proved his claim in the sequestration, in terms of the Bankruptcy (Scotland) Act, 1856. (4) Mr Oman's said properties not being liable for the assessments sued for, the defender is, in the circumstances, entitled to absolvitor, with expenses. (5) The Court has no jurisdiction over the defender, at least in the first instance, as such trustee, in reference to any matter forming claims upon the bankrupt estate."

On 12th and 21st June 1872, the Lord Ordinary pronounced the following interlocutors:—

"*Edinburgh 12th June* 1872.—The Lord Ordinary having heard counsel, and made avizandum, and having considered the debate, productions, and whole process, Finds that, under a sound construction of the terms of 'The Edinburgh and Leith Sewerage Act, 1864,' founded on by the pursuer, the assessments imposed by virtue of said Act, in respect of the heritable subjects which belonged to John Oman, the bankrupt, and which now form part of his sequestrated estate, are, in so far as properly imposed, preferable debts affecting the said subjects themselves, as well as the owner or proprietor thereof, or other intromitter with the rents of the same: Further, finds that the defender, as trustee on said sequestrated estate, is owner and proprietor of the said subjects within the meaning of the said Act, and while it is not alleged by him that the heritable creditors have entered upon possession of the said subjects, or any of them, he is, as such owner and proprietor, the party entitled to intromit with the said rents: Therefore sustains the first plea in law for the pursuer, and appoints the cause to be enrolled with a view to further procedure, and particularly as regards the ascertainment of the matters of fact not admitted by the defender on record, reserving meanwhile all questions of expenses."

On 21st June 1872, the Lord Ordinary, after allowing a minute to be put in by the defender admitting the disputed matters of fact, "Finds that the pursuer was not bound to have lodged a claim with the trustee on Oman's sequestrated estate; Decerns against the defender, in terms of the conclusions of the libel: Finds him liable to the pursuer in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The defender reclaimed.

Cases cited—*Macknight* v. *Currie*, 10 Macph. 289; *Currie* v. *Macgregor*, 9 Scot. Law Rep. 86.

At advising—

Lord Justice-Clerk—On the whole matter, I do not concur in the view that these assessments are preferable debts, but that the trustee is liable as primary debtor, being owner in the sense of the 47th section of The Leith Sewerage Act. This view does not depend on the provisions in the clauses from 67 to 85 of the Act. These clauses, though they may illustrate the meaning of the 47th clause, stand entirely apart from it. This is not an annual payment, but it is made once for all for the benefit of whoever draws the rents and enjoys the benefits of the drainage.

Lord Benholme—I substantially agree, but I think that the 73d section of the Act applies not only to any assessments for making the drains, but also to subsequent assessments supplemental to the general assessment. The word burden is used in a special and not a feudal sense. The assessment is made to run with the land. The owner, in the sense of the Act, takes the land under condition of paying the assessment, which exempts it from being made a claim in the sequestration, as a condition precedent to the entry of the trustee on the subject.

Lord Neaves—I think the pursuer's case is well founded, whether the 73d section applies to the assessment or not. The nature of the claim is for a price to be paid once for all for the continuance and perpetuity of the drainage works originally executed. It is not, like the poor rate or police assessment, an annual assessment for the exigencies of a particular year, when the proprietor for that year is liable. This is prospective and perpetual, and if not continuous, it is almost impossible to discover the *punctum temporis* when liability commences. It is reasonable that the proprietor at the time when the Commissioners ascertained the exact sum should be held owner in the sense of the Act, and should be held liable, provided there is no *mora* on the part of the Commissioners. The trustee here is liable *in virtute tenuræ*; and this is not a preferable debt to be claimed in the sequestration.

The Court altered the first finding in the Lord Ordinary's interlocutor of 12th June, to the effect that the assessments were debts due and exigible from the owner or other intromitter with the rents of the subjects, and adhered otherwise to his interlocutor.

Counsel for Pursuer—Watson and Hall. Agent—J. Macknight, W.S.

Counsel for Defender—Solicitor-General (Clark) and M'Kechnie. Agent—T. M'Laren S.S.C.

Saturday, November 30.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

MILLER *v.* KEITH.

Bankrupt—Bankruptcy (Scotland) Act 1856, § 141—*Trustee—Account—Composition.*

Circumstances in which it was *held* that the provisions of the 141st section of Bankruptcy (Scotland) Act 1856 had not been complied with. *Held* that not only the existing trustee, but any former trustee, is entitled to the benefit of the provisions of the 141st section of the Bankruptcy (Scotland) Act 1856.

This was an appeal from the Sheriff-court of Edinburgh at the instance of Mr Hugh Miller, C.A. Edinburgh, who was sometime trustee on the sequestrated estate of William Taylor Keith. Mr Miller had been appointed trustee by the creditors on the bankrupt estate, and in the course of his transactions as trustee all the available funds were swallowed up. Keith had been committed to prison by the Sheriff-Substitute (Hamilton) for failing to give a satisfactory explanation as to a certain sum of money at his examination, and as legal proceedings had been instituted thereafter in the Court of Session, at the instance of the bankrupt, to effect his liberation, Miller, having no funds in his hands belonging to the estate, had resigned his office. J. D. Ferrie was therefore appointed trustee in his room. A meeting of creditors was held on 21st August for the purpose of deciding on

a composition, and at that meeting were present Mr Ferrie, Mr Macqueen, agent in the sequestration, and David Craig, clerk to Mr Macqueen. A composition of 1s. per £1 was there offered and accepted.

In regard to Mr Miller's account for commission and expenses, it was agreed to offer a composition of £20, payable by a bill at four months after the date of the bankrupt's discharge. The total account was £60, 5s. 5d., of which £42, 19s. 11d. was for the law expenses of the sequestration, and £17, 5s. 6d. was for outlay and charge and trouble. The cautioners for the amount of the bill were the bankrupt himself and a Mr William Woodhead, a surgeon's assistant, said to reside at Abbeyhill, but who could not be found there. The trustee (Ferrie) then made a report to the Sheriff to the effect that the account had been audited by the Commissioners, the ballance ascertained, and the remuneration of the trustee fixed, and also that the expenses of taking out the sequestration had been satisfactorily provided for. It was represented to the Sheriff for the appellant that that was not a report in conformity with the 141st section of the Act, in so far as it merely reported that part of the expenses had been allowed to the former trustee (Miller).

The Sheriff-Substitute pronounced the following interlocutor and note:—

"*Edinburgh*, 16*th November* 1872.—The Sheriff-Substitute having considered the foregoing report, minute of meeting of creditors, and bond of caution therein referred to, together with the trustee's additional report and relative productions, and having heard the parties on 30th October last, and again since the lodging of said additional report, finds that the offer of composition, with the security therein mentioned, has been duly made, and is reasonable, and has been unanimously accepted by the creditors or mandatories of creditors assembled at said meeting; therefore approves of the said offer with the security; but before granting a discharge, appoints the bankrupt to appear and emit the statutory declaration.

"*Note.*—At the hearing on 30th October, Mr Macara, W.S., appeared for Mr Hugh Miller, C.A., formerly trustee in the sequestration, and objected that the expenses incurred during Mr Miller's tenure of office, including his remuneration, had not been paid or provided for, in terms of the 141st section of the Bankrupt Act. As the objection appeared to be a relevant one under the statute, and was, in point of fact, borne out by the terms of the trustee's report, the Sheriff-Substitute was unable at once to pronounce a deliverance approving of the offer of composition, and superseded consideration of the application for discharge until the bankrupt should arrange, to the satisfaction of the trustee and commissioners, for the settlement of the expenses referred to. This has now been done, as appears from the additional report lodged by the trustee, and the minute of meeting of commissioners therein referred to and produced.

"The Sheriff-Substitute would have hesitated to sustain Mr Miller's title to oppose the bankrupt's discharge upon any other than the special ground above mentioned."

Miller appealed.

It was argued for him, that in the above interlocutor the Sheriff-Substitute had approved of a report which was not in conformity with the provisions of the statute, and that the trustee had had no opportunity of being heard before the Sheriff, as allowed by the Act.

It was argued for the respondents that the question here was whether Mr Macara, the former agent, and Mr Miller, the former trustee, had a right to get remuneration and their expenses. What remedy Mr Miller might have against the present trustee, or against the bankrupt, was not a matter at present before the Court, but the point of dispute was whether the appellant had a *locus standi* under the 141st section of the Bankruptcy Act, and whether there was any ground for interference with the commissioners' deliverance under that Act. It was submitted that the appellant had no *locus standi* under the Bankruptcy Act, and that the commissioners' deliverance was in accordance with the provisions of the Act.

The Lord President, in pronouncing judgment, said there was a great many suspicious things about this sequestration. The first remarkable circumstance in its history was that while a very large majority, apparently, of the creditors voted against the appellant when he was a candidate for the trusteeship, he was yet duly declared elected, on the ground that a large body of the creditors who voted against him had no claim. The next step was the examination of the bankrupt, in the course of which the Sheriff-Substitute found it necessary to send him to prison because he would not answer a question regarding the disposal of considerable sums of money which had recently come into his hand. When this matter was brought before the creditors on the report of the trustee, they divided—one motion was made that the trustee's report be approved of, and another that it should not be approved of, in respect that in the opinion of the creditors the bankrupt had given a full and satisfactory statement of his affairs so far as was in his power; that his examination had been protracted and oppressive, and was being carried on by parties having no claim against the estate. The second motion was carried by a majority in value—£1593 against £630—the creditors who voted for it being substantially the same who had voted for the unsuccessful trustee. In consequence of the support he had thus obtained, the bankrupt petitioned for liberation, which was refused by the Lord Ordinary. The bankrupt reclaimed against that decision, and by that time the trustee, Mr Miller, finding he had no funds in his hands, resigned his office; and in consequence of that the bankrupt obtained his liberation, which his Lordship thought was very much to be regretted. Mr Miller then very naturally, upon the 22d August, sent in his account to the new trustee, and in his letter sent therewith said—"You will please arrange the settlement of this account before granting your report as trustee to enable the bankrupt to carry through his discharge." Nothing had been done in furtherance of that request. But an offer of composition had been made, entertained, and accepted by the creditors, and the new trustee had reported to the Sheriff that everything was in order, and, among other things, that the trustee's account had been provided for, and there was nothing to prevent the bankrupt obtaining his discharge. It was quite impossible, looking to the course of proceedings in this sequestration, to doubt that this was mere revenge against Mr Miller for his having done his duty under the sequestration. That such proceedings should be successful was very much to

be deprecated. It was contended that the only account which could be audited, and the only remuneration that could be fixed, and the only accounts or expenses that required to be paid or provided for under the 141st section of the Act, were those which were due to the existing trustee at the time when the audit took place. Nothing could be more unreasonable than such a construction of the statute. In what particular time the accounts of a previous trustee should be audited was a matter of little importance. His Lordship should think the only way would be for the existing trustee to present them along with his own accounts, and that the whole should be considered together, and the accounts provided for before the sequestration was brought to an end. His Lordship therefore thought the interlocutor of the Sheriff would not do. The Sheriff seemed to have been impressed himself with the difficulty of this clause of the statute, but he had been satisfied by what was done. Now, that which was done was not that which was required. The statute required the Commissioners to audit the accounts, to ascertain the balance which was due to the trustee, if any, and to fix his remuneration; and further, after that was fixed, it was to be paid or provided for to the satisfaction of the trustee or Commissioners before deliverance was pronounced. Now, what had been done here was this—the Commissioners met and considered the accounts of the former trustee, and offered him £20 in full of his claim of £60, 5s. 5d., and granted a bill at four months from the date of the bankrupt's discharge for the amount. Mr Miller did not accept that offer, and it would have been very strange if he had, looking to the amount of his claim. The only question that remained was whether the report of the Commissioners contained what was a sufficient discharge of duty under the 141st section. The Commissioners had not done one of the things required by that section. They had allowed the bankrupt and a commissioner to dictate to the former trustee what he was to receive; and his Lordship was therefore of opinion that the Court must find that the former trustee's accounts had not been audited, the balance had not been ascertained, and his remuneration had not been fixed, and there had been no payment or provision made for payment of the balance due to him in terms of the 141st section of the Bankruptcy Act; and that therefore the offer could not be accepted.

LORD DEAS and LORD ARDMILLAN concurred.

Counsel for the Appellant—Trayner. Agent—L. Macara, W.S.
Counsel for the Respondent—Scott. Agent—Macqueen, S.S.C.

Tuesday, December 3.

SECOND DIVISION.

BOARD OF SUPERVISION *v.* LOCAL AUTHORITY OF MONTROSE.

Petition and Complaint—Local Authority—Public Health (Scotland) Act.

The Board of Supervision having presented a petition and complaint against the Local Authority of a burgh, under the Public Health Act, calling upon them to introduce a proper system of drainage—*held* (1) that such a petition was the proper ultimate remedy under the Act; but (2) that sufficient time must be allowed to mature a comprehensive scheme of drainage.

The Board of Supervision presented a petition and complaint against the Local Authority of the burgh of Montrose, in which they set forth that the drainage of that burgh is exceedingly defective and that consequently the health of the locality is seriously affected by the effluvium from the sewage thereof. Further, that the question of a drainage scheme has been frequently considered by the Magistrates and Police Commissioners of Montrose, and that various reports from engineers have shown that the burgh may be effectually relieved from the noxious effects produced by the present state of matters. To effect these objects the Public Health (Scotland) Act provides for the introduction of a proper system of drainage. The complainers stated moreover that the efforts of those who wished a thorough system of drainage established have been hitherto foiled, and in consequence they on 23rd January 1871, ordered an inspection of the burgh, and received a report specifying the defects, and adding that the disposal of the sewage by means of irrigation could be profitably arranged. A copy of this report was sent on February 11th to the Local Authority, and subsequently there was considerable correspondence on the subject, but as yet nothing has been done. Finally the petitioners sought the authority of the Court to enforce the obligations of the Local Authority as to drainage, contending that in the circumstances the failure to proceed with the drainage was a "refusal and neglect" to fulfil the requirements of the Act, and an "obstruction" to the carrying out thereof.

The respondents denied all neglect or obstructive measures, and stated they were willing and anxious to obtain a drainage system for the burgh, but that they required to act with care and deliberation in order to arrive at the best scheme for that end.

At advising—

LORD JUSTICE-CLERK—I am sure your Lordships have no desire to assume the functions of the Local Authority, nor to do anything which might appear to be unreasonable towards a body of that nature. But the statutory right, which the Board of Supervision have in this application exercised for the first time, is one very important for the public interest, and I do not find that there is any question raised in the answers about its competency. An application such as this is, however, only the ultimate remedy. The respondents, in their answers, state that they, a newly elected body, are willing and anxious to promote a complete system of drainage, and ask us to allow them a reasonable time to take steps for that purpose. I think that course is a proper one. We are aware that a popularly constituted body like the Local Authority cannot move with great expedition in such a matter. We cannot dismiss the application, but, after the assurances we have received, I think we should appoint them within three months to report what steps they have taken, with this important object.

LORD COWAN—The power conferred on the petitioners to apply to this Court, in order to enforce proper drainage, is of the utmost importance to the