question had been an arrestment in execution, or if it had been followed up by arrestment on the dependence of the action, nothing would have been attached, and for that reason and others which your Lordship has given I am of opinion that this arrestment is altogether inept. If there be any novelty in the question as actually raised—and I think there is, because so far as direct authority goes it is a new point whether this was or was not an effectual arrestment *ad fundandam*—then I think the rule for our decision is furnished by the opinion of the whole Court in *Cameron* v. *Chapman*, 16 S. 907, in which Lord Corehouse, after pointing out the opposition between the doctrine of jurisdiction founded on the arrestment of moveables and the general principles of jurisdiction both in our own law and in the Roman law, goes on to say that while an artificial method has been so established, the Court are of opinion that it must not be carried further in any case than is expressly warranted by authority and precedent. Now, I think we are asked to carry it further in this case than it has ever been carried in any previous decision, so far as I know or counsel at the bar were able to inform us. I therefore agree that we should adhere to the Lord Ordinary's interlocutor.

LORD DUNDAS—I am entirely of the same opinion and upon the same grounds. Your Lordships have dealt with the case so exhaustively both as regards the law and as regards the facts, which I think present more difficulty than the law, that it would be idle for me to attempt to add further words on my own behalf.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Hunter, K.C.—Macmillan. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders (Respondents)— M'Clure, K.C.—Constable. Agents—Blair & Caddell, W.S.

Wednesday, November 13.

SECOND DIVISION.

[Lord Dundas, Ordinary.

MONTGOMERIE & COMPANY, LIMITED *v.* THE BURGH OF HADDINGTON.

Public Health — Burgh — Sewers — Formation — Procedure — Statute Applicable — Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 103—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 58), *sec.* 217—*Burgh Sewerage, Drainage, and Water Supply (Scotland) Act* 1901 (1 *Edw. VII, cap.* 23).

Held that the local authority in a burgh is entitled, in constructing sewers, to proceed under section 103 of the Public Health Act 1897, which has not been repealed either expressly or by implication by the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901 or any other statute; the procedure prescribed by the Act of 1897 is a code complete in itself and, in particular, the powers conferred by the 103rd section are not limited by, and can be exercised without reference to, the 217th section of the Burgh Police (Scotland) Act 1892, which imposes on the local authority the necessity of obtaining the "consent in writing" of parties affected.

Brown v. *Magistrates of Kirkcudbright*, November 17, 1905, 8 F. 77, 43 S.L.R. 81, *followed.*

Public Health — Burgh — Sewers — Formation—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 103 *and* 109 *—"Reasonable Notice in Writing" to Persons Interested—Failure to Give Notice —Rights of Persons Entitled to Notice.*

The Public Health (Scotland) Act 1897 by section 103 authorises the local authority to construct such sewers as they may think necessary, and to carry them "after reasonable notice in writing . . . into, through, or under any lands whatsoever."

A local authority having laid certain sewage pipes upon the surface of the bed of a stream, certain proprietors entitled to notice, who considered that they were prejudiced by the pipes being on the surface of instead of under the bed, raised an action in which they demanded the removal of the pipes, on the ground, *inter alia*, that the notice required by section 103 had not been given. The Court, while *finding* that the necessary notice had not been given (*diss.* Lord Stormonth Darling, who *found* that it had), *refused* to order the removal of the pipes, *holding* that under section 103, even if read along with section 109, the consent of the parties entitled to notice was not required and no power was given them to enforce their objections.

Observations to the effect that the Court would not, because of some unintentional failure to comply with statutory formalities, order the removal of a structure which could immediately be replaced when the statutory formalities had been complied with, especially where there was no radical defect in the title of those who had erected it.

The *opinion* of Lord Adam in *Brown* v. *Magistrates of Kirkcudbright, cit. sup.*, as to the extent of the powers conferred on the Sheriff by section 109, *approved.*

Public Authority—Public Health—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 3—*Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 166—*Action for Act Done under Public Health Act—Expenses.*

Held (in a question as to taxation of expenses) that the Public Authorities

Protection Act 1893 does not apply to an action &c., instituted on account of an act done under the Public Health (Scotland) Act 1897.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. 38), enacts—Sec. 103—"The local authority shall have power to construct within their district, and also when necessary for the purpose of outfall or distribution or disposal or treatment of sewage, without their district, such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any public or other road, or any street or place, or under any cellar or vault which may be under the foot pavement or carriageway of any street or road, and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever, and from time to time to enlarge, lessen, alter, arch over, or otherwise improve, or to close up or destroy, all sewers vested in them, provided no nuisance is created by such operations; and if any person is thereby deprived of the lawful use of any sewer, the local authority shall provide another sufficiently effectual for his use. The local authority shall cause their sewers to be so constructed, maintained, kept, and cleansed as not to be a nuisance, and for the purpose of cleansing and emptying them may construct and place, either above or under ground, such reservoirs, sluices, engines, or other works as may be necessary, and may, subject to the provisions of the Rivers Pollution Prevention Acts, cause such sewers to communicate with and be emptied into such places as may be fit and necessary either within their district, or, if necessary for the purpose of outfall or distribution or disposal or treatment of sewage, without their district, and to cause the sewage and refuse therefrom to be collected for sale or for any purpose whatsoever, but so as not to create a nuisance."

Section 109—"In case it shall become necessary to enter, examine, or lay open any lands or premises for the purpose of making plans, surveying, measuring, taking levels, examining works, ascertaining the course of sewers or drains, making or repairing, altering or enlarging sewers or drains, or other purposes ancillary to the powers herein given as to sewers and drains, and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in the daytime."

Section 166—"The local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act shall be commenced within two months after the cause of action shall have arisen, provided that nothing in this section shall exempt any member of any local authority from being surcharged with the amount of any payment which may be disallowed by the auditor in the accounts of such authority, and which such member authorised or joined in authorising."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 58), enacts—Sec. 217—"Nothing in this Act contained shall be construed to authorise the commissioners, contrary to any private right, to use, injure, or interfere with any sewers or other works already made or used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating lands, or to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same; and nothing in this Act contained shall prejudice or affect the rights, privileges, powers, or authorities given or reserved to any person under any local or private Act of Parliament for the drainage, preservation, or improvement of land, or for or in respect of any mills, mines, machinery, canal, or navigation as last aforesaid."

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61) enacts—Sec. 1—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect—. . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

Section 3—"This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament, when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding."

Montgomerie & Company, Limited, the proprietors of Bermaline mills and maltings, Haddington, and owners of the land abutting on the river Tyne on one bank, between two points known as Victoria Bridge and

Spoutwell Brae, brought an action against the Provost, Magistrates, and Councillors of the royal burgh of Haddington, in which they sought (1) declarator, *inter alia*, that the defenders had no right or title to construct any works or buildings upon the *solum* or *alveus* of the Tyne between Victoria Bridge and Spoutwell Brae, (2) interdict against their laying down any sewers or other works upon the said *solum* or *alveus*, (3) decree for the removal of certain pipes and structures and for the restoration of the said *solum* or *alveus* to the condition in which it was prior to their operations.

A proof was taken by the Lord Ordinary (DUNDAS).

The following is a brief narrative of the material circumstances:—Early in 1905 the defenders determined to undertake certain operations with a view to improving the drainage of Haddington. These operations included the lifting and relaying of an existing 12-inch pipe situated under the surface of the bed of the river Tyne between Victoria Bridge and Spoutwell Brae, and the laying of a new and additional 18-inch pipe between the same places. The pursuers were in a general way informed of these proposed operations, to which at first they offered no objections, and on 20th June 1905 they received the following letter from the Town Clerk:—

"Messrs Montgomerie & Co., Ld.,
"Maltsters, Partick.
"*Church Street, etc., Drainage.*

"Dear Sirs,—I send you herewith enclosed the plan which has now been approved of by the Council in order that you may see what is proposed to be done. The leading features of the scheme are the substitution of an iron and clay spigot and faucet pipe for Myldsburn—the normal flow of Myldsburn being taken in a 6-inch fireclay pipe to the manhole at the foot of Gowl Close, and thereafter right down the drain—provision being made at the manhole at the end of Trinity Church for the abnormal flow of the burn, which would then discharge into the river to the south of the Victoria Bridge. The whole of the built Myldsburn conduit is to be removed. The existing 12-inch water-closet sewage pipe will remain and enter the manhole at the foot of Gowl Close, which will also receive the contents of the drain coming down Gowl Close. The only drain which will discharge above the bridge will, as I have indicated, be the overflow of Myldsburn when it is in flood, and I do not think there can be any objection to that, as when the burn is in flood, the river will probably also be in flood. I shall be very glad to give you any further information. I am expecting to see your Mr Montgomerie soon, but in the meantime you might kindly return to me the plan, as it is wanted here.—Yours faithfully,

"G. H. STEVENSON, *Town Clerk*,
"*p.* D. T. STEIL.

"*Plan per separate packet.*"

The letter was accompanied by a plan which showed the old 12-inch pipe in its original situation and alongside of it the proposed new 18-inch pipe. There was nothing in the plan to show the level at which the pipes were to be laid, and nothing to indicate to the pursuers that either of the pipes was to be laid upon the surface of, instead of under, the bed of the river. This omission was not due to any desire upon the defenders' part to mislead the pursuers, but to the fact that until the operations were actually being carried out, the question of the level of the pipes had never been considered by the defenders' engineers, and was not present to the mind of the Town Clerk when he wrote the letter.

On 23rd June 1905 the pursuers sent the following letter to the Town Clerk:—

"G. H. Stevenson, Esq.,
"Town Clerk, Haddington.

"Dear Sir,—We are in receipt of your favour of the 20th inst. We quite approve of the scheme so far as it affects our property, and we think it will be a great improvement on the existing drainage system. We are returning the plan herewith.—We are yours faithfully,

"MONTGOMERIE & COMPANY, LIMITED,
"JOHN MONTGOMERIE, *Managing Director.*"

On 24th June the Town Clerk sent the following letter to the pursuers:—

"*Drainage.*—Dear Sirs,—I have to thank you for your letter of yesterday, and note that you quite approve of the scheme so far as it affects your property. The plan has arrived safely.—G. H. STEVENSON, *Town Clerk, p.* D. T. STEIL."

Thereafter the defenders proceeded to carry out the operations, and in their course took up the old 12-inch pipe and laid it and a new 18-inch pipe upon the surface of the bed of the river, and covered the two with a casing of cement, the whole structure measuring from 4 to 10 feet in breadth at different places, and forming an appreciable if not a serious obstruction to the flow of the water in the river bed in certain conditions of weather.

The pursuers averred that it was not until November 1905, at a date when a considerable portion of the work had been done, that they first discovered that the pipes were being laid upon the surface of the river bed instead of beneath it, and at any rate no active steps were taken by them to suspend operations until in December they raised the present action.

The nature of their case may be gathered from the following excerpts from their averments on record:—"(Cond. 12) The said operations complained of on the part of the defenders are entirely unauthorised. They have obtained no right of wayleave of any kind from the pursuers. Their operations are contrary to the provisions of the Burgh Police (Scotland) Act 1892, the Public Health (Scotland) Act 1897, and the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901. (Cond. 13) In particular, the defenders have not complied with the provisions of the Burgh Police (Scotland) Act 1892. It is believed and averred that the defenders promoted their said drainage scheme in virtue alone of their powers under the said Burgh Police (Scot-

land) Act 1892. They exercised the borrowing powers of the Statute of 1892 for the purposes of their said scheme. The defenders have not obtained the consent in writing of the pursuers to the operations complained of, as provided by section 217 of this statute. The defenders, further, did not give notice of their intention to execute such operations as was incumbent upon them under section 220 thereof. Nor did they obtain an estimate and report in connection therewith from their surveyor as provided by section 226 thereof. Such failure on the part of the defenders to observe the said enactments has been to the serious prejudice of the pursuers. (Cond. 14) Further, while the pursuers maintain that the defenders were bound to carry out their intended operations in accordance solely with the provisions of the said Burgh Police (Scotland) Act 1892, and upon the assumption that the defenders claim to have acted under the Public Health (Scotland) Act 1897, it is the fact, and the pursuers aver, that the defenders also failed to observe the provisions of the said Statute of 1897. (Cond. 15) Under the said Public Health (Scotland) Act 1897 the defenders were bound in terms of section 103, before constructing and carrying their said drains in the manner complained of, into, through, or under the lands of the pursuers, to have obtained from their surveyor a report to the effect that it was necessary for the defenders to construct or place their said drains above the surface of the said river bed, and to have given the pursuers reasonable notice in writing of such intended operations on their part. The defenders obtained no such report, and gave no notice in writing to the pursuers of such intended operations. In point of fact no necessity ever existed at any time for the construction or carrying of the said drains above the surface of the said river bed. . . . (Cond. 16) The said letter of 20th June 1905 was not a notice under the said Public Health (Scotland) Act 1897, and was not intended to be so. Moreover, the said letter of 20th June 1905 did not in point of fact notify the pursuers that the defenders (1) intended to uplift the said then existing 12-inch drain and to relay it; (2) intended to lay down a new 18-inch drain in the said river bed between the said Victoria Bridge and Spoutwell Brae foresaid; (3) . . . It gave, further, no notice of any kind that the defenders intended to alter the levels of such existing drain, or to make the level of any proposed new drain above the surface instead of beneath the surface of the said river bed. . . . (Cond. 18) By the said Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901, and by terms of section 5 thereof in particular, the said Public Health (Scotland) Act 1897 is incorporated, subject to the necessary modifications, with the said Burgh Police (Scotland) Act 1892, which is there styled the principal Act. In virtue of this section the said provisions of the Public Health (Scotland) Act 1897 in regard to notice as aforesaid are repealed by implication, or fall to be disregarded as necessary modifications in the sense of the said section, in all cases where the local authority is the town council of a burgh. The defenders were bound to comply with the provisions of the said Burgh Police (Scotland) Act 1892, and to disregard the said provisions of the Public Health (Scotland) Act 1897. (Cond. 19) The operations complained of are in violation of the proprietary rights of the pursuers, and are illegal. They will necessarily interfere, to the serious prejudice of the pursuers, with the natural flow of the river, and particularly in times of flood the proposed alteration of the bed of the stream will tend to divert the river from its accustomed course, and to throw the water upon the property of the pursuers. The defenders' proposed works contract the bed of the river where it is narrow. They form a bulwark or an embankment of about 123 yards in length, which extends into the river from 10 to 12 feet, and is about 3 feet in height. . . ."

The defenders averred, *inter alia*—"(Ans 13) Defenders did not promote said drainage scheme in virtue of their powers under the Burgh Police (Scotland) Act 1892, nor have they exercised the borrowing powers of that Act for the purposes of said scheme. (Ans. 15) Reference is made to said Public Health (Scotland) Act 1897 for its terms. . . . . In carrying out said drainage scheme defenders have proceeded under and in virtue of the powers conferred on them by said last-mentioned Act, and they have complied with the requirements and provisions thereof. The said letter of 20th June 1905 and the plan which accompanied it, and also the correspondence . . . are referred to. . . . In any event, the pursuers . . . acquiesced in the defenders' scheme and operations after the work was in progress and was well advanced, and waived any objection which they may have conceived themselves entitled to, . . ."

The pursuers pleaded, *inter alia*—"(2) The defenders' operations complained of being without any statutory authority or other legal warrant, *et separatim*, the defenders having failed to comply with the provisions of any statute conferring powers upon them for the construction of sewers or drains within or upon the property of the pursuers, the pursuers are entitled to have the said operations interdicted as concluded for. (3) The defenders' operations being unnecessary and injurious to the rights and interests of the pursuers, *et separatim*, being such as to create a nuisance upon their property, the pursuers are entitled to have the defenders interdicted from proceeding therewith, and to have them ordained to restore the property of the pursuers to its original condition."

The defenders pleaded, *inter alia*—"(4) The pursuers having consented to the operations now complained of, *et separatim*, having acquiesced in said operations during the progress of the work, decree should be refused with expenses. (5) The defenders' whole operations having been proceeded with under and in virtue of the powers conferred on them by the Public Health (Scotland) Act 1897, and they having co m

plied with the requirements of said Act, or alternatively, the pursuers having waived any objection competent to them on the ground that the requirements of said Act had not been complied with, the defenders should be assoilzied with expenses."

On 6th July 1906 the Lord Ordinary (DUNDAS) pronounced the following interlocutor—"Finds that the defenders' whole operations complained of were lawfully instituted and proceeded with under and in virtue of the powers conferred upon them by the Public Health (Scotland) Act 1897, and that they have validly complied with the requirements of the said Act: Sustains the first alternative branch of the fifth plea-in-law for the defenders; assoilzies them from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses as between agent and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61).

Opinion.—"The pursuers are proprietors of certain lands and of mills, &c., thereon lying upon the east bank of the river Tyne, and within the royal burgh of Haddington. By their summons they ask for declarator that they are heritable proprietors of the whole of the *solum* or *alveus* of the said river between Victoria Bridge and Spoutwell Brae within the said royal burgh, or, otherwise, that they have a right of common interest therein. In the argument the first of these alternatives was not insisted in. Declarator is then asked to the effect that the defenders, who are the Town Council of Haddington, have neither right nor title to construct any works or buildings upon the *solum* or *alveus* of the said river between the said points, or otherwise to encroach upon or to interfere with it. Conclusions then follow for interdict, and for the restoration of the bed or flood channel of the river between the said points to the condition in which it existed prior to certain recent operations by the defenders. It is common ground that for some years past the Town Council of Haddington have had under consideration a scheme or schemes for the improvement of the drainage of the burgh, and that in 1905 they did in fact execute certain operations with the view of securing this end. These operations, to describe them quite briefly and generally, consisted in, or rather included, the lifting and relaying of an existing 12-inch pipe and the construction of a new 18-inch pipe from Victoria Bridge northwards down to Spoutwell Brae. It is not, I think, maintained either that remedial works were unnecessary, or that any better scheme of improvement could have been devised than that which has been executed—that is, from the point of view of the public interest and apart from all questions of legality or interference with private rights.

"A proof has been led, which was of unnecessary length, and in parts of doubtful relevancy; and in the argument which followed an immense variety of topics was canvassed with great zeal and ability. In the view which I take of the case it may, I consider, be disposed of with reasonable brevity, and upon simple and distinct grounds.

"The main issue, or at least one of the most important issues raised, was whether or not the defenders gave to the pursuers 'reasonable notice in writing' within the meaning of section 103 of the Public Health (Scotland) Act of 1897 before proceeding to execute the works complained of. The defenders allege that they did give such notice, viz., by the Town Clerk's letter of 20th June 1905, which is fully printed in the record, and the plan which accompanied that letter. I need not pause to consider the preliminary point which was maintained by the defenders to the effect that no such notice was in the circumstances required, looking to the terms of the earlier branch of section 103 and to the position of the pursuers in regard to the *locus* of the operations. I assume, as the Town Clerk did, that 'reasonable notice in writing' was necessary, and so assuming I am of opinion that it was duly given to the pursuers by the said letter and plan. The pursuers' counsel argued strenuously to a contrary effect. His argument was based principally upon the grounds that neither the letter nor the plan sent with it disclosed at what level it was intended to lay the sewers; that the plan showed the proposed works incorrectly in certain respects; and that the pipes as laid are *de facto* to some extent further out riverward than as indicated upon the plan. The premises of their argument may be taken to be substantially correct, but it fails in my opinion as proceeding upon an erroneous view of the kind and character of notice which the statute contemplates. I find no warrant for holding that the local authority is bound to supply persons affected or likely to be affected by their scheme with complete details of what it is proposed to do, under penalty if they fail to do so of their notice being held to be inept. The power of the local authority to construct sewers into, through, or under lands is a very wide and drastic one. The notice to be given must be 'reasonable,' but I do not think that that infers a duty to disclose the scheme precisely and in detail. It is, I apprehend, sufficiently complied with if the party to whom notice is given is informed generally, in reasonably distinct terms, of the nature of the intended work in so far as it is to be situated upon, or to pass through, his lands. The case is not, I think, like that of a notice to treat for the compulsory acquisition of land. It is obviously proper and convenient that notice of some sort should be given to those having sufficient title and interest to receive it in order that they may not be taken unawares, and also to allow them opportunity of endeavouring, after a demand for and receipt of fuller details, to arrange with the local authority for such alteration or variation of the proposed works as they may desire and the authority may be prepared to concede

These are, I think, probably the principal reasons why notice is required to be given. In this case the Town Clerk, in his letter of 20th June, after describing 'the leading features of the scheme,' expressly added 'I shall be very glad to give you any further information.' I may here note that the proof involves, *inter alia*, a lengthy and keenly fought controversy as to what plan it was which was sent to the pursuers along with the letter of 20th June. The matter is to my mind involved in great obscurity, and I confess that even now I am not certain whether the plan sent was No. 8 or not, although I think that the balance of proof is in favour of the view that the plan which was sent was in fact No. 8 of process. But the point seems to me to be quite immaterial. I regret that it was elaborated to such an extent; but I did not see my way to exclude or to check *ab ante* the evidence which both sides were eager to tender. It appears to be common ground that the plan sent on 20th June, whether it was No. 8 of process or another, did indicate upon its face two lines of proposed pipes between Victoria Bridge and Spoutwell Brae, in approximately though not identically the positions in which the sewers were subsequently laid, although the plan did not disclose the level at which it was proposed to lay them. For the reasons above expressed I do not think that the notice can be held to be invalid or insufficient upon any of the grounds upon which the pursuers' counsel founded and to which I have already referred. But it was further argued for the pursuers that the letter of 20th June did not amount to a valid notice, because at its date the Town Council had not in fact come to any absolute and unqualified resolution to proceed with the whole sewerage works which they subsequently constructed. In regard to this point, and to that which I shall immediately after deal with, a good deal of the evidence led was in my opinion loose and unconvincing and some of it incompetent. I refer to what was said by a number of witnesses as to what passed at the various meetings of Town Council, the minutes of which are produced. Parole evidence may well be adduced to explain the language of any minute of a public body where its terms are ambiguous and require explanation; but not, in my judgment, in order to contradict the resolution which a minute records as having been passed at any meeting, nor to prove that some resolution was verbally arrived at although not recorded. I may refer on this matter to the recent case of *School Board of Tarbert* v. *Aird*, February 17, 1905, 42 S.L.R. 373. The question, however, is not of real importance in the view which I take of the matter. It is, I think, clear enough that at 20th June 1905 the Town Council had not committed themselves to the construction of the whole scheme. They had had some consideration of an alternative proposal to execute a cheaper because less extensive programme; and a final decision was I think left open, pending the ascertaining of what was at 20th June still a matter of uncertainty, viz., the cost of the undertaking. That this was so appears, I think, from the minutes themselves, the engineers' reports, the specification, and the correspondence. Assuming that this was the actual position, and discarding the parole evidence given to the effect that the defenders had come, before 20th June 1905, to a verbal resolution to proceed with the whole scheme, I am unable to see that the pursuers take any material benefit. It is not, I apprehend, a condition-precedent of giving a valid notice under section 103 that the local authority shall be committed or bound to go on with and complete the whole works contemplated, or that they shall have formally resolved to proceed with the whole and not merely with a part of the scheme. Here, again, I think that the pursuers' conception of the sort of notice required and of the purposes for which it is required is based upon error. The same remark is, in my judgment, applicable to the next point which it was endeavoured to establish for the pursuers. This was that at 20th June 1905, when the letter and plan were sent, the Town Clerk had not been specially authorised by his Council to serve this or any other notice in the matter. Assuming the fact to be so—and I rather think that it was—the pursuers' case does not appear to me to be advanced. The Town Clerk was in the month of July duly authorised in that behalf; and I think that, as in a question with the pursuers or any other third party, the previous notice was thus clearly validated so far as any want of authority was concerned. The objection is one which, in my judgment, could be pleaded only by the Town Council themselves. I may refer upon this point to the English case of *Cheetham*, 1875, L.R., 10 C.P. 249.

"In my opinion, therefore, the defenders did give the pursuers 'reasonable notice in writing,' within the sense and the language of the Act. If this view is well founded, then I need not consider or decide the further defences based upon alleged consent, or agreement, or acquiescence by the pursuers, with which a considerable portion of the proof was occupied. Nor, of course, do the conclusions for interdict, and for restoration of the *solum*, and the defenders' answers to these, arise for consideration.

"Only one matter, I think, remains as to which I ought to say something. An argument was advanced and pressed, which does not seem to me to be sufficiently pleaded upon the record, and which I understood to be given up by the pursuers' counsel in the procedure roll discussion (at all events, so far as the Outer House is concerned), but which, if it were well founded, would apparently afford a conclusive answer to the defenders' whole case. It was maintained, with reference to section 217 of the Burgh Police (Scotland) Act 1892, that the works complained of were fundamentally illegal and unwarranted, because the defenders have proceeded to 'interfere with' a 'stream' or

'river' 'in which the owner . . . of any lands, mills, . . . or machinery . . . have right and interest, without the consent in writing of the person legally entitled to grant the same.' In my judgment, this argument, even assuming that it is properly before me, can not be given effect to. In the first place, I gravely doubt whether the section referred to, when carefully read in its entirety and in conjunction with the surrounding context of the Act, amounts to an absolute prohibition against any interference by police commissioners with any stream in which owners of land or mills are interested, unless the latter are willing to grant a written consent. In the second place, if such consent by the present pursuers were necessary, I am not sure that it is not to be found in their letter of 23rd June 1905, which was written after receipt of and in reply to the Town Clerk's letter of 20th June and relative plan. Whatever the pursuers may have understood or misunderstood as to the proposals of the Town Council, they could not, I think, have failed to see that the intention of the latter was to 'interfere,' in the manner generally indicated with the 'river' Tyne in the immediate vicinity of their 'mills.' And the pursuers say, 'We quite approve of the scheme so far as it affects our property.' But, in the third place, I do not think that the section referred to has any place in or reference to the case with which we are here dealing. The defenders gave what I have held to be 'reasonable notice in writing,' under the Public Health Act 1897, and they proceeded to carry out their works under the powers and provisions conferred upon them by that Act. Now, it was decided in the recent case of *Brown* v. *Magistrates of Kirkcudbright*, 17th November 1905, 8 F. 77, that 'the procedure prescribed by the Act of 1897 for a local authority in the making of sewers was a code complete in itself; and that a local authority was entitled to exercise the powers given by the Act for the making of sewers in conformity therewith, without regard to the procedure prescribed by the Burgh Police Act.' Lord Adam in that case said—'The proceedings in this case were taken by the local authority under the Public Health Act of 1897; and the powers conferred by that Act are, I agree with Lord M'Laren, entirely independent of any powers that may be granted under the Burgh Police Act or other Acts.' What Lord M'Laren had said was as follows—'I think it is impossible on a fair reading of the Public Health Act 1897, to come to any other conclusion than that the procedure there authorised was intended to be complete in itself. . . . I cannot conceive that in applying the powers of the Act to burghs, the Legislature intended to put upon the administrators of the burgh the impossible task of carrying out constructive works under the provisions of two codes, each of which deals completely, but in a different way from the other, with the subject in hand. In availing themselves of the powers given by the Public Health Act 1897 I think that the Magistrates and Council are within their rights if they comply with the requirements of that statute, and they are not required, as part of their duty under that Act, to refer to the provisions of previous Acts of Parliament under which cognate powers are conferred.' The pursuers' argument was based upon an ingenious application of the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901. Prior to that Act there existed, of course, two separate and independent statutory codes of procedure in regard to the sewerage of drainage districts in burghs, viz.—(*a*) Under the Police Acts 1862 and 1892; and (*b*) under the Public Health Acts 1867 and 1897. Section 3 of the Act of 1901 provides that 'All special or separate drainage districts that may have been formed in any burgh under any Public Health Act shall, subject to the provisions of this Act, be deemed to be drainage districts under the principal Act,' *i.e.*, the Act of 1892. It was contended that the intention and effect of this provision were to transfer all existing drainage districts which had been formed under the second of the codes above mentioned so as to place them under the Police Act code. Then section 5 of the 1901 Act was referred to, by which, *inter alia*, it is enacted that the town council of any burgh, as the authority under 'the principal Act,' in addition to the powers conferred upon them by that Act or any other Act, shall have the same rights, powers, and privileges as are conferred by the Act of 1897 upon local authorities under that Act in districts other than burghs, with certain exceptions, 'and in so far as necessary for giving effect to this enactment, the last-mentioned Act and the Acts and parts of Acts incorporated herewith are, subject to the necessary modifications, incorporated with the principal Act.' The pursuers urged that under the Act of 1901 the Town Council, while they have the powers of the Public Health Act, have them only by way of incorporation with those of the 'principal' Act of 1892; that section 217 of that Act stands unrepealed, and is an integral part of and limitation upon the Town Council's powers, whether they profess to proceed under the 'principal' Act or under the Public Health Acts, and that the proceedings here complained of have been gone about in violation of section 217. They say that this point was not raised or decided in *Brown's* case. That is so far true, because in *Brown's* case section 217 does not seem to have been referred to, and had indeed, so far as appears, no application in the circumstances there existing. But the Act of 1901 was before the Court, as is shown by the reported arguments of counsel, and it was upon a consideration and construction of that Act and of the other Acts that the case was decided, and the opinions were pronounced which I have already sufficiently quoted. I think that, in view of these opinions, the question now raised can scarcely be held to be open, at all events so far as the Outer House is concerned. As I have before stated, it is not, I think, properly raised upon the record,

but as the point was ably and strenuously argued by the pursuers' counsel I have thought it right to express my views in regard to that.

"The result of the whole matter is that, in my opinion, the defenders' operations have been gone about lawfully and in compliance with their statutory powers. The action therefore fails, and the defenders must be assoilzied."

The pursuers reclaimed, and argued—It was incompetent for the defenders to proceed, as they had proceeded, under section 103 of the Public Health Act 1897. That Act, in so far as it dealt with the disposal of sewage, &c., by local authorities in burghs, had been *in toto* repealed either expressly or impliedly by the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901, and a consideration of that Act, taken along with an historical survey of the different statutes dealing with the powers of local authorities in this and kindred matters, made it abundantly clear that—at anyrate after 1901—the Burgh Police (Scotland) Act 1892 was the only Act under which the local authority in a burgh could proceed in dealing with sewage. See Public Health (Scotland) Act 1867, sections 3, 7, 24, 71, 72, 73, 76, 93; Burgh Police (Scotland) Act 1892, sections 4, 7, 8, 9, 10, 11, 12, 21, 23, 42, 43, 215, 217, 218, 219, 220, 221, 224, 237, 339, 361, 362, 363; Public Health (Scotland) Act 1897, sections 3, 12, 101, 103, 104, 109, 113, 114, 122, 131, 133, 134, 166, 190; Town Councils (Scotland) Act 1900, section 8; Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901, sections 1, 2, 3, 4, 5; Burgh Police (Scotland) Act 1903, section 3. The only authority adverse to this view was the case of *Brown* v. *The Magistrates of Kirkcudbright*, November 17, 1905, 8 F. 77, 43 S.L.R. 81, which had been erroneously decided largely owing to the fact that the Act of 1901 had not been properly brought under the notice of the Court. That being so, admittedly the defenders had not complied with the provisions of the Act of 1892, *e.g.*, they had not obtained the consent in writing required by section 217 or given the notice or held the meeting required by sections 220 and 221. Assuming, however, that they were entitled to proceed under section 103 of the Act of 1897, they were in no better position, for they had in more points than one failed to comply with the requirements of that Act. In the first place they had not given the "reasonable notice in writing" required by section 103. The letter and the plan entirely failed to give notice of the only matter of importance to the pursuers, viz., that the pipes were to be upon the surface of, instead of under, the river's bed. In the second place section 103 of the Act of 1897 was limited and qualified by section 217 of the Act of 1892, so that in no case could the defenders escape from the necessity of producing a written consent in writing, which admittedly they had not obtained. That being so, the defenders had acted illegally—they had obstructed the course of the river, which was an actionable wrong, forming *per se* a good ground for action—*Jackson, &c.* v. *Marshall*, July 4, 1872, 10 Macph. 913, 9 S.L.R. 576; *Menzies* v. *Breadalbane*, July 4, 1828, 2 W. & S. 235; *Bicket* v. *Morris*, July 13, 1866, 4 Macph. (H.L.) 44, 2 S.L.R. 222. The pursuers were entitled to have the pipes removed, and were not bound to accept a mere award of damages—*Krehl* v. *Burrell*, 11 Ch. D. 146; *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893. On the question of expenses the Lord Ordinary had erred in his interlocutor. The defenders were not entitled to have their expenses taxed as between agent and client—Public Authorities Protection Act 1893, section 3; Public Health (Scotland) Act 1897, section 166.

Argued for the respondents—The respondents were entitled to proceed under section 103 of the Public Health Act 1897—*Brown* v. *Magistrates of Kirkcudbright*, *cit. sup.*, having settled that the Act of 1897 was a code complete in itself for local authorities in burghs, and that they were entitled to exercise the powers given by that Act without regard to the procedure prescribed by the Act of 1892. It was erroneous to say that the Act of 1901 had not been before the Court in that case—see note of argument in S.L.R. report. If, however, it should be thought that the question was not conclusively settled by *Brown*, an examination of the statutes, and in particular the Act of 1901, showed that the decision in that case was sound, and that neither expressly nor impliedly was section 103 of the Act of 1897 repealed or qualified by the Act of 1901 or any other statute. Accordingly, the consent in writing, prescribed by section 217 of the Act of 1892, was unnecessary. The question accordingly came to be, had the procedure prescribed by the Act of 1897 been followed? It had. The plan and letter, which expressly offered further information if desired, constituted "reasonable notice" within the meaning of section 103. But as a matter of fact the pursuers were not people to whom notice required to be sent, being neither owners nor occupiers, but merely persons having an interest, nor were the operations operations of which notice had to be sent, being merely repairs and alterations and not new constructions. *Roderick* v. *Aston Local Board*, 5 Ch. D. 328, settled that the words "into, through, or under" did not limit them to carrying a sewer underground. Assuming, however, that notice was necessary, and that the notice sent was insufficient, what was the result? In the first place, it was to be observed that the statute afforded the party to whom notice should have been sent no remedy; in the second place, it was well settled that the Court would not, on the ground of a mere irregularity of procedure, order the demolition of a structure which could at once be again restored after the irregularity in procedure had been corrected—*Phillips* v. *Dunoon Police Comsioners*, November 21, 1884, 12 R. 159, 22 S.L.R. 127; *Hutchings*, 1898, 43 Solicitors Journal 41. But all the argument hitherto was based on the assumption that the respondents must find authority and justi-

fication for their operations under some statutory provision. There was no basis, however, for such an assumption, since at common law any operations on the *alveus* were permissible if, as here, they produced no "sensible effect upon the stream"—*Bicket* v. *Morris, cit. sup.*, at p. 49; *Orr Ewing & Co.* v. *Colquhoun's Trustees*, July 30, 1877, 4 R. (H.L.) 116, 14 S.L.R. 741, see Lord Blackburn; *Jackson* v. *Marshall, cit. sup*, at p. 917; *M'Gavin* v. *M'Intyre Brothers*, May 30, 1890, 17 R. 818, at p. 824, 27 S.L.R. 67. As to expenses, the respondents were entitled to the benefit of the Public Authorities Protection Act and to taxation as between agent and client. The following cases were also referred to:—*Lewis* v. *Weston-Super-Mare Local Board*, 40 Ch. D. 55; *Cheetham* v. *The Mayor, &c. of the City of Manchester*, 1875, L.R., 10 C.P. 249; *Police Commissioners of Kirkintilloch* v. *M'Donald*, October 31, 1890, 18 R. 67, 28 S.L.R. 57; *Swanston* v. *Twickenham Local Board*, 11 Ch. D. 838.

LORD STORMONTH DARLING—After mature consideration I have come to the conclusion that the Lord Ordinary's judgment in favour of the Burgh of Haddington is right, and should be adhered to. The conduct of the case throughout has been marked by an ability which has only been equalled by its keenness. Now, where private interests conflict with an admitted public benefit, and the question comes before a court of law, the court in my opinion ought to be strict to mark any neglect of the private interest which amounts to a failure to make the compensation for the property either taken or injuriously affected. But where, as here, there is no case of that kind, but only a difference of opinion as to the precise method by which the public benefit is to be conferred, and a criticism of the legal machinery which has been invoked in attaining it, I do not think that any such duty arises. Of course the public authority charged with the execution of the work must proceed according to law, but it is not every captious objection to their procedure that is to be listened to, particularly if it results in no serious or even sensible injury to the person objecting. And that in my view is a fair description of the kind of injury alleged here.

The case for the pursuers is, not that an improved system for the drainage of Haddington was altogether unnecessary, or even that the system actually projected and partially carried out was not a "great improvement" in the public interest; they admitted as much by their letter of 23rd June 1905. Their case as now presented, after a great part of the work has been done, is that they did not discover till 10th November of that year that the defenders were interfering with the *alveus* of the river Tyne, which at the place in question is their property, or in which at least they have a common interest with others, the interference consisting, not in the discharge of sewage into the river, but in the laying of certain drain-pipes *on* the surface of the *alveus*, instead of *in* the bed of the river, and thereby affecting the natural flow of the river opposite their mills; that the defenders could not, under the 217th section of the Burgh Police Act 1892, interfere with any stream without the pursuers' consent in writing; that they gave no such consent; and that, even if the defenders were justified in proceeding under the Public Health Act 1897 alone, they did not follow the directions of that Act, because they failed to give reasonable notice to the pursuers, as required by section 103, of their intention to carry their sewers through the property of the pursuers, and, in particular, did not send to them the report of a surveyor to the effect that such a course was necessary. The practical conclusion of the summons is that the defenders ought to be ordained to lift all their pipes and other structures, and restore the channel of the river to its former condition. It will thus be seen that the nature of the case leading to these rather startling conclusions is both complicated and involved. It means that where a burgh is situate on a running stream, the town council of that burgh cannot improve its drainage, however desirable in the public interest, if the scheme involves any interference with that running stream, without the consent in writing of everybody who can qualify any sort of right or interest in that part of the stream. It also means that the administrators of a burgh must make up their minds, before they set a drainage scheme on foot, which of two extant and possibly inconsistent codes they are to follow, under penalty that if they make a slip they may be called upon, months after the work has been done, to undo it at great public detriment and expense. This *may* be the result of too much legislation on a particular subject, or of want of care in framing the legislation, but it is not a result to be readily adopted.

The Lord Ordinary finds a sufficient justification for the interlocutor which he has pronounced in the recent First Division case of *Brown* v. *Magistrates of Kircudbright*, November 17, 1905, 8 Fr. 77, in which it was held that the procedure prescribed by the Public Health Act 1897 for a local authority in the making of sewers was a code complete in itself, and that a local authority was entitled to exercise the powers given by that Act (as the *Magistrates of Kirkcudbright* did) without regard to the procedure prescribed by the Burgh Police Act. That conclusion was necessary to the judgment, and none of the Judges expressed any dissent from it. Undoubtedly it justified the decision in this case so far as the Outer House was concerned, if the Lord Ordinary was of opinion—as he was—that the notice here given was in fact reasonable. *Brown's* case would not be equally binding on us, for we might take measures for the reconsideration of the point if we thought such a course desirable. But so far as I personally am concerned I am quite satisfied with the decision in *Brown's* case. I have no fault to find with it of any kind. And it was a unanimous judgment of the First Division.

It was urged by Mr Clyde for the pursuers that while the defenders might have had an option to proceed either under the Act of 1892 or under the Act of 1897 before the passing of the Burgh Sewerage and Water Supply Act of 1901, they had no such option after the passing of that Act, and that *Brown's* case would have been, or ought to have been, decided otherwise than it was if the provisions of the Act of 1901 had been properly brought before the First Division. I do not think so. The First Division had the Act of 1901 in view when they pronounced their judgment, and I do not see that it makes the great difference for which Mr Clyde contends. No doubt by section 1 it calls the Act of 1892 "the principal Act," and where sums of money have been borrowed for purposes of sewerage or water supply it lays upon town councils the duty of providing the sums necessary for repaying the principal and for paying interest on such sums out of a special assessment to be made under the Act of 1892, with certain limitations as to amount, and certain provisions as to approval of the Local Government Board for Scotland, in the case of such prescribed amounts not being sufficient to meet the expenditure. It is also true that by section 5 of the Act the town council of any burgh, in addition to the powers conferred upon them by the Act of 1892, or any other Act, with reference to sewerage and water supply, are to have the same rights, powers, and privileges as are conferred by the Public Health Act of 1897 upon local authorities under that Act in districts other than burghs, with certain specified exceptions. Further, it is true that to make these provisions harmonise with the course of legislation, sections 101, 113, 133, 134, and 137 of the Act of 1897 are repealed. But all that does not get over the fact that section 103 of the Act of 1897 is not repealed, and so long as it was left standing it does not seem to me that it was in any respect *ultra vires* of the defenders to proceed under section 103, which gave them the power to construct within their district (which this extension undoubtedly was) "such sewers as they might think necessary for keeping their district properly cleansed and drained." *They* were made the judge of the necessity of such operations, at least in the first instance, and if the pursuers meant to challenge the necessity, or to demand a report by a "surveyor" in addition to the plan (whatever it was) which was sent with the letter of the Town Clerk dated 20th June 1905, then was the time, in my judgment, for the pursuers to have formulated their demand. I agree with all that the Lord Ordinary says in his opinion on this part of the case, and particularly in view of the Town Clerk's offer to give the pursuers "any further information," I think it is too late now for the pursuers to complain that they did not get reasonable notice. I am satisfied that the pursuers on receipt of the letter of 20th June and its accompanying plan knew perfectly well that the defenders intended to carry a new drain "into, through, or under" the pursuers' lands, and that, their reply having been an express approval of the scheme without any qualification either as to the level of the new drain or otherwise, they must be held to have been satisfied of its necessity and of the sufficiency of the notice generally. It is clear from the decision of the case of *Roderick* v. *Aston Local Board* in 1877, 5 Ch. Div. 328, under the corresponding English Public Health Act of 1875, that a power to carry sewers "into, through, or under any lands whatsoever" cannot be read as if those words meant only "under."

In reaching the conclusion that the Lord Ordinary's judgment is right, I confess I do not share the doubts which my brother Lord Low has expressed as to the soundness of the Lord Ordinary's finding that the pursuers "have validly complied with the requirements of the Public Health Act 1897." These doubts are, as I understand, founded on the view that the Town Clerk failed to disclose, either by his letter of 20th June or by the plan which accompanied it, that the two proposed new pipes were not to be laid at the same level as the old single pipe, and that this omission, though not due to carelessness or a desire to conceal anything, was yet such as to justify the pursuers' assumption that the two new pipes were to be so laid. But that assumption (the justification of which I doubt, particularly looking to the note on the plan that the old 12-inch pipe was "to be lifted and relaid") ought only in my view to have led to an inquiry for more information which, be it observed, had been proffered in the Town Clerk's letter. At all events it does not seem to me to negative what is the main issue on this part of the case, viz., whether the defenders gave "reasonable notice in writing" of the works which they proposed to execute upon private property.

It remains for consideration whether the proceedings of the Burgh of Haddington have been gone about in violation of sec. 217 of the Act of 1892, the section which provides that "nothing in this Act contained shall be construed to authorise the commissioners" to do certain things, including using, injuring, or interfering with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, "without the consent in writing of the person legally entitled to grant the same." It might be enough to rely, as the Lord Ordinary does, on the judgment in *Brown's* case as settling that the defenders did not require to resort to the Act of 1892 as authorising them to use, injure, or interfere with the river Tyne, inasmuch as sec. 103 of the Public Health Act of 1897 gave them the required authority, and all that sec. 217 says is that "nothing in this Act contained" (*i.e.*, the Act of 1892) "shall be construed" to authorise the commissioners to do certain things. But even if this were not so, I greatly doubt whether sec. 217 applies to this case at all. Reading

the section as a whole, it looks to me very much as if the protection of the private owner was carried so far as to entitle him to withhold his consent altogether (instead of merely entitling him to receive compensation), for the reason that, in the exceptional cases specified, any interference with these "private sewers or watercourses," as the side-note calls them, might defeat the object aimed at by some local or private Act of Parliament, and not at all that, in the very common case of a river bordered by a town, any exceptional protection was thought to be necessary to guard against any, even the smallest, interference with the flow of the stream. The danger of pollution is dealt with separately in the Public Health Act by reference to the Rivers Pollution Prevention Acts; but I never understood that the high doctrine of *Morris* v. *Bicket*, 4 Macph. (H.L.) 44, which related to building operations by an opposite neighbour on the *alveus* of a stream, was thought to be within the purview of sanitary or drainage statutes.

Moreover, if the pursuers were to insist on the view that their consent in writing was a necessary preliminary to any interference with the river Tyne, they ought in my opinion to have tabled their proposition at once, instead of reserving it till the works were well advanced. My belief is that the applicability of sec. 217 was a pure afterthought on the part of the pursuers, due to the ingenuity of their legal advisers.

I have not adverted to any of the oral evidence in the case, because I consider it almost entirely beside the question. And I cannot help observing that in my opinion municipal authorities deserve some commiseration for having to pick their way through such a tangle of redundant legislation as Parliament has provided for their guidance.

With regard to the point which was made as to the application of the Public Authorities Protection Act 1893, and as to which the Lord Ordinary has given effect to the defenders' demand, I agree that that part of his Lordship's interlocutor must be recalled, on the short ground that the Act itself declares by section 3 that it shall not apply "to any action, prosecution, or other proceeding . . . on account of any act done in any case instituted under an Act of Parliament where that Act applies to Scotland only and contains a limitation of the time and other conditions for the action, prosecution, or proceeding." Now the Public Health Act, under which this action must be held to have been instituted (on the assumption that the defenders are to get their expenses), does contain, by sec. 166, a limitation of the time within which such action shall be commenced, and it also contains (at the beginning of the same section) "other conditions" applicable to the action.

LORD LOW—The first question to be determined in this case seems to me to be whether it was competent for the defenders to proceed under the powers conferred upon local authorities by the 103rd section of the Public Health Act 1897.

I am of opinion that that question must be answered in the affirmative, because the section applies to all local authorities, whether in burgh or in landward districts, and it has never been expressly repealed, nor in my judgment can it be held to have been repealed by implication.

After the passing of the Public Health Act 1897 a somewhat anomalous condition of matters arose in regard to public sewers and drains in burghs, because the Burgh Police Act 1892 contained a complete code in regard to these matters within burgh, and the Public Health Act also contained a complete code which was applicable to burghs as well as to other districts; and further, the assessments authorised by the two Acts differed both as to amount and as to the persons liable.

It was for the purpose of remedying, or at all events of partially remedying, that state of matters that the Burgh Sewerage, Drainage, and Water Supply Act 1901 was passed. That Act, by amending certain sections of the Act of 1892, and repealing (as regarded burghs) certain sections of the Act of 1897, did away with the double method of assessment authorised by the two last-mentioned Acts, and established one method of assessment for burghs. It further declared that as regarded burghs the Act of 1892 should be the principal Act, and it incorporated with that Act certain sections of the Act of 1897, and repealed certain sections of the latter Act.

That being the scheme of the Act of 1901 I think that one would have expected that all the provisions in the Act of 1897 which it was intended should still apply to burghs would have been incorporated in the Act of 1892, and that all provisions which it was intended should no longer apply to burghs would have been (*quoad* burghs) repealed. If that had been done, burgh authorities would have found the whole code applicable to them in the Act of 1892 as amended, together with the incorporated sections of the Act of 1897. But the course actually adopted by the Legislature was very different. As I have said, certain sections of the Act of 1897 were repealed, and other sections were incorporated into the Act of 1892, but there were also a number of sections in the former Act which applied to burgh as well as to other authorities which were neither incorporated nor repealed. It is true that a good many of these sections contained provisions identical, or practially identical, with what had already been enacted as regarded burghs in the Act of 1892, and so far as these sections were concerned it was immaterial that they were neither incorporated nor repealed. But there are also sections which contain provisions which have no equivalent in the Act of 1892. The 103rd section itself may be taken as an example. That section, *inter alia*, authorises all local authorities to construct sewers for the purpose of outfall or disposal or treatment of sewage without their district. It was admitted that (whatever may

be said as to the other powers given in the section) no such power as that which I have quoted is conferred upon the local authority in burghs by the Act of 1892, and therefore, unless the 103rd section is still applicable to burghs, the local authority in a burgh has been deprived of a very important power which has been conferred upon all other local authorities. No reason was, nor, I imagine, could be, suggested for denying such a power to burghs; and indeed I should expect that it would be more frequently expedient or necessary that sewage should be disposed of outside the area under the control of the local authority in the case of a burgh than in the case of a country district. I therefore see no reason for holding that section 103 (and the remark applies to other sections in a similar position) does not apply to burghs, because although it is not incorporated with the Act of 1892, it is not repealed. In taking that view I am confirmed by the judgment of the First Division in the case of *Brown* v. *Magistrates of Kirkcudbright*, 8 F. 77.

There is, however, another ground for holding that section 103 is still in force as regards burghs. By the 5th section of the Act of 1901 it is provided that "the town council of any burgh, as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act or any other Act, shall with reference to sewerage or drainage or water supply within such area, have the same rights, powers, and privileges as are conferred by the Public Health (Scotland) Act 1897 upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers, and privileges conferred by sections 122 and 131 of the last-mentioned Act, to which sections the present section shall not apply."

Now the two excepted sections are in express terms limited to districts of a "local authority, not being the local authority of a burgh," and in the part of the Act dealing with "sewers, drains, and water supply" there are other sections (at all events in regard to water supply) whose application is limited in the same way. It is plainly the powers contained in the latter sections which are conferred upon burgh authorities in addition to powers already possessed by them. The object, therefore, of the enactment is to add to and not to diminish the powers of burgh authorities, and the powers to which the addition is made are described as those conferred "by the principal Act" (that is, the Burgh Police Act 1892) "or any other Act." Now the Act of 1897 is another Act which confers powers upon burgh local authorities which they did not possess before (as, for example, by the 103rd section), and it seems to me to be plain that the Act of 1901, so far from taking away any powers conferred upon burgh authorities by any prior Act, conferred upon them powers which they did not previously possess.

I am therefore of opinion that the defenders were entitled to proceed, as they did in fact proceed, under the powers of section 103.

The next question is whether the defenders followed the procedure prescribed by that section. The part of the section applicable to this case is that which enacts that a local authority may construct a sewer, "after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever." The pursuers did not found upon the clause in regard to a surveyor's report, but they maintained that "reasonable notice" of the works proposed was not given to them. Notice was, in fact, sent to the pursuers by the letter of the Town Clerk of 20th June 1905, and the pursuers' complaint is that the information given as to the character of the proposed sewer was not reasonably adequate, in that not only did it not disclose that the new pipes were to be laid upon the surface of the bed of the stream instead of under the surface (as was the case with an existing pipe), but that the inference from the letter was that the new pipes were to be laid upon the same level as the existing pipe.

It seems to me that there are substantial grounds for that objection. The state of matters which existed when the notice was given was that a 12-inch pipe ran down the bed of the river from the Victoria Bridge to Spoutwell Brae, and the plan which was sent to the pursuers along with the letter of 20th June showed that pipe, and alongside of it an 18-inch pipe. In the letter it was said that "the existing 12-inch water-closet sewage pipe" (which I understand to be the pipe which ran down the bed of the river) "will remain," but nothing was said about the 18-inch pipe shown on the plan. The explanation of that I take to be that it did not occur to the Town Clerk that the laying pipes in the bed of the river below the Victoria Bridge could in any way affect the pursuers, and what he desired to make clear in the letter was what the proposed sewage arrangements above Victoria Bridge were—a matter in which he was aware that the pursuers were interested. The weir of the dam which supplies the pursuers' mills is immediately above Victoria Bridge, and the pursuers had objected to a discharge of sewage which under the existing system was made into the dam. By the proposed scheme that discharge was discontinued, and all the sewage was taken down the river by means of the two pipes, and what the Town Clerk desired to make clear was that the proposed scheme did away with a state of matters to which the defenders strongly objected. But although the Town Clerk did not refer in the letter to the 18-inch pipe he sent a plan which showed that pipe, and accordingly the pursuers were notified that if the scheme were carried through an additional and larger pipe would be taken down the bed of the stream. The plan, however, showed nothing in regard to the level at which the pipes were to be laid; but as the Town Clerk said that the 12-inch pipe would remain, I think that the pursuers were justified in assuming that the 18-inch pipe would not only be laid alongside of it, as

shown on the plan, but would be upon the same level.

Now, I think that it is established by the evidence that the 12-inch pipe was embedded in the channel of the river, and did not show above the level of the river bed, but to what extent that state of matters was due to the manner in which the pipe had been originally laid, and to what extent to sagging or sinking of the pipe it seems to be impossible to ascertain with certainty. I think, however, that the pipe most probably was originally laid under the river-bed. One thing seems to be clear, and that is, that neither the defenders nor the men of skill by whom they were advised ever considered the question of the level of the new pipes as compared with the level of the old pipe. It does not seem to have occurred to them that there was any question of that kind which required consideration, and for this reason—There were two fixed points between which the old pipe ran and between which the new pipes were to run, and did run when laid, the one point being an opening in the abutment of the Victoria Bridge through which the pipes were passed, and the other an iron pipe which crossed the river at Spoutwell Brae, and with which the pipes in question were connected. Now, obviously the natural and most efficient way to lay the pipes between these two points was to lay them upon a uniform gradient—that is to say, in a straight line from the one fixed point to the other—and it never occurred to the engineers to inquire whether the old pipe had or had not been originally laid in that way,

The failure, therefore, of the defenders to inform the pursuers that the new pipes would be above ground was not due to any desire on their part to conceal anything, nor can the Town Clerk be charged with carelessness in not having brought the matter to the pursuers' notice. On the other hand the pursuers were, as I have already said, in my opinion justified in assuming that the new pipes would be in the same position as the old, that is to say, below the surface of the river bed, and it is not surprising that they felt aggrieved when they found that instead of the bed of the river remaining free from obstructions, two large pipes were laid upon it and covered with cement, thereby forming a structure of from four to ten feet in breadth. The pursuers aver, and they have adduced some evidence in support of the averment, that that structure renders their mills more liable to be flooded than they were formerly, and although I do not think that they have made out a strong case, it seems to me to be impossible to say that the risk of flooding may not have been to some, although probably to a very slight, extent increased.

Now assuming that the pursuers did not get that reasonable notice of the works proposed by the defenders which is required by the 103rd section, what is the result? The pursuers' demand, and it is their only demand so far as this action is concerned, is that the pipes should be removed. In order to determine whether or not that is a remedy which is open to the pursuers I shall consider what the position of matters would have been if the pursuers had received notice of the precise way in which it was proposed to lay the pipes and had objected. It seems to me that notwithstanding an objection on the pursuers' part, the defenders could have proceeded with the works and laid the pipes exactly as they have done, because the 103rd section does not say that the consent of the persons to whom notice must be given is required, or that they may object to the proposed sewer. All that seems to be contemplated is that persons through whose lands it is proposed to take a sewer should have an opportunity of considering the matter and stating their views to the local authority.

In expressing that opinion I am not leaving out of view the provisions of the 109th section of the statute, which enacts that "in case it may become necessary to enter, examine, or lay open any lands or premises" for the purpose of making plans, surveying, taking levels, and the like, and, *inter alia*, for the purpose of making sewers, "and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the Sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in daylight." In terms of the 157th section of the Act any order made by the Sheriff is final and not subject to review.

In the case of *Brown* v. *Magistrates of Kirkcudbright* there was some difference of opinion in regard to the power conferred upon the Sheriff by that section, Lord M'Laren taking the view that the Sheriff was empowered to consider and determine whether the operations proposed by the local authority ought or ought not to be allowed, while Lord Adam was strongly of opinion that the Sheriff's powers were limited to questions of procedure, and that he had no authority to consider whether the proposed sewer was necessary or not. I agree with Lord Adam. I think that the main function of the Sheriff is to regulate the way in which the work is to be proceeded with, so as to be as little burdensome as possible to the owner or occupier. No doubt it is made imperative on the Sheriff to grant warrant to the local authorities to enter the lands only "if no sufficient cause be shown to the contrary," which implies that if sufficient cause be shown to the contrary the Sheriff may refuse the warrant. I do not, however, think that that is inconsistent with the view which I take of the scope of the enactment, because there may be cases in which the Sheriff would be justified in refusing a warrant without considering or dealing in any way with the question whether or not the works were necessary.

Suppose, for example, that a local authority proposed to construct a sewer through private lands in the exercise of the powers in the 103rd section, and attempted to enter the lands and commence operations without having given previous notice in writing to the owner or occupier, and without having obtained a report from a surveyor that the sewer was necessary, I have no doubt that the Sheriff would be entitled to refuse a warrant and to dismiss the application in respect that the local authority had not followed the statutory procedure. I am accordingly of opinion that the 109th section does not aid the pursuers, and indeed I did not understand their counsel to found upon that section.

I am therefore of opinion that if the defenders were entitled to proceed under the powers conferred by the 103rd section of the Act of 1897, without any limitation of these powers, except those contained in the section itself, and in the 109th section, the pursuers are not entitled to have the pipes in question removed. I take it that the Court will not order removal of a structure which can be immediately replaced, especially where, as here, there was no radical defect in the title of those who erected it, but merely an unintentional failure to comply with certain statutory formalities.

The question remains, however, whether the powers conferred by the 103rd section are not limited and qualified by the 217th section of the Act of 1892? By that section it is enacted "that nothing in this Act contained shall be construed to authorise" the local authority, *inter alia*, "to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same."

It seems to me that if that enactment is applicable to the present case, and if it is to be construed literally, it is conclusive in the pursuers' favour, because the defenders did, without the pursuers' consent, use and interfere with a river in which the pursuers not only had an interest as owners and occupiers of mills, but of the *alveus* of which they were proprietors, either from bank to bank, or *ad medium filum* at the part where the pipes in question are laid.

The Lord Ordinary suggests that even if the section is applicable, the pursuers gave their consent in writing. I cannot assent to that view, because although the pursuers did in writing express their approval of the scheme, they did so in the belief, which they were justified in holding, that the pipes were to be laid under ground. If they had been aware that the pipes were to be laid above ground they would certainly not have approved of the scheme, nor given their consent to it.

But however that may be, I am of opinion that the 217th section does not apply to the present case. In the first place, the section in terms only applies to operations carried out under the powers conferred by the Act of 1892. That appears from the opening words of the section, which are, "Nothing in this Act contained shall be construed to authorise."

In like manner the language of the 103rd section seems to me to negative the idea that the powers thereby conferred are subject to any limitation. The power which is in question in this case is to construct a sewer "into, through, or under any lands *whatsoever*." The word "whatsoever" is plainly unnecessary except for the purpose of emphasis, and the inference appears to me to be that it was used in order to make it clear that the generality of the power was to be subject to no exception. I am therefore of opinion that it would be contrary to the declared intention of the Legislature to hold that the power conferred has been limited and curtailed in the case of burghs so as to be excluded altogether as regards the subjects enumerated in the 217th section.

If I am right in the view which I have already expressed, that the 103rd section is not repealed by implication *quoad* burghs by the Act of 1901, the only ground upon which it could be contended that the 217th section applies to operations under the 103rd section would be that the Act of 1901, by declaring the Act of 1892 to be the principal Act, placed the 103rd section of the Act of 1897 in the position of an enactment which merely added to the powers conferred by the principal Act, and therefore fell to be read along with and as part of that Act. Now the Act of 1901 has left the 103rd section, along with the group of sections of which it is one, in a very anomalous position, because, while it makes the Act of 1892 the principal Act, and incorporates with that Act certain sections of the Act of 1897, and repeals other sections of the latter Act, it simply leaves the group of sections to which I have referred standing, without either repealing them or incorporating them with the principal Act. In these circumstances I do not think that it is legitimate to infer that the Legislature intended that the wide powers conferred upon all local authorities by the 103rd section should be limited in the case of burgh authorities alone by reading into that section the 217th section of the Act of 1892. To make that inference would be to construe the Act of 1901 either as incorporating the 103rd section with the Act of 1892, or as declaring that it should be read along with and as forming part of that Act. The section has certainly not been incorporated, and I do not think that there is enough to imply a direction that it shall be read as part of the Act of 1892. Accordingly I am of opinion that the pursuers cannot found upon the 217th section.

Upon the whole matter, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary should be affirmed in so far as it assoilzies the defenders. I am not, however, prepared, for the reasons which I have given, to assent to the finding that the defenders have validly complied with the requirements of the Public Health Act.

With regard to the question of expenses raised under the Public Authorities Protection Act, I need only say, without going into details, that an examination of the Act has led me to the same conclusion as that expressed by Lord Stormonth Darling.

LORD ARDWALL—I concur entirely in the opinion of my brother Lord Low, which I have had the privilege of reading, and with which I entirely agree.

LORD JUSTICE-CLERK—I have very little to add. The case has seemed to me to be attended with considerable difficulty. But I have come to the view that the judgment should be as proposed. I cannot say that I think the giving of notice under the Act was given with that clearness and formality which would be expected where notice was given by a public authority proposing to interfere with a piece of property in which private proprietors had a substantial interest. I think that the procedure was loose, and not by any means a model for imitation by any public body. But it was treated by the pursuers as a notice without objection. Accordingly the work proceeded in the knowledge and under the observation of the pursuers. It seems to me that, knowing that important works were going on under the notice, the pursuers were not acting as they should have done in allowing these expensive works to be carried on and completed without taking steps to vindicate any rights they had which they saw were being encroached upon. Except upon the strongest grounds I could not hold that merely upon a question of notice, an objector could come forward and require that the works erected should be removed, thus making a work involving great cost abortive, and compelling the adoption of some new and probably more expensive expedient. I agree with Lord Low in thinking that if the pursuers had objected they could not have made good their objection to the works being executed under section 103 of the Public Health Act, and that that Act applied. But further, in this case I have formed a very decided opinion that the pursuers have failed to prove in any reasonable degree that the works which were executed could cause any damage to their interests.

I do not add anything upon the question of application of the statutes. I entirely agree in the opinion that the authority proposing to make the alterations were entitled to proceed under section 103 of the Public Health Act, and I agree with Lord Low in the views he has expressed as to the 217th section of the Act of 1892, in holding that the pursuers cannot found on it.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties in the pursuers' reclaiming note against the interlocutor of Lord Dundas, dated 6th July 1906, Recal the said interlocutor in so far as it finds the defenders entitled to expenses as between agent and client in terms of the Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1 (*b*): *Quoad ultra* refuse the reclaiming note: Adhere to the said interlocutor reclaimed against, and decern: Refuse the defenders' motion for expenses as between agent and client in terms of the said Public Authorities Protection Act 1893: Find them entitled to expenses on the ordinary terms."

Counsel for the Reclaimers—Clyde, K.C. —Horne. Agent—T. S. Paterson, W.S.

Counsel for the Respondents—Dean of Faculty (Campbell, K.C.) — Malcolm. Agents—John C. Brodie & Sons, W.S.

HOUSE OF LORDS.

Monday, November 25.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson.)

BARCLAY, CURLE, & COMPANY, LIMITED *v.* SIR JAMES LAING & SONS, LIMITED.

Sale—Ship—Arrestment—Property in Ship in Course of Construction—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71).

A contracted to build and sell, and B to purchase, two ships, which were to be paid for by instalments and built under the supervision of B's inspector. C arrested the ships when approaching completion for an alleged debt of B's to him. A petitioned for recal of the arrestments.

Held that under the Sale of Goods Act 1893 the property in the ships depended upon the intention of the parties as expressed in the contract, and as there was nothing in the contract to show that the parties intended to transfer the property in the ships while in course of building, the property remained in A, the builder, who was therefore entitled to recal of the arrestments.

Arrestment—Process—Recal—Petition for Recal by Arrestee—Competency.

Per First Division—A petition for recal of arrestments at the instance of the arrestee (1) is not competent when it is an alleged debt, or sum due, which has been arrested; (2) nor is such petition competent when it is a corporeal moveable which has been arrested, and the arrestee (petitioner) admits that the ownership thereof is in the common debtor, but alleges claims upon it, such as a lien; (3) but such petition is competent in the case of a corporeal moveable where the arrestee (petitioner) makes no such admission, and in that case the question of recal first turns upon whether the arrester can, but as