to result in injustice. But its use by one foreigner against another foreigner is not unlikely to be an abuse which does not warrant any peculiar consideration being accorded to the user. By following out the process so commenced, and availing herself of the forms of our procedure, Mrs Brower, still in absence, has suceeded in vesting herself with an ostensible title to her alleged American debtor's interest in this trust estate, and that trust estate by no means clearly a Scots one. Until she has a contradictor this Court must recognise the title she has so acquired. But it is a title to a reversion. She has no present exigible interest, as the trust estate is held for another in liferent. Under the procedure she has followed, Mrs Brower assumes the place of the fiar, and is entitled to require that the trust be administered precisely as he might have required, that is, as the trustee directed but no more. The trustees owe their powers to the truster, and their duty is to carry out the trust as imposed on them by him. But Mrs Brower takes higher ground. She maintains that they have new and different duties imposed upon them by her having acquired the rights of the fiar, and demands that they shall so conduct the trust as to protect, not the interest of the fiar or her interest as in his right, but her title to that interest. Being evidently apprehensive that her title is not beyond challenge, she demands that the trustees shall take steps not required by their duty to the truster or to the fiar, which may obviate certain risks to her title. With that the trustees have no concern, and they are not so to be drawn away from the administration of their trust according to its terms.

I would add that I think that Mrs Brower has received from the trustees and from the Court an amount of consideration beyond what she was entitled to. The form of her action is virtually an attempt to throw this estate into Chancery, quite unprecedented in our practice, and I desire to reserve my opinion as to the competency of her proceeding and as to whether she was entitled even to the rope she has had. She has, in my opinion, received more than courtesy from the trustees, and more than consideration from the Lord Ordinary who had the earlier conduct of the cause.

LORD SKERRINGTON—I agree with your Lordship in the chair.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court in both actions adhered to the interlocutor of Lord Hunter, dated 16th March 1912, and refused the reclaiming note.

Counsel for the Pursuer and Complainer (Reclaimer)—Macmillan, K.C.—Lord Kinross. Agents—Guild & Shepherd, W.S.

Counsel for the Defenders (Respondents) — Macphail, K.C. — Steuart. Agents — Mackenzie & Kermack, W.S.

Friday, July 12.

FIRST DIVISION.

[Lord Cullen, Ordinary.

STIRLING COUNTY COUNCIL *v.* FALKIRK MAGISTRATES.

Process—Title to Sue—Burgh—Rates and Assessments—Ultra vires—Action by Ratepayer Challenging Legality of Assessment—Popularis actio—Expenses of Unsuccessful Provisional Order.

The magistrates of a burgh which had unsuccessfully promoted a Provisional Order for, *inter alia*, the extension of the burgh boundaries, resolved to defray the expenses connected therewith by annual instalments out of the burgh rates. Certain of the ratepayers (who had paid their assessments for the year in question) thereupon raised an action against the magistrates, in which they craved the Court (1) to find and declare that the defenders were not entitled to levy or exact any rates from "the pursuers or other ratepayers in the burgh" to be applied, directly or indirectly, towards payment of these expenses; and (2) to interdict the defenders from doing so. The Lord Ordinary having sustained the defenders' plea of no title to sue, the pursuers reclaimed, and at the hearing in the Inner House restricted the action to the protection of their own patrimonial interests by deleting the words "or other ratepayers in the burgh."

Held that the pursuers had a good title to insist in their demand.

Ewing v. *The Glasgow Commissioners of Police*, January 19, 1837, 15 S. 389, *aff.* August 16, 1839, M'L. & Rob. App. 847, *distinguished.*

Process—Declarator—Competency—Action by Ratepayers Challenging Legality of Burgh Assessments — Promotion Expenses.

Held that ratepayers of a burgh who challenged the legality of an assessment for promotion expenses were entitled to raise a declarator to try the question, and that they were not bound to proceed by way of a suspension of the alleged illegal assessment.

Police — Rates and Assessments — Ultra vires—Expenses of Unsuccessful Provisional Order—Right to Defray Expenses out of Burgh General Assessments.

Held that the magistrates of a burgh who had unsuccessfully promoted a Provisional Order for the extension of the burgh boundaries and for other purposes were not entitled, either under the burgh statutes or at common law, to defray the expenses connected therewith out of the burgh general assessments.

On 14th January 1912 the County Council of Stirling and others, owners and ratepayers within the burgh of Falkirk, *pur-*

suers, brought an action against the Provost, Magistrates, and Councillors of the Burgh of Falkirk, *defenders*, for (*in the first place*) declarator that the defenders "had no power, and were not entitled under the Burgh Police (Scotland) Acts 1892 to 1903, the Town Councils (Scotland) Acts 1900 and 1903, or any other statutes, or at common law, to levy or exact any rates from the pursuers or other ratepayers in the burgh of Falkirk to be applied, directly or indirectly, in or towards payment, in whole or in part, of any expenses incurred by the defenders in the promotion of or in connection with an application made by them in the session of 1911 to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act 1899 for a Provisional Order to extend the boundaries of the said burgh, to dissolve the Falkirk and Larbert Water Trustees and transfer the powers and undertaking of the said trustees to the defenders, and for other purposes, or to apply any part of the rates levied or collected, or which might be levied and collected by them under the authority of the foresaid statutes during the assessment year 1911-1912, or in any future year, directly or indirectly, in or towards payment, in whole or in part, of the aforesaid expenses," and (*in the second place*) interdict against the defenders "levying or exacting from the pursuers or other ratepayers in the said burgh any rates under the said Burgh Police (Scotland) Acts 1892 to 1903, or the Town Councils (Scotland) Acts 1900 and 1903, or otherwise, to be applied, directly or indirectly, in or towards payment, in whole or in part, of the foresaid expenses, and from applying any part of the rates levied or collected, or which might be levied and collected by them under the authority of the said last-mentioned statutes or otherwise during the assessment year 1911-12, or in any future year, directly or indirectly, in or towards payment, in whole or in part, of the aforesaid expenses."

The defender pleaded, *inter alia*—"(1) Pursuers having no title to sue the present action, the action should be dismissed. (2) The action is incompetent. . . . (5) The actings of the defenders complained of being legal and *intra vires*, the defenders should be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 10th April 1912 sustained the defenders' plea of no title to sue, and dismissed the action.

Opinion.—"In 1911 the defenders, who are the Provost, Magistrates, and Town Council of the Royal Burgh of Falkirk, made application to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act 1899 for a Provisional Order, the objects of which were to obtain a large extension of the boundaries of the burgh and to transfer to the defenders the powers and undertaking of the Falkirk and Larbert Water Trust. The application was opposed, and, after inquiry, was thrown out. The expenses incurred by the defenders exceeded £4000.

"The question on the merits intended to be raised in this action is whether it is lawful for the defenders to provide the amount of these expenses out of the burgh general assessment. The pursuers are owners of property and ratepayers within the burgh for the year 1911-12. They conclude (first) for declarator that the defenders have no power under their statutes or at common law '. . . [*quotes terms of declarator, v. sup.*] . . .' There is a second declaratory conclusion relating to assessments under the Falkirk Corporation Gas Acts, but it is now out of the case. The pursuers also conclude for interdict in terms corresponding to their declaratory conclusions, but at the hearing their counsel intimated that he did not press for interdict. Accordingly, the scope of the action is now limited to the first declaratory conclusion summarised above.

"Two questions have been argued—(1) Whether the pursuers have a sufficient title to insist in a declarator in such terms as they ask, and (2) on the merits, whether the defenders have power under the burgh statutes or at common law to provide the amount of the said expenses out of the burgh general assessment.

"As regards the first of these questions, it will be observed that the pursuers' declarator is not limited to such interest as they individually may have in the matter, and is not designed merely for the protection of themselves and their own properties from the exaction of an alleged illegal assessment. It extends to the interest of the whole ratepayers of the burgh. Further, it is not limited to the year 1911-12, *quoad* which the pursuers are within the body of burgh ratepayers, but extends to future years during which they may not be ratepayers. As regards the year 1911-12, the position is that the pursuers have paid the amounts of the assessment levied on them. No question of repetition is involved so as to give the pursuers any direct and immediate patrimonial interest in the result of the suit. The assessment for 1911-12 was *ex facie* imposed and levied in a regular manner. The defenders have collected the amount of it; and the money so levied being thus in the coffers of the burgh, the question so far relates to an apprehended application of part of it to purposes which the pursuers allege are not in accordance with a due administration of the affairs of the burgh. As no question of repetition is involved, the effect of a decree decisive of the legality or illegality of an application by the defenders of part of the 1911-12 assessment towards particular objects will not directly benefit the pursuers. The money in question, if it cannot legally be applied to these objects, will remain in the hands of the defenders as part of the fruits of an assessment regularly imposed and paid; and therefore the pursuers will not in any way obtain any patrimonial benefit. The result on this view might be to

diminish the defenders' estimates and lighten the amount of the burgh assessment for a future year. But it is impossible to say that this will benefit the pursuers. For they may not continue to be ratepayers within the burgh.

"Such being the conditions under which the pursuers' proposed declarator falls to be considered, it appears to me that, as the defenders contend, the principle of the decision in the case of *Ewing* v. *The Magistrates of Glasgow*, 15 Shaw 389, Maclean & Robinson's App. 847, applies, and that the pursuers have not set forth such 'a direct or immediate interest in the result' as to sustain their title to insist in the action.

"The pursuers might have brought a suspension of the assessment so far as sought to be levied from them respectively, as was done in the recent case of the *Leith Dock Comissioners* v. *The Magistrates of Leith*, 25 R. 126, 1 F. (H.L.) 65. The burgh Acts further provide them with the remedy of compearing at the audit of the burgh accounts. I am aware that in more than one case it has been said that an action of declarator is a form of remedy competent to a ratepayer. But it is not any declarator that is so competent; and as the conclusions of the present summons stand, and no amendment has been proposed, it appears to me that it would be inconsistent with the case of *Ewing* to give effect to them.

"I am accordingly of opinion that the defenders' first plea-in-law falls to be sustained.

"As, however, the question on the merits was very fully argued, and as it is one of some general importance, I think it right that I should express my view upon it. I am of opinion that the defenders are not empowered by the burgh statutes or by common law to assess for the expenses of their unsuccessful attempt to extend the area of the burgh, and, incidentally thereto, to obtain a transfer to themselves of the undertaking of Falkirk and Larbert Water Trust. So far as the statutes are concerned, it appears to me that the principles laid down in the well-known case of *Cowan* v. *Law*, 10 Macph. 578, apply. The defenders are only entitled to use their statutory powers of assessment to provide funds for carrying out the administrative purposes of the statutes which authorise these assessments. Under the Burgh Police Act of 1892 the extension of a burgh is to a defined extent included within the sphere of burgh administration. It is so, however, only under certain statutory conditions. Further, the method of procedure to be followed—an application to the Sheriff of the county—is prescribed. Now the defenders' proceedings in connection with the proposed extension of the burgh were quite outwith these provisions of the statute, and therefore not sanctioned by it as being within its administrative purposes. The defenders, however, appeal to sections 45 and 46 of the Act of 1892. These relate to certain kinds of special powers outwith the normal powers of administration conferred by the Act, and provide procedure for obtaining them by way of an application to the Secretary for Scotland for a Provisional Order. They do not mention the subject of burgh extension; and, looking to the kinds of powers which are specially enumerated, and also to the fact that, as I have mentioned, burgh extension is made matter of express provision in an earlier compartment of the Act, I am inclined to think that the special powers contemplated in sections 45 and 46 do not include an extension of the burgh of such a nature as is not provided for under sections 11 to 14 of the Act. But, be it otherwise, section 46 assigns to the Secretary for Scotland the discretionary power of authorising a charge on the burgh assessments of the expense of proceedings for obtaining such special powers as sections 45 and 46 contemplate; and the defenders' proceedings here in question for the extension of the burgh of Falkirk were not taken under these sections.

"Reference was made to certain legislative enactments subsequent to the Act of 1892, and in particular to sections 11 and 16 of the Private Legislation Procedure (Scotland) Act 1899. But it appears to me that these do not materially affect the issue, and that the question continues to be whether proceedings for the extension of a burgh, such as were here taken by the defenders, were within their normal administrative powers under the Act of 1892, for the expense of which they are entitled to assess the ratepayers within the burgh as for the purposes of the Act. In my opinion this question falls to be answered in the negative.

"The defenders submitted an argument to the effect that as they are the administrators of a barony burgh, and thus not merely administrators for defined statutory purposes, they fall to be regarded as having wider powers in regard to such a matter as burgh extension than the burgh statutes confer. This may be true, and it may follow that, where a burgh possesses a common good the disposal of which is not regulated by statute, it may be lawful for the corporation to defray out of the common good the cost of such an attempt at burgh extension as was in this case unsuccessfully essayed by the defenders. I express no opinion on this question, which is not raised for determination. The actual question at issue relates to the purposes for which the defenders may lawfully exercise their statutory powers of assessment. These are limited to providing funds for the statutory purposes; and, as I have said, the attempted extension of the burgh here in question does not in my opinion fall within these purposes."

The pursuers reclaimed, and at the hearing in the Inner House craved leave to amend the summons by deleting the words "or other ratepayers in the burgh of Falkirk," thus limiting the action to the protection of their own patrimonial interests. The Court allowed the amendment.

Argued for reclaimers—*On the question*

of Title.—The pursuers as ratepayers had a good title to sue—*Cowan and Mackenzie* v. *Law*, March 8, 1872, 10 Macph. 578, 9 S.L.R. 341; *Wakefield* v. *Commissioners of Supply of Renfrew*, November 29, 1878, 6 R. 259, 16 S.L.R. 183. They had also a sufficient interest, for they were owners as well as ratepayers. They were clearly entitled to raise the present declarator, for that was a competent form of process—Mackay's Manual, 139 and 375; *British Fisheries Society* v. *Magistrates of Wick*, January 30, 1872, 10 Macph. 426, 9 S.L.R. 260; *Heddle* v. *Magistrates of Leith*, March 5, 1897, 24 R. 662, 34 S.L.R. 479. The Lord Ordinary was in error in thinking he was bound by *Ewing* v. *The Glasgow Commissioners of Police*, January 19, 1837, 15 S. 389, *affd.* 16th August 1839, M'L. and Rob. App. 847. That case was distinguishable in respect (*a*) that it was not a proper declarator, and (*b*) that it was decided on a different statute. Further, the soundness of that decision had been questioned—*Conn* v. *Corporation of Renfrew*, June 14, 1906, 8 F. 905, *per* Lord Kyllachy at p. 911, 43 S.L.R. 664. A single ratepayer was clearly entitled to resist an illegal exaction—*Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893; *Blackie* v. *Magistrates of Edinburgh*, February 5, 1884, 11 R. 783, 21 S.L.R. 352, *affd.* 13 R. (H.L.) 78, 23 S.L.R. 501. Where the exaction was already imposed, he could do so by suspension and interdict—*Cowan, cit.*; *Wakefield, cit.*; *Leith Dock Commissioners* v. *Magistrates of Leith*, November 30, 1897, 25 R. 126, 35 S.L.R. 132, *affd.* July 25, 1899, 1 F. (H.L.) 65, 36 S.L.R. 956. Where it was not imposed but threatened he could bring a declarator—*Edinburgh and Glasgow Railway Company* v. *Meek*, November 23, 1849, 12 D. 153, at 158; *Scottish North-Eastern Railway Company* v. *Gardiner*, January 29, 1864, 2 Macph. 537. If there were any doubt as to the competency of the action *quoad* the interests of the other ratepayers, pursuers would amend—as they now craved leave to do—by deleting the words "or other ratepayers in the burgh of Falkirk." [The Court allowed the amendment.] *On the Merits.*—The burgh authorities were not entitled to levy assessments to promote a bill for the extension of the burgh; they were bound to follow the procedure prescribed by the Police Acts, viz., application to the Sheriff of the county. They could only assess for the purposes of the statutes which allowed the assessments—*Cowan, cit.* Even if they might act otherwise in cases of urgency, *e.g.*, procuring a water supply, there was no such necessity here. Neither the Burgh Police Acts of 1892 (55 and 56 Vict. cap. 55) or 1903 (3 Edw. VII, cap. 33), nor the Town Councils Act of 1900 (63 and 64 Vict. cap. 49), nor the Private Legislation Procedure (Scotland) Act of 1899 (62 and 63 Vict. cap. 47) authorised an assessment for promotion expenses. The fact that such a power was expressly sanctioned in the County Councils (Bills in Parliament) Act 1903 (3 Edw. VII, c. 9) showed that without such sanction it was invalid. The defenders' argument that the assessments were really levied for a legitimate purpose, viz., to repay the debt to the bank, was unsound, for the fact that part of a composite transaction was legal did not make an illegal part legal. Further, the estimates in question were headed "to expenses of burgh extension," not "to overdrawn accounts." *Lang* v. *Selkirk Magistrates*, 1748, M. 2515, was referred to.

Argued for respondents—*On the question of Title.*—The pursuers had no title to sue, for an *actio popularis* at the instance of a ratepayer professing to act for all the others was not a competent form of process—*Magistrates of Lauder* v. *Spence*, May 17, 1821, 1 S. 15; *Burgesses of Inverurie* v. *The Magistrates*, December 14, 1820, F.C.; *Trinity House of Leith* v. *Magistrates of Edinburgh*, February 6, 1829, 7 S. 374; *Ewing* v. *Glasgow Commissioners of Police, cit.* Their remedy was to suspend the assessment, each suspending his own share—*Parochial Board of Bothwell* v. *Pearson*, February 6, 1873, 11 Macph. 399, 10 S.L.R. 250. Even if the pursuers had a good title, they had sued the wrong party and had sought the wrong remedy. They should have sued the Town Council who authorised the assessment, and not the present defenders, who were not responsible. They had sought the wrong remedy, for where, as here, a statutory remedy existed—viz., objecting to the burgh accounts at the audit—other remedies were impliedly excluded. The case of *Cowan, cit.*, was distinguishable, for (*a*) the question of title was not there raised, and (*b*) the funds were still extant, whereas here the money had been spent. The declarator—assuming it to be a competent form of process, which was denied—was premature, for the Court could not determine *ab ante* the legality of future assessments—*Allgemeine Deutsche Credit Anstalt* v. *Scottish Amicable Life Assurance Society*, 1908 S.C. 33, 45 S.L.R. 29; *Cuthbert* v. *Cuthbert's Trustees*, 1908 S.C. 967, 45 S.L.R. 760. *On the Merits.*—The defenders were within their rights in levying the assessments in question, for the expenditure was incurred in the proper administration of the burgh—Burgh Police (Scotland) Act 1892, secs. 45, 46, 55 (3), and 59; Town Councils (Scotland) Act 1900, sec. 7; Private Legislation Procedure (Scotland) Act 1899, sec. 11 (2). *Esto*, however, that the defenders were not entitled to levy assessments for the purpose in question, they were entitled to levy them to repay the debt to the bank by whom the money had been advanced.

At advising—

LORD MACKENZIE—The pursuers in this case are owners of property and ratepayers in the burgh of Falkirk, and the defenders are the Provost, Magistrates, and Council of the burgh of Falkirk. The purpose of the action is to determine whether it is lawful for the defenders to provide out of the burgh general assessment for the expenses incurred by them in the unsuccessful promotion of a Provisional Order to extend the boundaries of the burgh and to transfer to the defenders the undertaking

of the Falkirk and Larbert Water Trust. That Provisional Order was opposed, and was thrown out, and the expenses which were incurred by the defenders amounted to over £4000.

The conclusions of the action are for declarator and interdict. The conclusion for interdict was not pressed, and accordingly the question is whether the pursuers are entitled to get a decree of declarator, and, if so, to what extent.

The case is in somewhat a different position, as regards the argument submitted, from what it was before the Lord Ordinary, because the pursuers did not insist upon their right to get a declarator that the defenders are not entitled to levy or exact rates from "other ratepayers," the pursuer's counsel recognising that, if it was, this would be a *popularis actio*, and their position would conflict with the decision in *Ewing's* case. Nor did the pursuer's counsel see his way to maintain that they were entitled to declarator that the defenders were not entitled to apply "any part of the rates" towards payment of the expenses. And, accordingly, the way in which the case comes before your Lordships is this, that all the pursuers seek to resist the proposed imposition upon them of any rates which are to be applied directly or indirectly in or towards payment in whole or part of the expenses incurred by the defenders in connection with the Provisional Order. The question is whether that is a demand that they have a title to insist in.

The Lord Ordinary's view is that they have no title, and that view proceeds upon the decision, in the House of Lords, in the case of *Ewing* v. *Magistrates of Glasgow* (15 S. 389, Maclean & Robinson's App. 847). The opinion of the Lord Ordinary is, that what the pursuers are here attempting to do is not to vindicate a patrimonial right. If it be the case that the pursuers here have a direct patrimonial interest in the action to the extent to which they now insist in it, then the case of *Ewing* will not apply, for in that case it was recognised, both in the Court of Session and also in the House of Lords, that an individual patrimonial interest is enough to entitle a pursuer to object to the imposition of an illegal tax. In *Ewing's* case the Court of Session and the House of Lords extended the law laid down in previous cases—such as *Inverurie*, December 14, 1820, F.C.—that private parties have no right to bring an action against the magistrates of a burgh in relation to matters connected with the common good. If such a naction is to be brought it must be brought at the instance of the Crown. In order to understand what was decided in *Ewing* it is necessary to have in view the fact that all the cases that were referred to by the Lord Chancellor in the House of Lords were cases dealing with common good in royal burghs. *Ewing's* case extended the principle to the case of police funds raised by assessment which are under the administration of a town council as police commissioners. This is pointed out by Lord Kyllachy in the case of *Conn* (8 F. 905).

If the action is not for the purpose of preventing malversation, but for the purpose of protecting a direct patrimonial interest, then the case of *Ewing* is not an authority against the pursuers insisting in it. The conclusion in *Ewing's* case brings out quite clearly what the meaning of the decision was, because there was no conclusion there which would have protected the pocket of the pursuers. The conclusion was to have the defenders ordained to pay back into the funds of the police establishment money which, it was said, was being diverted from those funds.

Accordingly I think, when the modifications in the demand which is now made are taken into account, a great deal of the difficulty which the Lord Ordinary had is removed.

The point is made against the pursuers by the defenders that they have paid the assessments for the year 1911-12. But one of them—the County Council—paid under reservation of a claim for repayment, and the question raised in this case is not limited to the application of the assessments of one year—it is whether the defenders are right in the position which they have taken up, under which they propose to devote the burgh general assessment to liquidate this debt by instalments in future years. That raises a question which will directly affect the pecuniary interests of the pursuers. It is plain on the facts that that is what the defenders propose to do, because at a meeting on the 28th September 1911 they approved and adopted a minute of the Finance Committee, held two days before, to the effect that "it was agreed to defray the expense partly out of the rates levied by the defenders under their statutory powers from the owners and occupiers of property within the burgh. . . ." And then there is a further part of the minute with regard to the payment of part of the expenses out of the gas assessment—a proposal which has now been dropped. The averment of the pursuers is not only that the defenders' intention is to defray the expense to the extent of £1000 out of the burgh rates collected within the current year, but that they intend to defray the balance of the expense of a similar character in future years. That raises sharply the question whether they are entitled so to deal with the assessment. If they levy rates and apply them to that purpose, they must come out of the pocket of the pursuers, because I cannot regard as of serious importance in this case the suggestion that it is possible they may part with their property in the burgh.

The defenders further contended that there is only one way in which a party in a burgh on whom an assessment is imposed can protect himself and that is by suspension and interdict. I think it is clear on the authorities that suspension and interdict is not the only remedy which is open to a person who is threatened in this way. I do not require to refer to any other

authority than the opinion of Lord Watson in the case of *Graham*, 9 R. (H.L.) 96. It is there made clear that when a person has an individual right he can have a declarator in order to ascertain what that right is. The authorities cited by the defenders were cases in which the Court refused to decide hypothetical cases. The resolution of the defenders at their meeting of 28th September 1911 raised the question on which a decision is now sought. It was then agreed to defray these expenses out of rates to be paid by the pursuers. The circumstances are thus different from those in *Bothwell*, 11 Macph., which was urged as an authority by the defenders. The two cases in 1908—*Allgemeine Deutsche Credit Anstalt*, 1908 S.C. 36, and *Cuthbert*, 1908 S.C. 967—were premature declarators. For an instance of cases where a declarator was granted I refer to the case of *Edinburgh and Glasgow Railway* v. *Meek*, 12 D. 153, and the *Scottish North-Eastern Company* v. *Gardiner*, 2 Macph. 537. Opinions were expressed in favour of trying such questions by way of declarator in the cases of the *British Fisheries Societies*, 10 Macph. 426, and *Heddle*, 24 R. 662.

Accordingly I do not consider that the argument founded upon this being an inappropriate form of action is sound.

Another point was argued. It is said the whole of this sum of £4182, 17s. 2d. has been paid to the original creditors. Their debt is discharged, and therefore the argument is, you cannot bring an action against the Magistrates in order to get back that money. It is no longer the original creditors who are to get the money; it is the bank. The date at which the whole of the creditors are said to have been paid was 26th October 1911. I am altogether unable to follow that argument. If what the defenders propose to do is illegal, it obviously is out of the question to allow them by borrowing money and paying it away to say now the matter is closed. The fact that cheques were drawn upon their bank account, and that these were cashed, and that the original creditors discharged their claims, cannot alter the true position of parties. It is at this point that another argument was used—that the wrong parties were being sued. It was maintained that those who had drawn the cheques are the people who ought to be sued. But the pursuers in this action seek to have it declared that the Magistrates of Falkirk are not entitled to take, in future years, rates from them for the purpose of replacing money that has been applied in paying the expenses of this unsuccessful bill. The only persons you could call in order to obtain complete protection is the body who impose the assessments.

The pursuers, in my opinion, have a title to insist in the action. On the merits there is nothing to be added to what is said by the Lord Ordinary. There is no answer to the pursuers' contention. Once it is decided that the pursuers have a title, the necessary result seems to me to be that the whole pleas of the defenders ought to be repelled.

There is no doubt that the defenders have been acting in perfect good faith, and that leads me to make the suggestion to your Lordships that in a case of this kind instead of proceeding at once to pronounce a decree of declarator, it might be appropriate, in order to give the defenders an opportunity of considering what they should do in view of the decision of the Court to pronounce findings; that the defenders have no power and are not entitled, at common law or under statute, to levy or exact any rates in the burgh of Falkirk on the pursuers, to be applied directly or indirectly in or towards payment, in whole or part, of the expenses incurred by the Provost, Magistrates, and Councillors of the said burgh in the promotion of the Provisional Order referred to on record.

LORD PRESIDENT—I concur in the opinion which has just been delivered. For the moment I will begin at the other end—Were the defenders here entitled to raise a general assessment for the purpose of paying the bill which they had incurred by the unsuccessful promotion of an attempted Act of Parliament? Well, upon that question really there has been no argument. After all, the inhabitants of Falkirk are only liable to be assessed for the purposes and in the way in which the statute says they may be assessed, and as soon as you get outside these purposes the assessment becomes simply and purely illegal. And therefore when that is once settled, good faith has really very little or nothing to do with the legal question. It comes to this, that if what are called the preliminary defences of the defenders here are right, there is no malversation of statutory funds raised by assessment which a set of burgh magistrates could carry through which might not be successfully defended, in this sense, that according to the defenders' argument no remedy could be obtained in this Court. I put it to Mr Watson several times during the debate that his arguments, especially his argument about payment to the bank, would have been equally good or equally bad if, instead of the money having been taken for the purpose of paying the expenses of this unsuccessful Provisional Order, it had been taken by the Magistrates in order to allow themselves a trip to Monte Carlo. According to Mr Watson's argument, all you have got to do is, not to take the money directly out of the coffers of the town, but to borrow the money from the bank. And then, says he triumphantly, the person now to be repaid is the honest bank, which must get back the money it has lent.

I am loath to suppose that our justice has come to that; and accordingly I do not think that the mere fact that the Magistrates here, instead of waiting until they got the assessment and then paying the money out of the assessment, first passed a

cheque upon their general account in the bank and took the money in that way, can possibly make any difference.

The only other remark I want to make is that I agree with Lord Mackenzie's view of what was decided by the House of Lords in *Ewing*. What was decided there was, in the first place, that the object of the action being to make the magistrates restore a sum to the coffers of the town which they had improperly diverted, such an action was an *actio popularis*, and, secondly, that the individual parties had no title to follow it forth. But where the action is at the instance of a man who says that you are telling him that you are assessing him for a purpose which is not within the powers of assessment of your statute, then he certainly and undoubtedly has a good cause of action.

I am of opinion, therefore, with Lord Mackenzie that we can give a remedy, and I think in order to bring the two cases which are now before us into line, there is no objection to making the findings which he suggests at this time. But assuredly it will further result that if the town do not choose to pay attention to the findings that have been pronounced against them, then I do not think we shall be so impotent as not to find a personal remedy. It is for the town to get out of this trouble into which they have fallen. If they have no common good—and in the case of Falkirk I should not suppose they had—the sooner they raise action against the persons who misused their funds the better, otherwise they will certainly find themselves before long subject to the penal consequences of an interdict.

LORD KINNEAR—I concur.

LORD JOHNSTON—The defenders in this case, the Magistrates of Falkirk, promoted unsuccessfully a Provisional Order in 1911 for extension of the burgh boundaries and acquisition of the undertaking of the local Water Trust, and in this unsuccessful promotion incurred expenses to the extent of £4000. On 28th September 1911 they resolved to defray these expenses out of the general rates levied by them under their statutory powers from the owners and occupiers of property within the burgh.

It may be taken as admitted that the burgh general assessment for the year was laid on in September; that it was in course of collection during the winter 1911-12, a portion having been collected prior to the raising of this action on 14th January 1912, and a portion subsequent to that date; that the actual accounts incurred, and amounting to over £4000, have *de facto* been paid by drafts on the general bank account of the burgh; also that the Council, before the raising of this action, had resolved to provide for a portion of the expenses in question out of the assessment of the year 1911-12, and had estimated and assessed accordingly, but had resolved to postpone the provision for the remainder of the sum in question to be spread over future years.

Three ratepayers, two who are owners and occupiers, and one who is an owner only, raise this process to challenge the legality of the action of the Town Council. It is admitted that all have paid their assessments for the year, though one has done so under special reservation of the right to recover.

The Lord Ordinary has indicated the opinion that the action of the Council is *ultra vires*, and in this, in common, I understand, with your Lordships, I agree. But the Lord Ordinary, holding himself bound by the decision in *Ewing* v. *Magistrates of Glasgow* (15 S. 389, and M'L. & Rob. 847), has sustained the defenders' plea to the pursuers' title to sue, and that question has been keenly contested.

The precise form of action is one of declarator and interdict, which at first sight would appear to be a most convenient mode of raising the question, and I think it would be unfortunate if we were compelled by any rule or practice to sustain the plea of no title. For in the declarator the question of right would be determined, and the pursuers have intimated, not as the Lord Ordinary seems to think, that they did not stand upon their conclusions for interdict, but that if they obtained declarator in the terms concluded for they would not press for the interdict which would naturally follow as an ancillary, so as to embarrass the Council, but would rely upon them naturally complying with any declarator obtained, without their being placed under the sanction of interdict. The question of title must therefore be considered in view of the full conclusions of the summons of declarator and interdict.

The pursuers sue the Town Council as Town Council, and therefore having perpetual succession, for declarator "that the defenders have no power, by statute or at common law, to levy or exact rates from the pursuers or other ratepayers in the burgh of Falkirk, to be applied directly or indirectly towards payment in whole or in part of the expenses incurred by them in the promotion of the foresaid Provisional Order," or to apply any of the rates levied or collected, or which may be levied and collected by them under the foresaid statute during the assessment year 1911-12 or any future year, directly or indirectly, in or towards payment in whole or in part of the aforesaid expenses. The relative conclusion for interdict against levying and applying is an exact echo of the declarator.

The Lord Ordinary founds the rejection of their actions on three considerations—First, that the declarator is not limited to the pursuers' individual interest, but extends to the interest of the whole ratepayers.

If that be a good objection it is easily cured, either by the pursuers deleting the words "or other ratepayers in the burgh of Falkirk," or by the Court not including these words in the decree to be granted. But as the pursuers have no exceptional position, it follows that if they ave right to the declarator they ask in their individual case, they have only such right on grounds of universal application

to all ratepayers. The question remains, Have the pursuers right as individual ratepayers to the remedy they crave?

Second, that they do not limit their conclusions to the year 1911-12, and *quo modo constat* that they will be ratepayers in any subsequent year?

To that I think it is a sufficient answer both that *pluris petitio* will not in itself destroy their title to sue, and that as proprietors, if they have an interest to obtain this declarator regarding the year 1911-12, they have also an interest in respect of their properties to obtain it regarding future years, as the intended action of the Town Council affects the value of their properties.

Third, that as they have paid their assessments and do not in this action raise any question of repetition, they do not show any patrimonial interest. The money, his Lordship assumes, is ingathered and in the coffers of the burgh. If the pursuers succeed in their action it will remain there as the fruits of an assessment regularly imposed and paid. The pursuers do not ask any of it back. The result of the excess assessment, if the pursuers are right, may diminish the assessment next year. But *quo modo constat* that the pursuers will have any interest in that year?

This view appears to me to be too narrow. Not only have the pursuers as proprietors an interest in respect of their properties, but I think as ratepayers they have an interest in the administration of a burgh fund to which they have contributed. Admittedly they have an interest to avoid the contribution, and could have effected this by suspension. Equally I think they have an interest to prevent the misapplication of their contribution, and can effect this by interdict, which may conveniently, in accordance with our practice, be prefaced by declarator. And it must be remembered that the assessment was a general assessment, not restricted to the particular object to which part of it is proposed to be applied, and that therefore it was not necessarily known to them at the date of assessment that they were to be over-assessed for an improper object, nor is it clear that they could be heard to stay the levying of a general assessment *ex facie* legal because a portion of it was threatened to be devoted to an illegal object. It appears to me that the conclusions of the summons include the really appropriate remedy, which is to stay the application of the assessment levied to the illegal purpose to which it is proposed to be diverted, and to that probably our decree may be conveniently restricted.

The Lord Ordinary has held himself bound by the case of *Ewing, supra*. But I do not think that that judgment has any real application. The illegality complained of was indeed the same as here, but the form of action was, as your Lordship has shown, wholly different. If after they have obtained their declarator and interdict in this case the pursuers find themselves obliged to take steps to compel the refunding of moneys illegally paid away, which I can hardly anticipate, they may find difficulty in the judgment in *Ewing's* case, though I do not think that it is difficulty which will pass the wit of counsel to surmount. But the judgment is no obstacle to the remedy which they seek at present.

Moreover, the value of *Ewing's* case as an authority is a good deal detracted from by the fact that the Lord Chancellor, under misapprehension, bases his judgment upon certain cases which had to do with maladministration of common good and similar funds, which according to our law can only be challenged by the Crown—*Conn* v. *Magistrates of Renfrew* (8 F. 905).

For these reasons I think that the Lord Ordinary's judgment falls to be recalled.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 10th April 1912]: Repel the whole pleas-in-law for the defenders: Find that the defenders have no power and are not entitled at common law or under statute to levy or exact any rates in the burgh of Falkirk from the pursuers to be applied directly or indirectly in or towards payment in whole or in part of any expenses incurred by the Provost, Magistrates, and Councillors of the burgh of Falkirk in the unsuccessful promotion of the Provisional Order referred to on record, and continue the case: Find the pursuers entitled to their whole expenses, and remit the account thereof," &c.

Counsel for Pursuers—Constable, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders—Dean of Faculty (Scott Dickson, K.C.)—Hon. W. Watson. Agents—Macpherson & Mackay, S.S.C.

Saturday, July 13.

FIRST DIVISION.

[Lord Cullen, Ordinary.

FARQUHAR & GILL *v.* ABERDEEN MAGISTRATES.

Process—Title to Sue—Burgh—Rates and Assessments—Parliamentary Expenses.

The town council of a burgh, having unsuccessfully promoted a Provisional Order and Private Bill for a new water supply, included one-half of the promotion expenses in the annual budget of the burgh water department.

Held, on a note of suspension and interdict brought by certain water ratepayers, that the complainers had a title to sue.

Burgh—Rates and Assessments—Ultra vires—Parliamentary Expenses—Aberdeen Police and Water-works Act 1862 (25 *and* 26 *Vict. cap. cciii*)—*Aberdeen Corporation Water Act* 1885 (48 *and* 49 *Vict. cap. cxxiii*), *sections* 35, 36, 42, 43—*Public*