never reached within five or six steps of it, and accordingly if the jury took it into consideration their verdict is clearly contrary to the evidence.

As regards the want of a hand-rail, as I understand, there is no universal obligation upon a landlord to put up such a rail, and accordingly his liability must depend upon the circumstances of the case. The deceased man became tenant of the house, and must have been satisfied at that time with the condition of the stair. There has been no alteration in it from that time, and accordingly I agree that it was his duty to complain to the landlord and insist upon the rail being put in. There is no evidence that he did so complain, and I am therefore of opinion that the verdict of the jury finding the defender liable was contrary to the weight of the evidence.

LORD M'LAREN—If the only point in the case had been the want of a hand-rail on the staircase, then supposing the demand had been made at the end of the pursuer's case, I might have directed that there was no evidence of fault to go to the jury. The contract between the defender and the deceased was a contract to hire a house with no rail on the staircase. There was no illegality in making such a contract, and if a tenant hires a defective house he is in the same position as a workman, in the analogous contract of the hiring of labour, who accepts a known danger.

There were, however, other elements which did not amount to much. The lighting was plainly enough not the landlord's fault, because the lamp must be kept lighted by the tenant. There was, however, the point about the stair being out of repair, and no doubt it was the landlord's duty to repair it if he was made aware of a defect in it.

There was therefore a difficulty in withholding the case from the jury. But assuming that I gave the jury the proper direction—and I have no very distinct recollection as to what passed—I think that the jury ought to have found for the defender, because the case as to the condition of the stair failed, and the want of a hand-rail was according to the contract of the parties. I therefore agree that the verdict is contrary to the evidence.

LORD KINNEAR concurred.

The Court made the rule absolute and granted a new trial.

Counsel for the Pursuer—Comrie Thomson—A. M. Anderson. Agent—D. Howard Smith, Solicitor.

Counsel for the Defender — Dewar — Grainger Stewart. Agent—Hugh Martin, S.S.C.

Tuesday, November 10.

FIRST DIVISION.

LAURENSON *v.* POLICE COMMISSIONERS OF LERWICK.

Police—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 143, 339—*Competency of Appeal to Court of Session from Order of Commissioners.*

The Police Commissioners of Lerwick ordered an owner of property in that burgh, in terms of section 142 of the Burgh Police Act 1892, to repair the foot-pavement "before your property . . . to a width extending outwards from the boundary of your property half the breadth" of the street. The said street, which was a public street, and one of the principal thoroughfares of the town, was paved over its whole surface, there being no footpath, kerb, or gutter, and it was not alleged that any portion thereof was the property of the proprietor in question.

Objection having been taken to the competency of an appeal presented in the Court of Session, under section 339 of the Act, against the order of the Commissioners, *held* that the appeal was competent, the right of appeal to the Sheriff, specially provided by section 143, being confined to cases where the property of the appellant is affected by the order complained of, and no such interference with property being here in question.

This was an appeal presented under section 339 of the Burgh Police Act 1892 by Laurence Laurenson, draper, Law Lane, Lerwick, against an order of the Police Commissioners of that burgh, on the ground that the said order was *ultra vires* of the Commissioners and illegal.

The notice served on the appellant, and containing the order complained of, intimated a resolution of the Commissioners, in terms of the Burgh Police Act 1892, section 142, to undertake the maintenance and repair of all the footways in the burgh: "And they therefore now call upon you, in terms of the foresaid section, . . . to have the foot-pavement before your property . . . to a width extending outwards from the boundary of your property half the breadth of said street . . . put in a sufficient state of repair." Notice was further given that, in the event of the appellant failing to do so, the work would be executed by the Commissioners at his expense. The notice concluded:—"Should you desire to appeal, you are referred to section 339 of the Act."

The appellant averred—"The said Law Lane is a public street within the meaning of the foresaid Act, and is one of the leading thoroughfares from Hillhead to Commercial Street, which is the principal street in the town of Lerwick. The foresaid lane or street, like all the old streets in Lerwick, including Commercial Street, is paved over

its whole surface. It is without footpath. kerb, or gutter, and said street forms the only available way for traffic of all kinds. The said lane or street is so narrow that no proper footpaths could be constructed along its sides, and it is used for all kinds of traffic across its whole breadth. The maintenance of the said lane or street as one of the public streets of the burgh is imposed on the respondents by the foresaid Act. Section 142 of the Act, under which the said notice professes to be given applies only to the foot-pavements along the sides of streets, and it does not apply to carriageways or to such streets as Law Lane, which are used for all kinds of traffic across their whole breadth, and in which it is impossible, or at least impracticable, as in some parts of Commercial Street, to form foot-pavements along the sides."

The respondents lodged answers, in which, while admitting the appellant's averments, and averring that the pavement of the lane in question had always been maintained by the adjoining proprietors, they contended that the appellant had no power to appeal under section 339, but that his appeal was regulated by section 143, under which appeal to the Sheriff only was allowed.

Section 142 of the Burgh Police Act 1892 (55 and 56 Vict. cap. 55) empowers the commissioners of a burgh to undertake the maintenance and repair of all the footways of the burgh, and when they do so to call upon all owners to have their foot-pavements before their properties put in a sufficient state of repair, failing which the commissioners may cause the same to be done at the owners' expense.

Section 143—"As regards the making, altering, paving, or causewaying and maintaining streets and foot-pavements, it shall be lawful for any person whose property may be affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner hereinafter provided."

Section 339—"Any person liable to pay or to contribute towards the expense of any work ordered or required by the commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved by any order . . . of the commissioners . . . may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session."

Argued for the respondents—The appeal was incompetent. Section 339 only allowed an appeal where an appeal had not been otherwise specially provided; and an appeal in matters of "making, altering, paving, or causewaying and maintaining streets" was specially provided by section 143. The appellant's proper course would therefore have been to appeal to the Sheriff.

Argued for the appellant—The appeal was competent. Section 143 gave a very limited right of appeal—a right confined to purely structural matters, as to which a local judge was peculiarly qualified to decide. The appellant here did not complain of any structural interference with his property by the operations of the Commissioners; what he was aggrieved by was the attack upon his purse. The question, in short, was one of liability to assessment, and all such general questions fell under section 339.

At advising—

LORD ADAM—[*After stating the facts and citing sections* 143 *and* 339 *of the Burgh Police Act his Lordship proceeded*]—The question therefore is, whether an appeal is competent under the 143rd section. That the appeal under section 143 relates to the subject-matter of this case is clear enough. But then it is necessary to see to whom appeal is given in such cases, and it will be observed that the appeal is given to "any person whose property may be affected, *and* who thinks himself thereby aggrieved," and not, as in section 339, where appeal is given to any person whose property is affected, "*or* who thinks himself aggrieved." It is not as under the 339th section. Therefore it appears to me that for an appeal to be competent under the 143rd section the appellant must be a person whose property is affected. Now, it is nowhere set out in the proceedings here that the appellant's property is affected. The notice bears that the foot-pavement which is to be repaired "extends outwards from the boundary of your property." Therefore it is quite clear from the order in question that no part of the appellant's property is taken or affected by this order. His purse is affected undoubtedly, but not his property.

Suppose, then, that in this case the appellant had brought an appeal under the 143rd section, he would be met with the plea of incompetency, in respect that his property was not affected; and I confess I do not see what answer he would have had. I can quite understand that an appeal under that section would have been competent if, for example, the accesses to his property had been interfered with by altering the levels of the street or otherwise; but I do not see in this case anything of that sort—where his property is not touched, and all that is done is to order him to repair a foot-pavement outside his property altogether—or how it can be said, in the sense of the Act, that his property is thereby affected. It therefore appears to me that the appeal specially provided in section 143, and referred to in section 339 does not apply to this case, for I do not think it was an appeal open to him. Therefore the conclusion I arrive at is that the appeal under the 339th section is right, and accordingly that the objection to the competency must be repelled.

LORD M'LAREN—I am always disposed to put a liberal construction on clauses in general or local Acts of Parliament, giving an appeal to this Court on questions of construction. Such clauses may be liberally interpreted, because it is convenient for those who are to administer the Acts that these clauses should be interpreted by the highest authority. Coming to the consideration of this prejudicial plea, with a certain bias in favour of sustaining the right of appeal, and keeping in view the peculiar

character of the streets of Lerwick, I agree with Lord Adam that the objections to the competency of the appeal may be repelled. I think that in the case of the burgh of Lerwick there are grounds for the contention that this is not a mere question of fact, because the streets of Lerwick are not constructed for vehicular traffic, and there is no distinction of footway and causeway. Again, it is said that the whole streets are the property of the burgh, and that this is merely a question of assessment. At the same time I do not wish to be understood to say that in any burgh, where the streets are of the ordinary character, the householder, by merely saying that the pavement is not his property, can exclude the jurisdiction of the Sheriff and obtain the benefit of the appeal to this Court. That will have to be considered if the question should arise.

Lord Kinnear—I agree with Lord Adam for the reason he has given. I think the 339th section provides an appeal generally to various classes of persons—persons who may be "liable to pay or to contribute towards the expense of any work ordered by the commissioners," and persons "whose property may be affected" by the order of the commissioners, or who may "think themselves aggrieved by such order," though not called upon to pay or contribute towards the expense. Now, I assume that if the present appeal could be shown to fall under section 143, it would be incompetent by reason of the provision that the appeal given in section 339 shall be open only if it is not otherwise specially provided in the Act. But I agree with what Lord Adam has said, that the 143rd section gives an appeal, not to persons who complain of an order on the ground that they may be wrongfully called upon to contribute towards the expense of its execution, but only to persons whose property may be affected by such an order, and who think themselves thereby aggrieved. Now, the appellant does not complain upon that ground. He does not allege that the footpath to be repaired is his property, nor that the repair will in any way affect the property belonging to him and bounded by the footpath. On the other hand, the Commissioners do not allege that the footpath is the property of the complainer, but on the contrary they call upon him to contribute to the expense of a footpath bounding his property. And therefore I cannot find anything to disclose a complaint that the order in question affects the property of the appellant. I think it is a complaint upon another ground, and therefore within the 339th section.

Lord President—I do not differ.

The Court repelled the objection to the competency of the appeal.

Counsel for Appellant—Balfour, Q.C.—Galloway. Agents—Carmichael & Miller, W.S.

Counsel for Respondent—J. G. Stewart. Agents—Irons, Roberts, & Co., S.S.C.

Saturday, November 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

GEMMELL (CUMING'S TRUSTEE) *v.* CUMING AND OTHERS.

Trust—Marriage-Contract Trust—Denuding of Trust Funds—Fund Held as Security for Annuity.

By antenuptial contract of marriage, a husband, after providing an annuity to his wife and binding himself to pay £500 at his death to the children of the marriage, assigned a life insurance policy to trustees "in security and for payment *pro tanto* to the said M. S. [his wife], in the first place, of the foregoing provisions in her favour, and in the second place, for security and payment of the foresaid provisions in favour of the children of the marriage . . . which sum of" £500, "and the sums to be received in virtue of the foresaid policy, in so far as the same may not be applied for payment of the foresaid provisions to the said M. S. are to be divided among the said children in such proportions as the said" spouses, "or the survivor of them, shall appoint by a writing under her or his hand, and failing of such appointment, to be divided equally among the survivors of them and the issue of such as may have predeceased leaving issue." The husband was survived by his widow, two daughters, and a grandson by a predeceasing daughter. *Held* (*aff.* the judgment of Lord Pearson) that the trustee was not entitled to pay the proceeds of the policy to the two daughters during the widow's lifetime in terms of a deed of appointment executed by her, but must retain and administer them as trust funds.

Opinion reserved as to the date of vesting of the proceeds of the policy.

Succession—Vesting—Marriage-Contract—Clause of Survivorship—Power of Appointment.

By antenuptial marriage-contract a wife conveyed her whole property and *acquirenda* to trustees for payment of the yearly profits thereof to herself and her husband during their joint lives, and, on the death of either, to the survivor, "and after the death of the longest liver of the said" spouses "the said trustees shall be bound to denude of the said trust and pay over or convey the said trust estate to the children of the marriage in such shares or proportions as may be appointed by the said" spouses, "or the survivor of them, by any writing under their hands, and failing such writing, then the said trustees shall be bound to pay and convey the same to the said children equally and to the issue of such child or children as may have predeceased, such issue having only the share to which their parents would have