

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

A2312/99

OPINION OF LORD OSBORNE

in

RECLAIMING MOTION

in the cause

ANDREW WILSON and OTHERS

Pursuers and Appellants;

against

INVERCLYDE COUNCIL

Defenders and Respondents:

Lord Osborne

Lord Drummond Young

Lord Coulsfield

Act: Parties;

Alt: Brodie, Q.C., Bowie; DLA

20 February 2003

[1] Since the resolution of certain of the issues arising in connection with this reclaiming motion depends upon the interpretation of transactions of some antiquity, it is appropriate to examine them against the background of the historical context in which they occurred, as disclosed in the documentation which it was agreed should be referred to in the argument before us. This I shall now do.

[2] From an early date, a harbour was established at Greenock. As early as 5 June 1635, the community of Greenock was erected as a Burgh of Barony. By a Charter, dated 30 January 1741, Sir John Schaw of Greenock, Baronet, Baron of the Barony of Greenock, granted power to the feuars and sub-feuars of the Burgh of Barony to meet annually and choose managers of the public funds of the town. Subsequently, by Act of Parliament certain duties were authorised to be imposed within Greenock for the purpose of "repairing the harbour of Greenock, and other purposes"; also certain persons were thereby appointed trustees of the funds arising from the impost so authorised. Provision was also made for their successors in office.

[3] By a Charter of Erection, granted by Sir John Schaw of Greenock, dated 2 September 1751, the public administration of the affairs of the Burgh of Greenock was further developed. In that charter, it was narrated:

"That, by the great increase of the said town and Burgh of Barony, it is now become necessary that the police and government thereof should be put under proper regulations, and that there should be a perpetual succession of a competent number of the inhabitants or burgesses of the said Burgh of Barony chosen, with bailies, treasurer, clerk, and officers of court, for the constant management of the funds or common good of the said Burgh of Barony, administration of justice and maintaining peace and good order with the same"

and

"That it will tend greatly to the advancement of these purposes, that during the subsistence of the said Act of Parliament, the trustees thereby appointed, and their successors in office, have the government of the town and management of the public funds thereof."

In these circumstances, in the Charter mentioned, the grantor did, as Baron of the Barony of Greenock and Burgh of Barony:

" ... give and grant full power, warrant and commission to all the feuars and sub-feuars of the said town and Burgh of Barony of Greenock, to meet and convene themselves, upon the second Monday of September current, at 10 of the clock in the forenoon; and then and there to make choice of the said nine trustees to be magistrates and councillors of the said Burgh; whereof, two to be bailies, one to be treasurer, and the other six to be councillors; ... and with power to manage the funds and common good presently belonging, or that, at any time hereafter, shall belong, to the said town and Burgh of Barony - and that in place of the nine managers chosen and appointed to be chosen by the said charter granted by me in the year 1741:".

[4]Subsequently, by Sasine, recorded on 1 February 1763, heritable right was conferred upon the Magistrates and Councillors of the Burgh of Greenock to certain shore ground within the east side of the east quay in Greenock. The purpose of this acquisition was to develop further the facilities of the harbour there.

[5]By a Feu Contract, dated 13 and 16 May 1772, between John Schaw Stewart, Esquire of Greenock and certain named persons said to be the bailies, treasurer and councillors of the town of Greenock and as such managers and trustees of the funds thereof there were disposed in feu farm and heritage forever

"to the said magistrates, treasurer and town council of Greenock and their successors in office for the use and behoof of the community heritably and irredeemably all and whole the harbour of Greenock and piers and quays of the same which have been all built and gained of the sea since the year 1700",

together with certain rights specified therein. Power was also conferred

"to the said magistrates, treasurer and town council and their foresaids to improve the said harbour and to erect and build other harbours within the space above mentioned and gain ground of the sea for that purpose ... ".

In the said deed it was declared:

"But that it shall not be lawful nor in the power of the said magistrates, treasurer and town council nor their successors in office to sell alienate or dispose either irredeemably or under reservation nor to wadsett or burden with infeftments of annual rent or any other servitude or burden the said harbour with the anchorages shoar bay and ring dues etc. whereby the same be evicted or adjudged and that all such dispositions, conveyances, wadsetts or other deeds so to be granted by them or their foresaids conveying or burdening the said subjects with any real diligence following thereon shall *ipso jure* be void and null and shall only be effectual against the grantors of such deeds and conveyances and that notwithstanding of such conveyances or other deeds so to be granted the right of property of the said harbours and others hereby conveyed shall forever remain with the said magistrates, treasurer and town council and their successors in office for the use and behoof of the said community and for the purpose of building, enlarging and improving the said harbours ... ".

Sasine was taken upon this Feu Contract and was recorded on 5 June 1772. The Feu Contract itself was registered in the Books of Council and Session on 6 July 1772, a copy of which is 6/3 of process.

[6]Following the foregoing transactions, there was enacted a series of Acts of Parliament relating to the harbours of Greenock and other matters. The first of these is the Act of 13 G. III, Cap. 28, of 1772. This Act is described as:

"An act for deepening, cleansing, and making more commodious the Harbours of the Town of Greenock; for supplying the Inhabitants with fresh and wholesome water; and for paving, cleansing, lighting, and watching the Streets, and other public Places, within the said Town."

This Act contains a number of provisions related to the matters just mentioned. For the present purposes, it is unnecessary to notice the numerous detailed provisions of this Act, with the exception of that part of it entitled "Trustees". It provided as follows:

"And be it further enacted by the authority aforesaid that the two bailies named by the feuars and sub-feuars and Town Council of Greenock, and their successors in office, shall be, and they are hereby appointed trustees for putting this Act in execution: and for the better effecting the ends and purposes of the same, and that the fee and property of the quays, piers, breasts, and other works to be made, built, and erected, by virtue of this Act, shall be, and the same are hereby vested in the said trustees, to and for the ends and purposes aforesaid; and that the said trustees are and shall be bound to apply the rates and duties hereinafter mentioned in making and repairing, and keeping and maintaining the same in good order and repair and in preserving the said port and harbours clean and free from mud, dirt, and other obstructions ...".

[7]The next enactment which it is necessary to notice is the Act of 29 G. III, Cap. 43, of 1789. This Act is described as one "for altering and enlarging the powers of the Act" just considered. In this Act, the former Act is summarised. Included within the summary is a reference to the granting of powers and authorities to

"the bailies of the Town of Greenock and to the other persons in the said Act mentioned and described as trustees for carrying the purposes of the said Act into execution ...".

[8]The third enactment to be noticed in the present context is the Act of 41 G. III, Cap. 51, of 1801. It is described as:

"An Act to amend two Acts, made in the 13th and 29th years of the reign of His present Majesty, for making more commodious the harbours of the Town of Greenock, and for other purposes mentioned in the said Acts; for watching the said Town and better supplying the same with Water; for regulating the Fares of Coachmen, Chairmen, Porters and Carters plying in the said Town, and of Pilots, Watermen, and Jobbers, employed in the said Harbours, and on the River Clyde, and for feuing out the Glebe of the said Town."

Once again, in the preamble to this Act, reference is made to powers and authorities having been given

"to the bailies of the Town of Greenock, and to other persons in the said Acts mentioned and described as trustees for carrying the purposes of the said Acts into execution ...".

Among the purposes of this latter Act were the enlargement and improvement of the harbours.

[9]The next stage in the history of the matter, upon which attention was focused in the argument before us, was the enactment of the Greenock Port and Harbours Consolidation Act, 1913, 3 and 4 Geo. 5. Ch. xlii. It was enacted

"to consolidate with amendments the Acts relating to the port and harbours of Greenock, to reconstitute and reincorporate the Trustees, to authorise the construction of new works, to provide for the adjustment of the finances of the trust, to provide for a guarantee by the Corporation of Greenock and for other purposes."

In the preamble to this Act it was narrated that the trustees responsible for the harbours of Greenock had been incorporated by an Act of 1866, to which we were not referred in detail, and their powers amended by subsequent legislation. Section 3 of the Act of 1913 had the effect of repealing the Harbour Acts, to the extent specified in Part I of Schedule A to the Act. Under section 9 of the Act of 1913, it was provided that the power and duty of carrying into effect the provisions of the Act should be vested in and be performed by the trustees appointed and elected under the Act, who should be substituted for the existing trustees. The new

trustees were to be a body corporate under the name of "The Trustees of the Port and Harbours of Greenock". Under section 212 of the Act of 1913, certain savings of rights and jurisdictions were enacted. For the present purposes, it is necessary to notice that it was there provided that:

" ... nothing herein contained shall hurt or prejudice the charter granted to the town of Greenock in the year one thousand seven hundred and fifty one by the deceased Sir John Shaw of Greenock, Baronet nor the feu contract betwixt John Shaw Stewart, Esquire and the Magistrates and Council of Greenock dated in the year one thousand seven hundred and seventy two or any rights privileges or dues thereby conferred or thence arising so far as consistent with the provisions of this Act".

[10]We were informed that the enactment of these provisions of section 212 of the Act of 1913, followed a petition against the draft provisional order, which eventually became the Act of 1913. In that petition, a copy of which is 6/47 of process, it is narrated that the petitioners were the municipal and police authority of the Burgh of Greenock, the successors in title to the Magistrates, Treasurer and Town Council of Greenock. They alleged that the proposed order would prejudicially affect their property, rights and interests and those of the inhabitants of the Burgh, for which they were responsible. In paragraph 12 of the petition, they averred that, prior to 1866, the harbour undertaking, as then existing, was vested in and managed by the Magistrates and Town Council of Greenock. As showing the proprietary rights of the petitioners in the harbour undertaking, they made reference to the Feu Contract, dated 13 and 16 May 1772, already narrated. In paragraph 14 of the petition they stated that the portions of the harbour conveyed to their predecessors by the said Feu Contract included the ground forming what was then known as the West Harbour and the quays surrounding it, the old Graving Dock, the Mid Quay, and the whole of the Custom House Quay and the eastern arm thereof. In paragraph 15 of the petition, they went on to narrate that, by the Greenock Port and Harbours Act, 1866, trustees were incorporated, consisting of representatives of the Magistrates, Treasurer and Town Council of Greenock and other trustees elected by ship owners and harbour ratepayers; the harbour undertaking was, by that Act, vested in those trustees. Section 98 of that Act provided that nothing in it should hurt or prejudice *inter alia* the said Feu Contract of 1772 or any rights, privileges, or dues conferred or thereon arising.

[11]Among the features of the draft provisional order to which the petitioners objected were provisions conferring upon the trustees, who were to hold the harbour undertaking, the power to sell or dispose of any part of that undertaking. This ground of opposition was based upon the provisions of the said Feu Contract of 1772. It was claimed, in paragraph 24 of the petition, that the predecessors of the petitioners had never sold to the harbour trustees, or in any way parted with their proprietary rights in the subjects disposed by that Feu Contract, nor had they exacted any annual rent therefor, but had allowed the trustees to use them as part of the undertaking, subject only to the payment by them of the feu duty and casualty mentioned in the Feu Contract. The petitioners averred that the promoters of the order had no right to ask Parliament for power to sell property which did not belong to the harbour trustees.

[12]The final chapter in the legislative history forming part of the context of the present litigation is the Clyde Port Authority Order Confirmation Act 1965, Ch. xlv. Under that Act there was established the Clyde Port Authority. By virtue of Part IV of that Act, there was transferred to the Clyde Port Authority the "transferred undertakings". Those undertakings were defined to mean the undertakings of the "transferring undertakers", which included the Greenock Harbour Trustees. It is to be noted that section 130 and Schedule 7 of the Act of 1965 effected the repeal of the enactments specified in the Schedule. Section 212 of the Act of 1913 however was not repealed.

[13]While the details of the matter were not gone into before us, it is a matter of agreement that the West Harbour of Greenock can no longer be used as a harbour. It has not been capable of such use for many years, having been in-filled and built over. The now in-filled West Harbour is subject to a number of different uses, which include public streets, the James Watt College, an electricity sub-station and part of a swimming pool and leisure centre. It appears that the West Harbour falls almost entirely within a larger area of land which is the subject of a land certificate title No. REN42086, first registered on 23 September 1987, the proprietor being stated as Scottish Enterprise, as statutory successor to the Scottish Development Agency.

[14]Against the foregoing background, in this action the three pursuers have convened as defenders Inverclyde Council and its elected members. The pursuers themselves are resident within the geographical area of operation of Inverclyde Council. The action contains four conclusions, to which I refer for their terms. It is appropriate to focus attention upon the terms of conclusion 1:

"For declarator that the public Trust, as set out in the Trust deed between Sir John Schaw Stewart and the Magistrates and Councillors of Greenock recorded 5 June 1772, is currently, lawful and active, and that each of the defenders, are statutory Trustees *ex officio* by virtue of the terms of the agreement 16 May, Sasine of 5 June and Feu Contract of 6 July all in the year 1772, and affirmed by several Acts of Parliament culminating in the Act of G. III 24 June 1803, also the House of Lords 1828 and 1913 and that the pursuers are beneficiaries of the said trust by virtue of their residence in, and forming part of the community of Inverclyde."

The pursuers have tabled five pleas in law. Pleas 1 and 5 relate specifically to the first conclusion of the action, plea 5 being a plea to the relevancy and specification of the defences and seeking a decree *de plano* in terms of the first conclusion. Plea 1 is in the following terms:

"That the court in exercise of its supereminent jurisdiction over Trusts and statutory Trustees, declare that the 'public trust', specified in this cause, is currently lawful and active, that the defenders are 'statutory Trustees' and that the pursuers are heritable beneficiaries of the Trust, notwithstanding the desuetude of office of the defenders as Trustees, and that the pursuers are heritable beneficiaries of the said Trust by virtue of their residence in, in and forming part of the community of Inverclyde, as first concluded for."

The remaining pleas in law relate specifically to conclusions 2 to 4.

[15]When this reclaiming motion came before us, each of the pursuers appeared on his own behalf. Detailed submissions in support of the motion were made by the first named pursuer. The second and third named pursuers adopted the submissions of the first named pursuer. The first named pursuer, at the outset referred to conclusions 3 and 4 of the summons. He said that it was agreed that these particular conclusions were incompetent and had not been debated before the Lord Ordinary. As regards conclusion 2, which was for interdict, he accepted that the acts sought to be prohibited therein had been completed; accordingly, the action was now essentially simply an action of declarator, in terms of conclusion 1. He submitted that the basis of the pursuers' claim was the Feu Charter dated 13 and 16 May 1772. That deed he described as a "constructive trust deed". He referred to the Charter of Erection of 1751, under which nine trustees were to be chosen "for the constant management of the funds or common good of the said Burgh of Barony", whereof two were to be bailies, one to be the treasurer and the other six to be councillors. The first named pursuer went on to draw attention to the terms of the Act of 13 G. III, Cap. 28, narrated above. He contended that the effect of that legislation had been that Parliament had conferred powers upon a harbour trust. The whole Magistrates and Councillors of the Burgh of Greenock had been the promoters of the legislation; however the powers had been conferred only on two bailies, who were appointed as trustees on the Harbour Trust. The first named pursuer then proceeded to trace the history of the administration of Greenock harbours by reference to a published work entitled *Historical Sketches of Greenock, with an Account of the Struggles in 1828 and 1880 regarding the Harbour Constitution*, published in 1881. He drew attention to passages in that work which stated that Greenock harbours belonged to the people. The first named pursuer contended that, following the Act of 1772, there had been a separately constituted harbour trust, but that the title to the land on which the harbours were established remained with the Magistrates and Councillors of the Burgh of Greenock. That was the result of the inalienability of the subjects feued under the Feu Contract of 13 and 16 May 1772.

[16]The significance of that Feu Contract had been recognised in the Greenock Port and Harbours Consolidation Act 1913, section 212. That section had not been repealed by the Clyde Port Authority Order Confirmation Act 1965, as appeared from section 131 and Schedule 7 of it. In this connection, the first named pursuer also referred to the Clyde Port Authority Scheme 1991, paragraph 2, 6/44 of process. The

pursuers' concerns, as now reflected in the present action, had been taken up with the former Inverclyde District Council. By a letter of 16 January 1990, 6/40 of process, that authority had declined to accept that it had had the status of a trustee in relation to the subjects involved. The position adopted on behalf of that local authority was erroneous. The present defenders were the successors to that local authority and also to the Magistrates and Councillors of the Burgh of Greenock holding office in 1772. The first named pursuer emphasised that the present action was not so much concerned with ownership, but with the management of the property in issue and, in particular, with the issue of who were the present trustees. It had to be noted that the present action had been raised, not only against Inverclyde Council, but also against the members of that corporate body; it was contended that they were now the relevant trustees.

[17]The first named pursuer next proceeded to draw attention to certain transactions which had taken place in relation to the subjects involved. First of all, he referred to an agreement dated 15 July and 2 August 1919 between the Corporation of Greenock and Caird & Company Limited, Engineers and Shipbuilders, a copy of which was 6/39 of process. Paragraph 2 of that agreement recognised that the Corporation of Greenock had certain rights in the West Harbour. That position was confirmed by the contents of a minute, No. 59, of Greenock Corporation, dated September 1919, 6/51 of process. The same was the position appearing from a minute of Greenock Corporation, No. 3, dated December 1966, a copy of which was 6/45 of process, which referred to land within the area which was the subject of the Feu Contract of 1772. These documents showed that Greenock Corporation had upheld their position as trustees in relation to that land. That position was confirmed by a document entitled "Obligation by the Magistrates of Greenock to John Schaw Stewart of Greenock", which was granted in connection with the promotion of the parliamentary bill which became the Act of 13 G. III, Cap. 28, No. 31 of the documents in the pursuers' Inventory of Productions.

[18]The first named pursuer went on to refer to a Feu Charter by Lord Cathcart in favour of the Magistrates and Council of Greenock, registered in the Books of Council and Session on 31 March 1819. The land to which this deed related was a small triangular piece of land adjacent to the land feud under the Feu Contract of 1772. It was 6/4 of process. 6/5 of process was an Instrument of Sasine in favour of the Magistrates and Council of Greenock, recorded on 24 April 1819, which related to a further additional piece of land associated with the land which was the subject of the Feu Contract of 1772. There were minutes of the Magistrates and Councillors of the Burgh of Greenock which demonstrated how the trust purposes created by the Feu Contract of 1772 became applicable to new acquisitions, for example 6/55A of process. The first named pursuer went on to refer, in connection with this part of his argument to documents 6/12 and 6/55 of process.

[19]In the foregoing circumstances, the first named pursuer contended that the court should pronounce a declarator in terms of the first conclusion of the summons. He recognised that interdict, in terms of the second conclusion of the summons, could not now be pronounced. The question was then raised by the court as to whether the pursuers were now seeking a bare declarator, with no practical consequence, which would be incompetent, as appeared from *Maxwell, Court of Session Practice*, page 650. The first named pursuer was asked how the pronouncing of such a declarator would benefit the pursuers. He responded by drawing attention to the present circumstances relating to the West Harbour which had been filled-in. Rent was derived from part of this property amounting to £1,000,000 per annum, which would go to Inverclyde Council, if the action succeeded, which would benefit the pursuers personally as council tax payers. Currently that rental income was paid to property developers. Continuing his submissions, the first named pursuer said that one had to ask the question of what had happened to the original trust purposes. They could not just disappear. Trust assets could not simply have been disposed of. Substantial sums of money were involved. The Scottish Development Agency had acquired a registered title of the area in question for £284,000. It was considered that that land was now worth between £28,000,000 and £30,000,000. There had been a sale to property developers following the renovation of the site. Before others than the developers could benefit, the property might require to be retrieved.

[20]Reverting to an earlier part of his argument, the first named pursuer drew attention to a passage at page 237 in the second part of the book *Historical Sketches of Greenock*, previously mentioned. In that part of the

work it was argued that the old harbours still belonged to the Town Council. The Act of 13 G. III, Cap. 28 had merely vested in the trustees there described "quays to be built". That did not have the effect of transferring the property which had been the subject of the Feu Contract of 1772. Reference was also made to pages 241 and 244 of the work concerned. In this connection reference was also made to the petition against the draft provisional order which became the Act of 1913.

[21]The first named petitioner next proceeded to consider the possibility of rectification of the inaccuracy which he contended existed in the registered title which covered the controversial subjects, in terms of section 9 of the Land Registration (Scotland) Act 1979. It was possible that the exception embodied in section 9(3)(iii) could be invoked in this case. There had been carelessness on the part of the proprietor now in possession in respect of the failure to ascertain the consequences of the Feu Contract of 1772. While there might be arguments for and against rectification of the registered title, it could not be said that there was no possibility of rectification. Prescription was not an issue, since the obligations of a trustee were imprescriptible. In all these circumstances, the issue raised in conclusion 1 was not academic. If the defenders required to recognise that they had been and were trustees, they would require to take steps with a view to asserting their right to the land concerned for the benefit of the community. While it could not be said with confidence what might be the outcome of such action, the establishment of the status of trustees would itself be a benefit to the community.

[22]Senior counsel for the defenders moved the court to refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary, dismissing the action. There were three bases upon which that motion was made. First, it was submitted that the present action could serve no useful purpose, since it was not explained either in averment or in submission how the objective wished for by the pursuers, of the rectification of the two registered titles, could be effected by any party having a right to seek such rectification, having regard to the provisions of section 9(3)(a)(iii) of the Land Registration (Scotland) Act 1979. Secondly, it was submitted that there was no basis either in averment or in argument why the subjects of any trust should extend beyond the land which was the subject of the Feu Contract of 1772. If that were correct, there would require to be left out of consideration the subjects included in the registered title REN43834 and there would be left in consideration only a part of the land comprised within the registered title REN42086. Thirdly, in fact, no trust had been constituted by the Feu Contract of 1772. The property carried by that deed had simply become a part of the common good of the Burgh of Greenock. Whatever consequences that might have had subsequently and whether or not that quality of the property had been recognised in subsequent transactions were matters of no concern in the context of the present action, which had been framed only upon the basis of the existence of a public trust. Furthermore, it ought to be recognised that there might be an issue which had not been raised before the Lord Ordinary as to whether, upon the assumption that there was a trust as contended for, the trustees were the councillors of Inverclyde Council or the local authority itself.

[23]Turning to his first major submission, senior counsel for the defenders drew attention to the terms of section 9 of the Act of 1979. There could be rectification where there was a proprietor in possession only where the inaccuracy to be rectified had been "caused wholly or substantially by the fraud or carelessness of the proprietor in possession". In this connection reference was made to *Kaur v. Singh* 1999 S.C. 180. That case confirmed that the reference to "proprietor in possession" in section 9(3) of the Act was a reference to the proprietor of the *dominium utile* when rectification was sought. In the present action there was nothing in the averments of the pursuers or in their submissions to show what the position was regarding the possibility of rectification. Thus, there was nothing in averment or submission to show that the present action, now confined as it was to an action of declarator, had any practical purpose. If it did not, then it was incompetent, as appeared from *Macnaughton and Others v. Macnaughton's Trustees* 1953 S.C. 387, at page 392. If this submission were to be sustained, that could only be done if the defenders were entitled to rely on their general plea to the relevancy of the action. On being pressed by the court as to whether the existence of the status of being a trustee was a practical matter, involving a necessity for the trustee to consider what might be done to retrieve trust property, in the circumstances of the present case, senior counsel for the defenders said that the question might depend on whether there was any discernible trust purpose.

[24]In view of the issue just raised by the court, senior counsel for the defenders considered that it was appropriate to turn to his third main submission. That involved a need to consider in detail the terms of the Feu Contract of 1772. In the first part of the document it was narrated that the agreement was between the grantor and individuals who were the present bailies and councillors of the town of Greenock and as such managers and trustees of the funds thereof. There then followed a disposition of property, described in part, but said to be outlined in a plan; the plan had not survived. There was then disposed a right to recover mooring fees from the old West Harbour and also from harbours yet to be built. The form of the deed did not suggest the impressing of trust purposes. The conveyance was in part that of a "right of harbour", an heritable right derived from the Barony title held by the grantor, which involved the right to levy charges for the use of the harbour in question. There was also conveyed a right to levy dues on goods brought into the harbour. Thereafter the grantor of the deed had gone on to give a right to improve the harbour in question. It had to be recognised that there followed wording which contained a restriction on alienation, the passage beginning with the words "but that it shall not be lawful ... ". That part of the deed was as much consistent with the view that the land disposed became part of the common good of the Burgh as it was with the view that a trust had been created. Common good property might be inalienable but, depending on circumstances, become alienable. In this connection reference was made to Greens Encyclopaedia of the Laws of Scotland, volume 2, paragraph 1258. Two judicial decisions were relevant to the issue of the effect of the Feu Contract of 1772. The first was *Magistrates of Banff v. Ruthin Castle Limited* 1944 S.C. 36. At page 49 Lord Mackay had provided a valuable historical perspective in relation to common good. At page 60, Lord Wark drew the distinction between property which formed part of the common good and property held under a separate and special trust. At page 67 Lord Justice Clerk Cooper expressed the view that before a separate and special trust could be established there would require to be distinctive trust purposes. Reverting to the Feu Contract of 1772, the property was to be held simply "for the use and behoof of the said community and for the purpose of building, enlarging and improving the said harbours". That was a general purpose consistent only with the property conveyed being part of the common good of the Burgh.

[25]The second relevant decision was my own in *Cockenzie & Port Seton Community Council v. East Lothian District Council* 1997 S.L.T. 81. That case demonstrated that property forming part of the common good, which might in a particular set of circumstances have been inalienable, might become alienable, in the event of a change in those circumstances. Thus here, where the particular part of the harbour concerned had been filled-in some 80 or so years ago and built over, the proper view might be that any inalienable quality had flown off.

[26]Reverting to the case made by the pursuers, which was not based on the property being part of the common good, the question was what was the test for ascertaining the existence of special trusts or distinctive trust purposes. In that connection reference was made to *Menzies on Trustees*, paragraphs 26-28; and also to *The Law of Trusts, Mackenzie-Stuart* pages 5-7. It was clear from these works that no special language was required for the creation of a trust. Further assistance could be got from *McDougall's Trustees v. The Lord Advocate* 1952 S.C. 260 at pages 261, 266, 267 and 278. In these passages the distinction was made clear between the fiduciary element inherent in the common good and a proper special trust. It was submitted that what was involved in this instance was a conveyance into the common good of the Burgh, not the creation of a special trust. In the Feu Contract of 1772 there was an absence of any special purposes. The language used was of a general nature, such as "for the use and behoof of the said community". Furthermore, the prohibition on alienation was itself quite consistent with a gift into the common good of the Burgh. In any event, that prohibition might not have survived the discontinuance of the harbour use in the West Harbour. If the court were to conclude that no separate trust was involved, it was inevitable that the action would fail, since it proceeded only upon the basis of the existence of such trust.

[27]It had to be appreciated that the Feu Contract of 1772 was a conveyance to the community of the Burgh of Greenock, which had been effected by a deed in favour of the Magistrates, Treasurer and Councillors of the Burgh. The deed itself contained no reference to a trust. The status of the property thus conveyed, which the defenders contended was that of being a part of the common good, was confirmed by the terms of the Charter of Erection of 1751. That document referred to the need for "the constant management of the funds

or common good of the said Burgh of Barony". Provision was made in it for the choice of nine trustees, who were to be the magistrates and councillors of the Burgh, who were to have "power to manage the funds and common good presently belonging, or that, at any time hereafter, shall belong to the said town and Burgh of Barony". It was apparent that the Feu Contract of 1772 contained similar language. This confirmed that the Feu Contract was a conveyance to the Burgh for the general purposes of the Burgh rather than the constitution of a trust for some special purposes.

[28]At this stage, senior counsel for the defenders reverted to his first principal submission, that the present litigation could serve no useful purpose and was therefore incompetent. He contended that rectification of the registered titles now existing in relation to the property concerned was not possible. Furthermore, no attempt had been made by the pursuers to make a case to the effect that there could be an indemnity under Section 12 of the Act of 1979. In that connection the terms of Section 12(3)(n) were important. Upon the pursuers' assumption that there was a trust, as contended for by them, the alleged trustees had done nothing by way of assertion of their rights as such for many years. That inactivity could properly be seen as a "careless act" within the meaning of that enactment. *Macnaughton and Others v. Macnaughton's Trustees* made it abundantly clear that the courts could only be concerned with live and practical issues. There was no indication here in the pleadings of the pursuers as to what those issues might be. For there to be a practical purpose to this litigation, it would require to be shown that the making of a declaration of trust would make a difference to the future of the property itself. There were simply no pleadings entitling the court to reach such a conclusion. Leaving aside the issue of what was averred by the pursuers, there were many unanswered questions as to the possible effect of such a declarator. It was possible that action should have been taken in 1969 by the alleged trustees with a view to the prevention of the sale of land by the Clyde Port Authority. However, the question was whether the present defenders could be seen as bearing any responsibility for a possible breach of trust by the then local authority.

[29]In answer to questions by the court, senior counsel for the defenders submitted that the pursuers' view of the terms of the Act of 13 G. III, Cap. 28, of 1772 was erroneous. It had been contended that, following that Act, there existed a harbour trust separate from the trust for the holding of the common good of the Burgh generally. That view proceeded upon the basis that the Act concerned had appointed only the two bailies referred to in the section of the Act dealing with trustees to be trustees for the harbour property. However, that involved a misreading of that part of the Act. That part of the Act referred to "the two bailies named by the feuars and sub-feuars and Town Council of Greenock" as being trustees. The proper reading of that provision was that the whole nine councillors were trustees. That view of that legislation was confirmed by an examination of subsequent legislation, in particular, the Act of 41 G. III, Cap. 51 of 1801. In the preamble to that Act, reference was made to "the bailies of the town of Greenock and ... the other persons in the said Acts mentioned and described as trustees for carrying the purposes of the said Acts into execution." It was quite plain from that reference that the bailies alone were not the trustees. Identical language had also been used in the Act of 29 G. III, Cap. 43 of 1789.

[30]The first named pursuer replied. He drew attention to the terms of the Charter of Erection of 1751. In that deed reference was made to "the said nine trustees to be magistrates and councillors of the said Burgh". The use of the expression "trustees" suggested a trust. Under reference to *McDougall's Trustees v. H.M. Advocate*, it was submitted that what took the property conveyed by the Feu Contract of 1772 out of common good was the feature of inalienability provided for in that deed. The effect of it was to create a special or separate trust distinct from the common good of the Burgh. It had been claimed that the trust contended for by the pursuers had no purposes. That was wrong; the purpose of the trust was to generate income for the inhabitants of the Burgh of Greenock and now Inverclyde. The income now generated was very substantial, as had already been indicated. So far as the Register of Titles was concerned, rectification was possible. As recently as 1966 a lease had been negotiated with the Ministry of Defence by the then council as trustees affecting part of the property concerned. Section 212 of the Act of 1913 was important; it had had the effect of preserving the status of the property as trust property.

[31]It is quite plain from the terms of conclusion 1, the averments made by the pursuers and the manner in which the pursuers' arguments in support of the reclaiming motion were developed before us that the basis of the pursuers' action is the premise that the Feu Contract of 1772 created a public trust separate and distinct from the common good of the Burgh of Greenock, as then constituted. If that premise is seen to be unsound, the whole basis of the pursuers' action, formulated as it is, disappears. In these circumstances, it is crucial to examine that premise in the light of the pleadings and documentation available, which, it was agreed, were sufficient to enable the court properly to determine the issue.

[32]In my opinion, in this connection, it is important to understand the distinction between the common good of a burgh, or other local authority, and property held by such an authority under a separate trust. Otherwise there is a risk that language of a kind which is frequently used in relation to common good property may be misleading. In paragraph 1258 of Volume 2 of *Green's Encyclopaedia of the Laws of Scotland*, to which we were referred it is said:

"As already stated, the Magistrates and Council are merely Trustees holding the common good and property of the Burgh in trust for behoof of the Corporation, and are only entitled to deal with it for the purposes of the trust. These purposes are public objects within the scope of municipal administration; and while the court will allow a fair discretion in the administration of the corporation funds, it has insisted that what is done must be done unequivocally for the benefit of the Burgh as a whole, and not for any particular part or limited class of persons".

In my opinion, the references in this passage to the "Magistrates and Council (being) merely Trustees holding the common good and property of the Burgh in trust are not references to a trust in the sense which must be established by the pursuers, if they are to succeed in this action. Rather, they are references to what Lord Mackay in *The Magistrates of Banff v. Ruthin Castle Limited*, at page 51, described as "what is sometimes called the quasi-trust (not really a trust in the proper sense) which compels the management of a Burgh to act with a reasonable outlook to the town's general good." It appears to me that it is in this sense that the language referred to in the Charter of Erection of 1751 was used. In that document there are references to persons "appointed Trustees of the funds arising from the said impost of two pennies on the pint of ale"; there is also a reference to the need for the establishment of persons "for the constant management of the funds or common good of the said Burgh of Barony"; also to "the Trustees thereby appointed, and their successors in office, (having) the Government of the town and management of the public funds thereof"; and finally to "the said nine trustees to be Magistrates and Councillors of the said Burgh".

[33]The distinction between what Lord Mackay called the quasi-trust affecting the common good of a burgh or local authority and a trust properly so-called was of fundamental importance in the *Magistrates of Banff v. Ruthin Castle Limited*. In that action, at the instance of the Provosts, Magistrates and Councillors of the two Burghs neighbouring the property in issue, a declarator was sought that a lease of that property was valid and effectual. The pursuers, founding in particular upon the terms of the destination in the disposition of the property, contended that it was not part of the common good, but constituted a separate trust estate held in joint ownership by the pursuers for the behoof of the community formed by the inhabitants of the two Burghs. In that context, Lord Mackay, with whose observations in this respect the other judges involved agreed, made the remarks which I have already quoted. Following that passage, his Lordship went on to set forth criteria which marked out a trust, properly so-called, existing separately from the common good. There he said:

"... nextly, it is conceded that to operate a proper trust right there must be a separation of two personalities, one to hold and to be affected by the *jus crediti* of the other, the other to claim and have a *jus crediti* against the holder. In my opinion this requisite is absent. Lastly, the most general requirement for the existence of any trust is best stated by *Menzies, Lectures on Conveyancing* (4th edition), at pages 503, 504, citing 1 Ross Leading Cases, page 401. In short, the purposes must be sufficiently declared in the conveyance itself or in some identified writing 'legally declared by the grantor'."

The distinction mentioned was also in the forefront of the mind of Lord Wark at page 60. There he said:

"I do not think it necessary to enter into the history and meaning of the expression common good, for two reasons, first, that these have been discussed at length by Lord Mackay, with whose observations I entirely agree, and, second, that there was in the end no dispute between the parties that all property of a Royal Burgh or a Burgh of Barony not acquired under statutory powers or held under special trusts forms part of the common good. The question in this case therefore really comes to be whether the Duff House subjects are excluded from the common good of either Burgh in respect that they are held under a separate and special trust."

In the same case, at page 66, Lord Jamieson, focusing upon the criteria for the recognition of a separate trust, said:

"... stress was laid on the fact that he goes on to say 'as well as for the recreation and well-being of the community'. By community he no doubt meant the inhabitants of the two Burghs, but I am unable to hold that such a reference to their well-being is sufficient indication of an intention that they should be regarded as fused into one body, so as to constitute a single beneficiary on behalf of whom the town councils were to hold and administer the estate as trustees. The true position appears to me to be that the estate belongs to the two Burghs as common property, *pro indiviso*, and that it merely falls to be administered by the councils, doubtless in a fiduciary capacity, but in the same fiduciary capacity as any other Burgh property. That being so, the interest of each Burgh therein must, I think, be regarded as part of its common good."

Again, at page 67, Lord Justice Clerk Cooper was concerned with the same issue, there he said:

"The whole efforts of the pursuers were devoted to establishing the proposition, twice formulated by them on record, that Duff House Estate 'constitutes a separate trust estate held by the two town councils in joint ownership for behoof of the community formed by the inhabitants of the two burghs'. This was the sole alternative offered by the pursuers to the view that the estate was property held not jointly but in common, and that the *pro indiviso* share of each burgh fell into that burgh's common good."

Special considerations would, of course, apply to a case in which, by the express terms of a disposition or deed of gift to a burgh, the grantor had impressed the transfer with specific conditions affecting the management, control or use of the subjects - a result which in this instance the pursuers strove to attain but failed - for subjects so transferred and accepted might not fall into common good. But that is not this case. For the reasons given by your Lordships, I consider that the theory of trust advanced by the pursuers has completely failed, (a) because there was no effective separation of the legal title from the beneficial right, and (b) because there are no distinctive trust purposes."

Similar issues were raised in *McDougall's Trustees v. H.M. Advocate*. In that case, the ultimate issue was the extent of certain trustees liability for estate duty. The resolution of that issue depended upon the status of a particular debt, which, in turn, depended upon whether certain property was held by a local authority under a separate trust. The circumstances were that a donor, desiring to give to the City of Edinburgh a property for use as a public park for the benefit of the citizens, purchased property and obtained from the common good of the City a loan to cover the purchase price and the expenses incidental to the transaction. The property was then conveyed by the sellers, with the consent of the donor, to the Lord Provost, Magistrates and Council of the City and their successors in office as representing the community of the City, subject to a condition restricting its use to a public park, which condition was declared to be a real burden in favour of the sellers and was fenced with a clause providing for reversion of the property to the sellers in the event of contravention of the restriction. The donor having died, his trustees claimed that when computing the value of his estate for estate duty purposes they were entitled to deduct as a debt the amount of the loan. The court held that the property gifted by the deceased was not held under any separate trust, but formed part of the common good of the City; and that therefore it was among the resources of the same person as had provided the consideration for the debt, which, accordingly could not be deducted in full in computing the value of the deceased's estate, but was subject to abatement in accordance with the provisions of the relevant legislation.

At page 266, Lord Justice Clerk Thomson dealt with the issue of the possibility of a separate trust, where he said:

"It was argued to us that the Corporation *qua* lenders and the Corporation *qua* disponees of the estate were different *personae* in law. *Qua* lenders they were entering into an ordinary transaction of loan, whereas *qua* disponees they were in effect trustees on behalf of a community for a certain specific purpose, i.e., the maintenance of a public park for the citizens. It followed that the estate was impressed with a specific trust and was not something to which the Corporation was entitled as part of its own property and was not part of its resources. The estate, it was said, never went into the common good or into the expendable resources of the Corporation.

It seems to me that it is fallacious to say that the estate was held by the Corporation as a separate trust. I have no doubt that it would be possible to convey property to a municipality as trustee and as a result segregate the trust funds from the common good - *Magistrates of Banff*. But I do not see that this result has been accomplished here. When one considers the form of the transaction one sees that the disposition is to the Lord Provost, Magistrates and Council 'as representing the community of said City', which is precisely the way in which any property would be conveyed to the common good. The existence of a real burden restricting the disponees' user is a matter of contract between them and the disponers, and there is nothing unusual in the situation that an item of the common good is so burdened. No doubt a fiduciary element arises in the administration of the common good, but the common good itself is the property of the citizens and the fiduciary element comes in because it is the duty of their elected representatives to administer it not for themselves but for their constituents. But, even if the deed of trust imposes certain duties on the Magistrates in their administration of the estate, it is a misuse of terms to equiparate this situation to a proper trust constituted for a specific charitable or public purpose. It seems to me, therefore, that the circumstance that the magistrates are under obligation, in a question with the citizens, to administer property of the municipality in a specific way does not prevent the property from being part of common good or from being a source of credit to the municipality and truly amongst its 'resources'."

It is appropriate for me to quote also the observations of Lord Patrick at page 278. There he said:

"That suffices to dispose of this contention of the appellants, but I add a word as to the alleged trust purpose. That purpose is said to be to preserve the subjects for use in all time coming as a public park and pleasure or recreation ground for the benefit of the citizens of the city. If this were truly a trust purpose, and the trustees failed to carry it out, the beneficiaries, the community, would not lose their property. But in this instance, if ever the alleged trust purpose is not fulfilled, the property is forfeited and reverts to the original owners, not to McDougall, the alleged truster. It is in truth not a trust purpose, but an ordinary restrictive condition as to user imposed by the sellers of land.

It was argued that this property, being burdened with a restrictive condition as to user for all time, could not form part of the common good of the city. The argument is unsound. There are innumerable instances where property which is part of the common good of a burgh is burdened with special restrictions as to user. There is no reason in principle why a person should not convey property burdened with the restrictive conditions to the community of a burgh, just as he can to other people."

[34]Since the Feu Contract of 1772 contains language, which I have quoted, prohibiting alienation of the property affected, it is appropriate for me to say something concerning the significance of such provisions. As was recognised in my own decision in *Cockenzie and Port Seton Community Council v. East Lothian District Council*, a property which in fact forms a part of the common good of a Burgh or local authority may be inalienable, or, having been inalienable, may become alienable, depending upon circumstances. Thus, the appearance of the language concerned in the Feu Contract of 1772 is not necessarily inconsistent with the view that the property concerned formed part of the common good of the Burgh.

[35]In the light of these authorities I now come to consider the basic question as to the effect of the Feu Contract of 1772, and, in particular, whether it had the effect of creating a separate trust, distinct from the

common good of the Burgh. The first observation which I would make concerning that deed, echoing that of the Lord Ordinary, is that *prima facie* it is a feudal conveyance, not a document expressly drafted for the purpose of creating a trust. That conveyance was granted, in consideration of the feu duty and other prestations mentioned in it, to the Magistrates, Treasurer and Town Council of Greenock and their successors in office "for the use and behoof of the community". In addition to the conveyance of the harbour, piers and quays, there were conveyed ring dues, tolls, ladles and customs in use to be paid by those using the facilities concerned. In my opinion, these features of the deed suggest a conveyance of heritable property by the holder of a baronial title in right of the privilege of harbour. Following upon the declaration of inalienability, to which I have already referred, it is provided that the

"said harbours and others hereby conveyed shall forever remain with the said Magistrates, Treasurer and Town Council and their successors in office for the use and behoof of the said community and for the purpose of building, enlarging and improving the said harbours ...".

Having regard to these salient features of the deed, I find myself quite unable to conclude that any trust separate from the common good of the Burgh was created by it, as contended for by the pursuers. In my opinion, it can be said here, as was said by Lord Justice Clerk Cooper in *The Magistrates of Banff v. Ruthin Castle Limited*, in relation to the transaction there under consideration, that there was no effective separation of the legal title from the beneficial right and that there are no distinctive trust purposes. As regards the latter point, in the Feu Contract of 1772, the grant is said to be "for the use and behoof of the community" and "for the purpose of building, enlarging and improving the said harbours". In my opinion, these features of the deed suggest simply a conveyance of heritable property by the holder of a baronial title in right of the privilege of harbour. The provisions quoted cannot properly be regarded as distinctive trust purposes which would have the effect of creating a trust separate from the quasi-trust existing in relation to the common good of the Burgh. It is my conclusion therefore that the Feu Contract of 1772 had the effect of conveying to the Magistrates, Treasurer and Town Council of the Burgh of Greenock the property and rights described to be part of the common good of the Burgh.

[36]During the course of the arguments before us, the pursuers were at pains to contend that the provisions of the Act of 13 G. III, Cap. 28, of 1772 had the effect of creating separate harbour trustees, a circumstance which was prayed in aid in support of the contention that there existed a separate trust created by the feu contract of 1772. In my opinion, that argument is unsound. In that part of that Act which deals with "Trustees" it is enacted that

"... the two bailies named by the feuars and sub-feuars and the Town Council of Greenock, and their successors in office, shall be, and they are hereby appointed, trustees for putting this Act in execution".

In my view, the proper reading of this passage is that the trustees are to be the two bailies named by the feuars and sub-feuars together with the other members of the Town Council of Greenock. I am confirmed in that view by a consideration of the terms of the Acts of 1789 and 1801, already referred to. In the former, the preamble narrates that powers and authorities were given to the "bailies of the town of Greenock, and to the other persons in the said Act mentioned and described as trustees". That, to my mind, indicates that the expression "Town Council of Greenock" in the Act of 1772 is in fact a reference to "the other persons in the said Act mentioned and described as trustees". Identical language is to be found in the Act of 1801. Thus I conclude that there never was a harbour trust distinct from the Magistrates and Councillors of the Burgh of Greenock until, as I understand it, such a separate trust was created by the Greenock Port and Harbours Act 1866. Only following the passing of that Act did the designation of the harbour trustees differ from those holding the property of the Burgh. I should make clear that I have reached this conclusion in the full knowledge that, from an early stage, there were kept separate accounts for the transactions of the Burgh and the harbours.

[37]In all these circumstances, having regard to the conclusions which I have reached, it follows that the essential premise upon which the present action proceeds is unsound, that the decision of the Lord Ordinary

to dismiss the action was correct and that this reclaiming motion must fail. While my conclusion is sufficient for the disposal of that motion, it is appropriate that I express my opinion briefly upon the other main submissions which were made to us. In his second main submission, senior counsel for the defenders argued that there was no basis in averment or argument to show how the registered title REN43834 could be rectified, or how that part of the land covered by registered title REN42086, not falling within the property conveyed by the Feu Contract of 1772, could be dealt with. In my opinion, this submission is beside the point. Conclusion 1 of the summons, which is all that is now in contention, does not raise the issue of rectification of the register. Accordingly, it appears to me that it is unnecessary to be concerned with the criticisms advanced as part of this submission.

[38]In his first main submission, senior counsel for the pursuer contended that the present litigation ought to be dismissed because it could serve no practical purpose. As regards that, it is necessary to understand the principle upon which it relies. That principle was elucidated in *Macnaughton and Others v. Macnaughton's Trustees*. The matter was succinctly put by Lord Justice Clerk Thomson at page 392 of the report. He said:

"Our courts have consistently acted on the view that it is their function in the ordinary run of contentions litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case. I doubt whether any good purpose is to be served by trying to extract any general rule from the decided cases. Each case as it arises must be considered on its merits, and the court must make up its mind as to the reality and immediacy of the issue which the case seeks to raise. Unless the court is satisfied that this is made out, it should sustain the plea of incompetence, as it is only with live and practical issues that the court is concerned."

Similar views are expressed in *The Practice of the Court of Session, Maxwell*, at page 650. The issue then is of the application of this principle to the circumstances of the present case.

[39]It was contended on behalf of the defenders that the present litigation had no comprehensible purpose, since it was not explained in averment or submission by the pursuers how the objective which they wished to achieve, that is to say rectification of the two titles mentioned, could be effected by any party, having regard to the provisions of section 9(3)(a)(iii) of the 1979 Act. In my opinion, this submission fails to take into account the practical realities of the situation now existing in this action. What the pursuers seek is a declarator to the effect that the public trust for which they contend is currently "lawful and active, and that each of the defenders, are statutory trustees *ex officio*". That conclusion raises no issue directly relating to rectification of the register. The question which, I consider, must be examined is whether the granting of such a declarator would bring a practical benefit to the pursuers. In other words, if the defenders were declared by the court to be trustees, the question is whether that new status, which would require to be recognised by them, would be of practical benefit. I consider that, while the benefit may be of a somewhat nebulous character, there would be a practical benefit involved. The account which I have given of the history of this matter indicates that issues of some complexity would require to be considered and appropriate action taken, in the event of its being established that a trust, such as contended for by the pursuers, existed. Plainly, in the event of a declarator being granted, the defenders would require to consider the whole intricacies of the history of the property and the transactions and legislation affecting it. While it cannot be said that such a consideration would necessarily result in action which might be successful in transferring assets to the defenders as trustees, I do not find it difficult to conclude that such an exercise of consideration requires to be seen as beneficial to council tax payers of the defenders. For these reasons, had it been necessary to do so, I would have rejected this particular submission.

[40]If I am right in the conclusion which I have reached that the Feu Contract of 1772 had the effect of transferring the property and rights described in it to the Magistrates and Councillors of the Burgh of Greenock, to be part of the common good, plainly a range of interesting questions arises in relation to the

manner in which that property and those rights have subsequently been dealt with. These matters are not in issue in the present action. Accordingly, I propose to express no view about them. However, it may be that the defenders themselves may wish to consider how those parts of the common good of the Burgh of Greenock have come to leave the possession of their predecessors and whether any action, beneficial to the council tax payers in their area, can now be taken in that regard.

**EXTRA DIVISION, INNER HOUSE, COURT OF
SESSION**

A2312/99

**OPINION OF LORD DRUMMOND
YOUNG**

in

RECLAIMING MOTION

in the cause

ANDREW WILSON & OTHERS

Pursuers;

against

INVERCLYDE COUNCIL

Defenders:

Lord Osborne

Lord Drummond Young

Lord Coulsfield

Act: Parties;

Alt: Brodie, Q.C., Bowie; DLA

20 February 2003

[1]The history of the harbours of Greenock so far as material to the present reclaiming motion is fully set out in the opinion of Lord Osborne, as are the other circumstances that are relevant to the court's decision. It is clear, however, that the regulation of Greenock harbour has been a matter of great interest and importance to the inhabitants of the town for over two centuries. In these circumstances I consider it appropriate to set out my own opinion on the matter.

[2]The principal remedy sought by the pursuers is a declarator that a public trust set out in a deed granted between Sir John Shaw Stewart and the Magistrates and Councillors of Greenock recorded on 5th June 1772 is still in force, and that the individual members of Inverclyde Council are trustees acting under that trust. That remedy is based on the proposition that the deed recorded on 5th June 1772, which takes the form of a feu contract, created a trust over the property conveyed by it. That property is described in the deed as "the harbour of Greenock and the piers and quays of the same which have been all built and gained of the sea since the year seventeen hundred". Those subjects came to be known in later years as the West Harbour. The defenders, by contrast, assert that the feu contract did not create any form of trust, but rather conveyed the West Harbour and its piers and quays into the common good of the burgh of Greenock. The dispute between the parties thus turns on the proper construction of the feu contract of 1772.

[3]The feu contract of 1772 was concluded between John Shaw Stewart on one part and the bailies, treasurer and councillors of the town of Greenock on the other. The bailies, treasurer and councillors are described as being "as such managers and trustees of the funds" of the town. The operative part of the deed provides as follows:

"The said John Schaw Stewart in consideration of the yearly feu duty and other prestations aftermentioned ... sells alienates and disposes and in feu farm and heritage forever lets and emits to the said magistrates treasurer and town council of Greenock and their successors in office for the use and behoof of the community heritably and irredeemably all and haill the harbour of Greenock and piers and quays of the same which have been all built and gained of the sea since the year seventeen hundred ... with the anchorages shoar bay and ring dues payable by all kinds of ships or vessels coming into the harbour of Greenock or into any other harbour or harbours that may be built betwixt the west side of the Kirk Burn and the east side of the Royal Closs in Greenock ... together with the tolls laddles and customs in the use to be paid by the inhabitants of the Burgh and Barony of Greenock or strangers coming into the said harbour or harbours".

The feu contract further provides as follows:

"But that it shall not be lawful nor in the power of the said magistrates treasurer and town council nor their successors in offers to sell alienate or dispose either irredeemably or under reversion nor to wadsett or burden with infeftments of annual rent or any other servitude or burden the said harbour with the anchorages shoar bay and ring dues etc whereby the same be evicted or adjudged and that all such dispositions conveyances wadsetts or other deeds so to be granted by them or their foresaids conveying or burdening the said subjects with any real diligence following thereon shall *ipso jure* be void and null and shall only be effectual against the granters of such deeds and conveyances and that notwithstanding of such conveyances or other deeds to be granted the right of property of the said harbours and others hereby conveyed shall forever remain with the said magistrates treasurer and town council and their successors in office for the use and behoof of the said community and for the purpose of building enlarging and improving the said harbours".

[4]Common good is a category of property held by burghs prior to 1975, and by the various forms of local authority that have existed since that date. In its original form, it comprised all property of a royal burgh or a burgh of barony not acquired under statutory powers or held under special trusts: *Magistrates of Banff v Ruthin Castle Limited*, 1944 SC 36, at 60 per Lord Wark. It was thus the ordinary property of a burgh, held for the general purposes of the community. It is owned by the community, and the town council or other local authority is regarded in law as simply the manager of the property, as representing the community: *McDougal's Trustees v Lord Advocate*, 1952 SC 260, per Lord Patrick at 278. Typically, the common good included public buildings such as churches and the municipal chambers, the streets of the burgh, public open spaces and markets: *Cockenzie and Port Seton CC v East Lothian DC*, 1997 SLT 81, at 89. It might also include lands, houses and other forms of property. In a coastal burgh, the harbour would typically form part of the common good. In this connection, it should be recalled that the burghs of Scotland were commercial in origin; that applied both to the older royal burghs and to the more recent burghs of barony created by private landowners, of which Greenock was an example. Consequently commercial property such as markets and harbours was an important part of the common good.

[5]The common good does not extend to property held by a local authority for special trust purposes: *Magistrates of Banff v Ruthin Castle Limited*, *supra*, per Lord Wark at 1944 SC 60; *McDougal's Trustees*, *supra*, at 1952 SC 266 per LJC Thomson and 278 per Lord Patrick. In the latter case LJC Thomson states (at 1952 SC 266) that, if property is conveyed to a municipality as trustee, the trust funds are thereby segregated from the common good. That would be the ordinary result of a trust, which is to separate the trust fund from the trustee's own property. In *Magistrates of Banff*, LJC Cooper states (at 1944 SC 67) that special considerations would apply in a case where, by the express terms of a disposition or deed of gift to a burgh, the granter had impressed the transfer with specific conditions affecting the management, control or use of the subjects, and that such a subjects might not fall into common good. I do not believe that the members of

the court in that case intended to state different principles; the fundamental point made by both the Lord Justice-Clerk and Lord Wark is that if property is held for special purposes, other than the general purposes of the burgh and its inhabitants, it will fall outwith the common good. If special conditions are to be imposed on property, a trust will normally be the most convenient way of doing so, but special conditions can be imposed in deeds conveying land, and similar considerations should apply to the two cases. Commercial property such as a harbour may obviously be the subject of special conditions or special trust purposes, but such conditions or purposes will only take the property outwith the common good if they have the result that the harbour is used for purposes other than the general trade of the burgh and its inhabitants.

[6]Property held as common good may be inalienable; this is true in particular of heritable subjects held for the good of the burgh, such as streets or churches or the municipal chambers. A harbour would normally fall into this category. The reason that such property is regarded as inalienable is that it is necessary "to sustain the dignity of the burgh and enable the magistrates and council to discharge properly their duties to the public": *Kerr v Magistrates of Linlithgow*, 1865, 3 M. 370, per Lord Deas. In more modern terminology, such property is essential to the administration and trade of the burgh and the convenience of its inhabitants. The prohibition on alienation must be read subject to that overriding purpose. Consequently the expression "inalienable" must be understood in a special sense, and the literal meaning of the word is subject to three important qualifications. In the first place, an Act of Parliament, including one promoted by the local authority, will prevail over the prohibition on alienation, and may transfer or authorise the transfer of any common good property to another body. Section 75(2) of the Local Government Act 1973 is an example of such a statute, but a private Act may achieve the same result. In the second place, it may in certain cases be necessary for a local authority to replace one item of property with another. For example, the municipal chambers or administrative offices may have become too small, or the livestock market owned by the local authority may be situated in an inconvenient location in the centre of town. In such cases it is open to the local authority to acquire a new property to replace the existing property, and to sell the latter. That is because the underlying reason for the prohibition on alienation does not apply in such circumstances; the item of property in question is to be replaced, and thus there will be no detriment to the administration or trade of the burgh or the convenience of its inhabitants. *Magistrates of Kirkcaldy v Marks & Spencer Limited*, 1937 SLT 574, and *Cockenzie and Port Seton CC v East Lothian DC*, *supra*, are examples of such a situation and clear authority for this qualification. In the third place, I am of opinion that the prohibition on alienation is subject to the overriding general principle that the law will not sanction the wasteful use of property. While this principle has normally been applied to testamentary bequests, it should be of general application, for obvious reasons. Consequently, if an item of common good property is no longer of use to the inhabitants of the town or area where it is situated, it may be sold. *Cockenzie and Port Seton CC v East Lothian DC*, *supra*, is authority for this qualification.

[7]The terms of the feu contract of 1772 are set out above. In my opinion their result is very clear; the West Harbour of Greenock was conveyed into the common good of the burgh, and no special trust purposes were created. I reach that result for the following reasons. First, the primary purpose that is identified in the deed is that the harbour is transferred to the magistrates, treasurer and town council and their successors in office "for the use and behoof of the community". That is the fundamental purpose that underlies the common good of a burgh, and points very strongly towards a conveyance into the common good. In *McDougal's Trustees v Lord Advocate*, *supra*, the court had to consider a disposition in favour of the Lord Provost, Magistrates and Council of Edinburgh "as representing the community of said city". LJC Thomson stated (at 1952 SC 266) that that was precisely the way in which any property would be conveyed to the common good, and Lord Patrick stated (at 1952 SC 277) that the disposition followed in all respects the form appropriate to a simple gift of lands to the common good of the city, in which there was no intention to create a special trust. In my opinion the present case cannot be distinguished from *McDougal's Trustees*. Secondly, the type of property concerned, a harbour, is one that would naturally fall within the scope of the common good, as it is clearly of general benefit to the burgh. Thirdly, no other beneficiary or beneficial purpose is identified. Thus there is nothing that can be considered a special trust purpose, going beyond the general benefit of the burgh and its inhabitants. The feu contract does provide that property in the harbour is to remain with the magistrates, treasurer and town council and their successors for the use and behoof of the community "and for the purpose

of building enlarging and improving the said harbours". The latter purpose, however, is inherent in a conveyance of property to form a harbour, and as such is plainly within the scope of the common good of the burgh. The narrative clause of the feu contract further describes the bailies, treasurer and councillors of Greenock as being "as such managers and trustees of the funds thereof". In my opinion that expression is merely a reference to the ordinary fiduciary responsibilities that magistrates and councillors had towards the property of their burgh, and in particular towards the common good; the funds in question are plainly the general funds of the burgh. It does not indicate that special trust purposes were to be created by the deed. Fourthly, the feu contract of 1772 contains a prohibition on alienation of the subjects conveyed. As explained in paragraph [6] above, such a prohibition is characteristic of certain types of property falling within the common good of a burgh or other local authority. Under the Act commonly known as the Abolition of Wardholding Act 1747 (20 George II cap 50), however, a superior was no longer permitted to impose a prohibition on alienation on his feuar. Thus the prohibition on alienation could only be valid if the intention of Sir John Shaw Stewart was to convey the property into the common good of the burgh of Greenock, in which case the prohibition would have been implied in any event. It must be presumed that the prohibition on alienation was intended to be effectual; consequently, the existence of such a prohibition is a strong pointer towards an intention to convey the West Harbour into the common good. Fifthly, the feu contract of 1772 includes not only the West Harbour and its associated piers and quays, but also the right to the shore, bay and ring dues payable by vessels coming into the harbour and the tolls and other impositions customarily paid by those using the harbour. The entitlement to payments of that nature, which were generally known as petty customs, is a common feature of the common good: Green's Encyclopaedia of the Laws of Scotland, vol 2, paragraphs 1250 and 1252. This aspect of the feu contract is a pointer towards an intention that the whole subjects of the deed should form part of the common good, although it cannot be said that it is decisive.

[8]The pursuers placed particular reliance on the prohibition on alienation contained in the feu contract of 1772. As I have indicated in the two preceding paragraphs, such a prohibition would normally be implied in a transfer of property such as a harbour into the common good of a burgh. In other cases the prohibition would normally be invalid under the Act of 1747. The prohibition on alienation of common good is, however, subject to the three qualifications that I have discussed in paragraph [6]. In the present case, I am of opinion that the prohibition contained in the feu contract was merely intended to restate the ordinary prohibition on alienation that would be implied in a conveyance into the common good. That appears in particular from the statement in the prohibition that the right of property in the harbour should forever remain with the magistrates, treasurer and town council and their successors in office "for the use and behoof of the said community", that is to say, the community of Greenock. It follows in my view that the express prohibition on alienation in the feu contract is subject to the same three qualifications as the prohibition on alienation that would normally be implied in respect of the common good.

[9]In the course of their arguments the pursuers placed some reliance on the terms of private Acts of Parliament relating to Greenock harbour. The first of these was the Act 13 George III cap. XXVIII, passed in 1773, the year after the feu contract. This Act was passed for the general improvement of Greenock harbour and for other purposes connected with the town. After conferring power on the magistrates and council of Greenock to dredge the harbour and build piers and quays of proper dimensions, it contained the following provision:

"That the two bailies named by the feuars and sub-feuars and town council of Greenock and their successors in office, shall be, and they are hereby appointed Trustees for putting this Act in execution: And, for the better effecting the ends and purposes of the same, and that the fee and property of the quays, piers, breasts and other works to be made, built, and created, by virtue of this Act, shall be, and the same are hereby vested in the said Trustees, to and for the ends and purposes aforesaid".

The pursuers argued that the trustees named in this Act were the two bailies referred to in the foregoing passage, and not the whole of the magistrates and council of the burgh of Greenock. The fact that the harbour trustees were differently constituted from the magistrates and councillors of the burgh indicated that a separate trust had been created by the feu contract of 1772. In my opinion this argument is not correct. The

two bailies referred to in the Act were named by the feuars and sub-feuars, and not the town council; that is clear from the charter of erection granted in 1751 which regulated the municipal affairs of Greenock in 1773. The other members of the town council were likewise chosen by the feuars and sub-feuars. The opening part of the passage quoted accordingly states that the bailies and the town council of Greenock and their successors in office will be trustees for the purposes of the Act of 1773. Thus there was no distinction between the persons who were harbour trustees and the persons who were the magistrates and council of the burgh.

[10]The second private Act relied on is the Greenock Port and Harbours Consolidation Act 1913. Section 212 of that Act provided that nothing contained in it should prejudice the feu contract of 1772, "or any rights privileges or dues thereby conferred or thence arising". If the feu contract of 1772 had created a trust separate from the common good of the burgh, there can be no doubt that section 212 would have preserved it. If no such trust was created, however, there is nothing to be preserved. While the bill that became the 1913 Act was before Parliament the town council of Greenock made representations to the effect that they and not the trustees owned the solum of the harbour; those representations may well have been the reason for the saving for the feu contract. The ownership of the harbour appears to have been the subject of considerable debate during the nineteenth century and through to 1913. The various statements about ownership that were made during this period appear largely to have been prompted by political considerations, however, and I do not think that any significance can be attributed to them in determining the ownership of the harbour.

[11]If the effect of the feu contract of 1772 was to convey the West Harbour and associated rights into the common good of the burgh of Greenock, the argument for the pursuers must necessarily fail; that argument is based squarely on the proposition that the feu contract created special trust purposes which are still in force. On that basis, it is not necessary to consider how the subjects of the feu contract may have come to be used for purposes other than a harbour and conveyed to persons other than the burgh of Greenock and its successors. The Act 13 George III cap. XXVIII, was passed in 1773 for the improvement of Greenock harbour. As mentioned above, it set up harbour trustees, who were the same persons as the bailies and town council of Greenock. It further vested in the trustees the property in the quays, piers and other works that were to be constructed under the Act. The trustees were charged with the duty of repairing and maintaining the harbour works and keeping the port adequately dredged. Those provisions seem to indicate that the trustees' responsibilities were intended to apply to the entire port of Greenock, including what came to be known as the West Harbour. In these circumstances it is quite possible that the intention of the Act was to transfer property in the whole of the harbour and its works to the trustees. The trustees were charged with the sole responsibility for the running, maintenance and repair of the harbour, and it is perhaps unlikely that they would assume such extensive responsibilities in respect of a property that they did not own; the potential for administrative confusion is obvious. If, for example, the trustees required to borrow money to fund harbour works, they would find it difficult to grant a security over the harbour unless they owned the whole of it. There was no obvious commercial or administrative purpose to be served by the burgh's keeping the land on which the harbour and its works were built, as the bailies and council and the harbour trustees were the same individuals. Admittedly the Act 1773 does not provide in terms that the harbour, as against the harbour works, should be vested in the trustees, but it is possible that that result was considered so obvious that it did not require stating. Alternatively, a dredged harbour may have been regarded as one of the "other works" that were vested in the harbour trustees by the Act.

[12]If that were correct, the West Harbour would have passed to the harbour trustees by virtue of the Act of 1773. Thereafter it would have vested in successive harbour trustees, including the reconstituted trustees created by the Greenock Port and Harbours Consolidation Act 1913. Section 46 of that Act provided that, when it took effect, the port and harbours and the whole rights of the existing trustees should be vested in and transferred to the trustees constituted by that Act. Subsequently, the Clyde Port Authority was set up under the Clyde Port Authority Order Confirmation Act 1965. Section 31(1) of that Act provided that the "transferred undertakings" should be vested in the Clyde Port Authority. That expression was defined in section 5(1) to include the undertaking of among others the Greenock Harbour Trustees, and in section 31(2) to include all heritable and movable property of those trustees. Thus the West Harbour would have been

transferred to the Clyde Port Authority to the extent that had not previously been alienated by the Greenock Harbour Trustees.

[13] Even if the land on which the West Harbour was built did not pass to the harbour trustees under the Act of 1773, but remained the property of the burgh of Greenock, it is still possible that the town council would have been entitled to sell the property. That is so despite the prohibition on alienation in the feu contract of 1772, because of the operation of the second and third of the qualifications discussed in paragraph [6] above. After 1773 extensive harbour works were constructed in Greenock; these included other harbours and docks. It was a matter of agreement between the parties that approximately eighty years ago the West Harbour was filled in, and that its site has subsequently been used for the construction of roads and commercial and public buildings. In those circumstances it appears likely that, by at least the early years of the twentieth century, the harbour accommodation in Greenock was greater than was required for the purposes of the port, and that the West Harbour, as the oldest of the harbours, was surplus to requirements. In that event it is likely that retaining the harbour as such would have been a wasteful use of the property. If that were so, the council would have been entitled to sell the harbour. Moreover, it seems clear that over the years the West Harbour had been replaced by other, more modern, harbour accommodation. That by itself might entitle the council to sell the West Harbour, or to use it for other purposes. On either, or possibly both, of these grounds the council would have been entitled to sell or otherwise alienate the West Harbour.

[14] Finally, I should mention an argument that was presented by the defenders to the effect that the present litigation served no useful purpose, as it had not been explained by the pursuers that the object that they ultimately had, namely rectification of the title to the land where the West Harbour had once been, could competently be effected in terms of section 9(3)(a)(iii) of the Land Registration Act 1979. In my opinion this argument is not well founded. If the pursuers are correct in maintaining that the land in question is still subject to a trust, the present trustees would be under a duty to consider what steps to take to vindicate their trust. A range of remedies, including seeking an indemnity from the Keeper of the Registers, might be open to them, and they would have to consider whether they should seek any such remedy. It is accordingly important to establish whether or not such a trust exists and whether the defenders are trustees of the land in question. That amounts in my opinion to a sufficient purpose for the present litigation.

[15] For the foregoing reasons I am of opinion that the reclaiming motion should be refused.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

A2312/99

OPINION OF LORD COULSFIELD

in

RECLAIMING MOTION

Lord Osborne

in the cause

Lord Drummond Young

ANDREW WILSON & OTHERS

Lord Coulsfield

Pursuers;

against

INVERCLYDE COUNCIL

Defenders:

Act: Parties;

Alt: Brodie, Q.C., Bowie; DLA

20 February 2003

[1]The full history of the subjects with which this action is concerned and the other circumstances relevant to the decision of this reclaiming motion are set out in the opinion of Lord Osborne, with which I agree. In view, however, of the interest which the inhabitants of Greenock have in the outcome of this action and in view of the importance which has been given to the position of Greenock Harbour Trustees over more than two hundred years, I propose to give a brief indication of the grounds of my own opinion.

[2]The only material conclusion of the action which remains alive is the first conclusion, which seeks declarator that a public trust set out in the trust deed between Sir John Shaw Stewart and the Magistrates and Councillors of Greenock, recorded 5 June 1772, is currently lawful and active, that the defenders are statutory trustees, *ex officio*, by virtue of the terms of the agreement and a number of succeeding documents and Acts of Parliament, and that the pursuers are heritable beneficiaries of the trust. The material provisions of the 1772 feu charter are, firstly, the clause of disposition which disposes the subjects to the magistrates, treasurer and Town Council of Greenock and their successors in office, for the use and behoof of the community, heritably and irredeemably: secondly, the description of the harbour of Greenock comprising the harbour and all piers and quays built and gained of the sea since the year 1700 together with anchorages, shore, bay and ring dues and other tolls and customs in use to be paid by the inhabitants of the Burgh and strangers coming to the harbour: thirdly, the power given to the disponees to improve and enlarge the harbour: and, most importantly, a clause in the following terms:

"But that it shall not be lawful nor in the power of the said Magistrates, Treasurer and Town Council, nor their successors in office, to sell, alienate or dispose either irredeemably, or under reversion, nor to wadset or burden with infeftments or annual rent or any other servitude or burden the said harbour with the anchorages, shore, bay and ring dues etc. whereby the same may be evicted or adjudged; and that all such dispositions, conveyances, wadsets or other deeds so to be granted by them or their foresaids, conveying or burdening the said subjects with any real diligence following upon them shall *ipso jure* be void and null...the right of property of the said harbours and others hereby conveyed shall forever remain with the said Magistrates, Treasurer and Town Council and their successors in office for the use and behoof of the said community and for the purpose of building, enlarging and improving the said harbours."

[3]The contention for the pursuers is that that clause set up a distinct trust whereby the subjects were to be held by the original disponees and their successors in office separately from any other property of the burgh, and, in particular, from any common good, and that the subjects were to be inalienable. The pursuers further maintain that the distinctness of that trust has been recognised in subsequent deeds and statutory provisions, so that the trust property remains a separate and distinct property in the hands of the present Council, or its members, as trustees, who are entitled, by some process, to vindicate their right, notwithstanding the fact that other persons are in possession of the subjects under registered titles.

[4]It was evident from the references to historical material and to a sequence of statutes, which the pursuers provided to us, that the trustees of the harbour of Greenock have, ever since 1772, been regarded as occupying a special place in the affairs of the town and that the distinctness of that place and role has been defended on a number of occasions on which attempts were made to alter, in one way or another, the constitution of the harbour authority. In my opinion, however, all that history is of no significance in determining the legal status of the original trust and its property. What has to be decided, in the first instance, is whether the original trust deed can properly be regarded as having established a separate trust by which these particular subjects were to be held distinct from the remaining property of the burgh. It may well be the case that the tests by which that question has to be answered, only became clear during the course of the

twentieth century and, in particular, through the decision of the court in *The Magistrates of Banff and Others v. Ruthin Castle Limited* 1944 S.C. 36; and that any previous discussions of the status of the harbour and its trustees were hampered by a lack of clarity as to what the proper tests were. However that may be, the decision in *The Magistrates of Banff* in my view makes the position absolutely clear. It is briefly expressed by the Lord Justice Clerk (Cooper) at p.67, where he says:

"Special considerations would, of course, apply to a case in which, by the express terms of a disposition or deed of gift to a burgh, the granter had impressed the transfer with specific conditions affecting the management, control or use of the subjects - a result which in this instance the pursuer strove to attain but failed - for subjects so transferred and accepted might not fall into common good. But that is not this case. For the reasons given by your Lordships, I consider that the theory of trust advanced by the pursuers has completely failed, (a) because there was no effective separation of the legal title from the beneficial right, and (b) because there are no distinctive trust purposes."

[5]The opinions of the other judges are to the same effect. What they make clear is that the common good of the burgh is property held by the burgh under that form of trust, in a broad sense, under which the magistrates are bound to administer the affairs of the burgh. Common good may be alienable or may be, and often is, inalienable. Examples of inalienable common good property are markets, burgh buildings and the like. Accordingly the fact that subjects are conveyed to magistrates and declared to be inalienable does not indicate that they form a separate trust. If the issue is considered in that light, in my opinion, it is amply clear that there is nothing in the 1772 disposition which provides either for a separation of legal title and beneficial right, or for separate trust purposes. The only provision of the deed to which the pursuers could point was the clause declaring that any purported conveyances should be void and null, but that adds nothing to the declaration of inalienability. Accordingly, the provisions of the 1772 deed simply fail to meet the conditions for the establishment of a separate trust, as they are now established, with the result that the only basis of the pursuers' case collapses.

[6]That result can, I think, be seen to be consistent with other important considerations. In 1773 a statute was passed which gave the magistrates of the burgh power to construct additional works in the harbour area. In the eighteenth century, the principles of local government law were still in the course of development. The principles upon which burgh property was held and burgh administration should be conducted were, in many respects, unclear. Moreover, there were a number of different forms under which burghs were created and their powers given and developed. Burghs originated in charters either from the Crown or from a barony proprietor and, in both cases, the distinction between property rights and public law rights may not always have been clear. The difficulties were enhanced by the fact that statutory powers of many different sorts were superimposed upon the charter rights and obligations. It was only in the course of the nineteenth century that burgh administration became regularised according to a common form. Looking back, however, it can be seen that an arrangement by which some parts of the harbour and some parts of the buildings within it were property held under a trust and other parts were held under a statutory powers and, it may be, yet more parts held as part of the burgh common good, would have been confused and unworkable. In these circumstances, it seems to me to be inevitable that the provisions with which we are concerned must be read in a way consistent with the developing understanding of public local administration. It therefore seems to me that the view which I take of the proper construction of the charter is entirely consistent with a proper understanding of the powers, rights and duties of the magistrates and council as a whole, as they were developed and clarified as time passed.

[7]It is evident from the material placed before us that, as a matter of practice, the administration of the harbour under the harbour trustees was recorded and accounted for separately from the administration of the Burgh over a long period. However, for the earlier part of that period at least, as the pursuers recognised, the magistrates and the harbour trustees were the same people and, while, as Mr. Wilson put it, they may have moved their chairs, they did not otherwise distinguish between their actions in the one capacity or the other. Again, while there were from time to time saving clauses for the feu charter and its provisions, there was nothing in any of the later deeds or statutes which was sufficient to give separate and distinct force to a

separate trust. Perhaps the most important of the provisions which were referred to is section 212 of the Greenock Port and Harbours Consolidation Act 1913 which provided:

"Nothing in this Act contained shall extend or be construed to extend or take away, alter, abridge, lessen or encroach upon any jurisdiction or power of the corporation...and nothing herein contained shall hurt or prejudice the charter granted to the town of Greenock in the year one thousand seven hundred and fifty one by the deceased Sir John Shaw of Greenock, Baronet nor the feu contract between John Shaw Stewart, Esquire and the Magistrates and Council of Greenock dated in the year one thousand seven hundred and seventy two or any rights privileges or dues thereby conferred or thence arising so far as consistent with the provisions of this Act."

[8]If the 1772 feu contract had created a separate trust, that provision would, of course, have saved it. Since, however, there was no separate trust and nothing, therefore, to keep any part of the harbour undertaking out of the provisions of the 1913 Act, the saving provision itself is not, in my opinion, capable of doing so.

[9]For these reasons, in my opinion, it is clear that the claim, as formulated by the pursuer, that some separate trust subsisted and subsists has no legal foundation and the action must fail. It is perhaps possible that there are questions about the legal effect of the various statutes and other transactions which followed on the original charter which remain to be answered, but it is not possible to consider any such question in this action. I should add that, although the pursuers presented their case with great knowledge and understanding of the history, they are not professionally legally qualified. We did consider whether, in that situation, it was proper to examine the fundamental question upon which I have expressed an opinion or whether the matter might be approached in some other way. In my view, however, it is impossible to dispose of this action properly without applying one's mind to the fundamental question of the basis of the whole action. Having considered the matter, I am satisfied that for the reasons given above there was no separate trust created by the 1772 disposition.

[10]A number of other questions were discussed in the course of the litigation and are dealt with in previous opinions in this and in previous litigations. The only one which was discussed to any depth in this reclaiming motion was the question how any trust established under the 1772 Act, if it was indeed a separate trust, could be given effect and who would be the trustees. With regard to this, I would only say that, had I been of the opinion that the 1772 deed did establish a separate trust, I would have been reluctant to accept that no means could be found by which the trust could be given effect. It is, however, unnecessary to reach any concluded view on that issue.

[11]For the reasons given I am of opinion that this reclaiming motion fails.