceptions,” and these are not proper exceptions—exceptions in the proper sense of the word to a general rule—for they do not indicate a certain class of cases, but they are simply individual instances which will not fit the rule. Well, of course, if you have a rule and find so many individual instances which do not fit it and which do not range themselves into classes, that is just as much as to say that it is a bad rule. That it is a bad rule is quite certain. That does not rest upon my dictum, but it is rested upon the decided cases in this Court. There are at least two or three cases which have been decided which will not square with Mr Bell’s rule, which is so widely expressed that if anyone gets a benefit by something that is done by another person without the intention of donation he is at once subject to recompense. I put the illustration in the argument, which I think is apt enough. One man heats his house and his neighbour gets a great deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say—“Give me so much for my coal bill because you have been warmed by what I have done, and I did not intend to give you a present of it.” If you take decided cases, there are the case of *Stewart v. Stewart*, the case of *Rankine*, and the case of *Buchanan*—all of which are instances which go dead in the teeth of Mr Bell’s rule. That being so, the truth is that it is an equitable doctrine, and the basis of the equitable doctrine, I think, lies upon the old brocard *Nemo debet locupletari ex aliena jactura*. I notice that that is the basis of Pothier’s definition of it—his definition of it being really practically no more than a translation of the brocard. The result is, of course, that each case must be judged of by its own circumstances. But there are certain marks or notes of the situation in which recompense is due, and I think that one mark or note is that the person who claims recompense must have lost something. That is contained in the idea of “*jactura*.” Now I find that the case here fails when that test is applied to it, because

I do not see that the Tramway Company have lost anything. I put it to Mr Wilson, and he answered with very great frankness that he had not been able to find any case where there was a claim for recompense allowed for something which a person had done upon his own property. When a person does something on somebody else’s property in the mistaken idea, it may be, that it is his own, then the *jactura* is obvious enough. He has expended money or something else which has passed into other persons’ property. But here nothing has passed. The boards and the fillets remain just as much portions of the tramway car as they had been all along. The power of dominion over them remains with the pursuers. If they do not like them, then they may take them away, and therefore there is here a great deal of analogy between the present case and the case of *Stewart*. The boards and the fillets are quite as much used by the pursuers as they are by the defender. As regards the boards upon the outside, the statement is made, and it is not contradicted, that not only are they useful in themselves in the way I have described, but as a matter of fact the Board of Trade would not allow tramway cars to run if they had not got them. Any way, so far as one can judge by what is called common knowledge, these boards are always seen on tramway cars. In the same way, in regard to the fillets, they certainly make the windows a great deal neater than if advertisements were put in one window and none in the other, making the two windows apparently of different sizes. So there again you have the same element that went to the decision of some of these cases, that the thing done was as much for the benefit of the man who did it as for that of the other person.

But I am bound to say that my whole difficulty, if I had any, was dispelled when I came to see the correspondence which began in 1900. Now the action was raised in 1907, but the original claim was made in 1900, and the moment the claim was made it was at once repudiated, and the attitude taken up by the defender seems to me to be perfectly correct. He said at once—“You are bound to have those boards upon the outside, and as they are there I can hang my advertisements to them.” In a subsequent letter he even goes so much by the card, if I may use the expression, that he says—“Well, if you want particularly that I should follow precisely the terms of your contract, which says that I am bound to supply boards as well as plates, if you like I will put a board on your board and then a plate on the board. But,” he says, “if you do not like that, take away your board, and I will put up a board which will cost me very much less money, and that will perfectly satisfy me.” In the same way he originally made a more than fair offer with regard to the fillets, to the effect that inasmuch as the fillets gave him something to attach the beading to, which he otherwise would not have had, or, in other words, allowed him to use a more slender beading, he made the pursuers an offer

of a sum of money. That was not accepted, and I think the result is that the attitude taken by the defender at that time was perfectly right, and once for all puts an end to any idea of recompense.

Upon the whole matter I confess I have no hesitation in coming to the result that here there is no relevant claim for recompense because the facts do not raise it, and that accordingly, contract also having failed, the defender ought to be assolizied.

LORD KINNEAR—I am of the same opinion and have nothing to add.

LORD MACKENZIE—I concur.

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

The Court recalled the Lord Ordinary's interlocutor, assolizied the defender from the pecuniary conclusions of the summons, *quoad ultra* dismissed the action, and decerned.

Counsel for Pursuers (Respondents)—Graham Stewart, K.C.—Wilson. Agents—Davidson & Syme, W.S.

Counsel for Defender (Reclaimer)—Blackburn, K.C.—Hon. W. Watson. Agent—James Reid, W.S.

Wednesday, October 31.

## FIRST DIVISION.

[Sheriff Court at Dunoon.

ARGYLL COUNTY COUNCIL *v.*

WALKER.

*Local Government—Rates—Insolvency—Mails and Duties—Preference—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), sec. 62, sub-sec. (5).*

The Local Government (Scotland) Act 1889, enacts—sec. 62—“The following provisions shall be made with respect to the levy of the consolidated rates;—that is to say, . . . (5) . . . and all rates imposed under any powers transferred or conferred by this Act shall, in the case of bankruptcy or insolvency or liquidation, be preferable to all debts of a private nature due by the parties assessed.”

*Held* that an action against a heritable creditor who had obtained decree of mails and duties, and in virtue thereof collected the rents of the heritable subjects, for payment of rates due by the owner (the debtor in the bond), who had become insolvent, was incompetent, and must be dismissed.

*North British Property Investment Co., Limited v. Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641, distinguished.

In July 1907 the County Council of Argyll brought an action against R. S. Walker, solicitor, Greenock, for payment of £34, 14s. 9d., being the amount of assessments for the year 1906-1907 due by Peter Nicol-

son in respect of the ownership of certain heritable subjects within the county—Walker having in virtue of a decree of mails and duties collected the rents due to Nicolson from the said subjects.

The following *narrative* is taken from the opinion of the Lord President:—“Peter Nicolson, feuar, Bannockburn Buildings, Tarbert, was entered in the valuation roll of the county of Argyll for the year 1906-7 as the proprietor of two tenements, and in respect of his ownership of these properties was assessed in the sum of £34, 14s. 9d. Demand notes were duly served upon Nicolson in terms of the Local Government Act of 1889, but he failed to pay, and on 12th March 1907 he granted a trust deed in favour of a chartered accountant in Glasgow. On 7th March 1907 Nicolson's name was included in a summary warrant granted by the Sheriff of Argyllshire, but beyond this the County Council took no steps for payment of the rates.

“There was a bond and disposition in security over Nicolson's properties in Tarbert in favour of Walker, and on 25th February 1907 the heritable creditor presented a petition and obtained a decree of mails and duties. No rents were due at that date, so that the creditor could not then get payment, but at the following Whitsunday term he collected the rents in virtue of his decree. These rents exceeded the amount of the rates due in respect of Nicolson's properties.

“The present action was brought by the County Council against the heritable creditor in July 1907, and the conclusion of the summons is for payment of the amount of these rates.”

The pursuers pleaded, *inter alia*—“(3) The rates sued for are public burdens imposed by statutory authority upon said heritable properties, and are preferable to the said bond and disposition in security, and defender having refused to pay pursuers, this action has been rendered necessary, and the defender should be found liable to pay the sum sued for with expenses. (4) The said Peter Nicolson being insolvent, the rates imposed by pursuers are preferable to the said bond and disposition in security, which is a debt of a private nature, and decree should be granted in favour of pursuers with expenses.”

The defender pleaded, *inter alia*—“(2) The action is incompetent.”

On 7th November 1907 the Sheriff-Substitute (PENNEY) decerned against the defender as craved.

*Note.*—“Apart from the preliminary pleas the parties seem to be practically at one upon the facts, and I have therefore disposed of the case by final judgment. I am of opinion that this case is ruled by that of the *North British Property Investment Company, Limited v. Paterson*, July 12, 1888, 15 R. 885. In that case the late Lord Moncreiff said—‘We are not in the category of competing creditors at all. The property must pay the rates, no matter into whose hands it may happen to pass’—and I think the same may be said here.