may be called the summer months, from April to August, that the petitioner is the labourer or servant of the Police Commissioners, and receives 18s. per week. So that as far as the first part of the year is concerned there is no doubt. The only question remaining is whether for the other eight months of the year he changes this character of labourer for that of a contractor. I think there is not enough in the agreement to effect this change. No doubt during the latter period he is allowed £2, 4s. a-week, but out of that he has to pay for two assistants, and in practice it just amounts to this, that he makes during these eight months 19s. instead of 18s. I do not think there is enough difference between his payment in one part of the year and the other to take the case out of the statute.

Lord Mure concurred.

Lord Adam—I observe that in the petition the petitioner is called a lamplighter, and he seems to be properly designed. He is therefore a labourer or workman. The substance of the agreement is that three men shall be employed to do this work, and the petitioner is one of them; and that being so, the law says that his wages under a certain amount must be regarded as alimentary and not attachable. That is the position of the petitioner. His wages seem clearly to be 18s. in summer and £2, 4s. in winter, but the latter sum is so much reduced by what he pays his assistants under his agreement that we must take him as making 19s. per week during this part of the year. Thus his wages are not arrestable.

Lord Shand was absent from illness.

The Court granted the prayer of the petition and recalled the arrestments.

Counsel for the Petitioner—Lyell. Agents—Smith & Mason, W.S.

Counsel for the Respondents—Forsyth. Agents—Parties.

Tuesday, February 7.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SPENCE *v.* BOYD AND OTHERS.

Trust—Breach of Trust—Agreement—Homologation—Bar.

By antenuptial contract of marriage a wife conveyed to trustees her whole estate for her liferent use allenarly, exclusive of the *jus mariti*, and for the liferent use of her husband if he survived her. The fee was to go to the children of the marriage. There was no conveyance of any property by the husband, but he became bound to effect an insurance upon his life, the policy being taken in name of the trustees, and to pay the premiums as they fell due. The proceeds of the policy were to be held for his widow in liferent, and the children of the marriage in fee. It was provided by the marriage-contract that in the event of the trustees finding it necessary at any time to pay the premiums, then the husband should be bound to repay to them the amount so expended. There was a power to the trustees to advance to the husband out of the wife's funds a sum equal to the amount of the policy of insurance, and this was done. Shortly thereafter the husband became bankrupt, and in order to prevent the policy lapsing, the trustees paid the premiums out of the income of the wife's estate. This they did from 1865 until 1877. The wife acquiesced, upon the statement of one of the trustees, who was a law-agent, that it was within the powers conferred upon the trustees by the marriage-contract. In 1875 the wife first consulted an independent law-agent, who suggested that there might be a question raised as to these payments. In 1878 she intimated to the trustee above referred to, who was then the only one surviving, that she could not sanction any further premiums being paid out of her income. A correspondence followed between the wife's legal adviser and the firm of law-agents of which the trustee was a partner, the result of which was that the wife wrote a holograph letter to the trustee in 1878, in which her husband concurred, authorising him to sell the policy, and retain the proceeds as forming part of the trust funds under his management, and undertaking to grant a deed of exoneration, if required, in respect of the sale. The policy was sold, and the proceeds added to the capital of the trust. In 1887 the spouses raised an action against the trustee for the amount of the premiums paid between 1865 and 1877 out of the interest of the wife's estate.

Held that the pursuers were barred by the arrangement under which the policy was sold from insisting in their claim.

Miss Mary Munro and Andrew Spence were married on 21st October 1862. An antenuptial contract of marriage was executed by them of the same date. There was an obligation in it by the husband to pay his wife, in the event of her survivance, a free yearly annuity of £100, but there was no conveyance of any property by him to the trustees. By the fourth clause of the contract Mr Spence bound and obliged himself, within three months from the date of the contract, to effect an insurance upon his life with the Colonial Life Assurance Company, for £600, in name of the marriage-contract trustees; "and the said A. Spence hereby binds and obliges himself and his foresaids to make payment to the said Assurance Company, regularly as the same falls due, of the sum of £13, 13s. 6d. as the annual premium on the said policy, or of such other sum as may annually be necessary for keeping the same in force, and to report to the said trustees the receipt thereof, and in the event of the said trustees finding it necessary at any time to advance and pay to the said Life Assurance Company any sum or sums on account of the said premium, the said A. Spence binds and obliges himself and his foresaids to make payment to them or their foresaids of each sum as the same may be instructed by the company's receipts therefor, with interest of such sum or sums at the rate of five per centum from the time at which the same falls due and till payment,

and a fifth part more of liquidate penalty in case of failure, which policy of insurance, and the price and proceeds thereof, the said trustees shall hold in trust for behoof of the said Mary Munro in liferent, for her liferent use allenarly, free of all rights of every description competent to her said intended husband, or any husband she may marry, and unaffectable by his debts and deeds, and they shall pay over to her the annual proceeds of the sum or sums to be recovered under the said policy, which annual proceeds shall be received by her in payment and satisfaction *pro tanto* of the annuity hereinbefore provided, declaring that the receipt of the said Mary Munro shall be sufficient without the consent of her husband: And upon her death the said trustees or trustee shall hold the said policy, and the price and proceeds thereof, for behoof of the issue of the said marriage, and failing issue for behoof of the nearest heirs or assignees of the said A. Spence, declaring the said intended spouses or survivor shall have the power of regulating the shares of such issue, and the period or periods of division."

Mrs Spence conveyed to the trustees the whole heritable and moveable estate and effects then belonging or that might belong to her during the subsistence of the marriage, in the *first* place for her liferent use allenarly, declaring that the *jus mariti* and all other rights of the husband were thereby excluded, and that the same should not be affectable by his debts or deeds; in the *second* place, for the liferent use allenarly of her husband in the event of his survivance; and in the *third* place, for behoof of the issue of the marriage, and failing issue for her heirs and assignees. The trustees were empowered "to advance to the said Andrew Spence out of the said trust-estate a sum not exceeding £600 sterling upon his own personal security, if they are of opinion he can make advantageous use of it in his business or otherwise." The original trustees were David Munro, residing in Madeira Street, North Leith; David Munro junior, residing in Madeira Street, North Leith; James Laurence Boyd, of Leith, S.S.C.; John Sheppard Shields, wine merchant, Leith; John Drever Spence of the Scottish Widows Fund and Life Assurance Society, Edinburgh; and Pillans Scarth, W.S., Leith.

A policy of insurance for £600 was effected with the Standard Life Assurance Company in accordance with the terms of the marriage-contract, and was taken in name of the trustees. After the marriage the trustees advanced to Mr Spence the sum of £600 under the authority given to them by the marriage-contract. Mr Spence not long afterwards became bankrupt.

Owing to Mr Spence's bankruptcy he was unable to pay the premiums of insurance upon the policy for £600, and in order that the policy should not lapse the trustees paid the half-yearly premiums as they fell due out of the income of the estate conveyed to them by Mrs Spence down to the year 1877. On 5th April 1878 a letter was written by Mrs Spence, with concurrence of her husband, to James Laurence Boyd, then the sole surviving trustee, in which they requested and authorised him to sell the policy of insurance, and to retain the proceeds "as forming part of the trust funds under your management, of which I am entitled to enjoy a mere liferent, and I undertake if and when required by you to grant a deed of exoneration in your favour in respect of the sale now authorised by me." The liferent of the estate had by this time been assigned by the spouses in security of advances, and the concurrence of the assignee was obtained to this proposal. The policy was accordingly sold, and realised the sum of £113, which was added to the capital of the trust.

In 1887 Mr and Mrs Spence raised an action against James Laurence Boyd, the sole surviving original trustee under their marriage-contract, as trustee, and also as an individual, for payment of the sum of £306, being the amount, with interest, of the premiums of insurance paid half-yearly out of Mrs Spence's liferent from 1865 until 1877. There were also called as defenders—J. H. Jamieson, W.S., and J. D. Kelly, S.S.C., who had been assumed as trustees, and also J. Hastie, S.S.C., the assignee of the pursuers' liferent for their respective interests, but decree was only asked against them in the event of their appearing to oppose the conclusions of the summons.

The pursuers pleaded—"(1) The defender Boyd having paid the said premiums out of the pursuer, the said Mary Munro or Spence's said life interest in breach of his duty as trustee and agent as condescended on, is bound to repay to her these sums, with interest as concluded for."

The defenders pleaded—"(2) All parties not called. (3) The defender Mr Boyd being only one of a number of trustees, is not in any event liable *in solidum*. (5) The trustees having acted within their powers in paying the said premiums of insurance out of revenue, for the purpose of keeping the said policy in force, should be assoilzied, with expenses. (7) The pursuers having authorised, or at least homologated, the payment of the said premiums out of the said revenue, the defenders are entitled to absolvitor, with expenses."

On 12th March 1887 the Lord Ordinary (M'Laren) sustained the defenders' second plea-in-law, and sisted process to enable the pursuers to raise a supplementary action.

"*Opinion.*—I think I must sustain the second plea-in-law for the defenders.

"The action is no doubt a personal action in this sense, that the trustees are said not to have fully accounted for the income of the lady's property; that they have debited her with payments which were really payments on account of the husband. Now that is nothing but an action founded upon accountability. My view is that trust is a joint office, a joint estate, a joint power of administration, and a joint obligation to account; and where there is no allegation of fraud or other wrong, but a claim to have items of credit disallowed, it is necessary to proceed against all the trustees. I think that this is not a mere technical view, because where the obligation to account is joint, then if any of the defenders is unable to perform his share of the obligation or pay his share of the money, that is a loss to the pursuer.

"I shall therefore sustain the second plea, and sist process until the other trustees or their representatives are called.

"I am inclined to think that it is a case that falls under the rule, that where the party has

been unsuccessful, the auditor may disallow the expenses of the part of the case in which he is unsuccessful. Expenses reserved."

Upon 31st May 1887 the pursuers raised a supplementary action in which they called the representatives of the deceased trustees for their interest, but no decree was sought against them, unless they appeared to oppose.

Defences in this action were only lodged for J. L. Boyd, J. H. Jameson, and D. Kelly.

The Lord Ordinary conjoined the actions and allowed a proof.

From the proof it appeared that the capital of the trust-estate was originally about £1600. On the bankruptcy of Mr Spence, Mr Scarth, one of the trustees, paid the insurance premiums out of his own pocket, and the only minute of the trustees bearing on the matter stated that "The trustees instructed Mr Boyd to pay to Mr Scarth the premiums which he had advanced to keep Mr Spence's life policy in force, and to deduct the same from this term's interest." This minute was dated 24th March 1864, and there were present at the meeting Messrs Shields, Spence, Munro, and Boyd. Mrs Spence's evidence was to the effect that her consent was never asked as to the policy of insurance being kept up out of her liferent interest. She received accounts from time to time showing the state of the trust funds, and noticed from them that the premiums were deducted from her liferent interest. Throughout her evidence she insisted upon the fact that it was only because Mr Boyd told her that the trustees had power to pay the premiums out of the interest due to her that she permitted the premiums to be so paid. At that time Mrs Spence had no independent legal adviser. In 1871 Mrs Spence borrowed money on the security of her liferent, and it was in 1875 that she first consulted a separate solicitor, Mr J. B. M'Intosh, S.S.C., in regard to her affairs. Mr M'Intosh indicated to her that there might be a question as regards the payment of the premiums by the trustees out of her liferent, and on his advice she wrote a letter to Mr Boyd, dated 7th February 1878, in these terms—"You are aware that for a considerable number of years (12 or 13 I am sure) the premiums of the insurance on Mr Spence's life have been paid out of my income, and as there are now additions amounting to upwards of £100 added to the policy, I think I am not unreasonable in requesting that some arrangement should now be come to, either to pay the premium or part of it out of these profits, or, as it is not at all probable I shall ever derive any benefit from it during my lifetime, that these profits should be given to me now. I am most unwilling that the insurance should lapse, but under present circumstances I cannot sanction that any further payments of the premium shall be paid out of my income." Some correspondence followed between Mr M'Intosh and Mr Boyd's firm, as the result of which the policy was sold as above stated. It was not until 1885 that Mrs Spence's attention was again directed by Mr Hastie, the assignee, to the question whether the trustees were entitled to pay the premiums, and she then intimated a claim against Mr Boyd.

Mr Boyd deponed—"After Mr Spence became bankrupt the trustees, finding it impossible to get him to pay the premiums, paid them out of the liferent funds coming into their hands. (Q) Did you explain to Mrs Spence that this was being done?—(A) That was done under instructions of the whole trustees, among whom was Mr Pillans Scarth, and I told Mrs Spence what the trustees' views were as to their duties. She acquiesced in everything being done throughout. I may say that I never received any employment as agent for Mrs Spence, and never made any charge against her. I had no reason to think that I was advising her, and she had no call to consider that I was doing so. I simply told her what were the trustees' views of their duties, and what they were doing."

On 17th December 1887 the Lord Ordinary pronounced this interlocutor:—"Having considered the conjoined actions, for the reasons stated in his opinion, sustains the defenders' seventh plea-in-law in the original action, and assoilzies the defender James Laurence Boyd from the conclusions of both actions as against him, and decerns: *Quoad ultra* in respect there are no conclusions against the other defenders unless they appear and oppose, dismisses both actions as against them, and decerns: Finds the defenders who have appeared entitled to expenses so far as regards their outlay out of the trust funds, &c.

"*Opinion.*—I have no doubt as to what my decision should be in this case, and never had although I was anxious to hear argument upon it in case there might be more in the case than at first appeared to me.

"It is a claim by a married lady against trustees to repay money which strictly speaking ought to be paid to her, but which was applied to her benefit in a somewhat different way—that is to say, the lady's husband's life being insured for her benefit the trustees, instead of paying over to her the whole life interest in terms of the marriage-contract, paid out of her income the premiums due on the husband's policy of assurance from which she was eventually to derive benefit.

"Now, it is clear enough that Mr Boyd, who took the chief management of the trust, explained this from the very beginning to Mrs Spence, and that she was throughout perfectly aware that a part of her income was applied towards keeping up the policy. And I am not sure that if she had been told that this application of the money depended on her assent she would have refused her assent, because it was obviously an arrangement for her interest and that of her children. But it certainly was not explained to Mrs Spence that her assent was needed. I think that Mr Boyd was himself under the belief that the trustees had the power of making this application of the money, and, being in that belief, it was not likely that he should convey any different impression to Mrs Spence than was in his own mind. One argument submitted to me was that it was the duty of every beneficiary to know his rights under the trust-settlement. That view can only be received with very large qualifications. It is certainly held to be the business of every man to possess such knowledge of the civil law as is necessary to regulate his conduct in any business in which he may be engaged. A merchant must understand the law of contracts and bills. A shipowner must understand maritime law, and if either makes a mistake he must suffer for

it. He cannot throw the loss upon any other party. But in matters between trustees and beneficiaries, where trustees have no interest distinct from that of the beneficiary, I should not hold that the beneficiary is barred from having the mistake in law—if there has been such—put right. It would obviously depend to some extent upon the consideration whether matters could be put right without detriment to other interests. But in the view I take of this case it is not necessary to consider such questions, because when Mrs Spence came to borrow money upon the security of her beneficiary interest, she employed an independent agent, Mr M'Intosh, a gentleman of ability and experience in his profession. He, going into the whole question of her rights under the settlement, clearly raised the point whether the trustees were entitled to appropriate his client's money to paying premiums, and the trustees were informed that Mrs Spence would not consent to a further appropriation of her money towards such purposes. It is, however, clear to my mind that if Mrs Spence was entitled to prevent the trustees from further payments she must be entitled to hold them responsible for former payments. That was the time to raise the question as to their appropriation of the estate. But this was not done. On the contrary, there being naturally some demur on the part of the trustees to the course of administration, it was eventually agreed as a fair arrangement between the parties, recognising that they were dealing with a point of some difficulty, that the policy should be sold so as to relieve Mrs Spence from the burden of paying the premiums. But with the view of protecting the children the proceeds were to be invested and held to be part of the trust-estate. Now, I hold that this was an arrangement entered into on behalf of Mrs Spence by an agent duly authorised, and certainly not exceeding the powers of an agent in family matters. Under that arrangement Mrs Spence brought forward all the claims that she intended to make against the trustees. They assented to her wishes so far as they thought it their duty, and that was an end of the matter. It is quite contrary to sound policy and legal principle that a party who, in full knowledge of her rights, has come to an arrangement with trustees should be allowed to re-open that question.

"In that view I have no hesitation in dismissing the personal conclusions against the trustees.

"With regard to the claim to be repaid the policy money out of the trust-estate, I think it must be held that Mrs Spence has irrevocably appropriated that money to the purposes of the trust. Even if the children were represented in the action I have great doubt whether the Court could hold that that money could be taken from them. Most certainly not in an action where the children were not represented. Therefore, on the other view of the case, I must come to the conclusion that the claim is not supported. I shall therefore assoilzie from the conclusions of the action generally."

The pursuers reclaimed, and argued—There was here a clear breach of trust on the part of the trustees. The two trusts which were constituted by the antenuptial contract of marriage were intended to be kept quite distinct, and only funds supplied by the husband were to be used in keeping up the policy; indeed the trustees had been appointed in order to protect the wife from her husband's actings. They had, however, taken the money which was meant for her aliment, and used it for keeping up the husband's policy. It was said that the wife had homologated the actings of the trustees in this matter, but that was not so. The only information and guidance she got was from the trustees themselves, and she was led by them to think that they had the power to apply the income of the trust-estate to this purpose apart from any consent given by her. The trustees were themselves under that opinion; they acted upon it, and impressed it upon her. She was led astray by the trustees, who were acting in breach of their duty, and where that was the case the trustees were answerable—*Douglas* v. *Douglas' Trustees*, June 30, 1859, 21 D. 1066, July 20, 1864, 2 Macph. 1379; *Saunders* v. *Saunders' Trustees*, November 7, 1879, 7 R. 157. The letter of 5th April 1878, founded upon by the defenders to show that Mrs Spence had authorised the sale of the policy, did not bar her from now claiming the amount of the premiums paid by the trustees in breach of their trust from 1865 until 1877. This case was different from that of *Kippen* v. *Kippen's Trustee*, July 10, 1874, 1 R. 1171, as there the trust had been wound up for some time before the question was raised, and legacies had been paid, but in this case there were no interests of third parties to be considered. In regard to the manner in which the original and supplementary action had been brought the pursuers had followed the authorities—*Houston's Factor* v. *Houston's Trustees*, January 29, 1868, 6 Macph. 286.

The respondents argued—Mr Boyd and the other trustees had paid these premiums under the powers conferred by the trust-deed. Even if they were wrong in this view, they could not be held liable for what they had done as trustees in the exercise of their discretion, and with the *bona fide* belief that they were doing the best for the beneficiaries. The marriage-contract must be looked at as a whole. On the one hand Mr Spence insured his life for £600, and on the other, Mrs Spence, by means of her trustees, lent £600 to her husband. That policy was the only provision for the wife and children, and the trustees were entitled to keep up the policy by means of the liferent income so long as Mrs Spence did not object. She was fully cognisant of what was being done, and made no objection. Therefore she had homologated the actings of the trustees. [Lord Rutherfurd Clark—She made no objection because she was told by the trustees that they could apply the money in that way if they thought proper without her sanction.] Assuming that was so, the trustees were under that belief themselves; that was an error in law, and according to the opinion of the Lord Justice-Clerk in the case of *Kippen*, an error in law would not avail to set aside an agreement or contract—*Graham* v. *Jolly*, June 29, 1831, 5 W. & S. 280. Mrs Spence was barred by the terms of her holograph letter of 5th April 1878 from claiming repetition of the premiums previously paid. The action was not properly brought, as the pursuers had selected one trustee only without

calling the representatives of the others. Then, when the Lord Ordinary had sustained the plea for the defenders of all parties not called, the pursuers had brought what they called a supplementary summons, which was not a summons at all, as it had no conclusions. The pursuers had not yet complied with the terms of the Lord Ordinary's previous interlocutor.

At advising—

Lord Justice-Clerk—In this case several pleas have been maintained on the part of the pursuers, Mrs Spence and her husband. The action is brought against the only surviving trustee under Mr and Mrs Spence's marriage contract, and it seeks repetition of certain payments which were made by the trustees under that contract out of the accruing interest or liferent to which the wife was entitled under the contract. These payments were made for the purpose of keeping up a policy of insurance by paying the premiums which the husband was bound to maintain on his own account, and which still remain apparently as debts against him.

The grounds upon which the challenge is made are, first, that the trustees were not entitled under the marriage settlement to make these payments; in the second place, that although the pursuer consented or acquiesced in their being made she was not aware at that time of her legal rights; and thirdly, it is contended that notwithstanding a certain agreement which was made between the spouses and the trustee, she is entitled to recover these payments from the trustee.

I think the case is one of considerable importance in some aspects of it, but the result at which I have arrived is that in consequence of the agreement that was come to in 1878 to sell the policy, and add the proceeds to the capital sum under the trust, there is no longer any ground for going back to consider the propriety of the former payments, and that the pursuers are substantially foreclosed from raising that question. I wish, however, just to say a word or two upon each of the views, because I rather think that the case stands in a different position from that in which it was presented at the bar.

This is not a case between trustee and beneficiary. It is a case between truster and trustee; between the author of the trust and the trustees who act under the authority so conferred. That is a material distinction as regards one part of the argument presented to us. Now, without going into the facts, my views upon the three heads are simply these—In regard to the question of authority under the trust-deed, I think it a more difficult question than it struck me as being at first. I am not prepared to say that the trust-deed does authorise these payments, but I do not think it is a question free from doubt, and on this ground that there was a provision in the trust-deed that the husband should receive a payment of £600 out of the wife's fortune, and the insurance in question was intended to provide for that sum coming back to the trust when the insurance should take effect, and the sum became due on the death of the husband. It was intended as a security and counterpart of this payment which was to be made simply on the husband's own credit out of the trust funds. No other property belonging to the husband was conveyed to the trustees. The whole property conveyed to the trustees as was known at the time was the property of the wife. Now, in those circumstances the trustees were authorised, in the event of the husband not paying the premiums, to advance the money, keeping it up as a debt against the husband. It is not said out of what fund that advance is to be made, but the fact remains that there were no funds of any kind or description handed over to the trustees out of which it could be made, except the property of the wife. The wife herself, by being a party to this deed, authorises the trustees to pay the premiums in the event of their thinking it desirable to do so, and the question is—I do not say the thing is clear—but the question is, whether that does not amount substantially to a mandate from the proprietrix who was setting up this trust, and prescribing the conditions under which power was given to the trustees to pay the money out of the only fund they had. I think there is more weight due to that view than I was at first inclined to give it.

But, in the second place, even irrespective of the ultimate agreement, I do not think I could have found the trustees liable for these payments. It is not like a case of election or repudiation of conventional provisions. It is a series of acts on the part of the truster herself with regard to her own estate going over two-and-twenty years, during which these payments were made by the trustees in satisfaction of the premiums of insurance without any objection, so far as I can see, on the part of Mrs Spence. Mrs Spence was entitled to make them if she chose to use her liferent in that way, and she was entitled, I think, also to direct her trustees to do it, or to approve of what her trustees did. I do not think there can be much doubt about that. It is said she did not know her rights. But she was herself a party to the marriage-contract; the rights were conferred upon herself, and no-one else, for no-one else had the property to which they applied. Now, although no doubt it is desirable in many cases in questions with trustees, to consider how far the party who is said to have acquiesced or homologated was aware of his or her rights, still in the case of the truster himself or herself, and when the act relates to payments made year by year—or rather half-year by half-year—on nearly forty different occasions without any representation to the contrary, I think it cannot be maintained that the truster was not aware of her rights. I think she was quite aware of her rights, and that she deliberately and intentionally gave her sanction to payments in which she had a deep interest, because it is quite certain that if they had not been made the policy must have fallen, and the £600 must have been ultimately lost to the estate.

I have indicated the views which have occurred to me on these matters, and looking to the termination of this long course of dealing—I mean the agreement to which both husband and wife were parties, and under which the trustees undertook to sell the policy and to add the proceeds to the trust-estate—I do not think the pursuers can now go back and raise any question either on the bygone use of the liferent right or the bygone payments of premiums. I think all matters were merged in that agreement, and on that ground I am pre-

pared to affirm the judgment of the Lord Ordinary.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court adhered.

Counsel for the Reclaimers — Kennedy — M'Lennan. Agent—D. Macaulay, S.S.C.

Counsel for the Respondents — Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, February 2.

FIRST DIVISION.

[Sheriff of Forfarshire.

GUTHRIE, CRAIG, PETER, & COMPANY *v.* MAGISTRATES OF BRECHIN.

(*Ante*, 12 R. 469, and 22 S.L.R. 343.)

Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec. 77—Rivers Pollution Prevention Act* 1876 (39 *and* 40 *Vict. cap.* 75), *sec. 7—Drainage—Burgh.*

A manufacturer whose works were within burgh, and who was liable for drainage assessment, presented a petition in the Sheriff Court, founding on the 77th section of the Public Health Act 1867, and the 7th section of the Rivers Pollution Act 1876, to have a local authority ordained to allow him to empty the drains containing the discharge from his works into the burgh sewers. The defenders, founding on the latter section, stated that the discharge in question would prejudicially affect the sewers and the quality of the sewage.

Held, upon a report by two men of skill, that the defenders' averments were not proved, and that therefore under the statutes they were bound to allow the pursuers to empty their drains into the burgh sewers.

Messrs Guthrie, Craig, Peter, & Company were the tenants and occupiers of the Brechin Paper Mill Manufacturing Works, within the burgh of Brechin, and as such were liable for sewerage or drainage assessment to the Magistrates and Town Council of the burgh, who were also the local authority under the Public Health (Scotland) Act 1867, and the Public Health (Scotland) Amendment Act 1871. Section 77 of the Public Health (Scotland) Act 1867, provides—"Any owner or occupier of premises within the district of a local authority, liable for general or special sewerage or drainage assessment, shall be entitled to cause his drains to empty into the sewers of such local authority on condition of his giving twenty days' previous notice of his intention so to do to the local authority, and of complying with their regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the local authority to superintend the making of such communications."

On 12th March 1883 Messrs Guthrie, Craig, Peter, & Company gave the Magistrates notice, in terms of the 77th section of the Public Health (Scotland) Act 1867, that they desired to cause the drains from their works to empty into the sewers within the burgh, and intimated their readiness to comply with the regulations as to the mode in which the communication should be made and otherwise.

The Magistrates replied agreeing to give facilities for enabling them to carry the liquids proceeding from their works into the public sewers, provided they were satisfied that this would not prejudicially affect the sewers or the sale of the sewage matter conveyed along the sewers.

Messrs Guthrie, Craig, Peter, & Company obtained a report from a chemical expert to this effect, but the Magistrates refused to allow any communication between the drains and the sewers to be made.

Messrs Guthrie, Craig, Peter, & Company accordingly presented a petition in the Sheriff Court of Forfarshire at Forfar, praying that the Magistrates should be ordained "to allow the pursuers to cause the drains of and containing the liquid flow from the Brechin Paper Mill Manufacturing Works, situate on the river South Esk, within the burgh of Brechin, tenanted and occupied by the pursuers, to empty into the sewers of the defenders in or near River Street within the said burgh of Brechin; and to find that the pursuers are entitled to make all proper communications between their said drains and the said sewers for the purpose aforesaid, on condition of the pursuers complying with the defenders' regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the defenders to superintend the making of such communication."

Besides founding on the 77th section of the Public Health Act 1867 (above quoted), they set forth the 7th section of the Rivers Pollution Prevention Act 1876. That section provides—"Any sanitary or other authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers, provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise, be injurious in a sanitary point of view; provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, or where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

The defenders stated in answer, that as part of a new drainage system which had recently come into operation, the sewage running through their drains which entered the river South Esk was now under a new scheme prevented from falling into the South Esk till it had been purified by passing through a sewage farm, and they averred that the discharge from the pursuers' drains would