under or in terms of the Public Health (Scotland) Act 1867, and it has its officer appointed under the provisions of that statute. The question therefore comes to be, whether in discharge of their duties under that Act the Parochial Board were entitled to order the demolition of the pursuer's house? I cannot find in the statute any authority for such a proceeding. They are entitled when they find a nuisance to order its removal, but they are not entitled to order a house to be pulled down. One can imagine a case in which the health of the inhabitants of a district might be so imperilled by the insanitary condition of a building that its removal might become a matter of necessity; but that is not the case which we have at present to deal with. No doubt this house, from not being occupied, had become a nuisance, but any objection which arose from this could easily have been remedied without necessitating its being pulled down.

It appears to me that the Sheriff has gone wrong on the general question raised under the statute, and that his interlocutor must therefore be recalled.

With regard to the amount of damages, I cannot agree with the sum found due by the Sheriff-Substitute, as I consider it in the circumstances excessive, and I propose, if your Lordships should agree with me, that we should reduce the amount to £10.

LORD ADAM—I think that the view of this case taken by the Sheriff-Substitute is the right one except in respect to the amount of damage sustained by the pursuer. I think that he has assessed the damage far too high, and that the sum named by your Lordship is reasonable in the circumstances.

[*His Lordship here enumerated the parties to the action and the facts established by the proof as above narrated.*]

The whole defence to the present action is grounded on section 118 of the Public Health Act of 1867; but from what I have already observed, it is clear that in what was done the officer was not acting in terms of the statute, but entirely outwith its provisions, and they are accordingly not entitled to the protection which the Act secures.

There is, however, the further question as to how far the Local Authority is to be held responsible for actings of their officer. Upon this matter I should have had considerable doubts had it not been for the admission appended to the report of their proof, by which they virtually adopt his actings. That being so, I can only view the actings of Leitch as being for and by the authority of the Parochial Board, and being so they are conclusive of the present case.

LORD M'LAREN—It was practically admitted in the Court below, and it has not been disputed here, that the act which is complained of was *ultra vires* of an inspector of poor. The Public Health Act no doubt gives extensive powers connected with the removal of nuisances, subject however to the approval of the Sheriff.

In the present case a double error was committed—first, in treating as a nuisance a building which did not fall under that category; and second, in not following out the provisions of the statute.

In considering how far a public body is liable for its servants, it is clear that when an illegal act is done by the servant, the principal must either approbate or reprobate the action.

What the public authority has done in the present case is to approve of and adopt the action of their servant, and then to plead the protecting clause of the statute. But in order to secure that protection the action complained of must have been done by the servant in the *bonâ fidê* execution of the statute, and that was not what occurred in the present case.

If the act done be not within the scope of the statute, then I do not think that the three months' limitation provided by the 118th section has any application. As regards the amount of damages I concur in the sum fixed by your Lordship.

LORD KINNEAR concurred.

The Court recalled the interlocutor of 2nd August and 23rd October 1890, and assessed the damages at £10.

Counsel for the Pursuer—M'Kechnie—Baxter. Agents—A. J. & J. Dickson, W.S.

Counsel for the Defenders—Jameson—Salvesen. Agent—R. Stewart, S.S.C.

Tuesday, June 2.

SECOND DIVISION.

SIR ROBERT JARDINE, BART. *v.* JOHNSTONE AND OTHERS.

Entail—Disentail—Whether Provision to Children a Burden on the Entailed Estate—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *secs.* 6 *and* 21.

By section 6 of the Entail Amendment Act 1848 provision is made, in the event of an entailed estate being disentailed, for existing debts and provisions in favour of younger children; and by section 21 it is provided that such provisions may be made a burden upon an entailed estate by way of bond and disposition in security.

A deed of entail dated in 1769 conferred power upon the heirs of entail to give suitable provisions for their children "to affect the rents of the lands, . . . such provision to be given by each heir of entail to his or her children . . . not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of entail possessing the estate and the rents thereof to the extent of one-half of whatever the heir

does possess yearly, . . . so that the whole provisions shall at no time exceed the sum of three years' rent." . . .

In 1818, in virtue of said power, Sir Archibald Grant, the heir of entail in possession, granted a sum by way of provisions in favour of his children amounting to three years' rent of the estate. He was succeeded in the entailed estate by his eldest son Sir James Grant, who possessed the property from 1820 to 1859, and died unmarried, without having paid off any of the provisions in favour of his brothers and sisters. The estate was disentailed in 1889, when it was *held* that the said sum was not a debt due by the representatives of Sir James Grant, but a provision affecting the fee of the entailed estate.

Sir Archibald Grant (I.), Baronet, of Monymusk, Aberdeenshire, entailed the estate of Monymusk in 1769 by a deed of entail, which contained the following provision with regard to the powers of heirs of entail to make provisions for their children—"And excepting also from the said restriction and limitation upon the heirs of entail, power to the said heirs of tailzie above specified to give suitable provisions to their children other than the heir of entail for the time being, to affect the rents of the lands and others contained in this deed of settlement, such provision to be given by each heir of tailzie to his or her children, other than the heir, not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of tailzie possessing the estates and the rents thereof to the extent of one-half of whatever the heir does possess yearly, and any estate, real or personal, belonging to them, other than the said entailed estate or rents thereof, until the provisions given in manner foresaid to the children of the former heirs of entail shall be satisfied and paid, at least shall affect the same no further than to the extent of what shall have been paid or otherways extinguished of the provisions given to the children of the former heir, so that the whole provisions shall at no time exceed the sum of three years' rent."

In 1818 Sir Archibald Grant (III.) bound and obliged himself, and the heir and heirs of entail succeeding to him in the said lands and estate of Monymusk, to satisfy and pay out thereof to his younger children after named the sum of £10,857, "which I compute to be within three years' rent of the said entailed estate, and . . . constitutes a capital of provision money payable from the said estate to the said children, . . . which sum I appoint the heir of entail succeeding to pay to them in the proportions following." . . .

He died in 1820, and was succeeded by his son Sir James Grant, who made up titles in 1821 as heir to his father under the said entail, possessed the property from 1820 to 1859, and died unmarried, without paying off any part of said provision in favour of his brothers and sisters.

Sir Arthur Henry Grant made up titles under the entail by service in 1888, and in 1889 disentailed the estate of Monymusk.

In consequence of certain difficulties having been raised by the reporter (Mr H. B. Dewar, S.S.C.), to whom the Lord Ordinary had remitted the petition for disentail, a special case was presented by Sir Robert Jardine, Bart., of Castlemilk, and others, as in right of those in whose favour the said provision of £10,857 was made in 1818, and upon which the successive heirs of entail in possession paid interest regularly until 1889, of the first part, the said Sir Arthur H. Grant of the second part, and the representatives of the said Sir James Grant of the third part, to obtain the opinion and judgment of the Court upon the following question, viz.—"At the date of the disentail executed by the second party, did the said sum of £10,857 affect, or could it have been made to affect, the fee of the entailed lands of Monymusk, or the heirs of entail possessing the same?"

The first and third parties maintained that the sum in question was or could have been made a burden on the entailed estate.

The second party maintained that it was a debt which could not have been made to affect the estate, but which it fell to the representatives of Sir James Grant (*i.e.*, the third parties) to pay.

The Entail Amendment Act 1848 (11 and 12 Vict. c. 36), by section 6, provides "That where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session . . . in order to disentail such estate . . . he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children affecting, or that may be made to affect, the fee of the said entailed estate or the heirs of entail, or if there are such debts or provisions, setting forth the particulars of the same, . . . and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions." . . . And by section 21 it provides "That in all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail by way of provisions to younger children, . . . in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, . . . it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate, . . . by granting bond and disposition in security over such estate, . . . for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date till repaid, and with corresponding penalties." . . .

Argued for the second party—Each heir of entail was under the deed of entail entitled to burden the estate to the extent of three years' rent, and to enable him to

do so he was necessarily under the corresponding obligation of paying off annually any provision made by the preceding heir of entail in possession to the extent of one half-year's rent. If he failed to do so, the obligation to pay that half-year's rent passed to his representatives, and ceased to affect any succeeding heir of entail in possession. Further, in the clause constituting the debt there was a direction to the heir of entail succeeding to pay. In the case of *Hope Johnstone*, November 27, 1880, 8 R. 160, relied on by the third parties, the burdening power was not limited as here to the amount of three years' rent in all. There there might be several such bonds. The only restriction was as to the amount the heir of entail in possession could be called upon to pay in one year. The Rutherfurd Act, here relied on, only applied where the charging was charging indefinitely, not where, as here, it was contemplated that the debt would be paid off within a certain limited period—*Campbell*, January 26, 1854, 16 D. 396, and *Baillie*, reported in Duncan on Entails, p. 239.

The other parties were not called upon.

At advising—

LORD JUSTICE-CLERK—The deed of entail before us is somewhat obscurely expressed, but presents in my opinion little difficulty as regards the point which has been argued. The question is, whether the sum of £10,857, which was placed as a burden upon the lands and estate of which the second party is now fee-simple proprietor, is to be dealt with as no longer due by him as heir of entail coming into possession of the estate with the burden upon it?

I do not find in the language of the deed which empowered the granting of the provision anything to indicate that if the creditor in the bond failed to exact from the heir of entail in possession during the lifetime of the latter the amount of the debt, the creditor's right was annulled as against the heir.

I do not see any distinction between this case and the case of *Hope Johnstone*. The two cases are on all fours; accordingly, the first question must be answered in the affirmative.

LORD YOUNG—I am of the same opinion. I think it is very clear that the first question must be answered in the affirmative. The only argument against the validity of the bond of provision is a clause in the deed of entail protecting the heir of entail in possession from being compelled to pay more than half-a-year's rent in any one year. I do not think that provision affects the question at all. It is a protection to the heir of entail in possession against creditors pressing him unduly, but to infer from it that if the creditor in the bond does not press him to the extent of half-a year's rent annually, the creditor's right as against the estate is gone, and his only action is against the representatives of the deceased heir, is almost extravagant. Is a bond of provision for the amount of one half-year's rent to be extinguished as against the estate upon the death of an heir of entail, who had only had possession for one year, nothing having been paid off, and no new bond having been put on in the course of the year? And if not, the length of time an heir is in possession can make no difference as to the creditor's right. I think this was a good burden on the estate at the date of the disentail.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court answered the question in the affirmative.

Counsel for the First Parties—W. C. Smith. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Second Party—Asher, Q.C.—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Third Party—Wilson. Agents—Auld & Macdonald, W.S.

Wednesday, June 3.

FIRST DIVISION.

WATSON AND OTHERS (SCOTT'S TRUSTEES) *v.* AITON AND ANOTHER.

Process—Special Case—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 63 *—Competency.*

A contract of copartnery provided that on the death of one of the partners, and in the event of the firm being employed to wind up his affairs, they should only be entitled to charge one-third of the usual professional fees and commission. The trust-deed of this partner provided for payment of any expenses incurred by the firm in terms of the partnership deed. The partner died in 1888, and prior to 28th March 1890 the firm had realised, ingathered, and invested the whole estate, and thereafter the trust subsisted for payment of certain annuities and the accumulation of the balance of income for the residuary legatee.

The trustees and the residuary legatee sought the opinion of the Court as to whether the restriction of professional fees and remuneration ceased to be operative after 28th March 1890.

The Court, on the ground that the questions submitted were hypothetical, and suited for the opinion of counsel, *dismissed* the special case as incompetent.

The deceased James Scott, law agent and banker, Stonehaven, died on 28th March 1889. He was a partner of the firm of Scott, Gardner, & Logan, the other partners being John Clanachan Gardner and David Logan.

By contract of copartnery, which was to endure for five years from June 1888, it was, *inter alia*, provided that "on Mr Scott's death, and in the event of Messrs