Scotland, laws, statutes, etc. Police law

THE BURGH POLICE (SCOTLAND) ACT, 1892.

WITH

NOTES THEREON AND REFERENCES TO SCOTTISH AND ENGLISH DECISIONS ELUCIDATING THE SAME, AND RELATIVE STATUTES,

AND

An Appendix containing the Schedules to the Act, Forms for carrying the Act into operation, unreported Cases on the Act of 1862, *and opinions of Counsel on Acts referred to.*

BY

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TO THE

RIGHT HON. J. B. BALFOUR, Q.C., M.P., LL.D.,

LORD ADVOCATE FOR SCOTLAND,

UNDER WHOSE SUPERVISION THE PRESENT ACT WAS PREPARED

AND BROUGHT INTO PARLIAMENT,

AND

TO WHOSE EXTENSIVE AND ACCURATE KNOWLEDGE OF THIS BRANCH OF LAW, AS WELL AS AN UNFAILING TACT AND COURTESY, THE PUBLIC OF SCOTLAND IS GREATLY INDEBTED FOR THE MEASURE,

THE PRESENT VOLUME IS, BY PERMISSION,

RESPECTFULLY DEDICATED

BY

The Author.

PREFACE.

THE favour with which the *Manual of Police Law and Practice*, the first attempt to consolidate that branch of law in one treatise in Scotland, has been received, followed by the request of a number of Clerks of Police Burghs for a new edition on the passing of "The Burgh Police (Scotland) Act, 1892," is the explanation of the appearance of the present work. After conferring with several Clerks of the largest and most important burghs under the Act, and several professional friends familiar with the subject, the writer came to the conclusion, that for all practical purposes the plan of publishing the text of the Act, with notes and references to cases, Scottish and English, elucidating the same, was preferable to analysing its provisions and embodying these notes in the shape of a treatise.

As the text of the Act was only issued in August 1892, the time for the compilation of notes and references has not been long, and the author has to acknowledge the ready courtesy and assistance he has received from many professional brethren. In particular he is indebted to Mr. Graham Stewart, LL.B., Advocate, for going over the MS. of the notes on the Dean of Guild sections and offences and penalties; to Mr. William MacLeish, City Clerk, Perth, for perusing the notes on the election of Commissioners; and to Mr. Cæsar, Clerk to the Commissioners of Carnoustie, for looking over and supplementing the notes applicable to the subject of roads and streets as affecting Police Burghs and County Councils. These gentlemen have no responsibility, however, for the notes, which rests entirely on the writer. He also acknowledges with pleasure his obligations to Mr. A. Macdonald, Town Clerk, Govan, and Mr. T. B. Laing, Town Clerk, Leith, for the use of opinions of counsel,

and several suggestions on the Act, and to many other County and Town Clerks for the use of opinions of counsel bearing on the provisions of the Act. To Mr. A. Murray, of the Board of Supervision, whose intimate acquaintance with the law and administration of Public Health and Local Government in Scotland is well known, he is indebted for going over almost the entire manuscript of the notes, for many valuable suggestions, and for revising the proof-sheets and checking the references.

It has not been considered necessary to print the table of analogous clauses in the 1850 and 1862 Acts, referred to at page 21, though prepared, as these Acts are, with very unimportant exceptions, entirely repealed, and the expense entailed in printing the table would have been altogether disproportionate to its value.

While no labour has been spared to make the statements of law in the notes and the references to authorities as full and accurate as possible, the author cannot but feel that, from the extent of the subject and the limited time at his disposal, many errors and omissions may be found. He does not doubt, however, that those best versed in this branch of the law, and knowing the difficulty and labour which the work entailed, will be the readiest to make allowance for any imperfections they may discover, and to extend to him the indulgence which he received in his former efforts to lessen the labours of his professional brethren in a department of law where no literature was extant.

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INTRODUCTION.

THE General Police and Improvement (Scotland) Act, 1862, had not been long in operation when it was felt that certain alterations and further statutory powers and provisions were required for adequately carrying out the police and sanitary arrangements of the burghs in Scotland. The Act of 1862 differed considerably from the Bill prepared by Mr. Lindsay and subsequently introduced into Parliament, and the general arrangement of its provisions was disturbed by the amendments and alterations introduced in its passage through Parliament. The result was that there were many defects in its enactments, while its arrangement did not follow upon any well-defined method. In consequence it soon became necessary to have further legislative enactment, and accordingly the Act was amended in the year 1868 by 31 & 32 Vict. c. 102, intituled "An Act to alter the qualifications of the electors in places in Scotland under the General Police and Improvement (Scotland) Act, 1862, or under the Act 13 & 14 Vict. c. 33, and to amend the said Acts in certain other respects;" and also in 1876 by 39 & 40 Vict. c. 25, intituled "An Act to amend the law of Scotland in regard to the division of burghs into wards."

In 1876 the writer suggested a number of amendments on the existing Acts—*inter alia*, that provision ought to be made for the amalgamation of contiguous burghs on certain conditions, and also for the revision of the wards of burghs which had been divided; that the elections of Commissioners after the first election ought to be made uniform over Scotland, and fixed, say, in November, at the time when the municipal elections take place, and when the Valuation Roll is completed; and that the poll in places adopting the Act should be conducted by ballot; it was also suggested that the

tenure of office of the senior Magistrate ought to be determined more precisely; that the Commissioners should have greater powers as to naming and numbering the streets, and removing obstructions therefrom, fixing the width and levels of new streets, the making, maintaining, repairing, and ventilation of sewers and drains, and generally as to the construction and sanitary arrangements of new buildings; and that power should be given to contiguous burghs to take joint action in constructing sewers, and in other police matters, with authority to refer any differences which might arise, either with or without the consent of the Court of Session; further, that the Court should also be authorised, on the application of a certain number of ratepayers, by the exercise of its *nobile officium*, to provide a remedy for cases where failure to put the Act in operation had occurred through oversight on the part of the parties adopting it; and that a general power should be given to the Court to make such orders for carrying the Act into operation as might be thought right and proper. Nearly all these suggestions were adopted and embodied in subsequent legislation, the General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1877, 40 & 41 Vict. c. 22, granting facilities for the adoption or execution of the General Police Act in burghs where, from a failure to observe the statutory provisions or otherwise, the Act had not come into operation; the General Police and Improvement (Scotland) Amendment Act, 1878, 41 & 42 Vict. c. 30, being an Act regulating the retiral, election, and rotation of Commissioners, and the tenure of office of the senior Magistrate; and the General Police and Improvement (Scotland) Act, 1882, 45 & 46 Vict. c. 6, conferring upon female as well as male householders the privileges hitherto enjoyed by the latter only.

The growing increase and importance of questions relating to police and public health, and the unanimous feeling that the authorities of Scottish burghs should be entrusted with extended powers of dealing with such matters, led to the preparation of a new Police Bill. The new Bill was again drafted by the late Mr. Lindsay at the request and under the supervision of the Lord Advocate (Mr. Balfour), and after consultation with many of the leading authorities in Scotland, it was printed and introduced into Parliament in 1883. During its prepar-

ation the writer was in constant communication with Mr. Lindsay. After having the benefit of criticism from most of the burghs where the Act of 1862 had been adopted, and that of the Convention of Royal Burghs in Scotland, the Bill was again introduced in 1884 and 1885; it was thereafter referred to a Select Committee of the House of Commons, from which it emanated in adjusted form, but owing to the objections of a very limited number of the members of Parliament it was not allowed to pass. It was again introduced in the year 1888, but did not pass. In 1892 it was reintroduced as amended by the Select Committee, but to carry a Bill of such huge dimensions through the various stages of parliamentary procedure in the few short hours that constitute Scotland's share of the attention of the Legislature was no light task. It was evident that any serious opposition would be fatal, and unfortunately a most pertinacious opposition arose. To disarm this, the sanitary clauses were sacrificed, and at length, maimed and mutilated by members whose constituencies it did not affect, shorn of some of its most valuable provisions, its usefulness contracted, and its symmetry impaired, the Bill was hurried through in the last hours of a dying Parliament, and became law on the 28th June 1892.

The effect of the Act is to introduce a number of important changes in the law applicable to Scottish burghs. To enumerate them all would be to give an analysis of the whole Act, but the principal points may be mentioned. In the first place, this Act differs from its predecessors in being of general application. It repeals all existing General Police Acts, and applies to all burghs in Scotland save five,—Edinburgh, Glasgow, Aberdeen, Dundee, Greenock,—which, however, have power to adopt it in whole or in part at any time. Further, wherever the Act applies, it applies in its entirety, there being no provision for adopting some clauses and excluding others, save in the five burghs aforesaid. An important change is made in the mode of creating new burghs. The decision is no longer left with the ratepayers, but is placed in the hands of the Sheriff; and in the case of places having 2000 inhabitants or upwards, he has no option—a burgh must be formed. In connection with the election of Commissioners, some notable changes are introduced. The

register is assimilated to the parliamentary register, with the female voters in addition; the nomination of candidates must be made on the Tuesday preceding the election, instead of the Thursday, and nominations may be withdrawn up till the Thursday at 4 P.M.; provision is also made for varying the number of Commissioners in accordance with any increase or decrease of the population.

The directions in which the powers of the Commissioners are increased are too numerous to admit of specific reference, but mention may be made of the wide powers which may be acquired by means of Provisional Orders, especially as regards the amalgamation of adjacent burghs. In the police arrangements the Act provides for considerable improvements, notably in discouraging the maintenance of separate police forces by the smaller burghs; for while burghs of not less than 7000 inhabitants presently possessing a separate police establishment may continue to do so, in future no burgh can establish a separate force unless it contains 20,000 inhabitants. There are also useful provisions whereby burghs may unite with other burghs or with counties in having the same Chief Constable.

Of purely sanitary matters little mention is made, these clauses—as already indicated—having been dropped to obviate parliamentary opposition. But the appointment of a Sanitary Inspector and of a duly qualified Medical Officer of Health is made compulsory; and power to make bye-laws for a number of sanitary purposes is provided. In matters closely connected with public health a considerable increase of powers has been given, and the Commissioners will now be enabled to deal more effectively with lighting and cleansing, with general town improvements, with streets and foot pavements, with buildings old and new, with sewers, drains, sanitary conveniences, water supply, and the cleansing of stairs, etc. Prominent among the changes in regard to these matters are the provisions enabling the Commissioners to establish a Dean of Guild Court. The clauses as to slaughter-houses, markets, hackney carriages, etc. etc., all tend in the same direction of giving the Commissioners additional powers. Theatres, music-halls, and places of public entertainment must in future be licensed by the Magistrates, and constables

are authorised to enter such places at all times. The power to make bye-laws is largely extended. Besides provisions scattered all over the Act, a list is given of specific purposes for which bye-laws may be made, and as these include one for carrying out or enforcing any provisions of the Act not specially mentioned, it is obvious that the powers of the Commissioners in the making of bye-laws could hardly be carried further. Sets of bye-laws for new buildings and for hackney carriages are given in Schedules IV. and V. Another feature of the new Act is the increase in the maximum of the Burgh General Assessment—which is the name given to the assessment for general police purposes. Where the Commissioners have introduced water, the maximum assessment is 4s. per £; in other cases it is 2s.

As regards offences and procedure many improvements are introduced, and a series of useful forms is given in the Schedule appended to the Act.

While the Act has thus in many most important respects extended the powers of Commissioners, there are several slips which will require early attention. The withdrawal from the ratepayers of a populous place of the right to determine whether it shall be formed into a burgh is unfortunate, and the absence of any provision regarding the poll to be taken with reference thereto seems to be an unintentional omission. This omission not only affects the adoption of the Act in these burghs, but seriously interferes with, and may render nugatory, the provisions of sec. 306, regarding special orders of the Commissioners. Again, while by sec. 29 the number of Commissioners in Police Burghs is to be increased or decreased according to the number of the population by application to the Sheriff, yet in those burghs which have a municipal authority elected under 3 & 4 Will. IV. cc. 76 and 77, no increase of the municipal body can be had without express legislation or Provisional Order. The result is that many burghs, generally those most requiring it, do not get the benefit of the provision at all.

The tenure of the Medical Officer and Sanitary Inspector under the Act ought to be put beyond doubt. With reference to the opinion of counsel referred to on p. 135, it is right to point out that the provisions in the Local Govern-

ment Act, 52 & 53 Vict. c. 50, as to the Medical Officer and Sanitary Inspector, occur under the heading "Provisions as to Powers of Council"—that "Council" means County Council, and that sec. 54, sub-sec. (4), applies to every Medical Officer and Sanitary Inspector appointed under the Act, or under the Public Health Acts. In these circumstances the question has been raised, whether the sanction of the Board of Supervision is required for the dismissal of officers appointed under the Act, on the ground that thereunder they only hold office during the pleasure of the Commissioners.

In sec. 429 it is provided that, on the conviction of a person for having for sale for human food any unsound or diseased animal, the Burgh Prosecutor may proceed against the original seller as art and part in the offence, and as liable to the same punishment as the Act prescribes therefor; but no such offence is in the Act, nor penalty prescribed thereby provided, consequently no prosecution can take place against the original seller. Again, in sec. 490, the Magistrate may sentence an accused, on conviction of common-law crimes or offences, to imprisonment for a period not exceeding two months, or impose a fine not exceeding £10; and in lieu of, *or in addition* thereto, he may order the accused to find security for good behaviour, under a penalty not exceeding £20, failing which he may award imprisonment, "or additional imprisonment not exceeding the respective periods after specified; but in no case shall the total imprisonment exceed sixty days, except as hereinafter provided." The "hereinafter provided" evidently refers to sec. 501, the maximum period of imprisonment wherein is sixty days. There is thus, first, the inconsistency between the sixty days and two months in these punishments; and second, a contemplated further period of imprisonment on failure to find caution, for which no provision is made.

By sec. 382, habitual drunkards may be charged with aggravation in case the accused has been three times convicted within the twelve months preceding, and an additional penalty or imprisonment is authorised on conviction; and, by sec. 465, it is competent for the Burgh Prosecutor, in charging any person with an offence under, or a contravention of, any of the provisions of the Act, to libel a charge of

aggravation by previous conviction within seven years, for a like offence or contravention of this Act, or any other Act or bye-laws; and in the event of the said offence or contravention, together with the said aggravation, being proved to the satisfaction of the Magistrate, it shall be lawful for the Magistrate to impose a penalty not exceeding 40s., or thirty days' imprisonment, without the option of a fine, in respect of such aggravation, in addition to the penalty or imprisonment which he is authorised by this Act to impose for the offence or contravention itself.

These two sections present a good deal of difficulty. While sec. 145 is wide enough to cover the case of habitual drunkards, it will be safer to hold sec. 382 as the only one providing for previous aggravations in such cases. Again, does sec. 465 authorise a Magistrate to inflict imprisonment for thirty days beyond the two months, or sixty days, sanctioned throughout the Act, or is the two months the maximum authorised by sec. 501?

The following useful penal provision, in sec. 251 of the Act of 1862, has been omitted:—"Every person who causes any tree or timber, iron beam, stone, or other thing, to be drawn or hauled otherwise than upon a wheeled carriage, or who causes any tree or timber, iron beam, stone, or other thing, to be drawn in or upon any carriage, without having sufficient means of safely guiding the same." Several other minor slips also occur, as in sec. 105, where the word "courts" is evidently used instead of "stairs"; in sec. 116, where the marginal note says the occupiers are to cleanse footways, while the section provides that Commissioners are to do it; and in sec. 461, where, in the clause itself, it is provided that the Commissioners are to appoint the Burgh Prosecutor, whereas the marginal note says it is the Magistrates. There is also a difficulty as to whether Police Burghs can add to the list of highways taken over from the County Councils, and in respect of which they would be entitled to assess under the Roads Act.

If any new Act be introduced these defects should be remedied, and opportunity should be taken at the same time to provide that the relative position and duties of the Procurator-Fiscal for the county and the Chief Constable for the

burgh in regard to fires as dealt with in sec. 296, be made more clear and definite. Sec. 461 might also be amended, to the effect of allowing Commissioners to appoint a Depute Burgh Prosecutor, even where there is only one Police Court. There does not seem to be any particular reason why the power to appoint a Deputy Burgh Prosecutor should be limited to burghs where there are more Police Courts than one. This is substantially making the enactment of no effect.

The powers of Commissioners as to building in courts are still defective, and are possibly impaired rather than improved by this Act. Its provisions seem to apply solely to new courts, whereas the greatest necessity arises in altering or adding to buildings in existing courts. Likewise, the provisions as to ruinous tenements are not sufficiently stringent and capable of rapid execution. Sec. 195 is only applicable to the case of ruinous buildings held by two or more joint owners, while in the cases to which sec. 200 applies, procedure can only take place after three months' notice. All cases might very well be dealt with under sec. 195, and sec. 200 eliminated.

The provision as to appeal is still left in a most unsatisfactory condition. Why, if an appeal be taken to the Sheriff, neither party can go further than the Sheriff-Depute, while if the appellant goes direct to the Court of Session the case may go to the Inner House, and presumably therefrom to the House of Lords, seems inexplicable. It would have been a much more practical and satisfactory course, in the event of either party being dissatisfied with the judgment of the Sheriff, if an appeal had been allowed direct to either Division of the Court of Session, on a case stated, or simply on the proceedings before the Sheriff.

The provisions as to articles found or stolen or fraudulently obtained are still defective. To render such thoroughly effective, every person who occupies premises, and exposes or offers for sale or exchange second-hand goods or articles of any description, including watches, jewellery, or any thing of a secondhand character, ought to be compelled either to obtain a licence from the Magistrates under suitable conditions, or at least to register their places of business in the Magistrates' books, and to keep a record of all their transactions relating

to such articles which should be patent to the police. Sec. 413 might also be improved by authorising the Burgh Prosecutor or Chief Constable to apply to the Magistrate for warrant, after sufficient notice, to deliver goods or money in the custody of the police to the owner or reputed owner thereof with or without payment of any sum, as the Magistrate may think fit.

The Act for the Protection of and Prevention of Cruelty to Children, 1889, though a very beneficial Act, has practically been allowed to become a dead letter in Scotland. The Burgh Prosecutor under the present Act should be made the prosecutor under that Act, and it should be specially incorporated as part of the present Act, so that the Chief Constable into whose hands these unfortunate children generally come may be enabled to deal with them as provided by the Act.

A provision ought also to be introduced empowering the Burgh Prosecutor to charge young lads or children with plucking, pulling up, or carrying away any fruit, flowers, vegetables, or such like, without consent of the owner, as an offence against the Act, punishable by a small fine, whipping, or caution for good behaviour, instead of such being dealt with as theft at common law, as at present; and a similar provision might with advantage be added applicable to the case of children climbing on walls, hoardings, fences, scaffolding, roofs of buildings, and the like, as well as the wading through, trampling down, damaging or destroying growing crops, ground, or nurseries, and such places, without the authority of the owner or occupier.

Clause 480 might also be amended by authorising fines imposed upon children under fourteen to be recovered from their parents, which would have a beneficial effect in compelling them to exercise a stricter supervision of them.

In dealing with the suppression of vagrants and habitual offenders much greater and more effectual remedies are urgently and immediately required. There is a considerable and, it is feared, increasing class who spend their time between the prison and the poorhouse, with an occasional summer holiday on the highway or village common. How to deal with such efficiently is one of, if not the most pressing problems of modern

times. At present, the police and the Poor Law are perfectly powerless to deal with such a class in any remedial manner, and the protection which the Poor Law affords only acts as a sanitorium to fit such persons for becoming the recipients of such punishments as the police law provides. Inquiry and legislation are both urgently needed with the view at least of endeavouring to find some solution of the problem, however inadequate.

But, numerous as its omissions and imperfections undoubtedly are, the Act of 1892 is a great and a useful piece of legislation. Applying to nearly half the population of Scotland, its effects will be far-reaching and influential. That they will on the whole be advantageous, both to the Local Authorities and the inhabitants under their charge, admits of little doubt. Much of the success of the Act, however, will depend on its administration. Prudence and discretion on the part of the Commissioners, patience and consideration on the part of the ratepayers, are alike necessary. Parliament has placed in the hands of the administrators of our Scottish burghs powers more extensive than were ever before entrusted to Local Authorities, and in the exercise of these powers they are untrammelled by the control of any officer of State or department of Government. It will be for them to show that this confidence is not misplaced, by using these extensive powers judiciously and wisely, with a single eye to the moral and material welfare of the community.

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A. & E.,	Adolphus and Ellis's Reports.
A. & E., Q. B.,	Adolphus and Ellis's Queen's Bench Reports, N. S.
Alison,	Alison's Principles and Practice of Criminal Law.
App. Cas.,	Law Reports, N. S., Appeal Cases.
Arkley,	Arkley's Justiciary Reports (Scottish).
B.,	Bacon.
B. & A.,	Barnewall and Alderson's Reports.
B. & Ad.,	Barnewall and Adolphus's Reports.
B. & C.,	Barnewall and Cresswell's Reports.
B. & S.,	Best and Smith's Reports.
Bank.,	Bankton's Institute of the Laws of Scotland.
Bazalgette,	Local and Municipal Government, Bazalgette and Humphreys, 1888.
Beav.,	Beavan's Reports.
Bell App.,	Bell's Appeal Cases.
Bell's Com.,	Bell's Commentaries on the Law of Scotland.
Brice,	Brice on *Ultra Vires*.
Broun,	Broun's Justiciary Reports.
Burr.,	Burrow's King's Bench Reports.
C. B.,	Common Bench Reports.
Ch. App.,	Chancery Appeals.
Ch. D.,	Law Reports, N. S., Chancery Division.
Ch. R.,	Reports in Chancery.
C. & K.,	Carrington and Kirwan's Reports.
C. L. R.,	Common Law Reports.
C. & P.,	Carrington and Payne's Reports.
C. P.,	Common Pleas.
C. P. D.,	Law Reports, N. S., Common Pleas Division.
Coup.,	Couper's Justiciary Reports (Scottish).
D.,	Dunlop's Court of Session Reports.
Deas,	Deas on the Law of Railways.
De Gex, or De G., J., & S.,	De Gex, Jones, and Smith's Reports.
E. & B.,	Ellis and Blackburn's Reports.
E. B. & E.,	Ellis, Blackburn, & Ellis's Reports.
E. & E.,	Ellis and Ellis' Reports.
Eq. Rep.,	Equity Reports.
Ersk.,	Erskine's Institutes of the Law of Scotland.
Esp.,	Espinasse's Reports.
Ex., or Exch.,	Law Reports, Exchequer Division.
F. & F.,	Foster and Finlayson's Reports.
F., Fac., F. C., or Fac. Col.,	Faculty Collection of Reports, Court of Session.
Giff.,	Giffard's Reports.
Glen,	Glen's Law of Public Health.
Guthrie,	Guthrie's Select Sheriff Court Cases.
H. L.,	House of Lords.

H. & N.,	Hurlstone and Norman's Reports.
I. C. C.,	Irish Circuit Cases.
I. C. L. Rep.,	Irish Common Law Reports.
Irons,	Irons' Manual of Police Law and Practice.
Irv.,	Irvine's Justiciary Reports (Scottish).
J. & H.,	Johnson and Hemming's Reports.
J. P.,	Justice of the Peace.
Johns.,	Johnson's Reports.
Jur.,	Jurist Reports.
Jur. Scot.,	Scottish Jurist.
Just.,	Justiciary Reports (Scottish).
L. J.,	Law Journal.
L. J., N. S.,	Law Journal, New Series.
L. R.,	Law Reports.
L. Rev.,	Law Review.
L. T.,	Law Times.
L. T.,—N. S., O. S.,	Law Times,—New Series, Old Series.
Lumley,	Lumley on Byelaws.
M. C.,	Magistrates' Cases.
M. & R., or M'L. & Rob.,	Maclean and Robinson's Appeals (Scottish).
M. & W.,	Meeson and Welsby's Reports.
M., M'P., or Macph.,	Macpherson's Court of Session Reports.
M., M'P., or Macph., H. L.,	Macpherson's House of Lords Reports.
Macq.,	Macqueen's App. Cases (Scottish).
Marwick,	Law and Practice in regard to Municipal Elections.
M., or Mor.,	Morison's Dictionary of Decisions (Scottish).
Mur.,	Murray's Reports (Scottish).
N. S.,	New Series.
Oke,	Oke's Magisterial Synopsis.
P. C.,	Privy Council.
Pat. App.,	Paton's Appeal Cases (Scottish).
Pixley,	Pixley on Auditors.
Q. B. D.,	Law Reports, N. S., Queen's Bench Division.
R., or Ret.,	Rettie's Court of Session Reports.
R. (Just.), or R. (J. C.),	Rettie's Court of Session Reports (Justiciary).
Rankine,	The Law of Landownership in Scotland.
Rob.,	Robertson's App. Cases.
S.,	Shaw's Court of Session Reports.
S. J.,	Solicitor's Journal.
S., N. E.,	Shaw's Court of Session Reports, New Edition.
Sc. Jur.,	Scottish Jurist.
S. L. R.,	Scottish Law Reporter.
Scot. Law Rev.,	Scottish Law Review.
Shaw,	Shaw's Justiciary Reports.
Sh. App.,	Shaw's Reports of Appeal Cases (Scottish).
Sh. Dig.,	Shaw's Digest of Decisions (Scottish).
Sh. & M'L.,	Shaw and Maclean's Reports (Scottish).
Skelton,	Handbook of Public Health.
Stuart,	Stuart's Reports (Scottish).
Swinton,	Swinton's Just. Rep. (Scottish).
T. L. R.,	Times Law Reports.
W. N.,	Weekly Notes.
W. R.,	Weekly Reporter.
W. & S.,	Wilson & Shaw's H. L. Reports (Scottish).
White,	White's Justiciary Reports (Scottish).

BURGH POLICE (SCOTLAND) ACT, 1892.

(55 AND 56 VICT. c. 55.)

An Act for regulating the Police and Sanitary Administration of Towns and Populous Places, and for facilitating the union of Police and Municipal Administration in Burghs in Scotland.—[28*th June* 1892.]

WHEREAS it is expedient to amend the laws relating to the police and sanitary administration of towns and populous places, and to facilitate the union of police and municipal administration in burghs in Scotland:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Title.—The title cannot be resorted to, says Lord Cottenham, in construing the enactment. The title, though it has occasionally been referred to, as aiding in the construction of an Act, is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all. And Lord Denman remarked that the Court had often laid that down. The rule has not, indeed, been invariably observed, but it does not seem that on these occasions attention was directed to the established rule.—Maxwell on Statutes, 2nd ed., p. 50.

Objects of Act.—These are—(1) to amend the laws relating to the police and sanitary administration of towns and populous places, and (2) to facilitate the union of police and municipal administration in burghs in Scotland. The sanitary, or public health, clauses of the Bill were dropped out in the last Committee stage in the House of Commons, otherwise the Bill would not have been carried. There remained the parts of the Act dealing with cleansing, regulation of new buildings, ventilation, sewers, drains, etc., which may be considered as sanitary administration. The public health in burghs and populous places will continue to be regulated by the Public

Health (Scotland) Act, 1867, and the amending Acts of 1871, 34 & 35 Vict. c. 38; 1875, 38 & 39 Vict. c. 74; and 1882, 45 Vict. c. 11. The Provost, Magistrates, and Council or Commissioners in every burgh are the Local Authority under the Public Health (Scotland) Act, 1867, within the area of the burgh (sec. 43, 55 & 56 Vict. c. 55).

The union of police and municipal administration is facilitated by the provisions of sec. 42, enacting that where various municipal or police authorities possess jurisdictions and powers within the area of the burgh, in police, water, gas, drainage, rating, matters of public health or otherwise, such jurisdictions and powers are to be wholly exercised by the Provost, Magistrates, and Town Council or Commissioners of the burgh. And clause 45 authorises application to be made to the Secretary of State for Scotland for a Provisional Order, whenever it appears desirable to the Magistrates and Council or the Commissioners of contiguous or adjacent burghs, for amalgamating the administration of such burghs for the purposes of the Act, or both for municipal purposes and the purposes of the Act, or carrying on jointly such administration.

Preamble.—The preamble of a Statute has been said to be a good means to find out its meaning, and as it were a key to the understanding of it; and as it usually states or professes to state the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.—Maxwell, p. 52.

1. Short Title and Extent.—This Act may be cited as the Burgh Police (Scotland) Act, 1892, and shall apply to Scotland only.

The Act should always be cited by this title, particularly in judicial proceedings.

Marginal Notes.—On the question as to whether the marginal notes are to be regarded as part of the Act, and read and construed as such, no authoritative decision has been pronounced, and conflicting opinions have been expressed. In Claydon *v.* Green (L. R., 3 C. P., 521), Willis, J., said: "Something has been said about the marginal note to sec. 4 of the 9 Geo. IV. c. 61. I wish to say a word upon that subject. It appears from Blackstone's Commentaries, vol. i. p. 183, that formerly, at one stage of the Bill in Parliament, it was ordered to be engrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849, when it was discontinued, without, however, any Statute being passed to warrant it. See May's Parliamentary Practice, 3rd ed., 382. Since that time, the only record of the proceedings of Parliament—the important proceedings of the highest tribunal of the Kingdom—is to be found in the copy printed by the Queen's printer. But I

desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the Act, the marginal notes, and the punctuation, not as forming part of the Act, but merely as *temporanea expositio*. The Act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again, if Parliament should be pleased so to order, in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament." And in Attorney-General *v.* Great Eastern Railway Co. (11 Ch. D., 465), James, L., indicates that the marginal notes may be looked at, while Bramwell, L.-J., doubts this.

While in Rex *v.* Milverton, 25th Nov. 1836 (Adolphus and Ellis, 5, 841), Lord Denman says: "There is a marginal note to this form, which is not merely found in the printed Act, but in the Parliament roll: 'If there are more highways than one to be stopped up, there should be a separate order for each.' These words are a part of the Act of Parliament, and must receive their full effect."

And again, *In re* Venour (2 Ch. D., 525), Jessel, M. R., said: "This view is borne out by the marginal note; and I may mention that the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts, and in fact are so clearly so that I have known them to be the subject of motion and amendment in Parliament."

In the Attorney-General *v.* Great Eastern Railway Co., Bramwell, L.-J., asked the pertinent question: "What would happen if the marginal note differed from the section, which is a possibility, as shown in sec. 112 of this Act? Does the marginal note repeal the clause, or the clause the marginal note?" See the marginal note to sec. 116 of this Act of 1892. The marginal note says "the foot pavements are to be swept by the occupiers," while the clause says "that the Commissioners shall keep the foot pavements properly swept and cleansed." There can be little doubt that the Court will hold that the obligation lies on the Commissioners.

2. Commencement of Act.—This Act shall come into operation, except so far as otherwise hereinafter provided, on the fifteenth day of May one thousand eight hundred and ninety-three, which date is hereinafter called the commencement of this Act.

See clauses 5 and 6 and Schedule I. as to the application of the Act, and clause 15 as to adoption of this Act. The Act comes into operation in every existing burgh in Scotland from its commencement, with the exception of the burghs named in Schedule II., which are—Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock.

By the Interpretation Act, 1889, 52 & 53 Vict. c. 63, sec. 36, it is provided—(1) In this Act, and in every Act passed either before or after the commencement of this Act, the expression "commencement," when used with reference to an Act, shall mean the time at which the Act comes into operation. (2) Where an Act passed

after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters-patent, rules, regulations, or bye-laws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

An Act of Parliament which comes into operation on a given day becomes law as soon as the day commences, and any event which occurs during that day takes place "after the passing of the Act"—Tomlinson *v.* Bullock (L. R., 4 Q. B. D., 230; 48 L. J., M. C., 95; 40 L. T., N. S., 459).—Glen, p. 591. See sec. 24 as to Commissioners and Magistrates in burghs, wholly or partly administered under any general or local Police Act, at the commencement of the Act, continuing to hold and exercise their office, and perform the duties thereof, till their successors are appointed under this Act. The words, "except so far as otherwise hereinafter provided," seem to refer chiefly to those cases where the Act does not come into operation till after the 15th May 1893, and where burghs are created after the Act, and possibly to the case of the burghs referred to in Schedule II.; see secs. 5 and 15.

In Campbell *v.* Police Commissioners of Leith, 28th Feb. 1870 (8 M., 31 H. L.), the Lord Chancellor referred to the schedule at the end of the 1862 Act, Schedule E, for the purpose of elucidating the construction of several clauses of the Act.

3. Division into Parts.—This Act is divided into parts as follows:—

Part I. General.
Part II. Constitution of Police Burghs.
Part III. Police Force.
Part IV. Police Administration.
Part V. Rating and Borrowing Powers.
Part VI. Offences and Penalties.

Headings to Parts of Acts.—"In a case arising under the Lands Clauses Consolidation Act, 1845, the House of Lords considered that the headings of a portion of the schedule might be referred to, to determine the sense of any doubtful expression in a section ranged under such heading."—Glen, p. 4; Hammersmith Railway Company *v.* Brand (L. R., 4 H. L., 171).

PART I.—GENERAL.

4. Definitions.—The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say,

Meanings of Words and Expressions.—Erles, J., draws a distinction between "include" and "mean." He says: "If the section had said, inhabitant shall mean one rated and no other, it would have been decisive; but I think the word 'include' is used throughout

the section by way of extension, as 'church' shall be understood 'chapel,' and that when it is intended to make an excluding definition the phrase is altered, as 'petty sessions' shall be understood to *mean* the petty session or petty sessions held for the division or place."—Reg. *v.* Kershaw, 6 E. and B., 1007.

(1.) "Board of Supervision" shall mean the Board of Supervision for the relief of the poor and of public health:

The Constitution of the Board of Supervision is fixed by the Poor Law Act, 8 & 9 Vict. c. 83, sec. 2, et seq. It derives its sanitary powers from the Public Health Acts, 30 & 31 Vict. c. 101, and amending Acts, which are enumerated under sub-heading (29) of this sec. 4.

(2.) "Broker" shall include any person dealing in second-hand goods or articles, or in yarn or waste, or in other unwrought material, or in old metals, bones, or rags: Provided always that wholesale dealers in rags, ropes, and waste, purchasing only from licensed brokers or licensed marine store dealers, or in quantities of not less than half a ton, shall not be included in this definition.

Person.—By the Interpretation Act of 1889, 52 & 53 Vict. c. 63, sec. 1, it is provided that "in this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears,—

"(*a*) Words importing the masculine gender shall include females, and—

"(*b*) Words in the singular shall include the plural, and words in the plural shall include the singular;" and by sec. 2 it is provided that "in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate."

Broker.—In M'Mullan *v.* M'Phee, 9th June 1882 (9 R., Justiciary Cases, p. 36), the question arose as to what constituted "dealing," within the meaning of the Glasgow Police Act, and as to what constituted a wholesale dealer. In regard to this, Lord Young says: "But he—the appellant—says he is a wholesale dealer, that his purchases are of a wholesale character, and that his sales are also of a wholesale character, although no doubt, on this occasion, he did purchase the small quantity of twenty-three bags. A transaction of that extent is, I agree, a retail transaction, such as any trafficker within the definition of the Statute might make, and I am altogether averse to the contention that a man who makes purchases of that nature—the criticism would apply even to smaller purchases than that—is not a dealer in second-hand articles, as a broker, merely because he only sells in wholesale quantities. . . . But then

it is not proved that this was other than an isolated transaction—that the purchase was other than an isolated transaction with a person accidentally coming to the appellant's shop. It is not stated that there was any other case. . . . Therefore I answer the question exactly as it is put, believing that it is put according to the facts as they were proved —whether this individual purchase was the carrying on of the trade of a broker as defined in this Act? And I am of opinion that the evidence of that single purchase was not evidence on which the magistrate could reasonably convict the appellant of carrying on that trade. The evidence might have been made sufficient by bringing witnesses to show that the appellant had many such transactions, and that this was really not an isolated case at all. But that is not the case before us."

(3.) "Building" shall include any structure or erection of what kind and nature soever, and every part thereof.

Building.—Not much assistance will be derived from this definition, as it leaves the words "structure or erection" to be defined themselves. In dictionary definition a structure is defined as "a building of any kind, but chiefly a building of some size, or of magnificence; an edifice;" while an erection is defined as "anything erected, a building of any kind." See Imperial Dictionary. In The Police Commissioners of Fort William *v.* Kennedy, 8th July 1878 (5 R., H. L., 215), it was held that a low wall and railing in front of a dwelling-house, which separated a small plot of ground from the street, did not constitute a building within the meaning of the Act of 1862, and that the Commissioners were not empowered to require the proprietor in building to keep back the new front wall of his house in a line with that of the adjoining house. See also Police Commissioners of Partick *v.* The Great Western Steam Laundry, 27th Jan. 1886 (13 R., 500).

In Somerville *v.* Macgregor, 7th Nov. 1889 (17 R., 46), the Lord Justice-Clerk said: "The words *to alter the structure* are words requiring interpretation, and are necessarily restrictive. The natural construction of such words is that they refer to alterations which affect the structure, either by altering it externally as regards its size, the ground it covers, or in some similar manner, or interfere with those walls or other parts of the building, whether external or internal, on which the stability and safety of the whole structure may depend. It is not a natural construction to make them apply to every internal fitting, such as lath and standard partitions, or the like, which are not part of the structure, but only conveniences in its use, which may vary according to the particular use to which the building may from time to time be put, or the family or business exigencies of the occupants. The actual work which he (the appellant) has done consists in putting up some lath and standard partitions, putting in an additional water-closet, and some sinks. None of these alterations, in my opinion, are alterations on the structure of the existing building."

In Magistrates of Edinburgh *v.* Brown, 17th Jan. 1833 (8 Fac.,

134), the Court held that where a party held a feu-right under the servitude that he shall not erect any building whatever, etc., a shed, open in front, with a roof covered with lead, supported by cast-iron pillars, and attached both to the parapet wall and to the walls of the session-house and church, was a building within the true meaning of the term, as used in the original charter and subsequent titles. And in Magistrates of Edinburgh *v.* Paton & Ritchie, 3rd March 1858 (20 D., 731), where a feu-charter contained a servitude that the vassal should not erect any building whatever on a certain part of the feu, the Court held that under these words the construction of cellars under the surface was forbidden. The Lord Justice-Clerk said: "The question was argued whether a cellar under the surface was a building. I hold that a cellar is a building. Then it was argued, that the prohibition being only against any building being erected, it could not apply to what was constructed underground—I do not think that this servitude is to be construed in such a narrow and judaical manner."

"A church, a stall in a market, a wooden stable, erected by a tenant, and which he was entitled to remove, a summer-house in a garden, a barn, have been sustained as 'buildings;' while, on the other hand, seats in a parish church, a ruined ice-house, a wooden tool-house in a garden, have been rejected as qualifications for registration purposes."—See Nicolson, p. 97.

In England, "under the Metropolitan Building Act, every building shall be enclosed with walls constructed of brick, stone, or other hard and incombustible substances." These words amount to a prohibition against building the walls of wood or other combustible substance; and a wooden structure intended to be used as a shop of a considerable size, and likely to last a considerable time, resting on joists, but having its footings or foundations in masonry, and capable of being lifted bodily off the ground by the application of sufficient mechanical power, was, in the opinion of the Court, a building within the prohibition of the Statute. On an action being brought by a builder for works executed under a contract, in connection with such a building, it was held that a contract to erect such a structure within the limits of the Act was illegal, and that the plaintiff could not recover. This decision was followed in a case arising under bye-laws with respect to new buildings made in pursuance of sec. 157 of this Act (38 & 39 Vict. c. 55). There, a wooden building, thirty feet long by thirteen, had been brought to the corner of a new street on wheels, and it was there used as a butcher's shop. *Per* Lord Coleridge, C.-J.: "The question is, for what purpose the building is there. I think it was not at all intended to be used merely as a caravan, but to all intents and purposes it is a house or building, and is so used, and the wheels have been adopted evidently with the intention of evading the Act of Parliament. Then the question is asked, When could it be said to begin to be erected? I think it began to be erected when it was put where it is. The beginning and completion may mean in this instance much the same thing." On the other hand, Pollock, C.-B., said "that he much doubted

whether a wall was a building within the provision of the Local Government Act, 1858. Relating to the line of buildings, the Act said 'a house or building;' and building there, he thought, must mean a chapel, or warehouse, or an erection of that kind. But arches used as store-rooms under a street were held to be 'buildings' through which a gas company could not carry their pipes. And a vinery was held to be a building within a covenant that no building should be erected."—Glen, p. 66.

(4.) "Burgh," when used alone, unless otherwise expressed or inconsistent with the context, shall include royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, burgh of regality, burgh of barony, and any populous place or police burgh administered in whole or in part under any General or Local Police Act, or any burgh created under this Act.

Burgh—Royal Burgh.—A burgh created by charter holding immediately of the Crown.—Erskine, bk. I. tit. iv. sec. 20.

Parliamentary Burgh.—See sub-heading (23) of this sec. 4.

Burgh of Regality—Burgh of Barony.—Burghs created by charter, and holding of the lord of regality or baron.—Erskine, I. tit. iv. sec. 20.

Populous Place.—See sub-heading (26) of this sec. 4.

Police Burgh.—See sub-heading (25) of this sec. 4.

(5.) "Carriage" shall include any coach, omnibus, tramway car, cab, chariot, fly, hansom, car, cabriolet, gig, brougham, waggon, timber-carriage, dray, truck, cart, hand-cart, wheel-barrow, hand-barrow, lorry, bicycle, tricycle, velocipede, or other vehicle used for the conveyance of persons, animals, or goods, and whether plying for hire or not.

(6.) "Cattle" shall include any horse, mare, gelding, foal, colt, filly, bull, cow, heifer, ox, calf, ass, mule, ram, ewe, wether, lamb, goat, kid, or swine.

(7.) "Chief magistrate" shall mean the Lord Provost or Provost, or in his absence the magistrate present next in seniority, according to priority of election as such, and also the magistrate temporarily acting as chief magistrate in any burgh.

(8.) "Clerk," "treasurer," and "collector," shall mean the clerk, treasurer, and collector respectively appointed by the Commissioners under the provisions of this Act.

Clerk.—There are two clerks provided for in the Statute, the clerk for keeping the records (see sec. 61), and the clerk to be appointed as clerk of the Police Court. One person may hold both offices (see sec. 460). The treasurer may be appointed by the Commissioners during pleasure, and so likewise may the collector. One

person may hold both appointments, but the treasurer cannot hold any place of profit or trust under the Commissioners save that of collector. The Commissioners cannot appoint the clerk to be treasurer (see secs. 63 to 66).

(9.) "The Commissioners" shall mean the Commissioners for the purposes of this Act, in their collective capacity, not being Commissioners appointed by the Secretary for Scotland for holding local inquiries under this Act.

The Commissioners.—It will be observed that the Commissioners are such for the purposes of this Act. The powers of the Commissioners are therefore limited to what is contained and referred to herein. See Clouston *v.* Edinburgh & Glasgow Railway Co., 14th December 1865 (4 M., 207). It will further be observed that the words "in their collective capacity" are introduced so that they can only act as a corporate body at meetings duly called and by a duly constituted quorum (see sec. 50).

(10.) "Court," where by the context it applies to a space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto.

Court.—In Cooper *v.* Elder, 6th March 1891 (18 R., p. 642), Lord Trayner says: "Building a court is an unfortunate expression, because a court, which is an area of uncovered ground, cannot be built in any proper sense, but I think the Statute means building round a piece of uncovered ground so as to form it into a court or building upon a piece of uncovered ground." It will be observed that the court must form a common access to lands and premises separately occupied.

(11.) "Court of Session" shall mean either division of the Inner House thereof.

(12.) "General Police Acts" shall mean the Acts specified in Schedule I. of this Act.

These are: 3 & 4 Will. IV. c. 46—The General Police Act of 1833. 10 & 11 Vict. c. 39—The General Police Act of 1850. 13 & 14 Vict. c. 33—The Police Act of 1853. 25 & 26 Vict. c. 101—The General Police Act of 1862, or Lindsay Act. 31 & 32 Vict. c. 102—The General Police Act Amendment Act of 1868. 40 & 41 Vict. c. 22—The General Police Amendment Act, 1877. 41 & 42 Vict. c. 30.—The General Police Amendment Act, 1878. 45 & 46 Vict. c. 6—The General Police Act, 1882. 52 & 53 Vict. c. 51—The General Police Amendment Act, 1889.

(13.) "House," where not otherwise expressed, shall mean dwelling-house, and shall include out-houses and other erections, being pertinents of the house.

House.—In Couper *v.* Elder, 6th March 1891 (18 R., 642), the Lord Justice-Clerk says: "The first question is a difficult one, and depends upon the interpretation to be put upon the word 'house' in the Act of Parliament (The General Police and Improvement Act, 1862), and it is rendered doubly difficult by the fact that, although this is a Statute which in a very large number of its provisions relates directly to houses, there is no definition whatever in the Statute of the word 'house.' The burgh surveyor maintains that the word 'house' means every place occupied or to be occupied as a separate dwelling. The appellant, on the other hand, who objects to the decision of the Court below, maintains that 'house' means tenement—that is to say, a house erected within four walls, consisting, it may be, of only one dwelling, or many dwellings, according to the convenience of the locality. Now, in this case, it is not necessary for us to decide that question, because I think the case can be decided quite sufficiently upon the second part of clause 177. But I think it would be hardly fair, in a case of this importance, to pass over that point altogether, although it is not necessary to give an authoritative decision upon it. I am inclined to state what my view of it is, viz. that the word 'house' does not mean any part of a building that is occupied as a separate dwelling, but means a house in a building sense—that is, the tenement contained within the four walls which constitute the building. I find that in other clauses of the Act it is quite plain that that is the meaning. Section 210 speaks separately of a house and of part of a house separately occupied. That section plainly indicates that the Statute recognises that part of a house. Section 213, which is the only one in which there is some ambiguity, alludes to where there are two or more houses in any tenement. I take that to mean that you may have a separate house altogether, although in the same tenement and within the same walls. It is a very common thing in Glasgow to have an entirely separate house on the ground opening separately from the street, though within the same four walls as the rest of the house, which contains a common stair above. Therefore the leaning of my opinion would certainly be to this effect, that if the appellant here satisfies the Statute, as regards his houses, by leaving a clear width of 15 feet between the houses and the other side of the court, he is not liable to add an additional foot unless there are more than eight separate houses in what he is building." Lord Trayner says, in the same case: "I think the word 'house' in section 177 of the General Police Improvement Act, 1862, means tenement, and not a separate dwelling-place, and I think so for this reason among others, that the immediately following section uses the same word 'house' or 'houses' in the sense which, from its context, must mean tenement. Therefore I am disposed to read in section 177 the word 'house' in the same way as it obviously is intended to be read in section 178—and the other sections that your Lordship referred to, I think, make this still clearer—and that is in the sense of its being a tenement, and not a separate dwelling-house."

(14.) "Householder" shall mean any occupier or inhabitant occupier of lands or premises whose occupancy would qualify him to vote for a member of Parliament for a burgh; and shall include any female occupier of lands or premises who would be entitled, under the Municipal Elections Amendment (Scotland) Act, 1881, to vote at municipal elections.

Householder. — The occupancy qualification for a voter for a member of Parliament in a burgh is regulated by the Representation of the People Act, 1884; and by section 7, sub-section 4 of that Act it is provided that "the expression a *household qualification* means, as respects Scotland, the qualification enacted by the third section of the Representation of the People (Scotland) Act, 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland, and for the purpose of the said section and enactments the expression *dwelling-house* in Scotland means any house or part of a house occupied as a separate dwelling; and this definition of a dwelling-house shall be substituted for the definition contained in section 59 of the Representation of the People (Scotland) Act, 1868." The third section of the Representation of the People (Scotland) Act, 1868, provides that "every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote at elections for a member or members to serve in Parliament for a burgh, who, when the sheriff proceeds to consider his right to be inserted or retained in the register of voters, is qualified as follows; that is to say—

1. Is of full age, and not subject to any legal incapacity; and

2. Is, and has been for a period of not less than twelve calendar months next preceding the last day of July, an inhabitant occupier, as owner or tenant, of any dwelling-house within the burgh, provided that no man shall, under this section, be entitled to be registered as a voter, who, at any time during the said period of twelve calendar months, shall have been exempted from payment of poor-rates on the ground of inability to pay, or who shall have failed to pay, on or before the 1st day of August in the present or the 20th day of June in any subsequent year, all poor-rates, if any, that have become payable by him in respect of said dwelling-house, or as an inhabitant of any parish of said burgh up to the preceding 15th day of May; or who shall have been in the receipt of parochial relief within the twelve calendar months next preceding the said last day of July; provided also that no man shall under this section be entitled to be registered as a voter by reason of his being a joint-occupier of any dwelling-house.

The Municipal Election Act, 44 Vict. c. 13, sec. 2, provides that, in the Municipal Elections Amendment (Scotland) Act, 1868, and the various Acts therein recited, prescribing the qualification of voters at municipal elections in Scotland, whenever words occur which import the masculine gender, the same shall be held for all purposes connected with and having reference to the right to vote in the

election of town councillors, and also to nominate candidates for election to the said office, to include females who are not married, and married females not living in family with their husbands; but such females shall not be eligible for election as town councillors.

(15.) "Infectious disease" shall mean and include cholera, smallpox, typhus, typhoid, scarlet, relapsing, continued, and puerperal fever, measles, scarlatina, and diphtheria, and such other disease as the Commissioners, with the approval of the Board of Supervision, or Her Majesty by Order in Council, may from time to time order, for the purposes of this Act, to be deemed infectious.

Infectious Disease.—See also the Infectious Disease (Notification) Act, 1889. The definition of infectious diseases in that Act is: "In this Act the 'expression *infectious disease*, to which this Act applies,' means any of the following diseases — viz., smallpox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names—typhus, typhoid, enteric, relapsing, continued, or puerperal, and includes, as respects any particular district, any infectious disease to which this Act has been applied by the Local Authority of the district, in manner provided by this Act." Scarlet fever and scarlatina are here mentioned separately as if they were different diseases, but they are entered as synonymous in the 'Nomenclature of disease.' The definition of infectious disease is retained, although the clauses dealing therewith were excised from the Bill when passing through Parliament. There is no section enabling the extension of the definitions to other diseases to be carried out, either by the Commissioners, or by Order in Council."

(16.) "Lands and premises" shall include all lands, springs, rights of servitude, dwelling-houses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, and the fixed or attached machinery therein; yards, places, and other heritages specified or included in the Acts for the Valuation of Lands and Heritages in Scotland in force for the time being.

Lands and Premises.—By the 42nd clause of the Valuation of Lands and Heritages (Scotland) Act, 17 and 18 Vict. c. 91, it is provided that "the expression *lands and heritages* extends to and includes all lands, houses, shootings, and deer forests, where such shootings and deer forests are actually let; fishings, woods, copse, and underwood, from which revenue is actually derived; ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coalworks, waterworks, limeworks, brickworks, ironworks, gasworks, factories, and all buildings and pertinents thereof, and all machinery fixed or attached to any lands or heritages: Provided always that no mine or quarry shall be assessed unless it has been worked during some part of the year to which such

assessment applies." And by the Interpretation Act, 1889, sec. 3, it is provided that the expression "land" shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure.

(17.) "Local Police Act" shall mean any Act other than the General Police Acts providing for the watching, lighting, paving, draining, cleansing, or improving of a burgh, or incorporating any portion of the General Police Acts, but shall not include any Act dealing exclusively with harbours, markets, or slaughter-houses, water supply, gas supply, sewerage, tramways, or financial arrangements, or such part of any Act dealing mainly with these subjects as relates exclusively to them.

Local Police Act.—A Local Police Act does not include a Road Act (see Kirriemuir Police Commissioners *v.* Reid, 7th July 1876, 3 R., 993).

(18.) "Lord Ordinary" shall mean any Lord Ordinary in the Outer House of the Court of Session.

(19.) "Magistrate" shall mean a magistrate or judge having jurisdiction under this Act.

(20.) "Magistrates" shall include the Lord Provost or Provost.

(21.) "Occupier" shall mean tenant or sub-tenant, or any person in the actual occupancy; and shall not include a lodger, or a person in the occupation as tenant of a furnished house let for a less period than one year; but shall include the person by whom such furnished house is so let.

(22.) "Owner" shall include joint-owner, fiar, liferenter, feuar, or other person in the actual possession of or entitled to receive the rents of lands and premises of every tenure or description, and the factor, agent, or commissioner of such persons, or any of them, or any other person, who shall intromit with or draw the rents.

Owner.—In Macknight *v.* Oman's Trustee, 29th November 1872 (11 M. 154, 45 J. 95), it was held that a trustee in a sequestration was owner of the bankrupt's property within the meaning of the 1862 Act, and that the Commissioners were not bound to claim in the sequestration an assessment—under the Edinburgh and Leith Sewerage Act, 1864—which had been imposed before the bankruptcy, the trustee being bound to pay it as a condition of his taking possession of the property or drawing the rents.

In England, "under the Public Health Act, 1875, 38 & 39 Vict. c. 55, the word 'owner' means the person for the time being receiv-

ing the rack rent of the lands and premises in connection with which the word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." A person was held to be owner of "premises for the purposes of the Public Health Act, 1848, while he was in fact receiving the rent from the occupier and being *bona fide* treated as owner by the occupier, although it turned out afterwards that another person, who had never interfered with the person receiving the rent, was the real owner, and a notice to execute works of paving, etc., under sec. 69 of that Act, served upon the first-mentioned person, was served on the 'owner' so as to enable the Local Board subsequently to recover the expenses from the real owner."

The Metropolitan Building Act, 1855, interprets the word "owner" as applying to "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will." And it was held that the owner in fee of land held under an agreement for a building lease for eighty-one years at a peppercorn rent for the first year, £6 for the second, and £12 for the remainder of the term, was not the "owner" within the meaning of that definition. *Per* Crompton, J.: "It is said that he is owner, because he is in possession of the rent of a peppercorn. My notion is that the definition points to a person who either recovers himself, or by his tenant, the whole or part of the rents and profits, and I do not think that a peppercorn reserved as rent can fairly be said to be part of the rents and profits." In giving a similar decision in a case in which the lessee under the agreement had become insolvent, but was the person who had the power to let the houses and receive the profits, Lush, J., said: "In what sense is the word owner used? It is used in the popular sense, and means the person who employed the builder to build the house for him. The person is called the 'owner' who has the immediate right of letting them, and who would, if there was an occupier, be entitled to have the rent from him." Under a local Act, giving a similar definition of "owner" to the present Act, Watkin Williams, J., is reported to have held, on further consideration, that "a man who is a lessee under a lease for 999 years, at a rack rent, is the owner within the meaning of this Act of Parliament;" the lease in question being a building lease at a ground rent of £26, and no houses having been built at the time; and in a subsequent case under the same Act, an agent employed to collect rents was held to be the "owner," and liable to be called upon to pay expenses of private improvements, even when he had no money belonging to his principal in his hands."—Glen, p. 12.

(23.) "Parliamentary burgh" shall mean a burgh having the right of sending or contributing to send a member to Parliament.

(24.) "Police Act, 1857," shall mean the Act passed in

the twentieth and twenty-first years of the reign of Her present Majesty, chapter seventy-two.

(25.) "Police burgh" shall mean a populous place, the boundaries whereof have been fixed under the General Police Acts, or under any Local Police Act, or under this Act.

(26.) "Populous place" shall mean any town, village, place, or locality containing a population of seven hundred inhabitants or upwards, not being administered under any General or Local Police Act; and for the purposes of this Act, two or more contiguous towns, villages, places, or localities, not being burghs, may be held to be a populous place.

(27.) "Private court" shall mean a court maintained or liable to be maintained by persons other than the Commissioners.

See "Private street" as to construction of "maintained or liable to be maintained."

(28.) "Private street" shall mean any street maintained or liable to be maintained by persons other than the Commissioners.

Private Street.—The complicated characteristics in the 1862 Act have been abolished, and the test of maintenance made the sole criterion of what is to be considered a private street. It is, however, carefully to be noted that private street shall mean a "street," which must be a street within the meaning of the Act. A street in this sense is defined under sub-heading 31 of this clause (see after).

The first question which arises here is as to maintenance, or what is to be considered as having been maintained. On this subject the Lord Justice-Clerk (Inglis), in Campbell *v.* Leith Police Commissioners, 21st June 1866 (4 M., 853), says: "Whatever be the general meaning of the word 'maintained,' I think that it means here, managed and looked after, and I think it is clearly proved that this street has not been looked after by anybody, that it has not been under any public management whatever."

In Magistrates and Town Councillors of Edinburgh *v.* Paterson, 3rd December 1880 (8 R., 197), the Lord President (Inglis) said: "A private street is defined in the interpretation clause of the Statute (The Edinburgh Roads and Streets Act, 1862) to mean 'streets within the districts which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county.' Now, there are two requisites here to distinguish private streets from other streets. The one is that they are or may be maintained by private persons, being either superiors, proprietors, or something of that kind; and, secondly, that they are not maintained

by the trustees under this Statute, or by the road trustees of the county. If these conditions are fulfilled, then the street becomes a private street as distinguished from other streets, not as distinguished from public streets, for that is not one of the terms of this Statute, but from streets generally; and the word 'street' is described as including 'any square, court, or alley, highway, lane, thoroughfare, or public passage or place within the district defined in this Act, open to be used by carts and carriages.' . . . If a street is maintained by private proprietors, indicating an obligation upon their part so to maintain it, that, I think, might sufficiently answer the description in this interpretation clause. But here there is not only no appearance of any obligation upon the part of the defender and the other proprietors in the street to maintain this lane, but in point of fact, as I think the Lord Ordinary holds upon the evidence, it never has been so maintained. I quite agree with him in that view. I think the passage which I have already read from the road surveyor's evidence clearly points in that direction; but there is more evidence to the same purpose, the general result of which is that nobody ever repaired or maintained this lane. It was left entirely to itself. Somebody might lay down a barrowful of stones to fill up a hole, or something of that kind, but beyond that temporary repair, which indicates nothing like a general obligation, nothing has ever been done; and therefore upon both grounds I am clearly of opinion that the pursuers are not entitled to prevail."

See also Cargill *v.* Provost and Magistrates of Portobello, 11th Dec. 1863 (36 Jur., 126); Millar's Trustee *v.* Leith Commissioners, 19th July 1873 (11 M., 932); Kinning Park Police Commissioners *v.* Thomson & Co., 22nd Feb. 1877 (4 R., 528); Hope *v.* Edinburgh Road Trust, 27th Feb. 1878 (5 R., 694); Johnstone Commissioners of Police *v.* Donald, 3rd Feb. 1882 (9 R., 613); Magistrates of Edinburgh *v.* Forsyth, 6th March 1884 (11 R., 671).

The second question which arises is regarding liability for maintenance, or the construction of the words *liable to be maintained by* persons other than the Commissioners. For all practical purposes, it may be assumed that, until a street has been properly levelled, paved, or causewayed, and flagged and channelled, to the satisfaction of the Commissioners, and taken over under clause 134 of the Act, there will remain a liability for maintenance resting on the persons who have laid out the street.

(29.) "Public Health Acts" shall mean the Public Health (Scotland) Act, 1867, and any Act amending the same.

Public Health Acts.—The Public Health Acts applicable to Scotland are: The Public Health (Scotland) Act, 1867; The Public Health (Scotland) Amendment Act, 1871; The Public Health (Scotland) Amendment Act, 1875; The Public Health (Scotland) Amendment Act, 1882; The Public Health (Scotland) Amendment Act, 1890; The Public Health (Scotland) Amendment Act, 1891. By sec. 105 of The Local Government (Scotland) Act, 1889, the expression "Public Health Acts" includes sec. 34 of the Contagious

Diseases (Animals) Act, 1878, as amended by sec. 9 of the Contagious Diseases (Animals) Act, 1886; these being the provisions as to dairies, cowsheds, and milkshops.

(30.) "Sheriff" shall include Sheriff-Substitute, except as regards (1) the duty of fixing and extending boundaries, (2) the compulsory acquisition of land, (3) any proceeding under sec. 15 of this Act.

(31.) "Street" shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station, depôt, wharf, towing-path, or bank.

Street.—It is to be noticed that the word "include" is used in defining the term "street," and not the word "mean" as used in defining "private street," and therefore, as laid down in Reg. *v.* Kershaw, has an extending signification. In Campbell *v.* Leith Police Commissioners, 21st June 1866 (4 M., 853), the Lord Justice-Clerk (Inglis) said, with reference to the definition of "street" in the 1862 Act: "The word 'street,' it is said, shall mean 'a public street, and shall extend to and include any road, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, not being a private street, and not being or forming part of any harbour, railway, or canal station, depôt, wharf, towing-path, or bank.' Now, what does this amount to? Simply to this, that every place within a burgh which is used by carts or foot passengers, and is not part of any harbour, etc., is a public street, unless it come within the definition of a private street. Now, what are the points of difference between these two things? Plainly, the particulars in the first definition, which distinguish it from the other, are, that the street has not, before the adoption of the Act, been well and sufficiently paved, etc., and that it has not been maintained as a public street."

It will be observed that in the definition of street the words used are, "shall include any road," etc.; while the definition in the 1862 Act was, "means a public street, and extends to and includes any road," etc.; and that the words, "not being a private street," which were in the 1862 Act, are omitted in this Act. The distinction, therefore, between private and public streets is abolished, though, if a private street has been made, paved, or causewayed, and flagged, together with the foot-ways thereof, and put in good order and condition to the satisfaction of the Commissioners, on the application of the superior or owner, it shall be lawful for the Commissioners to declare the same to be vested in the Commissioners, who thereafter shall maintain the street (see sec. 134).

In Heatherton *v.* Watson, 30th Oct. 1879 (7 R., J., 5), in the Burgh Court of North Berwick, John Heatherton, a coachman, was convicted of an offence under sec. 251 of the General Police and Improvement Act, 1862, "in so far as, on 4th August 1879, he did, to the obstruction, annoyance, and danger of the residents or passengers, exercise two horses on the foreshore within the parliamentary boundaries of the burgh." Sec. 251 provides that "every person who in any street, . . . to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty," etc.; and sub-sec. 1 narrates as an offence "exercising any horse or animal." On appeal, the Court held that the foreshore was not a "street" within the meaning of the section, and on that ground quashed the conviction.

Highway.—With reference to this, it has been settled that "in a highway there must be a point from which it commences, and at which it ends." Oswald *v.* Lawrie, 6th Nov. 1828 (5 Mur., 12).

Lane.—In Cargill *v.* Magistrates of Portobello, 11th Dec. 1863 (2 M., 244), the Lord President said: "It appears substantially that the lane has been used very much by passengers, and even by wheeled vehicles, and especially on one side; and it is not easy to conceive that one part of a lane communicating between two public streets should be a thoroughfare and the other not. On the other hand, the pursuer has led evidence to show that, for a very long period, carts had been in the habit of standing there, and dung-heaps had been suffered to be placed there without interference. In this question I am not disposed to attach much weight to the fact of such usages anterior to 1850, because one of the main purposes of the Act was to put it in the power of the magistrates of such places as Portobello to put an end to these very things. Viewing the matter in that light, the character of the proceedings since 1850, the use made of the lane, and the terms of the Statute, I have not been able to come to the conclusion that this lane does not fall within the operation of the Statute. Various little circumstances go to confirm that view, such as the fact of the lane being inhabited, its connecting two public streets, and the placing of the lights. It is, in fact, as much a thoroughfare as any other street in Portobello, and what took place in it before 1850 is also what may be supposed to have taken place in every other street or lane in Portobello." See also Lord Deas' opinion in the same question.

Public Thoroughfare or Public Passage.—In Wallace *v.* Police Commissioners of Dundee, 9th Mar. 1875 (2 R., 565), an action was brought for declarator of freedom from public right-of-way by the proprietor of the *solum* of a through-going close in the town, which, it was proved, had been originally formed by the proprietor on his own ground for the use of his tenants, and that a door had been placed at one end of it; it was also proved that the close had been used as a thoroughfare by the public for the prescriptive period, but that frequently, and particularly at night, the door had been locked by the proprietor so as to exclude strangers. *Held—rev.* judgment of Lord Shand, *diss.* Lords Ormidale and Gifford—that

the acts of possession on the part of the proprietor, in shutting up the passage, were sufficient to prevent the public from acquiring the right-of-way. In that case the close in question formed a thoroughfare between two streets in Dundee, Murraygate on the one hand and Meadowside on the other. That it has been proved that the public had, for a period far exceeding forty years, used the close as a foot passage between these streets, and that the Police Commissioners had paved, lighted, drained, and watched it. The Court, however, went solely on the interruption of the public use by the locking of the door frequently. See also Bailie *v.* Linton, 27th Nov. 1871 (10 M., 167).

Public Place.—In Wetherspoon *v.* Lang, Glasgow, 23rd April 1868 (1 Coup., 33), an appeal was brought against a conviction before a police magistrate for contravention of the Glasgow Markets and Slaughter-Houses Act, 1865, sec. 55, on the ground that the *locus delicti* was without the jurisdiction; and it was held, on a proof, that unenclosed premises belonging to a railway company, which are at all times accessible to the public, and paved and lighted like the public streets, fell within the term "a public place" within the meaning of that Act.

By sec. 3 of the Roads and Bridges (Scotland) Act, 1878, 41 & 42 Vict. c. 51, "highway" shall mean and include all existing turnpike roads, all existing statute labour roads, all roads maintained under the provisions of the Highland Roads and Bridges Act, 1862, and all bridges forming part of any highway, and all other roads when declared to be highways under the provisions of this Act, all public streets and roads within any burgh or police burgh not at the commencement of this Act vested in the Local Authority thereof, but shall not include any street or road so vested, or any street or road or bridge which any person is at the commencement of this Act bound to maintain at his own expense; and "bridge" shall include the accesses thereof, but shall not include any bridge which any person is, at the commencement of this Act, bound to maintain at his own expense.

Application of the Act.

5. Places to which Act shall apply.—(1.) This Act shall apply—

(*a*) From its commencement to every existing burgh, with the exception of the burghs named in Schedule II. of this Act, and

(*b*) To every burgh created under this Act, from the date when its creation is recorded in the Sheriff-Court books.

(2.) In the burghs to which this Act applies, this Act shall, except as hereinafter provided, supersede and come in

the place of the General or Local Police Acts, and all Local Police Acts applicable to such burghs are hereby repealed, except such portions of the Acts mentioned in the first column of Schedule III. of this Act as are specified in the third column thereof: Provided that where any of the provisions of a General Police Act are incorporated in the portions so excepted, such unrepealed portions shall be read as if in lieu of the reference to such provisions of a General Police Act there were substituted a reference to the corresponding provisions of this Act; and where in any Act it is provided that any rates, assessments, or charges may be levied, collected, or recovered under any General Police Act repealed by this Act, such provision shall be read as if this Act were therein inserted instead of such General Police Act.

The Act commences on 15th May 1893 (see sec. 2). The burghs named in Schedule II. are Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, which have private Acts applicable to these towns. But it is open to these burghs to adopt the Act in whole or in part in the manner provided for by sec. 15 of the Act.

The creation of burghs under this Act is provided for in secs. 8 to 22, and the date of recording the Sheriff's deliverance in the Sheriff-Court books is made the date of the commencement of the Act in new burghs.

For the definition of "burgh," see sec. 4 (4). It must be kept in view that as regards existing burghs—save those in Schedule II.—this is a general Statute, not an Act which may be adopted or not as the inhabitants see fit. From the commencement of the Act—*i.e.* 15th May 1893—all burghs, whether royal or parliamentary or police, or burghs of barony or of regality, save only the five burghs expressly excepted, come under the operation of this Act, without any resolution of the authorities or of the inhabitants. It will be observed that this Act only supersedes any General or Local *Police* Acts. See the definition of "General Police Acts," sub-head (12), and "Local Police Act," sub-head (17), sec. 4. This does not comprehend Road Acts. In The Commissioners of Police of Kirriemuir *v.* Reid's Trustees, 7th July 1876 (3 R., 993), the Lord President says: "I doubt whether the Act of 1874—the Forfarshire Roads Act—is a Local Police Act within the meaning of the clause—clause 35 of the 1862 Act. The object of the clause plainly was to say, 'If you adopt this new Statute, any General Act that you have previously adopted is repealed as regards your burgh, and any Local Police Act which enabled you to manage your police without a General Act is also repealed;' and again, while I am of opinion that the Act of 1874 is not a Local Police Act, if it could be so described, I should say it was impossible to hold that it is repealed by the 35th clause, because it was plainly intended to be a permanent Act

affecting the burgh, whatever may be the Act for the time regulating its police matters."

By the 38th clause of the Interpretation Act, 1889, it is provided:

"1. Where this Act, or any Act passed after the commencement of this Act, repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

"2. Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

"(*a*) Revive anything not in force or existing at the time at which the repeal takes effect; or

"(*b*) Affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

"(*c*) Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

"(*d*) Affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

"(*e*) Affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

"And any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed."

In the burghs referred to in Schedule III., it will require to be carefully kept in view that only those portions of the Acts mentioned in the third column of that schedule remain in force. But where any provisions of a General Police Act are incorporated in the excepted portions, these provisions will, in future, be read as if, instead of the reference to former General Police Acts, a reference was made to the corresponding provisions in this Act. For convenience in referring to such provisions, a table of analogous or corresponding provisions in the Police Acts of 1850 and 1862 will be found in the Appendix.

It will also be observed that, where in any Act it is provided that any rates, assessments, or charges may be levied, collected, or recovered under a General Police Act repealed by the Act of 1892, such provision is to be read as if the Act of 1892 were inserted instead of such General Police Act.

Notice will be taken that the words are "in any Act," so that this latter clause is not limited to Police Acts.

6. Repeal of General Police Acts.—The General Police Acts enumerated and set forth in Schedule I. of this Act, except to such extent as they are incorporated by refer-

ence in portions of Local Police Acts not repealed by this Act, are hereby repealed.

Reference is made to Schedule I. annexed to the Act, and to sub-head (12), sec. 4, p. 9. The decision in Kirriemuir *v.* Reid's Trustees, with regard to the interpretation of the words "Local Police Act," is to be kept in view. (See under sec. 5.)

This Act of 1892 repeals the whole former General Police Acts, except in so far as the provisions of these Acts are incorporated by reference in portions of Local Police Acts not repealed by this Act. But, by sec. 5, such references are to be read as if they were references to the corresponding provisions of the Act of 1892, so that, for all practical purposes, all former General Police Acts may be held to be repealed.

For cases where there are no corresponding provisions in this Act to those in former Acts, there seems to be no provision made.

BOUNDARIES.

7. Boundaries under any Police Act to be Boundaries for this Act.—The boundaries of any burgh, which at the commencement of this Act is administered wholly or partly under any General or Local Police Act, shall, for the purposes of this Act, be the boundaries to which such Police Act extends.

The date of commencement is 15th May 1893. See sec. 4, sub-head (4), as to definition of "burgh;" sub-head (12) as to definition of "General Police Act," and sub-head (17), sec. 4, as to definition of "Local Police Act."

8. Boundaries of other Burghs to which this Act applies from its commencement, and Division into Wards.—The boundaries of all other burghs to which this Act shall apply from its commencement, shall, for the purposes of this Act, be fixed by the Sheriff or Sheriffs of the county or counties in which the burgh is situated, on the application of the Magistrates and Council, or of any seven or more householders, and after such notice, by advertisement in the Edinburgh Gazette and in any newspaper published in such burgh, and if no newspaper is published therein, then in a newspaper circulating therein, and otherwise as the Sheriff or Sheriffs may direct; and after such investigation (if any) as he or they may deem necessary, the Sheriff or Sheriffs shall define, in a written deliverance, the boundaries of such burgh;

and, where the population is five thousand or upwards, the Sheriff or Sheriffs shall also, in his or their deliverance, divide the burgh into wards, and fix the boundaries thereof; and such deliverance, unless appealed against as hereinafter provided, shall be final, and when recorded in the Sheriff-Court books of the county or counties, as the case may be, shall determine the boundaries of the burgh for the purposes of this Act.

See sub-head (30), sec. 4, for the interpretation of "Sheriff" in this clause. As to the appeal, see sec. 13. It will be observed that, in the case of burghs coming under sec. 8, where the population is five thousand or upwards, it is obligatory upon the Sheriff to divide the burgh into wards, and to fix the boundaries thereof; while in the case of the populous places created burghs in terms of sec. 9, where the population is five thousand or upwards, the division into wards or not is left to the discretion of the Sheriff.

With regard to the finality of the Sheriff's judgment in the event of its not being appealed against as provided for by the Act, the judgment in Stirling *v.* Hutcheon and others, 25th May 1874 (1 R., 935), ought to be kept in view.

By sec. 15 of the General Police Act, 1862, Commissioners of Police of burghs—not being royal or parliamentary burghs—may adopt the Act by a Special Order, as defined in the Act. Sec. 365 enacts that it shall not be lawful for the Commissioners to do anything by Special Order, unless the resolution to do the same shall have been agreed to by the Commissioners at a special meeting, and confirmed at a second meeting held not sooner than four weeks after the former meeting, which subsequent meeting has been advertised once in each of the intervening weeks in a local newspaper. Sec. 20 enacts that the resolution, on being confirmed at the second meeting, shall be reported to the Sheriff, who shall, within forty-eight hours, pronounce a deliverance finding that the Act has, or has not, been adopted. It is further enacted that the Sheriff's deliverance shall be final, and "shall not be subject to be set aside, or reviewed, or affected by any Court or judicature, upon any ground or in any manner of way whatever."

In an action of reduction brought in the Court of Session to set aside the resolution of the Police Commissioners of a burgh to adopt the Act, and the deliverance of the Sheriff finding that the Act had been adopted, on the ground that the statutory advertisement in the local newspaper had been omitted, the defenders pleaded that the action was excluded by the finality clauses of the Act. Held—reversing judgment of Lord Mackenzie—that, in consequence of the failure to give notice by advertisement, the subsequent proceedings were outwith the Statute, and, along with the Sheriff's deliverance following thereon, fell to be reduced.

9. Boundaries of Populous Places.—(1.) The bound-

aries of any populous place shall, for the purposes of this Act, be fixed by the Sheriff or Sheriffs of the county or counties in which such populous place, as defined in the application, is situated, on the application of any seven or more householders in such populous place; and where the population of a populous place, as hereinafter ascertained, is five thousand or upwards, such populous place may, if the Sheriff or Sheriffs think fit, be divided into wards, and the Sheriff or Sheriffs shall fix the limits of each ward. The Sheriff or Sheriffs shall direct notice of the application to be given by advertisement for two successive weeks in the Edinburgh Gazette, and in some newspaper published or circulating in the county or counties in which such populous place is situated, and shall appoint a day not less than two weeks after the last date of such advertisement for hearing all parties interested, and shall also appoint and direct a proper person to ascertain and report the amount of the population of such populous place, and shall thereafter hear all parties interested, and determine whether the area included in the application, or any part thereof, considering the number of dwelling-houses within it and the density of the population, and all the circumstances of the case, is in substance a town, and is suitable for being formed into a police burgh; and if the Sheriff or Sheriffs are satisfied on these points, he or they shall define, in a written deliverance on such application, the boundaries of such populous place, and, where necessary, the limits of such wards.

In defining the boundaries of a populous place, it shall be lawful for the Sheriff or Sheriffs to include the whole area which in their judgment properly belongs to and forms part of the same town, with a reasonable margin for extension, if they think proper, but so as not to encroach on the boundaries of any other burgh or of any other county, unless the Sheriff of such county concurs in the deliverance.

(2.) In the case of any populous place, the population of which shall be ascertained in manner foresaid to be less than two thousand, the Sheriff or Sheriffs may find and declare that such populous place is a burgh;

(3.) In the case of any populous place, the population of

which shall be ascertained in manner foresaid to exceed two thousand, the Sheriff or Sheriffs shall find and declare that such populous place is a burgh;

(4.) Provided that, before a populous place is declared to be a burgh under this section, if it is contiguous or closely adjacent to any burgh, the Town Council or Commissioners of such burgh shall have an opportunity of stating objections, which shall be disposed of by the Sheriff or Sheriffs, who shall take the whole circumstances of the case into consideration.

(5.) The deliverance of the Sheriff or Sheriffs, unless appealed against in manner herein provided, shall be final, and shall be recorded, along with the application on which it proceeds, in the Sheriff-Court books of the county or counties wherein the burgh is situated, as the case may be.

The appeal against the Sheriff's deliverance is provided for in sec. 13.

With regard to the words, "it shall be lawful," Lord Cairns was of opinion that such words were simply permissive or enabling, but in all cases the intention of the Legislature is the test, and where it appears that it has not been intended to devolve a mere discretion, but to impose a positive and absolute duty, then the "enabling or facultative terms in which the power may be couched, such as 'it shall be lawful,' are to be regarded merely as the usual mode of giving a direction; as importing that it is not to be lawful to do otherwise than as directed." Maxwell on Statutes, p. 297. See Stirling *v.* Hutcheon, 25th May 1874 (1 R., 935), as to finality of Sheriff's judgment, referred to under sec. 8.

Where the population of a populous place is ascertained to be under two thousand, it is lett to the Sheriff to determine whether such populous place shall be formed into a burgh; where the population is over two thousand the Sheriff has no option—he must declare it to be a burgh, subject to the provisions of sub-head (4).

The mode of defraying the expenses incurred by the Sheriff in the two cases of creating a burgh and refusing to create it, is set forth in sec. 48.

10. Power to rectify Accidental Errors in defining Boundaries.—In the event of any accidental error having been committed by the Sheriff or Sheriffs in defining the boundaries of any burgh or populous place, or of any of the wards thereof, under the powers hereby conferred, it shall be lawful for the Commissioners of such burgh, or of such populous place, so soon as it has been declared to be a

police burgh and has elected Commissioners, to bring the matter under the consideration of the Sheriff or Sheriffs, who shall have power to rectify any such error, and whose judgment thereon shall be final; and the boundaries as so rectified shall, in regard to all future acts, payments, and liabilities, be held to be the boundaries originally assigned by the Sheriff or Sheriffs under this Act: Provided always, that any acts done or payments made, prior to such rectification, shall be in nowise affected thereby; but the same, in so far as done or made in good faith, shall, notwithstanding such error, be as valid, final, and free from challenge as if such error had not been committed.

See "Sheriff," sub-head (30), sec. 4. It will be carefully noted that it is only an accidental error in defining the boundaries of a burgh or populous place, or of any of the wards thereof, under the Act, which the Sheriff has power to rectify. What may constitute in the view of the Court an accidental error may be difficult to define. It may be assumed, however, that the absence of the statutory notice required would not be considered such. See Stirling *v.* Hutcheon (1 R., 935). If the Sheriff were to divide a burgh or populous place, having a population under five thousand into wards, would that be an accidental error which he would have power to rectify? It is thought not. The power of rectification given will be strictly construed and limited to an accidental error in defining boundaries. See sec. 17 as to the powers of the Court of Session and Sheriff to make orders to facilitate the execution of the Act in cases of a failure to observe any of the provisions of this Act or any other Act.

11. Revision of Boundaries.—Upon the application of the Commissioners or of the Council of any burgh, and after publication in the Edinburgh Gazette, and in any newspaper published in such burgh, and if no newspaper be published therein, then in a newspaper circulating in such burgh, and such other notice and inquiry as he may deem necessary, it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh, and where not divided into wards to divide the same into wards, and where divided into wards to revise the boundaries of such wards; and where in any burgh wards exist at present, the Sheriff may increase their number or lessen their number by combination or re-arrangement,

and the Sheriff shall define, in a written deliverance on such application, the new boundaries of such burgh and wards, for the purposes of this Act; and such deliverance, unless appealed against, in manner hereinafter provided, shall be final; and when recorded, along with the application on which it proceeds, in the Sheriff-Court books of the county, shall fix and determine the boundaries of such burgh and wards for the purposes of this Act. Where the burgh and the lands proposed to be included in any application for an extension of boundary lie in more than one county, the application shall be made to and disposed of by the Sheriffs of all the counties concerned. The Sheriff or Sheriffs, in revising the boundaries of a burgh, shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein. In the event of the Sheriffs not being unanimous in opinion, the application shall not be granted, subject to an appeal as hereinafter provided.

See also the Boundaries of Burghs Extension (Scotland) Act, 20 & 21 Vict. c. 70, and the Act to amend that Act, 24 & 25 Vict. c. 36. By the former of these Acts, the Sheriff had only power to extend the boundaries of any royal or parliamentary burgh, and that only where such boundaries included an area, two-thirds of which was wholly or partially built on, or laid out for building, and were such as, in his opinion, would be suitable for the extended boundaries of the burgh, the discretion as to which was solely vested in the Sheriff. See Dubs, etc. *v.* Police Commissioners of Crosshill, 1st June 1876 (3 R., 758), where, upon a petition for the extension of the boundaries of a burgh under the Statute 20 & 21 Vict. c. 70, the Sheriff found that neither the boundaries described in the petition, nor any others which might be within its scope, satisfied the requirements of the Statute, and therefore refused the petition. It was held that the judgment of the Sheriff was not subject to review.

And by the latter Act the Sheriff had only power to form the district comprehended within the extended boundaries into a ward or wards, or to annex such district or part thereof to one or more of the existing wards of a burgh, and to fix and arrange the limits of the extended wards and the number of Councillors to be elected for such existing and extended wards.

By this clause the Sheriff has power (*a*) to revise, alter, extend, or contract the boundaries of any burgh (see definition clause, sub-head (4), sec. 4) for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh; (*b*) to divide the burghs into

wards, and where already divided into wards, to revise the boundaries of such wards; (*c*) where wards exist at present, to increase or lessen their number by combination or arrangement. This last provision will be found very useful in practice in growing burghs. An appeal is provided for in sec. 13. See as to finality, the remarks on sec. 8.

12. Municipal Boundaries may be extended to Police Boundaries, and Police Boundaries may be extended to Municipal or Parliamentary Boundaries.—Where in any burgh the municipal boundary is either wholly or partly within the boundary for police purposes, it shall be lawful for the Council, at a meeting specially called for the purpose, of which a month's notice shall be given, to resolve that the boundary for municipal purposes, including the right to vote for Town Councillors, shall be extended up to the boundary for police purposes, and to fix the boundary for municipal purposes accordingly, and where in any burgh the police boundary is wholly or partly within the municipal boundary or royalty, or within the parliamentary boundary, it shall be lawful for the Commissioners, at a meeting specially called for the purpose, of which a month's previous notice shall be given, to resolve to extend such police boundary to the municipal boundary or the royalty or the parliamentary boundary respectively for police purposes, including the right to vote for Commissioners, but so as not to encroach on the boundaries of any other burgh, and to fix the date, not being less than fourteen days from the date of the said resolution, when such resolution shall come into operation. Upon any such resolution being adopted, the Council or the Commissioners of the burgh may present a petition to the Sheriff praying him to confirm the same; and the Sheriff, after such intimation and service as he thinks proper, and after hearing all parties interested, shall dispose of the application, and upon any final judgment confirming the resolution being pronounced, it shall be recorded in the Sheriff-Court books, and such resolution shall come into force from the date of such recording, or such later date or dates as may be specified in the resolution; and any Act of Parliament conferring police jurisdiction or any other authority within such extended boundary shall, in so far as it is inconsistent with the provisions of this section, be repealed.

See also the Extension of Boundaries of Burghs (Scotland) Act, 1857, 20 & 21 Vict. c. 70, and the Act to amend the Boundaries of Burghs Extension (Scotland) Act, 1861, 24 and 25 Vict. c. 36.

There are two important cases provided for here—(*a*) Where the municipal boundary of a burgh is either wholly or partly within the boundary for police purposes, the Council may resolve that the boundaries for municipal purposes, including the right to vote for Town Councillors, shall be extended to the boundaries for police purposes. (*b*) Where the police boundary is wholly or partly within the municipal boundary or royalty, or within the parliamentary boundary, the Commissioners may resolve to extend the police boundary to the municipal boundary or the royalty, or parliamentary boundary for police purposes, including the right to vote for Commissioners. In either case, this can only be done at a meeting specially called for the purpose, of which a month's previous notice shall be given.

The month's notice is imperative, and the meeting must be specially called for the purpose. Unless the statutory requirements are complied with, the proceedings will be invalid. See Stirling *v.* Hutcheon, before referred to under sec. 8. The notice prescribed must be duly given, and the full period allowed to elapse before the meeting is held. See Marquis of Lothian *v.* Haswell, 8th Feb. 1738 (H. L., 14th April 1738, 1 Pat. App., 207). All the Commissioners should receive the notice, which should bear the purpose for which the meeting is called, otherwise the meeting will be invalid. See Provost of Dumbarton *v.* Denny, 11th March 1796 (H. L., 6th Dec. 1796, 3 Pat. App. 516). See also Strathie *v.* Steele, 23rd Feb. 1892 (19 R., 488). See also sec. 50 of this Act. The extended burghs in either case must be such as not to encroach on the boundaries of any other burgh.

The Council or Commissioners are to fix the date, not being less than fourteen days from the date of the resolution, when the same shall come into operation. But it does not come into force until it has been confirmed by the Sheriff, on a petition by the Council or Commissioners, and until such confirmation has been recorded in the Sheriff-Court books. There is no appeal provided for in this section, but in the 13th section immediately following an appeal against the Sheriff's interlocutor is allowed. Failing that being taken, the Sheriff's judgment on the resolution will be final.

13. Appeal.—In any proceeding for fixing, altering, extending, contracting, or revising the boundaries of a burgh or populous place, or of the wards of a burgh, it shall be lawful for any owner or occupier within the boundaries as fixed by the Sheriff or Sheriffs, who considers himself aggrieved by the deliverance of the Sheriff or Sheriffs, or the resolutions of the Council or Commissioners, as the case may be, or for the County Council or the Standing Joint Committee of any

county into which the said boundaries extend beyond the existing boundaries, within fourteen days from the date thereof, to present a petition against the deliverance of the Sheriff or Sheriffs to the Court of Session, setting forth the grounds on which they object to such deliverance; and the Court of Session may thereupon order answers, and, after answers have been lodged, may either pronounce a final order, or remit to a Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of such burgh; and such order shall in either case be final, and, when recorded in the Sheriff-Court books of such county, shall fix and determine the boundaries of such burgh for the purposes of this Act. Where it is the duty of two or more Sheriffs to fix the boundary, and they cannot come to a unanimous decision, they shall state a case for the Court of Session, and the same procedure shall, with the necessary variations, be followed as hereinbefore prescribed in the case of the petition against the deliverance of the Sheriff.

See interpretation clause, sec. 4, as to "burgh," "populous place," "owner," "occupier," "Sheriff," "Court of Session."

The County Council and the Standing Joint Committee of any county here referred to are the bodies constituted under the Local Government (Scotland) Act, 1889, 52 & 53 Vict. c. 50, secs. 3 and 18.

The appeal here provided to the Court of Session will, no doubt, be found useful in practice, particularly having in view the judgment in Dubs *v.* The Police Commissioners of Crosshill, June 1, 1876 (3 R., 758), where, upon an application for the extension of the boundary of a burgh under the Statute 20 & 21 Vict. c. 70, the Sheriff found that neither the boundaries described in the petition, nor any others which might be within its scope, satisfied the requirements of the Statute, and therefore refused the petition. The grounds on which the Sheriff went were, that the boundaries wished did not contain an area two-thirds of which was wholly or partially built on or laid out for building, and that they were not such as, in his opinion, would be suitable for the extended boundaries of Glasgow. The Court, on appeal, held the appeal was incompetent, and that the judgment of the Sheriff was not subject to review.

The appeal here provided must be taken within the statutory time of fourteen days, and the form prescribed must also be followed, the petition, in particular, setting forth the grounds on which the deliverance is objected to.

It will be observed that the right of appeal is given to any owner or occupier within the boundaries as fixed by the Sheriff. It would

thus appear that in a case where the boundaries are contracted, an owner or occupier outwith the new boundaries, though within the original boundaries, would not have an appeal. Similarly, a right of appeal is given to the County Council or Standing Joint Committee of any county into which the new boundaries extend beyond the existing boundaries; but in the event of the boundaries being contracted, it would seem to be incompetent for these bodies to appeal.

14. Plan of New Boundary to be sent to Board of Agriculture.—Where the boundary of a burgh is fixed for the first time, or altered under the provisions of this Act, plans showing the new boundary, duly certified by the Commissioners, shall be sent, within one month after the boundary is fixed, to the Board of Agriculture.

This section does not say how the plan is to be certified. "The Commissioners," by the interpretation clause 4 (9), means the Commissioners for the purposes of the Act, in their collective capacity; and it may be proper in attending to the provisions of this section, to have the certificate by the Commissioners appended at a meeting, and signed, at least, by the preses thereof. It might even not be amiss to follow the course required by section 55 (2), in the case of deeds, contracts, and writs of importance, viz. that they shall be signed by three of the Commissioners and by the clerk, and sealed by the common seal of the Commissioners.

ADOPTION OF THE ACT.

15. Adoption in Burghs wholly administered under Local Police Acts.—In any burgh named in Schedule II., this Act may be adopted in whole or in part, that is to say, in parts, sections, or sub-sections, by a resolution of the Council where there is no separate Board of Commissioners, and where there is such a separate board by such Commissioners, at a meeting called for the purpose, after a month's previous notice in a newspaper published or circulating in the burgh, which notice shall specify the parts, sections, or sub-sections of this Act proposed to be adopted, and the portions of Local Police Acts proposed to be repealed: Provided that such adoption in part of this Act shall not affect any private interest which shall have been specially regulated by any Local Act, and provided, further, that in in every case where Part V. of this Act shall be adopted only in part, such adoption shall include the provisions of this Act relating to incidence of assessments.

Such resolutions shall be reported to the Sheriff, who shall pronounce a deliverance thereon, declaring the parts, sections, or sub-sections of this Act specified in the resolution to have been adopted, and shall cause such resolution to be recorded in the Sheriff-Court books.

From and after the recording of such resolution, the parts, sections, or sub-sections of this Act so adopted shall come into force in the burgh, and all portions of Local Police Acts inconsistent with or dealing with the same matters as the parts, sections, or sub-sections so adopted, shall be repealed, which portion shall be specified in the resolution so recorded.

The burghs named in Schedule II. are, Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock. These burghs have private Local Acts of their own, but may adopt this Act in parts, sections, or sub-sections. If Part V., which deals with rating and borrowing powers, is adopted only in part, it is compulsory that the 373rd section, which relates to the incidence of assessments, shall form part of this adoption.

The notice in the newspapers here provided for ought to be carefully attended to. In Stirling *v.* Hutcheon, 25th May 1874 (1 R., 935), the Court held that, in consequence of the failure to give notice by advertisement, the proceedings of the Police Commissioners of Turriff, in adopting the 1862 Act, were outwith the Statute, and, along with the Sheriff's deliverance following thereon, which by the Act was decreed to be final, and not subject to be set aside or reviewed or affected by any Court or adjudicator upon any ground or in any manner or way whatever, fell to be reduced.

In Campbell *v.* Leith Police Commissioners, 29th June 1865 (3 M., 1035), the Lord-Justice Clerk said, with reference to the 18th section of the 1862 Act, "Reading the 18th section alone, I see no doubt as to its construction, because it says that if the Police Commissioners adopt this Act in whole, any General or Local Police Act in operation within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act; and if they resolve to adopt this Act in part, such resolution shall specify the parts, sections, and clauses so adopted, etc. This is all very plain; it seems to me simply to mean that, if there is either a Local Act or a previous General Act in operation at the time, the adoption of this shall supersede these previous Acts, except in so far as relates to matters not provided for in this Act. And, if adopted in part, shall supersede these previous Acts in so far as they relate to the parts so adopted. If it had been said, 'shall be repealed in manner to be hereinafter provided,' and there had been provided some way of repeal by something to be done *de futuro*, I should have considered that there was some force in the contention of the complainer, that the adoption of the Act was ineffectual until that was done; but we have no such expression in the clause under consideration. The 18th section alone is thus free from ambiguity; and that it is

intended to have effect by itself, without any other proceeding, is shown by some of the other sections of the Act which immediately follow. The adoption is that which supersedes the old Acts and introduces the new."

By clause 2, this Act is to come into operation on 15th May 1893, "except so far as hereinafter otherwise provided." By clause 5, this Act shall apply (*a*) from its commencement to every existing burgh, with the exception of the burghs named in Schedule II. of this Act, and (*b*) to every burgh created under the Act. Does the exception in sec. 2 authorise the burghs named in Schedule II. to adopt the Act in the manner provided for in this section immediately? So far as can be discovered, the exception chiefly applies to the burghs created under the Act referred to in sub-head (*b*) of clause 5, wherein the excepted burghs are also dealt with. But it is a much more serious question whether the effect of this section can be extended to the burghs named in Schedule II., to the effect of enabling them to adopt the Act, or portions thereof, prior to 15th May 1893. In the absence of any express provision to that effect, it can hardly be held that the Legislature has authorised certain burghs to take advantage of the provisions of an Act, and put these in operation at once, while at the same time declaring that the Act is not to come into operation until 15th May 1893. Any burgh, may, however, prior to 15th May 1893, take any steps that may be necessary for bringing the Act into operation at that date. This is clearly authorised by sec. 37 of the Interpretation Act, 1889, which provides that — "Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument—that is to say, any Order in Council, order, warrant, scheme, letters-patent, rules, regulations, or bye-laws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act—that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof; subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation" (see sec. 37, 52 & 53 Vict. c. 63).

16. Where Populous Place not declared a Burgh, New Application may be made after two years.— Where a populous place has not been declared a burgh by the Sheriff, another application to have such populous place declared a burgh in manner hereinbefore provided, may be made, but such application shall not be competent until after the lapse of two years from the date of the deliverance on the last preceding application.

See sub-head (26) for definition of "populous place," sub-head (4) "burgh," sub-head (30) "Sheriff," sec. 4.

Two years must elapse between the date of the deliverance on the last application and any new application.

MISCELLANEOUS.

17. Court of Session may make Orders to facilitate Adoption or Execution of Act.—Wherever, in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh, or in any burgh the boundaries of which have been determined in terms of this Act, it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect:—

(1.) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff-Court, setting forth the failure which has taken place to observe the provisions of this Act, or any other Act, or other cause which has made it impossible to proceed with the execution of this Act, and praying the Court to pronounce an order in terms of this Act, as hereinafter mentioned.

(2.) The petition shall be intimated in any newspaper published in such burgh, and if no newspaper be published therein, then in a newspaper circulating in such burgh, or in such other manner as the Court shall appoint.

(3.) Upon resuming consideration of the petition, with or without answers, and after receiving such evidence as they shall require, the Court may pronounce any order which, in their judgment, will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said failure to observe the provisions of this Act, or any other Act, or other cause, had not taken place; and such order shall be final, and shall be recorded in the Sheriff-Court books of the county within which such burgh is situate.

(4.) As soon as any directions contained in the said order of the Court shall have been complied with, the proceedings

for the execution of this Act within such burgh may proceed as nearly as possible in the same manner, and with the same incidents, as if the said failure to observe the provisions of this Act, or any other Act, or other cause, had not taken place.

(5.) The Court may pronounce any order as to the expenses of the petition, and the proceedings following thereon, and as to the persons against whom or the assessments against which they shall be chargeable; and such order shall be final.

This section substantially re-enacts the provisions of the General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1877, 40 & 41 Vict. c. 22, but it empowers the householders to take the procedure in the Sheriff-Court which was only competent in the Court of Session, although it will be observed that in the margin only the Court of Session is mentioned. It is hardly necessary to add that the statutory procedure must be carefully followed.

See Brander and others, 18th July 1890 (17 R., 1254), in the case of a burgh where the General Police Act of 1862 had been adopted in 1864, and Commissioners had been elected for the first year, but no subsequent election had taken place; a petition was presented by seven householders in 1890, under sec. 4 of the Amendment Act of 1877, for an order to authorise Commissioners to be elected, to enable the proceedings for the carrying out of the Act to be continued as nearly as possible as if the failure in question had not taken place. The Court, after a report by the Sheriff to the effect that a large number of the householders of the burgh were in favour of the Act being carried out, granted the prayer of the petition, with expenses out of the first assessments to be levied by the Commissioners. See also Town Council of Stromness, 1st December 1891 (19 R., 207).

18. Statutory Provisions as to Fixing of Boundaries, etc., to be deemed to be complied with.—All statutory requirements and provisions applicable to the fixing of the boundaries of any burgh or place under the General Police Acts or this Act, or to the adoption of any of the said Acts or of this Act, or to the election of Commissioners for any such burgh, shall be deemed and taken to be duly complied with, and shall have effect accordingly, unless the same shall have been or shall be challenged in a competent Court of law within three years from the date of the alleged non-compliance with the said statutory requirements and provisions: Provided always, that nothing herein contained shall

prejudice or affect the pecuniary rights, liabilities, or interests of any person which shall have been finally decided by or are under the consideration of any Court of law at the time of the passing hereof.

This clause simply re-enacts the provisions of the General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1889, and will form a very useful prescriptive limitation of objections more or less technical or trivial, which might have been taken. Its operation will, however, be limited strictly to the matters to which it applies, viz.: (1) All statutory requirements and provisions applicable to the fixing of the boundaries of any burgh, under the General Police Acts or this Act; (2) Or to the adoption of any of the said Acts; and (3) Or to the election of Commissioners for any such burgh. — See sub-head (4) "burgh," (12) General Police Acts, sec. 4.

19. Saving of Contracts.—When this Act shall apply in any burgh which has previously been wholly or partly administered under any General or Local Police Act, or shall be applied in whole or in part by being adopted in any burgh so administered, all bonds, contracts covenants, agreements, and securities made and entered into, and obligations incurred, and all assessments imposed under and by virtue of such Acts, in so far as regards anything done under such Acts, or any of them, previous to the commencement of this Act, shall remain in full force and effect, and shall continue available and binding on all concerned; and nothing herein contained shall be construed to affect the debts, rights, or claims of any creditor, or any special interest provided for under such Acts; and the officers appointed under and employed in the execution of such Acts shall continue to exercise their offices, until they are respectively superseded, or legally removed therefrom, under the authority of this Act.

And where any Local Act contains provisions embodying or giving effect to or saving any contract or agreement with any private individual or public body, such provisions shall be saved and excepted from any repeal of such Act, and any such contract or agreement shall remain binding notwithstanding anything contained in this Act.

All complaints and prosecutions raised or pending at the passing of this Act shall continue and be followed forth to a conclusion in the same way, and with the same jurisdic-

tion, remedies, penalties, and powers, as if the Act had not passed.

See also sub-head (2), sec. 38, of the Interpretation Act, 1889, quoted in note to sec. 5, *supra*.

See also sec. 2 of this Act as to date of the commencement of the Act.

20. Property vested in Commissioners under this Act.—In all cases where the management, for the purposes of this Act, of any burgh is by the application of this Act transferred from any existing Commissioners of Police or other persons acting under any of the General Police Acts or any Local Police Act to Commissioners under this Act, the whole lands, heritages, assessments, claims, demands, and effects of every kind belonging to or vested in the Commissioners of Police, or other persons, from whom such management is so transferred, or in any person on their behalf, and all powers, rights, and privileges conferred on or vested in such Commissioners of Police, or other persons, by any Act of Parliament, charter, or writing, in so far as not inconsistent with the provisions of this Act, shall be, and are hereby transferred to and vested in the Commissioners under this Act, and they shall be liable for the whole debts and obligations of the Commissioners of Police or other persons from whom such management is transferred.

And where by any Act of Parliament any powers and duties are conferred or imposed upon the Commissioners under the General Police Acts, such powers and duties shall now be vested in and discharged by the Commissioners under this Act.

In Campbell *v.* Leith Police Commissioners, 29th June 1865 (3 M., 1035), the Lord Justice-Clerk said, with reference to sec. 22 of 1862 Act: "Its object is, in the first place, to provide for those cases in which there is a change in the local board of management, where the superintendence of police affairs is transferred from existing Commissioners of Police to the Magistrates and Council of the burgh, or to Commissioners under this Act; and in those cases it is provided that the property, the whole lands, heritages, etc., vested in the Commissioners of Police, or other persons from whom such management is so transferred, and all the powers, rights, and privileges then vested in such boards, in so far as not inconsistent with the provisions of this Act, shall be and are hereby transferred to the new board of management. There is an immediate transfer of the

whole property, whole powers and rights vested in the board for the regulation of the police of the burgh; and from the moment, therefore, of the adoption of the Act, and of this clause taking effect, there is no body in the burgh but the body constituted for the first time under this Act that has any power whatever for police purposes, showing that the effect of the Act is to be instantaneous on adoption. Then comes the later part of the clause, which is broader in its operation than the earlier, for it provides that in all cases where this Act shall be adopted, in whole or in part, such adoption shall not have the effect of relieving the Magistrates and Council or Police Commissioners from any obligations incumbent on them at the date of such adoption, again pointing out the point of time at which the resolution of adoption is passed as the time when such obligations would necessarily have ceased but for this enactment."

21. Powers, etc., of Local Authorities under Public Health Act to be transferred to Commissioners.—Wherever the boundaries of any burgh have been determined in terms of this Act, the whole powers and duties (including the rights to levy assessments) exercisable by any Local Authority acting under the Public Health (Scotland) Act, 1867, and Acts amending the same, within the district or districts comprehended within such burgh, shall cease and determine, and the same shall be transferred to and vested in the Commissioners under this Act, and all drainage, water, and other works executed in such district or districts by such Local Authority in the performance of its powers and duties under the said Acts, shall be taken over by the Commissioners under this Act, who shall be liable for the whole debts and obligations of such Local Authority applicable to such district or districts; and in the case of difference of opinion as to such debts or obligations, the Sheriff shall determine the dispute, and his decision shall be final.

This section provides that wherever the boundaries of any burgh have been determined in terms of this Act, the powers of the Local Authorities under the Public Health Acts within said boundaries shall cease, and be transferred to the Commissioners under this Act. The Commissioners are also bound to take over all works executed by the said Local Authority, as well as their liabilities; all disputes to be settled by the Sheriff. The cases in which this section will apply are—(1) The burghs whose boundaries are determined under sec. 8, *i.e.* all existing burghs which are not administered under any General or Local Police Act. In these cases the Town Council will in general be the Local Authority which will be superseded. (2) The populous places created burghs in terms of sec. 9. In these

cases the District Committee of the County Council will be the Local Authority superseded. (3) The burghs whose boundaries are adjusted under secs. 11 and 12.

The Local Authorities to execute the Public Health Acts are fixed by sec. 5 of the Public Health Act, 1867, as amended by the Local Government Act, 1889. They are—(1) Where there are Police Commissioners, the Police Commissioners; (2) Where there is a Town Council, but no Police Commissioners, the Town Council; and (3) Where there are neither Police Commissioners nor Town Council, the District Committee of the County Council.

By sec. 99 of the Local Government Act, 1889, it is provided that "on the formation of any police burgh the Commissioners of Police thereof shall become the Local Authority therein under the Public Health Acts, subject to adjustment by the Sheriff in regard to the property and debts and liabilities affected by such change."

Looking to these provisions, it is probable that, even without the specific enactment contained in sec. 21, it would be held that on this Act coming into force in any burgh or populous place, the Commissioners would *ipso facto* become the Local Authority under the Public Health Acts within their jurisdiction. This section, however, makes it quite clear that the Commissioners are to supersede any body acting as Local Authority. It also provides that in the case of differences of opinion as to the transfer of debts or obligations, the Sheriff shall determine the dispute. This is a useful provision, which does not occur in the Public Health Act.

Along with sec. 21 must be read secs. 42 and 43, which to a great extent enact the same provisions. See these sections and the notes thereto.

Questions may arise as to what is included in the obligations transferred under this section, *e.g.* whether the Commissioners are bound to retain in their employment the officers appointed by the former Local Authority. Any dispute must be referred to the Sheriff for decision; but it may be mentioned that the Board of Supervision have expressed the opinion that where part of the district of a Local Authority has been formed into a burgh, the appointments of medical officer and sanitary inspector fall *quoad* the new burgh, and the Commissioners are free to make new appointments.

The right to levy assessments is expressly specified as one of the powers of Local Authorities transferred to the Commissioners. The assessing powers of Local Authorities are given by secs. 93–95 of the Public Health Act of 1867, as amended by sec. 1 of the 1871 Act. The maximum assessment is 2s. 6d. per £ where the enactments as to water or drainage or hospitals have been put in force, and 6d. per £ where these have not been put in force. The assessment is leviable in the same manner as the police assessment, but certain specified subjects are rated on one-fourth (see secs. 94 (2) and 95 (1) of the 1867 Act, and sec. 1 of the 1871 Act).

In Edmonstone *v.* Police Commissioners of Kilsyth, 9th June 1882 (9 R., 917), the Local Authority of a parish in 1875 created

a portion of it into a "special drainage district," under the 76th section of the Public Health (Scotland) Act, 1867. Thereafter, in 1877, and before any operations were projected or executed in the "special drainage district" so created, the General Police and Improvement (Scotland) Act, 1862, was adopted in a populous part of the parish. The Police Commissioners appointed under that Act proceeded to carry out a general scheme of sewers and drains throughout the whole area under their jurisdiction—which included, besides other lands, the above-mentioned special drainage district—and to meet the expenses so incurred laid on assessments under the powers given them by the 1862 Act. An owner of mines and minerals partly within and partly beyond the "special drainage district," but wholly within the police area, presented a suspension and interdict against these assessments, on the grounds—(1) That the lands and heritages within the special drainage district fell to be assessed separately; and (2) That the assessments fell to be laid on minerals at one-fourth of their value, in terms of the 94th section of the Public Health Act, and not at the full value, as authorised by the 98th section of the Act of 1862. The Court—reversing judgment of Lord M'Laren—repelled the reasons of suspension. See also Lang *v.* Munro, 9th March 1892 (29 S. L. R., p. 612), quoted under sec. 42.

22. Where Burgh extended, Commissioners to pay County Council proportion of Expenses of Register of Voters.—Where by the extension of the boundary of a burgh under the Boundaries of Burghs Extension (Scotland) Act, 1857, and any Act amending the same, or this Act, any area of any county is annexed to such burgh, the Commissioners of such burgh shall pay annually to the County Council of such county from which such area is taken, such proportion of the expenses payable by the County Council for the preparation of the register of parliamentary voters for such county or division thereof, as the case may be, as the number of voters in the said area shall bear to the total number of voters in such county or division thereof.

See also the Act to amend the Boundaries of Burghs (Scotland) Act, 1857, 24 & 25 Vict. c. 36. The County Council is the body appointed under the Local Government (Scotland) Act, 1889, 52 & 53 Vict. c. 50.

See Commissioners of Supply of Fife *v.* Magistrates of Dunfermline and others, 19th Dec. 1884 (12 R., 389). A rural district with villages, extending to an area of one thousand acres, which lies contiguous to the parliamentary boundaries of the burgh of Dunfermline, as defined by the Reform Act of 1832, but outside them, was within the municipal boundaries as defined by royal charter and Act of Parliament. It was held, on a construction of the terms of the Lunatics Act, 1857, the Militia Act, 1854, and the Contagious

Diseases Animals Act, 1878, and relative Acts, that the assessments authorised to be levied and assessed by virtue of these Acts by Commissioners of Supply in counties could not be levied or assessed by the Commissioners in this district.

PART II.—CONSTITUTION OF POLICE BURGHS.

23. Establishment of New Authority in Burghs having Magistrates and Councillors, and in New Burghs.—In any burgh having Magistrates or a Magistrate and Councillors, or other municipal authority under whatever name, at the commencement of this Act—

(1.) The Magistrates or Magistrate and Councillors, or other municipal authority, shall, subject to the provisions of the immediately succeeding sections, be the Commissioners under this Act.

Provided that where there are already Police Commissioners under any General or Local Police Act, such Police Commissioners shall be the Commissioners under this Act until the first annual election of Magistrates and Councillors, or other municipal authority, after the commencement of this Act.

(2.) After the commencement of this Act—

(*a*) In burghs in which the Magistrates and Councillors are elected in manner provided by the Acts third and fourth William the Fourth, chapters seventy-six and seventy-seven, and other Acts amending the same, the Magistrates and Councillors shall be elected as heretofore, except in so far as the said Acts are modified or amended by this Act.

(*b*) In all other burghs the Magistrates and Councillors or Commissioners shall be elected under the provisions of the two immediately succeeding sections, as the case may be.

Where there are Police Commissioners under a General or Local Police Act, they shall continue as such till the first annual election after the commencement of the Act on 15th May 1893. After that date, in burghs which elect their Magistrates and Councillors under the 3 & 4 Will. IV. c. 76 and 77, the Magistrates and the Council shall still be elected thereunder, except in so far as these Acts are modified by this Act. The 28th section provides that "any male householder, not in arrears with any burgh assessment, shall be eligible as a Commissioner" for the purposes of this Act. Is this a modification, and does it apply to the election of Councillors? The writer thinks not. The 28th section deals with persons eligible to be

elected as Commissioners. Councillors are not elected as Commissioners, but as Councillors under the Acts applicable to such, and become, *qua* Councillors, Commissioners under this Act. The modification here referred to seems to be that contained in the 39th and 41st sections of the Act.

24. Present Commissioners to remain in office till their Successors are appointed. — In burghs wholly or partly administered under any General or Local Police Act, the Commissioners and Magistrates at the commencement of this Act shall continue to hold and exercise their office, and to perform all the duties appertaining thereto, till their successors are appointed under this Act, and the order of the retirement of such Commissioners shall be the same as if this Act had not been passed; but as vacancies occur the election of their successors shall take place under this Act, and where an increase or decrease in the number of the Commissioners in such burghs falls to take place in virtue of this Act, the Sheriff shall, on the application of the existing Commissioners or of any seven electors of the burgh, ascertain the extent of the population of the burgh, and thereupon fix the number of Commissioners to which the burgh is entitled under this Act; and it shall be lawful for the Sheriff to determine when and in what manner the increased or decreased number of Commissioners, and the consequent increase or decrease in the number of Magistrates, shall take place in the burgh, and if it is divided into wards, in the different wards thereof, and he shall fix the order in which they shall vacate office; and the Sheriff shall also determine in a summary manner all questions that may arise in reference to these matters, and he shall forthwith cause his deliverance to be recorded in the Sheriff-Court books of the county, and in the books of the burgh (if any) to which it specially applies, and such deliverance by the Sheriff shall be final.

In the burghs here provided for, the Commissioners and Magistrates will generally hold office up till the November following the commencement of the Act. Where a change is to take place in the number of Commissioners, the simplest plan will be for the Sheriff to make the election at the ensuing November, which will save expense and trouble. The order of retirement can be fixed as nearly as practicable on the lines laid down in Thomson *v.* Magistrates of

Rutherglen. (See sec. 32, p. 64.) When vacancies occur, these will be filled up under secs. 30 to 41 inclusive. With regard to the number of Commissioners to be elected under this Act, see sec. 29.

25. First Election of Commissioners in certain Burghs.—In burghs other than those referred to in the immediately preceding section, an election of Commissioners shall take place as soon as may be after the commencement of this Act, and the householders whose names are in the Assessor's list in this section mentioned shall be entitled to vote.

The Sheriff shall, preparatory to the said election, require the Assessor under the Valuation Acts to furnish him, within fourteen days, with a list of the householders in the burgh; and where the burgh is divided into wards, the Assessor shall state separately the householders in each ward respectively; and the list shall be subscribed by the Assessor, and be returned by him to the Sheriff, who shall hold the same as the list of householders entitled to vote in the election.

The other burghs here referred to are:—1. Those whose boundaries are determined in terms of sec. 8. The election in these cases is to take place as soon as may be after 15th May 1893, the commencement of the Act; it must, of course, be delayed until the boundaries have been determined. 2. The populous places created, or to be created, burghs under sec. 9. In these cases the election is to take place as soon as may be after creation of the burgh is recorded in the Sheriff-Court books.

Election means the choosing or selecting, in a proper and regular order, of one or more persons, from others, qualified and capable of performing the duties of the particular office for which they are so elected. In the King and the Mayor of Cambridge, 27th Jan. 1767 (4 Burrows, K. B., 2010), the case was that the corporation of Cambridge had in fact chosen a mayor on the 16th August, which was the charter day, viz., Mr. James Gifford, junior, who was an officer in the army just gone to North America, and without the least probability of returning till long after the year would be expired. The electors were sufficiently apprised of the fact at the time of election, and, soon after it, had express notice given them of it, but they refused to go to a new election. The Court granted a mandamus for a new election.

Lord Mansfield said: "The ground of the present application is, that there has been *no* election. This pretended election is a mere colour to avoid any election at all. The electors knew the circumstances of this person; they were apprised of the whole before the election was conducted. They chose him because it was impossible for him to execute the office. This is *no* election at all, it is a mere colour, a playing upon words. "An election" means a *due* election.

They are morally certain that he could not execute the office to which they chose him. The person now pretended to be elected is incapable, and chosen because he was so; nor can he be obliged to accept the office, and act. It is a void election, and as they knew of the incapacity, their votes were as no votes. They were thrown away."

Householder.—See sub.-sec. (14), sec. 4. See M'Donald *v.* Robertson, May 17, 1876 (3 R., 645). The Police and Improvement Act, 1850, enacts that "any householder" of the burgh shall be eligible to be elected a Commissioner. The Police Act, 1868, defines the word "householder" to be "a male occupier of lands or premises of the yearly value of £4 and upwards, as appearing on the valuation roll." The valuation roll of a burgh contained an entry of "David Swan, junior, & Company" as occupiers of premises of the annual value of £220. At 31st December 1874 a change took place in the partnership, the new firm taking the name of David Swan & Sons. At an election of Police Commissioners in June 1875, a person, who was a partner of the new firm, and held a written authority from the new firm to vote, was elected a Commissioner. In an action brought by a defeated candidate to reduce the election, on the ground that the defender had not the qualification, as neither his name nor the name of his firm appeared in the valuation roll, *Held*—(1) That the Court had jurisdiction to entertain the objection; but (2) that the objection was not valid, as the candidate had a substantial qualification.

26. Sheriff to conduct the Election.—The Sheriff shall conduct the election, and shall give due intimation thereof, and of the time within which the nomination of candidates for the office of Commissioner shall be made to him; and he shall be the returning officer, with power to appoint presiding officers, assistants, and clerks, and all other persons necessary to preside and officiate at the polling places in the burgh, or if it is divided into wards, in the several wards thereof.

The election shall be conducted by ballot, and as nearly as circumstances will permit in the manner hereinafter prescribed for the annual election of Commissioners for the purposes of this Act; and the Sheriff shall determine in a summary manner all questions that may arise in reference to the election, and his decision shall be final; and in cases of equality of votes, either in the burgh or in the several wards thereof, if it is divided into wards, the Sheriff shall have a casting vote; and he shall preside at the first meeting of the Commissioners, as hereinafter provided for, or shall appoint

some person other than a Commissioner to preside in his stead.

The Sheriff is to give *due* intimation of the time within which the nomination of candidates shall be made to him, and the election is to be conducted by ballot, and as nearly as circumstances will admit in the manner hereinafter prescribed for the annual election. The procedure, therefore, should be that followed at the annual election. (See secs. 28 to 41, and remarks applicable thereto; see sec. 35 as to the first meeting of Commissioners, and procedure thereat.)

27. Saving of Patrimonial Rights.—(1.) Where, by the operation of this Act, the right to elect the municipal authority is transferred and taken away from the existing body of electors, and any dispute arises as to whether any right or privilege exercised by all or any of such is a public or a private and patrimonial right, such dispute shall be decided by the Sheriff, but an appeal shall lie to the Court of Session.

(2.) Nothing contained in this Act shall affect the patrimonial rights of any body of feuars at the passing of this Act administered by the Town Council of any burgh or barony.

See Town Council of Stromness, 1st Dec. 1891 (19 R., 207), where a burgh of barony was in use to elect its Magistrates and Council in terms of its Crown charter, in September every third year, the electors being the male owners and tenants of subjects yielding £10 annually. The General Police Act, 1862, was adopted in the burgh in 1863, but the elections continued to be conducted in the burgh under the charter, the last having been held in September 1888. In November 1891, after the date of election for that year under both the charter and the Police Act had passed, the Court was asked to ordain the Town-Clerk of the burgh to make up the roll of electors, in terms of the General Police Act, 1862, and subsequent Statutes, and to appoint a returning officer to hold the election under the provisions of the Ballot Acts. The Court declined to do more under the petition than appoint a Returning Officer. The Court, in that case, declined to entertain the question whether the roll should be made up under the charter or under the Police Act, and whether the Ballot Act applied, expressing the opinion that if the parties wished them decided they must bring a declarator. The petitioners accordingly lodged a minute stating that they were advised "that the election of Magistrates for the Burgh of Barony of Stromness falls to be made in terms of the charter of the burgh, 1817, except as regards the manner of taking the poll, to which the provisions of the Ballot Act apply." And thereupon the Court appointed the Sheriff-Substitute to act as Returning Officer, and found the petitioners entitled to the expenses of the petition, and procedure following thereon, out of the first assessment for police purposes

which might be levied by the Magistrates and Council, Commissioners of Police of said burgh.

It will be observed that, under sub-head (2) of sec. 23, (*b*), that in all burghs other than those in which the Magistrates and Councillors are elected in the manner provided by the Act 3 & 4 Will. IV. caps. 76 and 77, the Magistrates and Councillors, or Commissioners, shall be elected under the provisions of secs. 24 and 25 of this Act. The mode of appeal to the Court of Session does not seem to be specially provided for. The terms of the appeal clause 339 do not seem to cover the appeal against a judgment of the Sheriff.

Election of Commissioners.

28. Persons eligible to be Elected.—At the election, any male householder in the burgh who is not in arrear with any burgh assessment shall be eligible as a Commissioner for the purposes of this Act, and may be proposed and seconded by any two householders in the Assessor's list hereinafter mentioned; or if the burgh is divided into wards, by any two such householders in the ward for which the election is to take place: Provided always, that the nomination paper shall be signed by the person nominated or his mandatory, and also by not less than five other such householders.

The same procedure with respect to the declaration of acceptance of office, and as to the election of Magistrates, and as to resigning the office of Commissioner, and as to filling up any vacancy in the office of Magistrate and Commissioner, shall take place under this Act as is by law provided with regard to such matters in burghs having to provide for the election of Magistrates and Councillors as aforesaid.

See sub-head (14), sec. 4, for definition of "householder." It will be observed that though female householders may be voters, only a male householder is eligible for election as a Commissioner. It is only a male householder in the burgh, who is not in arrear with any burgh assessment, who can be eligible as a Commissioner. No definition is given of the words "burgh assessment." By clause 340, what was formerly known as the Police Assessment, is to be called the "Burgh General Assessment." In the absence of a definition, it may be assumed that a person in arrear with any assessment under this Act will not be eligible as a Commissioner.

By sec. 32 of the 46 & 47 Vict. c. 52, it is provided—

1. Where a debtor is adjudged bankrupt, he is subject to the provisions of this Act, and disqualified for . . .

(*d.*) Being elected to or holding or exercising the office of Mayor, Alderman, or Councillor.

3. The disqualifications imposed by this section shall extend to all parts of the United Kingdom. By 47 & 48 Vict. c. 16, sec. 5, it is provided that in the application of sec. 32 of the Bankruptcy Act, 1883, to Scotland, the following provisions shall have effect:—

1. The expression "adjudged bankrupt" shall include the case of a person whose estate has been sequestrated, or with respect to whom a decree of *cessio bonorum* has been pronounced by a competent Court in Scotland.

2. A person adjudged bankrupt shall be disqualified from being elected to or holding or exercising the office of Provost, Bailie, Treasurer, Dean of Guild, Deacon Convener of Trades, or Councillor, or Commissioner, or Magistrate of Police; or being elected to or holding or exercising the office of member of a Parochial Board or School Board, or Road Trustee, or member of any Local Authority under any Act for the time being in force, whether passed before or after the commencement of this Act, relating to local government in Scotland.

By sec. 34 of the 46 & 47 Vict. c. 52, it is provided that if any person is adjudged bankrupt whilst holding any of the offices therein specified, his office shall thereupon become vacant. By sec. 6 of the 47 & 48 Vict. c. 16, sub-head (3), it is provided that the above section shall be deemed to apply to any person whilst in the office of Provost, Bailie, Treasurer, Dean of Guild, Deacon Convener of Trades, or Councillor or Commissioner, or Magistrate of Police, or member of Parochial Board or School Board, or Road Trustee, or member of any Local Authority under any Act for the time being in force, whether passed before or after the commencement of the Act, relating to local government in Scotland.

In Thom *v.* Magistrates of Aberdeen, 28th Feb. 1885 (12 R., 701), it was held that "the operation of the disqualification imposed by the Bankruptcy Act of 1883, and the Bankruptcy, Frauds, and Disabilities (Scotland) Act, 1884, upon a bankrupt, by which he is disqualified from being elected to the office of Town Councillor, or from holding that office, is not limited by the enactment of the Act 16 Vict. c. 26, by which any action for reducing the election of a Councillor, or finding it null, or interdicting a person elected to that office from acting as such, is declared illegal and incompetent after the lapse of a month from the date of his election. A Town Council passed a resolution, more than a month after the election of a Councillor, declaring his office vacant, on the ground that at the date of election he was under decree of *cessio*, which was still unrecalled. Interdict against their proceeding to elect another Councillor in his place refused. In that case the Lord Ordinary (Kinnear) said: "Now, the disqualification is, in the first place, from being elected—that is, from being elected after the passing of this Act—to the office, amongst others, of Town Councillor; and, secondly, from holding or exercising the office of Councillor when the appellant was elected to the office of Town Councillor after the

passing of the Act of 1883, he had been adjudged bankrupt in the sense of the Statutes, and was still an undischarged bankrupt in the sense of the Statutes; and therefore there can be no doubt whatever that the disqualification applied, provided the 32nd section of the Act of 1883 could be construed, without the aid of the Act of 1884, so as to cover the case of a Town Councillor in Scotland, with respect to whom a decree of *cessio bonorum* had been pronounced by a competent Court. I am disposed to think that, if the Act of 1884 had not been passed, I should have held such a person to be adjudged bankrupt in the sense of the Act of 1883; and I should certainly have held the office of Town Councillor to be one of those to which the disqualification of sec. 32 applies. But if there were any difficulty in so reading the Act of 1883, it is entirely removed by the Act of 1884. I agree that this Statute also is not retrospective. But the enactments which the 5th section interprets were already applicable to Scotland; and I do not think they can be construed in one way before December 1884, and in a different way after that date. But if they could it would be immaterial, because, if the appellant were not disqualified under the Act of 1883 from being elected, he became disqualified when the Act of 1884 came into operation, from continuing to hold his office. For the Statute appears to me to contemplate two alternative conditions—that of being elected while the disqualification attaches, or going on to hold or exercise an office after it has attached, although the election may have been perfectly valid and free from any disqualification at all. It follows, of course, from what I have said, that in my opinion the office which the appellant claims to hold is now vacant; indeed, it has never been duly filled, because this gentleman was at the time of the election disqualified, and therefore it is quite impossible to interdict the Town Council from proceeding to act upon that footing."

Nomination of Commissioners.—The candidate must be proposed and seconded by two householders in the Assessor's list (see secs. 30 and 31), and if the burgh be divided into wards, by two householders in the ward for which the election is to take place. It will further be observed that the nomination paper is to be signed by the person nominated, or his mandatory. This is a new provision. A written mandate ought to be given (see Burns *v.* Cassells, 23rd Nov. 1891, 29 S. L. R., 141). The mandatory must be a person other than any of the five assenters, as the nomination paper is to be signed by the mandatory and the assenters. The section does not prevent either of the two proposers from being the mandatory, but the schedule assumes that it will be the nominee himself; and failing him, it will be safer to have a third party other than either of the proposers or seconders. The section does not say that the five householders are to be householders in the ward for which the election is to take place (unless this is implied in the word "such"). But the schedule to the Act implies this by adding the words [or " for the . . . ward " [specify ward] as the case may be], (see Schedule IX.). The two proposers and the five assenters must, of course, be on

the Assessor's list, and be persons who, on 15th July immediately preceding, were not in arrear with any burgh assessment (see sec. 31).

By sec. 39, notwithstanding the 9th section of the Municipal Elections Amendment (Scotland) Act, 1868, it shall not be competent to elect any person to the office of Town Councillor at the annual municipal election unless his name shall have been intimated to the Town-Clerk before four o'clock on the Tuesday immediately preceding the first Tuesday of November, in the terms of Schedule IX., appended to the Act. By clause 41 the said 9th section is repealed in so far only as it relates to the time and form of making the intimation of nomination to the Town-Clerk (see sec. 41). See as to procedure at annual election, declaration of acceptance (sec. 32); election of Magistrates (secs. 35 and 36); resigning the office of Commissioner, and filling up any vacancy in the office of Magistrate and Commissioner (sec. 32).

29. Number of Commissioners.—In burghs where the population is less than ten thousand, the number of Commissioners elected shall be nine, unless, on application to the Sheriff by the existing Commissioners, or by seven householders of the burgh, he shall see cause to fix the number at twelve; where the population is between ten thousand and twenty thousand, the number shall be twelve; where the population is between twenty thousand and fifty thousand, the number shall be fifteen; where the population is between fifty thousand and one hundred thousand, the number shall be eighteen; where the population is over one hundred thousand, the number shall be twenty-four. And the number of the Commissioners to be elected may from time to time be determined by the Sheriff in conformity with this section.

Where the burgh is divided into wards, the number of wards and the number of Commissioners to be elected shall be settled and adjusted by the Sheriff, so that there shall be as nearly as may be three Commissioners for each ward.

The provisions in the latter part of the first paragraph, as well as the second paragraph of this section, seem to contemplate the Sheriff determining the number of Commissioners, and the apportionment of these to their respective wards from time to time as the population increases.

30. Register of Voters to be made similar to Register of Parliamentary Burghs.—In all burghs where an annual election of Commissioners falls to be made under this Act, from and after the first election of Commis-

sioners as above provided for, a list and register of the persons entitled to vote in such annual election shall be made up yearly, before the 15th day of September, and the procedure to be followed with reference to such list and register shall, as far as practicable, be similar to that prescribed by the Acts for the registration of parliamentary voters for burghs in Scotland, and for this purpose the Clerk to the Commissioners shall come in room and place of the Assessor and also of the Town-Clerk; and the Chief Magistrate, or in his absence one of the Magistrates, shall hold a Court for correcting and revising the said list accordingly; and the County-Clerk, Assessor, or other person in the possession of the Valuation Roll, shall, on or before the 15th day of August, exhibit and give reasonable access to the same, without making any charge, to enable such list and register to be made up and completed in terms of this Act.

The Sheriff is to conduct the first election, which is provided for in secs. 25 and 26. In future annual elections, in burghs, under sec. 9 of the 48 & 49 Vict. c. 3, the Assessor is, in the months of April and May, to inquire or ascertain with respect to every dwelling-house, whether any man other than the owner, or other person rated, or liable to be rated in respect thereof, is entitled to be registered as a voter in respect of his being an inhabitant-occupier, and to enter his name in the Valuation Roll, and the situation or description of the dwelling-house in respect of which he is entitled, and this should be completed by the 1st June. And by sec. 4 of the 48 & 49 Vict. c. 16, the Assessor is authorised, instead of using the means of obtaining information for the purposes of registration provided by the section of the Act above referred to, to call upon every person rated or liable to be rated in respect of the occupation of any lands and heritages which comprise any dwelling-house, for an accurate written list of the names and occupations of all persons, inhabitant-occupiers of any dwelling-house, and the month and year in which they began to occupy such dwelling-house. If any person fail to return this list, he is liable in a penalty.

By sec. 18 of 31 & 32 Vict. c. 48, where a poor-rate due from an occupier of premises to which a right of voting is for the first time attached by that Act, remains unpaid on 15th May, the collector of poor-rates, on or before 1st June, must serve a demand note in the form set forth in Schedule C to that Act to every such occupier. If the rate be not paid by the 20th June, the person shall not be entitled to be registered as a voter. Neither will he be so entitled if he have been exempted from payment of poor-rates on the ground of inability to pay, or if he shall have been in the receipt of parochial relief within the twelve calendar months next preceding the last day of July (sec. 3, 31 & 32 Vict. c. 48). On or before 1st July, the

collector of poor-rates must deliver to the Assessor a list, in the form in Schedule D annexed to 31 & 32 Vict. c. 48, and in the order as nearly as may be in which the names appear in the Valuation Roll, of all occupiers of premises who have been, during the period, disqualified under the section before quoted. The Assessor is to be guided by the said lists, which are *primâ facie* evidence of the correctness of the entry therein contained, in ascertaining the right of any person to be inserted or entered in the Register of Voters (sec. 19, 31 & 32 Vict. c. 48).

On or before 15th September in every year, the Assessor is to make out, according to Form No. 1 of the Schedule A annexed to 19 & 20 Vict. c. 58, a list of all persons who may be entitled to vote in the election of a member of Parliament, and such list shall be arranged in wards, where the burgh is divided into wards, and into polling districts. Each ward and polling district is to be arranged, as far as conveniently can be, in the alphabetical order of the surnames of the persons entitled to vote, or in the alphabetical order of streets, squares, lanes, and other places in which houses are distinguished by numbers, and in which the subjects of qualification are situated; as regards all other places, in the alphabetical order of the surnames of the persons entitled to vote.

In the list, the Christian name and surname of each person is to be written at full length, together with his occupation, the place of his abode, and nature of his qualification, and the name of the street, and number of the house (if any), or other description of the place where the property in respect of which he is entitled to vote may be situated. The Assessor must sign this list, and forthwith cause a sufficient number of copies to be written or printed.

On or before 15th September, the Assessor must publish copies of the list, by affixing the same on or near the Town-Hall or other conspicuous place within the burgh, and give notice by advertisement in some one or more newspapers circulating in the burgh, of the place at which a copy of such list will be open to perusal. A copy must be open to perusal without fee, at any time between the hours of ten o'clock forenoon and four o'clock afternoon of every day except Sunday, from 16th to 21st September, both inclusive. The Assessor must deliver copies of this list to all persons applying for the same, on payment of a price for each copy after the rate contained in Table No. 1 of Schedule B annexed to the Act. If any person desires his name not to be entered in the list, and intimates this in writing to the Assessor, the Assessor shall not insert his name (sec. 2, 19 & 20 Vict. c. 58; sec. 20, 31 & 32 Vict. c. 48).

Persons omitted to lodge Claims.—Any person whose name has been omitted from the List of Voters, and any person desirous of being registered by a different qualification than that for which his name appears in the list, must, on or before 21st September, give notice to the Assessor according to the Form No. 2 in the Schedule to the Act, and the Assessor shall include the names of all such persons claiming, in a list according to the Form No. 3 of the Schedule A appended to the Act.

Objections to be lodged. — Any person whose name has been inserted in any list of voters for a burgh, may object to any other person as not having been entitled on the last day of July to have his name inserted in any list of voters, and this must be done by giving to the Assessor, on or before 21st September, a notice according to the Form No. 4 of Schedule A appended to the Act, and he must likewise, on or before 21st September, give notice to the person objected to according to the Form No. 5 of the said Schedule A (sec. 4).

Assessor to make up and publish Lists.—On or before 25th September in each year, the Assessor shall include the names of all persons objected to in a list, according to the Form No. 6 of Schedule A appended to 19 & 20 Vict. c. 58, signed by him. Copies of this list are to be written, or printed and published, with the list of claimants, on or before said 25th September, by advertising in one or more newspapers circulating in the burgh the place at which copies of the said lists and notices of claims and objections will be open to perusal. The advertisement must be repeated not earlier than six and not later than eight days after the day on or before which the same is required to be published (see sec. 10, 19 and 20 Vict. c. 58). Copies of these lists, and the notices of claims and objections which he shall have received, are, unless when in use in the Registration Court, to be open to be perused by any person without payment of any fee, at any time between ten o'clock in the forenoon and four o'clock in the afternoon of each day except Sunday, between 25th September and the 1st day of October. The Assessor must deliver copies of the said lists, or either of them, to any person requiring the same, on payment of the rate contained in the Table No. 1 of Schedule B appended to 19 & 20 Vict. c. 58 (see sec. 5, 19 & 20 Vict. c. 58; and sec. 20, 31 & 32 Vict. c. 48).

By sec. 6 of 19 & 20 Vict. c. 58, the Assessor must deliver to the Town-Clerk copies of these lists within the prescribed period, but as, by sec. 30 of this Act, the Clerk to the Commissioners is to come in room and place of the said Assessor and also of the Town-Clerk, this provision cannot be operative, although the Clerk to the Commissioners must still have the lists ready and in his possession by the 25th September.

The Town-Clerk, on 25th September in each year, or as soon thereafter as possible, is to transmit an abstract of the several lists of claimants, and lists of persons objected to in the burgh, to the Magistrate, indicating the number of claims and objections to be disposed of by him (see sec. 18 of 19 & 20 Vict. c. 58; see sec. 20 of 31 & 32 Vict. c. 48). As the Chief Magistrate, or in his absence one of the Magistrates, is to hold the Court for correcting and revising said lists, these lists should be transmitted to him within the prescribed period.

Revising Courts.—On or before 25th September in each year, or as soon thereafter as possible, the Magistrate will deliver to the Clerk of each burgh a written notice of the days, within the period mentioned, on which he is to hold Courts for revising the Register

of Voters. The Courts must be held between the 25th September and 16th October in each year, between which dates the Magistrate must revise the Register of Voters and the Lists of the several burghs, and for that purpose hold open Courts during that period.

The Town-Clerk must give public notice of the Burgh Registration Courts by advertisement in one or more newspapers circulating in the burgh, and cause a copy of the notices, written or printed, to be delivered to the Assessor of the burgh, and require him to attend at the Courts appointed.

As the Clerk to the Commissioners comes in room both of the Assessor and Town-Clerk, he must see to the notices being properly given, and he ought to retain a copy thereof.

The Clerk must attend the Courts to be held, and at the first Court deliver to the Magistrate the list made out by the Assessor, and the list of claimants and persons objected to in the current year relating to the burgh, with one or more printed copies of the Register of Voters then in force. The Clerk must also deliver to the Magistrate the original notices of claim and objection, and the person having the custody of the Valuation Roll then in force shall have the same on the table of the Registration Court. The Clerk must produce all documents, papers, and writings in his power touching any matters necessary for revising any lists of voters. The Magistrate has power to require any person having the custody of the Valuation Roll to attend before him and to produce the same (see sec. 20 of 19 & 20 Vict. c. 58).

For the purpose of enabling the Clerk to make up his list, the person in possession of the Valuation Roll must, by the 15th August, give access to the same without making any charge. This gives the Clerk a month to make up his list.

If any person who has given to the Clerk due notice of his claim to have his name inserted in the List of Voters for the burgh has been omitted therefrom, the Magistrate must, on the revision of the list, insert the name of the person so omitted, if it be proved that, on the last day of July last preceding, such person was entitled to be inserted therein in respect of the qualification described in the notice of claim (sec. 21).

Claims omitted may be objected to.—Any person whose name is on the List of Voters of the burgh may oppose the claim of a person to have his name inserted in the List of Voters, but the person intending to oppose must, in the Court to be held for the revision of the list, and before the hearing of the claim, give notice in writing to the Magistrate of his intention to oppose the claim. If he does this, he must be admitted to oppose by evidence or otherwise without any previous or other notice, and has the same rights, powers, and liabilities as to costs, appeals, and other matters relating to the hearing and determination of the claim, as any person who has duly objected to the name of any other person being retained on the List of Voters, and who shall appear and prove the requisite notices in terms of 19 & 20 Vict. c. 58 (see sec. 22, 19 & 20 Vict. c. 58; sec. 20, 31 & 32 Vict. c. 48).

Magistrate to revise and correct List.—The Magistrate shall correct any mistake which shall be proved to him to have been made in any list, and expunge the name of every person whose qualification shall be insufficient in law to entitle such person to vote, and the name of every person proved to be dead. If, in entering the name and qualification of any voter, anything requiring to be specified be omitted, or if any description be insufficient for identification, the Magistrate shall expunge the name of every person so entered, unless the matter so omitted or insufficiently described be supplied before he have completed the revision of the list. The Magistrate in open Court must write his initials against the names respectively expunged or inserted, and against any part of the said lists in which any mistake shall have been corrected, or any omission supplied, or any insertion made by him (see sec. 23, 19 and 20 Vict. c. 58).

Magistrate may grant Warrant to cite Parties.—The Magistrate may, upon *ex parte* application made to him by any claimant, objector, or appellant, grant warrant to cite parties, witnesses, and havers, and diligence for the recovery of writings with reference to any claim, objection, or appeal to be discussed before any Registration Court to be holden by him, or before any Court of Appeal of which the Magistrate may be entitled to be a member; such warrants are equally valid as if granted in the course of any ordinary or summary process or procedure, and that notwithstanding that the Appeal Court to which such citation or diligence refers be holden without the limits of the ordinary jurisdiction of the Magistrate (sec. 24, 19 & 20 Vict. c. 58).

Magistrate may adjourn Registration Courts.—The Magistrate has power to adjourn the Court from time to time, but so that no such adjourned Court shall be holden after the 15th day of October in any year. And at all Courts, whether of Registration or Appeal, the judge shall have power to administer an oath to all persons examined before such Court; and all parties, whether claiming or objecting or objected to, and all persons whatsoever, may be examined upon oath touching the matters in question; and every person taking any such oath, who shall wilfully swear falsely, shall be deemed guilty of perjury, and shall be liable to be punished accordingly (sec. 25, 19 & 20 Vict. c. 58; sec. 20, 31 & 32 Vict. c. 48).

On Completion of Registration Courts, Lists of Voters to be delivered to Clerk.—On the revision of the Lists of Voters being completed, the Magistrate must, at latest, on the 16th day of October in each year, deliver the same to the Clerk, who shall retain the same in his possession, and produce the same to the Court of Appeal (sec. 26, 19 & 20 Vict. c. 58; sec. 20, 31 & 32 Vict. c. 48).

Valuation Roll to be prima facie *evidence of matters stated therein.*—In all questions and proceedings, the Valuation Roll shall from and after the 15th day of August in the year in which such roll is made up, and subject always to such alterations as may be afterwards lawfully made thereon, be received and taken as *prima facie* proof that the gross yearly rent or value of any subjects specified in such Valuation Roll is, and has been for the year from the 15th day of

May in such year, of the amount set forth for the time in such Valuation Roll, and also as *prima facie* proof that the persons therein set forth as proprietors, tenants, and occupants respectively have, for the period to which such valuation applies, been such proprietors, tenants, and occupants respectively as therein stated; it is competent to prove, to the satisfaction of any Magistrate or Court of Appeal, that such subjects are or have been of a greater or of a less annual value than the value stated in such Valuation Roll; and it shall be competent, in any appeal from any Court of Registration to any Court of Appeal, to refer to and found upon any Valuation Roll, notwithstanding that such Valuation Roll may not have been produced in such Court of Registration (see sec. 17 of 19 & 20 Vict. c. 58).

Clerk, etc., to attend Appeal Courts.—All Town-Clerks, Assessors, and other persons bound to give attendance or make productions before any Sheriff, in terms of the Act 19 & 20 Vict. c. 58, are bound to give the like attendance, and make the like productions, in each year before the Court of Appeal (sec. 28, 19 & 20 Vict. c. 58).

Clerk to cause Burgh Lists to be printed, and to authenticate them.—The Clerk must forthwith, after 15th October, or sooner if the Registration Court be earlier concluded, cause the List of Voters, signed as aforesaid, to be copied and printed in a book, arranged in wards—where the burgh is divided into wards—and in polling districts; each ward or polling district being arranged, as far as conveniently may be, in the alphabetical order of the surnames of the persons registered as voters, or otherwise, as conveniently may be, in the alphabetical order of streets, squares, lanes, and other places in which houses are distinguished by numbers, and in which the subjects of qualification are situated; and each such street, square, lane, and other place being arranged according to the numbers of the houses; and the arrangements in all places in which the houses are not distinguished by numbers being according to the alphabetical order of the surnames of persons registered as voters; and the said book shall be so arranged and printed that the List of Voters of and for each and every separate ward, and each and every separate polling district, may be cut out or detached, and ready for the purposes of the Act, or for sale as aforesaid; the said Clerk must prefix to every name in the said register book its proper number, beginning the numbers from the first name and continuing them in a regular series down to the last name; and cause the said book to be printed off as so corrected. The Clerk must sign the said book so completed, and deliver the same, on or before the 31st day of October, to the Magistrate, to be by him kept for the statutory purposes (sec. 29, 19 & 20 Vict. c. 58).

It is incompetent by petition and complaint to set aside an election of Councillors in a royal burgh, on the ground of the Town-Clerk having improperly transferred to the Municipal Register the names of certain voters alleged not to be qualified, the Court reserving their opinion as to the competency of a reduction which had been raised.

Thomson *v.* Magistrates of Wick, 8th July 1836 (14 S. 1118, 11 F. 912).

Lists so printed to be the Register of Voters.—The printed book, signed by the Clerk, and delivered to the Magistrate, shall be the register of persons entitled to vote at any election of a Commissioner, which shall take place in and for the same burgh between the 31st October in the year wherein such register has been made and the 1st November in the succeeding year; and the Clerk shall keep printed copies of the register, and deliver copies thereof, or of any part thereof, to any person applying for the same, upon payment of a price at the rate contained in the the Table No. 2 of the Schedule B, annexed to 19 & 20 Vict. c. 58. No person is entitled to a copy of any part of any register relating to any ward, or polling district of a burgh, without taking or paying for the whole that relates to such ward or polling district respectively. Any merely clerical error found to exist in any such printed book may be competently corrected at any time by the Magistrate, on its being proved to him to exist; and such correction shall be made by the Magistrate writing it on such printed book, and signing his name and the date against the same (sec. 30, 19 & 20 Vict. c. 58).

Register of Voters to be in force till New Register established.—Every Register of Voters so established continues to be the Register for such burgh until it is revised, and a new Register completed in the like manner in the following year (sec. 31, 19 & 20 Vict. c. 58).

When a Sunday is last-named day, the day after to be the last day.—When any of the days on which, or before which, any acts and proceedings are appointed to be transacted shall happen to be a Sunday, such acts and proceedings shall take place on or before the day next ensuing (sec. 35, 19 & 20 Vict. c. 58).

Agents and Mandatories may act for Party.—Any claim, objection, notice of appeal, or other writ, may be signed, and any proceedings prosecuted, by any person as agent or mandatory for the party thereto; and any mandate bearing to be signed by such party shall be *prima facie* a sufficient mandate, and shall have all the privileges attaching to any judicial mandate (sec. 36, 19 & 20 Vict. c. 58).

Appeal against Decision of Magistrates in Registration Court.—If any person whose name has been struck out of any Register or List of Voters by the Magistrate, or who shall claim or object at any Court, considers the decision on his case to be erroneous in point of law, he may, in open Court, require the Magistrate to state the facts, the question of law, and his decision, in a special case. The Magistrate must prepare, sign, and date the special case, and deliver the same in open Court to the Clerk. The person appealing may thereupon, in open Court, declare his intention to appeal, and within ten days of the date of the special case shall lay a certified copy thereof before the Court of Appeal. The Court will hear all parties, and give their decision, specifying therewith every alteration, or correction, if any, to be made on the register, in pursuance of that decision. The register must be, as soon as possible after 31st October in each year, altered accordingly by the Magistrate. If the Magis-

trate considers that his judgment respecting the qualifications of two or more persons depends on the same question of law, he must append to the special case the names of all such persons who have appealed against his judgment. The decision of the Court will apply to the qualifications of all these persons. The Court has power to award costs, and its decision is final. The Court may remit the special case to the Magistrate to have the same more fully stated, if necessary (see sec. 22, 31 & 32 Vict. c. 48).

Constitution of Court of Appeal.—The Court for hearing appeals consists of three judges of the Court of Session, named by Act of Sederunt, one from each Division of the Inner House, and one from the Lords Ordinary in the Outer House. The judges may sit either during the sitting of the Court of Session, or in vacation or recess, and the Junior Principal Clerk of Session is the Clerk of the Court (see sec. 23, 31 & 32 Vict. c. 48).

The Assessor is disqualified from being registered and from voting or taking part in any election of a member to serve in Parliament or in municipal elections within the burgh (see sec. 8, 19 & 20 Vict. c. 58). Notice to the Assessor may be delivered to him or left or sent by post, postage paid, at his place of abode or his business place; and notice to any other person may be sent by post, postage paid, addressed with a sufficient direction at his usual place of abode (see sec. 9, 19 & 20 Vict. c. 58). A document to be affixed on any place must continue so affixed for a period including two consecutive Sundays at the least next after the day of publication, and if removed or defaced must be replaced by the person giving the notice. And any person mutilating such notice is liable under a penalty, but no list is to be invalidated in consequence of a failure to advertise or publish the same, and no claim or objection will be affected by any mistake of any public officer appointed to receive the same (see secs. 11, 12, 13, 14 of 19 & 20 Vict. c. 58).

31. Persons who shall be entered in Register of Voters under this Act.—The persons who shall be entered in the said list and register shall be the same as if the burgh was a burgh having to provide for the appointment of Magistrates and Councillors in terms of the Acts thereanent, and such list and register, including the female voters (which need not be a separate list), when so made and completed, shall be called the Register of Voters under this Act; and there shall be included in the said List or Register of Voters the names of all persons within the burgh who are qualified for the parliamentary franchise as inhabitant-occupiers under the third section of the Representation of the People Act, 1884: Provided always, that no person shall be placed on the said list or register who on the 15th day of July immediately pre-

ceding was in arrear with any burgh assessment; and such register shall be the register of persons entitled to vote at the next ensuing election of Commissioners under this Act, and be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively; and the said register may, if desired by the Commissioners, be printed, and copies thereof kept by the Clerk to the Commissioners, and delivered to persons applying therefor on the same terms as is provided for by the Burgh Voters Registration Act, 1856, in regard to other burghs.

See sub-heading (14), sec. 4, for definition of "householder," and remarks thereunder. The persons qualified for the parliamentary franchise as inhabitant-occupiers, under the 3rd section of the Act, 48 Vict. c. 3, are as thereby provided: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant-occupier of such dwelling-house as a tenant."

It will be observed that no person in arrear with any burgh assessment on 15th July immediately preceding can be placed on the register. What may be meant by burgh assessment is not defined, but it will be safe to assume that it is any assessment leviable in respect of or under the provisions of this Act.

By the Municipal Elections Amendment (Scotland) Act, 1881, sec. 3, it is provided that in any royal or parliamentary burgh in which the list or roll of persons entitled to vote in the election of the Town Council of such burgh is made up in the way and manner directed by the Municipal Elections Amendment (Scotland) Act, 1868, or by the said Act, and any local Act or Acts of Parliament, such list or roll shall continue to be made up as heretofore, so far as regards the persons entitled under these Acts to vote in the election of the Town Council of such burgh; but in order that the females on whom the municipal franchise is by this Act conferred may be added to such list or roll, without necessitating the preparation of an entirely separate list or roll, which shall include all the persons entitled to vote in the election of the Town Council of such burgh, it is hereby provided that the Assessor appointed and acting under the Registration of Voters Acts in such burgh shall annually prepare a separate list of all females on whom the municipal franchise is by this Act conferred, and the same procedure shall be followed with reference to such separate list as is by the Registration of Voters Acts appointed to be followed with regard to the preparation, publication, completion, and otherwise of the Register of Parliamentary Voters for Burghs in Scotland; and such separate list, when

completed in terms of the Registration of Voters Acts, shall, along with the list or roll of persons made up in terms of the Municipal Elections Amendment (Scotland) Act, 1868, or of the said Act, and any local Act or Acts of Parliament, form together the list or roll of persons entitled to vote in the election of the Town Council of such burgh.

And by the Municipal Elections Amendment (Scotland) Act, 1881, it is provided, sec. 2, that "in the Municipal Elections Amendment (Scotland) Act, 1868, and the various Acts therein recited prescribing the qualifications of voters at municipal elections in Scotland, whenever words occur which import the masculine gender, the same shall be held for all purposes connected with and having reference to the right to vote in the election of Town Councillors, and also to nominate candidates for election to the said office, to include females who are not married and married females not living in family with their husbands; but such females shall not be eligible for election as Town Councillors.

The register is to be considered as conclusive evidence that the persons therein named have the qualifications annexed to their names.

In Macdonald *v.* Robertson, 17th May 1876 (3 R. 645,) an objection by a candidate claiming to have been elected at an election of Police Commissioners, that a number of persons had voted who had not paid their assessments, and were therefore, under sec. 34 of 13 & 14 Vict. c. 33, not entitled to vote, can only be inquired into by a committee of the Commissioners upon a complaint brought under sec. 31 of 13 & 14 Vict. c. 33.

32. Future Elections of Commissioners to be same as Election of Town Councillors.—There shall be an annual election of Commissioners under this Act, on the first Tuesday of November; and such annual election in the burgh, or, if it is divided into wards, in the several wards thereof, shall be conducted under the rules, regulations, and provisions applicable by law to the election of Town Councillors in burghs in Scotland; and for all the purposes of such annual election, first meeting of Commissioners, and election of Magistrates, and other procedure consequent upon such annual election, a burgh under this Act shall be deemed a burgh having to provide for the appointment and election of Magistrates and Councillors therefor in terms of the Acts relating to the election of Magistrates and Councillors in royal and parliamentary burghs in Scotland which may be in force for the time: Provided that, in the case of any burgh situated in any island of Scotland, it shall not be necessary, in the event of a double return, or failure to nominate the

requisite number for election, to carry through the whole election procedure of new, but instead thereof, the Commissioners, at a meeting to be held at twelve o'clock noon on the first Friday after the annual election, shall, in the event of there being an equality of votes, determine by vote which of the candidates shall be preferred; and in the event of the whole or any part of the number of the Commissioners not being elected, it shall be lawful for the Commissioners then in office, at such meeting, to supply the deficiency by such and the like proceedings as are provided for in the case of interim vacancies.

Preliminary Arrangements for Election.—By sec. 20 of the Ballot Act, 35 & 36 Vict. c. 33, sub-head (3), and sec. 22, sub-head (1), the Provost or other Chief Magistrate, as returning officer, is to provide everything which, in the case of a parliamentary election, is required to be provided by the returning officer for the purpose of a poll. The returning officer will thus timeously arrange the place or places at which the election is to take place. In burghs not divided into wards, the Town-Hall or other public hall in the burgh will be the most suitable place. But, in burghs divided into wards, suitable rooms will have to be selected for each ward. The rooms should, if possible, be situated within the respective wards, but there is no authority for taking schools or other places compulsorily for a municipal election, as is provided in regard to a parliamentary election. The returning officer having thus provided proper places at which the election for each ward is to take place in the event of a poll, the returning officer must give this information to the Clerk, who must, ten days at least previous to the election, give intimation, by notice affixed on the church doors of the several parishes of the burgh, of the place or places so fixed by the returning officer. In this notice it is usual to mention what vacancies have to be supplied in each ward, and to indicate to the electors the manner of nomination of candidates (see form of notice in Appendix).

The vacancies will be those caused by the ordinary retirement of the third of the Commissioners (sec. 37), as well as those occasioned by the death, disability, or resignation of any of them during the year, whether the places of Commissioners who have died, been disabled, or have resigned, have been supplied *ad interim* or not.

The nomination paper will be in the form (Schedule IX.) appended to the Act (see sec. 28, and remarks thereunder). Can the Clerk reject nomination papers?

By sec. 39, the intimation to the Town-Clerk is to be in the form of Schedule IX. annexed to the Act, "or as near thereto as circumstances admit;" and by sec. 28, any male householder in the burgh, who is not in arrears with any burgh assessment, shall be eligible as a Commissioner. This throws impliedly on the Clerk the duty of seeing that the nomination paper is (1) in conformity with

the Statute; (2) that it is duly signed by two qualified householders; (3) by the person nominated or his mandatory; and (4) by not less than five other qualified householders.

The Register of Voters will, in the first place, be conclusive evidence as to the qualifications of the respective parties. But what if the person proposed have become subject to the bankruptcy disqualification? or ineligible on other grounds? The Act says it is only a male householder in the burgh who is eligible. None of the Statutes confer discretion on the Town-Clerk to judge in the matter, as he is only required to give public notice of the names of persons so intimated to him; but these must be persons, firstly, who fall within the category of male householders within the meaning of the Acts; and, secondly, only such male householders as are eligible for the office; and, in the first instance, the Clerk must have some discretion as to intimating candidates. On receiving nomination papers, the Clerk is required, by sec. 9 of the Municipal Elections (Scotland) Act, 1868, on or before the Friday immediately preceding the election day, to cause public notice to be given, in the form of Schedule C annexed to that Act, of the names of all persons intimated to him in terms of the Act. The notice must specify the name and place of abode of the candidate, and the names and places of abode of the two nominators and the five assenters. These should be given as in the Municipal Register. If the burgh be divided into wards, the schedule implies that the names and designations of the candidates for each ward shall be separately stated in the notice. The notice prescribed by the Statute must be affixed to the doors of the Town-Hall or Council Chambers and the parish churches in the burgh; and if the Clerk consider it expedient, he may also advertise it in one or more newspapers published or circulating in the burgh. If the number of persons whose names are intimated to the Clerk for election as Commissioners in the burgh do not exceed the number of vacancies to be supplied, there will be no poll, and the persons so proposed will, on the day appointed for declaring the election, be declared to be elected Commissioners of the burgh accordingly (see sec. 3 of the Municipal Election (Scotland) Act, 1870).

Arrangements for Poll in case of a Contested Election.—By sec. 8 of the Ballot Act, 35 & 36 Vict. c. 33, the returning officer must provide "such nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of the Register of Voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in manner provided for by this Act." By sec. 20, sub-sec. (4), all expenses shall be defrayed in manner provided by law with respect to the expenses of municipal elections (see also sec. 16, sub-sec. (5)).

By Rule 54, Schedule I., of the Ballot Act, the returning officer must make a statutory declaration of secrecy before the opening of the poll, in presence of a justice of the peace. If the returning officer requires any assistance in the performance of his duties, the person he appoints should also make a statutory declaration of secrecy, either in presence of a justice of the peace or of the return-

ing officer. No other declaration or oath need be taken by the returning officer on the occasion of any election. Sec. 4 of the Ballot Act must be read over to the person making the declaration. The returning officer must provide competent presiding officers, polling clerks, and persons to assist him in counting the votes; but no person shall be appointed by a returning officer for the purposes of an election who has been employed by any other person in or about the election.

For the further procedure regarding the taking of the poll, and the management of the election generally, reference is made to the Ballot Act, 35 & 36 Vict. c. 33.

In M'Donald *v.* Robertson, 17th May 1876 (3 R., p. 645), it was held that treating of voters by candidates at an election of Police Commissioners was not a relevant ground for setting aside the election. But since then the Elections (Scotland) Corrupt and Illegal Practices Act, 1890, 53 & 54 Vict. c. 55, has been passed, making bribery, treating, undue influence, and personation, illegal practices under that Act. Reference is made to the Statute.

Declaration of Elections.—After the counting of the votes for the respective candidates in the different wards has been completed, the returning officer must, between the hours of twelve and two the Wednesday following the election, declare the persons elected by the majority of votes. When an equal number of votes has been given for two or more candidates in any ward, the returning officer must declare this and make a double return. It will be observed that in sec. 32 it is not necessary, in the event of a double return in the case of any burgh situated in any island of Scotland, to carry through the whole election procedure of new, but in all other cases where there is a double return this must be done.

The returning officer has no further power, even though one of the persons having the equality of votes should decline to accept office on the spot. Neither the Provost nor the Chief Magistrate can take any cognisance of that till the first meeting. A new election, except in the case of a burgh situated in any island of Scotland, is inevitable. In the event of a failure to nominate the requisite number for election, the same procedure is necessary. It appears that the last clause of this provision only applies to the case of a burgh situated in any island of Scotland. In the case of the retirement of a Commissioner as one of the third, where his place has not been supplied at the annual election, or within the period allowed for the case of a double return, or of a Commissioner declining to accept, there seems to be no provision, and nothing can be done till the next election of Commissioners. In the case of Thomson *v.* Magistrates of Rutherglen, 17th Feb. 1876, a Councillor and Magistrate was held not to have been duly elected on the ground that he was ineligible for the office. This created a vacancy both in the Council and the Magistracy, and the opinion of Mr. Watson and Mr. Balfour was taken on what course should be taken as to filling up the vacancy, when they gave the following opinion:—"We are of opinion that none of the statutory provisions referred to are applicable to the

ease which has occurred, or could be used—without liability to challenge—for filling up the vacancy in the Town Council and Police Commissioners caused by Mr. Hamilton's removal. The Act of 16 Vict. c. 26, is inapplicable, because the vacancy has not been occasioned by Mr. Hamilton's election being found null or reduced, but by the expiry of his term of office, and the provisions of 3 & 4 Will. IV. c. 76, sec. 25, are inapplicable, because the vacancy has not occurred in the course of the year by any disability on the part of Mr. Hamilton. The present case appears to us to fall within the description of events provided for by 30 & 31 Vict. c. 108, sec. 9, but the procedure directed by that section is not available, because the period within which alone that provision could be adopted has long ago expired. There does not appear to us to be any course open, except to leave the Council in its present condition till the election in November next, when the vacancy caused by Mr. Hamilton's removal can be filled up along with any other vacancies which may occur before that time." This opinion was acted upon.

Declaration of Acceptance.—The same procedure with respect to this is to take place as is provided with regard to Magistrates and Councillors elected for parliamentary burghs. In parliamentary burghs, in the event of there being no greater number of candidates nominated than there are vacancies to be supplied in such burghs or wards, no poll or voting will take place, and in that event, on the day appointed for declaring election, the persons thus proposed will be declared to be duly elected in the same manner as if they had been elected by a majority of votes in the case of a contested election (see sec. 3 the Municipal Elections Amendment (Scotland) Act, 1870).

If there has been a poll, then, after the counting of the votes, the returning officer declares that the respective persons having the greater number of votes have been elected. Thereupon the returning officer will direct the Clerk to intimate his election to each of the gentlemen so declared to be elected, and require each of them to attend at the Town-Hall, or other convenient meeting-place, on the following day at a specified hour, when each of them must declare whether he accepts or declines accepting the office of Councillor to which he has been elected.

On the following day, accordingly, the Clerk will produce at the meeting a certificate stating that there had been written and delivered to each of the gentlemen who had been elected, as set forth in the minute of the returning officer, a letter requiring them to attend this meeting, and to declare whether he accepted or declined office, in terms of the Burgh Reform Act, 1833. If he fail to attend on the day appointed for declaring his acceptance, he shall be held to have declined. Each person who accepts the office of Councillor will declare that he has done so, and this declaration will be recorded in the minute-book of the Commissioners, and signed by the Provost or Chief Magistrate, after the person so elected has made and subscribed a declaration *de fideli administratione officii.*

If any newly-elected Commissioner fails to attend on the day appointed for declaring his acceptance, he must be held to have declined accepting said office, unless he then transmit to the meeting a sufficient written explanation, signed by himself or his agent, of the cause of his absence, and intimating his acceptance (see sec. 13 in 3 & 4 Will. IV. c. 76, and sec. 10, 3 & 4 Will. IV. c. 77).

By clause 35, the Commissioners first elected under the Act are to hold their first meeting in the Town-Hall, or other convenient place, at 12 o'clock noon, on the first Friday after the first election.

Roll of Commissioners.—Though the Statute does not provide for the making up of a roll of the Commissioners when elected, it will be found in practice to be a considerable convenience to make up a roll at the first meeting of the Commissioners. This may be done by the Clerk submitting the names of the Commissioners, arranged in the order of their election. At the first election under the Act, this will be done solely with reference to the number of votes given for each, the Commissioner who had the fewest votes being placed first, then the Commissioner who had the next fewest votes being placed second, and so on. In subsequent elections, regard will require to be had to the length of time the Commissioners have been in office.

In Thomson *v.* The Magistrates of Rutherglen, 17th Feb. 1876 (3 R., 451), the Lord President (Inglis) said: "The 16th section of the Statute provided that in 1834—the first year after the Act came into operation—the third to go out should 'consist of the Councillors who had the smallest number of votes at the election of Councillors' in 1833. And, farther, that in the following year (1835) 'the third of the Councillors first elected under the Act who shall go out shall consist of the Councillors who, at such first election under this Act, had the next smallest number of votes, the majority of the Council always determining, where the votes for any such persons shall have been equal, who shall be the person to retire;' and thereafter, that is in 1836 and subsequent years, 'the third of the Councillors so annually going out of office shall always consist of the Councillors who have been longest in office.' Now, all this is plain enough so far. At the second election, in 1834, the one-third going out were those who had the smallest number of votes at the first election in 1833. At the third election, in 1835, the one-third going out were those who had the next smallest number of votes at the first election in 1833. Then, if everything kept its normal course, according to the defenders' theory, it would follow that in 1836 the remaining one-third would go out. But that is not what the Statute provides. It includes the remaining one-third in its general provision for the future, that 'the one-third so annually going out of office shall consist of the Councillors who have been longest in office.' Now, it might very well happen that in 1836 the remaining one-third of those elected in 1833 were no longer all in office. Deaths or resignations might have occurred which could not be counted as equivalent to going out of office in 1836. Supposing that to have been the state of matters in 1836, what would have been the proper

course to take then? If only three remained to go out of the six who had been elected in 1833, where would you have found the other three? Evidently they could only be found in the remainder of the Council who had not been so long as three years in office. The question is, How are you to select among them who are to be, so to speak, the victims? Nothing is suggested in the Statute as a criterion, except the number of votes at election. And yet in the Statute itself that criterion is expressly applied only in the case of the elections of 1834 and 1835, and nothing is said about it with reference to any future year. But it is argued that the terms of the Statute are, 'the third of the Councillors so going out,' and that the word 'so' implies that the mode of selecting who shall go out, if selection is necessary, shall be as provided with reference to the years 1834 and 1835, in accordance with the number of votes.

"Now, I should have had great difficulty in adopting that interpretation, if it were not for subsequent legislation. But the Statute passed in 1870 (33 & 34 Vict. c. 92), to amend the law as to municipal elections, throws light on the subject. It must be kept in view, in the first place, that under the Act 3 & 4 Will. IV. c. 76, no one could be elected without being voted for, either by means of signed lists or by a poll being taken. Even where there was no contest, the Councillors elected still came into office with a certain number of votes. The intermediate Statute, the Municipal Elections (Scotland) Act, 1868 (31 & 32 Vict. c. 108), can hardly be said to touch the question, except that it provides for notice being given of the names of those who are to be put in nomination. But the Act of 1870 by sec. 3 makes a provision that, when the number of persons nominated does not exceed the number of vacancies to be filled up, there is to be no poll, and the persons nominated are simply to be declared duly elected. Consequently in such cases there will be no voting, and the persons thus elected will come in, not in virtue of the votes they have received, but by reason of there being no opposition. This being a novel situation in the history of municipal elections, it is provided for by sec. 5 of the Act, which declares 'that, where in any burgh or ward two or more Councillors have been elected on the same day under the provisions of this Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the Town Council—including the Councillors so elected—shall determine the order in which the Councillors so elected shall retire.' Now, that is a very important enactment in reference to the matter before us, because it assumes, in the first place, that persons elected on the same day may go out at different times; and, in the second place, that if the persons so elected on the same day came in with unequal votes there is no difficulty as to the order in which they shall go out. For it is only in the case of no contest, or of equality of votes, that the majority of the Council is to determine. Suppose, for instance, that of two Councillors elected in November 1873, one had a larger number of votes than the other, and one is wanted to retire

in 1875 to make up the proper number of retiring Councillors, the section does not provide for that case, because it plainly assumes that it is provided for already. Where, therefore, there has been an election by votes, and the number of votes by which the different Councillors have been elected is unequal, then the test of number of votes is the test to be applied to determine the order in which they are to retire.

"I come, therefore, to the conclusion that sec. 16 of the Act 3 & 4 Will. IV. c. 76, is to receive this effect, that where, as in the present case, there is not a sufficient number of Councillors three years in office, to constitute the one-third of the Council to go out, you must make up the deficiency by selecting from the next younger class of Councillors; and that the principle of selection is to be this, that you are to take the member or members from that younger class who had the smallest number of votes, and, in a case of equality of votes, or no contest, if only one is wanted, the majority of the Council is to decide."

The Town-Clerk of a burgh included, in the list of Councillors to retire by rotation at an annual election, one who had been only a year in office—on the assumption of his being a substitute to serve out the unexpired time of a Councillor resigning; and an election took place, and those elected were inducted. *Held*, that although no objection or protest was taken till the first meeting of the new Council, when his vote was refused, he and his constituents were not barred by acquiescence from asserting his right to continue in the Council; and that a suspension and interdict was a competent process for preventing his being obstructed in the exercise of his functions. Scott *v.* Magistrates of Edinburgh, 22nd Dec. 1838 (1 D., 347; 14 F., 622).

It is competent to suspend, and not necessary to reduce, an election of a Commissioner of Police, where he has not been fully inducted by taking the necessary oaths. Watson *v.* Glasgow Commissioners of Police, 10th March 1832 (10 S., 481; 7 F., 370).

And the same has been held with regard to a Town Councillor, under the Act 3 & 4 Will. IV. c. 76. Monteith *v.* M'Gavin, 29th Nov. 1837 (16 S., 122; 13 F., 118).

Suspension is an incompetent mode of complaining of the election of a Commissioner of Police after he has been sworn into office, and acted for some time in his official capacity. Magistrates of Glasgow *v.* Abbey, 3rd Dec. 1825 (4 S., 266; N. E., 271).

In Bruce *v.* Leisk, 20th Feb. 1892 (29 S. L. R., p. 412), a candidate for election to the Town Council of Glasgow brought an action of damages for slander against an elector, who, as he averred, had stated to other electors, prior to the election, "that he had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure—and that his creditors had received only eighteenpence in the pound, and that he was in consequence an unsuitable person to represent the electors in the Council of Glasgow." *Held*, (1) that it was a jury

question whether the words used bore the innuendo sought to be put upon them; but (2) that the record disclosed a case of privilege, and as malice had not been averred, the action fell to be dismissed.

33. If Returning Officer declines to act, Commissioners to appoint one, or the Clerk to act.—Where, in any burgh under this Act, the person entitled to act as Returning Officer at any annual election of Commissioners under this Act cannot competently act as such, or declines to act, and to discharge the duties devolving on him in that respect, it shall be lawful for the Commissioners to nominate and appoint one of their own number, or any other duly qualified person, to be Returning Officer; and failing any such appointment, the Clerk, or any qualified person to be appointed by him, shall be the Returning Officer; and such person so to be nominated and appointed, or the Clerk, shall possess all the powers for the purpose of such election as if he had been the Chief Magistrate, or other person entitled to act as Returning Officer for such election.

The section does not give any indication of what is to be considered a duly qualified person to be Returning Officer in the event mentioned, but of course for a responsible office of this character a responsible person ought to be appointed. Some guidance will be afforded from the persons selected by the Court for this important office.

In Magistrates of Musselburgh, 29th Oct. 1881 (9 R., 78), where the duty of Returning Officer at a municipal election for a royal burgh devolved upon the Senior Bailie, who declined because he had adopted a position of partisanship on behalf of some of the candidates, the Court, while denying his right to be relieved of a task which was imposed upon him by Statute, in the circumstances, appointed the Bailie next in seniority to act in his place. In that case the Lord President said: "But it has been explained that this gentleman has been taking a very active part in promoting the election of a particular candidate. But that is not a statutory disqualification, because the Statute must have contemplated that the Magistrates would take part in the return of particular candidates, and do what they could to promote their election, and yet has laid upon them this duty. So that we cannot hold that there is any disqualification. But in the whole circumstances, and looking to the fact that the gentleman who it is proposed shall act is the next person whom the Statute itself would have chosen for that purpose, I am disposed to grant the prayer of the petition."

In an application for the appointment of a Returning Officer to act at the annual election of Commissioners for a police burgh, it

appeared that neither the Provost nor either of the Junior Magistrates could competently act, and the Court, refusing an application for the appointment of one of the non-retiring Commissioners of Police, nominated the Sheriff-Substitute of the county to act as Returning Officer. Muirhead, petitioner (S. L. R., vol. xxiv. p. 18).

A burgh of barony, under the powers of its Crown charter, elected its Magistrates and Councillors on the first Wednesday in September every third year, the electors being male owners or tenants of land of the annual value of £10.

In 1863 the burgh adopted the General Police Act of 1862, but in spite of the extension of the franchise under the Amendment Act of 1868 to co-occupiers of land of the yearly value of £4, and under the General Police Act of 1882 to female occupiers of the same value, the elections continued to be conducted under the charter, the last being held in September 1888.

In November 1891, after the date of the election for that year under both the charter and the Burgh Election Acts had elapsed, the Court was asked to direct the Town-Clerk of the burgh to make up the roll of electors, including male occupiers of lands or premises of the yearly value of £4 and upwards, as appearing in the Valuation Roll, and female occupiers of lands or premises, as aforesaid, who were not married, or, being married, did not live in family with their husbands, or otherwise, including only persons qualified in terms of the said charter of Stromness, and to appoint a Returning Officer to hold the election under the provisions of the Ballot Act.

The Court refused to do more than appoint a Returning Officer to act at the election to be held on 18th December following. Magistrates of Stromness, 1st December 1891 (19 R., 207; S. L. R., vol. xxix. p. 177).

In Provost and Magistrates of Dunfermline, petitioners, 3rd Nov. 1877 (5 R., 47), the Municipal Election Act, 1852, sec. 5, provides for the conduct of burgh elections in the case of the Provost and all the Magistrates being among the one-third of the Council going out of office by rotation, but there is no statutory provision for the case of one or more of the Magistrates remaining in office but being incapacitated by illness or otherwise from acting as Returning Officer, etc. Where such a circumstance occurred, the Court appointed the Provost, whom failing, the retiring Magistrates in their order, to act as Returning Officer at the election, and to preside at the first meeting of Council thereafter until a Provost and Magistrates should be elected in place of the Magistrate so incapacitated from acting.

In Robert Todd and others, Magistrates of Peebles, 29th Oct. 1881 (9 R., 80), the whole Magistrates of the royal burgh of Peebles—who were the Provost and two Bailies—fell to go out of office at the same date. All were nominated for re-election, and there was therefore no one who could act as Returning Officer upon the day of the poll. In an application at their instance, with concurrence of the members of the Town Council, for appointment of a

Returning Officer, this interlocutor was pronounced: "The Lords having considered the petition, with signed concurrence, by the Provost, Bailies, and seven Councillors of the royal burgh of Peebles (No. 6 of process), and heard counsel for the petitioners, in the circumstances stated, grant the prayer of the petition; authorise and appoint the Sheriff-Substitute at Peebles, whom failing, John Buchan, solicitor and banker, Peebles, to act as Returning Officer at the election of Councillors of the said burgh on the 1st day of November next, with all the statutory and other powers competent and necessary for the discharge of the said office; allow the petitioners their expenses, as taxed by the Auditor of Court, out of the burgh funds; and authorise a certified copy of this interlocutor to be used in place of an extract, and the petitioners to act thereon, and decern."

In John Ogilvy and others, Police Commissioners of Kirriemuir, 8th Nov. 1884 (12 R., 103), the Provost and the two Junior Magistrates of the police burgh of Kirriemuir fell to go out of office at the same date, the Provost being a candidate for re-election. By the 22nd clause of the Act 35 & 36 Vict. c. 33, Parliamentary and Municipal Elections Act, 1873, it was provided that "all municipal elections shall be conducted in the same manner in all respects in which elections of Councillors in royal burghs . . . are conducted by the Acts in force at the time of the passing of this Act as amended by this Act, and the Provost or other Chief Magistrate of a burgh was further declared to be the Returning Officer for the burgh." The Provost being incapacitated from acting as Returning Officer by reason of his seeking re-election, a petition was presented by the Commissioners of Police of the burgh, stating that "no provision is made for the appointment of Returning Officer in the event of the Chief Magistrate being incompetent to act as such in the case of a police burgh, and it has therefore become necessary to apply to the Court, in the exercise of its *nobile officium*, for the appointment of a Returning Officer;" and asking the Court to appoint "the Sheriff-Substitute at Forfar, whom failing, David Burnett," the Junior Magistrate who did not retire, whom failing, James Davidson, the Sheriff-Clerk-Depute at Kirriemuir, or such other person as the Court might think proper, to act as Returning Officer. The Court appointed Mr. David Burnett, the Junior Magistrate who did not retire, and failing him the Sheriff-Clerk-Depute at Kirriemuir, to act as Returning Officer.

By the Act 15 & 16 Vict. c. 32, sec. 5, it is enacted, that "whenever it shall so happen that the Provost and Magistrates of any of the said burghs shall all be included in the one-third of the Council going out of office as aforesaid, they shall, nevertheless, retain and continue to exercise all the powers and functions of their several offices of Provost and Magistrates respectively until the election and coming into office of their successors." At the annual election of Councillors for a burgh, the Provost, who had been elected *ad interim* both as Councillor and Provost, and consequently went out of office, presided. All the other Magistrates, with one exception, were in the same position as the Provost. *Held*, that the election was good.

Ogilvy, etc., *v.* Guthrie, etc., 3rd March 1865 (3 Macph., 589; 37 Jur., 293).

34. Expenses to be defrayed out of Assessments.—All reasonable charges and expenses incurred by the burgh in connection with the election of Commissioners after the first election, as above provided for, shall form a charge against, and be defrayed out of, the assessments leviable under this Act, and may be apportioned among such assessments as the Commissioners think proper, and may be recovered from the Treasurer of the burgh, who is authorised to charge the same against its funds.

It will be observed that it is only the expenses incurred by the burgh after the first election that are to be defrayed out of the assessments leviable under the Act. These may be apportioned among the different assessments as the Commissioners think proper. The expenses incurred by the Sheriff in fixing the boundaries of populous places, which are formed into burghs, are to be defrayed out of the burgh general assessment, except in the event of the Sheriff refusing to hold that the place is suitable for being formed into a burgh, in which case the expenses are to be borne by the persons signing the application for fixing the boundaries (see sec. 48).

35. Magistrates to be Elected.—The Commissioners first elected under this Act shall, at twelve of the clock noon on the first Friday after the first election, hold their first meeting in the Town-Hall, or other convenient place; and at such meeting shall, by a majority (the Sheriff, or the person appointed by him to preside, having a casting-vote, in case of equality), elect, from among the Commissioners, Magistrates of Police; and the Commissioners first elected shall be entitled to act, although from any cause the full number of Commissioners may not be filled up; and all subsequent elections of Magistrates shall take place at the same time and in the same manner as if the burgh was a parliamentary burgh, having to provide Magistrates and Councillors as herein provided for.

The first meeting must be held on the date here specified, and not earlier. M. of Lothian *v.* Haswell, 8th Feb. 1738 (H. L., 14th Ap. 1738; 1 Pat. App., 207). Provost of Dumbarton *v.* Denny, 11th March 1796 (H. L., 6th Dec. 1796; 3 Pat. App., 516). No provision is made in this section for notice of this meeting being sent, but, in addition to the fact that notice must be sent under the Municipal Acts to every elected member, there is the provision in the 50th section of this Act, that all the Commissioners shall be cited to

attend all meetings—the citation being given personally, or at the dwelling-houses or places of business, by notices issued by their Clerk at least twenty-four hours before the time of meeting, which shall specify the matters to be considered at the meeting.

It will be observed that in this section the Commissioners are required by a majority to elect Magistrates of Police (see observations made under sec. 28).

See sec. 32 as to procedure in the event of the full number of Commissioners not being filled up.

The Council of a royal burgh having been elected, were equally divided as to the appointment of Magistrates—six members wishing to elect one set of Magistrates and six another—and failed to meet with a proper quorum of seven Councillors for the election, as required by the Burgh Reform Act (sec. 17).

The Town-Clerk having presented a petition praying the Court to appoint Managers for the burgh, the Court issued an order appointing a meeting of the Council on a certain day, and ordained each of the Councillors to attend the meeting, and act and vote in the election. Herron *v.* Town Council of Renfrew, 22nd Jan. 1880 (7 R., 497).

In Hoggan *v.* Wardlaw, Feb. 1734 (H. L., 10th March 1735; 1 Pat. App., 148), it was held where a bond entered into by a portion of a body of electors binding themselves to vote according to the opinion of the majority of their number was *contra bonos mores*, and therefore illegal, and an election of Magistrates carried by the parties to such a bond was annulled.

36. Number of Magistrates.—There shall be elected in burghs:—Where the population is fifty thousand and upwards, a Chief Magistrate and six other Magistrates; where the population is between ten thousand and fifty thousand, a Chief Magistrate and four other Magistrates; and where the population is less than ten thousand, a Chief Magistrate and two other Magistrates; and the Chief Magistrate shall be called Provost and the Magistrates be called Bailies.

The number of the Magistrates here provided for must be rigidly adhered to. For the first time the Chief Magistrate in police burghs becomes entitled to use the designation Provost, and the other Magistrates Bailies.

Burgh.—Held, in a competition for the office of Provost in the City of Glasgow before either party was inducted—

1. That it was competent to try the question in a suspension and interdict by the one party against the other from molesting him in the office;

2. That it was not necessary to call the other Members of Council; and,

3. That, as the former Provost had gone out of office both as Provost and Councillor, he was not entitled on his re-election as a

Councillor to act as Provost, and as such to give the casting vote; but that such vote belonged to the Senior Bailie who had continued in office. Dunlop *v.* Fleming, 16th Dec. 1837 (16 S., 254; 13 F., 243); *Rev.* on the two first points, 13th June 1839 (M'L. and Rob., 547).

The Statute 16 & 17 Vict. c. 26, applies to the general election of Magistrates and Councillors as well as to incidental elections in the course of the year, and therefore a reduction of a statutory election of Councillors is incompetent, unless brought within a month from the date of the election sought to be reduced. Drew *v.* Maxwell, 14th Nov. 1854 (17 D., 51; 27 Jur. 3).

An action of reduction of certain proceedings at the election of Magistrates, by virtue of a royal warrant, raised more than two months thereafter, dismissed as incompetent. Tod *v.* Tod, 2nd June 1826 (4 S., 658; N. E., 664; 4 F., 658); *Aff.* 26th March 1827 (2 W. S., 542).

Suspension and interdict held competent to try the validity of an election as Bailie under the Municipal Reform Act, the bill having been intimated before the party sought to be interdicted had taken the oaths of allegiance and *de fideli*, and assumed the seat of office; see M'Culloch *v.* Hill, 22nd Feb. 1839 (1 D., 549; 14 F., 619).

Election of Magistrates.—The same procedure with respect to the election of Magistrates is to take place as is by law provided with regard to this in burghs having to provide for the election of Magistrates and Councillors, under the 3 & 4 Will. IV. caps. 76 and 77, and Acts amending the same.

Every year after the first election, the Commissioners will meet, according to almost invariable practice in burghs, on the third lawful day after the annual election, being Friday, the same day as is provided by the Act for the meeting after the first election. The Chief Magistrate, or in his absence, or if he were included in the third who went out of office, the Magistrate next in order of seniority, and in the absence of all Magistrates such one of the Commissioners as shall be chosen by the meeting, shall preside. The preses of the meeting shall have both a deliberative and, in case of equality, a casting vote. Care must be taken that the proper person presides in terms of the Act. See the Lord Provost of Edinburgh *v.* Leith Police Commissioners, 28th May 1828, 6 S., 873, where, by the Statute for the Regulation of the Municipal Government of Leith, it is enacted that, at the meeting of the Commissioners, the Lord Provost (of Edinburgh), the Admiral, or Senior Bailie of Leith, present, etc., or in their absence, such one of the Commissioners as shall for that purpose be chosen by a majority of the Commissioners present, shall be preses. The Commissioners having, in absence of the Provost, chosen a Senior Bailie, although the Admiral was present, a bill of suspension and interdict, at the instance of the Provost and Admiral, was passed.

The meeting being duly constituted, the Clerk should thereupon read the minutes of the election, and if any Commissioner is present who was unable to attend the meeting to declare his acceptance, but

had accepted by letter, he will take the declaration *de fideli administratione officii.*

By the 53d section of the Act, it is provided that the Commissioners may adjourn to any other day, hour, and place within the burgh. It was doubtful if this applies to the meeting for the election of Magistrates. With regard to the first election, the 35th section provides that the Commissioners shall, at the first meeting, elect the Magistrates, and, in municipal elections, it is the almost invariable practice to proceed with the election on the third lawful day after the election of Councillors.

In Gibson *v.* Kerr, 20th Dec. 1856 (19 D., 261), where, at the usual meeting for the annual election of office-bearers of a royal burgh, a motion was made and carried by the majority of the Councillors present for the adjournment of the election till a specified day, an amendment to proceed at once with the election was adopted by the minority, and certain gentlemen were declared to be elected to the offices of Bailie and Treasurer. A note of suspension and interdict was then brought by the minority to prevent the majority proceeding with an election in terms of their resolution. *Held, dub.* Lord Deas, that the suspension was incompetent, and observed that it was only after a completed election, at which all parties had voted, or in circumstances in which the Councillors who had not voted could not be held to have been excluded from exercising their privilege, that such a procedure was competent. In that case Lord Ivory said: "I am not prepared to say that if there be good and reasonable and *bona fide* grounds for asking an adjournment, there is any statutory rule forbidding the adjournment of the day for electing Magistrates. It is not as if the Statute had fixed the election for a certain day, so that, if not completed on that day, the election could not be completed on any other day. The Council must meet on that day, but, until their number is completed, they cannot elect, and therefore you are not tied up to any absolute point of time as regards the day of election. There are, doubtless, circumstances in which the election may be adjourned, and if so, it is reasonable at least to entertain a motion for adjournment made on sufficient grounds and in good faith."

His Lordship assumes that a motion for an adjournment must be made on sufficient grounds and in good faith, and if such a motion be made properly the ground thereof should be stated in the minute. If the motion is not agreed to, it should be met by a direct negative, or amendment to proceed, and nothing further. The vote will then be taken between the motion and amendment, and if the latter be carried every Commissioner will have an opportunity of voting on each individual Commissioner proposed. But if the motion to adjourn be carried, and the minority consider that it has been carried on insufficient grounds, or in *mala fide*, they may protest, proceed with the election, and have the matter determined by the Court.

In Gibson *v.* Kerr, Lord Ivory says: "You must so manage that each individual Councillor may give his vote for the one candidate or the other, as he pleases; and, further, you are not to mix up the

voting for an election with the voting for adjournment." And Lord Deas says: "At the meeting of 7th November a motion was made to adjourn the election of office-bearers to a future day. This was met by what was called an amendment, but which was truly both an amendment and a motion, embracing two things, quite distinct in themselves, and which ought not to have been linked together—namely, *first*, that the election be at once proceeded with; and, *second*, that certain persons named should be elected. Now, if the question had been first put, "Adjourn or proceed?" the whole Councillors present would afterwards have had a proper opportunity of voting or declining to vote for or against the particular persons put in nomination, which, as the matter was managed, they have not yet had. According to the best opinion I can form at this moment, this objection to the proceedings appears to me to be well founded, and the case being pressed to judgment on the argument as it stands, I can only go upon this opinion."

If not more than one person be proposed for the vacant office, the election will be unanimous. If two persons are nominated, then the preses will have a deliberative and casting vote in case of equality. If three or more Magistrates are nominated for one office, the question arises, How will the vote be taken? A vote by ballot would be illegal (see Watson *v.* Glasgow Police Commissioners, 10th March 1832, 10 S., 481; 7 F., 370).

The 17th and 24th secs. of the 3 & 4 Will. IV. c. 76, provide that the election of Magistrates and Office-bearers shall be "made by plurality of voices." Does this mean that all the candidates are to be voted on at once? The Dean of Faculty, afterwards Lord Justice-Clerk (Moncreiff), and Mr. (afterwards Lord) Anderson, while at the Bar stated that—"We are of opinion that, according to the sound construction of the 17th and 24th sections of the Statute, the vote must be taken only once, and that it would be the duty of the chairman to declare the candidate having the greatest number of votes, even though that be the minority of the meeting, to be duly elected Lord Provost. The Statute does not warrant any other mode of proceeding." On the other hand, Mr. (now Lord Rutherfurd-Clark) states: "In my opinion, the proper form of taking the vote is to strike off the candidate who has the fewest votes, and to follow out this course until no more than two remain, the vote between whom will be decisive. This is the practice which obtains in the election to offices which are within the patronage of the Council; and it is, I think, in accordance with the provision of the Statute, by which it is directed that the office-bearers shall be elected by a plurality of voices. It is the only way of securing that the office-bearers shall be elected by a majority of the Council. I read the phrase, 'plurality of voices,' as meaning that the office-bearers shall be elected by a majority of the meeting. I do not think that it would be competent for the Council to fix any other way of taking the vote. I think that the vote must be taken in such a manner as that the office-bearers shall be elected by a majority, and the only way of doing so is by following a practice which has hitherto existed,

and which is, I think, the most consonant to the provisions of the Act."—See Marwick, pp. 252, 253.

The Lord Advocate (Mr. Balfour) and Solicitor-General (Mr. Asher) gave a joint opinion to the same effect. This opinion is in conformity with the prevailing practice throughout Scotland. After the Commissioners have elected a person to the office of Chief Magistrate, the Clerk should request him to declare whether he accepts office, and if so he will take the declaration appointed by the Act 31 & 32 Vict. c. 72, and also a declaration *de fideli administratione officii*. The newly-elected Chief Magistrate will thereupon take the chair. He ought to do so before the election of the other Magistrates. With reference to this, Mr. (now Lord) Rutherfurd-Clark said: "I am of opinion that the presiding Magistrate ought to administer the oath to the person who is elected Provost, so that he may immediately proceed to the discharge of his duties. It is only where there is no Chief Magistrate that any other person has a casting vote, and, in my opinion, that alternative should exist no longer than necessity requires. I do not say that the proceedings would be irregular if the Provost did not preside after he was elected, but allowed them to proceed under the presidency of the original chairman. I think, however, that the regular course would be, that he should take the chair as soon as he is elected, and that it would be illegal to exclude him from it if he claimed it."—See Marwick, pp. 254, 255.

In England it is expressly provided that the election of Aldermen shall be held after the election of the Mayor, and it has been decided that if it precedes the election of Mayor it will be void. Reg. *v.* M'Gowan (11 A. and E., 1869; Rawlinson, p. 150). When the election of the Magistrates has been completed, the Clerk should request the persons elected *seriatim* to declare whether they accept office. In the event of their accepting, they should make a declaration *de fideli administratione officii*.

There is a very general practice throughout Scotland of designating the Bailies first, second, and third, and so on. This, however, in no way affects the seniority of Magistrates. In 1868, Mr. (now Lord) Young gave an opinion:

"I cannot find reason or authority for any distinction among the Bailies of a burgh, except that which arises from seniority depending upon priority of election. It is harmless and convenient to number them first, second, third, etc., but rank or precedence cannot thus be conferred; and there is, therefore, no reason that I can see for attaching the numbers otherwise than according to seniority. Even seniority gives no superiority of rank, but only affords a reasonable ground of precedence in the absence of any other. When by Statute the Senior Magistrate is required to preside at a meeting, I am very clearly of opinion that seniority depends upon priority of election, and is not affected by resolution of the Council to the contrary. In other respects, precedence among the several Bailies of a burgh is a mere social matter with which a Court of law would not, in my opinion, interfere. Seniority ought to govern, but it is a matter of conventional propriety, and not of law."

And in 1883 the present Lord Advocate (Mr. Balfour), Solicitor-General (Mr. Asher), and Mr. Hay, advocate, gave the following opinion:—

"We are of opinion that there are no distinctive positions within the Magistracy such as would be represented by the several offices of first Bailie, second Bailie, or third Bailie, except in so far as that classification imports order of seniority according to date of election. We think that the powers, duties, and rank of all the Bailies are equal. When a Councillor is elected to the Magistracy in consequence of the retirement of a first Bailie, he would not, in our opinion, take precedence over Bailies elected at prior elections."

37. Commissioners to Retire in the same manner as Councillors in other Burghs.—One-third of the Commissioners shall, on the first Tuesday of November annually, retire in the order prescribed by law for the retirement of Councillors in burghs having to provide for the election of Magistrates and Councillors as aforesaid; and the Chief Magistrate shall always remain in office for three years after his election to that office, in like manner as the Provost or Chief Magistrate in such burghs.

By the Acts 3 & 4 Will. IV. c. 76, sec. 16, and 3 & 4 Will. IV. c. 77, sec. 12, on the first Tuesday of November in every year, one-third, or a number as near as may be to one-third, of the whole Council must go out of office; and by that Act, the third who went out of office after the passing thereof consisted of the Councillors who had the smallest number of votes at the election in that year. In the 1862 Act, by clause 51, this provision was inserted, but in the present Act there is no similar provision. Will the provision apply? It is thought it must, as one-third is to retire in the order prescribed by law for Councillors. In the following year the third of the Councillors first elected under the Reform Acts was to consist of those who at such first election had the next smallest number of votes, the majority of the Council always determining in both cases, where the votes for any such persons have been equal, who shall retire. Will these provisions apply under the present Act? It is thought they must, in the absence of any other rule regulating the matter.

In all succeeding elections, the third of the Councillors who shall go out shall consist of the Councillors who have been longest in office. By the 5th clause of the Municipal Elections Amendment (Scotland) Act, 1870, 33 & 34 Vict. c. 92, it was provided that where, in any burgh or ward, two or more Councillors have been elected on the same day under the provisions of that Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the Town Council, including the Councillors so elected, shall determine the order in which the Councillors so elected shall retire from the Town Council.

The third of the Councillors of a burgh going out of office annually by rotation, under the provisions of the 3 & 4 Will. IV. c. 76, consists of those who have been longest in service; and when Councillors resign before the expiry of their period of service, and others are elected in their place, the latter are not to be regarded as substitutes for those resigning, but as original Councillors, entitled to hold their office till expiration of the full statutory period. Scott *v.* Magistrates of Edinburgh, 21st Dec. 1838 (1 D. 347; 14 F., 622).

In Thomson, etc. *v.* Magistrates of Rutherglen, etc., 17th Feb. 1876 (3 R., 451), the Royal Burghs Reform Act, 3 & 4 Will. IV. c. 76, after giving directions for the election in royal burghs of new Town Councils in November 1833 by the votes of electors, enacted that upon the first Tuesday in November 1834, and in every succeeding year, "one-third, or a number as near as may be to one-third," of the whole Council "shall go out of office," and that the third to go out of office in November 1834 should consist of the third who had the smallest number of votes at the election of 1833, and the third who should go out in November 1835 should consist of the third who had the next lowest number of votes at the election of 1833—the majority of the Council always determining, where the votes for any such persons shall have been equal, who shall be the persons to retire—and thereafter the third of the Councillors so annually going out of office shall always consist of the Councillors who have been longest in office. The Act contained no provision for the case of elections subsequent to 1835, where, in consequence of deaths or resignations in previous years, those longest in office at the end of the year should be less in number than a third of the Council, and furnished no criterion for selecting the required number from the class next longest in office. The Municipal Elections (Scotland) Act, 1870, 33 & 34 Vict. c. 92, dispensed with voting for Town Councillors when the number of candidates did not exceed the number of vacancies, and enacted, sec. 5, "that where in any burgh or ward two or more Councillors have been elected on the same day under the provisions of this Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the Town Council shall determine the order in which the Councillors so elected shall retire."

In a question as to the compulsory retirement in 1875 of a Town Councillor who had held office for two years only in a burgh where the number of Councillors was eighteen—*Held*, (1) that the retirement annually of six Councillors was imperative, although the number of those bound to retire in respect of their being longest in office was less than six, and that the deficiency fell to be made up from the class next longest in office; (2) that the Municipal Elections Act of 1870, in providing for Town Councils fixing the order in which Councillors should retire, only in cases where Councillors had been elected on the same day, without being voted for, or "by an equality of votes," had by implication recognised the rule of retirement founded on disparity of votes prescribed by the Royal Burghs Reform Act for the elections of 1834 and 1835, as applicable to

subsequent elections; (3) that a vacancy caused by the death or resignation of a Councillor, who was not one bound to retire at the next annual election, could not be reckoned among the vacancies required by the Statute.

The Provost or Chief Magistrate remains in office for three years after his election to that office. The words "after his election to that office" remove an ambiguity which formerly created considerable difficulty. The Lord President Inglis, in Thomson *v.* Magistrates of Rutherglen, 17th Feb. 1876 (3 R. 451), said: "Now, the number of Councillors in this particular burgh being eighteen, the practical application of this rule in the present case is that six Councillors go out yearly, and six new ones are elected in their place. Accordingly, we find that in the three years (1871, 1872, and 1873), that course was precisely followed—six Councillors went out and six were elected. But in 1874, when the time for the election came round, it turned out that, in the interval between that and the previous election, a gentleman had been elected Provost, who would have been one of the six to go out in November 1874. Now, the 24th section of the Statute provides that the Provost shall always remain in office for the period of three years, and that has been construed by universal practice, and very reasonably so, to mean that the Provost is to have three years' tenure of office after his appointment to that particular office, irrespective of the date at which he was elected to the Council and of the date at which he should have gone out of the Council; consequently Mr. Scouler, the gentleman who was elected Provost in November 1873, must remain in the Council till November 1876. He had been elected to the Council in November 1871, and therefore, in the ordinary course of events, he would have been one of the six Councillors who fell to go out in November 1874, but, having been elected Provost, he remained in, and, instead of six, only five Councillors went out in November 1874."

38. Magistrates and Commissioners to have like Powers as Magistrates and Councillors.—The Magistrates and Commissioners elected in virtue of this Act shall, within the limits of the burgh for the purposes of this Act, possess such and the like rights, powers, authorities, and jurisdiction as are possessed by the Magistrates and Council of royal and parliamentary burghs in Scotland.

This is a very wide clause. Magistrates and Councillors in royal or parliamentary burghs possess very extensive rights, powers, authorities, and jurisdiction (see sec. 30 of the 3 & 4 Will. IV. c. 77).

39. Intimation of Candidates for Town Council at Annual Elections to Town Clerk. 31 & 32 Vict. c. 108.—Notwithstanding the provision in the 9th

section of the Municipal Elections Amendment (Scotland) Act, 1868, it shall not be competent to elect any person to the office of Town Councillor at the annual municipal election on the first Tuesday of November in any royal or parliamentary burgh in Scotland, unless the name of such person shall have been intimated to the Town-Clerk of such burgh, in the manner hereinafter provided, before four of the clock afternoon on the Tuesday immediately preceding the said first Tuesday of November, and the intimation to the Town-Clerk shall be in the form of Schedule IX. hereunto annexed, or as near thereto as circumstances admit.

The 9th section of 31 & 32 Vict. c. 108, provided that the name of the person proposed should be intimated to the Town-Clerk on the Thursday immediately preceding the day of election, and the Town-Clerk was to cause notice to be given on the Friday. This gave very little time for the notices, and as the candidates may now be withdrawn (see sec. 40), it was necessary to give some time for this to be done, and hence the intimation must be made on the Tuesday immediately preceding the first Tuesday of November.

40. Power to withdraw Candidature.—Any intimation so made to the Town-Clerk of such burgh shall be competently withdrawn by giving notice of withdrawal to him before four of the clock afternoon on the Thursday immediately preceding the said first Tuesday of November, and such notice of withdrawal shall be signed by the person nominated and proposed for election, and by his proposer or seconder, or shall be signed by both his proposer and seconder, and also by one of the five assenters to the intimation, and the said notice shall be in the form of Schedule X. of this Act, or as near thereto as circumstances admit: Provided that no such withdrawal shall be competent where its effect would be to reduce the total number of persons nominated for the then ensuing annual election of Town Councillors in such burgh (or in a ward thereof where the burgh is divided into wards, and the notice applies to such ward) below the number necessary to supply the vacancies to be filled up in the burgh or ward, as the case may be, at that election.

The notice of withdrawal must be signed by the person nominated, and by his proposer or seconder, or by both his proposer and seconder, and one of the assenters.

The withdrawal is not allowed where the effect thereof would be

to reduce the total number of persons nominated below the number necessary to supply the vacancies.

The Returning Officer will be the judge as to this, and he and the Clerk will have to take whichever course circumstances dictate.

41. Partial Repeal of Section 9 of 31 & 32 Vict. c. 108.—The 9th section of the last-mentioned Act is hereby repealed, in so far only as it relates to the time and form of making the intimation of nomination to the Town-Clerk, and wherever otherwise in that section, or in the said Act, reference is made to the said intimation, such reference shall be held to apply to the intimation of nomination to the Town-Clerk referred to in the two immediately preceding sections of this Act, and the said last-mentioned Act shall be construed and read accordingly.

The 9th section of the 31 & 32 Vict. c. 108 is only repealed in so far as it relates to the time and form of making the intimation of nomination to the Town-Clerk.

Resignation of Commissioners.—The same procedure with regard to resigning the office of a Commissioner is to take place under this Act as is by law provided with regard thereto in burghs having to provide for the election of Magistrates and Councillors under the 3 & 4 Will. IV. caps. 76 and 77. By sec. 26 of 3 & 4 Will. IV. c. 76, and sec. 24 of 3 & 4 Will. IV. c. 77, any person elected and accepting the office of Councillor, Magistrate, or other office-bearer, in any Town Council, may resign his office at any time upon giving not less than three weeks' notice of such his intention, by a written intimation to the Town-Clerk, or Chief or Senior Magistrate. The resignation does not take effect till the expiry of the twenty-one days fixed by the Statute, until which date the person resigning must be regarded as in office.

When a Councillor or Commissioner vacates his office, either voluntarily, or under any statutory provision, he shall cease to hold any office, whether that of Magistrate or otherwise, which he holds in virtue of his office (see sec. 72).

Withdrawal of Resignation.—The question has been raised several times whether a Councillor or Commissioner can withdraw the resignation during the three weeks. The opinion of counsel has been taken thereanent, and Mr. (now Lord) Rutherfurd-Clark states: "I am of opinion that it is competent to recall the resignation within the three weeks. By the 26th section of the Act of 1833, no Councillor can resign his office without giving three weeks' notice. Consequently, a resignation, though absolute in form, is no more than an intimation of an intention to resign; and while the three weeks are current, it is, I think, competent for the Councillor to recall the intimation given by him, and to retain his office."—See Marwick, p. 288.

Filling up Vacancies in Offices of Magistrates and Commissioners.—The same procedure with respect to filling up any vacancy in the office of Magistrates and Commissioners is to take place under this Act, as is provided with regard thereto in burghs having to provide for the election of Magistrates and Councillors under the two Acts 3 & 4 Will. IV. before referred to. By the Acts 3 & 4 Will. IV. c. 76, sec. 25, and 3 & 4 Will. IV. c. 7, sec. 23, if any vacancy occur in the course of the year in the Council or Magistracy, or office-bearers, by death, disability, or resignation, the remaining members of the Council shall fill the same up *ad interim*, by election to be made by plurality of voices,—the Chief or Senior Magistrate having a double or casting vote in case of equality.

In Sime *v.* Coghill, 15th Nov. 1877 (5 R., p. 132), the General Police Act, 1850, provides, by sec. 36, that in case of vacancies occurring, "it shall be lawful for the remaining Commissioners or Magistrates of Police to nominate persons duly qualified to supply such vacancies." When the number of Commissioners of Police of a burgh had been reduced below the statutory quorum, by resignation of Commissioners, *Held*, that the nomination of Commissioners, in place of those who had resigned, was not a corporate act which required to be done at a meeting of Commissioners, and which would require a quorum, but was a statutory duty imposed on the Commissioners who remained in office, and might be done without any formal meeting, and that it was not necessary to fill up the whole vacancies, but only such a number as would make a quorum.

It is to be borne in view, however, that the filling up of vacancies under this Act is to be done in the same way as Town Councillors. Neither under the Act of 1850 nor of 1862 is there any specific provision that a meeting is absolutely required. In Syme *v.* Coghill, the Lord President (Inglis) says: "In this they are in distinct contrast to the words of the Municipal Election Act of 1833, which provides that when vacancies occur within the year, they are to be filled up *ad interim* by the remaining members of the Council, by election, 'at a meeting to be called on five days' notice by the Town-Clerk, by intimation in writing to each of such remaining members of the Council.' It may be doubtful whether the election is a corporate act under that Statute, but there certainly is more to be said for its being a corporate act than under the Act of 1850."

Another question arises, whether the ballot affected such election *ad interim*, and on that subject Mr. A. R. (now Lord) Rutherfurd-Clark and Mr. Watson stated: "We are of opinion that the provisions of the Ballot Act have exclusive application to cases where the right of election belongs to qualified electors of the burgh; and that interim elections by the Council must continue to be conducted under the old law."—See Marwick, App. xv. p. 184.

The election will be made at a meeting, which must be called, on five days' notice, by the Clerk, by intimation in writing to each of the remaining members of the Commission (see sec. 25 of 3 & 4 Will. IV. c. 76, and sec. 23 of 3 & 4 Will. IV. c. 77). The five days' notice is absolutely indispensable. See Marquis of Lothian *v.* Haswell,

8th Feb. 1738 (H. L., 14th April 1738; 1 Pat. App., 207), where the meeting for election of Magistrates of a burgh being held previous to the usual day, and without due notice, the election was —affirming judgment of Court of Session—reduced. See also Dumbarton and others *v.* Denny, 11th March 1796 (H. L., 6th Dec. 1796; 3 Pat. App., 516), where, on the day following the death of one of their number, a Town Council meeting for usual business proceeded to elect a new Councillor. A minority objected, and it was held that the election was void, fourteen days' notice to each Councillor being required previous to such election.

The same rule applies to all vacancies occurring during the year, whether it be that of Magistrate or Treasurer or Commissioner, the person elected *ad interim* only holds office till the first Tuesday of November following his election, and the vacancy caused at that time by his retirement falls to be supplied at the next annual election. If the burgh be divided into wards, the vacancy will be supplied by the electors of the respective wards for which the Commissioner who resigned, died, or has become disabled, is elected.

POLICE AND MUNICIPAL ADMINISTRATION.

42. Various Municipal Jurisdictions to cease, and to vest in the Provost, Magistrates, etc.—In any burgh where various municipal or police authorities possess jurisdictions and powers within the area of such burgh in police, water, gas, drainage, rating, matters of public health or otherwise, such several jurisdictions and powers, and the whole privileges, rights, and duties exercised in connection therewith, other than those vested in and possessed and exercised by the Provost, Magistrates, and Town Council or Commissioners, shall cease and determine; and such jurisdiction, and all the powers and duties already existing or conferred by this Act in relation thereto, shall thereafter devolve on and be vested in, and be wholly exercised by, the Provost, Magistrates, and Town Council or Commissioners: Provided always, that where a royal burgh, or a police burgh, or part thereof, is included within the parliamentary area of a burgh, this section shall not apply to the effect of uniting such burghs or amalgamating the administration thereof, but without prejudice to any application for such amalgamation under the provisions of sec. 45 of this Act.

See sec. 21 as to the powers and duties of Local Authorities under the Public Health Act being transferred to the Commissioners under this Act. The effect of this clause is practically to make the Provost,

Magistrates, and Town Council, or the Commissioners under this Act, the sole Local Authority within the burgh, charged with the administration of all matters relating to police, water, gas, drainage, rating, and matters of public health.

The powers and privileges of water or gas companies, however, will not be affected; but provision is made in a subsequent clause for the Commissioners acquiring the works of any water company (see sec. 261).

43. Provost, Magistrates, etc., to be Local Authority under Public Health Act.—Notwithstanding the provisions of any General Act or Local Police Act, the Provost, Magistrates, and Town Council or Commissioners in every burgh shall be the Local Authority under the Public Health (Scotland) Act, 1867, within the area of such burgh: Provided that nothing contained in this Act shall prejudice or affect the provisions of sec. 81 of the Local Government (Scotland) Act, 1889; and if any question shall arise under this proviso, the same, failing agreement, may be determined by the Secretary for Scotland, after such inquiry as he shall think fit, and the provisions of sec. 93, sub-sec. (3), of the last-mentioned Act shall apply to such inquiry.

It will be observed that the phrase is "General Act," not "General Police Act" (see sub-head (17), sec. 4, for definition of Local Police Act; see sec. 21 and observations thereon as to Public Health Act).

There is a further provision in sec. 5 of the Public Health Act, to the effect that where a parish is partly within a burgh, the Board of Supervision may, on application, determine which body is to be the Local Authority within the whole limits or within any portion of the parish. The Board exercised this power in a large number of instances, but, as these determinations were to a certain extent inconsistent with the provisions of the Local Government Act, 1889, they were all, on that Act coming into force, recalled by the Board. The present section still further curtails the powers of the Board of Supervision in determining the Local Authority, and sec. 5 of the Public Health Act may now be regarded as virtually, if not expressly, repealed.

The powers and duties of the Local Authority are not confined to those set forth in the Public Health Acts. They are found also in other Statutes, *e.g.* the Rivers Pollution Act; Factory and Workshop Acts; Housing of the Working Classes Acts; Infectious Disease (Notification) Act (where that Act has been adopted); the provisions as to dairies in the Contagious Diseases (Animals) Acts, 1878 and 1886, and orders issued thereunder, etc. etc. It is the duty of the Local Authority to carry out the provisions of these Statutes; and if they fail or neglect to do so, the Board of Super-

vision is empowered, by sec. 97 of the Public Health Act, 1867, to take steps to compel them.

The Local Authority and the Commissioners are not distinct bodies; the Provost is, *ex officio*, Chairman of the Local Authority, and the Clerk to the Commissioners is the Clerk to the Local Authority. But it is advisable that the transactions of the Commissioners under this Act should be kept distinct from those of the Local Authority, otherwise confusion may arise, and difficulty be found in apportioning the charges to the burgh assessment and public health assessment respectively. Money raised by assessment under this Act is to be employed "for the uses and purposes mentioned in this Act, and for no other purpose whatever" (sec. 59). The cost of works carried out under the Public Health Act cannot be defrayed out of the assessment levied under this Act, and *vice versâ*. See Edmonstone *v.* Police Commissioners of Kilsyth (under sec. 21), and Kirkintilloch Police Commissioners *v.* M'Donald, 31st Oct. 1890 (18 R., 67).

See Lang *v.* Munro, 9th March 1892, S. L. R., vol. xxix. p. 612.—The Glasgow Police Act, 1862, made certain provisions as to the structural requirements of underground apartments let as dwellings, but provided that these provisions should not apply to underground apartments which had been so let prior to the Act, provided these were registered in a register to be prepared by the Sheriff. The Glasgow Police Act of 1866 repeated the provisions and the exemption. The Public Health Act, 1867, contained provisions as to the structural requirements of such dwellings, which were similar to but not identical with the provisions of the Glasgow Police Acts, and contained further conditions as to drainage, etc., which were not to be found in the Local Acts. No mention was made of houses registered under the Local Acts. It was *held*, that registration under the Glasgow Police Acts did not exempt from compliance with all or any of the provisions of the Public Health Act, and the owner of a house registered under the Glasgow Police Acts, which with regard to structural conditions did not comply with the provisions of the Public Health Act, was guilty of a contravention of that Act.

Sec. 81 of the Local Government Act makes provision for special drainage or water supply districts as follows: "With respect to special drainage districts or special water supply districts, the following provisions shall have effect:—

"1. Where a special drainage district or special water supply district has been formed in any parish under the Public Health Acts, the district committee may, subject to regulations to be from time to time made with the consent of the County Council, appoint a sub-committee for the management and maintenance of the drainage or water supply works, and such sub-committee shall in part consist of persons, whether members of the district committee or not, who are resident within the special drainage district or special water supply district.

"2. Where a special drainage district or water supply district is

partly within a county and partly within a burgh or police burgh, the sub-committee appointed under the immediately preceding sub-section, and such number of the Town Council or Police Commissioners—as the case may be—of such burgh or police burgh as, failing agreement, the Secretary for Scotland may determine, having regard to all the circumstances of the case, shall be charged with the management and maintenance of the drainage or water supply works within such special district; and the determination of the Secretary for Scotland may provide for the regulation of the proceedings and for the allocation and payment of the expenses incurred under this sub-section.

"3. Where a special drainage district or special water supply district is wholly within a police burgh formed after the passing of this Act, the Police Commissioners of such police burgh shall become the Local Authority under the Public Health Acts for such special district, and the assessments in respect of the drainage and water supply shall be levied in the same manner as they were before such district was formed into a police burgh."

The last provision is an important one. The Public Health Act provides (secs. 93, 94), that in special drainage and special water supply districts in non-burghal areas the assessments shall be levied in the same manner as the poor-law assessment. The effect of sec. 81 (3) of the Local Government Act accordingly is that, where a special district is wholly within a burgh formed after the passing of that Act (26th August 1889), the assessments for water or drainage, instead of being levied on the occupiers, like the burgh assessment or the general public health assessment, must be levied in the same manner as the poor-law assessment, viz. half on owner and half on occupier, and subject to the deductions and classification (if any such is in force) authorised by the Poor-Law Act.

Sec. 93 (3) of the Local Government Act provides: "Where the Secretary for Scotland causes any local inquiry to be held under this Act, the costs incurred in relation to such inquiry, including the remuneration of any person appointed to hold the same, not exceeding three guineas a day, shall be paid by the Councils and other authorities concerned in such inquiry, or by such of them and in such proportions as the Secretary for Scotland may direct; and the said Secretary may certify the amount of the costs incurred, and any sum so certified shall be a debt to the Crown from the Council or Authority directed to pay the same."

Provisional Orders.

44. Alteration of Number of Magistrates and Council.—In any burgh where the Magistrates and Council are the Commissioners under this Act, it shall be lawful for the Magistrates and Council to make application to the Secretary for Scotland for a Provisional Order, determining

that the number of the Magistrates and Council, or either of them, may be altered to any number, which would be competent under this Act for the Commissioners of Police of such burgh, and for distributing the number of the Magistrates and Council so altered among the wards of the burgh, if it is divided into wards, and that such alteration shall come into effect either immediately at the next election, or at successive elections by gradual increase or diminution of the number of the Magistrates and Council, or either of them.

If such Order is made and confirmed by Parliament, as hereinafter provided, it shall regulate the number of the Magistrates and Council of such burgh for the future, any charter, right, or Act of Parliament notwithstanding.

As the number of Commissioners is now defined by sec. 29 relative to the number of the population, and the number of Magistrates is now defined by sec. 36 relative to the number of the population, in burghs where the Magistrates and Town Council are the Commissioners under the Act, it may be found expedient to alter the number of the Magistrates and Council, or either of them. This section has been framed for that purpose (see secs. 46 and 47 for procedure as to Provisional Order).

45. Special Powers.—Whenever it shall appear to the Commissioners of any burgh to which this Act applies, that they require additional powers for the better carrying out of the purposes of this Act, and specially powers relating to the supply of gas or water, or to the roads and streets, or to drainage or sewers or the utilisation of sewage in addition to the powers conferred by the Public Health Acts, or for the repeal or amendment of any Local Acts of Parliament relating to such subjects, or their adaptation and adjustment to the provisions of this Act, with such amendments as may be found necessary, or for the repeal of any exemption from rating derived from this or any General or Local Act, or to other matters cognate to the purposes of this Act, they may apply to the Secretary for Scotland for a Provisional Order.

Or whenever it appears desirable to the Magistrates and Council or the Commissioners of contiguous or adjacent burghs, that provision should be made for amalgamating the administration of such burghs for all or any of the purposes of this Act, or both for municipal purposes and the purposes

of this Act, or carrying on jointly such administration or any part thereof by joint committees or otherwise, or for executing jointly any conduits or main sewers, or any other drainage works necessary for the more effectually draining of such contiguous or adjacent burghs, such Commissioners, or Magistrates and Council, as the case may be, may make joint application to the Secretary for Scotland for a Provisional Order.

Two drafts of the Order proposed shall be transmitted with every application for a Provisional Order.

1. It will be found in the working of the Act that provisions either in Local Acts or in some General Acts may conflict with the provisions in this Act, or further powers may be required for carrying out this Act, and the machinery of a Provisional Order may prove useful for such cases.

A Provisional Order presents various advantages over a Local Act, chief among these being that it is less expensive. The local inquiry, too, gives any inhabitants who may object to the scheme an opportunity of being heard, and of obtaining such modification of the proposals as may be found desirable. In the case of a Local Act, these objects could not be obtained without the enormous expense of a parliamentary opposition.

2. The provision for the amalgamation of contiguous burghs, particularly for the execution of joint drainage works in such, may be found of great service in working the Act; but, before applying for a Provisional Order for such joint drainage works, the Commissioners would do well to consider whether they could not avoid expense by proceeding under the Public Health Act, sec. 87 of which empowers any two or more Local Authorities, with the sanction of the Board, to combine together for the execution and maintenance of sewerage or drainage works. In that case, however, the cost would have to be met by an assessment upon occupiers, while, if the works were carried out under this Act, the cost would fall upon the owners. It is only a pity that these burghs are to be put to the expense of obtaining a Provisional Order and relative Act of Parliament, when it might have very well been left to the Sheriff of the county, who really will be the adviser of the Secretary for Scotland in the matter, and thus practically the judge.

3. By sec. 76 of the Local Government Act, 1889, Town Councils or Commissioners may join with County Councils in appointing a Joint Committee for any purpose of that Act in which they are jointly interested; and this is done without a Provisional Order or the intervention of the Sheriff. In Campbell *v.* Leith Police Commissioners, 29th June 1865 (3 M., 1035), the Lord Justice-Clerk (Inglis) said, with reference to the 79th section of the 1862 Act: "But it is quite necessary to follow the argument directed to the effect of the 79th section, the meaning of which has been much mis-

understood. The object of that section is to grant permission to Magistrates and Councils, or Police Commissioners, in certain events, to present a petition to one of Her Majesty's Principal Secretaries of State, praying for such provision, repeal, or alteration, as to the petitioners may appear desirable. Inquiry may be directed by the Secretary of State in respect to the subject-matter of the petition, in the way provided; and it shall be lawful for the Secretary of State to issue a Provisional Order in relation to the several things mentioned in the petition. But if the adoption of this Act in a burgh, where there was a previous Act in operation, could not be effectual without a Provisional Order by a Secretary of State, confirmed by Act of Parliament, would it have been made optional to the Magistrates to obtain this Order and confirmation? On the contrary, it would have been made imperative on them to do so. But it is clear that the Magistrates are to have it as a matter of discretion, whether they are to proceed under this 79th section or not. Further, it is plain, from the language of the clause, that it is meant to apply, not to cases occurring immediately after the adoption of the Act, but to any future time when this Act itself shall be in operation. It is *whenever* it appears desirable to the Magistrates, etc., that they may apply for this Provisional Order; and that is quite consistent with the subject-matter of the Provisional Order that is to follow. What is it they may ask to be done? If they think it is desirable to provide for the better execution of the provisions of this Act, or for the future application and execution of any Acts in force in the burgh, having relation to the purposes of this Act, or to the roads and streets within the burgh, or to any other matter connected with the police of the burgh; or if they think it desirable to unite the municipal and police government, and transfer to the Board so created the powers and jurisdictions of police, paving, lighting, and watching; or if it appears desirable to provide for the drainage of contiguous burghs—then a petition may be presented to the Secretary of State. Now, looking to the number of things which may be made the subject of application to the Secretary of State, it must be obvious that the meaning which I have given of the first word in the section is its true meaning. Provision is made, too, that any Provisional Order applying this Act may again be altered. It is quite plain that this 79th section is not applicable specially to cases where there is a previous Act in operation. It applies although there may never have been an Act in operation before; and that explains one part of the clause which relates to the future application and execution of any Acts in force having relation to the purposes of this Act, or to any other matter connected with the management of municipal affairs, and provides that these Acts may be repealed. Now, nothing is more desirable and expedient—and it is expediency that is at the bottom of this provision—than that, if some provisions of a previous Act left in operation, notwithstanding the adoption of this Act, be found to work ill, this short way of repeal should be had. It is also open to the Magistrates of the burgh, or Commissioners of Police, who have

not adopted this Act, to obtain the benefit of the 79th section. If that be the case, then the burgh, under a Local Act, or previous General Police Act, may go to the Secretary of State and ask to have clauses of a previous Act repealed or altered."

46. Procedure. — (1.) Upon the receipt of any such application for a Provisional Order, the Secretary for Scotland may direct the Sheriff or other Commissioner or Commissioners to hold a local inquiry in the district in respect to the several matters mentioned in the application, after giving at least fourteen days' notice of the time, place, and subject of the inquiry in two consecutive weeks in a newspaper published or circulating in the burgh.

The Sheriff or other Commissioner or Commissioners shall hold such inquiry, and for the purposes thereof shall have power to take the assistance of valuators, accountants, engineers, or other persons of skill, to such extent as they may find necessary, and shall make a written report to the Secretary for Scotland.

Thereafter it shall be lawful for the Secretary for Scotland to issue a Provisional Order, either in accordance with the prayer of the application, or with such modifications or alterations as may appear to him to be requisite.

(2.) No Provisional Order shall be of any validity unless the same has been confirmed by Act of Parliament.

(3.) It shall be lawful for the Secretary for Scotland to make such order as he thinks fit in reference to the costs, charges, and expenses incurred in relation to such Provisional Order, including the costs of any party opposing the same, and to direct that the whole or any portion thereof shall be a charge upon the burgh general assessment, or any other assessment imposed under this Act in any burgh concerned in the application, and the Court of Session may interpone their authority to any order of the Secretary for Scotland under this section.

As soon as it seems probable that a Provisional Order will be required, it would be well for the Commissioners to communicate with the Secretary for Scotland, and ascertain what are the requirements in connection with such applications. A timeous knowledge of these requirements will be of great advantage. There are Standing Orders of Parliament applicable to the Acts for confirming

Provisional Orders, and these have to be complied with, otherwise the whole proceedings would be invalidated. It is the practice of the Local Government Board, London, to issue annually a circular setting forth the details of the procedure for obtaining Provisional Orders. These circulars will be found in the annual reports of that body.

The Sheriff-Clerk will give the notice prescribed by the first paragraph of this section.

It will be observed that the Provisional Order is not to be valid till it has been confirmed by Act of Parliament, and care should be taken that the Act provides for the time when the Order is to come into operation.

(3.) The question as to the expenses, it will be observed, is not left in the hands of the Sheriff, but in those of the Secretary for Scotland. The cost of obtaining the Order will in general be defrayed out of the assessments levied under the Act, but if the costs of opposing are either given to or against the party making the opposition, the only machinery for recovering the same seems to be an application to the Court of Session, upon the order of the Secretary for Scotland.

47. Who to preside where more than one Sheriff.—When any investigation or other proceeding under this Act requires to be conducted by the Sheriffs of more than one county, the senior Sheriff shall preside, and the senior Sheriff-Clerk shall act as Clerk of Court in such investigation, and such senior Sheriff-Clerk shall, after recording the deliverance in the Sheriff-Court books of his own county, transmit a certified copy thereof to the Sheriff-Clerk of the other county, and such certified copy shall be sufficient warrant to such Sheriff-Clerk to record the deliverance in the Sheriff-Court books of such county.

Although coming under the general heading of "Provisional Orders," this and the following section chiefly apply to the inquiry regarding boundaries, provided for in secs. 8 to 14, and would have been better inserted thereunder.

48. Expenses of Sheriff, how to be defrayed.—All expenses incurred by the Sheriff in the fixing of boundaries of populous places which are formed into burghs, and in all other proceedings necessary for carrying this Act into execution, shall be defrayed out of the burgh general assessment herein provided; and where in any proceedings for defining the boundaries of a populous place the Sheriff shall refuse to hold that the place is suitable for being formed into

a burgh, or in the case of a populous place not having two thousand inhabitants the Sheriff shall refuse to find and declare it to be a burgh, the expenses incurred shall be paid and borne by the persons signing the application for the fixing of the boundaries.

See secs. 8 to 14 as to fixing of boundaries, and sec. 340 as to burgh general assessment. Sheriff Mackay held it incompetent to give expenses to a compearing objector under the 1862 Act. Buckhaven (S. L. R., vol. vii. p. 141).

49. Jurisdiction where Burgh in more than one County.—Where any burgh is situated in more than one county the duties imposed by this Act on the Sheriff of the county, except where such duties are expressly imposed by the Act on two or more Sheriffs jointly, shall be performed by such one of the Sheriffs of said counties as may, on the application of the Commissioners of said burgh, be appointed by the Secretary for Scotland.

See sub-head (4), sec. 4, definition of "burgh;" sub-head (30), definition of "Sheriff."

Where the burgh is in more than one county, the Commissioners must apply to the Secretary for Scotland to nominate the Sheriff who is to attend to the duties laid on the Sheriff under this Act, except where the Act lays these jointly on two or more Sheriffs, as in the boundaries of burghs.

MEETINGS OF COMMISSIONERS.

50. Commissioners to be summoned to attend Meetings.—Meetings of the Commissioners shall be held at such times and at such places as may be fixed by them from time to time. All the Commissioners shall be cited to attend all meetings, such citation being given personally, or at their dwelling-houses or places of business, by notices issued by their clerk at least twenty-four hours before the time of meeting, which shall specify the matters to be considered at the meeting; but no proceeding of the Commissioners shall be invalidated in consequence of the omission to send such notice or the informality thereof, or in consequence of any vacancy among their number, or of any disqualification of, or objection to, any Commissioner. And the Chief Magistrate, or, in his absence, the Magistrate next in order of seniority,

and, in the absence of all the Magistrates, such one of the Commissioners as shall be chosen by the meeting, shall preside; and the preses of the meeting shall have both a deliberative and, in case of equality, a casting vote in all matters which shall come before it: Provided always, that one-third of the Commissioners (and in no case less than three) must be present at all meetings to constitute a quorum.

Meetings may be held at such times and places as the Commissioners fix. The Commissioners will, no doubt, only hold meetings at reasonable hours. The place may be fixed by them from time to time. In Magistrates of Kirkcaldy, 10th March 1826 (4 S., 547; N. E., 556), it was held to be unnecessary for a Town Council to have the sanction of the Court in changing their place of meeting.

The section is very specific as to the manner in which the Commissioners should be cited to attend meetings, and this should be carefully attended to, notwithstanding the saving clause as to invalidity. The section says, no proceeding of the Commissioners shall be invalidated in consequence of the omission to send such notice or the informality thereof. This will not be a safe proviso to rely upon. Suppose the Clerk omitted to send any notice, and only a quorum attended, would that be a good meeting under this Act? It is doubtful. The intention of the Statute is, that every Commissioner shall have notice given him, in order that he may take part in the proceedings of the meeting, and the omission to send a notice to a person who is of sound mind, though done accidentally, and where a general dispensation from notice has been given, has been held to invalidate the proceedings of the meeting. See Brice on *Ultra Vires*, 2nd ed., p. 38, and cases there cited. The notice must specify the matters to be considered at the meeting. The notice ought to specify fully and accurately the business to be considered, as failure to do so has sometimes invalidated the business transacted. See Wills *v.* Murray, 29th and 30th January 1850 (4 Exch. Rep., 843).

If a meeting be called to confirm a resolution arrived at at a prior meeting, the notice ought to state the terms of the resolution, or give its import. Dean *v.* Bennett, 21st and 22nd February 1870 (L. R., 6 Ch., 489).

The chairman has no right to interrupt or postpone the business of a meeting by adjournment, his duty in the chair being merely to regulate the proceedings, and to forward the business so far as he can, and so far as it is such as the meeting can legally entertain and proceed upon. But although the right of adjourning the meeting is not generally vested in the chairman, but in the whole of the members present, it seems that the chairman may, of his own authority, adjourn a meeting for the *bona fide* purpose of forwarding or facilitating business—as, for instance, to take a poll where a poll is demandable and has been duly demanded, or if circumstances of violent interruption make it unsafe or seriously difficult to proceed

with the business at the time. In such cases the question will turn on the effect and intention of the adjournment.

One-third of the Commissioners must be present at all meetings to constitute a quorum. As the smallest number of Commissioners to be elected is nine (see sec. 29), three is made the least possible quorum.

Where a Town Council consisted of nineteen members, and one died, it was held that a meeting at which nine were present was not a legal meeting, as, in order to such a meeting, a majority must be present. Meiklejohn *v.* Masterton, 28th May 1805 (13 F. C., 469; Mor., No. 17, App. "Burgh Royal"); *Aff.* 22nd March 1810; 15 F. C., App.

Where no quorum is specified for the election of Magistrates, a majority of the Council must be present. Todd *v.* Todd, 15th June 1824 (3 S., 148; N. E., 101).

A majority in number of the whole Council is required to constitute a legal quorum. Macnab *v.* Martin, 24th December 1803 (13 F. C., 292; Mor., No. 2, App. "Appeal").

The Commissioners will find it useful—if not essential—for the orderly transaction of business, to frame rules or Standing Orders for regulating their proceedings. Such rules are authorised by sec. 55 (6), subject to the proviso that they "shall not be contrary to the law of Scotland, or to anything in this Act contained."

51. Power to grant Leave of Absence.—It shall be lawful to the Commissioners to grant leave of absence to a Commissioner on his application, and on reasonable cause shown, for any period not exceeding twelve months.

Commissioner not attending for Six Months shall demit Office.—Any Commissioner who without leave of the Commissioners shall fail to attend any meetings of the Commissioners for a period of six months, having been duly cited thereto, shall *ipso facto* vacate his office, and if he is a Magistrate or Town Councillor, he shall *ipso facto* vacate such office also at the same time.

See sub-head (9), sec. 4, for definition of "Commissioners." This leave should be granted at a meeting, and should be duly minuted. What the nature of the reasonable cause may be is not defined, but this must be left in the discretion of the Commissioners.

Any Councillor or Commissioner who may vacate office under the provisions of this section, or otherwise, shall at the same time vacate any other office which he holds in virtue of being a Councillor or Commissioner (see sec. 73, which also provides for the filling up of vacancies).

52. Special Meetings may be called on Requisition.—The Clerk to the Commissioners, when required in

writing by the Chief Magistrate, or on requisition being made to him, stating in writing the object of the intended meeting, and signed by one-fifth, not being less than two of the Commissioners, shall cause special meetings to be called within forty-eight hours, and to be held within four days after such requisition, and shall cause all the Commissioners to be summoned to attend such meetings, by summonses, containing a copy of such requisition, or stating the purpose thereof.

The business to be taken up at a special meeting ought to be limited to what is stated in the notice. Unless all the Commissioners are present, take part in the proceedings, and consent to any other business being taken up, such business beyond what is contained in the notice might be set aside as being invalid. See Bridport Old Brewery Co., 12th January 1867 (L. R., 2 Ch., 191), Imperial Bank of China *v.* Bank of Hindostan, 6th and 7th May 1868 (L. R., 6 Eq. Rep., 91), and Anglo-Californian Gold Mining Co. *v.* Lewis, 16th November 1860, 6 Hurlstone and Norman (Exch.), 174; Stearic and Co., 23rd July 1863 (9 Eng. Jur., N. S., 1066). And it has been held that business done at an extraordinary meeting without due notice cannot be validated by confirmation at an ordinary meeting, unless the business was such as could be competently transacted at an ordinary meeting without previous notice. Lawes Case, 10th and 17th March 1852, De Gex, Macnaghten & Gordon (Chancery), 421.

53. Meetings may be Adjourned. — The Commissioners may adjourn to any other day, hour, and place within the burgh.

The Commissioners should be cited to attend the adjourned meeting, as prescribed by sec. 50. The adjourned meeting continues to be an ordinary meeting, though special notice may have been given that it is to be held for the transaction of special business. Wills *v.* Murray, *supra*, sec. 50. The adjourned meeting is not to be considered a fresh meeting, but only a part or continuation of the original meeting. See Scadding *v.* Lorant (3 H. L., 418; 19 L. J., M. C., 5). In Cree *v.* Somerville and others, 25th Oct. 1878 (6 R., 80), it was held that where no notice was given in the circular calling a meeting of a specific matter dealt with at a former meeting, that that was unnecessary. This, however, proceeded on the special terms of the contract, as will be seen from Lord Gifford, who says: "It was said that there was no notice given, in the circular calling the general meeting of shareholders of 1st February 1877, that the proposed sale and purchase was to be one of the matters considered at the meeting, and that consequently they could not take it up, as it was not on the billet. The billet is quite in general terms, and does not mention any business at all. But it appears to me that this is not of much consequence in the present case, for, as there was an actual majority

both in number and value present at the meeting, and as they confirmed the purchase, that majority had a good right to do so even though they had only met accidentally, and although there had been no general meeting at all. The contract does not say it is to be done at a meeting."

54. Power to appoint Committees.—The Commissioners shall have power to form Committees of their number, either with directions to report to the Commissioners or for carrying the various purposes of this Act into execution, and to delegate to such Committees the powers competent to the Commissioners under this Act, in whole or in part, with regard to the subject which may be remitted, to name the convener, and to fix the numbers of such Committees which shall form a quorum, and if they see fit, to allow any Committee to appoint Sub-Committees with powers; and the convener who shall preside, or in his absence the person to be elected by the Committee for the time, shall be entitled to a deliberative and, in case of equality, a casting vote, and to convene the members by notices in the way he shall think most convenient.

Though the section gives the Commissioners power to delegate to the Committee the powers competent to the Commissioners under the Act, this must be done with a due regard to the different powers of the Commissioners under the Act. Where, under the Act, a thing is to be ordered by the Commissioners, an order by the Committee will not be sufficient.

The Perth Local Police Act, 2 Vict. c. 43, empowers the Police Commissioners to appoint Committees "for carrying the purposes of the Act into execution," and for that purpose to delegate their powers to them. *Held*, upon a construction of the Statute, that a Paving Committee had no power to order proprietors to repave a street, but only to see to the execution of decrees pronounced by the Commissioners. Thomas *v.* Elgin, 4th July 1856 (18 D., 1204; 28 Jur., 590).

Under the powers conferred by sec. 63 of the General Police and Improvements Act, 1862, incorporated with the Dundee Police Act, 1882, the Dundee Police Commissioners appointed a Works Committee to superintend the building of houses, etc. This Committee had no express power under the General or Local Act to delegate its powers. The Committee remitted certain plans to a Sub-Committee of their number. The Sub-Committee issued a deliverance in name of the "Commissioners," disapproving the plans. On appeal, it was held that the Works Committee had no power to delegate its powers, and that therefore the deliverance fell to be quashed. The Lord President said: "I do not think that here we have anything to do with public interest, or any general consideration of expediency.

The sole question is, Whether the deliverance complained of is good under the Act? It bears *ex facie* that it is a deliverance of the Police Commissioners, and therefore, *ex facie*, it is a good statutory deliverance. But it is not disputed that in reality it was made not by the Commissioners, nor by the Committee appointed by them, but by a Sub-Committee of that Committee. The simple question then is, Had the Committee power to delegate? If they had not, then the deliverance is bad; if they had, then it is good. What, then, are the powers of delegation in naming Committees given to the Commissioners? That is to be found in sec. 63 of the General Police Act, which is incorporated into the Dundee Police Act. That section gives the Commissioners a very clear power to appoint Committees, but it does not import that each Committee so appointed can subcommit to a certain number of their own body to do anything in name of the Commissioners or of the Committee. So to decide would be to disregard the rule of the common law, which is perfectly fixed —*Delegatus non potest delegare*. That is the ground on which I hold that this deliverance is altogether unstatutory and null, and that therefore it must be quashed." Thomson *v.* Dundee Police Commissioners, 8th Dec. 1887 (15 R., 164).

Powers and Duties of Commissioners.

55. Powers and Duties of Commissioners.—(1.) The Commissioners shall be a body corporate, having a common seal. The seal shall bear a device to be fixed on by the Commissioners at a meeting to be held for the purpose.

See sub-head (9), sec. 4, for definition of "Commissioners." A body corporate is held in law to be a person, and by the Interpretation Act, 1889, 52 & 53 Vict. c. 63, sec. 2, the expression "person," unless the contrary intention appears, includes a body corporate.

(2.) In all burghs to which this Act applies, with the exception of burghs having already a corporate name or title under any local charter or Act of Parliament, the corporate name of the Commissioners shall be "the Commissioners of the burgh of [*here insert the name of the burgh*]." Excepting bonds for moneys to be borrowed, as hereinafter provided for, all deeds, contracts, and writs of importance shall be granted in the corporate name of the Commissioners, and shall be signed by three of the Commissioners and by the Clerk, and sealed with the common seal of the Commissioners; and all such deeds, contracts, and writs so executed shall be binding on the property and funds of the Commissioners.

The bonds for moneys to be borrowed for the purposes of the Act

are provided for in secs. 374 to 379 inclusive. They are to be signed by three of the Commissioners and the Treasurer, and though the section does not say the seal is to be attached, it implies it by the appearance of the seal in the clause itself.

(3.) The Commissioners shall estimate, assess, levy, and apply the sums of money hereby authorised to be raised for the purposes of this Act.

There are four distinct matters provided for here—(1) the estimate, (2) assessment, (3) levying, and (4) applying the money authorised to be raised. All four are to be solely for the purposes of the Act.

The Commissioners are, in certain cases under the Act, bound to obtain an estimate before proceeding with the work, such as in sec. 226, they must get an estimate before proceeding with sewage works. Where this is specified, it is absolutely necessary that the estimate precede the execution of the works, otherwise it may affect the right of recovery of the rate to be levied. See Nowel *v.* Mayor of Worcester (9 Exch. Rep., 457; 23 L. J., Exch., 139).

The estimate here referred to, however, is not an estimate of the cost of any specific work, but an estimate of the money required to be raised by assessment during the year. Before assessing, the Commissioners are required to have before them an estimate of the amount that will have to be raised. There seems to be no specific provision requiring an estimate to be made of the amount to be raised for general purposes, but by sec. 341 an assessment is to be levied for the sums *estimated* to be necessary for paying damages; and in sec. 371 the words imply that each rate is to be annually estimated for. It is of course evident that the Commissioners cannot fix the rate of assessment unless they have an estimate of the amount required.

The Commissioners must borrow in terms of and within the powers prescribed by the Act. For further remarks on this subject, see secs. 340 to 373 inclusive.

The rates or assessments ought to be levied—that is, raised or collected—in strict accordance with the provisions of the Statute; though it is provided that no mistake or informality committed in proceedings in assessing, levying, or recovering the assessments shall prejudice the recovery thereof (sec. 356; see secs. 340 to 373).

The moneys raised must be applied strictly for the purposes of the Act (see sec. 59). In doing this, the Commissioners are to be regarded as public trustees, having like liabilities, responsibilities, and disabilities imposed on them. In Magistrates of Kilmarnock *v.* Aitken, 31st May 1849 (11 D., 1089), it was *held*, that it was not *ultra vires* of the Magistrates of a burgh to appropriate a part of the common good to the endowment of a parish church in connection with the Church of Scotland, provided such endowment was not extravagant in the circumstances of the burgh. It is doubtful if this precedent would now be followed, and certainly it would not be safe for Police Commissioners to assume that they would be entitled to adopt such a course. They are, in the first

instance, to apply the funds solely for the purposes of the Act, and this has been so rigidly construed that they have been held not entitled to go to Parliament at the expense of the ratepayers for an alteration or extension of their powers. See Cowan and Mackenzie *v.* Law, 8th March 1872 (10 M., 578). In this case the trustees acting under the Edinburgh and District Water-Works Act applied to Parliament for powers to bring in an additional supply of water. This application was opposed by a number of ratepayers. The Bill was passed by the House of Commons, but was thrown out by the House of Lords. Great expenses had been incurred in promoting the Bill, and the trustees proposed to defray these out of the trust funds. *Held*, Lord Deas dissenting, that the above-mentioned Acts did not authorise the trustees to apply to Parliament for the additional powers sought, and interdict granted against paying the costs out of the trust funds; and it was *held*, Lord Deas dissenting, that sec. 35 of the Water-Works Clauses Act, 1847, 10 & 11 Vict. c. 17, in requiring water trustees "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants in the town or district," does not impose an obligation on the trustees to provide additional sources of supply if the existing sources are insufficient.

The leading authorities, both English and Scottish, will be found collected and commented upon in this case. See also Ewing *v.* Glasgow Police Commissioners, 19th Jan. 1837 (15 S., 389; 12 F., 331); Myles *v.* M'Ewan, 13th Dec. 1855 (18 D., 205). Trustees are, however, entitled to the expenses of consulting counsel, and of employing law agents for the benefit of the estate under their charge, as well as the expenses of litigations undertaken *bona fide* and on reasonable grounds, either for the protection or defence of the trust property or for the recovery thereof. See Shepherd and Grant, 24th Feb. 1855 (17 D., 516).

Trustees are also entitled to charge against the estate under their management the expenses of opposing any Bill attacking the existence of the trust, or invading the rights, powers, or privileges of the Trustees. Campbell, petitioners, 12th Jan. 1847 (9 D., 397). But Commissioners will not be allowed the costs incurred by them in unsuccessfully opposing a Bill in Parliament promoted by certain inhabitants of a burgh for the purpose of extending the water supply and the area of distribution. See Water-Works Commissioners of Perth *v.* M'Donald and others, 17th June 1879 (6 R., 1050). See in this case observations on the application of the Act, 35 & 36 Vict. c. 91, as to allowing public bodies to apply the funds or rates under their charge in certain cases in promoting or opposing local or personal Bills in Parliament. It will be borne in view that the powers of Commissioners of Police under such a Statute as this will be more rigidly construed, and more strictly limited; than the powers of Magistrates in royal burghs. See observations of Lord Cockburn in Ewing *v.* Glasgow Police Commissioners, 19th Jan. 1837 (15 S., 389; 12 F., 331).

(4.) The Commissioners shall have power to appoint, at such salaries as they think fit, to be paid out of the assessments leviable under this Act, in such proportions as the Commissioners may determine, clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not herein otherwise provided for, to be employed in the execution of this Act, and to provide such offices as may be necessary, and to remove and suspend such clerks, treasurers, collectors, surveyors, inspectors, and other persons at pleasure, and to fix the number and description of officers to be employed in the execution of this Act, and the wages to be paid to them respectively, whether appointed by themselves or not, and to increase or diminish their numbers from time to time as they shall see cause, and to make orders and regulations for their government.

This section, it will be observed, applies to clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not otherwise provided for. The appointment of the Clerk to the Commissioners is provided for in secs. 61 and 62, and of the Clerk of the Police Court in sec. 460; the Treasurer and Collector is provided for in secs. 63 to 66, the Surveyors and Inspectors in secs. 73 to 77 inclusive. The appointment of an officer need not be under seal. Smart *v.* West Ham Union (10 Exch. Rep., 867; 24 L. J., Exch., 201); Reg. *v.* Greene (17 Q. B., 793; 21 L. J., M. C., 137; 16 Jur., 663). But the appointment should be made at a meeting of the Commissioners, and minuted, so that proof of it having been made may be available.

The power of the Commissioners to remove such clerks and other officials "at pleasure" will not affect the rights of the officials to the reasonable notice to which they are entitled at common law. See Morrison *v.* Abernethy School Board, 3rd July 1876 (3 R., 945), referred to under sec. 77 (3).

The orders and regulations for the government of the officials do not require to be confirmed and published as other bye-laws do (see secs. 55 (6), 316, 318). These orders and regulations, as well as the bye-laws, come under the provisions of sec. 32 (3) of the Interpretation Act, 1889, which enacts: "Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or bye-laws."

(5.) The Commissioners shall also have power from time to time to purchase, or take in feu and build, or to lease such lands and premises as shall be required, and to sell or feu and

dispose of such lands and premises as may have become unfit or otherwise unnecessary for the purposes of this Act. The titles to all heritable property to be acquired in the execution of this Act shall be taken in favour of the burgh in its corporate name, or of the Commissioners, as the case may be, and such titles shall be sufficient for vesting the subjects in the Commissioners and their successors in office.

See sub-head (16), sec. 4, for definition of lands and premises.

The title of heritable property is to be taken in favour of the burgh in its corporate name, or of the Commissioners. There does not seem to be any real distinction between the alternatives. Burghs which have already a corporate name under any charter or Local Act are to retain that name. In royal burghs the corporate name is "The Royal Burgh of ——" (see the form of bond in sec. 376), and in police burghs "The Commissioners of the Burgh of ——."

The corporate name will be the Commissioners of the burgh, and the title of the Commissioners as such in their collective capacity will be the same. It would not be expedient to make up the title in the individual names of the Commissioners.

In a petition, presented by the Clerk to the Commissioners of Police of a burgh constituted under the General Police and Improvement (Scotland) Act, 1862, the Court granted authority to sell by public roup part of the burgh property acquired by the Commissioners under sec. 125 of the said Act. Thom, Clerk to Police Commissioners of Linlithgow, petitioners, 2nd Feb. 1887 (14 R., 444).

In Graham *v.* Police Commissioners of Kirkcaldy, 19th June 1879 (6 R., 1066), by royal charter confirmation in 1644 there was disponed to the Magistrates of a burgh all its lands and pertinents, "*nec non cum acris burgalibus et communi mora et lie moss et muirlands.*" The Common Muir, or, as it afterwards came to be called, the South Links, extended to about eight acres. The Magistrates, though recognising that the inhabitants had some rights over the ground,—as in a deed granted in 1754 they reserved to the inhabitants "one-third part of said links in grass, as at present, for drying linnen cloths, allenarly, and free access thereto at all times for that end,"—gradually feued off for building purposes, prior to 1804, all but about an acre of it. A street was afterwards run through this remaining acre, and the larger of the portions into which it was divided was appropriated as a public bleaching-green. The smaller portion, less than a quarter of an acre in extent, lay, so far as evidence extended, in a very foul and neglected condition. Occasionally circus and other shows were allowed to exhibit, and quoits to be played on it; but for a considerable time it was used as a public dung stance. It, however, remained open, and there was evidence to the effect that the practice of laying out clothes to dry, when any patches of grass could be found on it, had not entirely died out among the poorer class of inhabitants in the neighbourhood. In 1877, the Magistrates, as Police Commissioners acting under the General Police and Improve-

ment Act and the Lands Clauses Act, acquired it from themselves as Magistrates, and were proceeding to erect town stables, etc., on it. In a suspension and interdict, brought by one of the inhabitants, it was *held*, that the ground was vested in the Magistrates for the common use and enjoyment of the inhabitants, and that neither previous encroachments, nor its neglected condition, nor the fact that it was of little or no real value to the public, entitled the Magistrates to apply it to any purpose inconsistent with such common use and enjoyment; (2) that the Police and Improvement Act, 1862, and the Lands Clauses Act, 1845, did not enable the Magistrates as Police Commissioners to acquire from themselves as Magistrates property vested in them for behoof of the inhabitants, so as to deprive the inhabitants of the uses had of the property from time immemorial."

(6.) The Commissioners shall also have full power and authority to make not only all necessary rules, orders, and regulations (which do not require to be confirmed by the Sheriff), but also all bye-laws they may deem proper (which require to be confirmed by the Sheriff), in so far as the powers of this Act authorise the same; and to execute all the provisions of this Act, and otherwise to carry fully into effect all the objects and purposes by this Act committed to their charge: Provided always, that the rules, orders, and regulations, and the bye-laws so to be made, shall not be contrary to the law of Scotland, or to anything in this Act contained.

See sec. 127 as to bye-laws for cleansing, and sec. 268 as to bye-laws regarding water, and secs. 316 to 324 as to general bye-laws. See Crichton *v.* Grant, 15th Feb. 1859 (21 D., 488), where it was held (1) that rules and regulations made by Magistrates, in accordance with the statutory powers contained in a Municipal and Police Act, do not require to bear that they were so made; (2) that smoking by passengers conveyed by omnibuses formed a proper subject of regulation under such an Act; (3) that penalties enacted against "parties transgressing" the rules, "by allowing" the rules to be disregarded, applied to those in charge of the omnibuses, and not to the parties disregarding the rule; (4) that a party not paying a fine for transgressing the rule might be competently imprisoned, although that alternative was not provided for in the Act or regulations; (5) that the proceedings under such a rule were civil, and not criminal; and (6), altering judgment of Lord Kinloch, that the Court of Session had jurisdiction to entertain a suspension of a sentence pronounced for an alleged violation of the rule.

A bye-law has the same force within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has upon the subjects at large. See Hopkins *v.* Mayor of Swansea (4 M. & W., 640). Powers given to make bye-laws, though in general terms, are limited to objects contemplated by the Statute,

and a general power to make bye-laws for the good management of navigation was held not to authorise a bye-law that the navigation should not be used on a Sunday. Calder Navigation Co. *v.* Pilling (14 M. & W., 76; Glen, 358). See further observations, secs. 316 to 324.

The power given to the Commissioners to make "all bye-laws they may deem proper" is limited by the succeeding words, "in so far as the powers of this Act authorise the same;" and it will not be safe for the Commissioners to make bye-laws for any purpose not specially authorised.

The statement in this sub-section, that all bye-laws require to be confirmed by the Sheriff, is inconsistent with the provision in sec. 318, that bye-laws for sanitary matters are to be confirmed by the Board of Supervision.

56. Actions by or against Commissioners, how to be brought.—Except as hereinafter specially provided, all actions, suits, or proceedings to be brought by or against the Commissioners, shall be in their corporate name as Commissioners of the burgh, and it shall be lawful for the Clerk to accept service on their behalf.

By the 74th clause of the 1862 Act, such actions were to be directed by or against the Clerk, but now under this section all actions brought by or against the Commissioners must be in their corporate name, *i.e.* "The Commissioners for the burgh of ——" As to service on the Commissioners, see sec. 338.

57. Two or more contiguous Burghs may provide a Hall and Offices.—It shall be lawful for the Commissioners of two or more contiguous or adjacent burghs, for the better accommodation of such burghs for the purposes of this Act, and for the general benefit of the inhabitants of such burghs, on such terms as such Commissioners may agree, to purchase and acquire lands and premises, and to build thereon a hall and offices, with all conveniences thereto, and from time to time to repair the same, and to employ proper persons to take charge thereof, with power to make bye-laws to regulate the use of the same; and all official business transacted therein shall be as valid and effectual as if it was transacted within the boundaries of each of such burghs respectively: Provided that the title to the said subjects shall be taken in the corporate names of the Commissioners of such burghs; and such title shall be sufficient for vesting the said subjects in the Commissioners of such burghs; and should the Commissioners of such burghs resolve

at any time to sell and dispose of the said subjects, or any part thereof, it shall be lawful for them to do so, provided that all such burghs, through a majority of their respective Commissioners, agree to dispose of the said subjects, or any part thereof, but not otherwise.

See sub-head (9), sec. 4, for definition of "Commissioner." They are only empowered by this clause to acquire lands and premises, and to build thereon a hall. It does not appear whether a public hall or simply a court hall is meant; probably the use of the general term will cover both. There is no provision laying down the manner in which the cost is to be apportioned among the combining burghs, whether equally or in proportion to valuation. This will be one of the subjects of agreement among them. See sub-head (16), sec. 4, as to definition of "lands and premises." It is unfortunate that the joint Commissioners are not authorised to acquire an existing hall, as provided for by sec. 315, for a single burgh. There are other differences between the provisions of sec. 57 and those of sec. 315. Under the latter the Commissioners must proceed by Special Order; they may apply the general improvement rate, or part thereof, for twenty years to the payment of the expense; and they may borrow on the security of that rate. Under sec. 57 there is no provision as to the payment of expenses; and the question may arise, in the absence of any provision authorising the application of the general improvement assessment to this purpose, must the expense be met out of the burgh general assessment? or, are the provisions of sec. 315 to be read into sec. 57? Can it be held that each of the burghs, combining under sec. 57 to provide a joint hall, will be in the same position as an individual burgh providing a hall for itself, and will be subject to the provisions of sec. 315? See observations as to bye-laws under sec. 55 (6) and secs. 316 to 324. The title must be taken in the corporate names of all the burghs.

The sale of the subjects cannot be carried out unless all the burghs agree, the words "but not otherwise" excluding procedure in any other event.

58. Commissioners may Contract for Execution of Works.—The Commissioners, or any Committee of their body thereunto specially empowered, may contract with any person for carrying into execution any of the operations hereby authorised, and such contract shall be made by the Commissioners in their corporate name, and signed and sealed as hereinbefore provided for.

The contract will be signed by three of the Commissioners and the Clerk, and sealed with the common seal (see sec. 55 (2)). See also Thomas *v.* Elgin, 4th July 1856 (18 D., 1204), as to the powers of a Committee; and Thomson *v.* Dundee Police Commissioners, 8th December 1887 (15 R., 164), referred to under sec. 54.

As to illegality of any Commissioner holding an interest in any contract, see sec. 71.

59. Property vested in Commissioners. — The moneys arising from the assessments hereby authorised to be levied, and all other property acquired by the Commissioners in pursuance of the powers hereby granted, shall be, and the same are hereby vested in the Commissioners and their successors for the uses and purposes mentioned in this Act, and for no other purpose whatever.

See observations under sub-heads (3) and (5), sec. 55.

Commissioners under a Local Police Act, which was about to expire, applied to Parliament for a new Bill, but were opposed, and a meeting of householders having determined to adopt the General Police Act, the new Bill was abandoned. *Held*, that the Commissioners were not entitled to defray the expenses of their application to Parliament out of the funds of the old Commission in their hands. Myles *v.* M'Ewen, 13th December 1855 (18 D., 205; 28 Jur., 96).

Held, under the Glasgow Police Statute, in conformity with Ewing, 19th January 1837, that residenters liable in police assessments had no sufficient title to complain of resolutions of the Commissioners of Police, authorising a certain appropriation of the funds alleged to be illegal, and that parties who, besides being ratepayers, were the minority of the Board of Commissioners on occasion of passing these resolutions, but whose character as such was not expressly set forth, were in no better situation as to title. Question, Whether the minority of the Board, if their character as such were properly set forth, would have had a good title to complain of the resolutions of the majority in regard to the matter in dispute? Morrison *v.* Glasgow Commissioners of Police, 13th June 1837 (15 S., 1128; 12 F., 1055); *Aff.* 16th August 1839 (1 Rob., 868).

60. Applications to Sheriff for Power under Lands Clauses Acts.—In every case in which the Commissioners are empowered by this Act to acquire land compulsorily under the Lands Clauses Acts, with the authority of the Sheriff they may present a petition to the Sheriff praying that they, with reference to such lands or premises, be authorised to put in force the powers of the said Acts with respect to the purchase and taking of lands or premises otherwise than by agreement, and along with the petition the Commissioners shall lodge a plan showing the road or roads or the street or streets to be improved, the lands or premises to be taken, and the contemplated improvement, and also a

Book of Reference relative to the said plan, specifying the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of such lands and premises proposed to be taken, defining in each case the particular lands or premises to be taken; and the Sheriff shall, upon any such petition being presented, direct intimation thereof, on fourteen days' notice, to be given to the owners or reputed owners, lessees or reputed lessees, and occupiers of the respective lands or premises to be taken as aforesaid, and otherwise as the Sheriff may direct, and of the time, place, and subject of the inquiry to be held in reference thereto; and he shall, upon the expiry of such notice, make such inquiry into the several matters stated in the petition and relative plan, and shall have power to call for such information from the Commissioners and others, as he may consider necessary, and to do all such matters and things as may be expedient for the purposes of the inquiry, and grant a deliverance in accordance with the prayer of the petition, or with such modifications or alterations as may appear to him to be requisite, or he may refuse to grant the prayer thereof; and if power be granted to put in force the Lands Clauses Acts aforesaid, the Commissioners shall have the same rights in carrying out these Acts as if powers to that effect had been herein specially enacted so far as regards the lands and premises specified in the plans and proceedings, and in the deliverance of the Sheriff aforesaid.

It shall be lawful for any owner or occupier whose property may be affected, or for the Commissioners, if dissatisfied with the decision of the Sheriff, to appeal to the Secretary for Scotland, who may order further inquiry, or take such other step or steps as he may think desirable in the circumstances, and he may thereafter issue an order either in accordance with the prayer of the application, or with such modifications or alterations as may appear to him to be requisite, and may make such order as he thinks fit in reference to the cost, charges, and expenses incurred in relation to such order.

See sec. 4 (30) as to "Sheriff." A very cumbrous method of procedure is here instituted before the Commissioners can even take the initial step of acquiring lands or premises, under the provisions of the Lands Clauses Acts. Protection enough was surely afforded by the Lands Clauses Act without this additional precaution, but nevertheless the machinery provided by this section must be gone

through in the first instance. Not only so, but if an owner or occupier is dissatisfied with the Sheriff's decision, he may appeal, not to a Court in Scotland, but to the Secretary for Scotland, who may take what course he thinks proper in the circumstances.

By sec. 108 the Commissioners may acquire land compulsorily under the Lands Clauses Act for a manure depôt, etc., with the authority of the Board of Supervision.

Minutes and Accounts, Appointment of Clerk, Treasurer, and Auditor.

61. Clerk to be appointed.—The Commissioners shall appoint a Clerk for keeping the records of the proceedings of the Commissioners and their Committees, and for performing the other duties required of him by this Act; which records shall contain accurate minutes of the proceedings and orders of the Commissioners and their Committees, and they, being signed by the preses of each respective meeting, or any copy or extract therefrom authenticated by the signature of the Clerk, shall be received as evidence in all Courts whatsoever, in any case or matter concerning this Act.

The Clerk to be appointed by the Commissioners has no right to his office *ad vitam aut culpam*, but the Commissioners are entitled to define the time during which he shall hold office. See Hamilton *v.* Dunoon Police Commissioners, 13th June 1871 (9 M., 826; 8 S. L. R., 561). In that case the Lord President said: "The Lord Ordinary 'finds that, at the meeting of the Police Commissioners for the burgh of Dunoon held on the 26th Oct. 1868, the pursuer was elected Clerk to the Commissioners for a year from that date, at a salary of £40: finds that on the expiry of that year, the appointment to the pursuer was not renewed for any specific period, but that he was continued as Clerk, under an interim arrangement, until that arrangement was put an end to, in terms of a resolution passed at a meeting held on the 17th January 1870.' His Lordship goes on to find that the Commissioners had reasonable cause for resolving not to continue the pursuer in the office of Clerk. I do not consider it necessary to go into that. From October 1869, there was a complete dispute as to the nature of the office. The pursuer insisted that he held the appointment for life, while the Commissioners continued him in office under an interim appointment. The question really is, Can the pursuer defend his possession of the office, on the ground that he was appointed for life? Are the Commissioners justified in maintaining that he was appointed for one year? The first point is the construction of the General Police and Improvement Act. The pursuer says that, under sec. 67, it is unlawful for the Commissioners to appoint a Clerk on any other tenure than for

life. The words of sec. 67, when read without reference to other sections, give no countenance to any such notion. It enacts that 'the Commissioners shall appoint a Clerk for keeping the records of the proceedings of the Commissioners, which records shall contain accurate minutes of the proceedings and orders of the Commissioners and their Committees, and being signed by the preses of each respective meeting, or any copy or extract therefrom, authenticated by the signature of the Clerk, shall be received as evidence in all Courts whatsoever, in any case or matter concerning this Act.' No doubt the Clerk to a body of Commissioners, whose proper and chief duty is to record their proceedings, is in a certain sense a public officer. But there is no rule in common law that the officer is necessarily *ad vitam aut culpam;* on the contrary, the tenure depends on the circumstances of the appointment. But the pursuer says that sec. 67, when contrasted with other sections which deal with the tenure on which certain other offices are to be held, clearly shows that the Clerk can only be appointed *ad vitam aut culpam.* The 436th section is referred to as in instance,—the Commissioners shall appoint a proper person to be Clerk of the Police Court, who shall hold office only during their pleasure, and such person may be the same person who is Clerk to the Commissioners, etc. Here the provisions of the Statute are imperative. The Commissioners cannot make an appointment of Clerk to the Police Court for life, nor for a definite period. But does it follow that because the Statute is silent in regard to the office of Clerk to the Commissioners that it must necessarily be a life office? We cannot, from these other clauses, construe sec. 67 as, from its silence, enacting that the Clerk must necessarily be appointed for life. The very nature of the appointment, and the duties which the Clerk has to discharge, would make it improbable that the Legislature would tie down the Commissioners to a life appointment. It is highly expedient that the appointment should be for a time, in order to give the Commissioners an opportunity of revising the duties, salary, and conditions of the office. It appears to me that this is precisely the sort of discretion intended to be given by sec. 67. I have no doubt, on the first point, that it is perfectly lawful to appoint a Clerk for a definite term. The next question is, Did the Commissioners make the appointment for a year? . . . I am satisfied, in point of fact, that what passed at the meeting was that Mr. Hamilton was appointed Clerk for a year." Lord Deas said: "The first question here which is certainly of general importance is, Whether a Clerk to a body of Commissioners under the General Police and Improvement Act can be appointed otherwise than for life? I am of opinion, with your Lordship, that there is no incompetency. The second question is, Whether the pursuer was appointed for life? The minute of appointment is ambiguous. It was mainly to clear up this ambiguity that a proof was allowed. The proof has branched out into all sorts of irrelevant matter; but, so far as it applies to the *res gestæ*, it shows that it was not intended by the words of the minute that the appointment was to be for life. The only other question that remains is, Whether

there was reasonable cause for the pursuer's removal. I agree with the Lord Ordinary, that even if he had been appointed during the pleasure of the Commissioners, he could not be capriciously removed without due notice. But he was not taken unawares. An appointment for a year is itself notice of its termination. When the year was about to terminate, the Commissioners did not at once hold him to be out of office, but elected him *ad interim*. Their conduct was so reasonable and deliberate that I do not know that it is necessary to find that there was any cause of complaint against Mr. Hamilton. But it is quite evident that there were disputes of a serious character between Mr. Hamilton and the Commissioners." Lords Ardmillan and Kinloch concurred. And in Wright *v.* the Lockerbie Police Commissioners, 1st July 1876—not reported—Lord Rutherfurd-Clark held that it was *ultra vires* of the Commissioners to appoint a Clerk *ad vitam aut culpam*. As the case is not reported, a copy of the Lord Ordinary's (Lord Rutherfurd-Clark) judgment will be found in the Appendix. Right of Town-Clerk to accommodation in Town Hall—see Downie *v.* Magistrates of Annan, 7th Jan. 1879 (6 R., 457).

62. Clerk not to be concerned as Agent, etc., in any Prosecution under this Act.—No such Clerk, or the partner of any such Clerk, or any person in the employ of such Clerk or of his partner, shall act as agent or solicitor in the trial of any offence in the Police Court; and in the event of a contravention of this provision such Clerk shall be thenceforth disqualified from holding any office whatever under this Act, and also from acting as a Commissioner under this Act.

Neither the Clerk nor any of his partners, or any person in his or their employment, can act as agent or solicitor in the trial of any offence in the Police Court. Does this apply either to acting as prosecuting agent or defending agent? The Clerk of the Police Court clearly cannot act in either capacity. But suppose the Clerk to the Commissioners is not the Clerk of the Police Court, can the former either act as agent in the trial of any offence, or be appointed Procurator-Fiscal for the trial of offences? It is quite clear that he cannot act as agent for any person charged with an offence. Can he then act as agent for the Commissioners or Magistrates, and be appointed Procurator-Fiscal? If the Commissioners be parties to a case in the Police Court, he cannot act as their agent. Can he be appointed Procurator-Fiscal? Mr. Mackintosh (now Lord Kyllachy), upon the construction of the Act of 1862, gave the following opinion in answer to these queries:—

I.

"*Q.* Is it competent for the same person to hold the offices of Clerk to the Commissioners and Procurator-Fiscal of the Burgh?

"*A.* I am of opinion in the affirmative. The Procurator-Fiscal is not, I think, an 'agent' or 'solicitor in the trial of offences under the Act,' in the sense of the 68th section, and apart from that section I do not find in the Act any prohibition against the Clerk of the Police Commissioners being appointed Procurator-Fiscal by the Magistrates. Neither does it appear to me that there is any reason of public policy against such an appointment. The Clerk to the *Police Court* is a different official from the Clerk to the Commissioners (sec. 436), and although the two offices *may* be combined, I understand that the memorialist is *not* Clerk in the Police Court.

II.

"*Q.* Does the fact that the memorialist holds also the office of Collector militate against the other two offices being held by him?

"*A.* I think not. The fines, I rather think, are payable to the Clerk of the Police Court and not to the memorialist. But in any case I do not see that there can be any conflict among the duties of Clerk to the Commissioners, Collector, and Procurator-Fiscal.

III.

"*Q.* In the event of the memorialist accepting the appointment of Procurator-Fiscal offered to him, what risks does he run?

"*A.* If the above opinion is erroneous, the memorialist runs the risk of the penalties mentioned in the 68th section. The only other risk is to the validity of the sentences of the Police Court.

The Opinion of

W. MACKINTOSH."

63. Treasurer and Collector to be appointed.—The Commissioners shall in like manner elect and appoint a Treasurer and a Collector to act during their pleasure; and such Collector and Treasurer, before they shall be permitted to take upon them the execution of their office, shall respectively grant bond, with sufficient sureties, to the Commissioners, for their intromissions, and for the just and faithful execution of their office, to such an amount as the Commissioners shall think reasonable; and any Collector or Treasurer who may be convicted of wilfully secreting or not accounting to the Commissioners for any sum of money received by him as Collector or Treasurer, shall forfeit triple the amount thereof to the Commissioners, besides being liable to be punished according to the law, and to be deprived of the office.

The Commissioners may appoint the same person Treasurer and

Collector (see sec. 66). As these appointments are important, they should be made at a meeting of the Commissioners. These officers are to hold their appointments during the pleasure of the Commissioners. This will preclude the Commissioners appointing them for a definite period, but will not affect their common law right to reasonable notice before dismissal. See Morrison *v.* Abernethy School Board, referred to under secs. 73 and 77 (3).

Treasurer and Collector to be appointed.—A Collector of taxes appointed by Magistrates of a royal burgh, by minute entered in the Council books, requires no separate commission on stamped paper. Hunter *v.* Hill, 11th July 1833 (11 S., 989). It has been held, upon a construction of secs. 51–58 of the General Police Act, 1850, that the Treasurer, and not the Clerk, of the Police Commissioners in a burgh is the proper officer in whose hands to arrest funds due and owing by them to a common debtor. Macdonald *v.* Reid, etc., 2nd December 1881 (9 R., 211).

The Clerk to the Commissioners nor his partner, nor any person in the service or employ of such Clerk or of his partner, can be appointed Treasurer. The disqualification is not expressed so as to cover the collectorship, and Mr. Mackintosh (now Lord Kyllachy) gave the opinion that the disqualification does not apply.

The Commissioners cannot be too careful as to the terms of the bond of indemnity, and seeing that the conditions thereof are duly complied with. In the case of the Property Investment Company of Scotland, Limited, and Liquidators *v.* National Guarantee and Suretyship Association, Limited, the Lord Ordinary (Lord Stormonth Darling) found that the pursuers' company failed duly to observe and put in practice the precautions and checks stipulated for by the defenders for securing accuracy of account on the part of the employed, and therefore assoilzied the Guarantee Company. His judgment is instructive and important, and is as follows:—

"By two guarantees, dated respectively in 1874 and 1876, and each for £1000, the defenders' company agreed to indemnify the pursuers' company, within the limit of the stipulated amount, against all loss which the latter might sustain by any act of default or dishonesty on the part of Peter Couper in the capacity of their manager. Couper absconded about the end of July 1890, and the company immediately thereafter went into liquidation. It was thereupon discovered by Mr. Millar, the liquidator, that Couper had committed very large defalcations, extending over a series of years, and on 14th August 1890 he intimated a claim against the defenders to the full amount in each policy. The defenders refused to admit liability, and the present action was raised.

"The first answer made by the defenders is founded on the 9th condition endorsed on the policies, to the effect that 'the right to make a claim under the within agreement in respect of any loss, shall cease at the expiration of six calendar months after the act or default occasioning such loss shall have happened." The claim having been made on 14th August, the defenders say that they are not responsible for any act or default of Couper's prior to 14th

February 1890. This, they say, excludes all the heads of the pursuers' claim, except the last head, No. 9. The pursuers, on the other hand, contend that a sum of £1065 under head 3, and a sum of £714, being the corrected amount of head 7, as well as the amount of head 9, are to be regarded as sums for which Couper's failure to account occurred as late as 30th July 1890. There was a good deal of discussion as to what was the true date of an embezzlement, whether the date when the money is appropriated, or the date when the books for the year are balanced, and the money ought to be accounted for. I do not think it necessary to go into that question, for the defenders admit that head 9 includes a sum of more than £2000—the full amount concluded for—which came into Couper's hands within the six months. No doubt, they explain that of that sum £1628 represented rents of heritable properties, of which the company had taken possession; and they contend that these rents came into his hands, not as manager, in which capacity they guaranteed his fidelity, but as a member of the firm of Couper & Cook, who acted as factors for the properties. It seems to me that the proof does not sustain that contention. There is nothing to show that Couper & Cook were ever appointed factors, or recognised as factors, by the directors. On the contrary, an excerpt from their minutes—No. 598 of process—shows that they regarded the factoring of properties as part of Couper's individual duties as manager. The collection of rents may take more trouble than the collection of interest on loans, but the one is the substitute for the other as regards the income of the company, and in the absence of any agreement to relieve Couper of that duty, I cannot assume that it was laid upon his firm. Indeed, the only piece of evidence to which the defenders can point is the fact that the rents were entered in the books of the firm. But that seems to have been a practice adopted by the clerks in the office for their own convenience, and even if Couper knew and approved of it, as probably he did, I cannot hold it as a recognition by the company of the firm as their factors.

"So far, therefore, my opinion is in favour of the pursuers. But the second answer made by the defenders is of a much more formidable kind. Each of the guarantees contains a reference to certain proposals, signed by the employer and the employed, 'setting forth the circumstances and conditions of the said employment, and the checks to be used by the employer to secure accuracy of accounts, which proposals are hereby declared to be the basis of the contract.' And there is a further stipulation, 'that the aforesaid guarantee and indemnity shall continue operative and in force only so long as the precautions and checks for securing accuracy of account, and for limiting the amount of moneys and property entrusted to or left in the hands of the employed at any one time, shall be duly observed and put in practice on the part of the employer, in accordance with the said proposal and declaration.' In the proposals signed by Couper and the chairman of the company there is a question, 'State the largest sum at any time likely to be held in hand, and for how long a time?' To this the answer in 1874 is, 'Banked every day,'

and in 1876, '£10,000 may be in his hands during a day, but not overnight.' Again, there is the question, 'How often will the employer balance the applicant's accounts, and what checks will he use to secure accuracy?' To this the answer in 1874 is, 'Books audited once a month,' and in 1876, 'Company's books are audited by a professional auditor once a month.'

"Between these two questions I think there is a distinction. The first merely asks for a statement of probable practice, the second demands a positive answer as to the frequency of balancing accounts, and the checks to be used to secure accuracy. If, therefore, the case depended on Couper's practice as to banking money, I should be in favour of the pursuers. It is certain that money was not banked every day, and it is very likely that this occurred when there was money in Couper's hands which ought to have been banked. But I do not think it is proved either that this was the case, or that he ever retained £10,000 overnight. Moreover, I think that the element of probability introduced into the question allowed a considerable latitude as to practice.

"It is otherwise with the representation as to audit. That seems to me to be a positive undertaking, applicable to the future as well as to the present, that there should be a monthly audit of Couper's accounts. If so, undoubtedly the undertaking was not fulfilled. Down to 1884 there was a monthly audit of a sort, but after that period the books of the company were allowed to get into such arrear that the audit could only be made once in three or four months, and for the last seven months of the company's existence there was practically no audit at all until the final audit at the close of the financial year.

"A good deal was said, both in evidence and in argument, as to the inefficiency of a monthly audit as any real check on the intromissions of a person in the position of Couper; and Mr. Chiene, the manager of the defenders' company, quite candidly and properly admitted that monthly audits are not common among companies, and that the question of a short audit, whether monthly or quarterly, very seldom comes up as an element in inducing the defenders to undertake a risk. I do not believe that a monthly audit, of the kind which was here practised at longer intervals, would have resulted in detecting any but a very small proportion of Couper's defalcations. Most of these consisted in falsifying the books by non-entry or erasure, so as to conceal moneys which had come into his hands; only a few consisted in making entries of fictitious payments. A short audit, if effective, might possibly have detected the latter, because it would have disclosed the want of vouchers. But it could hardly have detected the former without a much fuller and more laborious examination of the whole books of the company than is said to be usual, or indeed possible, except at the final audit for the year.

"But where two parties stipulate that a thing shall be done, and that unless it is done the obligation of the one to the other shall come to an end, I do not think I am at liberty to speculate whether

the doing of it would have served its purpose. It is enough, in my opinion, that the thing was not done.

"The same considerations apply to the new statement and plea which the defenders were allowed to add to the record in the course of the proof. They are founded on the seventh condition endorsed on the agreements, to the effect that if any change is made in the remuneration of the employed, without being intimated in writing to the association, the liability of the latter shall cease and determine from the date of such change. Now, it is proved that long prior to the defalcations for which alone the defenders could be made liable, Couper's salary was reduced from £400 a year—at which it stood in 1876—to £200 a year, without intimation to the defenders. If the non-fulfilment of the obligation to have a monthly audit had not been, in my view, sufficient for the decision of the case, I should have held that this reduction of salary put an end to the defenders' liability under the second policy. I should not have held that it affected their liability under the first, because £200 was the salary stated in the proposal of 1874, and although the words of the condition are wide enough to cover a change by way of increase as well as decrease, I think the defenders would have been barred from urging that plea by the fact that they continued to accept premiums under the policy of 1874, in the full knowledge that there had been a rise of salary in 1875 not intimated at the time. But I do not think that this barred them from afterwards founding on an unintimated decrease, for the meaning of the condition plainly is that a decrease of remuneration may have the effect of tempting the employed to commit acts of dishonesty. It is true that the kind of case to which this consideration most strongly applies is, where the employed has nothing else to live on except the emoluments of his employment, and probably it had very little weight in the minds of the defenders in a case like the present. But here again I think I am bound to give effect to the plain terms of the agreement, however hard I may think its operation in the particular case. The truth is, that persons entering into guarantees of this kind ought to look a great deal more closely at the words of the contract before they agree to conditions so stringent. It was urged that the receipt by the defenders—as possible investors—of the annual reports and balance-sheets of the pursuers' company fixed them with knowledge of the decrease in the manager's salary, but I cannot hold a proceeding of that kind, *alio intuitii*, as equivalent to the intimation in writing required by the agreement; and it is to be observed that Mr. Chiene, the manager of the defenders' company, denies that he ever looked at the balance-sheets, or knew of the decrease in salary until the present question arose. There is, however, no reason why this point should not have been raised in proper time, for the defenders were in possession of the means of information before the defences were lodged, and therefore there must be some modification of the expenses to which they are entitled. I think it is due to the directors of the Property Investment Company to say that, in my opinion, there is not the slightest ground for the suggestion that they had any knowledge or

suspicion of Couper's dishonesty before the company went into liquidation.

"They have been among the chief sufferers by his frauds, for they were individually very large shareholders; but misplaced confidence, however serious may be its results, is a thing of which no man need be ashamed."

In Haworth & Co. *v.* Sickness and Accident Assurance Association, 26th February 1891 (18 R., 563), an assurance association entered into a contract with a merchant and traveller employed by him, by which the association agreed, on payment of a premium, to guarantee the employer to a certain amount against loss by embezzlement on the part of the traveller. The contract set forth that the employer had delivered to the association a proposal containing certain statements, and a declaration setting forth, *inter alia*, "the checks to be kept upon" the traveller's "accounts, and has consented that such proposal and declaration, and each of the statements therein referred to or contained, shall form the basis of the contract; and this agreement is granted on the condition that the business of the employer shall be conducted in every particular in accordance with the said proposal, statement, and declaration, except with the consent of the association in writing." The proposal referred to contained the following questions to and answers by the employer:—"*Q.* How often will the employer balance and settle the applicant's accounts?—*A.* Monthly. *Q.* Specify the checks which the employer will use to secure accuracy in the applicant's accounts?—*A.* Statements sent to customers by employer. *Q.* In particular, will the employer send accounts direct to customers, and if so, how often?—*A.* Every three months."

In an action by the employer against the association for payment of the amount of a sum embezzled by the traveller, it was proved in defence that no monthly settlements had been made between the employer and the traveller, and that the practice had been that, at the end of three months from the date of an order, the employer sent the account, not to the customer direct, but to the traveller himself for collection. *Held*, that the employer had failed to comply with the conditions of the contract, and that the defenders were not liable.

The septennial limitation of cautionary obligations must also be kept in view. See Act 1695, c. 5, and Scott *v.* Yuill (5 W. & S., 436); Tait *v.* Wilson (1 Robson's App., 137); Stocks *v.* M'Lagan, 11th July 1890 (17 R., 1122).

64. Collector to lodge all Moneys received by him in Bank.—The Collector or Treasurer shall be obliged to lodge all money received by him in a chartered or other bank, or in one of the branches of such bank in the burgh, to be fixed by the Commissioners, upon an account to be opened in the name of the Commissioners, in their corporate name, and to be operated upon by two of the Commissioners

specially authorised to that effect, and the Treasurer; and no drafts on the said account shall be made for any private purpose on any pretence whatever, nor for any other purpose than the payments which shall from time to time be authorised by the Commissioners or their Committees for the purposes of this Act, as the same shall be certified by the Clerk, who shall countersign all cheques.

This section should be rigidly enforced for the protection of the Commissioners, and a rule should be laid down that neither the Collector nor the Treasurer shall have in hand at any given time beyond a certain amount. Care should be taken that the payments are certified in the manner prescribed by the Act. In cases where the Treasurer or Collector is the bank agent (a doubtful arrangement), special care is necessary.

65. On Insolvency of Treasurers or Collectors, Deficiency may be Assessed.—In case any Treasurer or Collector shall become insolvent, and the sums chargeable against him shall not have been paid by his cautioners or sureties, the amount deficient shall be chargeable against the next or any subsequent annual assessments.

This section does not say that the Commissioners are to sue the cautioners for payment of the official deficiencies, but the Commissioners will be required to use due diligence in this matter, and as any deficiency should be charged against the next annual assessment, proceedings should be prompt.

66. Treasurer and Collector may be the same person, but Clerk and Treasurer not to be the same person.—The Commissioners may appoint the same person to be both Treasurer and Collector, but shall (saving the case of persons appointed prior to the passing of this Act) not appoint their Clerk, or the partner of such Clerk, or any person in the service or employ of such Clerk or of his partner, to be the Treasurer; or appoint any person who may have been appointed Treasurer, or the partner of such Treasurer, or any person in the service or employ of such Treasurer or of his partner, to be the Clerk to the Commissioners; and if any person shall accept both the offices of Clerk and Treasurer, or if any person being the partner of such Clerk, or in the service or employ of such Clerk or of his partner, shall accept the office of Treasurer, or shall act as deputy of the Treasurer, or in any manner officiate for the

Treasurer, or, being the Treasurer, or the partner of such Treasurer, or in the service or employ of such Treasurer or of his partner, shall accept the office of Clerk, or shall act as deputy of such Clerk, or if any Treasurer shall hold any place of profit or trust under the Commissioners other than that of Collector, every person so offending shall for every offence forfeit and pay the sum of £100 to any person who shall sue for the same, to be recovered, with full expenses, in the same manner as any of the penalties imposed by this Act may be sued for and recovered.

The Clerk cannot be Treasurer, nor his partner, nor any person in his employ. The Collectorship is the only other place of profit or trust under the Commissioners which the Treasurer may hold. The object of prohibiting the Clerk from being Treasurer is no doubt to secure that the one officer shall be a check upon the other. The Clerk cannot deal with the money, because he does not hold it; and the Treasurer can only make payments authorised by the Commissioners as certified by the Clerk. In Muckarsie *v.* Walker, 25th June 1831 (9 S., 804; 6 F., 517), a person was subjected in the penalty imposed by the General Road Act for acting both as Clerk and Treasurer, though nominally only holding one of the offices. The penalty is payable to any person who shall sue for the same.

67. Books of Accounts to be kept by Commissioners.—Accounts of all property, heritable and movable, vested in the Commissioners, showing the nature of such property, and of all money received and disbursed, shall be kept in books by the Treasurer or Collector in such form as the Auditor of the Court of Session shall prescribe; and all such books of accounts may, at all reasonable times, and on payment of a reasonable fee, be inspected and perused by any person assessed, and also by any person entitled to any money due and owing on the credit of the assessments; and such persons may take copies of or extracts from any such books and accounts, on payment of a reasonable fee, the amount of such fee to be fixed by the Auditor of the Court of Session; and any person in whose custody or power any such books and accounts are, who shall refuse inspection thereof, or to permit copies or extracts to be taken as aforesaid, shall be liable in a penalty not exceeding £10; and in case any person who shall be assessed shall be dissatisfied with any accounts which shall have been made up as herein provided, or with any of the items or articles contained in such accounts,

such person may, at any time within three months after the accounts are approved by the Commissioners, complain against the same, by petition to the Sheriff, in which complaint shall be specified the grounds of objection to such accounts, items, or articles; and the Sheriff shall proceed to hear and determine the matter of such complaint, and his decision shall be final.

A new provision is introduced here. The Auditor of the Court of Session is to prescribe the form of books to be kept by the Treasurer or Collector, and this may necessitate an application being made to the Auditor for the prescribed form. If the Auditor do not prescribe a form, the provision may remain inoperative.

These books of accounts are to be open to inspection on payment of a reasonable fee at all reasonable times, by any person assessed or by any person entitled to any money due on the credit of the assessments. These persons may take copies or extracts from the books on payment of a fee to be fixed by the Auditor of the Court of Session. In a case, Heddle *v.* Russell, etc., 21st Dec. 1883, in the Sheriff-Court (not reported), wherein the pursuer asked (1) that the defenders shall be ordained to allow the pursuer to inspect and to take copies and extracts of an account for £54, 5s. 6d., which it is explained in the condescendence (articles 2 and 3) is the voucher or one of the vouchers for a charge of that amount in a book of accounts kept by the Commissioners of Police for the burgh of Leith, in terms of the 75th section of the General Police and Improvement (Scotland) Act, 1862; (2) that the defenders, or any of them, who may be ascertained to have refused to allow the pursuers to inspect the account mentioned, shall be found liable under the 75th section of the Statute in a penalty not exceeding £10; (3) to have it found that the sum of £54, 5s. 6d. does not form a valid item of charge against the police funds of the burgh; and (4) that the defenders, John Russell and William Henderson Couper, shall be ordained to pay that sum in to the credit of the police funds, with interest from the 17th of October 1883. The Sheriff (Rutherfurd) found that the pursuers' averments were irrelevant and insufficient to support the conclusions of the libel, and therefore dismissed the action, and found the pursuers liable in expenses. In his note the Sheriff quotes the 75th section of the General Police Act, 1862, "and it appears to the Sheriff-Substitute that, under this section of the Act, any ratepayer may gratuitously and at all seasonable times, *i.e.* within office hours, inspect and peruse the books or accounts kept by the Treasurer or Collector, and may also make copies of or excerpts from these books, or from the accounts which they contain of the heritable and movable property with which the Commissioners are vested, and of the money received or disbursed by the Commissioners, but that no right is conferred upon individual ratepayers to demand production of the vouchers tending to instruct the different items of charge or discharge in the books or accounts referred to. The 76th and 77th sections of the Act provide for an annual audit of the Commissioners

accounts by a professional auditor, and in the opinion of the Sheriff-Substitute it never was contemplated by the Legislature that individual ratepayers should have the power of conducting a private audit by insisting on the production of the vouchers, a proceeding which would obviously prove a serious obstruction to the Commissioners or the officials employed by them in the discharge of their duties. The Sheriff-Substitute is therefore of opinion that the pursuers are not entitled, as matter of right, to demand access to the account for £54, 5s. 6d., referred to in the prayer of the petition, which, as explained in the condescendence (articles 2 and 3), is the voucher or one of the vouchers for a charge of that amount in one of the books kept by the Commissioners. The pursuers were not refused access to any of the books or accounts of the Commissioners, and it is not alleged that any demand to inspect the voucher in question was made by Mr. Heddle in his official capacity as one of the Commissioners of Police, or was refused by the defenders. According to the view of the matter taken by the Sheriff-Substitute, it follows that the defenders are not liable in the penalty enacted by the 75th section of the Statute for refusing to allow the pursuers as ratepayers to obtain access to the vouchers for the Commissioners' accounts. In any case, however, the Sheriff-Substitute does not see how he could competently find the defenders liable in the statutory penalty, which he thinks could only be sued for and recovered in the manner provided by sec. 411. As regards the remaining conclusions of the libel, it is not denied by the pursuers that the sum of £54, 5s. 6d. is not now an item of charge against the police funds. It is admitted that the money was paid to the defender, Mr. Couper, out of the funds in the hands of the Commissioners merely for a temporary purpose, in order to facilitate the recovery of the amount by the Magistrates from the Tramway Company. The money has been paid by the Tramway Company, and replaced to the credit of the Police Commissioners in their accounts, so that it neither forms nor ever did in any proper sense form a charge upon their funds, but is simply a subject of a cross entry in the accounts."

The Sheriff (Davidson) recalled the interlocutor appealed against, but dismissed the action, and found the pursuers liable in expenses.

68. Account of Receipt and Application of Moneys to be made out by Commissioners and printed.—The Commissioners shall yearly cause to be made out a just and accurate account of all the moneys received and expended in the execution of this Act, for the year ending on the 15th day of May immediately preceding, showing from what sources such moneys have been received, and to what purposes the same have been laid out and applied; which account, as the same shall have been audited, as hereinafter provided, shall be laid before a meeting to be

held on the second Tuesday in July in each year, or at a meeting to be held for the special purpose as soon thereafter as may be, and shall, if and as approved by the Commissioners, be signed by the Preses of said meeting and the Clerk, and shall be deposited with the Clerk, who shall forthwith cause such account or an abstract thereof to be printed, and shall permit any person assessed under this Act to inspect and examine such account at all reasonable times, without payment of any fee or reward for such inspection.

The Commissioners must annually make out the account herein provided for, and within a month after 15th May (see sec. 70) deliver the same to the Auditor. The account as stated must be laid before a meeting held on the second Tuesday in July, or at a meeting held for the purpose as soon thereafter as convenient. If approved of, it is to be signed by the Preses and the Clerk, and the account or an abstract thereof is to be printed. Any person assessed under the Act is entitled to inspect the account at all reasonable times without fee. It is the account itself, not the abstract merely, that is to be open to inspection.

69. Auditor to be appointed by Sheriff.—The Sheriff shall annually, on the application of the Commissioners, appoint an Auditor, for the purpose of auditing their accounts; and in case the office of such Auditor shall, before such accounts are audited by him, become vacant by death or from any other cause, the Sheriff shall appoint an Auditor to supply such vacancy.

The appointment of Auditor is now committed by this section to the Sheriff, on the application of the Commissioner. By the 1862 Act (see sec. 77), the Commissioners are bound annually to appoint a professional Auditor. There is no provision as to the remuneration of the Auditor, such as was contained in sec. 78 of the 1862 Act, which provided that "if any dispute arise as to the amount of remuneration to be paid to such Auditor, it shall be settled by the Sheriff, whose decision shall be final."

The Auditor is appointed for the purpose of auditing their (the Commissioners') accounts. "A thorough and efficient audit should embrace an examination of all the transactions of a company, and an Auditor acting on this principle would ascertain that all had been duly entered and discharged. A purchase made, a sale effected, or any matter of business transacted, and once entered in one of the subsidiary books, becomes part of a system with which it is so incorporated that it cannot be omitted, overlooked, or cancelled, without so disarranging the organisation that an efficient Auditor would at once detect either the carelessness or the fraud."—Pixley, p. 171. An

Auditor is presumed to have knowledge of what is contained in the books of the Company, and cannot plead ignorance of entries or of omission of entries in the books affecting himself, in order to escape liability. *Re* Matlock Old Bath Hydropathic Coy. Limited, Wheatcroft's Case (29 L. T., 324).

70. Auditor to Report.—The Commissioners shall deliver to the Auditor, within one month after the said 15th day of May annually, all the accounts, together with their books and vouchers; and it shall be the duty of the Auditor to audit such accounts, and either make a special report thereon, or simply confirm the same; and such report or confirmation shall be read at the foresaid meeting; and if any question arise in regard to any item in such accounts, the matter shall be disposed of by the Sheriff in the same manner as appeals from the Auditor of the Sheriff-Court are disposed of, and in all cases where the sum in dispute is less than the sum of £25 his decision shall be final, and where the sum in dispute exceeds the sum of £25 there shall be the same right of appeal as in ordinary actions in the Sheriff-Court: Provided always, that it shall not be competent to raise any such question before the Sheriff after the lapse of three months from the date of the meeting at which the Auditor's report is received.

The Commissioners must deliver to the Auditor, within a month after 15th May, all the accounts, with their books and vouchers. The Auditor is to audit these and make a special report thereon, or confirm the same. The report and docket must be read at the meeting held on 2nd July, or at a special meeting (see sec. 68). If any question arise in regard to any item in the accounts, it is to be disposed of by the Sheriff as an appeal from the Auditor in the Sheriff-Court. There is no provision here as to who is to make the appeal. If the Auditor has disallowed the matter, it is presumed that the Commissioners must appeal against the disallowance. If the amount in dispute is less than £25 the Sheriff's decision is final. If the amount exceed that sum the complainers will have an appeal to the Sheriff-Principal. No question can be raised after the lapse of three months from the date of the meeting at which the Auditor's report is received.

The audit of the books of the Commissioners is a most important matter. There is first the duty laid on the Commissioners not to sanction illegal payments, to see that only payments are made in terms of and in the manner sanctioned by the Act, and that the Treasurer and Collector do their duties under and in terms of the Act. These two last officials must also do their duties in terms of

and in the mode sanctioned by the Statute. On the Auditor lies practically the responsibility of seeing that all this is done. This is well illustrated in the case of the Leeds Estate Co. *v.* Shepherd, 9th Aug. 1887 (L. R., 36; Ch. Div., p. 787). In this case the balance-sheets on which the dividends were declared, were prepared, not by the directors but by the manager. These were delusive, they over-estimated the assets of the company, and were framed with the object of showing a profit available for a dividend. The Auditor never looked at the articles of association, but accepted the statements of the manager, and certified from time to time that the accounts submitted to him were true copies of those shown in the books of the company. No proper statement of income and expenditure or Auditor's report was ever laid before the company. The directors did not know the true state of the company's affairs, or that the balance-sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager and Auditor.

Held, (1) That the directors had fallen short of the standard of care which they ought to have applied to the affairs of the company, and that the onus was upon them to show that the dividends had been paid out of the profits; (2) That upon the evidence they had failed to show this, and that they were jointly and severally liable to make good all sums improperly paid out of capital in respect of dividends to the shareholders, directors' remuneration, and bonuses to the manager.

In re Oxford Benefit Building and Investment Society (1) followed:

Held, (3) That it was the duty of the Auditor, in auditing the accounts of the company, not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association, and was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs; and (4) That as the improper payments by the directors were the natural and immediate consequence of breach of duty on the part of the manager and the Auditor, the manager and Auditor were liable in damages, to the amounts so paid, except in the case of the Auditor (who had pleaded the Statute of limitations), so much thereof as was covered by the Statute.

71. Commissioners not to hold Places of Profit under Act.—No Magistrate, Town Councillor, or Commissioner shall, directly or indirectly, derive any emolument or profit from any business or work performed by him under this Act; nor shall he be capable of enjoying any office of profit to be created or established by virtue of this Act, or of holding any share or interest in any contract relating to the execution thereof, or of standing as a candidate

for any such office, or of being a competitor for any such contract, save and except contracts entered into with any chartered or joint-stock company of which such Commissioner may be a partner; and any Commissioner who shall act in contravention of this section shall *ipso facto* cease to be a Commissioner, and the Sheriff, at the instance of any householder within the burgh, may declare the office of such Commissioner to be vacant, and may inflict a fine upon him not exceeding one hundred pounds.

No emolument or profit is to be derived by any Magistrate, Councillor, or Commissioner for any business or work performed by him under the Act. This provision has been very rigidly enforced. See Deas *v.* Murray, 26th June 1851 (13 D., 1236), where a medical man who was a General Police Commisssioner, on the employ of the inspector of police, investigated and gave evidence as to certain nuisances, and it was held that his claim for remuneration was barred by the 24th section of the Edinburgh Police Act, which annulled all contracts for work to be done between the Commissioners and any of their number. See also Haining *v.* Dumfries Police Commissioners, 16th Mar. 1861 (23 D., 755).

It has been held in the Sheriff-Court that Commissioners are entitled to fees as witnesses against the opposite party. In the case of Deas, the action was directed against the inspector of cleansing, but in reality against the Commissioners. In the Sheriff-Court case, Edgar *v.* Pollok, 11th July 1890 (not reported), Sheriff Spittal said: "I have found the defender's objections attended with a good deal of difficulty. The Auditor has struck off certain allowances charged for the defenders' witnesses, on the ground that if these witnesses, who are Police Commissioners, received payment for their attendance, they would be deriving "profit" or emolument from their office, contrary to the provisions of sec. 57 of the Police Act. On this point I differ from the Auditor. No doubt the Commissioners are bound to perform the duties of their office without fee or reward, but witness-bearing in a Court of justice is not a duty naturally incumbent on them as Commissioners, and I think that if a ratepayer insists on chasing them into Court, and they, acting in the interests of the general body of ratepayers, successfully defend the action, they are as much entitled to payment as witnesses as if they had been merely members of the general public." In England a member of a "governing body may be summoned as a witness and paid accordingly."—Glen, p. 843.

Nor shall he be capable of enjoying any office of profit to be created or established by virtue of the Act. No Commissioner, therefore, ought to be appointed to the office of Clerk, Treasurer, or Collector, or any of the offices under the Act. The disability is not so much to holding the office, as to enjoying the emoluments.

In England, where the General Turnpike Act, 1822, prohibits a

turnpike trustee from enjoying "any office or place of profit" under the Turnpike Act (3 Geo. IV. c. 126, sec. 65), a trustee accepted the office of treasurer to the Turnpike Trust, but allowed another person to receive the moneys paid in to the trust, and never made any profit out of the office. It was held that the question was not whether the trustee himself made a profit of the office, but whether the office was one which enabled him to make a profit; and that if the balance in the hands of the officer were such that it might reasonably be expected that a man would make a profit of it, it must be considered an office of profit; but that if the average balance was so small that a banker would not allow interest for it, the office in that case might not perhaps be considered an office of profit. Delane *v.* Hillcoat (9 B. & C., 310; 4 M. & R., 175).—Glen, p. 657.

In Deas *v.* Murray, above referred to, Lord Cockburn said: "Had the Commissioners employed one of their number as a law agent, he would clearly have fallen under this clause, and I see no distinction between that case and the present." In an opinion obtained by the Town Council of St. Andrews on 17th September 1872, from Mr. (afterwards Lord) Rutherfurd-Clark, then Solicitor-General, he said: "In my opinion, it is not illegal for the Town Council to appoint a member of their body to the office of city factor, or to any such office, or for a member of the Town Council to hold the office of city factor or any such office. But it is illegal for the Town Council to pay, or for the member of Council holding such office to receive, from the city funds any salary or remuneration. The Town Council are, in my opinion, trustees for certain public purposes, and the law which obtains in regard to private trusts is applicable to public trusts. It depends on the existence of the trust, and therefore it is immaterial whether the trust be public or private. I think that a body of trustees have power to appoint one of their own number to be factor to the trust. See the opinion of Lord Deas in Goodsir *v.* Carruthers, 19th June 1858 (20 D., 1149), and also the opinion of the Lord Chancellor in Home *v.* Pringle, 22nd June 1841 (2 Rob. Apps., 433). Hence I think that the Town Council may appoint one of their own number to the office of city factor, or to any similar office. But it is quite settled that a trustee cannot receive emolument for any services rendered by him to the trust, and that, when one of the trustees has been appointed factor, he must discharge his duties gratuitously. Consequently it is, in my opinion, illegal for the Town Council to pay from the city funds any salary or remuneration to one of their number who holds the office of city factor or any similar office."—Marwick, p. 435.

It will be observed, however, that under this section the Commissioner is not only incapable of enjoying the office of profit, but that he is likewise incapable of standing as a candidate for the office, otherwise he will be liable in a penalty.

He is also incapable of holding any share or interest in any contract relating to the execution of the Act, or of being a competitor for such a contract, excepting contracts entered into with a chartered or joint-stock company of which he may be a partner. See the

leading case of Blaikie *v.* Aberdeen Railway Company, 19th November 1851 (14 D., 66; reversed 20th July 1854, 17 D., H. L., 20), where a director contracted with the company to supply it with iron railway chairs. The House of Lords held that the contract was void by the common law, and not enforceable against the company. See also Haining *v.* Dumfries Police Commissioners, above referred to, where Commissioners of Police entered into a contract with one of their number for furnishing clothing to the police force, he having lodged estimates along with other tradesmen in answer to an advertisement by the Commissioners. One of the competing tradesmen brought an action for reduction of the contract, with the conclusion for damage, and it was held that he had a good title to sue for damages, but the question of the title to sue the reduction was left till the merits came to be disposed of.

In England, in an action for penalties against a Town Commissioner, under a Local Act which incorporated the Commissioners Clauses Act, 1847—Reg. *v.* Francis (18 Q. B., 526; 21 L. J., Q. B., 304; 16 Jur., 1046; 10 & 11 Vict. c. 16, secs. 9, 15)—for acting as a Commissioner after having become disqualified, a bill was produced for lime supplied at four different times; the bill was made out by the defendant, addressed to the Commissioners, and receipted by the defendant; and it was held that there was evidence to go to a jury that the defendant was "concerned in or participated in a contract," and that he thereby became "disqualified" within the meaning of the Act. Nicolson *v.* Fields (31 L. J., Exch., 233; 7 H. & N., 810; 10 W. R., 304).

Where one of the trustees of a turnpike road let horses to a contractor to perform certain works on the turnpike road, and the horses were used in the execution of the works, the trustee was held liable, under the General Turnpike Act, 1822 (3 Geo. IV. c. 126, sec. 65), to the penalty imposed by that Act. Towsey *v.* White (5 B. & C., 125).

A mere casual dealing, such as going to a shop for an article and paying for it over the counter, would not be contracting for the supply of articles, so as to make a person liable to a penalty if he afterwards continued to act as a member of a Local Authority. Wooley *v.* Kay (25 L. J., Exch., 35; 1 H. & N., 307; 20 J. P., 776).

A person who, in the ordinary course of his business, sold goods required for the execution of public works to the contractor who was executing the works for the Town Council, was held not to be disqualified, under the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76, sec. 28), as having "directly or indirectly, by himself or his partner, any share or interest in any contract or employment, with or by or on behalf of such Council." Le Feuvre *v.* Lankester (3 E. & B., 530; 23 L. J., Q. B., 254; 18 Jur., N. S., 894; 18 J. P., 198). A sub-contractor, however, who performed part of the contract work for the contractor, was under the present Act ruled by Field, J., to be disqualified, although he had not been paid for the work. Tomkins *v.* Joliffe (51 J. P., 247); also West *v.* Andrews (5 B. & Old., 328).

A casual, isolated order, given across the counter, so to speak, by a person not known to be contracting for the Government, or supplying the means for ascertaining at the time whether he was so or not, and accepted by a trader who was not aware that he was dealing with the Government, either then or at the time of the election, was held not to disqualify such trader for election to the House of Commons, under the Statute (22 Geo. III. c. 45, sect. 1), disqualifying persons who undertook contracts with any other persons for or on account of the public service, or who knowingly and willingly furnished wares to be employed in the service of the public. Royse *v.* Birley (L. R., 4 C. P., 296; 38 L. J., C. P., 203; 20 L. T., N. S., 786; 17 W. R., 827).

There is nothing to confine the contracts referred to in the rule to contracts made while the person interested is a member, if the contract and his interest in it subsist after his election. A member of a metropolitan vestry was thus held to be disqualified, because he had, before his election, taken as security for a loan made by him to another person, an assignment of a contract to do works for the vestry. Hunning *v.* Williamson (L. R., 11 Q. B. D., 533; 52 L. J., Q. B., 416; 32 W. R., 267; 49 L. T., N. S., 361; 48 J. P., 132).

The contract does not, however, necessarily continue or subsist, so as to disqualify a person who is elected, until it has been completely performed by both parties. For a contractor who had completely performed his part of the contract before the election, so that he had nothing to do but to receive the price, and nothing to hope for in respect of that payment, except receiving that which was his due, was held to be no longer a person holding or enjoying a contract within an enactment which disqualified from membership of the House of Commons "any person who shall directly or indirectly undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission . . . for or on account of the public service" (22 Geo. III. c. 45, sect. 1). *Per* Willes, J.: "Before the election he had ceased to be a person holding or enjoying a contract within the meaning of that Statute, and had been converted into a mere creditor of the Government, whose claim had been ascertained, and whose right was to receive his money, and as to whom, as it appears to me, it would be an injustice to say that a mere delay in payment on the part of the Government should have the effect of disqualifying him as a candidate." Royse *v.* Birley, etc., before referred to.

Under the Municipal Corporation Acts, the disqualification by reason of interest in a contract was held to exist so long as the contract continued, and a penalty was held not to be recoverable under those Acts against a person who had acted as alderman after his contract with the corporation had come to an end. Lewis v. Carr (L. R., 1 Ex. D., 484; 46 L. J., Ex., 314; 24 W. R., 940; 36 L. T., N. S., 44; 40 J. P., 279). But, under the present Act, a person who, while a member of a Local Board, has become interested in a contract with the Board, absolutely ceases to be a member, and cannot resume his functions as a member even after his interest in the

contract has ceased, unless he is re-elected; and therefore a person was held liable to a penalty under Rule 70, because he had acted as a member of a Local Board after having, while a member, done certain work at the request of the surveyor, who was unable to get it done by any one else in time, and where delay would have occasioned great expense, the Board having paid for the work, and the member having derived no profit from the transaction. Fletcher *v.* Hudson, (L. R., 7 Q. B. D., 611; 51 L. J., Q. B., 48; 30 W. R., 349; 46 L. T., N. S., 125; 46 J. P., 372).

Rule 64 was held to apply to an Improvement Commissioner who was interested in a contract which had been entered into by virtue of the Local Improvement Act, even though the contract was not one which was authorised by the Public Health Act. Lea *v.* Facey (L. R., 17 Q. B. D., 139; 55 L. J., Q. B., 371; 50 J. P., 295; affirmed L. J. Notes, 23rd July 1887, iii.).

It would appear that the contract itself remains in force, notwithstanding the disqualification of the contractor. See Rex *v.* St. Margaret's, Westminster, Paving Commissioners (1 Jur., 104). For there is no such prohibition in the case of a member as that which is contained in sec. 193 with reference to contracts by officers of the Board.—Glen, p. 658–9.

Contracts entered into with any chartered or joint-stock company of which a Commissioner may be a partner, are saved and excepted. In Paterson *v.* Portobello Town Hall Company, 22nd May 1866 (4 M., 726), a contract entered into between the Town Hall Company and the Police Commissioners was sought to be reduced, on the ground that some of the Commissioners were shareholders in the Company, but the Court held—distinguishing from Blaikie case—that the contract was not null on the ground, as Lord Curriehill put it, that the principle contended for does not apply, because the functionaries of the public body in this case were not dealing with themselves individually, but with a separate corporate body, which is a separate body in law. It would be most extraordinary if no public body could enter into a contract with any joint-stock company whatever, however useful or fair the transaction might be, if it happened that any of the functionaries of such public body happened to be also directors or partners of the joint-stock company.

There seems to be some doubt whether the selling or feuing of land to the Commissioners for the purposes of the Act would result in disqualification. The fact that a Commissioner might be the only person who could supply what was wanted, and that the price could be fixed under the Lands Clauses Acts, makes a contract of this kind exceptional.

In the Eyemouth School Board, and also in several parishes where all the land belonged to one proprietor, who was a member of the School Board, the question arose whether such a member could sell or feu his land to the Board. An opinion was therefore taken from Lord Advocate Gordon and Solicitor-General (now Lord) Watson by the Scotch Education Department. The memorial re-

ferred to the Scotch cases of Pender *v.* Henderson, 20th July 1864 (2 M'Ph., 1428), and Tasker *v.* Shaw's Water Company, 22nd Dec. 1866 (5 M'Ph., 256); and to the English cases of Burgess *v.* Wheate (1 Ed., 226), and Bentley *v.* Craven (18 Beav., 75): "We are of opinion that landed proprietors, although members of the School Board, may lawfully sell and convey to the Board in feu, or otherwise, sites for schools, teachers' houses, and gardens. The resolution of the Board to acquire a site from one of their own number, being a landowner, for the purposes of the Act, must, in order to its validity, be carried by the votes of a quorum and majority of the Board, independently of such landowner. It appears to us, however, that it would be expedient that the consideration to be paid by the Board, whether it be a slump price, or a feu-duty, should in such cases be ascertained and fixed under the provisions for the taking of land by agreement of the Lands Clauses Act. The principles given effect to by the Courts of England and Scotland in the decisions cited in the memorial, and the considerations on which these principles rest, have, in our opinion, no application whatever to such cases as are referred to in this query, where a member of the Board may be the only person who can supply that which is necessary for the Board, and where the Legislature have constituted a special tribunal for the purpose of determining what it is fair and reasonable that the Board shall pay for their acquisition. See Education (Scotland) Act, 1878, sec. 31.

The case of tradesmen is less favourably situated, because, in the general case, there are many firms or persons, other than members of the Boards, who can supply the work or materials required by the Board; and in these cases the price to be paid by the Board must be fixed by agreement between them on the one side, and the individual member on the other, and not by an independent statutory tribunal. All we can say regarding such contracts between the Board and a member is, that in law they are not void, but voidable at the instance of the Board—in other words, that the Board can compel implement of the contract, if they conceive it to be for their advantage, but the other contracting party cannot. Whilst, therefore, it appears to us that the Board may not only legally, but as matter of fair administration, enter into such contracts, where circumstances such as are referred to in the memorial render that course pecuniarily advantageous, it is manifestly expedient that, in the general case, such contracts ought to be avoided" (Sellar on Education Acts, 8th ed., p. 181).

Any Commissioner who contravenes this section ceases *ipso facto* to be a Commissioner, and the Sheriff, at the instance of any householder, may declare the office vacant, and inflict a fine not exceeding £100. It will be observed that, although the person contravening ceases at once to be a Commissioner, the office does not become vacant until declared to be so by the Sheriff. Accordingly, in the event of no procedure being taken to have the office declared vacant, it will be incompetent for the Commissioners to proceed to fill the place of the disqualified Commissioner. In such an event, the ques-

tion may also arise, whether the Commissioner, on his disqualification ceasing (*e.g.* by his ceasing to hold an interest in a contract, or otherwise), would be entitled to resume office?

72. Commissioners vacating Office to vacate other Municipal Offices. — Where any Councillor or Commissioner vacates his office as such, either voluntarily or under any statutory provision, such Councillor or Commissioner shall cease to hold any office, whether that of Magistrate or otherwise, which he may hold or has been appointed to in virtue of his being a Councillor or Commissioner; and the place of such Magistrate or officer shall be filled in the manner provided in sec. 25 of the Act 3 & 4 Will. IV. c. 76, and sec. 23 of the Act 3 & 4 Will. IV. c. 77.

The Councillor or Commissioner who vacates office will, under this section, cease to hold any other office, whether as Magistrate, Dean of Guild, or trustee in any office held by virtue of his office as Commissioner. The vacancy is to be filled up, *ad interim*, by the remaining members of the Council or Commission by election by plurality of voices, the Provost or Senior Magistrate having a double or casting voice in case of equality, at a meeting to be called on five days' notice by the Clerk, by intimation in writing to each remaining member of the Council (see sec. 25 of 3 & 4 Will. IV. c. 76, and sec. 23 of 3 & 4 Will. IV. c. 77).

SURVEYOR, INSPECTOR, AND MEDICAL OFFICER OF HEALTH.

73. Surveyor.—The Commissioners shall from time to time appoint a person duly qualified to act as a Surveyor of the paving and drainage and other works authorised under the provisions of this Act, and who shall be called the Burgh Surveyor.

See sec. 4 (9) for definition of "the Commissioners." The appointment should be made at a meeting of the Commissioners.

The words of this section are imperative, differing in this respect from the corresponding section in the Act of 1862. It is not clear what is meant by the expression "from time to time," which is not used in connection with the appointment of the other officials, although they all hold office on a similar tenure, viz. during the pleasure of the Commissioners (see sec. 77 (3)). The use of the words "from time to time" will not authorise the Commissioners to appoint a Surveyor for a fixed period, such appointment being incompatible with an appointment during pleasure. In Morrison *v.* Abernethy School Board, 3rd July 1876 (3 R., 945), Lord Gifford, speaking of the effect of the provision in sec. 55 of the Education

Act that "every appointment shall be during the pleasure of the School Board," said, "I think that the true meaning and effect of sec. 55 of the Education Act of 1872 is, that every schoolmaster appointed under the Act shall hold his office simply at the pleasure of the School Board, and not either for life or for any fixed period. I think it quite impossible to read the enactment as providing that the School Boards may fix, "at their pleasure," any definite time during which the schoolmaster shall have a right to hold office,—in short, that the School Board shall have liberty to contract according to circumstances. On the contrary, I think the Statute deprives the School Board of all power in the matter, and prevents them from making any time-engagement whatever with the teachers whom they may appoint. The Statute appears to me to be imperative in its terms, and to fix in all cases the character of the employment and appointment. The words are, "Every appointment shall be during the pleasure of the School Board." It is not "for such period as the School Board may fix"—it leaves the School Board no discretion. They cannot elect for life, or *ad vitam aut culpam*, or for a period of years, but only "during pleasure." The School Board is a varying body, and the Board of any particular date cannot bind its successors, or even itself, for any time. The enactment seems to me to be that the office of teacher shall be precarious, at the pleasure of the respective Boards. With the policy of this provision I have no concern. If the enactment is clear, it must receive effect,—and I read it as equivalent to a provision that every schoolmaster under the Act may be dismissed at any time and at the mere pleasure of the School Board. I cannot, therefore, agree with the Sheriff-Substitute, who finds that the bargain was for a year certain, renewable by tacit relocation. On the contrary, I agree with the Sheriff-Principal, that the appointment was during pleasure, and terminable whenever the School Board should choose."

The Surveyor is to be "duly qualified." The qualifications are not specified, but they may be gathered from the nature of the duties laid upon him. He is to take a general charge of the paving and drainage and other works authorised by the Act, and to discharge various other duties specified in subsequent sections.

The office may be held jointly with that of Inspector of Cleansing, or Inspector of Lighting, or Sanitary Inspector (see sec. 76). It may also be held by the Chief Constable, but it will seldom happen that an officer of police will possess the technical knowledge required in a surveyor.

The Burgh Surveyor may also hold the office of Master of Works in connection with the Dean of Guild Court (see sec. 204); if so appointed, he will have a separate salary for that office.

74. Inspector of Cleansing.—The Commissioners may appoint an Inspector of Cleansing to superintend and enforce the due execution of all duties to be performed by the scavengers appointed under this Act, and to report to the

Commissioners any breach of the provisions of this Act, or other Acts or bye-laws herein referred to, and the Commissioners shall duly publish the name of any Inspector of Cleansing appointed by them, and shall require him to provide and keep a book, in which shall be entered all reasonable complaints made by any inhabitant of the burgh of any breach of the provisions of this Act, or of the bye-laws made by the Commissioners, and the Inspector of Cleansing shall forthwith inquire into the truth of such complaints, and report upon the same to the Commissioners at their next meeting; and such report, and the order of the Commissioners thereon, shall be entered in the said book, which shall be kept at the office of the Commissioners, and shall be open at all reasonable times to the inspection of any householder, elector of the burgh, or other person interested, and the Commissioners may also appoint an Inspector of Lighting.

See sec. 4 (9) as to definition of "the Commissioners" and (4) "burgh."

While the sections as to the appointment of Surveyor, Sanitary Inspector, and Medical Officer are imperative, that as to Inspector of Cleansing is simply enabling. But certain sections of the Act which impose duties on the Inspector of Cleansing imply that such an officer is indispensable, and it might be held that in this case the word "may" not merely confers a power, but imposes a duty. As to binding force of enabling words, see note to sec. 9 (5), p. 25. The appointment, if made, should be at a meeting of the Commissioners.

Nothing is said of the qualifications of the Inspector of Cleansing, but his duties are set forth in greater detail than those of the other officers. His name is to be published by the Commissioners. The mode of publication is not specified, but no doubt the requirement would be satisfied by an advertisement in a newspaper circulating in the burgh. In addition to the duties specified in this section, a number of specific duties are laid upon the Inspector of Cleansing by various sections. By this section he is required to report as to all breaches of the provisions of this Act, or other Acts or bye-laws herein referred to; but it would be unreasonable to hold that he is to undertake duties which are by Statute laid upon other officers. For instance, all complaints as to sanitary matters will be attended to by the Sanitary Inspector; as to paving, drainage, insecure buildings, etc., by the Burgh Surveyor; as to matters of police, by the Chief Constable.

The duties of the Inspector of Cleansing and the Sanitary Inspector overlap to some extent, and certain duties are laid alternatively on either of these officers. Where the two offices are not held by the same person, it will be necessary for the Commissioners to make

regulations (as authorised by sec. 55 (4)) determining the duties to be performed respectively by each officer.

The authority to appoint an Inspector of Lighting, which is tacked on to the end of sec. 74, seems unnecessary, as the general authority to appoint inspectors and other officers given by sec. 55 (4) would no doubt have sufficed for such an appointment.

75. Sanitary Inspector. — The Commissioners shall appoint a Sanitary Inspector, subject to the provisions of the Public Health Acts, whose duty it shall be to superintend and enforce the sanitary provisions of such Acts and this Act.

The appointment of a Sanitary Inspector is imperative, but, as a matter of fact, there are few burghs in Scotland where such an officer has not already been appointed. The appointment is to be subject to the provisions of the Public Health Acts. The leading provisions regarding the appointment of Sanitary Inspectors are contained in sec. 8 of the Public Health Act of 1867, which runs: "The Local Authority may, and where it shall be thought necessary by the Board for the purposes of this Act the Local Authority shall, appoint a Sanitary Inspector or Inspectors, who shall be also Inspector or Inspectors of Common Lodging-houses, and a Medical Officer or Medical Officers, and may make bye-laws for regulating the duties of such Inspectors and Medical Officers, which bye-laws shall not be effectual until they are approved of by the Board; and the Local Authority shall appoint convenient places for their offices, and shall allow to every such Inspector or Medical Officer on account of his employment a proper salary; and if no such Inspector or Medical Officer is appointed, the Local Authority shall, in all cases in which any duty is laid on them by this Act, appoint some person, where the same shall be necessary, to perform such duty, and shall remunerate him as they shall see fit; and the names and addresses and salaries of the said Inspectors and Medical Officers shall be reported by the Local Authority to the Board immediately on such persons being appointed and such salaries fixed; and the said Inspectors and Medical Officers shall be bound to make such returns and special reports to the Board as the Board shall require them to make; and the said Inspectors shall be removable from office only by the Board, except in the case where the Local Authority is the Town Council, or Police Commissioners, or Trustees in any burgh in Scotland having a Local Act for police purposes, or having a population of 10,000 or upwards according to the census last taken, in which case the Inspectors shall be removable from office by the Local Authority."

The duties of the Sanitary Inspector are to superintend and enforce the sanitary provisions of the Public Health Acts and of this Act. He is *ex officio* Inspector of Common Lodging-houses, and is generally, though not necessarily, Inspector of Dairies. Besides his duties under the Public Health Acts and this Act, the Sanitary

Inspector has duties under other Acts, *e.g.* the Factory and Workshop Acts, especially the Act of 1891. As to the bye-laws for regulating the duties of the Sanitary Inspector, see sec. 97 (3) and notes.

There is considerable doubt how far the Sanitary Inspector of a county appointed under the Local Government Act is entitled to act within a police burgh. On the one hand, the County Sanitary Inspector's salary is paid out of the general purposes rate, which is levied on police burghs as well as on landward districts, and the police burghs have therefore an equitable claim to a share of his services. On the other hand, police burghs are expressly excluded from the operation of sec. 11 (4) of the Local Government Act, by which the administration of the Public Health Acts is transferred to the County Councils, and consequently these burghs may be held to be outwith the sanitary jurisdiction of the County Council and the officers appointed by them. A question was addressed to the Lord Advocate in the House of Commons on this point. Mr. Reid asked "whether a burgh, with a separate Local Authority to administer the Public Health Acts, could be legally assessed for the salaries of the County Medical Officer and Sanitary Inspector, for which they were receiving no benefit, inasmuch as the burgh was already assessed by the Burgh Local Authority for the salaries of the Burgh Medical Officer and Sanitary Inspector?" The Lord Advocate (Robertson) replied that "the salaries of these county officers are paid out of the general purposes rate, and burghs such as Maxwelltown contribute their proportion towards the payment of these salaries. It is no doubt the case that such burghs are also assessed under the Public Health Act for the salaries of their own Medical Officer and Sanitary Inspector, but in this respect they do not differ from the rural sanitary districts. The new Medical Officer is appointed to take a general supervision of the sanitary condition of the whole county, including both urban and rural districts." The question still remains, however, What is the nature and extent of this "general supervision"?

By sec. 2, iii. (*a*) of the Local Taxation (Customs and Excise) Act, 1890, it is provided that a contribution shall be made "to the amount of £15,000 to the cost of Medical Officers and Sanitary Inspectors appointed under the Public Health (Scotland) Act, 1867, or under the Local Government (Scotland) Act, 1889, as the case may be, in such manner and according to such regulations as may be prescribed by the Secretary for Scotland." The appointments of Sanitary Inspectors in burghs being made under the Public Health Act, the salaries of these officers will rank as claims against this contribution. The regulations issued by the Secretary for Scotland provide, *inter alia*, that to entitle a Local Authority to participate, their arrangements "as regards the amount of salaries and qualification of the officers shall be approved by the Secretary for Scotland, on the recommendation of the Board of Supervision." That Board has formulated certain conditions, which must be complied with before their recommendation is given. These, however, are applicable to the officers of county authorities only.

As to the tenure of office of Sanitary Inspectors (see sec. 77 (3) and notes).

76. Same person may be Surveyor and Inspector.—The Commissioners may, if they think fit, appoint the same person to fill any two or more of the offices in the three immediately preceding sections mentioned.

If the office of Sanitary Inspector is combined with any other office, it will be necessary to keep the salaries distinct, in order that the Commissioners may be entitled to claim a share of the government contribution referred to in the notes to the preceding section.

77. Medical Officer of Health.—(1.) The Commissioners shall appoint a Medical Officer of Health, who shall be a registered medical practitioner, and who shall also, if appointed after the 15th day of May 1894, be registered on the Medical Register as a holder of a diploma in sanitary science, public health, or State medicine, under sec. 21 of the Medical Act, 1886.

The appointment of a Medical Officer of Health is imperative, and it is also imperative that any Medical Officer of Health appointed after 15th May 1894 should hold a diploma in public health. As to the power of the Medical Officer of the county to act in police burghs, and as to the contribution from the local taxation account to the cost of Medical Officers, see notes to sec. 75.

(2.) It shall be the duty of the Medical Officer to ascertain the existence of disease within the limits appointed to him, especially of all infectious diseases, and to point out any local causes likely to occasion or continue such diseases, or otherwise injure the health of the inhabitants, and to point out the best means of checking or preventing the spread of such diseases, and from time to time, as required by the Commissioners, to report to them upon the matters aforesaid, and to perform any other duties of a like nature which may be required of him, as well as all duties pertaining to Medical Officers under the Public Health Acts.

In addition to the general duties set forth in this sub-section, specific duties are laid upon the Medical Officer of Health by various sections of the Act. The duties pertaining to Medical Officers under the Public Health Acts will be found in the Public Health Act, 1867, and in the Factory and Workshop Acts, Infectious Disease (Notification) Act, Housing of the Working Classes Acts, etc.

(3.) The Commissioners shall make bye-laws for regulating

the duties of the Medical Officer of Health and the Sanitary Inspector, subject to the approval of the Board of Supervision, in manner provided by the Public Health Acts. The Burgh Surveyor, Inspector of Cleansing, Inspector of Lighting, Sanitary Inspector, and Medical Officer of Health shall hold office during the pleasure of the Commissioners, but as regards the two last-mentioned officers subject to the provisions of sec. 54 of the Local Government (Scotland) Act, 1889.

Sec. 8 of the Public Health Act, 1867, provides for the making of bye-laws for regulating the duties of the Medical Officer and Sanitary Inspector, but under the Public Health Act the making of bye-laws is permissive (see the section which is quoted *in extenso* under sec. 75),—under this Act it is imperative. As these bye-laws refer solely to officers of the Commissioners, it will not be necessary to carry out the procedure as to confirmation and publication set forth in secs. 316 to 324.

The various officers hold office at the pleasure of the Commissioners, but, in the case of the Medical Officer and Sanitary Inspector, subject to the provisions of sec. 54 of the Local Government Act. The Burgh Surveyor, Inspector of Cleansing, and Inspector of Lighting are thus removable at the will of the Commissioners without any reason being assigned. But although the engagement is terminable at pleasure, it does not follow that it may be terminated without notice. In Morrison *v.* Abernethy School Board, 3rd July 1876 (3 R., 945), it was held that a schoolmaster, who held office during the pleasure of the School Board, was entitled at common law to reasonable notice before dismissal, or to a money payment in lieu thereof. The Lord Justice-Clerk (Moncreiff) said: "There is no doubt about the tenure. The only question is, what a tenure 'at pleasure' implies. It is said that we cannot import the common law into the Statute. From this I entirely dissent. The Statute necessarily imports the common law by providing that the teacher shall hold office during the pleasure of the School Board. We are compelled to resort to the common law to ascertain what are the incidents of a tenure at pleasure. I think that a tenure at pleasure, while it implies the right of the employer to dismiss the employed at any time, without reason assigned, lays upon him an obligation either to give reasonable notice or compensation in lieu of notice. It is not necessary to go into the principle of this rule, because it has been applied in so very many cases; but the rule is based on obvious equity. Our judgment will not allow a schoolmaster to retain his office one day longer than the Board thinks fit, but it will secure to men offering their services as teachers to School Boards that they will not be obliged to leave suddenly without compensation."

But the tenure at pleasure of the Medical Officer of Health and the Sanitary Inspector is very greatly modified by the provisions of sec. 54 (4) of the Local Government Act, which provides: "Every Medical Officer and every Sanitary Inspector appointed under this Act,

or under the Public Health Acts, shall be removable from office only with the sanction of the Board of Supervision." By sec. 8 of the Public Health Act (which is quoted in the notes to sec. 75, *supra*), it is provided that in burghs with a population of ten thousand or upwards, the power of removing Sanitary Inspectors should lie with the Local Authority alone. This proviso, however, is superseded, and no Sanitary Inspector can be removed without the sanction of the Board of Supervision. That Board obtained the opinion of counsel—Lord Advocate (Robertson), Dean of Faculty (J. B. Balfour), and Mr. Gillespie—as to the grounds upon which they were entitled to sanction the removal of officers. Counsel stated: "In answer to this question, we are of opinion (1) that the Board is bound to grant consent on being satisfied that the officer is unfit or incompetent. But we are further (2) of opinion that the Board ought to consent to the removal of any individual Inspector, on being satisfied that the office which he holds is unnecessary. Looking to the reorganisation which is contemplated by the Act, and particularly by the 52nd section of it, we think it is the duty of the Board to facilitate this reorganisation by consenting to the removal of any existing Inspector, on being satisfied that his office is unnecessary. We consider that the Inspectors do not hold their office *ad vitam aut culpam*, and it would be unfortunate if they did, as this might very seriously impede the introduction of the new arrangements, as well as the general efficiency of the administration. On the other hand, we think that Inspectors will be fully secured against unjust or capricious dismissal, by the necessity of satisfying the Board that the officers are incompetent, or that the offices which they are to vacate have become unnecessary, or that some other good reason exists for no longer continuing their services. We are of opinion that the Board must satisfy itself upon this matter in each case, giving due weight to the averment of the Local Authority, but applying its own mind to a consideration of the circumstances." In answer to a further question, whether the provision of sec. 54 (4) of the Local Government Act can be held to import an *ad vitam aut culpam* appointment in the case of Medical Officers, counsel stated: "We do not think that the section referred to imports an *ad vitam aut culpam* appointment in the case of Medical Officers. We have already expressed an opinion to the effect that the consent of the Board, which is required for the removal of Inspectors, does not import any such tenure. In both cases we think that that consent may be given if the public interest is found to require either the removal of the individual or the abolition of his office." Counsel further stated: "We are further of opinion that the necessity for obtaining the sanction of the Board of Supervision cannot be evaded by the appointment being made for a limited period. The principle which has been applied in the case of Town-Clerks of royal burghs (see Marwick on Municipal Elections, p. 346, and cases there cited) seems to be applicable in the present cases also."

PART III.—POLICE FORCE.

CHIEF CONSTABLE AND CONSTABLES.

78. Appointment of Chief Constable and of Constables.—The Commissioners of burghs which at the date of the last census had a population of not less than seven thousand, and at the date of the passing of this Act maintain a separate police force, and of burghs which at the date of the last census had a population of not less than twenty thousand, and of any burgh with respect to which it shall be at any time proved to the satisfaction of the Sheriff, on the application of the Commissioners of such burgh, that it has a population of not less than twenty thousand, shall from time to time appoint a Chief Constable, at a fixed annual salary, who shall not be removable or subject to have his salary diminished by the Commissioners, unless with the approbation of the Chief Magistrate of the burgh and the Sheriff, or, in case of their differing in opinion, of the Secretary for Scotland, but may be suspended by the Magistrates, with consent of the Sheriff, for a definite period pending any inquiry instituted with a view to his removal: and as often as such Commissioners shall fix the number of constables which they shall judge to be necessary for the burgh, and the rank and designation of such constables, the said Chief Constable shall appoint proper persons for the duty, subject (so long as any contribution is made from public funds towards the expenses of the police force of the burgh) to such regulations as may be made from time to time by the Secretary for Scotland, and shall have power to direct their distribution within the burgh, and to suspend or remove them at pleasure; and the Chief Constable may also be appointed to any one or more of the offices of Burgh Prosecutor, Burgh Surveyor, Inspector of Cleansing, Inspector of Lighting, Sanitary Inspector, and Firemaster.

It shall be lawful to appoint the same person to be Chief Constable for two or more adjoining burghs, whether situated in one or more counties, if the Commissioners of such burghs shall agree to join in such appointment; and the Chief Constable of a burgh may, if the Commissioners shall agree to

join in such appointment, be appointed, by the Standing Joint Committee of the county, Chief Constable of the county in which such burgh is wholly or partly situated, or of any county closely adjacent; and the Chief Constable of a county or any Superintendent of a division of the county may, if the Standing Joint Committee of the county shall agree to join in such appointment, be appointed Chief Constable of any burgh situated within or closely adjacent to such county or division of a county; and in like manner it shall be lawful for the Chief Constable of a county, with the sanction of the Standing Joint Committee, to appoint the Chief Constable of any burgh, situated within or closely adjacent to any division of the county, to be Superintendent at the head of the constables of such division of the county, if the Commissioners of the burgh shall agree to join in such appointment.

Provided that nothing herein contained shall be taken to prevent the consolidation of county and burgh police establishments in terms of the Police Act, 1857; and the provisions of the said Act as regards consolidation shall apply to all burghs which, at or after the passing of this Act, have, or are entitled to have, a separate police force.

If the Commissioners fail of their own accord, or on the requisition of the Sheriff of the county, within three months after such requisition, to appoint a Chief Constable, or to fix the number of constables for the burgh, or should the Chief Constable, if appointed, fail from any cause to appoint a sufficient number of constables for the burgh, the Sheriff shall in any such case make a representation to the Secretary for Scotland, who shall inquire and report thereon to Her Majesty in Council; and it shall be lawful for Her Majesty, with the advice of Her Privy Council, by Order in Council, to ordain the Commissioners of such burgh to appoint a Chief Constable, and to fix the number of constables for the burgh, and otherwise to give effect to this enactment. The police of the burgh, so long as it is reported efficient by Her Majesty's Inspector of Constabulary for Scotland, shall be certified and treated as an efficient police force under the Police Act, 1857, and for the purposes of that Act the burgh shall not be deemed to form part of the county in which it is situated.

For the purposes of this section, the burgh of Renfrew, and

the police burgh of Lerwick, shall be deemed each to have had at the date of the last census a population of not less than seven thousand.

Three classes of burghs under this Act may appoint a Chief Constable—(1) Those having a population of not less than seven thousand, which at the date of the passing of the Act maintained a separate police force; (2) Burghs which, at the date of the last census, had a population of not less than twenty thousand; and (3) Any burgh which can prove to the satisfaction of the Sheriff, on the application of the Commissioners, that it has a population of not less than twenty thousand. It will be observed that the words used under the first category are: "At the date of the passing of the Act." Now, the date of the passing of the Act was 28th June 1892, while the date of the commencement of the Act is 15th May 1893 (sec. 2). The appointment ought to be made at a regular meeting of the Commissioners duly called, and if there be more than one candidate the appointment should be made by a plurality of voices, as before indicated in discussing that subject. At a meeting of statutory Police Commissioners, held for the purpose of filling up the vacant office of Superintendent of Police, a candidate having been preferred by a majority of votes taken by ballot, with the addition of the casting-vote of the chairman—the Court considered this mode of voting illegal. Watson *v.* Glasgow Commissioners of Police, 10th March 1832 (10 S., 481; 7 F., 370).

The Chief Constable is entitled to receive a fixed annual salary, and is not removable, or subject to have his salary diminished, except with the approbation of the Chief Magistrate and the Sheriff. If they differ, the Secretary for Scotland is to be the judge. The Magistrates, with the consent of the Sheriff, may suspend the Chief Constable for a definite period, pending any inquiry with a view to his removal. It will be observed that the power of suspension lies with the Magistrates, not with the Commissioners.

The Chief Constable, after the Commissioners have fixed the number of constables and the rank and designation of these, is to appoint proper persons to the duties, subject to regulations to be made by the Secretary for Scotland. The Police Act, 1857, 20 & 21 Vict. c. 72, sec. 3, provides that "rules for the government, pay, clothing, accoutrements, and necessaries of such constables as may be appointed under this Act, shall from time to time be made by one of Her Majesty's Principal Secretaries of State." This provision has until now applied to the county police only, and as the "regulations" to be made under this Act are not limited, it may be assumed that they will be as general as under the older Act. The Chief Constable has power to direct the distribution of the constables within the burgh, and to suspend or remove them at pleasure. The Chief Constable is eligible for any one or more of the offices of Burgh Prosecutor (see sec. 461), Burgh Surveyor (sec. 73), Inspector of Cleansing (sec. 74), Inspector of Lighting (sec. 74), Sanitary Inspector (sec. 75), and Firemaster (sec. 291).

The Police Act, 1857, 20 & 21 Vict. c. 72, sec. 61, provides that it shall be lawful "for the Commissioners of Supply of any county, and for the Magistrates and Town Council of any burgh situated in or adjoining to such county, to agree together for the consolidation of the county and burgh police establishments; and in every such case, all the constables appointed either for the county or the burgh shall have all the powers, privileges, and duties throughout the county and the burgh and the adjoining counties, which constables appointed for any county have within such county or adjoining counties under this Act, and all the provisions of this Act shall be taken to apply to the burgh constables as well as to the county constables; and the Magistrates and Council of the burgh shall thereupon forthwith, and thereafter annually, on or before the 30th day of April, appoint to be members of the Police Committee hereinbefore mentioned, one or more of their number as may have been fixed in such agreement, who, while the agreement subsists, shall have the like powers, as members of such Committee, with the members appointed by the Commissioners of Supply; and every such agreement which shall have been agreed to by the Commissioners of Supply of the county on the one hand, and by the Magistrates and Town Council of the burgh on the other hand, shall be binding on both parties as soon as a memorandum of such agreement shall be signed by the Convener of the Commissioners of Supply and Clerk of Supply of the county on behalf of the county, and by the Chief Magistrate and Town-Clerk of the burgh on behalf of the burgh; and when any such agreement shall have been made between any county and any burgh, either party shall be empowered to put an end thereunto without the consent of the other party, after six months' notice in writing shall have been given to the other party; such notice, if given by the county, to be signed by the Convener of the Commissioners of Supply and Clerk of Supply of the county, and if given by the burgh, to be signed by the Chief Magistrate and Town-Clerk of the burgh: provided always, that no such notice shall be given by the county or by the burgh, unless in either case such notice shall be agreed upon by a majority of three-fourths of a meeting of the Commissioners of Supply of the county, specially convened for the purpose, or at one or other of the statutory meetings of the Commissioners of Supply, fourteen days' notice having been given of the intention to bring such subject before the meeting, or three-fourths of the Magistrates and Town Council of the burgh; and no such notice shall be given by any county or burgh without consent of one of Her Majesty's Principal Secretaries of State." By the Local Government Act, 1889, the County Council is substituted for the Commissioners of Supply, and the County Clerk for the Clerk of Supply; and the Standing Joint Committee of the county takes the place of the Police Committee. See the Local Government Act, sects. 11 (1), 12 (4), and 18 (1) and (5).

It will be observed that under this clause the Chief Constable is to appoint proper persons for the duty of constables, the Commissioners only having power to fix the number of these. Under the old Edinburgh Police Acts a somewhat similar provision existed;

charging them with certain financial and fiscal duties, but not giving them the power to appoint a Police Superintendent, or of interfering with the criminal department, except to fix the number of constables. They were therefore held not liable for a wrongous apprehension and assault committed by a constable belonging to the police force which they paid. Thomson *v.* Mitchell (1 Robinson App., 162, 1840). But in Melvin *v.* Wilson, 22nd May 1847 (9 D., 1129), the liability of the Police Superintendent for the acts of his subordinates was assumed, though in that case it was held that the watchmen were justified in apprehending and securing a prisoner who had been found carrying a peacock at an early hour in the morning, and brought to the police office, in the cells of which he was confined on suspicion of having stolen it. So again in Young *v.* Glasgow Magistrates, 16th May 1891 (18 R., 825), in an action of damages for wrongous apprehension against two police constables and the Magistrates and Town Council of Glasgow as Police Commissioners, the Magistrates and Town Council were assoilzied, on the ground that the constables were not their servants, the control and management of the police being vested in another statutory body, a committee of the Police Commissioners and the Sheriff. In this case the trial proceeded against the two constables alone, and they were found liable in damages upon an issue, on which it was held that the pursuers were bound to aver malice and want of probable cause.

In Pringle *v.* Bremner and Stirling, 6th May 1867 (5 Mac., H. L., 55), in an action of damages raised against the Chief Constable of Fife and a sergeant in the constabulary, the House of Lords (reversing the judgment of the Court of Session), held the action relevant where the pursuer alleged that the defenders had illegally and without warrant searched his repositories and apprehended and imprisoned him, leaving the defenders to justify their conduct at the trial.

The Chief Constable has, however, a considerable discretion vested in him, and it is not every error in judgment, particularly in relation to a precautionary act, that will render him liable in damages.

In Brown *v.* Murray, 6th March 1874 (1 R., 776), unofficial and inaccurate cards of certain horse races were being sold in a burgh near the race-course. The proprietor of the official card applied to the Superintendent of Police, who, being apprehensive that the sale of inaccurate cards would lead to a breach of the peace, went to the shop of the publisher, and there, by strong remonstrances, though without express threats of criminal procedure, induced him to stop the sale. *Held*, that neither the Superintendent nor the proprietor of the official card were liable in damages to the publisher for loss of profit.

A Superintendent of Police has no power, without the authority of a Magistrate, to convey a prisoner to a place beyond the bounds in which he is entitled to act. See Hollands *v.* Richardson, 12th July 1843, 5 D., 1352. See sec. 494, entitling Magistrates to require the dismissal of constables.

79. Declaration by Constables.—The Chief Constable and other constables so appointed shall, before a Magistrate,

make the following declaration—*videlicet*, "I hereby do solemnly, sincerely, and truly declare and affirm that I will faithfully discharge the duties of the office of constable."

This declaration must be taken by the Chief Constable and all other constables appointed under the Act, and should be made before the Magistrate immediately on appointment.

80. Powers of Constables.—The Chief Constable and constables shall have all the powers and privileges which any constable or police officer duly appointed has, by virtue of the common law or by Statute, in the burgh for which they are so appointed, and in any county in which such burgh is wholly or partly situated, and in any burgh contiguous or adjacent to such burgh, and in any harbour, bay, loch, or anchorage within or adjoining such burgh or county.

The powers of constables at common law are very difficult to define. Erskine says: "It is their duty to apprehend offenders against the peace, vagrants, frequenters of disorderly houses, and such as can give no account of themselves, and carry them to justice; to suppress riots, with the assistance of the neighbourhood, and apprehend the rioters, but after the riot is over no constable is authorised to lay hold of any person concerned in it unless one has been dangerously wounded in the fray."—Erskine, i. 16. See also Hume, i. 386, ii. 75; Barclay's Digest.

For the constables' powers under Statute, reference may be made to the various Police Statutes under which they act. Their powers under this Statute will be seen therein. Constables are privileged when acting within the sphere of their duty, and may even apprehend without a warrant (see sec. 86), but that is always a question of circumstances whether it is justifiable or not. See Melvin *v.* Wilson, 22nd May 1847 (9 D., 1129); Peggie *v.* Clark, 10th Nov. 1868 (7 M., 89); Young *v.* Magistrates of Glasgow, 16th May 1891 (18 R., 825).

81. Police Arrangements for other Burghs.—All other burghs shall be supplied with constables by the counties in which they are situated, under the provisions of the Local Government (Scotland) Act, 1889, or, in the option of the Commissioners of the burgh, under the provisions hereinafter contained, and in the latter case the Chief Constable of the county, in making his arrangements for distributing the constables within the county, shall, on the requisition of the Commissioners of such burghs, appoint as constables for the burgh all or any one or more of the county constables, who in virtue of such appointment shall, in addition to the powers of,

and duties incumbent on them as county constables under the Police Act, 1857, have all the powers of and shall perform all the duties incumbent on them as constables under this Act, and such Chief Constable shall also appoint one of the said constables to be stationed in the burgh, and to hold the position of Chief Officer of Police in the burgh; and such Chief Officer of Police shall, for the purposes of this Act, and subject to the control and orders of such Chief Constable, and of any officers having by special authority of such Chief Constable the duty of supervising the constabulary force stationed within the burgh (but only so long as his appointment by the Chief Constable continues in force), hold the position of Chief Constable in the burgh, and possess all the powers (except that of appointing, distributing, suspending, removing, or imposing fines on constables), and be entitled to act in all other respects as other Chief Constables appointed by the Commissioners under this Act, and all the powers and authority conferred on Chief Constables appointed by the Commissioners under this Act shall be held, and may at his pleasure be exercised, by the Chief Constable of the county, and by any officers having special authority as aforesaid; and the expenses to be incurred in carrying out this arrangement shall be borne and disbursed by the County Council of the county; and it shall be lawful for the Commissioners of such burghs from time to time during pleasure, with the consent of the Standing Joint Committee of the county, to appoint such Chief Officer of Police to any office in the burgh which it would be competent for the Chief Constable of a burgh to hold; and it shall also be lawful for the Commissioners of such burghs, and they are hereby required, to contract with and agree to pay out of the burgh general assessment to the County Council of the county in which the burgh is situated, such sums as may from time to time be found requisite for the constabulary service within the burgh, as the same may be agreed on between themselves and the Standing Joint Committee of the county, or, failing such agreement as aforesaid, as shall be fixed by the Sheriff after hearing parties, and whose decision shall be final, and the expense defrayed by the County Council under the two heads of general expenditure and local expenditure for the police in the said burgh shall be paid to the

County Treasurer out of the burgh general assessment, which payment shall be regulated and determined in accordance with the provisions of sec. 59 of the Police Act, 1857; and so long as the sums, either fixed by agreement or determined as aforesaid, are duly paid by the Commissioners of such burghs, all the powers to assess for the purposes of the said Police Act, 1857, within the burgh for which the same are paid, shall be suspended; and the Chief Magistrate of such burgh shall be *ex officio* a Justice of the Peace, and a Commissioner of Supply of each and all of the several counties in which any part of such burgh may be situate; and so long as such contract or arrangement subsists, it shall be lawful to act upon it, although the population may, according to the last census for the time, amount to twenty thousand or upwards; but without prejudice, in that event, but in that event only, to the Commissioners terminating the contract, after twelve months' notice, and themselves appointing a Chief Constable, and having constables, as in the case of burghs having a population of twenty thousand or upwards, in which case all the powers of assessment within the burgh for the purposes of the said Act shall thereafter cease and determine.

Provided always, that sec. 73 of the Police Act, 1857, shall, from and after the commencement of this Act, be read and construed as if after the words "any burgh being a royal or parliamentary burgh, or burgh of barony or regality," therein occurring, the words "or police burgh" were therein added.

By sec. 13 of the Local Government (Scotland) Act, 1889, 52 & 53 Vict. c. 50, it is provided that, "where a burgh or police burgh contains a population of less than seven thousand, then, on and after the appointed day, all powers, duties, and liabilities of the Magistrates and Council or Police Commissioners of such burgh or police burgh, if any, in relation to the raising, management, and maintenance of a police force — hereinafter referred to as the administration of the police—shall cease, and subject to the provisions of this Act as to the existing members of the police force, the County Council shall have the same powers and duties, and shall have transferred to it the same liabilities as regards the administration of police within such burgh or police burgh, as they have in every other part of the county. For the purposes of sec. 74 of the Police Act, 1857, the expression 'this Act' shall include the Local Government (Scotland) Act, 1889, and shall be held to apply to police burghs."

And by sec. 18, sub-head (5), it is provided that "the Standing Joint Committee appointed in terms of this section shall, after the appointed day, be deemed to be the Police Committee under the Police Act, 1857, and shall have all the powers of such Committee, and be subject to all the provisions of that Act, except in so far as these provisions are expressly modified by this Act."

And by sec. 60 it is provided that, "in order to give effect to the provisions contained in secs. 13 and 14 of this Act, with respect to the burghs and police burghs therein referred to, the following further provisions shall have effect:—

"(1) The County Council and the Town Council or Police Commissioners of any such burgh or police burgh, as the case may be, may make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act, in manner and to the effect hereinafter provided;

"(2) In case of any inability to agree upon any matter requiring adjustment for the purpose of this Act, the Boundary Commissioners hereinbefore appointed, and, after the expiry of the powers of the Boundary Commissioners, the Secretary for Scotland, on the application of either party, may by order make the adjustment in the manner and to the effect hereinbefore provided.

"(3) Every such burgh shall contribute to the county fund in aid of the expenditure thereout for the administration of the Police and of the Contagious Diseases (Animals) Acts, or for the latter purpose only, as the case may be.

"(4) For the purpose of every such contribution, the rateable property of the burgh, as appearing on the Valuation Roll of the burgh, shall be included in the rateable property of the county, and the item of the consolidated rates applicable to the expenditure, in the immediately preceding sub-section mentioned, shall be ascertained and fixed accordingly, as if such burgh were one of the parishes in the county; but the amount of the contribution apportioned to the burgh shall not be assessed by the County Council on the several lands and heritages in such burgh, but shall be paid by the Town Council out of the police assessment, or, if there is no police assessment, out of any other assessment imposed and levied therein, or out of the common good of such burgh.

"(5) The lands and heritages within any such police burgh shall be assessed by the County Council in respect of the expenditure on the administration of the Police and of the Contagious Diseases (Animals) Acts, in the same manner as other lands and heritages within the county."

And by sec. 73 of the Police Act, 1857, it is provided that, "if under this Act any burgh, being a royal or parliamentary burgh, or burgh of barony or regality, containing by the Government census immediately preceding more than two thousand inhabitants, shall be comprehended in and form part of any county or district for the purposes of this Act, the Chief Magistrate of such burgh shall be an *ex officio* member of the Police Committee of the county or district: provided always, that there shall never be more than two such

members of any Police Committee, and if more than two such burghs shall be so comprehended, the Chief Magistrates of such burghs shall be members of the Committee in annual rotation, the Chief Magistrates of the two burghs which contain the greatest amount of population, as shown on such census, being members of the Committee for the year commencing on the 1st day of November next, and the like order being observed annually in regard to the Chief Magistrates of the other burghs respectively."

See sub-head (25), sec. 4, for definition of "police burgh."

Sec. 81 provides for the police arrangements of the burghs to which sec. 78 does not apply. These burghs are to be supplied with constables by the counties in which they are situated, either under the provisions of the Local Government Act (in which case the burgh would be assessed for police purposes as part of the county), or, in the option of the Commissioners, under certain new provisions contained in this section. None of the new provisions will apply to those burghs where the Commissioners elect to continue the existing arrangements under the Local Government Act. Where the Commissioners resolve to adopt the new arrangement, the expense will be defrayed in the first instance by the County Council, but that body will be reimbursed by the burgh paying out of the burgh general assessment such sums as may be agreed upon between them and the Standing Joint Committee of the county, or, failing agreement, as may be fixed by the Sheriff, in conformity with sec. 59 of the Police Act, 1857. Sec. 59 of the Police (Scotland) Act, 1857, 30 & 31 Vict. c. 72, provides: "If the Secretary of State shall approve of such division of the county (the division of the county into districts as provided by sec. 58), or of any part thereof into police districts, for the purpose aforesaid, the expense of putting this Act into execution in such county, or part of such county, shall be classed under two heads of general expenditure and local expenditure; and the general expenditure shall be defrayed in common by all the districts, and the local expenditure, consisting of the expense of the salaries and clothing of the constables appointed for each district, and such other expenses as the Commissioners of Supply, subject to the approval of the Secretary of State, shall direct to be included under this head, shall be defrayed by each police district separately; and the assessments under this Act shall be assessed and levied in such police district accordingly: provided always, that, notwithstanding the division of any county or part of any county into police districts, the constables of all such districts shall continue as part of the same force, and be subject to the same authority, and be liable, if required, to perform the same duty, in any part of the county or elsewhere, as if no such division into police districts had been made." So long as these sums are paid, the power of the County Council to assess the burgh for police purposes is suspended. A burgh which has adopted this arrangement may, in the event of its population increasing to twenty thousand or upwards, either continue to act upon that arrangement, or may, after twelve months' notice, terminate the contract, and themselves appoint a Chief Constable and employ other constables,

in terms of sec. 78. There is no specific provision enabling the Commissioners of a burgh to terminate the contract or agreement entered into under the provisions of this section, and to revert to the arrangement provided for by the Local Government Act, but possibly such a course would not be incompetent.

82. Additional Number of Constables for Burghs temporarily.—Where in any burgh there is, during part of the year, a large increase of the population, either for the purposes of trade or for recreation and health, whereby, or for any other reason, it is necessary or expedient to have an additional number of constables in such burgh, it shall be lawful for the Chief Constable of the county in which such burgh is situated, or of any other county, with the consent of the Standing Joint Committee of the county, or the Chief Constable of any other burgh, with the consent of the Magistrates, on the application of the Commissioners of such burgh, accompanied, if so required, with a satisfactory undertaking to pay the expenses after mentioned, to direct the constables of such county or burgh respectively to proceed to and act temporarily as constables in such burgh; and such constables, during the time they are so doing duty in such burgh, shall have all the powers and perform all the duties of constables in such burgh; and the expenses to be incurred in sending the constables to, and bringing them back from, such burgh, and the remuneration for the services of the constables, and all expenses incident to such services, shall form a charge against such burgh, and the Commissioners thereof shall pay the same out of the burgh general assessment of such burgh; and in case of dispute, the amount thereof shall be ascertained and fixed by the Sheriff in a summary manner, whose decision shall be final: Provided that the Chief Constable of any burgh may, with the sanction of the Chief Magistrate, appoint additional constables to act within such burgh on any special occasion, or for such period for which such additional constables may be deemed by him to be necessary, and such additional constables so appointed shall have all the powers of police constables.

A question may arise here, whether under the words "it shall be lawful," for the Chief Constable, in the circumstances stated, to direct the constables to proceed and act in a burgh, implies an obligation on the part of such Constable to grant the request, or if a

discretion is vested in him to grant or refuse. It is only the question of expenses in the event of a dispute, which is to be fixed by the Sheriff, and it would have obviated any difficulty on this score had this matter likewise been committed to the Sheriff. The correct view seems to be that the discretion lies, not with the Chief Constable, but with the Standing Joint Committee of the county, or with the Magistrates (as the case may be), whose consent is necessary, before the Chief Constable can act. It would appear that the giving or withholding of the consent lies in the discretion of the two bodies respectively, but such consent being given, and the other requirements of the Statute being complied with, the Chief Constable would have no option, but is required to act in terms of the section.

83. Power to detach Constables to other Places.—On the requisition of the Sheriff of any county or Chief Magistrate of any burgh in Scotland, the Chief Constable of any burgh, or Chief Constable of any county, shall, if so directed by the Magistrates of the burgh or the Standing Joint Committee of the county respectively, or, in case of urgency, by the acting Chief Magistrate or the Chairman of the Standing Joint Committee respectively, detach constables to act in other counties or burghs, guarantee being obtained for outlay and expense, and also a reasonable sum for the services of the constables, and also for provision in case of constables being injured or killed; and during the time they are so doing duty in other counties or burghs, the constables shall have all the powers and perform all the duties of the constables in such counties or burghs respectively; and further, on the requisition or order of the Secretary for Scotland, the Chief Constable of any burgh, or the Chief Constable of any county, shall have power to supply a certain portion of the police force under his charge for any special or temporary duty or service elsewhere within Scotland, the proportion from any one force not to exceed ten per centum, and the expense to be defrayed by the force requiring the extra police assistance.

Apparently, under this section, the Magistrates of a burgh, or the Standing Joint Committee of a county, are to have a discretion as to whether the Sheriff's or Chief Magistrate's request for constables in an emergency is to be granted. Possibly the good judgment of Magistrates and the Joint Committees may obviate any difficulty under this head.

Although this Act applies in general to burghs only, the enactment in this section applies to both burghs and counties.

There is no provision in this section, such as is made in the preceding section, to meet the case of a dispute as to the expenses.

84. Constables may execute Warrants.—All warrants and deliverances by any Lord Commissioner of Justiciary, Sheriff, Magistrate, Justice or Justices, Court, or other lawful authority, which may be issued in any criminal proceeding, may be served and executed, and all services, citations, and executions in any such criminal proceeding may be made and given by the Chief Constable, or by any constable appointed under this Act.

It will be observed that the warrant and deliverance here referred to are limited to those issued in regard to criminal proceedings (see also secs. 472 and 475 as to warrants).

The Act 44 & 45 Vict. c. 33, sect. 12, provides that "all summonses, complaints, warrants, orders, or other process in prosecutions under the Summary Jurisdiction Acts, at the instance of procurators-fiscal, parochial boards, or school boards, may be served and executed by police constables within the county, burgh, or police district in which the persons upon whom the same are to be served reside, or may be found."

85. Constables to account for Fees.—It shall not be lawful for any constable acting under this Act to receive for his own use any fee for the performance of any act done by him in the execution of his duty as such constable; but this enactment shall not extend to prevent the receipt by any such constable of any fee or other payment which he may be liable to account for or pay over to the Commissioners, or otherwise for the use of the burgh.

The constable, under this section, will not be entitled in future to receive any gratuity for the performance of an act done in the execution of his duties as constable. But this clause will not prevent a constable receiving a reward for meritorious services (see sec. 89).

86. Duties of Chief Constable and Constables.—It shall be the duty of the Chief Constable, and of the constables to be appointed by him, to guard, patrol, and watch within the burgh, according to the regulations to be prescribed by the Chief Constable, under the control of the Commissioners; and it shall be lawful for the said Chief Constable, or any constable of police, without any other warrant than this Act, to apprehend and to bring before the Magistrates of Police all persons actually committing any criminal, riotous, or dis-

orderly act, or accused or suspected of having committed crimes, delinquencies, or offences, of whatsoever description, and at what place and period soever the same may have been or are suspected to have been committed, whether the same be of such a kind as can be competently tried before the Magistrates of Police, or be of a nature requiring to be remitted for trial before another tribunal, or which, from having been committed beyond the bounds of the burgh, fall to be tried in another jurisdiction; and the Chief Constable and constables shall obey the orders of the Magistrates, and at all times afford their aid and assistance to the Magistrates, and to all other Judges and Magistrates having jurisdiction within the burgh, in all matters relating to the preservation of peace and good order, the suppression of nuisances, and the removal of obstructions within the burgh, and shall enforce the observance of all bye-laws, orders, rules, and regulations made, or to be made, by the Commissioners, and they shall give attendance at the Police Courts of the burgh, and, when required, at all meetings of the Commissioners or their Committees, and furnish them with all explanations relating to matters falling within their several departments of duty.

The duties of the constables are limited to the burghs (see definition sub-head (4), sec. 4). The Chief Constable will have regulations framed for the guidance of the constables under the control of the Commissioners. Though the constables are authorised, without any other warrant than the Act, to apprehend and bring before the Magistrates persons committing, or suspected of committing, crimes, this power must be exercised with considerable caution.

The Lord President (Inglis) said in Peggie *v.* Clark, 10th Nov. 1868 (7 M., 89): "I am of opinion that under special circumstances a police officer is entitled to apprehend without a warrant, and it will always be a question whether the circumstances will justify the apprehension;" and in the same case Lord Deas said: "There are many exceptional cases in which police officers or constables are entitled to apprehend without a written warrant, and for such cases no Statute was required. If a policeman or constable sees a crime committed, it is his duty to apprehend the criminal at once; or if the criminal is pointed out to him running off from the spot, the same rule would apply. If, again, the criminal is in hiding, or the officer is credibly informed, or has good reason to believe, that he is about to abscond, the officer may *de plano* apprehend him, to prevent justice from being defeated. The same thing would hold if the crime believed to have been committed was murder or the like, the very nature of the punishment of which would render absconding

the probable and natural result of the crime itself. Still further, if a suspected individual belongs to a class of persons reputed to live by crime, or who have no fixed residence, or known means of honest livelihood, in all such cases a police officer or constable has large powers of apprehending without a warrant. . . . If an individual, even although expressly charged with crime by an aggrieved party, be a well-known householder—a person of respectability—what, in our Justiciary practice, we call a 'law-abiding party,' and where there are no reasonable grounds for supposing that he means to abscond or flee from justice, I find nothing in this Statute, any more than in the common law, to justify a police-officer or constable in apprehending him without a warrant." The Police Act of 1857 confers no greater powers on constables than they have at common law.

See also Pringle *v.* Bremner, 6th May 1867 (5 M., H. L., 55); where the defenders, when executing a warrant to search the pursuer's house for pieces of wood, had, without warrant for doing so, inspected his papers and apprehended him, the question was sent for trial, whether they had done so wrongfully and illegally? The police, when they make an apprehension without a warrant, must forthwith take the accused before a Magistrate. The Superintendent has no power in himself to send an accused person without a warrant into another jurisdiction. In Hollands *v.* Richardson, 12th July 1843 (5 D., 1352), in an action of damages against a Superintendent of Police, on the ground that the pursuer had been, by his orders, conveyed as a prisoner to a place beyond the bounds in which he was entitled to act, and there incarcerated—*Held*, that the Superintendent, having merely the power of a constable within his own bounds, had acted illegally and beyond his powers in transmitting the prisoner beyond them without the authority of a Magistrate, and that the pursuer was, therefore, not bound to take an issue with malice.

A constable may accompany a man into another jurisdiction, for the purpose of having a charge investigated, without having the accused in custody as a prisoner, and if no Magistrate can be found at the time, he is entitled to detain the accused in prison a reasonable time till one can be found. Evans *v.* M'Louchlin, 18th Feb. 1859 (21 D., 532; *rev.* 21st Feb. 1861, 23 D., H. L., p. 1; 4 Macq., 89). This was an inland revenue case, but the principles laid down are quite applicable to police practice, being general in their terms.

87. Penalty on persons Obstructing Constables in their Duty.—Every person who shall at any time resist, obstruct, or molest any constable in the execution of his duty, or shall aid or incite any persons so to do, shall for every such offence be liable to a penalty not exceeding £5, or to imprisonment, without the option of a penalty, for a period not exceeding sixty days; and if any person shall assault or

strike any such constable employed as aforesaid, or rescue or attempt to rescue, or aid or incite any person to rescue or attempt to rescue, any prisoner whom any such constable shall have in custody, or be aiding to secure, such person so offending shall, for every such offence, be liable to a penalty not exceeding £10, or to imprisonment without the option of a penalty for a period not exceeding sixty days, without prejudice to any constable or other person on whom such assault or offence may have been committed to sue in any competent Court for compensation, damages, or expenses for any injury or loss he may thereby have sustained.

See sec. 501: O'Brien *v.* M'Phee, 30th October 1880 (8 R., Jus., 8). In England, it has been held that an indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault being made upon him by persons in his custody, with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoners made upon the constable; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody. The Queen *v.* Sherlock (I., C. C., 20), 20th Jan. 1866. A prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and, after an interval of an hour, returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes, the constables forced open the door, entered, and arrested the prisoner, who wounded one of them in resisting his apprehension. *Held*, that as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. The Queen *v.* Marsden (I., C. C., 131), 20th April 1868.

88. Constables not to Resign without Leave or Notice.—No constable shall resign his office, or withdraw himself from the duties thereof, unless expressly allowed so to do in writing by the Magistrates or by the Chief Constable, or until he has given to the Chief Constable one month's notice; and every constable who so resigns or withdraws himself, without such leave or notice, shall be liable to forfeit all arrears of pay then due to him, and, on conviction before a Magistrate, to a penalty not exceeding £5, or to imprisonment for a period not exceeding fourteen days, without the option of a fine.

See sec. 501 as to penalty and imprisonment.

In Innes *v.* Adamson, 25th Oct. 1889 (17 R., 11), a police constable brought an action of damages for slander against a Chief Constable, his superior officer, stating that the defender had, in the presence of two police officers, maliciously and without probable cause slandered him, by saying that he had given in a false report, that that report was a lie, and that instead of attending to his duties, he had merely been putting off his time. The Court *dismissed* the action as irrelevant, holding—(1) That it appeared from the pursuer's statement that the defender was acting within his duty in admonishing his inferior officer in regard to the report, and that his statement was privileged; and (2) That the pursuer in averring malice had failed to state specifically facts and circumstances from which malice was to be inferred. Observed that in certain cases of privilege a general averment of malice is sufficient.

A police constable tendered his resignation to the Chief Constable of his district, but the latter refused to accept the resignation, and dismissed him from the force. He raised an action of damages against the Chief Constable, on the ground that the dismissal was malicious and without probable cause. The Court *dismissed* the action as irrelevant, holding that the defender was acting within the powers conferred upon him by the 6th section of the Police (Scotland) Act, 1857, as well as within his ordinary duty, when he dismissed the pursuer. Innes *v.* Adamson, *supra.*

89. Commissioners to fix Salaries of Constables.—It shall be lawful for the Commissioners to fix and appoint suitable wages to the constables and other persons employed by them, to pay the necessary expenses incurred by them in the execution of the duty of their respective offices, and to reward them for meritorious services, and also to make provision for any Chief Constable, constable, or other servant of the establishment employed for any of the purposes of this Act to whom the Police (Scotland) Act, 1890, does not apply, and who may at any time be disabled in, or after long service be unfitted for, the execution of his duty, or for the widow or family of such constable who may lose his life in the execution of his duty.

It shall be lawful for the Commissioners to fix and appoint suitable wages to the constables; but if the regulations of the Secretary for Scotland referred to in sec. 78 are for the same purposes as the rules authorised by sec. 3 of the Police Act, 1857, which regulate, *inter alia*, the "pay" of constables, this power of the Commissioners to fix the wages will be subject to these regulations.

The Commissioners are, for the first time, authorised to reward constables for meritorious services. The Commissioners may also make provision for a constable or other servant of the establishment,

employed for any of the purposes of the Act, to whom the Police (Scotland) Act, 1890, does not apply, who may be disabled in, or after long service be unfitted for, the execution of his duties, or for the widow or family of a constable who may lose his life in the execution of his duty.

The expression "other servant *of the establishment*" is peculiar. What is meant by the word "establishment"? Does it mean the police staff? or does it extend to the whole official establishment of the burgh? The words "employed for any of the purposes of this Act," would seem to imply that the expression is not confined to the purely police staff. But, on the other hand, the clauses in this portion of the Act all refer exclusively to the police, and as the context deals solely with constables, the better construction would be a person connected with the constabulary establishment, such as a searcher or warder.

The provisions of the Police Act of 1890, 53 & 54 Vict. c. 67, are pretty comprehensive, and the expression "constable" therein means and includes the chief officer of any police force, and the other members of such force appointed by and subject to the orders of such chief officer (see sec. 30).

90. Chief Constable may appoint Temporary Substitute.—The Chief Constable, with the consent of the Magistrates, may from time to time appoint any constable to act as chief officer of police in his stead during any temporary absence or any illness, with power to act in case of his death until the appointment of his successor, but the Commissioners may, if they think fit, supersede any constable so appointed, and may appoint some other person.

This is a very necessary provision in case of the Chief Constable having holidays, or being ill. If the Chief Constable appoint, the appointment will not expire on his death, but will continue in force until the appointment of his successor, unless the Commissioners supersede the appointment made by the Chief Constable, and appoint some other person. The appointment by the Chief Constable should be in writing, and should receive the consent of the Magistrates prior to the date when it is to come into operation.

91. Constables dismissed to deliver up Accoutrements.—Every constable who is dismissed from, or ceases to hold or exercise his office, shall forthwith deliver over to the Chief Constable, or to such person, and at such time and place, as the Chief Constable shall direct, all the clothing, accoutrements, appointments, and other necessaries which have been supplied to him for the execution of his duty, under pain of imprisonment, for any period not exceed-

ing one month; and the Magistrate may grant warrant to search for and seize all such clothing, accoutrements, appointments, and other necessaries not so delivered over, wherever the same are found.

See secs. 483, 488, and 501.

92. Penalty for Unlawful Possession of Accoutrements, or for Assuming the Dress of Constables.—Every person who, not being at the time a constable appointed under this Act, has in his possession any article, being part of the clothing, accoutrements, or appointments supplied to any such constable, and who is not able satisfactorily to account for his possession thereof, or who puts on the dress, or takes the name, designation, or character of any person appointed as such constable, for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any act which such person would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, shall, in addition to any other punishment to which he is liable for such offence, be liable to a penalty not exceeding £10.

This clause is limited to persons, not constables, having in their possession any article supplied to a constable appointed under this Act. (See secs. 483, 487, 488, and 501.)

93. Penalty for Neglect of Duty.—Every constable who is guilty of any neglect or violation of his duty as a constable, and is convicted thereof before a Magistrate, shall be liable to a penalty not exceeding £10, the amount of which penalty may be deducted from the salary or wages due or to become due to him, or payment thereof may be enforced like other penalties, or, at the discretion of the Magistrate before whom he is convicted, he may be imprisoned for any period not exceeding sixty days.

It is not very clear what is meant by being guilty of any neglect or violation of his duty as a constable. It will no doubt include any breach of the regulations prescribed by the Chief Constable under sec. 86. In any charge to be framed under this section, some further specification will be required than a mere averment of neglect or violation of duty. Any trifling things might be brought under that head which would not be of a criminal or even a quasi-criminal character, rendering a constable liable under a penalty, or

imprisonment. At the same time, the provision in sec. 477 will be kept in view, which provides that, in describing any offence against this Act or other Acts, the description of any offence against the Act founded on in the words of such Act shall be sufficient at law (see secs. 483, 487, 488, and 501).

94. Provisions relating to Harbour Police not affected.—Nothing in this Act shall alter or affect or interfere with the provisions relating to the harbour police contained in any Act authorising the construction or improvement or maintenance of a harbour, or any Act amending the same.

In certain cases, such as Greenock, Leith, etc., the police who take charge of the harbour and docks are maintained either under different Statutes, or by arrangement with the Commissioners acting under a Statute, and this Act does not in any way interfere with these arrangements.

95. Saving of 53 & 54 Vict. c. 67.—Nothing in this Act shall prejudice or affect the provisions of the Police (Scotland) Act, 1890.

This Act, 53 & 54 Vict. c. 67, is chiefly concerned with pensions and gratuities to constables, and widows and children of constables. It is entitled "an Act to make provision respecting the pensions, allowances, and gratuities of police constables in Scotland, and their widows and children, and to make other provisions respecting the police of Scotland."

SPECIAL CONSTABLES.

96. Magistrates may appoint Special Constables.—For the purpose of aiding the police constables on occasions of emergency, and for suppressing or preventing tumult or riot, the Magistrates may from time to time appoint any of the owners or occupiers of lands or premises, or other person residing within the burgh, between the ages of twenty and fifty, to act as special constables for a period not exceeding six months, and may recall such appointment at pleasure, and the special constables so appointed shall have the same powers and privileges as constables of police appointed and acting under this Act.

See sub-head (20), sec. 4, for definition of "Magistrates," (22) "owner," (21) "occupier," and (16) "lands and premises." The expression is, "magistrates," so that there must be at least two to

make an appointment of this nature. The same observation applies to the making of regulations under sec. 98.

In England, an order was made by Justices, which, after reciting that a special constable had been appointed pursuant to 1 & 2 Will. IV. c. 41, and that the appointment was occasioned by the behaviour, and by reasonable apprehension of the behaviour, of the persons employed on the defendants' works, ordered the defendants, in pursuance of 1 & 2 Vict. c. 80, to pay to the special constable the sum of £3, 9s. 2d. for his services as special constable. The defendants had no notice either of the appointment of the special constable or of the order for payment by them until after the same was made. *Held*, that the making of the order for the payment of the expenses of the special constable was a judicial proceeding, and that the defendants were entitled to notice before the order was made. The Queen *v.* Cheshire Lines Committee (8 Q. B., 344), 31st May 1873.

97. Roll of Special Constables to be kept.—A roll of the names and addresses of all special constables shall be kept by the Chief Constable, and the expenses of providing them with batons, or otherwise equipping, training, and employing them, shall be paid by the Commissioners out of the burgh general assessment.

See sec. 340 as to burgh general assessment.

98. Special Constables on Duty to be under Chief Constable.—Every special constable shall, when on duty, be under the direction of the Chief Constable, but the Magistrates may make such regulations for their organisation and training as they think proper.

The regulations here referred to must not be contrary to law.

PART IV.—POLICE ADMINISTRATION.

LIGHTING.

99. Streets to be Lighted.—The Commissioners shall make provision for lighting in a suitable manner all the streets, and all other places within the burgh which in their judgment should be lighted at the public expense, and shall provide, erect, and maintain such a number of lamps, lamp-posts, and lamp-irons, and other appurtenances, as may be necessary for that purpose, and shall light, or shall enter into contracts for lighting, and cause to be lighted, such lamps by means of

gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same, as they may find expedient; and the Commissioners are hereby authorised to order the lamp-irons, lamp-posts, and lamps to be fixed, either upon the sides of the causeways, streets, and roads, or upon the kerbstones of the pavements or footways, or at or upon the rails, or in or upon the walls or buildings on the sides of the streets, as they shall think proper, without being liable to any claim for compensation thereanent. The Gasworks Clauses Act, 1847, the Gas and Water-Works Facilities Act, 1870, the Gasworks Clauses Act, 1871, and the Gas and Water-Works Facilities Act (1870) Amendment Act, 1873, and any Act amending the said Acts, shall, except in or so far as they are expressly varied by this Act, be incorporated with this Act; and the expression "the undertakers" in the said Acts shall mean the Commissioners.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh."

It is left in the judgment of the Commissioners what other places within the burgh should be lighted at the public expense. It is the duty of the Commissioners either to light all the places to which the public have access, or to see that that is done.

There is an obligation resting on the Commissioners to do this. See Wallace *v.* Dundee Police Commissioners, 9th March 1875 (2 R., 565), where Lord Deas says: "It is necessary that closes, whether they be thoroughfares or *cul-de-sacs*, into which the public are in use to enter, should be made safe and wholesome for the public by being lighted and cleaned, so long as they are accessible to and used by the public, however the rights either of property or servitude may stand; and it is not incumbent on the Commissioners to enter into litigation with individuals upon these points before they can exercise their jurisdiction over such places, and expend public money upon them for the safety and comfort of the public. I should have so construed the Police Statutes applicable to Dundee, even if it had not been proved to demonstration, as it is, that in practice the Commissioners themselves have so construed these Statutes." See also Harris *v.* Leith Magistrates, 11th March, 1881 (8 R., 613), where, in an action of damages against the Magistrates of that burgh, for injury sustained in consequence of their alleged neglect to fence and protect a parapet wall at Newhaven, an issue was adjusted by the Lord Ordinary, putting the question whether the defenders had failed in their duty of lighting a road under the management of road trustees. The case, instead of being tried by jury, went to proof. The Lord President (Inglis) says: "The allegation of insufficient lighting has certainly not been proved on the evidence. On the

contrary, there was a lamp within quite a reasonable distance of the place, and it has not been proved, or indeed alleged, that the lamp was not lighted at the time the accident occurred." And Lord Shand, who took the proof, says: "It is not now maintained that the Magistrates of Leith have failed in their duty in lighting the road. It appears that there were lamps at proper intervals along its pathways, and that this place was as well lighted as any in the burgh." Following on the case of Kirkpatrick *v.* Dumbarton Police Commissioners, 29th April 1870 (1 Coup., 434), Mr. Denny, for whom Kirkpatrick was factor, brought an action in the Sheriff Court against the Police Commissioners, to have them ordained to light the squares which they had requested him to light. The Sheriff-Substitute (Steele) said: "That the pursuer, William Denny, was proprietor of the grounds of Dennistoun, lying within the boundaries of the burgh of Dumbarton, which in the year 1854 were laid out for building, and now comprised three squares or streets, upon which numerous buildings and tenements had been erected. The Commissioners contended that these squares were private courts, but the Sheriff found that they were public streets, and ordained the Commissioners to light them, and this was upheld on appeal by the Sheriff-Principal (Hunter).

See the Electric Lighting Act, 1882, 45 & 46 Vict. c. 56. The Police Commissioners, under this Act, shall be the Local Authority under that Act, and shall be the undertakers.

While it is the duty of the Commissioners either to light all places to which the public have access, or to see them properly lighted, they cannot be compelled to light private courts or private places within the burgh at the instance of parties. The Dean of Faculty (Mr. J. B. Balfour) gave the following opinion on this point: "Upon the information contained in the Memorial, I do not think the memorialist would succeed in compelling the Commissioners to light the street in question at the public charge. Even assuming that the language of section 126 of the Police Act of 1862 is to be construed as imperative, it applies to 'streets' and other places which would probably be held to be *ejusdem generis* with 'streets;' and by section 3 it is declared that the word 'street' shall mean a public street, and shall extend to and include any of the enumerated places not being a 'private street,' a term which is immediately afterwards defined. Now, having regard to the decisions in such cases as Millar's Trustees *v.* The Leith Police Commissioners (11 M., 932), and the Kinning Park Police Commissioners *v.* Thomson & Co. (4 R., 518), I should expect, upon the facts stated in the memorial, that the street in question would be held to be a 'private street,' in the sense of the Act of 1862. It has not been open for the prescriptive period, and it does not appear that it had, before the adoption of the Act, been well and sufficiently paved and flagged by the owners of premises fronting or abutting upon it, or that it has been maintained as a public street. There is nothing in the memorial to show that the memorialist and the persons to whom he has sold houses or stances in the street, could not, if they pleased, shut it up and exclude the

public from it. Consequently, if the view which I am disposed to adopt—namely, that section 126 does not apply to private streets, is well founded—the street in question would not fall within its scope." As, however, it is the duty of the Commissioners to protect the public where there is any doubt as to the party on whom the obligation lies to light, the Commissioners should light and test the liability, and not leave the place in darkness. In a case with reference to a piece of vacant ground, the Lord Advocate (now Lord President Robertson) and Professor Rankine, said: "We are of opinion that while the section referred to (sec. 130 of the 1862 Act) does not apply so as to compel Mr. S. to light and cleanse the street (it not being a *passage* in the sense of the clause) it would be the duty of the corporation to see to the proper watching, lighting, and cleansing of this locality (to which the public resort with or without title), so as to secure order and discourage crime and nuisance."

100. Penalty for wilfully breaking Lamps. — It shall be lawful for any one who shall see any person take away, or wilfully break, throw down, or damage any lamp or lamp-post, or wilfully extinguish the light, or damage the iron or appurtenances of any lamp, to seize and apprehend him, and for any person to assist in seizing the offender, and by the authority of this Act, without any other warrant, to convey such offender to the police office, or to deliver him into the custody of a police officer, watchman, or constable, or other officer, in order to be secured and taken before a Magistrate; and if the person accused of such offence, whether apprehended as aforesaid or afterwards cited for the same, shall be convicted thereof, he shall forfeit a sum not exceeding £10 for every such offence, and, moreover, shall pay such further sum as the Magistrate may assess as the amount of the damage done by him, and the payment of such damage shall be enforced in the same way as if it were an additional penalty.

See secs. 487 and 501 as to alternative of imprisonment on non-payment of penalty.

101. Persons accidentally breaking Lamps to repair the damage.—If a person shall, through negligence or accident, break any lamp set up in any street, or in any common stair or passage or private court, and shall not, upon demand, make satisfaction for such damage, it shall be lawful for any of the Magistrates, upon complaint thereof being established in the Police Court, under the summary procedure

authorised by this Act, to order such sum of money to be paid as the damage proved shall amount to, which sum shall be recoverable as a civil debt.

Where the procedure here prescribed is followed, the forms to be adopted in the recovery of the sum ordered to be paid by the Magistrate shall be those provided for enforcing decrees pronounced in the Small Debt Courts of the Sheriff, and there shall be added to the finding of the Magistrate a warrant for execution in the form prescribed by sec. 511.

102. Price to be paid for Gas to be ascertained in case of dispute.—If the Commissioners and the owners of any works authorised by Act of Parliament to supply gas or other light within the burgh, and with whom the Commissioners shall be desirous of contracting, shall not agree as to the terms and conditions of the supply, and as to the price to be paid for such supply, then such terms and conditions and price shall be settled by arbitration; and for that purpose the clauses of the Lands Clauses Acts, with respect to the settlement of disputes by arbitration, shall be, and are hereby, incorporated with this Act, and the expression "the promoters" in the said Acts shall, in reference to this Act, mean the Commissioners: Provided always, that this enactment shall not apply to any burgh where the supply of gas for public lamps is regulated by a Local Act, if the provisions of such Local Act are inconsistent with this enactment.

The expression, "the promoters of the undertaking," shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the Special Act empowered to execute such works or undertakings (see 8 Vict. c. 19, sec. 2).

In Brown and Another *v.* Lennox and Others, 4th Feb. 1886 (13 R., 515), the Burgh Gas Supply Act, 1876, sec. 20, enacts that, where there is a company not incorporated by Act of Parliament, or authorised by Provisional Order confirmed by Act of Parliament, supplying gas within a burgh, the Police Commissioners of the burgh may, subject to the provisions of the Act, buy, and the company, with consent of three-fourths in value of its shareholders, may sell, its undertaking and property.

More than three-fourths of the shareholders of an unincorporated joint-stock company supplying a burgh with gas, entered into an agreement with the Police Commissioners of the burgh to sell the property of the company to the Commissioners. The burgh had not, at the date of the agreement, adopted the Burghs Gas Supply Act, but it subsequently did so, and the agreement bore to proceed on the footing that the Act was to be adopted. Two shareholders, who had

not assented to the agreement, brought a reduction of it against the Company and the Police Commissioners. *Held*, (1) That the Act was to be taken as having been adopted by the burgh at the date of the agreement, even in a question with shareholders not consenting to the agreement; and (2) That, as three-fourths of the shareholders had, in terms of the Act, consented to the sale of the Company's property, the pursuers had no right to object to the sale, either under their contract of copartnery or at common law; defenders therefore assoilzied.

103. Gas to be Tested.—In order to secure a uniform supply of good gas in the burgh, it shall be lawful for the Commissioners, where the gas is not supplied by them, after intimation to the manufacturers of the gas supplied within the burgh, to provide suitable places and instruments for testing the quality and illuminating power of the gas supplied within the burgh; and tests shall be made as often as may be necessary to obtain a fair and true test of the quality and illuminating power of the gas, and the results of such tests shall be final and conclusive of such quality and illuminating power when the tests were so made; and where the gas supplied within the burgh is manufactured by the Commissioners, they shall be bound to provide suitable places and instruments for testing the quality and illuminating power of the gas supplied by them within the burgh, and to publish the results at least once a month. Provided always, that the person to make the tests shall be appointed by the Sheriff on the application of the Commissioners, or any seven electors or ratepayers in the burgh, after such notice of the application and after such inquiry as to the Sheriff shall seem proper; and the whole expense to be incurred in carrying out this enactment shall be defrayed by the Commissioners out of the burgh general assessment.

Where the gas is not supplied by the Commissioners, it shall be lawful for them to provide places and instruments for testing the gas. From the words which follow—"tests *shall* be made," etc.—it may be argued that the expression "it shall be lawful" has more than a merely enabling force. Where the gas is manufactured by the Commissioners themselves, they are bound to provide the testing places and instruments, and to publish the results at least once a month. The mode of publication is not specified. The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), which is incorporated with this Act by sec. 99 hereof, makes provision as to the testing of gas (see secs. 28 to 34, and Schedule A).

The person to test the quality and illuminating power of the gas must now be appointed by the Sheriff. The expense incurred in carrying out this section is to be defrayed out of the burgh general assessment (see sec. 340).

104. Lighting of Common Stairs, etc.—The owner, or owners, of common stairs or passages or private courts, or of lands or premises having a right of access by any common stair or passage or private court, shall provide, fit up, and maintain, and renew in such common stairs, passages, or private courts, all necessary lamps, brackets, and other means of lighting, and all necessary means of extinguishing the light, and shall provide the necessary supply of gas or other light therefor; and such owner or owners shall further, on being required by the Commissioners, within seven days next after the service of an order for that purpose, provide and fit up in such common stairs, passages, or private courts, such number of lamps, brackets, and other means of lighting, and all such means of extinguishing the light as the Commissioners may determine, and provide the necessary supply of gas or other light, as may be required by the Commissioners, and shall maintain, alter, repair, and renew such lamps and brackets to the satisfaction of the Commissioners, and in default of compliance with any order of the Commissioners under this section, such owner or owners shall, each only in respect of any act or default of his own, be liable to a penalty not exceeding forty shillings, and a daily penalty of a like amount: Provided always, that the owner or owners so providing a supply of gas or other light, shall be entitled to recover the amount expended by such owner or owners in providing such supply from the occupiers of every such house or building in, or entering or having access by the common stair, passage, or court, each such occupier being liable to pay his proportionate part of such amount according to the rent payable by each such occupier respectively: Provided further, that the occupier or occupiers shall in all cases clean, light, and extinguish the lights, at such time or times as shall be ordered by the Commissioners by any resolution passed by them, and published once weekly for at least two weeks in some newspaper published or circulating in the burgh; and any occupier failing to comply with any such order or resolution shall be liable to

a penalty not exceeding 40s., and to a daily penalty of like amount.

See sub-head (22), sec. 4, for definition of "owner," and sub-head (21) of "occupier." The phraseology of this section obviates the difficulty raised in Stewart *v.* Edwards, 8th Dec. 1875 (3 R., Jus., 14). Here the question arose whether the owner was bound to provide the gas, and the Court held that he was not. It is a somewhat clumsy machinery to make the owner provide the gas, and throw on him the burden of recovering the cost from the occupier. As to this the Lord Justice-General said: "It would be very extraordinary if the sections of this Statute—25 & 26 Vict. c. 101—which deal with the matter of lighting, should invert the ordinary arrangement between landlord and tenant, which is, that the owner supplies the fixed and permanent apparatus for holding or conveying the illuminating substance, while the occupier supplies the illuminating substance which is to be consumed, and lights it when required." This Statute has taken the extraordinary course referred to by the Lord Justice-General. See Kirkpatrick *v.* Dumbarton Police Commissioners, 29th April 1870 (1 Coup., 434), where the Superintendent of Police, as instructed by the Commissioners, wrote two letters to the appellant, requiring the proprietors, in terms of the 130th section of the General Police Act, to make provision for lighting the courts in a suitable manner within the period mentioned therein. The receipt of the letters was admitted, and the failure to obey not disputed. Upon this the Magistrates had found the appellant guilty of a contravention of that section, and mulcted him in a penalty. An appeal against the conviction was sustained, on the ground that the letters did not amount to the requisition and order by the Commissioners required to be served under the section. Lord Neaves said: "There is no order here, and no service of any order by the Commissioners. Their duty was to make an order on the appellant, and cause their Clerk to enter it on the records, and serve it, before any jurisdiction could arise to the Police Magistrate under the Act."

In Forbes *v.* Linton, 10th Nov. 1887 (15 R., Jus., 19), the Edinburgh Municipal and Police Act, 1879, sec. 5, defines the word "owner" to include "the factor, agent, or commissioner" of the true owner, "or any other person who shall intromit with or draw the rents" of the property. *Held*, that under this provision a person who, as factor, drew the rents and otherwise managed a tenement with a common stair, the owner of which was resident in Edinburgh, had rightly been convicted of a contravention of sec. 95 of the Act, in respect that he had, "as owner" of the stair, failed to provide the necessary supply of gas for lighting it.

Question, Whether a mere rent-collector could have been prosecuted as "owner"?

105. Power to Commissioners to supply Light and charge Owner.—The Commissioners may at any time, and from time to time as they think fit, provide, fit up, and

maintain and renew, in such common courts, passages, or private courts, as they may consider to be insufficiently lighted, all necessary lamps, brackets, and other means of lighting, and all necessary means of extinguishing the light, and provide the necessary supply of gas or other light therefor, and by their Inspector of Lighting, or any other officer or servant of the Commissioners, clean any lamps and brackets, and light and extinguish the same, and for all purposes aforesaid the Inspector of Lighting, or any other officer or servant of the Commissioners, shall be entitled to require and shall have access to and from all such common stairs, passages, or private courts at all times; and the Commissioners may, in such cases as they think fit, recover the expense they may incur as a debt from the owner, or if there are more owners than one, then proportionately from each owner according to the rental of the properties of each owner in any house or building, or part thereof, to which access is obtained by such common stair, passage, or private court, and such owner or owners shall be entitled to recover the amount expended in providing the supply of gas or other light from the occupiers, each such occupier being liable to pay his proportionate part of such amount according to the rent payable by him: Provided always that the said expense, recoverable by the Commissioners as aforesaid, shall not in the case of common stair lighting exceed 20s. per burner per annum, and in the case of all other lighting exceed 25s. per burner per annum.

See sec. 4, sub-head (10), as to "court," (27) "private court," (31) "passage." The same roundabout process of recovering the cost of the illuminating substance is provided for in this section as in the last, namely, that the Commissioners are to recover first from the owner, who is then to recover from the occupier.

The word "courts" occurring in this clause as "common courts" is evidently a mistake for "stairs." It should be "common stairs," as the remainder of the clause shows.

106. Commissioners may remove, etc., Lamp-post, etc., where not lighted according to Regulations.—If the Commissioners shall have given permission to any person to erect any lamp-posts, lamp globes, gasfittings, or other articles, and if the same shall not be kept lighted, or otherwise disposed, according to the orders or regulations of the Commissioners, the Commissioners may take possession of

or remove the same without compensation being made therefor: Provided always, that any such lamp-posts, lamp globes, gasfittings, or other articles so removed, shall be delivered up to the owner thereof, in the event of his claiming the same within six months after such removal, and paying all costs and expenses attending the removal and preservation of the same.

This section seems to contemplate that the Commissioners shall frame orders or regulations for the lighting of lamps, etc., erected by private persons. Compliance with these regulations will be a condition of obtaining permission to erect the lamps, etc. By sec. 159, "no person shall erect any projection, or make any erection whatever in any street, public or private, without the written consent of the Commissioners." The projections and erections referred to will include lamp-posts, etc. By sub-head (4), sec. 316, the Commissioners may make bye-laws for fixing the times of lighting and extinguishing lights in common stairs, passages, or private courts, and the order of rotation in which the occupiers of houses or flats in such shall be responsible therefor.

CLEANSING.

107. Dust, etc., collected to be vested in Commissioners.—The dust, night-soil, dung, ashes, rubbish, filth, and manure, including slaughter-house manure, whether such slaughter-house is or is not the property of the Commissioners (excepting always cattle dung, mill dust, and the ashes of any kiln, engine, furnace, baker's oven, or the clinkers of any stove, and the refuse of any breweries, tanworks, soap or chemical or other work), within the burgh, shall be vested in the Commissioners, who shall have power to sell and dispose of the same as they think proper, and the money arising therefrom shall be applied to the general purposes of this Act; and the Commissioners shall cause all the streets and footpaths from time to time to be properly swept and cleansed, and all the dust, night-soil, dung, ashes, rubbish, filth, and manure which is found on them, or in privies, sewers, cesspools, houses, or other premises, to be collected and removed at such convenient hours and times as they shall consider proper; and in all cases where there is insufficient access for a cart or wheel-barrow to the dungstead, ashpit, or privy, the owner shall be bound to provide such access to the satisfaction of the Commissioners, and, failing his doing so, he shall be bound to pay the extra expenses of the removal as the

same shall be fixed by the Commissioners, and the same shall be recoverable as a private improvement assessment.

See sub-head (22) for definition of "owner," (4) "burgh," (31) "street," sec. 4. This 107th section as now framed obviates the difficulty raised in Pullar & Sons *v.* Perth Police Commissioners, 20th July 1876 (3 R., 1176).

The Act of 1862 enacted that, in burghs adopting the Act, "the dust," "ashes," "rubbish," etc., "within the burgh shall be, and hereby are, vested in the Commissioners," and that they shall cause the same to be collected from the streets, houses, and premises in the burgh; and it was held that the enactment did not apply to ashes produced in the furnaces of a manufactory. The residue of retorts from a gaswork was held, in construing the 132nd section of the 1862 Act, not to fall within the terms thereof, and a petition by the Gas Company to have the Commissioners ordained to remove this refuse was dismissed by the Sheriff. See Perth Gas Company *v.* Perth Police Commissioners (Irons, App., IV.), pp. 192 and 198.

See sec. 365 as to private improvement assessment, and secs. 366 to 372 as to recovery thereof.

In Barton *v.* Kinning Park Commissioners and Others, 20th Jan. 1892 (29 S. L. R., 329), the Act of 1852 provides that the Commissioners shall cleanse the streets and remove sweepings "at such convenient hours and times as they shall consider proper."

The Commissioners of Police of a burgh employed a servant to clear the streets of mud and collect it in heaps for removal by a contractor. The mud on a certain street had been brushed to the side, and on the following morning the Commissioners' servant attempted to collect it in heaps, but, owing to its watery state, he could only gather it together in liquid accumulations. He had to stop work owing to a dense fog. The day was frosty, and the mud became partially frozen. The contractor's men were on their way to remove the mud, but had to return on account of the fog, which continued all day. In the afternoon, a carter, while leading his horse and cart along the side of the road to avoid the traffic, tripped over the mud and was injured.

In an action for damages at his instance, it was held that the Commissioners were not liable, as the mud had been collected according to a reasonable custom, and as the accumulations were of ordinary size, and had not been removed because of the fog; and that the contractor was not liable, as his duty was to remove the mud when prepared for removal; that, owing to the fog, that mud not so prepared, and that his duty had not begun at the time of the accident.

Cattle dung is expressly excluded from the list of materials vested in the Commissioners. It is dealt with in secs. 122 to 126. It must not be mixed with the refuse belonging to the Commissioners.

The Commissioners are to cleanse all the streets and footpaths (see also secs. 112 and 116). They are also bound to remove the filth or refuse found in "privies, sewers, cesspools, houses, or other

premises" (see sec. 316*b* (2) as to bye-laws for removing the contents of privies, etc.). As regards the removal of refuse from sewers, the Commissioners are authorised by sec. 219 to cause the refuse from sewers "to be conveyed by a proper channel to the most convenient site for its collection and sale, for agricultural or other purposes, as may be deemed most expedient, but so that the same shall in no case become a nuisance." But they are not bound to cleanse private properties (see secs. 120 and 316*b* (8)). They are empowered, however, if they think fit, to undertake the cleansing of private courts, etc., and charge the expense to the burgh general assessment, or, in the case of unoccupied property, to the owners (see sec. 120).

Any person who lays rubbish, etc., on any street, etc., is liable in a penalty (see sec. 381 (36)); and by sec. 381 (42), any person who "accumulates within any enclosure, area, house, building, garret, cellar, or other apartment, any dung, soil, dirt, ashes, filth, or other offensive matter or thing," is liable in a penalty.

This section enacts that owners shall provide suitable access to any dungstead, ashpit, or privy, or, failing their doing so, to pay the extra expense of removal of the contents. Sec. 253 provides that the situation, mode of access, and construction of every ashpit shall be subject to the approval of the Commissioners. Secs. 254 and 255 contain further provisions as to ashpits, privies, middens, etc.

108. Commissioners may provide Lands, etc., for deposit of Soil and Materials.—The Commissioners may from time to time provide places convenient for the deposit, treatment, and disposal of the dust, night-soil, dung, ashes, rubbish, filth, and manure, to be collected under the authority of this Act, and for stabling and keeping all horses, carts, implements, and other things required for the purposes of this Act; and for any of such purposes the Commissioners may purchase or hire any lands or premises by them considered necessary, either within or beyond the boundaries of the burgh, and may for this purpose acquire the said lands and premises otherwise than by agreement under the provisions of the Lands Clauses Acts, with the authority of the Board of Supervision, in the manner hereinbefore provided, or they may cause any new buildings, machinery, appliances, and plant to be erected and provided upon any lands which shall be purchased or hired by them under the provisions of this Act.

In providing a manure depôt under this section, care must be taken that nuisance is not created. By sec. 16 of the Public Health (Scotland) Act, 1867, sub-head (*d*), "any accumulation or deposit of

manure or other offensive matter within fifty yards of any dwelling-house within the limits of any burgh, or wherever situated, if injurious to health, or any accumulation of police manure within a quarter of a mile of the municipal boundaries of any burgh, excepting the city of Glasgow, or any accumulation or deposit from ashpits, or manure from town or village, laid nearer than fifty yards to a public or parish road, or dwelling-house," constitutes a nuisance. Mr. George (now Lord) Young, Mr. E. S. Gordon, and Sheriff Monro expressed the opinion that, in a prosecution under this section for any accumulation or deposit of manure within fifty yards of any dwelling-house within the limits of any burgh, it is not necessary to aver or prove that such accumulation or deposit is injurious to health.—Skelton, p. 21.

By sec. 214, one of the duties laid upon the burgh surveyor is "to point out the most approximate (*sic*) means and sites for the collection and sale of filth and refuse for agricultural or other purposes."

Lands and premises for the purposes of this section may be acquired compulsorily under the provisions of the Lands Clauses Acts, with the authority of the Board of Supervision, "in the manner hereinbefore provided." But as the manner in which that Board is to give its authority is nowhere "hereinbefore provided," the words here presumably mean that the authority of the Board is to be given in the same manner as is provided in sec. 60 with regard to the authority of the Sheriff.

109. Removal of Dust, Ashes, and other Refuse.—The Commissioners may cause carts, having a covering proper to prevent the escape of the contents thereof, to pass through any street or district every morning between such hours as may be fixed by the Commissioners, for the purpose of collecting and removing the dust, ashes, and other material composing the burgh refuse, from the lands and premises in and adjoining such street or district; and may, by public notice in one or more newspapers published or circulating in the burgh, or by handbills posted in such street or district, require the occupiers of lands and premises within and adjoining such street or district to cause all their dust, ashes, and other material composing the burgh refuse, to be deposited in a suitable box to be approved of by the Inspector of Cleansing, and placed daily on the outer side of the foot pavement opposite the lands and premises occupied by them, or at such other place near thereto as the Inspector of Cleansing shall appoint, not later than the time fixed as aforesaid; and when such daily service is in operation in any such street or district, the Commissioners may direct any ashpit in connection with

the lands and premises in or adjoining such street or district to be shut up or removed; and every occupier failing to comply with such notice shall be liable to a penalty not exceeding 10s. for each offence.

See sub-head (16), sec. 4, for definition of "lands and premises," (21) "occupier," (31) "street." See also Pullar *v.* Perth Police Commissioners, 20th July 1876 (3 R., 1177), where the Police Commissioners are held not bound to remove the ashes produced by the furnaces maintained by the pursuers for the purposes of their trade (see sec. 107). See secs. 487 and 501 as to alternative of imprisonment.

In addition to the provisions of this section, the Commissioners are empowered, under sec. 316*b* (2), to make bye-laws "for removing the contents of ashpits, dungsteads, drains, cesspools, water-closets, lavatories, baths, and privies within reasonable periods."

110. Public Conveniences.—The Commissioners may erect or continue public water-closets or earth-closets, and latrines and urinals, in suitable places, and may place movable or fixed boxes for the temporary deposit of street sweepings in any of the streets, in such situations as shall, in the opinion of the Commissioners, cause the least inconvenience or nuisance, and may defray the expense thereof and of keeping the same in good order.

These public conveniences must be so erected and placed as not to create a nuisance. Though the words "cause the least inconvenience or nuisance" are used, if, after erection, they are found to create a nuisance, proceedings might be taken under sec. 16 (*b*) or (*d*) of the Public Health Act. See Adam & Spowart *v.* Moir, 24th Nov. 1874 (2 R., 143).

An English Local Authority empowered a society to put up a public convenience in their district. A resident in the neighbourhood raised an action to restrain the erection, on the ground that it would be a nuisance. Mr. Justice Stirling held that he could not assume that the mere fact of the erection of this building would create a nuisance at law. But he felt the strongest doubt whether this agreement of the Local Authority to delegate its powers to a society was not *ultra vires*. Mogg *v.* Bocken, Sanitary Record for Nov. 1888, p. 243.—Skelton, p. 48.

Under the powers given by sec. 41 of the Public Health Act, the Commissioners, as Local Authority, "may erect such public water-closets, privies, and urinals, and in such situations, as they may think fit, and may defray the expense thereof, and of keeping the same in repair and in good order, and shall cause such privies to be cleansed daily."

111. Streets to be Watered, and Wells, Pumps, etc., provided.—The Commissioners shall, as often as in

their opinion occasion requires, cause the streets to be watered, and they may contract with any water company or person for a supply of water for that purpose, and for cleansing the sewers and drains; and, if necessary, they may place pipes, conduits, and pumps in any such streets, or provide any other works and engines proper for that purpose, and remove and alter the same when and as they think proper.

See sub-head (31), sec. 4, for definition of "street." See Stephen *v.* Thurso Police Commissioners (referred to in next section) as to whether Commissioners can relieve themselves of liability by making such a contract as is herein referred to.

Sec. 219, which provides for the construction of sewers, provides further, that the Commissioners "shall also cause to be made all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers."

112. Scavengers.—The Commissioners shall employ a sufficient number of scavengers, or contract with any person for sweeping, cleansing, and watering the streets, including the foot-pavements, and for removing all dust, ashes, rubbish, and filth therefrom, and for emptying privies and cesspools, in the manner by this Act directed; and every such contractor who in any instance fails to discharge any duty imposed on him by his contract, shall for every such offence be liable to a penalty not exceding £5.

See sub-head (31), sec. 4, for definition of "street." See secs. 487, 500, 501, as to imprisonment failing payment of penalty, etc.

In Stephen *v.* Thurso Police Commissioners, 3rd March 1876 (3 R., 535), a person raised an action of damages against the Police Commissioners of a burgh, for injuries sustained by him from having fallen over a heap of rubbish left upon the street after nightfall, and not fenced or lighted. The defence was that the Commissioners, under the powers conferred upon them by the Police Act, had contracted with a person for the cleaning of the streets and removal of refuse, and accordingly, that if there was negligence on the part of any one, it was the contractor who was liable, and not the Commissioners. *Held*, upon the terms of the contract, that the Commissioners retained a complete control over the execution of the operations contracted for, and were not relieved from the obligation incumbent on them to remove the rubbish or to put it in a state free of danger to the lieges.

Question, Whether, even if the contractor had been uncontrolled in the execution of the work, the Commissioners could have so delegated their statutory duty as to free themselves from liability in case of its non-performance? See also Thomson *v.* Greenock Harbour Trustees,

10th Dec. 1875 (3 R., 1194). Barton *v.* Kinning Park Commissioners, 20th Jan. 1892 (37 S. L. R., 329).

113. Penalty for obstructing Scavengers.—Every person who refuses to permit the scavengers to remove such dirt, ashes, or rubbish as by this Act they are authorised to do, or who obstructs the scavengers in the performance of their duty, shall for every such offence be liable to a penalty not exceeding £5.

See sec. 2, Interpretation Act, 1889, 52 & 53 Vict. c. 63, as to interpretation of "person." See secs. 487, 500, and 501, as to alternative of imprisonment on failure to pay penalty.

114. Penalties on persons other than Scavengers removing Dirt.—Every person other than the person employed by the Commissioners, or by some person contracting with the Commissioners for that purpose, who collects or carries away any dung, night-soil, dust, ashes, rubbish, or filth, by this Act directed to be collected or removed by the Commissioners, or by persons employed by them, shall be liable in a penalty not exceeding 40s. for every such offence.

See sec. 2 of 52 & 53 Vict. c. 63, for interpretation of "person," and secs. 487, 500, 501 of this Act for imprisonment failing payment of penalty.

115. Sweeping and Washing of Common Stairs.—The occupiers of every house, flat, or storey, having entrance by a common stair, shall cause the landing and the stair immediately below the flat or storey possessed by them to be kept clean, to the satisfaction of the Sanitary Inspector. If any flat or storey of the tenement be unoccupied, the occupiers of the flats or storeys above shall cause the landings and stairs below, leading to such empty flat or storey, to be kept clean and washed downwards to the next house which shall be occupied; and if the top flat or storey be unoccupied, then the stair leading thereto shall be kept clean by the occupier of the flat or storey immediately below such top flat or storey; and any water-closet or other closet used in common, and any passage or continuation of a passage to any area, back-green, or any ground used in common, shall be kept clean and washed by the occupiers of the several houses in such tenement in weekly rotation; and all areas and common passages leading

to cellars shall be cleansed weekly by the occupiers of the cellars in the same, or by parties having a right to use such areas or passages, or who shall use such areas or passages. In cases where the common stair enters from or off a street (public or private) above, the occupiers of every house, flat, or storey shall keep clean the passage and stair from such street or flat immediately above them downwards to the house, flat, or storey possessed by them, and also cleanse any area or any passage leading to any ground or back-green connected therewith; and if any flat or storey of the tenement be unoccupied, the occupiers of the flats or houses occupied shall keep clean the stair and passages upwards to such street, and clean the area, if there be one, or to the next house that shall be occupied; and owners or persons having charge of houses or buildings shall clean out unoccupied cellars and apartments.

Sweeping and Washing of Common Passages.—The occupiers of every house or building having entrance from a common passage shall, in weekly rotation, cause such passage and steps to the street to be kept clean: Provided always, that where there is no house or other occupied building having entrance from such passage, the duty of keeping clean the passage and steps to such street shall devolve upon the occupiers of the several flats above, in weekly rotation. Every person failing in any of the above matters shall, for each offence, be liable to a penalty not exceeding 5s.

See sub-head (21), sec. 4, for definition of "occupier," (13) "house," (3) "building." See secs. 487, 500, 501, as to penalty on repetition of offence, and imprisonment failing payment of penalty.

This section lays the duty of cleaning common stairs, passages, water-closets, etc., on the occupiers, but it would appear that the owners may be liable too. Sec. 316*b* (8) provides for the making of bye-laws "for requiring *owners or occupiers* of houses and buildings to keep clean closes, areas, courts, passages, stairs, roofs of outhouses, and common water-closets, and thoroughfares owned or occupied by them."

Bye-laws "for regulating the sweeping and cleansing of common stairs in accordance with the sections of this Act relating to cleansing," may be made under sec. 316*b* (19).

See Daish *v.* Paterson, 22nd Dec. 1876 (4 R., Jus., 10). The Act 11 & 12 Vict. c. 113, sec. 197, enacts "that the occupiers of every house, flat, or storey, entered by a common stair or passage, shall cause the stair and passages immediately below the flat or storey possessed by them to be swept every lawful day and washed

at least twice a week, and all areas connected therewith to be swept every lawful day; . . . and every person offending herein shall, for each offence, be liable to a penalty of 5s."

The Sheriff convicted and fined the parties 2s. 6d. One of them appealed. The facts appear from the Lord Justice-Clerk's opinion. He said: "The Sheriff has referred to us the following questions—Whether the appellant's house 'is entered by a common stair or passage,' in the sense of sec. 197 of the Edinburgh Police Act, 1848? and Whether the appellant is liable to be proceeded against for failing to clean, as directed in said section, the passage? which, as shown on the plan, separates his house from that of his neighbour, Mr. Martin.

"That is purely a question of construction of the Statute, and though it is not one of any great moment in the particular case, as the amount of the fine inflicted on the appellant was only 2s. 6d., or one day's imprisonment, still it is one which, in a town like this, has a very general bearing. There are a great many houses in Edinburgh built in the same manner as that of the appellant, and if the Sheriff's decision is sustained, their occupiers will find a burden of cleaning thrown upon them which, in my opinion, the Statute did not contemplate. I think the section of the Statute does not apply to houses which have main doors from the street, but only to houses whose usual entrance is from a common stair or passage. In the case of the appellant's house, there is no proper entrance from the common passage. There is, indeed, a means of getting access to the back-door of the appellant's house by means of the common passage. But it obviously exists only through the accident of the occupants of the common stair requiring a means of access to the common back-green, and therefore to the back passage leading to the back-green, on which the appellant's back-door opens. It is not a means of access intended for the benefit of the appellant's house, or from which the appellant derives any benefit.

"I cannot therefore hold that the appellant, under this clause in the Statute, is bound to clean this common passage.

"The answer to the question, therefore, will be, That the appellant's house is not entered by a common passage in the sense of the Statute, and consequently that he is not liable to be proceeded against for not cleaning it."

116. Foot Pavements to be swept by Occupier.—The Commissioners shall keep properly swept and cleansed the foot pavement of every street, so far as is reasonably practicable, and shall collect and remove from the said foot pavements, so far as is reasonably practicable, all dust, ashes, rubbish, filth, and snow.

This section is in direct contradiction to the marginal note (see observations as to construction of marginal notes, p. 2). The obligation will rest here on the Commissioners. See sub-head (31) sec. 4, for definition of "street."

117. Common Stairs and Houses let for short periods to be cleansed by Owners.—The owners of all common stairs and common passages shall whitewash or, at the option of the owner, paint the same once every year if required to do so by the Sanitary Inspector, and the owners of all premises occupied as dwelling-houses let for shorter periods than six months, shall whitewash such premises, and every part and pertinent thereof, to the satisfaction of the Sanitary Inspector, once every year, if required to do so by such officer; and any such owner failing to do so shall be liable to a penalty not exceeding 40s.

See sub-head (22), sec. 4, for definition of "owner," (16) "premises," secs. 487, 500, 501, as to penalty for repetition of offence and imprisonment for failure to pay penalty.

118. Surveyor, Medical Officer, or Inspector may enter and cleanse Dwelling-houses, etc., at expense of Owners.—It shall be lawful at all reasonable times for the Burgh Surveyor, Inspector of Cleansing, Medical Officer of Health, and Sanitary Inspector, to enter all dwelling-houses and other premises, and their pertinents, where he has reason to believe that they are not in a cleanly condition, and to cleanse and purify the same, and to remove any filth therefrom, at the expense of the owner of such dwelling-houses and other premises if they are unoccupied, but if they are occupied then at the expense of the occupier: Provided always, that if the owner or occupier of such dwelling-house or other premises shall object to the entrance of such Surveyor, Medical Officer, or Inspectors as aforesaid, it shall not be lawful for such Surveyor, Medical Officer, or Inspectors to enter without a warrant from the Magistrate authorising him to do so, and the Magistrate is hereby authorised to grant such warrant.

See sub-head (22), sec. 4, as to definition of "owner," (21) "occupier," (16) "premises."

The officers referred to here are authorised to proceed *ex proprio motu* and without any instruction of the Commissioners, the only restriction being that, in the event of any owner or occupier objecting to the entrance of the officer, a Magistrate's warrant is necessary. Although not expressly stated, there is little doubt that any expense incurred under this section will come within the category of "private improvement expenses," and be recoverable as such (see sec. 365).

119. Penalty on keeping Dwelling-houses in dirty condition.—Every person occupying any part of a building let out as separate dwelling-houses, who shall keep the same, or any building or place appurtenant thereto, in a dirty, unwholesome, or unhealthy condition, after notice shall have been served upon him by the Sanitary Inspector to cleanse the same, shall be liable to a penalty not exceeding 40s., and to a further penalty not exceeding 20s. for every day during which such offence shall continue after conviction.

See sub-head (3), sec. 4, for definition of "building;" see secs. 487, 500, 501, for penalty for repetition of offence, and imprisonment failing payment of penalty.

120. Areas, etc., to be cleansed by Occupiers.—All private courts, yards, areas, roofs of outbuildings in the same, and other places which are not cleansed by scavengers appointed under this Act, shall be kept clean to the satisfaction of the Inspector of Cleansing or Sanitary Inspector, by or at the expense of the occupiers of such courts, yards, areas, or other places respectively; and if such courts, yards, areas, roofs therein, or other places shall not be so kept clean, the occupiers thereof, or such of them as in the judgment of the Magistrate may be found to be the real offender, shall, in addition to the expense of cleaning the same, be liable to a penalty not exceeding 10s. for every such offence: And the word "occupiers" in this section shall include all persons having a right to use such courts, yards, areas, or other places for any purpose whatever: Or, if the Commissioners think fit, they may cleanse all such private courts, yards, areas, roofs therein, and other places, and charge the expense thereof to the burgh general assessment, or, if the property is unoccupied, may charge the expense thereof to the owners.

See sub-head (27), sec. 4, for definition of "private court," (21) "occupier," sec. 340 as to burgh general assessment. See secs. 336 to 338 as to giving notice. See secs. 487, 500, 501, as to penalty on repetition of offence, and imprisonment for failure to pay penalty.

This section lays the duty of cleansing the premises referred to on the occupiers, but authorises the Commissioners to undertake the work themselves, charging the expense to the burgh general assessment, or, in the case of unoccupied property, to the owners. But see sec. 316*b* (8), as to bye-laws for requiring *owners or occupiers* to keep clean the subjects referred to therein. See also sec. 381 (36) and (42), which impose a penalty on persons throwing refuse on

streets, etc., or accumulating dung, etc., within enclosures or buildings.

121. Stables and Byres to be kept clean.—All stables and byres, and areas therewith connected, and roofs of outhouses, shall be constantly kept in a clean condition to the satisfaction of the Inspector of Cleansing or Sanitary Inspector, by the occupier thereof, under a penalty not exceeding 20s. for each offence; and it shall be the duty of the Inspector from time to time to examine the state of all such places, with a view to the enforcement of this enactment.

See secs. 487, 500, 501, as to penalty for repetition of offence and imprisonment for failure to pay penalty.

"Any stable, byre, pig-stye, or other building in which any animal or animals are kept in such a manner as to be injurious to health" is a nuisance, under sec. 16 (*c*) of the Public Health Act. Special provisions as to byres are contained in the Dairies, Cowsheds, and Milk-shops Order of 1885, issued under the authority of the Contagious Diseases (Animals) Act, 1878, and administered by the Commissioners as Local Authority under the Public Health Act.—See Skelton, p. 201.

The duty of carrying out the provisions of this section is laid upon the Inspector of Cleansing or the Sanitary Inspector. Where these offices are held by different persons, it will be advisable for the Commissioners to determine which officer is to undertake the duty, so as to avoid any dispute. This may be done by means of orders or regulations under sec. 55, sub-head (4) or (6).

122. Horse and Cow Dung to be kept off the streets.—It shall not be lawful to deposit, except for the purpose of removal, any cattle dung upon the streets (mews or stable lanes excepted); and no cattle dung, wherever lawfully kept, shall be mixed with any dung, soil, dirt, ashes, or filth, declared by this Act to be the property of the Commissioners; and where any cattle dung shall be found in any street (excepting as aforesaid), or shall be so mixed, the same shall be taken possession of by the Inspector of Cleansing and sold, and the proceeds of such sale accounted for and applied to the police purposes of this Act.

See sub-head (31), sec. 4, for definition of "street;" and sec. 107 as to soil, etc., vested in Commissioners. The "police purposes of the Act" are not defined. In the 1862 Act the expression was defined to mean and include the whole Act, excepting the public health enactments.

123. Dungsteads, etc., to be cleaned out.—It shall

be lawful for the Commissioners, after inspection and report by the Chief Constable or Inspector of Cleansing or Sanitary Inspector, to regulate and limit the time within which all common necessaries and dungsteads shall be emptied and cleaned out; and if any person, under obligation by contract or otherwise to empty or clean out such places, shall fail so to do within the time so limited, such person shall be liable in a penalty not exceeding 20s., besides forfeiture of any dung in such place; which dung the Inspector of Cleansing, or Sanitary Inspector, or any officer authorised by the Commissioners, may remove or dispose of as aforesaid.

See sec. 2, 52 & 53 Vict. c. 63, as to definition of "person." The regulations must be reasonable and within the limits of the Act, and not in repugnance to common law. See secs. 487, 500, 501, as to penalty for repetition of offence and imprisonment for failure to pay penalty. See also sec. 51 of the Public Health Act, which provides: "Where notice has been given by the Local Authority or their officer or officers for the periodical removal of manure or other refuse matter from mews, stables, or other premises (whether such notice shall be by public announcement in the locality or otherwise), and subsequent to such notice the person or persons to whom the manure or other refuse matter belongs shall not so remove the same, or shall permit a further accumulation, and shall not continue such periodical removal at such intervals as the Local Authority or their officer or officers shall direct, he or they shall be liable, without further notice, to a penalty of not exceeding 20s. per day for every day during which such manure or other refuse matter shall be permitted to accumulate, such penalty to be recovered in a summary manner." See sec. 51, Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101.

124. As to removal of Dung.—Every person who shall lay, or cause to be laid, on any street, any dung or manure, or any hay or straw, for the purpose of removing the same, shall remove and take the same away before eight of the clock of the morning of the day on which it shall be so laid in any street, from the 1st day of October to the 1st day of April, and before seven of the clock of the morning from the 1st day of April to the 1st day of October; and if dung or manure shall be allowed to remain on any part of such streets after the said hours, the person offending shall be liable to a penalty not exceeding 40s. for each offence, and that over and above the forfeiture of the dung or manure, which shall be removed and disposed of as aforesaid.

See sec. 2, 52 & 53 Vict. c. 63, for definition of "person," sub-head

(31), sec. 4 of this Act, "street." See secs. 487, 500, 501, for penalty on repetition of offence and imprisonment for failure to pay penalty. See also sec. 381 (36), which deals with persons laying down dirt, litter, etc., on streets.

125. Penalty for conveying offensive matter at improper times.—The Commissioners may from time to time fix the hours within which only it shall be lawful to remove any offensive matter or thing from any premises within, or into, or through the burgh; and when the Commissioners have fixed such hours, and given public notice thereof in such manner as they may deem proper, every person who removes any offensive matter or thing from any premises within, or into, or through the burgh at any time, except within the hours so fixed, and every person who at any time, whether such hours have been fixed by the Commissioners or not, uses for any such purpose any cart or carriage not having a covering proper for preventing the escape of the contents of such cart or carriage, or of the stench thereof, or who wilfully or negligently spills any such offensive matter or thing in the removal or passage thereof, or who does not carefully sweep and cleanse every place in which any such offensive matter or thing has been placed or unavoidably spilled, shall for every such offence be liable to a penalty not exceeding 40s., and in default of the apprehension of the actual offender, the driver or person having charge of the cart or carriage employed for any such purpose shall be deemed to be the offender.

See sub-head (16), sec. 4, for definition of "premises," (4) "burgh," (5) "carriage," and sec. 2, 52 & 53 Vict. c. 63, "person." See also secs. 487, 500, 501, as to penalty for repetition of offence and imprisonment on failure to pay penalty. See also Vert *v.* Richardson, 20th Feb. 1869 (7 M., 552), where it was held that the powers given to Commissioners of Police to regulate the removal of offensive matter within the burgh, under the 145th sec. of the 1862 Act, apply only to rules for premises within, and not to the conveying of offensive matter through burghs. The phraseology of the 1862 Act was somewhat more limited than that of the present section. The 145th section only empowered the Commissioners to fix the time to remove offensive matter from any premises, and when that had been done every person who removed along any street, etc., was to be liable to a penalty. The words used in this section *within* or *into* or *through* the burgh, seem to have been introduced specially to obviate such a case as that of Vert's. See sec. 316*b* (4), which authorises bye-laws

"for regulating the time and mode of the removal of any offensive matter or thing."

126. As to laying down Dung on Fields, Nursery, or Garden Grounds.—Nothing in this Act contained shall have the effect of prohibiting any person laying down dung on any field, nursery, or garden ground, for the purpose of manuring the same; but if in any case the medical officer of health shall certify that the manure so laid down in any place within the burgh is offensive or prejudicial to health, the Magistrate may order it to be removed or otherwise disposed of forthwith; and every person failing to comply with such order shall be liable to a penalty not exceeding £5, besides the forfeiture of such manure.

See sub-head (4), sec. 4, for definition of "burgh," sec. 2, 52 & 53 Vict. c. 63, for definition of "person." See secs. 487, 500, 501, for imprisonment on failure to pay penalty. The medical officer of health is left with a discretion as to what is to be considered offensive or prejudicial to health. But see the provisions of sec. 16 (*d*) of the Public Health Act referred to under sec. 108, *supra*.

127. Commissioners may make Bye-laws.—The Commissioners shall have power to make bye-laws for enforcing the provisions of the preceding sections with reference to cleansing.

See sub-head (6), sec. 55, and secs. 316–324, as to the making of bye-laws.

PAVING AND MAINTAINING STREETS.

128. Carriageway of Streets to be under control of Commissioners.—Subject to the provisions of this Act, and of the Roads and Streets in Police Burghs (Scotland) Act, 1891, the Commissioners shall have the sole charge and control of the carriageway of all the streets within the burgh maintained or which shall be maintained by the Commissioners and also of all foot pavements and footpaths.

See sec. 4 (25) for definition of "police burgh," (31) "street." By the Roads and Streets in Police Burghs (Scotland) Act, 1891, 54 & 55 Vict. c. 32, it is provided, sec. 2:—

"2. It shall be lawful for the Commissioners of any police burgh, at a meeting summoned for the purpose, on not less than one month's notice by special advertisement in any newspaper published or cir-

culating in the police burgh, to resolve, if they think fit, to undertake the management and maintenance of the highways within the police burgh; and it shall be lawful for the County Council or County Councils of any county or counties within which a police burgh is situated, at a meeting summoned for the purpose, on not less than one month's notice by special advertisement in any newspaper published or circulating in the county or counties, to resolve to require the Commissioners for such police burgh to undertake the management and maintenance of the highways within the police burgh; and in either of these cases it shall be lawful for the Commissioners to agree with the County Council of the county or counties within which the police burgh is situated, as to the terms upon which the highways within the police burgh shall be transferred to the Commissioners, and failing agreement the said terms shall be settled summarily by the Sheriff or Sheriffs of the county or counties in which such police burgh is situated, who shall take into consideration all the circumstances of the case, including the cost of maintaining the highways in the neighbourhood of such police burgh, and whose decision shall be final; and upon the parties agreeing as aforesaid, or upon the terms of transference being settled as aforesaid, the highways within the police burgh shall, as from and after the 15th day of May next ensuing, but subject to the provisions of this Act, be transferred to and vested in the Commissioners, who shall have the entire management and control of the same, and shall possess the same rights of assessment, and other rights, powers, and privileges, and be subject to the same liabilities in reference to the highways (including the construction of new roads and bridges) therein, as the Local Authority of any burgh under the Roads and Bridges (Scotland) Act, 1878, and any Act amending the same, possesses and is liable to in reference to the highways therein (including as aforesaid), and also in reference to the streets within such burgh. Provided always, that any such resolution of the Commissioners or County Council or County Councils may be rescinded with the consent of and upon such terms as may be agreed upon with the County Council or County Councils or such Commissioners respectively, and thereupon the original rights, powers, and privileges, and liabilities of the said County Council or County Councils, in regard to the highways within such police burgh, shall revive in full force and effect."

(1.) The Sheriff, when an application is made to him to settle the terms of transference, will take into consideration both the use of the burgh roads by the county and of the county roads by the burgh. The Statute is not to be read as meaning that in all cases burghs *must* pay the costs of maintaining roads outside their boundaries. There are small burghs whose inhabitants make very little use of the county roads, and on the other hand, in the vicinity of large burghs the adjacent roads are mainly used by the town people. The Sheriff will take the latter circumstance "into consideration" when he finds it to exist, but it is not imperative upon him to do more than have regard to it in settling the terms of transference.

(2.) "The circumstances of the case" in regard to which the Sheriff is likely to desire information are—the general character of the traffic which passes into and through the burgh, as to whether it is resorted to as an agricultural or manufacturing or commercial centre; whether it is a terminus for traffic or mainly used as a place through which produce, etc., is conveyed to some more distant place; whether the traffic is mainly due to the wealth of the county or to the advantages possessed by the burgh.

Carnoustie was the first burgh which obtained the decision of the Sheriff. The Forfar County Council claimed £179, or alternatively £208, 10s. per annum, for the maintenance of the roads in the neighbourhood of the burgh. The Sheriff decided that no payment was to be made to or by the Commissioners or County Council. His interlocutor is as follows:—

"*Edinburgh*, 8*th March* 1892.—The Sheriff having considered the pleadings of the parties, proof, and whole process, and having heard parties thereon and taken into consideration all the circumstances of the case as provided by the Statute, decides that the terms upon which the highways within the burgh of Carnoustie shall be transferred to the Commissioners of that burgh, are, that no payment shall be made to them by the County Council or by them to the County Council. JOHN COMRIE THOMSON."

The interlocutors by Sheriff Mackay, Fife, in the cases of Newport and Tayport are in similar terms to that of Sheriff Comrie Thomson in the Carnoustie case.

"3. At any time after the expiration of ten years after a settlement under this Act between the Commissioners of any police burgh and any County Council or County Councils, or if the boundaries of the said burgh are extended, it shall be lawful for the Commissioners of the said police burgh or for such County Council or County Councils to obtain the readjustment of the said terms of settlement, either by entering into a new agreement, or by an appeal to the Sheriff or Sheriffs, in the manner provided in this Act.

"4. Where any matter falls to be determined under this Act by two Sheriffs, and they shall differ in opinion, they shall report the case to the Lord Ordinary on the Bills in the Court of Session, whose decision shall be final.

"5. Nothing contained in this Act, or done in pursuance thereof, shall affect any allocation or liability for payment of road debt under the Roads and Bridges (Scotland) Act, 1878, or under any other Act, general or local, or of the interest thereon.

"6. In the event of the Commissioners of any police burgh not resolving to undertake the management and maintenance of highways as aforesaid within the police burgh, it shall be lawful for such Commissioners to claim annually from the County Council of the county within which such police burgh is situated, or in the case of the county being divided into districts from the district committee or committees, a fair and reasonable contribution towards the expense of managing and maintaining such streets and roads within the police burgh as are maintained by the said Commissioners; and it shall be

lawful for the said County Council, or for the said district committee or committees, if in its opinion the said claim is a reasonable one, to agree with the said Commissioners as to the amount of the said contribution, and to pay the amount so agreed upon to the Commissioners out of the rate levied for the management and maintenance of highways within the division or district or parish (as the case may be), in which the said police burgh is situated.

"7. In this Act the expression 'police burgh' means a populous place, the boundaries whereof have been fixed and ascertained under the provisions of the General Police and Improvement (Scotland) Act, 1862, or of the Act first therein recited, or have been determined by or under any Local Act."

The word "highway" shall have the same meaning as in the Roads and Bridges (Scotland) Act, 1878, and any Act amending the same.

The word "Sheriff" shall not include "Sheriff-Substitute." See 54 & 55 Vict. c. 32.

The sole charge and control of the streets and foot pavements carries with it very considerable obligations. In Innes *v.* Magistrates of Edinburgh, 6th Feb. 1798 (12 Fac., 137), a person receiving a mortal injury from falling during the night into a temporary pit made in one of the lanes of a burgh was found entitled to damages from the Magistrates, although a considerable degree of precaution had been used by those who dug the pit to prevent accidents. In Threshie *v.* Magistrates of Annan, 11th Dec. 1845 (8 D., 276), the Magistrates of Annan were held bound to maintain the street, which was a public road, forming the great road from Dumfries, by Annan, to the river Sark, entering the High Street of the burgh at the one end and issuing again at the other, in repair, out of the funds of the burgh; and following that case and that of Innes, the Court held, in Dargie *v.* Magistrates of Forfar, 10th March 1855 (17 D., 730; 27 Jur., 311), in an action of damages at the instance of a burgess against the Magistrates and Town Council of a royal burgh, as representing the community, for injury sustained in consequence of their alleged neglect to remove a large stone which obstructed the pavement of a public street. It was pleaded in defence that the action should have been directed against the individuals who had been guilty of the alleged neglect, and that it was incompetent as laid against the community. Defence repelled, and, in accordance with the decision in the case of Innes *v.* Magistrates of Edinburgh, relevancy of the action sustained, and the pursuer held (affirming judgment of Lord Neaves) entitled to an appropriate issue. This was followed in Virtue *v.* Police Commissioners of Alloa, 12th Dec. 1873 (1 R., 285); where it was held, by a majority of seven judges (*diss.* Lords Cowan, Deas, and Neaves), that the case of the Mersey Dock Trustees *v.* Gibbs (L. R., 1 E. and 1 App., 91), had overruled that of Findlater *v.* Duncan (H. L., M'L. and Rob., 911), and consequently that Statutory Trustees or Commissioners acting gratuitously in the administration of a public trust, and administering funds appropriated by Statute to special purposes, were bound to give

compensation from the trust funds for damages caused by the fault of their servants.

The Police Commissioners of a burgh under the Police and Improvement Act, 1862, are liable for damage caused by the negligence of a person in their employment, while engaged in the execution of his duty.

See also Harris *v.* Magistrates of Leith, 11th March 1881 (8 R., 613), referred to under sec. 130, and M'Phee *v.* Police Commissioners of Broughty-Ferry (17 R., 764), where a railway company having feued ground on each side of a railway embankment, in 1860 made a private road for the use of the feuars, which passed through the embankment and gave access to a public street of an adjoining town. The bridge supporting the railway over the road was only seven feet in height, which was not sufficient to allow of the passage of a cab. In 1864, on the town adopting the General Police Act, 1862, the road was taken over by the Police Commissioners as a public street. In 1888 a person driving a cab along the street at night was killed by coming in contact with the railway bridge. In an action of damages raised by his widow against the Police Commissioners and also against the railway company, the Police Commissioners maintained that they were not responsible for the accident, in respect that they had called upon the railway company, who were owners of the bridge, to remove it, or to raise it so as to make it safe; and that they had no power to perform any operation upon it themselves. *Held*, that it was the duty of the Police Commissioners, as custodiers of the street, either to have had the danger removed, or to have taken effective measures to prevent the public from using the street for purposes for which it was not safe; that the accident was caused by their neglect of this duty; and that, therefore, they were primarily liable in damages.

Opinions reserved as to the duty of the railway company, and as to the right of the Commissioners to enforce performance of that duty if it existed.

In Hamill *v.* Caledonian Railway Company and others, 15th Feb. 1887 (4 Scot. Law. Rev., 69), it was held (1) that the Magistrates and Town Council of a burgh are, as conservators of the public streets, liable for the condition of the roadways and pavements, except in so far as by statutory regulations or private compact the burden of their maintenance is laid upon others; and (2) that a railway company who had, under statutory authority, made their railway cross under a public street did not thereby become proprietors of lands and heritages adjoining such street.

In Hendrie *v.* The Magistrates and Council of Glasgow, 11th June 1886 (2 Scot. Law Rev., 307), it was held that, under the Glasgow Police Act, sec. 289, every public street, "for the object and purposes thereof," vests in the Magistrates and Council as constituting the police board, and that they are entitled at common law, and also by virtue of the provisions in that section and the other powers contained in said Act, to make such a use of a street as laying tramway rails on it without special

authority, so long as their operations are not a source of danger to the public.

In M'Indoe *v.* Renfrewshire County Council, 10th March 1891 (7 Scot. Law Rev., 225), a person having sustained injuries through an accident brought about by the defective construction of a grating on the roadway—*Held*, that the district committee of the County Council, who were responsible for the safe and proper maintenance of the road, were liable in damages for the injuries so sustained; and that the knowledge of a suspected danger, of which no notice had been given by the injured party, did not, *per se*, debar him from recovering damages.

Opinion, per Sheriff Cheyne, that a person traversing a public road is not to be expected to keep in mind every defect which he may have on previous occasions observed on it.

It will be observed that it is only the charge and control of the carriageway and foot pavements and footpaths of the streets which the Commissioners have. They have, therefore, no further right to, or interest in, the solum of the streets, than is necessary for the purposes of the Act or Acts which they administer.

In Glasgow Coal Exchange Company, Ltd., *v.* Glasgow City and District Railway Company, 20th July 1883 (10 R., 1283), a railway company, by a special Act providing for the formation of a line of railway which ran under a public street, had power to "enter upon, take, and use," such of the lands delineated and described on the plans and books of reference as might be required for their purposes. They had, by another section, "power to appropriate and use the subsoil" of the streets, roads, and others shown and described as above.

Another section enacted: "With respect to any lands which the company are by this Act authorised to enter upon, take, and use, for the purposes of the railways, and which are in or under the roadway or footpath of any street, road, or lane shown on the deposited plans, and described in the deposited books of reference, the company shall not be required wholly to take those lands or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house fronting or abutting on any such street, road, or lane; but the company may appropriate and use the subsoil and under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and use, and the owners of and other persons interested in any such cellar, vault, or other construction shall sell the same, for the purposes of the railways; and no such subsoil or under-surface, cellar, vault, or other construction to be appropriated and used or purchased as aforesaid, shall be deemed part of a house or other building or manufactory within the meaning of sec. 90 of the Lands Clauses (Scotland) Act, 1845."

Held, that the railway company were entitled to appropriate and use the subsoil under the street without purchase, but subject to liability for compensation for any damage resulting from their operations; and petition for interdict at the instance of the pro-

prietors of the solum against their removing the subsoil without purchase refused.

Held, that the jurisdiction of the Glasgow Police Commissioners over the solum of the public streets of the city is limited to the purposes of the Statute under which they act, and does not otherwise interfere with the rights belonging to the proprietors therein.

See also Kinning Park Police Commissioners *v.* Thompson & Company, 22nd Feb. 1877 (4 R., 528).

In the Town Council of Oban *v.* The Callander and Oban Railway Company, 21st June 1892 (19 R., 912; 29 S. L. R., 818), when land is taken by a railway company under compulsory powers, all servitudes which affected the land prior to its acquisition by the railway company are extinguished, unless the company's Act contains a provision to the contrary.

By the 28th section of the Callander and Oban Railway Act, it was provided that the company incorporated under the Act should satisfy every claim competent to the Town Council of Oban, for the loss of all rights of servitude then possessed by the public along part of the bay of Oban of which they should be deprived "by the construction of the company's works."

A portion of the ground acquired by the company under their statutory powers was laid out by them as ornamental ground in front of the station which they constructed at Oban. Prior to the acquisition of this piece of ground by the company, the public of Oban had possessed a servitude of way over it.

Held, that this servitude had been extinguished, as the land had been acquired for the purposes of the company's works, although no part of the works had been constructed upon it.

Besides the general control given by this section, the Commissioners have special powers under various other sections of this Act. See sec. 381, as to offences; sec. 383, as to removal of obstructive articles placed or left in streets; sec. 385, as to regulation of traffic; sec. 386, as to cattle straying in streets; sec. 316 A (1), as to bye-laws for preventing nuisances in streets; and sec. 316 A (7), as to bye-laws for regulating the driving of cattle through streets.

As to the power of the undertakers of gasworks to break up streets, and the duty of the Commissioners in connection therewith, see the Gasworks Clauses Act, 1847, 10 Vict. c. 15, secs. 6–12; in regard to waterworks, the Waterworks Clauses Act, 1847, 10 Vict. c. 17, secs. 28–34; and in regard to tramways, the Tramways Act, 1870, 33 & 34 Vict. c. 78. See also the Acts as to the use of locomotives on public roads, 24 & 25 Vict. c. 70, 28 & 29 Vict. c. 83, and 41 & 42 Vict. c. 58.

In an English case, Gas Light and Coke Company *v.* Vestry of St. Mary Abbotts, Kensington (15 Q. B. D., 1; 54 L. J., M'C., 414; 53 L. T., N. S., 457; 32 W. R., 892), the defendants used steam-rollers for the repair of the streets; but the rollers they used were so heavy as frequently to injure the plaintiffs' gas pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair, if such rollers had not been used. *Held*,

that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam-rollers in such a way as to injure the pipes of the plaintiffs.

By sec. 134, when the Commissioners take over private streets, they are "vested in" the Commissioners. The words "vested in" have been the subject of a number of decisions in the English Courts. In one of these, James, L.-J., said that "the soil and freehold, in the ordinary sense of the words 'soil and freehold,' that is to say, the soil from the centre of the earth up to an unlimited extent in space, did not pass [to the Local Board], and that no stratum, or portion of the soil defined or ascertainable, like a vein of coal or stratum of ironstone, or anything of that kind, passed; but that the Board had only the surface, and with the surface such right below the surface as was essential to the maintenance and occupation, and exclusive possession of the street, and the making and maintaining of the street for the use of the public."

Though the Commissioners, as Road Authority, have no title to the subsoil of the streets, they have certain rights as the Sewer Authority. Under sec. 228 hereof, "No vault, arch, or cellar shall be made under the carriageway of any street, public or private, without the consent of the Commissioners first obtained in writing."

129. Power to Commissioners to improve and form Public Streets.—The Commissioners may from time to time cause all or any of the streets, foot pavements, and footpaths, or any part thereof, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and they shall also maintain the streets other than private streets: provided always, that nothing in this Act contained shall interfere with any right to have applied to the streets, so far as applicable thereto, the assessment under the Roads and Bridges (Scotland) Act, 1878, or any Local Act, and any fund by law applicable to the maintenance or repair of the streets.

See sec. 4 (31) for definition of "street."

It will be observed that this clause deals with the streets of the burgh other than private streets. Now, as the Commissioners have the sole charge and control of these, it is only proper that they should be entitled to raise, alter, lower, and form the same as they think proper. With regard to the footways thereof, if the Commissioners have not resolved to undertake the maintenance thereof in terms of clause 142, considerable caution will require to be exercised in issuing orders as to such. See observations on sec. 141. It rather appears that this clause is merely intended to apply to those streets, the carriageways and footways of which are maintained or to be main-

tained by the Commissioners. If the Commissioners cause damage by their operations they will be liable therefor.

As to the formation of private streets see sec. 133; formation of footpaths, sec. 141; and as to the precautions to be taken when a street is being altered or repaired, see sec. 186 *et seq.*

1. In Strachan *v.* Bridges, 21st Feb. 1837 (12 F., 602), a Local Act was obtained for improving the city of Edinburgh, whereby an assessment was to be levied on the inhabitants for that purpose, which assessment was doubled on certain districts especially benefited by the operations. *Found*, that the proprietor of a tenement in one of these districts was entitled to damages for an alleged deterioration of his property by the levelling and lowering of Bank Street, in consequence of the operations.

2. It being provided by the Act that all claims of damage, if disputed, should be settled by the verdict of a jury summoned by the Sheriff, on the application of the Improvements Commissioners—*Found*, that a party whose property was injured may, notwithstanding, bring an action for damages before the Court of Session.

In England it has been held that the power to cause the streets to be levelled has reference only to any want of equality or want of uniformity in the street itself, and does not authorise the urban Sanitary Authority to raise or lower the level of the street, so as to bring it into uniformity of level with the adjoining streets. See Carey *v.* Kingston-upon-Hull; Brown *v.* Clegg, *infra*.

Where a Local Board had so altered the level of a footpath in front of a warehouse as to cause an accumulation of water to take place, to the injury of the owner, the Court granted an injunction to restrain the Board from permitting the water to remain so accumulated. See Milward *v.* Redditch (21 W. R., 429; W. N., 1873, 39). For a Sanitary Authority is bound, in the exercise of its statutory powers, to act so as to create the least possible injury.

A Local Board took upon itself the maintenance of part, namely, the footway, of a turnpike road, and it was held by the House of Lords that the Board had power to cause it to be raised, lowered, or altered, and having raised it, was liable to compensate a person who sustained damage thereby. Mutter *v.* Accrington Local Board (43 L. T., N. S., 710; W. N., 1880, 148: in the Court of Appeal L. R., 4 Q. B. D., 375; 48 L. J., Q. B., 487; 43 J. P., 635; 40 L. T., N. S., 802).

This case was distinguished by Fry, J., in another in which a County Roads Board in South Wales was held to be entitled to levy tolls on a turnpike road which had become a street within an urban sanitary district. Swansea Improvement Commissioners (41 L. T., N. S., 583).—Glen, p. 246.

The Urban Sanitary Authority have power only to require a street to be levelled with reference to any want of equality or want of uniformity in the street itself. They have no power to require the level of a street to be raised or lowered, so as to bring it into uniformity with the adjacent streets. *Per* Cockburn, C.-J.: "Under the words of the 69th section (6) of the Public Health Act, 1848, the

Board has no power to require the appellant to raise the footpath to the level of the adjoining streets. The object was to make each street uniform. And it must be looked at as one isolated street, so far as this question is concerned. If there are inequalities in it, there is power to make it level. It may be that it would be a convenience for the neighbourhood if this street was made of the same level as those near it, but there is no power to throw the expenses of doing so upon the owners." Caley *v.* Kingston-upon-Hull (11 L. T., N. S., 339); S. C. Cary *v.* Kingston-upon-Hull (34 L. T., M. C., 7; 11 Jur., N. S., 171).

With reference to a provision in a Local Act substantially the same as the 51st section of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, sec. 51), the Court of Queen's Bench expressed their opinion that the section would not justify the lowering the level of a street for a purpose unconnected with paving or repairing the pavement. Brown *v.* Clegg (16 Q. B., 681).—Glen, p. 263.

The following are the clauses of the Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51) applicable to the streets of burghs:—

"46. *Boundaries of Burghs.*—The boundaries of burghs for the purposes of this Act shall be held to be the boundaries thereof, as the same are or may be ascertained, fixed, or determined for police purposes, under the provisions contained in any General or Local Act of Parliament, or, when no police assessment is levied, as the same are or may be ascertained, fixed, or determined for municipal purposes.

"47. *The Local Authority to have Management of Roads within Burghs.*—From and after the commencement of this Act, the highways and bridges situated within any burgh shall be, by virtue of this Act, transferred to and vested in the Local Authority of such burgh, and such Local Authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities in reference to such highways and bridges—including the construction of new roads and bridges—as the Trustees under this Act possess and are liable to in reference to roads, highways, and bridges, including as aforesaid, in the landward part of the county, including the right to any assets belonging thereto, and shall also have, and may exercise, with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries, such and the like powers and authorities as they possess with reference to any streets within their respective boundaries; provided that the Local Authority of any burgh not containing more than ten thousand inhabitants according to the census last taken may, by a resolution passed at a meeting summoned for the purpose, on not less than one month's notice, by special advertisement, devolve the management and maintenance of the highways and bridges within the boundaries, or forming the boundary thereof, upon the Trustees of the county within which such burgh or any portion thereof is situated, on payment to such Trustees of such an annual sum, or upon such terms as

may be agreed upon; and in default of such agreement, on payment of such sum or upon such terms as shall from time to time be settled, on the summary application of either party, by the Sheriff, who shall take into consideration the proportion of traffic from the county passing through the burgh, and all the other circumstances of the case, and whose decision shall be final; provided also, that any such resolution of the Local Authority of a burgh may be rescinded, with the consent of and on such terms as may be agreed upon with the County Road Trustees, and thereupon the original rights, powers, privileges, and liabilities of the said Local Authority shall revive in full force and effect.

"48. *Burgh within County where Act not in force may, by Agreement or otherwise, assume Management, etc., of Highways within it.*—In any county in which tolls and statute labour have been abolished or are not exigible, *and in which this Act is not in force*, it shall be lawful, at any time after the passing of this Act, for the Local Authority of any burgh situated therein, being a burgh within the meaning of this Act, at a meeting summoned for the purpose, on not less than one month's notice by special advertisement, to resolve to undertake the management and maintenance of the highways within the burgh; and it shall thereupon be lawful for such Local Authority to agree with the County Road Trustees, or other authority having the charge of the highways within the county, as to the terms upon which the highways within the burgh, together with a proportionate part of the debt, if any, affecting the highways within the county, shall be transferred to such Local Authority, and, failing agreement, the said terms shall be settled on summary application by the Sheriff, who shall take into consideration all the circumstances of the case, and whose decision shall be final; and upon the parties agreeing as aforesaid, or upon the terms of transference being settled as aforesaid, the highways within the burgh shall be transferred to, and vested in, the Local Authority thereof, who shall have the entire management and control of the same, and shall possess the same rights of assessment, and other rights, powers, and privileges (including the appointment of a clerk or clerks, surveyor or surveyors, and other necessary officers), and be subject to the same liabilities in reference to the highways (including the construction of new roads and bridges), therein, and debt, if any, affecting the same, as the burgh Local Authority of any burgh under this Act possess and are liable to in reference to the highways (including as aforesaid), and also in reference to the streets within such burgh; provided always, that any such resolution of the Local Authority of a burgh may be rescinded, with the consent of and on such terms as may be agreed upon with the County Road Trustees or other authority as aforesaid, and thereupon the original rights, powers, privileges, and liabilities of the said County Road Trustees or other authority in regard to the highways within such burgh, and the debt, if any, affecting the same, shall revive in full force and effect."

It is enacted by section 16 (2) of the Local Government (Scotland) Act, 1889, that "from and after the appointed day the

Roads and Bridges (Scotland) Act, 1878, *shall have effect in every county*, subject to the modifications following, and to such other modifications as are necessary for adapting the said Act to the provisions of this Act." See *County Council Guide for Scotland*, by Messrs. Nicolson and Mure, sec. 16, and footnote 2, pp. 20 and 21.

This renders sec. 48 of the Roads and Bridges (Scotland) Act, 1878, inoperative, as that section is of importance only *where this Act is not in force*. But by the Local Government Act as above, the Road Act of 1878 is now in force in all counties.

"53. *Maintenance of Bridges in Two Districts.*—Where any bridge is partly situated in one district and partly in another district, the burden of maintaining and repairing such bridge shall be deemed to rest equally on such districts, and the management thereof shall be vested in such manner as the Trustees shall determine.

"54. *Assessment in Burghs for Maintenance and Repair.*—The amount required for carrying out the provisions of this Act within any burgh, or by the Local Authority thereof, where there is no rate or assessment now levied wholly or partly for the maintenance and repair of streets or roads within the same, shall be levied by the burgh Local Authority, at such rates as may be necessary for the purpose, by an assessment to be imposed and levied on all lands and heritages within the burgh; and such assessment shall be paid, except as otherwise expressly provided, one half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which such assessments are imposed, unless where the name of the tenant or occupier is not set forth in the Valuation Roll, in which case the whole of the assessments imposed on such lands and heritages may be levied from and paid by the proprietor, who shall be entitled to recover the half thereof from the tenant or occupier.

"55. *Former Modes of Assessment may be retained in certain Burghs.*—Where in any burgh, at the time of the commencement of this Act, the management and control of the streets and roads within the same, and the power to levy any rates or assessments wholly or partly in respect thereof, is vested in the burgh Local Authority, in virtue of any General or Local Act of Parliament, it shall be lawful to continue to impose and levy such rates or assessments, and the amount required for carrying out the provisions of this Act within such burgh or by the Local Authority thereof shall be included in the sums for payment of which such rates or assessments may be imposed and levied; provided that such rates and assessments, if limited to a maximum, may be raised above such maximum, but only to an extent sufficient to produce the amount required for executing this Act as aforesaid; provided also, that such burgh Local Authority may, at any meeting called for the purpose, on not less than one month's notice, by special advertisement, pass a resolution that such rates and assessments shall, from and after a date to be fixed in the resolution, thenceforth cease to be levied in respect of such streets and roads; and in the event of such

resolution being carried by a majority of votes, the maintenance and repair of the streets and roads, and all expenses connected therewith, and with the carrying out the provisions of this Act, shall, from and after such date, be provided for by an assessment within the burgh, to be imposed and levied and to be payable as provided in the immediately preceding section, except as otherwise hereinafter provided."

"86. *Assessments in Burghs, how to be levied and recovered.*—The Local Authority of any burgh shall, in the imposing, levying, and recovering of the assessments authorised by this Act, possess the whole powers, rights, and remedies in force for the time being within such burgh, with reference to the imposing, levying, and recovering of the police assessment, or if there be no police assessment any other assessment or rate levied by the Local Authority within such burgh; and the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment or other assessment or rate, and may be collected either separately or along therewith. The whole amount of the assessments authorised by this Act may be levied on and recovered from the tenant or occupier, who, on payment and on production of a receipt therefor by the collector, shall be entitled to deduct one-half of the amount, or, in the case of assessments for payment of debt and interest thereon, the whole amount thereof, from the rent payable to the proprietor; and all such assessments shall, in the case of bankruptcy or insolvency, be preferable to all debts of a private nature due by the persons assessed: Provided that it shall be lawful for the Local Authority to relieve from assessment the occupier of lands or heritages under the annual value of £4 as appearing on the Valuation Roll, on the ground of poverty."

In Magistrates of Glasgow *v.* Police Commissioners of Hillhead, 14th May 1886 (13 R. P., 110), sec. 37 of the Roads and Bridges Act, 1878, 41 & 42 Vict. c. 51, enacts that "where a bridge is not situated wholly within one county or burgh the expenses of maintenance, and, if necessary, of rebuilding, shall, failing agreement, be a charge equally against both."

Sec. 88 bears that: "Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic, not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties and burgh or burghs, or one or more of them; and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect, the same, should be imposed upon the county or burgh within which they are so situated;" and enacts that, "In respect of such bridges (1) the Trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which . . . the cost of maintenance, and, if need be, of rebuilding such bridge shall be borne and defrayed by the county or counties and

burgh or burghs to which it is common. . . . (2) It shall be lawful for the County Road Clerk, or Clerk of Supply of any county, or for the Town-Clerk or Clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties, and burgh or burghs, to be named in his determination."

Held, — affirming judgment of First Division, — that the 88th section was not limited to bridges wholly situate within one county or burgh, but was applicable to bridges partly in one county or burgh and partly in another.

"88. *As to Cost of Maintaining, etc., certain Bridges.*—Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county or of other counties, and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect, the same, should be imposed upon the county or burgh within which they are so situated, be it enacted that in respect of such bridges the following provisions shall have effect:

"(1.) The Trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which the debt (if any), and the cost of maintenance, and, if need be, of rebuilding such bridge, shall be borne and defrayed by the county or counties, and burgh or burghs, to which it is common; and such agreement, when confirmed by a resolution of the Trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an Order by the Secretary of State, as provided hereinafter.

"(2.) It shall be lawful for the County Road Clerk, or Clerk of Supply of any county, or for the Town-Clerk or Clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties, and burgh or burghs, to be named in his determination.

"(3.) Upon such application being presented to the Secretary of State, he may, if he shall think fit, by any writing under his hand, appoint any two persons as Commissioners to institute a local inquiry as to the circumstances of the case, and after hearing all parties interested to report thereon to the Secretary of State; and for the purposes of such inquiry the Commissioners shall have power, after such public notice as they may think sufficient, to examine witnesses on oath, and to call for such documents as they may consider necessary, and to do all such matters and things as may seem expedient to them for the purposes of the inquiry.

"(4.) If the Commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and, if need be, rebuilding the bridge mentioned in the application, and of paying the debt affecting, or which may affect, the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Secretary of State should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination.

"(5.) The Secretary of State after such further inquiry (if any) as he shall deem necessary, may approve of the draft submitted with or without alterations; and any determination made by him, under his hand and seal, shall have the same effect as if it were contained in this Act: Provided always, that such determination shall be laid before both Houses of Parliament, and if either House of Parliament, within forty days after the same has been so laid before it, resolve that such determination ought not to take effect, the same shall be of no effect, without prejudice to the making of any new determination, but otherwise shall come into operation at the expiration of the said forty days, or any later date mentioned in the determination.

"(6.) The Secretary of State may make orders as to the costs incurred in relation to any inquiry under this section, including the reasonable remuneration of the said Commissioners, and as to the parties by whom such costs shall be paid, and the funds or assessments against which they shall be charged; and the Court of Session may interpone their authority to any order made by the Secretary of State as to such costs, and may grant decree conform thereto, upon which execution and diligence may proceed in common form."

41 & 42 Vict. c. 51, Roads and Bridges (Scotland) Act, 1878, sec. 88.

130. Commissioners may place Fences to Footways.—The Commissioners may from time to time place and maintain such fences and posts on the side of the footways of streets as they may consider necessary for the protection of passengers, as also posts in the carriageways of the streets, so as to make the crossing thereof less dangerous for foot passengers, or may remove the same, or any obstructions to any such carriageway or footway.

See sub-head (3), sec. 4, for definition of "street."

An obligation rests on the Commissioners to fence all dangerous places within the burgh, or to see that this is done where the public have access, and where this is necessary for the protection of passengers.

In Johnstone, etc., *v.* The Magistrates of Glasgow, 6th February 1885 (12 R., 596), sec. 94 of the Turnpike Roads (Scotland) Act,

1831, enacts that "the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges, embankments, or other dangerous parts of the said roads."

By sec. 47 of the Roads and Bridges Act, 1878, the management and maintenance of roads within burghs are laid on the Local Authorities thereof.

Sec. 94 of the Turnpike Act, 1831, is incorporated with the Roads and Bridges Act, 1878, by sec. 123, which declares that it shall apply to burghs, "except so far as inconsistent with the provisions of any General or Local Police Act in force therein."

The Glasgow Police Act, 1866, sec. 384, enacts: "The master of works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction." This section occurs in division 27 of the Act, entituled "Buildings: their erection, alteration, and use;" and its marginal description is "Dangerous chimney-stalks, appurtenances to buildings to be repaired."

The portion within burgh of a road which was originally a turnpike road, under the management of certain County Road Trustees, was by the Roads and Bridges Act, 1878, vested in the Local Authority of Glasgow. A portion of this road where it ran along the top of an embankment had originally been fenced by the County Road Trustees, but the wall had fallen into disrepair. In a question between the Local Authority of Glasgow and the proprietors of lands through which the road at that point ran—*Held*, that the provisions of sec. 94 of the Turnpike Act, 1831, were not inconsistent with those of sec. 384 of the Glasgow Police Act, 1866, and that, therefore, the duty of fencing dangerous parts of the road, originally laid on the County Road Trustees, was now incumbent on the Local Authority.

See also Lang *v.* Kerr, Anderson, & Co., 1st June 1877 (4 R., 779; *aff.* 26th February 1878, 5 R., H. L., 65), where the Lord Chancellor (Cairns) said that the fence here sought to be erected "is, as was candidly admitted, a fence, the whole purpose and object of which is that when the public are passing along this road they may be protected from falling into the waters of the river Clyde, and thus coming into danger. Now it appears to me that that is not a purpose for which any fencing under this section was intended. It was not intended for the purpose of protecting and keeping inside those persons who had got into a heritage; it was for the purpose of excluding from the heritage those who were outside, for keeping those who were outside from going into it."

In Greer *v.* Stirlingshire Road Trustees, 7th July 1882 (9 R., 1069), a road, at a point where it crossed a burn in the vicinity of a village, was protected only by a fence placed about a foot from the edge, and constructed of wooden posts three feet high and two feet

nine inches apart, with an iron rail at the top. A child, twenty-two months old, which had crept through the fence, fell into the burn and was drowned. In an action by the child's father against the Road Trustees—*Held* (*diss.* Lord Young), that, in the circumstances of the locality, the defenders had provided an insufficient fence, and were liable for the death of the child.

In Harris *v.* Magistrates of Leith, 11th March 1881 (8 R., 613), Leith was originally a burgh of barony, holding of Edinburgh, but after 1832 it became a parliamentary burgh, and there were subsequent Acts dealing with the rights, powers, authority, and jurisdiction of the Magistrates. Ultimately in 1862 the burgh adopted the provisions of the General Police Act, 1862.

In an action of damages against the Magistrates of that burgh for injury sustained in consequence of their alleged neglect to fence and protect a parapet wall at Newhaven, within the parliamentary limits of the burgh, on the road leading by the shore from Leith to Granton—*Held*, (*dub.* Lord Deas), that as the road in question had not been placed by the Statutes above referred to under the charge of the Magistrates, but remained under the County Turnpike District Road Trustees, there was no liability attaching to the Magistrates either (1) at common law, or (2) under the General Police Act, 1862. Observations upon the cases of Innes *v.* The Magistrates of Edinburgh (13 M., 189); Threshie *v.* The Magistrates of Annan (8 D., 276); and Dargie *v.* The Magistrates of Forfar (17 D., 730).

131. Penalty on altering Pavements without consent of Commissioners.—Every person who wilfully displaces or makes any alteration in the pavement, flags, or other materials of any street, without the consent of the Commissioners in writing, or without other lawful authority, shall be liable to a penalty not exceeding £5.

See sub-head (31), sec. 4, for definition of "street;" see secs. 487 and 501 as to imprisonment for non-payment of penalty.

A party who, without proper authority, lifted part of the foot pavement in Princes Street, Edinburgh, opposite to his property, and formed it on a different level, ordained to restore it to its original state, failing which warrant granted to the procurator-fiscal to do so at his expense. Hunter *v.* Turnbull, 10th March 1824 (2 S., 786; N. E., 650).

132. Commissioners may allow Telegraph Poles, etc., in or under the Streets.—The Commissioners may allow any person on such terms and conditions as may be arranged:—

1. To erect telegraph or telephone poles in the streets;

2. To erect or place telegraph or telephone wires either over, in, or under such streets;

3. To make tunnels under or bridges over such streets: Provided always, that the persons who erect such poles or wires, or make such tunnels or bridges, shall be responsible for their proper maintenance, and for any accident that may result from any default in that respect; and any person considering himself aggrieved by any such arrangement made by the Commissioners may appeal to the Sheriff in manner after provided. But nothing in this Act shall take away or abridge or prejudicially affect any right, power, or authority of Her Majesty's Postmaster-General under the Telegraph Acts, 1863 to 1889, or otherwise.

See sub-head (2), sec. 4, p. 5, for definition of "person."

See sub-head (31), sec. 4, for definition of "street;" see sec. 339 as to appeal.

In Scott *v.* Orphan Hospital, 18th November 1835 (14 S., 18; 11 F., 12, vol. i. p. 291), it was held, Magistrates of a burgh have no power to sell right to a private party to erect an arch over part of a public street or lane within the extended royalty, at least where it cannot be absolutely demonstrated that the operation is *innocuæ utilitatis*.

In England the Metropolis Management Act, 1855, does not, by sec. 96, confer upon a vestry, or a Board of Works constituted under that Statute, such a property in the streets situate within their district, as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height, and causing no appreciable danger to the public or to the traffic in the street. Coverdale *v.* Charlton (4 Q. B. D., 104) followed.

Notwithstanding the Telegraph Act, 1869, sec. 3, a telephone company, registered under the Companies Act, 1862, and not incorporated under any special Act, does not fall within the phrase "the company" used in the Telegraph Act, 1863, and therefore is not forbidden by sec. 12 of the last-named Act to erect its wires across a street, unless the consent of the body having the control of the street is obtained (L. R., 13 Q. B. D., 904).

In England a telegraph company were held liable on indictment for a nuisance where they had set up telegraph posts along the road, though the posts were not placed on the hard or metalled part of the highway, nor on the footpath artificially formed upon it, and though sufficient space was left for the public traffic. Reg. *v.* United Kingdom Telegraph Company (2 B. and S., 647; N. 31 L. J., M. C., 166; 26 J. P., 324).

By the Telegraph Act, 1863 (26 & 27 Vict. c. 112), certain powers in connection with the streets are given to the undertakers of telegraph works, subject to the consent of the body having control over the streets. By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), these powers are extended to the Postmaster-General. By the

Telegraph Act, 1878 (41 & 42 Vict. c. 76, secs. 3–5), it is provided that, should the body having control over a street or public road fail, within twenty-one days after application, to give consent to the postmaster-general to place telegraphs and posts in, under, upon, along, over, or across such street or road, the matter may be referred to the Sheriff for determination, as if he were an arbitrator under the Regulation of Railways Act, 1868. If either party is dissatisfied with the decision of the Sheriff, he may cause the matter to be referred to the Railway Commissioners.

In Ritchie *v.* Dundee Police Commissioners, 4th June 1886 (13 R., 63), by sec. 28 of the Street Tramways Act, 1870, it is enacted that "the promoters shall, at their own expense, at all times, maintain and keep in good condition and repair, with such materials and in such manner as the Road Authority shall direct and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than 4 feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends 18 inches beyond the rails of and on each side of any such tramway." The Dundee Street Tramways Turnpike Roads, and Police Act, 1878, which incorporates this section, provides, by sec. 22, "The Commissioners shall at all times maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist." The Dundee tramways were taken over by the Police Commissioners of the burgh, who were themselves the Road Authority under the latter Act. In a complaint brought against them at the instance of a ratepayer, under these Statutes and under the Summary Jurisdiction Acts, charging them with having wilfully failed to maintain in good order the rails and the roads adjoining the rails—*Held*, that the complaint was irrelevant, because (1) no specific allegation was made in the complaint that the rails were in bad repair; (2) that the sole duty imposed by sec. 28 of the Tramways Act, 1870, was to maintain the line to the satisfaction of the Road Authority, and that, as the Police Commissioners were themselves the Road Authority as well as invested with the liabilities of the tramway company, the 28th section of the Act of 1870 could not found a complaint against them.

Question, Whether a complaint under the Summary Jurisdiction Act is competent at the instance of a ratepayer against the Commissioners of Police of a burgh?

The Tramways Act, 1870, does not require tramway companies to construct any bridges, but it contains restrictions with respect to the construction of tramways over bridges (33 & 34 Vict. c. 78, sec. 26; see this Act in Glen's Law of Highways), and requires roads broken up by the company to be reinstated, and to a certain extent maintained, at their expense for six months (*ibid.* sec. 27). It also requires the company to maintain the portion of road which lies between the rails, and so much as extends 18 inches beyond the

rails on each side (*ibid.* sec. 28); and see Vestry of St. Luke *v.* North Metropolitan Tramways Company (L. R., 1 Q. B. D., 760); Croydon Corporation *v.* Croydon Tramways Company (56 L. T., N. S., 78). Under the same Act the "Road Authority" may agree with the company for the repair of any road in which the tramway may be laid, and for the payment of contribution towards the expense of paving and maintaining the road (33 & 34 Vict. c. 78, sec. 29); and see Howitt *v.* Nottingham and District Tramways Company (L. R., 12 Q. B. D., 16; 53 L. J., Q. B., 21; 50 L. T., N. S., 99; 32 W. R., 248); Steward *v.* North Metropolitan Tramways Company (54 L. T., N. S., 35)."—Glen, p. 232.

The relation of railways to Police Commissioners and others interested in the streets may here be briefly noticed.

It has been seen that though a railway company may have statutory power to appropriate and use the subsoil under the street without purchase, that is always subject to liability for compensation for any damage resulting from their operations. Glasgow Coal Exchange Company *v.* Glasgow District Railway Company, 20th July 1883 (10 R., 883), under sec. 128, *supra.*

In Don *v.* North British Railway and Don *v.* Newport Railway Company, 21st June 1878 (5 R., 972), in 1870 a railway company obtained an Act empowering them to make a line of railway which, according to the deposited plans, passed through a certain park which the proprietor was in process of feuing. In 1871 the proprietor gave off a feu bounded on the east by a proposed street, as delineated on the feuing plan. The street, when completed, would have given access to the feu from a turnpike road. This proposed street would have passed through ground required by the company for their line. In 1872 the company served on the proprietor a notice to take the portion of the park required for their line. No portion of the feuar's land was taken, and the proposed street had not been formed. When the company commenced the construction of the line, which would have prevented the construction of the street, the feuar raised an interdict against their proceeding with the works, on the ground, *inter alia*, that he had received no statutory notice from the company. It was held that, as they did not take any of his land, they were not bound to serve any notice upon him, and that, as they had not exceeded their statutory powers, he was not entitled to interdict.

Observed (*per* the Lord President), that his claim, if good, was undoubtedly a claim for compensation under the 6th section of the Railways Clauses Act, and that, under the Lands Clauses Act, the initiative was with the company; while under the Railways Clauses Act, in the case of lands only injuriously affected, the initiative, after the notice given by the Statute itself, was with a claimant.

In Fleming *v.* Newport Railway Company, March 19, 1883 (10 R., H. L., 30; *aff.* First Division, November 12, 1879, 7 R., 179), a proprietor had, before the service of the railway company's notice upon him, feued a piece of field to A. B. "together with free ish and entry thereto by the streets laid down on 'a plan,' but in so far only as the same may be opened and not altered in virtue of the

reserved power after-mentioned," and he reserved "full power and liberty to vary and alter the said plan or streets and roads thereon, in so far as regards the ground not already feued." The railway was not formed for five years after the service of the notice, and during that time there was an access for carts, not by a road, but across the part of the field on which the railway was to be formed. When it was formed the feuar claimed compensation, in respect that the operations, though they did not touch his feu, were injurious, as they cut off the existing access, and prevented the superior from making the streets or roads which the feuar maintained he was bound to make under the feu-charter. It was held that, as the road in question was not in existence when the notice was given, and the superior was not bound under the feu-contract to make it, that he was not entitled to compensation.

Opinion (*per* Lord Watson), that the reservation of power "to vary or alter" by the superior afforded no answer to the claim for compensation, because the compulsory taking of part of the estate would not be regarded as equivalent, in fact or law, to the exercise of that reserved power by the superior himself.

It was held in the same case by Lord Rutherfurd-Clark, and acquiesced in, that there was no claim for compensation for the deviation of a public road rendered less convenient.

In Lawson *v.* Caledonian Railway, January 27, 1881 (8 R., 442), a person held a feu bounded on one side by a vacant piece of ground which the superior bound himself to form into a street, the feuar being bound to maintain it when made. Subsequently a railway company scheduled this piece of ground, and obtained by private Act (incorporating the general ones) compulsory powers to acquire it. They acquired it by voluntary agreement with the superior. The level of the ground having been lowered, and the feuar's access injured, the feuar raised an action of damages against the company, maintaining that, as he had not got notice under sec. 17 of the Lands Clauses Act as a party "interested" prior to the purchase, the company were not entitled to found on the Statutes. It was held that he was not entitled to notice under sec. 17 of the Lands Clauses Act, and his only remedy was a claim for compensation under sec. 6 of the Railway Clauses Act.

In Hay *v.* City of Glasgow Union Railway Company, July 14, 1874 (1 R., 1191), and Glasgow Coal Exchange Company *v.* Glasgow City and District Railway Company (*supra*, p. 184), a railway company obtained powers under their special Act to "stop up and divert" a public road according to certain deposited plans on which a certain deviation road was laid down, the result would have been to cut off the access to the public road from a property previously bounded by it, and the only access offered to the owner was one involving a long detour. It was held, in an application for interdict, that the provision in the special Act did not exclude the operation of the 46th and 47th sections of the general Statute; that the operations in question were *ejusdem generis* with those mentioned in the 16th section of the general Statute; and that the company were

bound to supply the petitioner with a substitute road, "equally convenient as the former road, or as near thereto as circumstances will allow."

In Caledonian Railway Company *v.* Walker's Trustees, March 29, 1882 (9 R., H. L., 19; *aff.* Second Division, January 21, 1881, 8 R., 405), a railway company, in the exercise of their statutory powers, closed two public streets. The owner of subjects in the neighbourhood, no part of which was taken but whose access to a leading thoroughfare had thereby been materially injured, was held entitled to compensation under sec. 6 of the Lands Clauses Act, as his property had been injuriously affected.

In Glasgow City and District Railway Company *v.* MacGeorge, Cowan and Galloway, February 25, 1886 (13 R., 609), the Glasgow City and District Railway Act provided for compensation being given, under the Lands Clauses Acts, for "any structural damage" caused "by reason of the construction of the said covered way or tunnel," to "any building, present or future, fronting or abutting on the streets or roads in or under which railway No. 1 is constructed, or any buildings erected, or which may hereafter be lawfully erected, upon the land over or by the side of the tunnel, or to the foundations of any such buildings." In an arbitration under this section, the oversman found that the claimants' property had sustained "structural damage to the buildings erected on and forming part of said property, and to the foundations of such buildings," and that they were entitled to certain damages. The company raised an action for reduction of this award, on the ground that the arbiter had corruptly and illegally, in making his award, allowed a sum for damages which did not fall within the above section, *e.g.* for speculative deterioration on the future marketable value of the property, and that therefore the award was *ultra vires* of the arbiter and *ultra fines compromissi*. It was held (1) that it was competent for the railway company to examine the oversman with a view to finding out whether he had awarded damages in respect of other than "structural damage" to the buildings or their foundations; but (2) on his evidence, that it had not been proved that he had done so; and (3) that it was not competent for the Court to inquire into the mode by which he had arrived at the sum awarded by him for structural damage.

In Glasgow City and District Railway Company *v.* Hutchison's Trustees, March 20, 1884 (11 R., J. C., 43), the Glasgow City and District Railway Act (1882), empowering that company to make underground railways within a town, and to interfere with streets for the purposes of their undertaking, enacted that "in constructing the railways the company shall restore the portions of carriageway of any street to be from time to time closed by them for traffic for the purposes of the works, within three months from the day upon which such portions shall respectively be so closed; and they shall be liable to a penalty not exceeding £20 for every day after the expiration of the said period during which such portions respectively shall not be so restored."

It was held that the company were liable in the penalty if they did not, within three months, restore portions of the street used by them for the purposes of their works, although these portions did not include the whole breadth of the carriageway, but left a sufficient space to allow carriage and cart traffic to pass.

The penalty was declared to be recoverable, with costs, in the Sheriff-Court, "on summary application by all or any of the proprietors in that part of the street" which was opposite the portion not restored within the fixed period.

It was held competent to proceed under the Summary Jurisdiction Acts, 1864 and 1881.

In Clyde *v.* Glasgow City and District Railway Company, July 16, 1885 (12 R., 1315), the Statute imposing the above penalties was held not to deprive, by implication, the persons injured by the closing of a street beyond the legal period of their common law right to damages; and a shopkeeper in a street obstructed by the operations, who averred that the company had by their operations closed the street in which his shop was situated for a period longer than three months, to his loss and damage, was held to have stated a relevant case for reparation.

In Glasgow City and District Railway Company *v.* Meldrum's Trustees, July 15, 1884 (11 R. J. C., 59), it was held that it was sufficient to give the owner or tenant of a corner house a title to recover the penalty under these enactments that the obstruction was partly opposite the area, though the portion of the street opposite the house itself was clear of obstruction; and that a proprietor or tenant proceeding for the recovery of these penalties was in the position of an informer for the public interest, and consequently that half the penalty was properly apportioned to the poor of the parish under sec. 142 of 8 & 9 Vict. c. 33.

In Glasgow City and District Railway Company *v.* Magistrates of Glasgow, etc., July 18, 1884 (11 R., 1110), an action of declarator at the instance of the railway company, to have it declared that under these sections they were not bound to restore within three months portions of streets occupied by them, where only a part of the breadth of the street was so occupied, leaving sufficient space to allow carriage and cart traffic to pass, was held competent, but the company were held bound to restore, within the three months, all portions of streets used by them for the purposes of their works, though these portions did not include the whole breadth of the carriageway, but left a sufficient space for traffic.

The Railway Clauses Act, sec. 39, provides: "And such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company." These provisions have been construed as meaning that, where the road is carried over the railway, the company must keep in repair not only the bridge but the roadway over the bridge and the approaches thereto. North Staffordshire Railway Company *v.* Dale, 1858 (27 L. J., M. C., 147); Loech *v.* North Staffordshire Railway Company, 1860 (29 L. J., M.

C., 150); but where the railway is carried over the road, the company are bound to keep only the bridge and the road under it in repair. Waterford Railway Company *v.* Kearney, 1860 (12 Ir. C. L. R., 224), Fosberry *v.* Waterford Railway Company, 1862 (13 Ir. C. L. R., 494).—Deas, p. 404.

The Lord Advocate (now Lord Robertson) expressed the opinion, upon the authority of the English cases cited (the two North Staffordshire Railways cases cited in the preceding paragraph), that railway companies were bound to maintain the surface of the roadways over their over-line bridges and approaches thereto. In the same opinion he stated that although the burgh Road Trustees had maintained the surface of these roadways voluntarily hitherto, that had not the effect of relieving the railway companies from such maintenance in the future. This matter is determined one way or other by public Statutes in the interest of the public, and the practice of administering bodies cannot alter the liabilities which those Statutes determine. He further said: "I think those two bodies (the burgh Road Trustees or the Town Councils), and probably either of them, would have a sufficient title to enforce against the railway companies their statutory obligations in this matter." In answer to the query, "Are the burgh Road Trustees responsible to the public for the maintenance and safety of such roadways and bridges?" he answered, "I think not." He does not see room for a dual responsibility, but certainly the burgh Road Trustees ought to have their legal rights cleared up before abandoning the existing practice.

Railway Bridges.—The Railway Clauses Consolidation Act, 1845, requires that if a railway to which that Act applies crosses any turnpike road or public highway, "then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent and descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all time thereafter maintained, at the expense of the company," unless two justices consent to a level crossing being made. 8 Vict. c. 20, sec. 46.—Under this enactment it has been held that, if the highway is carried by a bridge over the railway, the company are bound not only to construct the bridge and the roadway and approaches, but also to keep all these in repair for the future. Great North of England Railway Company *v.* Langbaurgh (24 L. T., N. S., 544; 35 J. P., 581); Newcastle-under-Lyme and Leek Turnpike Trustees *v.* North Staffordshire Railway Company (5 H. and N., 160; 29 L. J., M. C., 150; 8 W. R., 216); also that the repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. North Staffordshire Railway Company *v.* Dale (8 E. and B., 836; 27 L. J., M. C., 147; 4 Jur., N. S., 631); and if the company make default in repairing the roadway, etc., they may be compelled by mandamus to

repair. Reg. *v.* South-Eastern Railway Company (32 L. T., N. S., 858; 39 L. J., P., 44; 40 J. P., 200). But if the railway is carried by a bridge over the highway, no liability devolves on the company to repair the portion of highway on either side of the bridge, even though the company have lowered the level of the highway in constructing their works; such portions of the highway not being approaches to the bridge within the meaning of the Act. London and North-Western Railway Company *v.* Skerton (5 B. and S., 559; 33 L. J., M. C., 158; 10 L. T., N. S., 648; 12 W. R., 1102); Waterford and Limerick Railway Company *v.* Kearney (3 L. T., N. S., 90; 12 Ir. C. L. R., 224); Fosberry *v.* Waterford and Limerick Railway Company (13 Ir. C. L. R., 494)."—Glen, p. 231.

PRIVATE STREETS.

133. Private Streets not properly formed.—Where any private street, in which houses or permanent buildings have been erected on one-fourth of the ground fronting the same, or part of such street, has not, together with the footways thereof, been sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged and channelled in such way and with such materials as to them shall seem most expedient, and completed with fences, posts, crossings, kerbstones, and gutters, and street gratings or gullies, and thereafter maintained to the satisfaction of the Commissioners.

See sub-head (28), sec. 4, for definition of "private street," and (31), "street." The effect of these two definitions is, that a "private street" means any "road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh, used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depôt, wharf, towing-path, or bank," maintained or liable to be maintained by persons other than the Commissioners.

The sole test of whether any of the aforesaid places is a private street or not is whether it has been or is maintained, or is liable to be maintained, by persons other than the Commissioners. Practically this means that all such places are private streets, unless they have been taken over by the Commissioners. But then, before the Commissioners can put their power as to paving into operation, there are other characteristics necessary: (1) It must be a private street "in which houses or permanent buildings have been erected on one-fourth of the ground fronting the same;" and (2) it must be a private street which has not, or part of which has not been, together

with the footways thereof, sufficiently levelled, paved, or causewayed and flagged, to the satisfaction of the Commissioners. The words "in which houses or permanent buildings have been erected on one-fourth of the ground fronting the same," were not in previous General Police Acts, but have been introduced into this Act, and are not an improvement; their meaning is by no means clear, and their construction and application will lead to a good deal of difficulty. Questions will arise as to what is a "house" (see sub-head (13), sec. 4) or "permanent building" (sub-head (3), sec. 4), and as to such "being erected on one-fourth of the ground fronting the same." This is a very indefinite phrase, capable of several constructions, and the words "part of such street has not" only add to the difficulty. One of the chief difficulties in any question as to private streets is generally the extent thereof. In Campbell *v.* Leith Police Commissioners, 29th June 1865 (3 M., 1035), one of the main questions was the extent of the streets. The averments of the complainer were, *inter alia*, that upon both sides of the street one or two buildings have been erected on areas of ground feued out by the complainer; that the remainder of the ground was open and unenclosed; that it had been contemplated to continue the street through this piece of ground, but that in fact no road had ever been laid out; and that, on the contrary, posts had been so placed in the ground as to prevent the centre spaces from being converted into a road or thoroughfare, or used as such. On a proof, the Court held the street to be a private street, 21st June 1866 (4 M., 853), and although the House of Lords reversed it, it was on the point of notice, the street being held to be a private street. See also Millar's Trustees *v.* Leith Police Commissioners, 19th July 1873 (11 M., 932, 45 J., 578). A piece of ground within a burgh, which had been originally intended to form a continuation of a street, and had been enclosed by walls marking out the line of the intended street, was held by three joint-proprietors, whose titles conferred right on any one of their number at any time to insist upon it being thrown open as a public thoroughfare. It was used as an access to workshops and yards belonging to the several joint-proprietors, and occupied by various tenants. For a long time it was shut off from the street of which it formed a continuation by a wall with a locked gate therein; the wall was, however, broken down, and the gate removed, about fourteen years before the present action, but the ground was never thrown open as a public thoroughfare. The General Police and Improvement Act having been adopted in the burgh, the Police Commissioners, after giving the statutory notice, caused a portion of the ground to be paved. *Held*, in an action at the instance of two of the joint-proprietors against the Police Commissioners, that the ground was a private street in the sense of sec. 3 of the Act, and, as such, fell under the regulations of the Act applicable to private streets, and that consequently the pursuers, who had failed to object to the execution of the work in the manner prescribed by the Act, were barred from complaining thereof. See Kirriemuir Police Commissioners *v.* Jamieson, 16th February 1891 (67 Scot. Law Rev., 183), affirmed by Court of Session on appeal, but not reported.

A piece of ground within the burgh, 29 feet in breadth, ran along the march of two proprietors, 15 feet on one side and 14 feet on the other. The proprietor on the east, or 15 feet side, feued along his march, and bound his feuars to form the 15 feet in front of their houses into a road, and stated in their charters that the other proprietor was to form his 14 feet so as to make a road of 29 feet in breadth along the whole feus. The feuars roughly formed the 15 feet in front of their houses, and a wire fence was erected on the opposite proprietor's ground, marking off the full breadth of 29 feet. The rough road formed by the feuars was used by carts passing from one public street to another. The 14 feet on the west proprietor's ground was used by him as a deposit for rubbish and stones, and could not be used by carts. Two years before the raising of the present action he removed a stone wall at the south end of his 14 feet strip, which projected across it to the feuars' 15 feet of roughly formed road. The General Police and Improvement Act having been adopted in the burgh, the Commissioners, after giving the statutory notice, caused the whole strip of ground, to the full breadth of 29 feet, to be paved. *Held*, in an action at the instance of the Police Commissioners against the proprietors of the 14 feet strip, for the recovery of his share of the private improvement assessment for putting in order and paving the whole 29 feet of road, that only the 15 feet strip in front of the feuars' houses was private street in the sense of sec. 3 of the Act, and as such fell under the regulations of the Act applicable to private streets, and that the 14 feet strip was private property to which the Act did not apply.

In Hope *v.* Edinburgh Road Trust, 27th February 1878 (5 R., 694), a road was constructed by a proprietor of lands within Edinburgh through the said lands, under an agreement with an adjoining proprietor, who gave ground for an extension of the road, that the latter's property should have a servitude over the road. In consequence of the existence of the servitude, it was found impracticable to exclude general public traffic. *Held*, that the road was a "private street" within the meaning of the Edinburgh Roads and Streets Act, 1862, and that the Road Trustees were entitled to present an application to the Sheriff, under the 33rd section of the Act, with a view to having the proprietor compelled to "make up, construct, and causeway" the road at his own expense.

These cases show what the Court has held to be a "private street," and the next question to consider is, What will be considered sufficient levelling, paving, etc., in terms of the Act? On referring to the session papers in Campbell *v.* The Leith Police Commissioners, 21st June 1866 (4 M., 853), it appears that the whole length of the street, as contended for by the respondents, was from Commercial Street to Madeira Street, a distance of 1045 feet. The first 48 feet were causewayed 10 feet wide, the next 66 feet were causewayed 18 feet wide, the next 339 feet were causewayed 10 feet wide, and that there were 101 feet of causeway 14 feet wide. No other part of the street was causewayed. There were 491 feet not causewayed. There were 48 feet of footpath, 4 feet 3 inches wide, not flagged but

laid with gravel, not very well. In front of three houses the footpath continued of the same width for the next 66 feet, but was flagged, though not in good order. The footpath continued for 37 feet farther, but was not flagged, though laid with gravel but not in good order. A portion had no footpath, not even a kerbstone. Farther on there was a footpath of 5½ feet in width and 75 feet in length, not flagged but consisting of mud, with a rough whinstone kerb. For a distance of about 30 feet there was no kerb or footpath. Along the same side, to a distance of about 184 feet, there was 15 feet causewayed and hornised in very good order. There is no other footpath on that side. On the other side there was no footpath or kerb of any kind visible between Madeira Street and Great Junction Street; the greater portion of the street from east to west there was a footpath 11 feet 6 inches wide, 80 feet long, but neither flagged nor gravelled, and in bad order. From there to Couper Street, a distance of 43 feet, there was a footpath 5 feet wide, flagged and in fair order. From Couper Street, a distance of 101 feet, there was a footpath 5 feet wide, laid with flags and in fair order. Then there was a vacant space; but at the end of Prince Regent Street next Commercial Street there was a footpath formed for 50 feet, 10 feet 6 inches wide. There were buildings going on there, and the footpath had been widened and was still in an unfinished state. There were 295 feet of water channel, taking both sides. There were on both sides 1695 feet unchannelled. In these circumstances, the Court unanimously held that the street had not been properly levelled and paved. The Lord Justice-Clerk (Inglis) said: "Now I think it is clearly proved that this subject with which we are now dealing was designed as a street of some kind or other, that it was not well and sufficiently paved when the Act was adopted, and further, that it has not been maintained as a public street." See also Millar's Trustees above referred to.

On the other hand, in Police Commissioners of Johnstone *v.* Donald, 3rd February 1882 (9 R., 613), where, in a case under the 1850 Act and the Nuisances Removal Acts, the former of which provides that if any street have not, before the adoption of the Act, been well and sufficiently paved and flagged, or otherwise made good, the Commissioners may require the owners of property abutting on the street to make it good, the Court held that the street had been made good prior to the adoption of the Act, and assoilzied the defender. It appears by the Lord Ordinary's note that the road was originally well made, and since 1857 had carried, without maintaining or repair, all the heavy traffic which passed to and fro from the mills. This would have been impossible if it had not been a good road, and in the opinion of the Lord Ordinary there was no fault to be found with it when the Act was adopted. It had certainly become worse since that date, but chiefly by the operations of the pursuers, who in 1875 made a drain along it, and did not replace in a sufficient manner the materials which they had removed. See also Magistrates of Edinburgh *v.* Forsyth, 6th March 1884 (11 R., 671), where it was held that, where the owners of lands fronting on any private

street, three-fourths of the frontage of which had not been built over, but made at the time of construction a properly constructed street, within the meaning of sec. 120 of the Edinburgh Municipal and Police Act, 1879, they were not liable to be called upon by the Magistrates of the city to put the same at their own expense into temporary repair. This case was under the Edinburgh Act, which is different in its phraseology from this Act, but it throws some light upon this section.

It will be observed that it is the Commissioners who may cause the work to be done. By the definition clause, the "Commissioners" means such in their collective capacity, which practically implies that the order should be made at a meeting of the Commissioners. In Thomas *v.* Elgin, 4th July 1856 (18 D., 1204; 28 Jur., 590; Digest of Cases, 302), the Perth Local Police Act, 2 Vict. c. 43, empowers the Police Commissioners to appoint committees "for carrying the purposes of the Act into execution," and for that purpose to delegate their powers to them. *Held*, upon a construction of the Statute, that a paving committee had no power to order proprietors to repave a street, but only to see to the execution of decrees pronounced by the Commissioners. See also Thomson *v.* Dundee Police Commissioners, 8th December 1887 (15 R., 164), under sec. 54, *supra*.

It will be noticed that there is no point of time fixed as to when the street must have been properly paved. In the Act of 1850, the words used were, "If any street have not before the adoption of the Act been well and sufficiently paved and flagged," etc., the Commissioners may act. On that, in the case of Johnstone above referred to, the Lord Justice-Clerk (Moncreiff) expressed the opinion that it is at the time when the Police Act of 1850 is adopted that the Commissioners have the duty imposed on them of judging whether a road is properly made good or not, and if they are not satisfied they are bound at the time so to say, and to require the owners of the land abutting on the road to make it good. In the Act of 1862 the words used were: "Where any private street, or part of a street, is at the adoption of this Act formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled," etc., the Commissioners may act. Under the present Act the matter is left quite open.

There is no provision here for notice being given to the owners, and as the 339th clause of this Act is quite different from the appeal clause in the 1862 Act, there does not seem to be any statutory provision absolutely prescribing notice. The form and service of notices to be given under the Act is provided for in sec. 336, which provides that, "unless otherwise herein expressly provided, the following provisions shall apply to the making, giving, delivering, or service of any notice, order, resolution, requisition, demand, or other instrument under this Act, or any bye-laws in force." Then follows the mode of giving the notice. In Campbell *v.* Leith Police Commissioners, 28th February 1870 (8 M., 31), it was held—*rev.* judgment of the Court of Session—that the paving of a private street by the Commissioners of Police was an improvement for

which they were entitled to charge "private improvement assessment," and of which they were bound to give notice under the 397th section of the Act.

Now, as the "Commissioners" must resolve that the street, together with the footways thereof, has not been sufficiently levelled, paved, and causewayed, and flagged to their satisfaction, so the order to cause the work to be properly done must likewise proceed from the Commissioners. See the Lord President's opinion in Thomas *v.* Elgin, 4th July 1856 (18 D., 1204). This order will therefore be an order, resolution, requisition, or demand under the Act, to which the 336th section will apply, and notice accordingly should be given under and in terms of that section. It is of the utmost importance that the notice should be given under the proper sections of the Statute. See Magistrates of Edinburgh *v.* Paterson, 3rd December 1880 (8 R., 197). In that case the Magistrates had proceeded on the wrong sections of the Edinburgh Roads and Streets Act, 1862, and the Court held the proceedings invalid. The Lord President (Inglis) said: "I am therefore clearly of opinion that the pursuers here have proceeded under the wrong section of the Statute, and the consequence is that their whole proceedings are invalid, and that they cannot be allowed to recover this money," *i.e.* the expenses of paving the street. See also as to the sufficiency of notices, Youden *v.* Jackson, 16th July 1887 (14 R., 1001), referred to under sec. 137. The notice in this case looked very like a notice to be given under the 394th instead of the 397th section of the 1862 Act, but the Sheriff held it to be sufficient under the 397th section and the Second Division so held on appeal. See also the case of Campbell *v.* Magistrates of Edinburgh, 24th November 1891 (19 R., 159), where the Court held that notices to pave or causeway a street under the provisions of the Edinburgh Municipal and Police Acts were insufficient, in respect that they did not sufficiently specify the nature of the work required to be done.

The Commissioners may cause the street, or part thereof, and the footways to be "freed from obstructions." What are obstructions? On examining the session papers in Campbell *v.* Leith Police Commissioners, 29th June 1865 (3 M., 1035), it appears that there was a part of an old garden wall, 6 or 8 feet high, jutting out on the street at one part, and a small wooden paling at another part of the street, while wooden posts were placed across a part of the street to prevent carts going along. Yet the Court held the whole length of the ground to be "private street," and consequently these were obstructions which the Commissioners would be entitled to remove. And in Millar's Trustees *v.* Leith Police Commissioners, 19th July 1873 (11 M., 932), there was a stone wall which extended out about 9½ or 10 feet on the street, and a gate post about 1½ feet high, with a wooden shed inside, leaning against the side wall of the street, all of which the Commissioners caused to be removed as obstructions, and the Court upheld the finding the street to be a private street. On the other hand, the Court will not allow a house to be removed as an obstruction. In Newall and Inman *v.* Commissioners of Dum-

fries, 21st June 1830 (4 Wilson and Shaw's Appeal Cases, 137), it was held (reversing the judgment of the Court of Session) that a clause in the Police Act of Dumfries, authorising the Commissioners to remove obstructions, did not warrant them, for the purpose of widening the entrance to a street, to remove a tenement which did not encroach on or obstruct the line of the other houses.

The mode and manner of levelling, and the materials to be used in paving, etc., are to be as shall seem most expedient to the Commissioners. In the case of Connal & Co. *v.* Govan Police Commissioners, 14th November 1888 (5 Scot. Law Rev., 93), Sheriff Balfour *held*, that it is not a relevant ground of appeal, under the 396th section of the 1862 Act, that the order of the Commissioners appealed against requires operations to be executed which are alleged to be altogether exceptional in the district.

On the other hand, in a case at the instance of The Corporation of the Burgh of Galashiels *v.* William Haldane, 20th May, not reported, the Sheriff (Pattison) decided otherwise. This was a case praying the Court to interdict the defender from constructing the footway in front of or abutting on his property of water stones bedded in sand, and to ordain him to comply with an order of the corporation, whereby he was requested to cause the said footway to be made, and to be well and sufficiently formed and channelled with the materials, etc., specified in said order, and that in terms of Part 4, sec. 3, of the General Police Act of 1862, and clauses 40 to 47, both inclusive, of the Galashiels Municipal Extension Police and Water Act, 1876. On appeal against this order, the Sheriff-Substitute (Milne) varied the order of the Commissioners to the extent of allowing the appellant "the option of forming the footway of 'concrete,'" or to be paved with stones, in terms of clause 149 of the Police Act. The appellant proceeded to do the work with water stones instead of concrete or Caithness pavement, as the Commissioners ordered. The Commissioners brought an interdict in the Sheriff-Court, which the said Sheriff refused, and on appeal the Sheriff (Pattison) "recalled his Substitute's interlocutor, and refused the petition."

The judgment of Sheriff Balfour in the Govan case is more to be relied on. The judgments in the Galashiels cases are barely creditable to judicial authority. For a Sheriff to allow a ratepayer an alternative method of implementing a statutory order is a novelty in judicial procedure, as is the recalling of a Sheriff-Substitute's interlocutor by a Sheriff to pronounce the same interlocutor himself.

The danger of such vacillating procedure is well illustrated in Hillhead Police Commissioners *v.* Martin and Bruce.

See Hillhead Police Commissioners *v.* Martin and Bruce, 27th November 1889 (17 R., 125; 27 S. L. R., 97). On 12th October 1883, the Commissioners gave notice, in terms of the Act, that they intended to have the street causewayed. Subsequently, however, yielding to the wishes of a number of the proprietors, they, on 12th November 1883, resolved that, while they could not accept macadamising as a mode of completing the street to their satisfaction

in terms of the Statute, they would, "as a temporary mode of meeting the requirements of the case, substitute macadamising for causewaying for the centre of the street, reserving full right at any time hereafter either to order the street to be causewayed, or to order such further repairs or operations to be executed on the same, at the expense of the owners of property abutting thereon, as they may deem proper." Immediately after the work of repairing the street in pursuance of this resolution had been completed, and notice of the assessment had been given to the various proprietors, two proprietors, who had not previously joined in any of the representations made to the Commissioners with regard to the street, called on them to take it over under sec. 104, in respect that it had been put in good order and repair to their satisfaction. The Commissioners deferred consideration of this application, but two years afterwards they yielded to a similar request on the part of a number of the other proprietors. In an action at the instance of the Commissioners against the two proprietors above mentioned—*Held*, (1) that in coming to the resolution of 12th November 1883 the Commissioners had not acted under the authority of the Statute, and therefore that the assessment had not been validly imposed on the defenders; but (2) that the defenders were liable therefor, in respect that, by their actings subsequent to the notice of assessment, they had barred themselves from objecting thereto.

134. Private Streets may be declared Streets as defined in this Act.—If any private street shall at any time be made, paved, or causewayed and flagged, together with the footways thereof, and put in good order and condition to the satisfaction of the Commissioners, then, and on application of any one or more of the owners of premises fronting or abutting upon such street, or of the superior or owner of the ground on which such private street has been formed, it shall be lawful for the Commissioners to declare, and if such street has been paved and put in order on their requisition, as hereinbefore provided, they shall declare the same to be vested in the Commissioners, and it shall be thenceforward maintained by the Commissioners.

See sub-head (28), sec. 4, for definition of "private street," (22) "owner," (16) "premises." It will be noticed that if a private street has been paved and put in order on the requisition of the Commissioners under sec. 133, they must declare the street to be vested in the Commissioners, and thereafter maintain the same. This, of course, can only be done on the application of any one or more of the owners of premises fronting or abutting on the street, or the superior or owner of the ground on which the same has been formed.

In Macleish *v.* Christie, etc., 21st Oct. 1885 (Scot. Law Rev.,

vol. i. p. 180), it was held that the provisions of this section (sec. 176 of 1862 Police Act) as to streets taken over on completion by the Commissioners do not apply to the foot pavement, which must be laid by the owners of the properties abutting thereon.

In Kinning Park Police Commissioners *v.* Thomson & Company, 22nd Feb. 1877 (4 R., 528), a street constructed and maintained by the feuars on either side, to whom the solum belonged, and which was from 1870 to 1875 open to public traffic, but had not been sufficiently paved and flagged, was, in 1875, after the district in which it was situated had been erected into a burgh under the Police Act, 1862, ordered by the Commissioners of the burgh to be properly levelled and causewayed at the expense of the feuars. *Held*, that after this was done, the street still remained a private street in the sense of the General Police and Improvement (Scotland) Act, 1862, and that the feuars were entitled to exclude general public traffic by means of posts and chains.

In Commissioners of Kinning Park *v.* Stewart, 15th Dec. 1885 (2 Scot. Law Rev., 166), it was held that a proprietor in a private street is under no obligation to maintain and repair the street after it has once been levelled, paved, etc., under their statutory powers, to the satisfaction of the Commissioners.

135. Temporary Works on Private Streets. — Where, in the judgment of the Commissioners, it is not expedient that any private street should be paved or causewayed and flagged and channelled to the full extent, as above provided for, it shall be lawful for the Commissioners to cause any such private street, or any part thereof, to be only temporarily put in order; and in carrying out this enactment the Commissioners may cause all or any of the following works to be executed, viz.:—

1. The carriageway to be properly levelled, and laid with road metal or such other material as they shall deem proper;

2. Lines of kerb to be laid in such position to such level, and of such size, shape, and material, as the Commissioners may determine;

3. Channels or gutters with gratings or gullies to be made to carry off the water;

4. Temporary footways or crossings to be formed and made, using gravel, or road metal, or other material, to secure the public convenience:

And it shall be lawful for the Commissioners from time to time to cause such temporary works to be renewed: And provided always that the Commissioners may at any time after two years, subsequently to the execution of such

temporary works, or any renewals thereof, cause the street, or any part thereof, to be permanently paved or causewayed and flagged and channelled in the manner herein provided for in regard to private streets, or to cause the footways to be permanently laid in the manner herein provided for in regard to foot pavements of streets, at any time they may deem proper, though the causeway and channels or gutters be not permanently completed till a subsequent time.

See sub-head (28), sec. 4, for definition of "private street." This will be a very useful provision, as it will enable the Commissioners in suburban localities to adopt temporary measures, and execute temporary works instead of causewaying private streets which are not fully formed, or do not actually require to be causewayed. They can now do this and keep the same in proper order, without losing their right to call upon the street to be paved and causewayed in terms of sec. 133. The necessity for such a provision as the present is well illustrated in the Hillhead case, referred to in last section.

136. Carriageway of Private Streets may in certain cases be Macadamised. Footpaths may for a time be laid with Gravel, etc.—Where, in the judgment of the Commissioners, it is not necessary to pave or causeway the carriageway of any private street, as herein provided for, but only to macadamise the same, it shall be lawful for the Commissioners to cause the carriageway of any such street, or any parts thereof, to be macadamised in such manner and with such material as they shall deem proper, provided that the owners of two-thirds of the frontage of the lands and premises in such street consent to such macadamising thereof; and where such macadamising of the carriageway is so agreed on, and completed, with all necessary fences, posts, crossings, kerbs, and gutters, to the satisfaction of the Commissioners, such streets, or parts thereof, shall be maintained by the Commissioners; and in such case the footpaths of such street shall be dealt with as the Commissioners shall deem proper; —that is to say, the Commissioners may cause the same to be paved in the ordinary way, as herein provided for in regard to foot pavements; or they may allow the same to be temporarily dealt with by the owners using gravel, or road metal, or other material, to serve the public convenience, for such time, and from time to time, as the Commissioners shall see fit; but all such owners shall be bound to lay and main-

tain foot pavements before their respective properties in the ordinary way, as herein provided for, whenever required to do so by the Commissioners.

See sub-head (28), sec. 4, for definition of "private street." If the owners and the Commissioners elect to accept macadamising instead of causeweying the carriageway, the Commissioners must thereafter maintain the street. The right of the Commissioners as to the footways is, however, reserved.

137. Expense to be paid by Owners.—The whole of the costs, charges, and expenses incurred by the Commissioners in respect of private streets, including the footways, fences, posts, crossings, kerbs, gutters, and gratings or gullies thereof, shall be paid and reimbursed to them by the owners of the lands or premises fronting or abutting on each street, as the same shall be ascertained and fixed by the Commissioners or their surveyor, and the whole of such costs, charges, and expenses shall be recoverable as private improvement expenses.

See sub-head (28), sec. 4, for definition of "private street," (22) "owner," (16) "lands and premises." In Campbell's case the House of Lords found that these costs were a private improvement under the 1862 Act, and the Legislature has declared this in this section.

In Dundee Police Commissioners *v.* Mitchell, 2nd June 1876 (3 R., 762), Police Commissioners served notice upon a house proprietor, under the 64th section of the Nuisances Removal Act, requiring him to pave a street. The proprietor having paid no attention to the notice, the Commissioners paved the street themselves, and raised an action in the Sheriff-Court against the proprietor, under the same section, for recovery of the expense. The defender averred that the street was not of the description which, under the Statute, he was bound to pave. The Commissioners maintained that the defender not having appealed against the notice to the Sheriff, under sec. 286 of the Police and Improvement Act, 1850, he had acquiesced, and the matter was concluded. *Held*, that sec. 286 related solely to matters "the cost attending which was directed to be provided for by way of private or district assessment," and had no application to proceedings. Under the Act of 1862, and under this Act, the cost of this work falls to be provided for as private improvement assessment, so that this judgment does not apply.

In Govan Police Commissioners *v.* Macleod, 9th Nov. 1886 (4 Scot. Law Rev., 11), the alleged owner of ground in a police burgh having been called on to execute certain repairs on the roadway in front of his ground, refused to do so, and the Burgh Commissioners having executed the necessary work, sued him for the cost. *Held*,

(1) that he was not liable, not being an owner in the sense of the Police Act of 1862, in respect his only title was a written offer which had not been accepted in writing, and the contract had not been validated *rei interventu;* (2) that he could not question the amount of the assessment, his remedy having been to appeal to the Commissioners; (3) that a challenge of the validity of the proceedings in constituting the burgh could not be made by way of defence, but only by a substantive action of reduction, and was, in any event, too late; and (4) that, in the circumstances, neither party should get expenses.

In Youden *v.* Jackson, 16th July 1887 (14 R., 1001), sec. 150 of the General Police and Improvement Act, 1862, enacts with reference to private streets, that it "shall be lawful for the Police Commissioners to cause any such street or part of a street . . . to be properly levelled, paved, or causewayed and flagged." Sec. 151 authorises the Commissioners to recover the cost from the proprietors of property fronting or abutting on the street, by private improvement assessment. Sec. 397 enacts that the Commissioners shall "give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office, or delivered personally or at their dwelling-houses, to the individuals having interest, as the Commissioners shall think proper; and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the Commissioners in respect of such matters or things," etc. The Act provides no special form for such notices.

The Commissioners of a burgh put up a notice at the market cross, and at each end of a road which had long been used as a public road, intimating the intention of the Commissioners "to fix the level" of the road, "to make the roadway thereof, and a footpath on both sides, with kerb and gutter;" but the notice did not state that the road was to be dealt with as a private street, and did not show that the Commissioners intended to hold the owners of property fronting or abutting on the road liable for the cost.

In an action brought by the Commissioners against the owner of property abutting on the street for payment of a proportion of the cost, the defender pleaded (1) that the road was not a private street, and (2) that if it were a private street, the Commissioners had not given sufficient notice under sec. 397.

The Court, after a proof, *held*, (1) that the road was a private street, and (2) that the notice was sufficient.

In Magistrates of Leith *v.* Gibb, 3rd Feb. 1882 (9 R., 627), where a house was separated from a private street by the remains of an old wall, the site of which did not belong to the owner of the house—

Held, that he was not liable to be assessed under sec. 151 of the General Police and Improvement (Scotland) Act, 1862, as an owner of premises "abutting" on the street. In this case it was observed by the Lord President, that unless premises have access to a street they cannot "abut" upon it within the meaning of the Statute. With all the respect which is due to the dictum of so eminent an authority as the late Lord President (Inglis), the writer submits, with deference, that there is no warrant in the Statute for such an opinion. At the corner of every street, in any town, will be found tenements which abut on a street, but which have no access to that street; and other cases might be instanced of owners having lands and premises abutting on a street without an access thereto. The word "abut" is from the French *abouter*, from *bout*, an end, and means to border upon, to be contiguous to, to meet; in strictness, "to adjoin to at the end" (Imperial Dictionary). There is nothing in the word itself implying access, and there is nothing in the Act itself necessitating this. In Gibb's case, on an appeal being intimated to the House of Lords, the assessment was paid. This view is confirmed in Campbell *v.* Magistrates of Edinburgh, 24th Nov. 1891 (29 S. L. R., 146; 19 R., 159), where the proprietor of a garden and of an upper flat of a tenement fronting A street on the west, and bounded by B street on the north, objected to a notice under the Edinburgh Municipal and Police Acts, 1879 and 1891, calling on him to pave and causeway B street, as owner of "lands and heritages fronting or abutting on the same." The only access to the flat was from A street, but the conveyance also included a *pro indiviso* right to the solum on which the tenement was built. Objection repelled.

In Cran *v.* Anderson, 13th Dec. 1887 (4 Scot. Law Rev., 197), it was held that the feuars in the principal street are liable for the expense of causewaying the roadway and paving the crossings at and opposite to streets abutting on the street in which their property is situated.

In England, a railway and canal company whose premises abutted on a street, but with a fence between them and the street, were held liable to be charged. Reg. v. Newport Local Board (32 L. J., M. C., 97; 3 B. and S., 341; 9 Jur., N. S., 746; 11 W. R., 263).

A line of railway was situate in a deep cutting at a place where a road was carried over on a bridge from one boundary of the line to another, supported on stone piers erected on the slope of the cutting. It was held that the line and the slopes of the cutting did not "bound or abut on" the road within the meaning of the Metropolis Management Act, 1862. London, Brighton, and South Coast Railway *v.* Vestry of St. Giles, Camberwell (L. R., 4 Ex. D., 239; 41 L. T., N. S., 162; 48 L. J., M. C., 184).

And, in a subsequent case, a railway line ran in a deep cutting, and a highway was carried over it (nearly at right angles) by a bridge built by the railway company under statutory powers, and in pursuance of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, secs. 46–51. The parapets of the bridge consisted of two

walls resting upon arches which had their foundations outside the lines of the roadway in the railway company's land. The walls were not used by the company otherwise than as fences for the bridge. The District Board of Works having paved the highway, which was admitted to be a new street within the meaning of the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, sec. 105, the House of Lords decided, reversing the decision of the Court of Appeal, that, assuming the fence-walls to be the railway company's land, the company were not "owners of land bounding or abutting on" the highway, and were not liable as owners of the fence-walls to contribute to the expenses of paving. It was held also, by Lords Blackburn and Watson, that the railway line and slopes being much below the level of the highway, the company were not, in respect of such line and slopes, "owners of land *bounding or abutting on*" the highway, and were not liable as owners of the line and slopes to contribute to the expenses of paving. Great Eastern Railway Company *v.* Hackney Board of Works (L. R., 8 App. Cas., 687; 48 J. P., 52).

Under the Manchester General Improvement Act, 1851, 14 & 15 Vict. c. 119, sec. 17, which enacts that the expenses incurred by the Town Council in sewering and flagging a street shall be borne by the owners, "according to the extent of their respective houses and grounds lying alongside or adjoining to the said street," it was held that the owner of ground at the end of a street forming a *cul-de-sac* was liable to pay an apportioned share of the expenses, although a wall divided his property entirely from the street. Manchester Mayor, etc. *v.* Chapman (37 L. J., M. C., 173; 18 L. T., N. S., 640; 16 W. R., 974; 32 J. P., 582). Again, where a small stream ran between one side of a street and the adjoining premises, which were connected with it by two bridges, the owners of the premises were held liable to pay their share of the expenses of paving the street. Wakefield Local Board *v.* Lee (L. R., 1 Ex. D., 336; 35 L. T., N. S., 481; 40 J. P., 372). And where a railway ran in a cutting adjoining a new street which a vestry in the metropolis were about to pave, and the railway was separated from the street by a wall, through which there was no communication between the street and the railway, it was held that within the meaning of the Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, sec. 77, the railway "bounded" the street. London and North-Western Railway Company *v.* St. Pancras Vestry (17 L. T., N. S., 654).

By the Metropolis Management Acts, 18 & 19 Vict. c. 120, sec. 105, and 25 & 26 Vict. c. 102, sec. 77, the costs of paving a new street under the compulsory powers of the former Act are payable by the owners of the houses "forming" the street and of the land "bounding or abutting on such street," and are to be apportioned by the Vestry or District Board of Works. Strips of land belonging to a railway company abutting upon a street, and kept and used for the sole purpose of repairing the arches of the railway viaduct, were chargeable with the costs of paving the street under the Metropolitan Acts, as was also land used only as a buttress for the railway embankment, and to allow for slippings from it. Higgins *v.* Harding (L. R.,

8 Q. B. 7; 42 L. J., M. C., 31; 27 L. T., N. S., 483; 21 W. R., 191; 37 J. P., 677). So, under the same Acts, the owner of private roads running into a new public road, and not dedicated to the public, was held liable to pay a share of paving the new road. Pound *v.* Plumstead Board of Works (L. R., 7 Q. B., 183; 41 L. J., M. C., 51; 20 W. R., 177; 25 L. T., N. S., 461; 36 J. P., 468). But the owner of the soil of public roads was held not to be so liable. Plumstead Board of Works *v.* British Land Company (L. R., 10 Q. B., 203; 44 L. J., Q. B., 38; 32 L. T., N. S., 94; 23 W. R., 634; 39 J. P., 376).

By a Local Paving, etc., Act, a rate was to be made on every tenement "within the said street." To the north of High Street, Whitechapel, and communicating with it by a covered gateway, there was a yard which, with the exception of the width of the gateway, and together with all the houses, etc., round it, was situated at the back of houses which front High Street. No part of the yard was ever paved or repaired by the Local Commissioners, nor had they within the yard at any time exercised any of the powers conferred on them by the Act. It was held that the occupiers of the yard and houses therein were liable to be rated in respect of the paving and repairing of High Street, the premises being for that purpose "within the street," inasmuch as they had a frontage on the street, and their sole communication was with it. Baddeley *v.* Gingell (1 Ex. Rep., 319; 11 J. P., 838). So also a house in a yard, to which the only access was by a private passage leading into the street, was held to be one of the houses "forming the street," within the meaning of the Metropolitan Acts. *Per* Cockburn, C.-J., "access to the premises is the foundation for the liability." London School Board *v.* Vestry of St. Mary, Islington (L. R., 1 Q. B. D., 65; 45 L. J., M. C., 1; 33 L. T., N. S., 504; 24 W. R., 137; 40 J. P., 310). See also Dodd *v.* St. Pancras Vestry (34 J. P., 517).

A. was the owner of three houses fronting a street called York Place, and adjoining or abutting at the rear upon a footpath at the end of a street called St. Julian Street, which formed a *cul-de-sac*. The ground at the back of these houses was five feet above the level of St. Julian Street, and the wall, which was the property of A., was about twelve feet high on the outside. There was no access from the premises of A. to St. Julian Street. Nevertheless, it was held that A.'s premises "adjoined or abutted on" that street within the meaning of the Act, and consequently that he was chargeable with his proportion of the expenses of paving, etc., that street, under sec. 150. Newport Urban Sanitary Authority *v.* Graham (L. R., 9 Q. B. D., 183; 47 L. T., N. S., 98; 31 W. R., 121; 47 J. P., 133).

A different result was arrived at where the premises of the person charged were separated from the street by a wall five feet high, belonging, together with the land on which it stood, to another person. There was no direct access from the premises to the street, but in order to reach it persons had to pass for a short distance down a public footpath or other intervening land, and it was held that the

premises were not "fronting, adjoining, or abutting on" the street within the meaning of sec. 150, and therefore the owner was not liable to contribute to the expenses of sewering and paving the street under that section. Lightbound *v.* Bebington Local Board (L. R., 16 Q. B. D., 577; 55 L. J., M. C., 94; 34 W. R., 219; 53 L. T., N. S., 812).

In another case, a person was owner of a strip of land four inches wide, and 265 feet in length, upon which a fence was erected between a new street and the adjoining lands. He kept up the fence under a covenant, the ownership and occupation of the strip being retained by him, but there was no other land belonging to him upon the same side of the road. It was held that he was in the beneficial occupation of the strip, and was the owner within definition of "owner" in the Metropolis Management Acts, and that he was therefore liable to bear a proportion of the expenses of paving the road as the owner of land *abutting on* a new street. Williams *v.* Wandsworth Board of Works (L. R., 13 Q. B. D., 211; 53 L. J., M. C., 187; 32 W. R., 908; 48 J. P., 439).—Glen, p. 260.

In Coatbridge Town Council *v.* Evangelical Union Church, April 18th, 1892 (8 Scot. Law Rev., 203), it was held that the cost incurred by the pursuers in laying a pavement in front of the defenders' church was not an assessment under the General Police Act, 1862, such as entitled the defenders to exemption from payment claimed by them as a church, under the Act 37 & 38 Vict. c. 20.

This was an action at the instance of the Provost, Magistrates, and Town Council of the Burgh of Coatbridge, incorporated under the Coatbridge Burgh Act, 1885, against Alexander Russell, 6 Weir Street, Coatbridge, William Revie, 104 Main Street, Coatbridge, and Davis Smith, Coats Cottage, Dundyvan, Coatbridge, trustees and managers of, or as otherwise representing the Evangelical Union Church in Coatbridge. The pursuers sued for £33, 8s. 3d., being the amount incurred by them in laying down and forming pavement opposite defenders' church in the burgh of Coatbridge, they having failed to do so when called on by the pursuers in terms of the General Police Act, 1862. The defenders pleaded that they were not liable for the expense of paving, as it was of the nature of an assessment, and that all churches and chapels are exempt from local rates, in terms of 37 & 38 Vict. c. 20. The Sheriff-Substitute (Mair) finds that the expense so incurred is not of the nature of a local rate or assessment, and therefore the provisions of the Act 37 & 38 Vict. c. 20, intituled "An Act to provide for the exemption of Churches and Chapels in Scotland from Local Assessments," do not apply to the defenders; finds that the defenders are bound, in terms of sec. 399 of the General Police and Improvement (Scotland) Act, to reimburse the pursuers for the amount expended by them as aforesaid; therefore decerns against the defenders for the sum of £33, 8s. 3d., with interest, as prayed for; finds the pursuers entitled to expenses, etc., and decerns. On appeal, the Sheriff (Berry) adhered, and in his note said: "But it is contended by them that they are exempt from the liability which the Statute imposes, and they rest this claim of

exemption on the Statute 37 & 38 Vict. c. 20, passed in 1874, which enacts 'that no assessment or rate under any General or Local Act of Parliament for any county, burgh, parochial, or other local purpose whatever, shall be assessed or levied upon or in respect of church, chapel, meeting-house, or premises in Scotland, exclusively appropriated to public religious worship.'

"The question here is simply one of interpretation, and, regarding it in that light, I am of opinion that the language of the Act of 1874 is not sufficiently wide to confer the exemption which the defenders seek to set up."

138. In certain cases, Proportion of Expenses to be fixed by Commissioners. — Where one or more private streets, or parts thereof, serve for or lead to various premises adjoining the same, or where, from the peculiar nature of the locality, in the judgment of the Commissioners, the proportions of each owner cannot be regulated according to the frontage as above provided for, the Commissioners shall fix and determine the premises the owners of which shall be liable for such costs, charges, and expenses, and the proportions leviable from each owner, as they shall consider, under all the circumstances of the case, to be just, and their determination shall be final.

See sub-head (28), sec. 4, for definition of "private street," (16) "premises," (22) "owner." This is a section somewhat difficult of explanation and application. In a case, Leith Police Commissioners *v.* Armitt, 7th April 1874, Irons' Manual, Ap., p. 202, the Sheriffs held that this section did not apply to the case where an owner's house entered from another street behind and parallel to the street paved, in consequence of the front plots of ground intervening between the houses and the street paved. The Sheriff-Substitute (Hamilton) said: "Clearly the provision referred to applies to a very different case from the present; to the case, for instance, of an off-lying point or circle of houses to which the adjoining street forms the only access." It practically amounted to this, that where the Commissioners can assess by frontage they must do so.

In the case of Govan Commissioners *v.* Caledonian Railway Co., 25th February 1890 (6 Scot. Law Rev., 365), it appeared that the Caledonian Railway Company were proprietors of a depôt, partly in the Burgh of Govan and partly in the Burgh of Kinning Park, but only to a very small extent in Govan. Vermont Street runs east and west right through Cornwall Street and Lambhill Street, both of which latter streets run north and south. All these streets are in the Burgh of Govan. The goods entrance to the depôt of the railway company was from Vermont Street, and the pursuers contended that the whole of the goods traffic to their depôt coming from

anywhere must either pass along Lambhill Street or Vermont Street. The title of the Caledonian Company showed that this ground was bounded by the centre line of Vermont Street. The pursuers called upon the defenders to pave the street, but the defenders neither executed the work nor appealed against the order of the Commissioners, who thereupon executed the work and sued for payment of the cost. The paving and causewaying work executed by the Commissioners ran from the junction of Cornwall Street to the junction of Lambhill Street. On both sides of the street the property of Connal & Co. Limited, alone fronted and abutted, but the gateway to the station was directly opposite the end of Vermont Street, though actually fronting and abutting on Lambhill Street. In these circumstances the Commissioners were of opinion that, from the peculiar nature of the locality, the proportions of the expenses incurred in the paving and causewaying operations could not be regulated according to frontage, as provided for in the 151st clause, and therefore fixed and determined the proportions in terms of clause 152, finding the railway company liable in the amount thereof. The Sheriff held that the defenders were, in the sense of the General Police Act of 1862, frontagers of the street, and that, not having timeously objected to the assessment, it was now too late for them to do so.

In Magistrates of Leith *v.* Paxton, 20th July 1885 (1 Scot. Law Rev., 348), the defender contended that the assessment in respect of a corner tenement should not be laid on according to sec. 151, but according to sec. 152. The Sheriff-Substitute (Hamilton) held that the assessment complained of had been rightly imposed in terms of sec. 151 of the General Police and Improvement Act, 1862, and that sec. 152 of said Act had no application to the circumstances of the case, and repelled the defences.

In a note the Sheriff-Substitute says: "There are two answers to the contention upon which the defence is founded—(1) That as the streets shown on the plan No. 16 of process are all private streets within the meaning of the Acts libelled, and were so treated without objection until after the operations mentioned on record had been completed, the pursuers had no alternative but to charge the expense of these operations, in terms of the 151st section of the General Police Act, upon the owners of property fronting or abutting on the several streets, in proportion to the extent of such frontage. That is the only mode of assessment recognised by the Act in the case of private improvement expenses, and it must be strictly carried out, even though in particular instances it may operate with apparent harshness. Thus, in the present case, the proportion payable by the owners of houses on the line A to B, in the plan, is much greater than that payable by the other owners, to whom the assessment applies. This, however, is a result for which the pursuers are in no way responsible. (2) It is a mistake to suppose that sec. 152 of said Act applies to this case. Although the street running eastwards off Lochend Road forms the only access to the other streets shown on said plan, and may, therefore, be said to 'serve for or lead to' them,

the expression 'premises' used in said section cannot be held to include 'streets.'

"Upon these grounds the Sheriff-Substitute is of opinion that the objections stated to the present assessment are not well founded. Practically, however, the question is of no importance to the defender, for under the feu contract relating to the area embraced in said plan he can obtain the very relief which he here claims."

In Duncan *v.* Cousin, 20th June 1872 (10 M., 824), by the Edinburgh Roads and Streets Act, the expense of making up, constructing, and causewaying private streets is laid upon "the owners of lands and heritages, according and in proportion to the lineal frontage of the same," the proportion so leviable from the owners of buildings being "assessed on them as among themselves, according and in proportion to the annual rent or value of such buildings." *Held*, that the owners of lands and heritages on one side of a street, which consisted of a single row of villas, the other side not being available for building purposes, were liable for the whole expense of making up, constructing, and causewaying such street.

139. Owners to be liable only for Proportions of Expenses.—Each owner shall be liable only for his own proportion of the said costs, charges, and expenses, and any owner who shall have well and substantially, and to the satisfaction of the Commissioners, levelled, made, paved or causewayed or macadamised, and flagged and channelled, any part of such private street, or of the footways thereof, or done any of such works, shall be entitled to such relief as shall appear to the Commissioners to be just.

See sub-head (22), sec. 4, for definition of "owner," (28) "private street."

There is a new provision here, giving an owner who may have done work a claim for relief in respect thereof.

140. Right of Relief, etc., not to be affected.—Nothing in this Act contained shall affect any right of relief in regard to the making, paving or causewaying, maintaining, or cleansing of streets which the owner or any other person may have by feu contract or otherwise, or the right to claim repayment of any expense incurred by the Commissioners in making any street in terms of any Local Act of Parliament; nor shall any liability attaching in law to any persons liable to make, pave or causeway, maintain or cleanse streets, or the footways thereof, be affected, altered, or abridged thereby.

In Govan Police Commissioners *v.* Provan, 26th October 1888

(5 Scot. Law Rev., 21), where the footway of a turnpike road passing through a burgh was, prior to the passing of the Roads and Bridges Act, kept up by the Roads Trustees—*Held*, that the Burgh Commissioners, as thereafter responsible for its upkeep, were entitled to compel the adjacent frontagers to execute any needed repairs, and to enforce that demand by levying a private improvement assessment.

The Sheriff-Substitute (Lees), in giving his decision, said: "I have gone carefully through the points which were debated before me at the hearing. The considerations that weigh with me are these. This claim is made under sec. 103 of the General Police and Improvement (Scotland) Act, 1862. The pursuers are the Commissioners of the Burgh of Govan, and the defender is the owner of property abutting on the Paisley Road which passes through Govan, and his property is, I presume, within two miles of the cross of the burgh and of the Burgh of Glasgow. The Commissioners, going upon sec. 103, called upon the defender to execute the repairs stated in the account founded on, and on his failure to do so they executed the work themselves, and imposed a private improvement assessment, in accordance with the Act; and the question is, Was this a repair which the defender was bound to make? As I understand Mr. M'Lennan's argument, he says that the Road Trustees, previous to the passing of the Roads and Bridges Act, should have done it, and that the Local Authority as coming in their place are now bound to do so. The defence is, therefore, that under sec. 82 of the General Turnpike Act of 1831, the obligation laid on the Road Trustees of maintaining the roads and footways was operative in this place, as being within two miles of a burgh. Govan was made a burgh in 1864, and the section founded on by Mr. M'Lennan would then be in force. This is a turnpike road, and of course the footways would be kept up by the Trustees out of the tolls which they levied. Now, the effect of the Police Act of 1862 is to relieve the Road Trustees, except in so far as the 181st section may modify the matter. Then comes the Roads and Bridges Act of 1878, and it is quite plain that that Act contemplated that the footways might be maintained by the Local Authority. who were maintaining the surface of the roads: sec. 45 provides for that. Then comes sec. 47, which declares that the Local Authority, shall have the management of the roads within the burgh, and be subject to the same liabilities as Landward Trustees. The pursuers are the Local Authority of the burgh, and this, it is said, makes them liable for the upkeep of the pavement in the same way as the Trustees were bound to maintain them. This, it is said, follows as an inference, from the provision in sec. 32 that Landward Trustees are to have the same liabilities as Turnpike Road Trustees formerly had. The question thus narrows itself to this—Has the 181st section of the General Police Act the effect of making different provisions, so far as regards footways on turnpike roads from those which affect the streets of the burgh? I think it must be at once conceded in favour of Mr. M'Lennan's argument, that that section is not very happily expressed. The Commissioners take the view that this

clause is to be interpreted as meaning that the liability of the Road Trustees refers only to the streets and not to the footways; and I am clear, on the construction of the Statute, that the view taken by the Commissioners is right. As I have said, the clause is not very happily expressed, but I think it means that the foot pavements are to be dealt with in terms of the General Police and Improvement Act. That is certainly consonant with the spirit of the Statute; and just as the intention of the Act is to leave to the Local Authority the option of themselves maintaining the footways, it has left it open to them to resolve whether they will undertake to do so or not. If they undertake to maintain them, then the whole locality is assessed for keeping them up, just as the expenses of the roads were formerly applied; but the alternative reading of the section would lead to the result that certain ratepayers would be assessed generally to keep up the footways of their neighbours whose premises were in front of a turnpike road, and in addition would have to maintain the footways opposite their own properties in other streets of the burgh at their own expense. This would be, I think, a very inequitable state of matters. I am of opinion that the view taken by the Commissioners is the sound one." With reference to this question, the Lord Advocate (Mr. Balfour) and Mr. Dewar, advocate, said: "We are of opinion that the law is correctly laid down in Police Commissioners of Govan *v.* Provan."

See sec. 4, sub-head (31), for definition of "street," (22) "owner."

Foot Pavements.

141. Foot Pavements.—The owners of all lands or premises fronting or abutting on any street, shall at their own expense, when required by the Commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved, or constructed with such material, and in such manner and form, and of such breadth, as the Commissioners shall direct, and the Commissioners shall thereafter from time to time repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, or not laid out or used as a garden or pleasure-ground, or pertinent of a house, it shall not be lawful for the Commissioners to require such owner to construct such footway, but the Commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-

thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground, or pertinent of a house; and all expenses to be incurred by the Commissioners, in so far as recoverable from the owners, shall be recoverable as a private improvement expense: Provided that nothing contained in this section shall apply to the footways of private streets.

See sub-head (22), sec. 4, for definition of "owner," (16) "lands and premises," (31) "street," (13) "house," (28) "private street." See sec. 365 for "private improvement expenses." See secs. 336, 337, as to "notice."

It will be observed that it is the owners of lands or premises fronting or abutting on any street who are to cause their footways to be made. With regard to the construction of "fronting or abutting," see Campbell *v.* Magistrates of Edinburgh, 24th Nov. 1891 (19 R., 159), and cases and remarks under sec. 137. The work is to be done when required by the Commissioners. The notice ought therefore to be given under and in terms of secs. 336 to 338 inclusive, and the notice must specify in what manner the work is to be carried out. See Campbell *v.* Magistrates of Edinburgh, *supra*. The notice ought to give some short specification of the material, the manner and form and the breadth the Commissioners require. There is a new provision in this section. In the 1862 Act the owners were required to uphold and repair the footways, but by this section after the footways are properly constructed the Commissioners must "thereafter from time to time repair and uphold such footways."

In Brown *v.* Lang, 12th June 1888 (4 Scot. Law Rev., 473), it was held that a parish minister is "owner" of the manse in the sense of the 212th section of the Police Act of 1850, and as such is liable for the expense of laying down a footway opposite the manse.

In Magistrates of Portobello *v.* Bryce, 30th November 1885 (2 Scot. Law Rev., 297), it was held that a promenade 20 feet broad, extending along the shore below high-water mark, and retained by a sea wall, was not a footway on the side of a street within the meaning of the Act, and that the proprietors of abutting premises could not be compelled to construct such promenade and wall *ex adverso* of their tenements.

In Cathcart Railway Co. *v.* Commissioners of Crosshill, 20th May 1889 (5 Scot. Law Rev., 370), a railway company, whose line ran in a cutting below, but parallel to a footpath on a disturnpiked road, from which the line was separated by a boundary wall belonging to the railway company, were held to be owners of lands or premises fronting or abutting on the street in terms of sec. 149 of the General Police and Improvement Act of 1862, and therefore liable for the paving and maintenance of the footpath.

In Police Commissioners of Lanark *v.* Baxter, January 1888

(4 Scot. Law Rev., 93), sec. 212 of the Police and Improvement Scotland Act, 1850, which is incorporated with the Lanark Police Act, 1854, enacts: "The owners of all houses, . . . which are adjoining to or fronting any street, shall at their own expense, when required by the Commissioners, cause footways before their property respectively on the sides of the said streets to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner or form, and of such breadth, as the Commissioners shall direct," etc. *Held*, that the obligation on owners to make footpaths applied to all footpaths, whether made prior to the Roads and Bridges Act, 1878, or upon requisition under the Police Act of 1850.

In Lowson *v.* Commissioners of Police of Forfar, 16th March 1877 (4 R., J. C., 35), the Forfarshire Roads Act, 1874, sec. 22, and the General Police Act, 1850, sec. 212, laid upon the owners of property within the Burgh of Forfar the obligation of making paved footways along the frontage of their properties, and empowered the Police Commissioners, after the lapse of fourteen days from notice given to any such owner requiring him to do so, to proceed against him by summary complaint, on which imprisonment for a limited time might follow. Notice was served upon an owner requiring him to pave the footpath in front of his property, and he at once, without waiting for a complaint to be laid against him and disposed of by the inferior Court, brought a suspension of the notice in the High Court of Justiciary, and craved interdict against the Commissioners carrying out any proceedings under their notice. The Court held that the suspension was premature, and refused to entertain it.

In Reid, Clerk to Commissioners of Police of the Burgh of Johnstone, *v.* Donald and Husband, 3rd Feb. 1882 (9 R., 613), it was held that sec. 212 of 13 & 14 Vict. c. 33 (Police and Improvement Act, 1850), which enacts that owners of houses adjoining any street "shall at their own expense, when required by the Commissioners, cause footways to be made, and to be well and sufficiently paved with flat, hewn, or other stones," does not entitle the Commissioners to insist on the formation, by the proprietor, of gutters along such footpaths.

In Highland Railway Co. *v.* Police Commissioners of Perth, 26th Feb. 1890 (6 Scot. Law Rev., 155), it was held that a proprietor who owned ground considerably over 100 yards in continuous length along a street was not entitled to the exemption, contained in clause 149 of the General Police Act, from payment of two-thirds of the cost of laying foot pavement along his ground, although it was unoccupied and unbuilt upon. This was an appeal to the Sheriff against an order by the Commissioners requiring the railway company to lay foot pavement before their property fronting or abutting on Glasgow Road in the Burgh of Perth. On remit to an architect to report on the dimensions and mode of occupation of the appellant's property, it appeared that the main or east part of their property had a frontage to the roadway of 267 feet, and was occupied by their engine sheds, water tanks, coal sidings, etc. There was also a service road leading to the works, with depôt for ashes and

small piece of garden ground adjoining. Immediately to the west of the above, and fronting Glasgow Road, there was a long narrow strip of ground, stated to belong to the railway company, but which seemed to be subject to certain accesses off it. There was no fence between it and the public road, and nothing to show the boundary line of the road. This narrow strip had a frontage to Glasgow Road of 368 feet 6 inches, and was bounded on the north by the premises of Messrs. MacDonald, Fraser, & Co. It was further reported that the main accesses to the property were through the end portions of the narrow strip of unenclosed ground, and that their property was occupied by mart buildings and refreshment rooms constructed of wood, a brick dwelling-house, and various sheep and cattle pens.

In the Commissioners of Falkirk *v.* Thallon's Trustees, 13th July 1891, unreported, the defenders were proprietors of two subjects fronting a private street in the burgh. One of said subjects fronted or abutted on said street for a length less than 100 yards, and was partly built upon. The other subject fronted or abutted on said street for a continuous length exceeding 100 yards, and was unfeued or unbuilt on. The two subjects were not contiguous, being separated by lands and premises fronting said street for a length of 32 yards or thereby belonging to a different proprietor. The Commissioners sent a notice to the defenders requiring them to put in a kerb and make a footpath in front of said subjects. The defenders did nothing, and thereafter the kerb was put in and the footpath formed by the Commissioners. The Sheriff-Substitute (Hamilton) held "that the lands or premises of the defenders front or abut on said roadway, and for a continuous length exceeding 100 yards are unfeued and unbuilt upon, that the footpath in question was properly made in terms of sec. 149 of said Act, and that the defenders are liable as follows for the cost of making the same,—for the whole cost so far as the footpath is *ex adverso* of buildings belonging to them, and for one-third of the cost in so far as the footpath is *ex adverso* of lands belonging to them which are unbuilt upon and unfeued." Both parties appealed to the Sheriff-Principal (Blair), who held that the notice given was a sufficient notice in terms of sec. 397 of said Act; that in terms of sec. 149 of said Act the pursuers were entitled to recover from the defenders the whole of the sum expended by them upon the construction of the footpath in front of the property of the defenders first above mentioned, and also to recover from the defenders one-third of the sum expended by them upon the footpath in front of the property of the defenders second above mentioned: therefore sustained the appeal for the pursuers, and decerned against the defenders, and dismissed the appeal for the defenders.

The Sheriff, in a note, said: "The defenders maintained that they were not liable in any part of the sum claimed by the pursuer, in respect (1) that the notice sent to them or their agents on their behalf was not such as to comply with the requirements of the Act; and (2) that the footpath made by the Police Commissioners had not been constructed in the manner specified in the notice. The Sheriff does not think that either of these objections is well founded. No

particular form of notice is required by the Act, and although that given by the Commissioners might have been rendered more precise by a reference to the section of the Act under which the defenders were called upon to carry out the work, it appears to be sufficiently distinct. The ground of the second objection is that the pursuers, in making the footpath, substituted, at the request of some of the proprietors interested, a layer of stones covered with engine ashes in place of cement, with the result that the work was done at less expense. But the words of the 149th section give the Commissioners power to determine the manner in which the work is to be done, and seems to be sufficient to enable them to make an alteration in the details of carrying out the work, at least when that does not involve increased expense.

"The more difficult question is that raised by the pursuers' appeal. They maintain that, as the two properties belonging to the defenders are not contiguous, but separated by subjects belonging to a third party, the unbuilt on frontage of the smaller property cannot be tacked on to the larger property, which is wholly unbuilt on, so as to be liable at present only for one-third of the sum expended upon the footpath *ex adverso* of it. The Sheriff adopts this construction of the 149th section of the Act. He is of opinion that an owner who claims to be assessed on the lower scale of one-third of the Commissioners' outlay must show that his premises exceed 100 yards of unfeued or unbuilt on frontage along the street, and that the frontage is continuous.

"The interjection of the subjects belonging to a different proprietor displaces the last condition in the case of the subjects belonging to the defenders, and as the smaller property does not exceed 100 yards in length, and is in part built on, it follows that the full cost of the footpath is payable in respect of it."

In a case in the Sheriff-Court (Melville *v.* Leith Police Commissioners), unreported, Sheriff Crichton held that a nursery garden and a market garden were not to be considered a garden or pleasure-ground within the meaning of a similar section under the 1862 Act. His judgment explains itself.

After quoting sec. 149 of the 25 & 26 Vict. c. 101, the Sheriff says: "In virtue of the provisions contained in the above-quoted section, the Burgh Surveyor for Leith, on behalf of the Magistrates and Council, served, on 3rd March 1888, a notice on the appellant requiring him to pave the footway on the eastern side of Pilrig Street, the said footway being that on which the lands of Pilrig belonging to the appellant front or abut. It was admitted that the lands of Pilrig, where they front or abut on Pilrig Street, are unfeued and unbuilt on, and are used partly as a nursery garden and partly as a market garden.

"The appellant asks that the order contained in the notice served upon him should be quashed; and one of the grounds on which he asks this to be done is that the length of the footpath to be formed fronting his lands exceeds a continuous length of 100 yards, and that the said lands are unfeued and unbuilt on. This being admitted, the Sheriff is of opinion that it was not lawful for the

Commissioners to require the appellant to construct a footway on the eastern side of Pilrig Street. The proper course for the Commissioners to adopt is to construct a footway themselves, and to proceed to recover from the appellant one-third of the expense thereof, or the whole expense, if it shall be held that the lands have been used 'as a garden or pleasure-ground or pertinent of a house.'"

In Commissioners of Police of Dalkeith *v.* Duke of Buccleuch, 8th Mar. 1889 (16 R., 575), the Police and Improvement Act, 1862, enacts, by sec. 149: "The owners of all lands or premises fronting or abutting on any street shall at their own expense, when required by the Commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved; . . . . and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands are unfeued or unbuilt on, it shall not be lawful to the Commissioners to require such owner to construct such footway, but the Commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground, or pertinent of a house." *Held*, that in the cases where the Commissioners are not entitled to require the owner to construct a footway, but may construct one themselves and recover one-third of the expense from the owner, the obligation of maintenance, if such footway be constructed by them, is divisible between them and the owner in the same proportion. *Diss.* Lord Rutherfurd-Clark, who held that the obligation of maintenance rested solely on the owner.

Police Commissioners served notice, under sec. 149 of the Police and Improvement Act of 1862, upon the proprietor of houses in a burgh which had adopted that Act, requiring them to adjust and properly lay the footway in front of their property. Certain of the proprietors having paid no attention to the notice, the Commissioners repaired the footway, and raised an action in the Sheriff-Court against them for recovery of the expense. The defenders averred that the Commissioners, in adopting the Police and Improvement Act of 1850, took over the footway as sufficiently constructed, and further, that the works contemplated in the specification amounted to reconstruction of the footway. *Held*, that the items of the account libelled showed that the operations were of the nature of repairs; that sec. 149 of the Act of 1862, besides incorporating sec. 212 of the Act of 1850, imposed upon owners the burden of maintaining the footways opposite their lands; and that the defenders had made no relevant averment that the Commissioners had ever undertaken to relieve the defenders of this latter obligation. Commissioners of Police of Old Aberdeen *v.* Leslie, 18th March 1884 (11 R., 733).

142. When Commissioners undertake Maintenance of Foot Pavements, Owners to put same in a sufficient state of repair.—It shall be lawful for the Commissioners to resolve, at a meeting specially called for the purpose, to undertake the maintenance and repair of all the footways of the burgh. When the Commissioners shall undertake the maintenance and repair of the foot pavements in the burgh, they shall call upon all owners to have their foot pavements before their properties put in a sufficient state of repair, and, failing their doing so within six weeks, the Commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot pavements shall be maintained by the Commissioners: Provided that nothing contained in this section shall apply to the footways of private streets.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (22) "owner," (28) "private street." See sec. 50 as to calling meeting.

By sec. 134 it is provided that, if any private street shall, together with the footways thereof, be put in good order to the satisfaction of the Commissioners, then, on the application of the parties therein mentioned, the "street" is to be vested in the Commissioners, and thereafter maintained by them. By sec. 141, after the footways in streets have once been formed to the satisfaction of the Commissioners, they are thereafter to repair and uphold them.

143. Right of Appeal.—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.

See sub-head (31), sec. 4, for definition of "street." See sec. 339 as to "appeal."

NAMING THE STREETS AND NUMBERING THE HOUSES.

144. Houses to be Numbered and Streets Named.—The Commissioners shall from time to time cause the houses and buildings in all or any of the streets to be marked with numbers, as they think fit, and shall put up or paint on a conspicuous part of some house, building, or place, in legible characters, at or near each end, corner, or entrance of every

such street, the name of such street; and no name shall be given to any street except by the Commissioners or with their consent, and they shall have power to alter the name and the numbers of any streets; and every person who destroys, pulls down, or defaces any such number or name, or puts up any number or name different from the number or name put up, or caused to be put up, by the Commissioners, shall be liable to a penalty not exceeding 40s. for every such offence.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (3) "building," (31) "street." See secs. 487, 500, 501, for imprisonment in default of payment of fines, penalty for repetition, and power to mitigate, and 458 as to punishment of abettors. The Commissioners have now power to alter the names and numbers of streets under this Act, which they had not under the 1862 Act.

In Lauder *v.* Brown, 10th December 1889 (17 R., Just., 5), it was held that an owner of a house in a street who had been called upon by the Police Commissioners to mark his house with number 58, had failed to do so, by allowing his house to bear the former number 3 along with the new number.

This was a case where the Police Commissioners of Hillhead caused the street named Cecil Street to be numbered with a series of numbers, and these numbers were placed on the houses. The appellant is the owner of a house in this street, which was numbered 58. It appears that the street, or the part of the street in which it is situated, had been formerly called Sardinia Terrace. The appellant's house was the third house of that terrace, and it bore the number 3 on the fanlight over the door. In order that Cecil Street should be numbered as they had directed, the Commissioners, on 20th February 1889, required the appellant to remove from his house the "existing number 3 put up or exhibited by him thereon."

The appellant refused to comply with this requisition, and in consequence two complaints were made against him, one under the 158th section for putting on his house the number 3, and the other under the 159th section for failing to number his house with the number 58. He was convicted under both complaints. . . . Lord Rutherfurd-Clark, who gave the leading opinion, said: "The first question is, What is the power which has been committed by the Legislature to the Commissioners? They are authorised to cause the houses in every street to be marked 'with numbers as they think fit.' But, in my opinion, this means not only that the houses shall bear the number which they direct to be displayed upon them, but also that they shall bear no other number. The purpose of the Act is to secure the proper distinction of the houses within the burgh. That end is to be attained by each house bearing a particular number, and no other. It could not be attained if it were lawful for the owners to mark them with such other number or numbers as

they chose. The Statute was passed for the interest of the public, and I think that we are bound so to construe it as to secure that interest. But there is no room or necessity for forced or ingenious construction. The meaning which I have assigned to it seems to me to be the natural and only reasonable meaning of its language. I am therefore of opinion that the house of the appellant must bear the number 58, and that it must bear no other number.

"The question remains, Whether the appellant has been rightly convicted under either complaint? It is here that the difficulty lies. For, as I have said, the number on the fanlight was there before the action of the Commissioners, and the number 58 was on the house before the complaints were served. But it also follows that if both prosecutions fail, the appellant can set the Commissioners at defiance. This would be a very lamentable result, and one which the Legislature could hardly have contemplated; for it means that the order of the Commissioners may be disobeyed, and that the Statute furnishes no means for enforcing its provisions.

"I do not think that we are reduced to so hard a necessity. For, if I am right in holding that no number shall be displayed on a house except the number which the Commissioners desire, it follows that a house which bears any additional number is not marked as the Statute requires. To mark a house with the proper number is to put on it that number only, and to remove every other number. To do anything else is to my mind a non-compliance with the order, and a failure to mark the house with the requisite number. I am therefore of opinion that the appellant has failed to mark his house with the number 58, and that he has been rightly convicted under the 159th section.

"There is perhaps more difficulty in regard to the other complaint, but I do not think it necessary to consider it. I am not disposed to sanction two convictions for one offence. I think that the Commissioners were bound to elect under which section they desired to proceed, and that they are not entitled to proceed under both. On that ground, I am of opinion that the conviction under the 158th section should be quashed."

145. Numbers of Houses to be Marked and Renewed by Owners.—The owners of houses and other buildings in the said street shall mark their houses with such numbers as the Commissioners direct, and shall renew such numbers as often as they become obliterated or defaced; and every such owner who fails, within one week after notice for that purpose from the Commissioners, to mark his house with a number to the satisfaction of the Commissioners, or to renew such number when obliterated, shall be liable to a penalty not exceeding 40s.; and the Commissioners shall cause such numbers to be marked or to be renewed, as

the case may require, and charge the cost thereof to the burgh general assessment.

See sub-head (22), sec. 4, for definition of "owner," (13) "house," (3) "building," (31) "street." See secs. 487, 500, 501, for imprisonment in default of payment of fines, penalty for repetition, and power to mitigate. As to form and service of "notice," see sec. 336; "burgh general assessment," sec. 340.

LAYING OUT NEW STREETS.

146. Notice of Intention to lay out New Streets to be given to Commissioners.—Every person who intends to form or lay out any new street shall give notice thereof to the Commissioners, and along with such notice he shall lodge a plan of the proposed street, with longitudinal and cross sections, showing the proposed levels and means of drainage thereof, in order that the level of such street may be fixed by the Commissioners; but where any such street is, at the time of the coming into force of this Act, in whole or in part, the subject of any contract then existing for the formation thereof, the same shall not be held or taken to be a new street within the meaning of this Act.

See sub-head (31), sec. 4, for definition of "street," (9) "Commissioners," p. 5 as to "person." What is a new street? The definition of "street" is given, but most "new streets" are "private streets" till taken over by the Commissioners. And yet the word "street," and not "private street," is used in this section. It will certainly be safer to assume that the section provides for all new streets.

In England, the meaning of the words "new street" was considered by the House of Lords, in a case in which it was decided that a bye-law under sec. 157 (388 of 39 Vict. c. 5), providing that every new street should be laid out and formed of such width and at such level as the Urban Authority should in each case determine, referred only to the width of roadway, and not to the width between the houses on opposite sides of the street, and that therefore the Authority were not entitled to disapprove of and pull down houses in course of erection on the ground that the building line was too near the roadway. Lord Selborne, L. C., said: "The interpretation clause has said that (when there is nothing in the context to exclude it) the words shall be applicable to a mere highway, on neither side of which are houses. . . . It is perfectly consistent with that, that they should be read as applicable, and should be applied, to those things to which they in their natural sense apply, and which do not require any interpretation clause to bring them in; and in the natural and

popular sense of the word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side; (it is not necessary to say how far they must or may be continuous or discontinuous;) and by 'new street' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it." It was accordingly held that the term "new street" in the Act and the bye-laws was applicable to a road which had existed as a country lane with a cinder roadway, with no well-defined footways, and with grass growing at the sides, since a period long anterior to the existence of the Local Board. The road had been lighted by the Board since 1865; it had been sewered by them in 1876 and 1877; cindered footpaths had been made in 1880 and 1881; the roadway was channelled and paved in 1880; and the road was repaired by the Board as a highway repairable by the inhabitants at large. There were eighty-seven houses along the road, of which sixty-two had been erected within the last ten years, during which time the bye-laws had been in force. Robinson *v.* Barton Eccles Local Board (L. R., 8 App. Cas., 798; 53 L. J., Ch., 226; 50 L. T., N. S., 57; 32 W. R., 249; 48 J. P., 276).

It had previously been decided, with reference to the Metropolis Management Acts (25 & 26 Vict. c. 102, sec. 112; see also *ib.*, sec. 98), that an old highway became a new street on the erection of buildings along it. Pound *v.* Plumstead Board of Works, and Lord Northbrook *v.* Plumstead Board of Works (L. R., 7 Q. B., 183; 41 L. J., M. C., 51; 25 L. T., N. S., 461; 20 W. R., 177; 36 J. P., 468). Dryden *v.* Putney Overseers (L. R., 1 Ex. D., 223; 34 L. T., N. S., 69; 40 J. P., 263). Under these Acts it was also held that a portion of the Edgeware Road in the Metropolis, not yet built upon to any extent, having formerly been a turnpike road, became a "new street" on the expiration of the Trust. Vestry of St. John, Hampstead, *v.* Cotton (L. R., 16 Q. B. D., 475; 54 L. T., N. S., 441).

A person built six cottages upon a piece of garden ground adjoining an ancient public lane, 6 feet wide and 250 feet long, upon which there had previously been only two houses, the sides of which abutted on the lane, one at each end. The cottages stood 15 feet back from the lane, and had gardens in front, leaving the same width as before. The builder was convicted of having neglected to give proper notices under the bye-laws before constructing a new street, and of laying out and forming a new street of less width than that required by the bye-laws, subject to a special case, in which the Magistrates stated: "We found as facts, on the facts proved or admitted, that the erection of the said cottages in accordance with the said plan would have and had converted the said lane into a new street within the meaning of the Public Health Act, 1875, and the said bye-laws." As to this statement, Denman, J., said "that what the Magistrates had done was, that though they found certain facts, they felt themselves bound in point of law to find it was a new street." On this point of law the convictions were quashed, the

Court holding that there was no evidence to show more than that the appellant, having land on which he was entitled to build, determined to build six cottages, without contemplating the formation of a new street, and nothing to justify the Magistrates in coming to the conclusion that the lane became a new street by the act of the appellant alone, without the aid of the other owners. The Court discussed the judgment of the Court of Appeal in the case above cited, viz. Robinson *v.* Barton Eccles Local Board (L. R., 21 Ch. D., 621; 47 L. T., N. S., 286; 52 L. J., Ch., 5), which was not affected on this point by its reversal on another point by the House of Lords (as to which, see *ante*, p. 233), Hawkins, J., saying that it was there pointed out that a "street may become a new street in a variety of ways. If the land on both sides belongs to one owner, and he lays it out in building plots, and begins to build on one plot, he would begin to form a new street, having an intention to go on and make a street. Another way is where the land belongs to different owners, and by their united acts you can find an intention indicated to make a new street, in the popular sense of the term. In that case it would be impossible to come to any other conclusion than that it was a new street. Another case is where the land belongs to different owners, and no tribunal could say that there ever was at the same time an intention amongst them all to build. In that case the precise time at which it does become a new street may be a question of some difficulty, and it is a question of fact to be decided by the Justices." Williams *v.* Powning (48 L. T., N. S., 672; 47 J. P., 486).—Glen, pp. 285–7.

Every person intending to lay out a new street must give notice thereof to the Commissioners. The notice to be given should be in terms of sec. 338 of the Act, and must be accompanied by a plan, as provided in this 146th clause. The Act does not in this case fix the scale on which the plan is to be drawn, as it does in the case of plans of new buildings (sec. 166), but it is advisable that the scales—horizontal and vertical—should be fixed, and probably the Commissioners could accomplish this by means of bye-laws under sec. 316*a* (10). The plans and sections must show the proposed levels and means of drainage of the new streets, and in this connection the map of the burgh referred to in secs. 210–213 must be consulted.

The date of the commencement of the Act is 15th May 1893, but other dates will here apply, as in burghs adopting parts of the Act, or in new burghs created under the Act.

147. Levels to be fixed by Commissioners.—The level and gradient of every such new street shall be fixed by the Commissioners within one month after the delivery of such notice, and the level and gradient so fixed shall be kept thereafter by every person erecting any house or other building in such street.

See sub-head (31), sec. 4, for definition of "street," (13)

"house," (3) "building." See secs. 336 to 338 regarding the notice.

148. If Commissioners fail to fix Level, party may proceed without.—If the Commissioners do not fix such level and gradient within one month from the time of the delivery of such notice as aforesaid, the person giving such notice may proceed to lay out such street at any level or gradient which will allow of compliance with the other provisions of this Act, as if such level and gradient had been fixed by the Commissioners; and in such case every change of the level and gradient which the Commissioners afterwards deem requisite, and the works consequent thereon, shall be made by the Commissioners, and the expense thereof, and any damage which any person may sustain in consequence of such alteration, shall be defrayed by them out of the burgh general assessment.

See sub-head (31), sec. 4, for definition of "street." See sec. 340 as to "burgh general assessment," and p. 5 "person."

It will be observed that if the Commissioners fail to fix the level, the person giving the notice may proceed to lay out the street, but only at a level or gradient "which will allow of compliance with the other provisions of this Act." This is a serious responsibility to be laid on a person through the failure of the Commissioners. The chief matter, however, to be attended to is the levels for drains, water, gas, etc., and the Commissioners have to provide maps showing the best levels for these (see secs. 210 and 212).

If, in preparing the plan and sections required by sec. 146 to accompany the notice, due regard was had to the necessity of proposing nothing which would interfere with "compliance with the other provisions of this Act," and if the Commissioners or their Surveyor expressed no objection, the person giving notice would probably incur little risk if he proceeded in accordance with the plan and sections which he lodged.

In Police Commissioners of Govan *v.* Mowat & Co., 13th October 1886 (3 Scot. Law Rev., 241), it was held, (1) That Commissioners have no power under the Police Act to insist upon a proprietor levelling the street opposite his property, or to pay the expense thereof after the street has been once levelled to the satisfaction of the Commissioners, at the expense of the proprietor; (2) That notices served upon a proprietor in the circumstances above stated, being beyond the powers of the Commissioners, do not fall to be appealed against, in terms of secs. 157 and 397.

In Phillips *v.* Dunoon Police Commissioners, 21st November 1884 (12 R., 159), the 146th section of the General Police and Improvement Act empowers the Police Commissioners to cause any streets within their jurisdiction "to be raised, lowered, altered, and formed,"

as they think fit, and gives any person considering himself aggrieved right of appeal to the Sheriff, as after provided.

Section 394 provides that twenty-eight days "before fixing the level of any street which has not been theretofore levelled," the Commissioners shall give notice of their intention, specifying time and place where all persons interested may be heard thereon. By sec. 395, after hearing parties, the Commissioners are to pronounce an order abandoning, altering, or for the execution of the work, in their discretion; and by sec. 396 appeal to the Sheriff in manner provided is given to any person aggrieved by the order of the Commissioners.

With regard to other appeals to the Sheriff allowed by the Act, sec. 397 provides merely that they shall be disposed of summarily. In both classes of appeals the Sheriff's judgment is final.

The Police Commissioners of a burgh, in rebuilding a bridge within the burgh, proceeded without any notice slightly to alter the levels of the street which formed the access to it on either side. A proprietor of premises fronting the street near the bridge applied for interdict against them interfering, without the statutory notice, with the levels of the street, and craved an order on them to restore matters to their former condition. He averred that the street had not previously been levelled. This was denied by the Commissioners, though they did not state when it had been levelled.

Held, (1) That unless it were proved that the street in question had not previously been levelled, the case fell under sec. 146, which permitted the Commissioners to proceed without notice, though it gave an appeal to the Sheriff; (2) That as the complainer's resort to his common-law remedy of interdict depended on the applicability of sec. 394, and as the applicability of that section depended upon the street not having previously been levelled, the onus lay on the complainer of proving that fact. *Diss.* Lord Rutherfurd-Clark, who was of opinion that sec. 394 applied wherever the alteration on a street amounted to re-levelling.

It will be observed that any change of level and gradient afterwards requisite is to be made at the expense of the Commissioners, and that any damage which any person may sustain in consequence thereof is to be defrayed by them out of the burgh general assessment. How is the damage to be estimated? The Burgh Surveyor would be the proper person to determine the extent of the damage, and it would have saved trouble and expense, if, in the event of any person being aggrieved by his award, an appeal to the Sheriff under sec. 165 had been the remedy. This is not so provided, and the matter will be regulated by common law. See case of Strachan *v.* Edinburgh Improvement Commissioners, 21st February 1837 (15 S., 637), referred to under sec. 129.

149. Situation of Gas and Water Pipes to be altered if required by Commissioners.—If the Commissioners deem it necessary to raise, sink, or otherwise alter

the situation of any water pipe or gas pipe, or other water-works or gas-works, laid in any such streets, they may from time to time, by notice in writing, require the person to whom any such pipes or works belong, to cause forthwith any such pipes or works to be raised, sunk, or otherwise altered in position, in such manner as the Commissioners may direct: Provided that such alteration be not such as permanently to injure such works, or to prevent the water or gas from flowing freely and conveniently; and the expenses attending such alteration shall be paid by the Commissioners out of the burgh general assessment, or other rates or assessments, as the case may be.

See sub-head (31), sec. 4, for definition of "street;" sec. 340, as to "burgh general assessment." See secs. 336, 337, 338, as to "notice."

The expenses of the alterations are to be paid out of the burgh general assessment, "or other rates or assessments, as the case may be." The meaning of this provision is not clear. Are the Commissioners empowered to charge these expenses to any assessment they think fit? Probably not. It rather appears that they are to have regard to the object for which the alteration of pipes is made, and to charge the expense to the particular rate or assessment effeiring thereto; *e.g.*, if the Commissioners lay down a new sewer, the cost of which is to be met by a special sewer rate, any alteration of gas or water pipes necessitated by the construction of such sewer would form a charge against such special sewer rate. But is there any option left with the Commissioners? Can they charge the burgh general assessment with the expense of any alteration of pipes whatever its object? Or, when the works in connection with which the alteration is made are paid for out of a specific assessment, are the Commissioners restricted to charging the expense of the alteration to that assessment? The words "as the case may be" might be held to support the latter view.

150. Commissioners may agree as to making of New Streets.—It shall be lawful for the Commissioners to agree with any person for the making of new streets for the public use through the lands and at the expense of such person, and to agree that such streets shall become, and the same shall accordingly become, on completion, streets to be maintained and repaired at the public expense; and it shall be lawful for the Commissioners to agree with such person to advance any portion of the expense of making such streets out of the burgh general assessment by way of loan, and

accordingly to advance the same: Provided that the expense so advanced shall be repaid to the Commissioners in such manner as they may fix.

Provided that such street shall be formed and made by the proprietor within two years from the date of granting such application, or within such reasonable time as may be fixed by the Dean of Guild Court or the Commissioners; and that no building shall be erected in such street until it is so formed and made from its junction with another street as far as any proposed building may extend in such street.

See sub-head (31), sec. 4, for definition of "street," (16) "lands," (3) "building;" sec. 340, "burgh general assessment."

This is a new provision, and, it is feared, will be practically inoperative. Does the making of "new streets" contemplate the levelling, paving, or causewaying both of the streets and the footways, or only of the carriageway alone? It is difficult to decide. Such streets are to become, "on completion," streets to be maintained and repaired at the public expense. But it is only when the street has been properly made, paved or causewayed and flagged, together with the footways thereof, and put in good order and condition to the satisfaction of the Commissioners, as provided in sec. 134, that they can take it over, and maintain it thereafter. Is it intended that a different course should be followed under this section? The presumption is against this, and it will be well to provide for the proper formation of the footways as well as the streets.

Under this section the Commissioners are empowered to advance any portion of the expense of making a new street out of the burgh general assessment by way of loan. There is no provision as to security, interest, or mode of recovery. The street itself is no security, as it has no market value, and the buildings in the street are not available as security, as no building can be erected until after the street has been formed. The Commissioners must therefore be careful to obtain some sufficient security for the advances they make. There is no provision here empowering the Commissioners to lend without interest, but the analogy of the succeeding clause points to the competency of such an arrangement. On the other hand, if the Commissioners have to pay interest, they are not authorised to charge such against any assessment. The repayment is to be made in such manner as the Commissioners may fix. In fixing the manner in which the expense so advanced shall be repaid, the Commissioners would do well to keep in view clause 366, which provides that private improvement expenses are to continue burdens on the lands or premises liable for the same only for seven years from the date when these are payable. It is by no means clear that this loan can be classed under the head of "private improvement expenses." The expenses of forming and making private streets are private improvement expenses. See Campbell,

28th February 1870 (8 M., H. L., 31). But if such expense is incurred by the owner, or any other person who meets part of it out of a loan obtained from the Commissioners and pays the remainder, it rather appears that, unless expressly agreed to, these would not thereafter be held to be private improvement expenses, nor entitled to the provisions in regard to such enacted by the Statute. There is no provision for enforcing repayment in case of default. The Commissioners ought therefore to safeguard themselves in the same way that a private lender would, and stipulate the same remedies in case of default that a private lender would have, as well as the statutory remedies applicable to private improvement assessments.

It is provided that the street is to be formed by the proprietors within two years from the date of granting "such application." There is no application previously mentioned in the section. Probably what is referred to is the arrangement to advance a proportion of the expense. The Commissioners, however, can regulate this, as the street is to be made within such reasonable time as they or the Dean of Guild Court may fix. As the matter as to paving, etc., is under the regulation of the Commissioners, and not under the Dean of Guild Court, which has only to take cognisance of buildings, etc. (see sec. 201), it will be found more convenient for them to deal with this than the Dean of Guild Court.

No building is to be erected in such a street until it is so formed and made from its junction with another street as far as any "proposed building" may extend in such street. This is a very awkwardly expressed and inconvenient provision. It is usual to allow buildings to be erected first, and then to form and make the street, which is a considerable saving to the tear and wear of the street, besides allowing of sewers, gas and water pipes, etc., with their several house connections, being laid without the necessity of breaking up a newly-made street. Under this provision, in future this could not be done with reference to the streets herein provided for.

Again, what is a "proposed building"? Take a case. A street is to be formed under this section. A feuar at one end is about to erect a building. But he dare not begin until the street is made as far as any "proposed building" therein. How is he to know where buildings are proposed to be erected? In almost every case this would mean that the whole street must be made before any building can be erected.

151. Commissioners may make New Streets.—Whereas it may happen that the whole or part of the ground on the line of a new street will remain for a time unfeued or unbuilt upon, and it is expedient to encourage the opening up of streets that might be or become main thoroughfares for the public use: Therefore, upon the approval of any new street becoming final, or at any time thereafter, and in the event of such new street not being opened up and paved, flagged, or

otherwise made good to the satisfaction of the Commissioners by the owners or others interested, in whole or in part, it shall be lawful for the Commissioners to open up and make any such street in whole or in part according to its approved lines and levels, and that either temporarily or permanently as to the Commissioners may seem proper, and to advance and pay *ad interim* the expense of so doing in so far as effeiring to vacant or unfeued ground, subject to relief from the feuars or other persons erecting buildings along such street when and as the same are erected: Provided that, so soon as buildings are erected along such street, the Commissioners shall be entitled to charge the expense advanced by them, without interest thereon, against the feuars or other persons erecting buildings thereon respectively, proportionally to the length of the frontages of their feus or properties along such street, as such proportions of expense, without interest thereon, shall be certified by the Treasurer; and the said expense, without interest thereon, may be recovered in the same way and by the same means as any assessments levied under this Act: Provided further, that should any such street be only temporarily laid out by the Commissioners, the said feuars or other persons erecting buildings shall, in proportion to the length of their frontages respectively, be also bound to pave and flag or otherwise make good such street to the satisfaction of the Commissioners, as and when required by the Commissioners; and after such street shall have been paved, flagged, or otherwise made good as aforesaid, it shall be maintained and repaired by the Commissioners out of the assessments levied under this Act.

See sub-head (31), sec. 4, for definition of "street," (3) "buildings." See sec. 353 as to "recovery of assessments."

This clause enacts that upon the approval of any new street becoming final, certain matters are to follow. Unfortunately there is no provision requiring the approval of a new street. The use of the words "its approved lines and levels," in a subsequent part of the section, suggests that probably the reference is to the fixing of the level and gradient provided for in sec. 148. If this be so, in the event of this new street not being opened up and paved, flagged, or otherwise made good to the satisfaction of the Commissioners, they may proceed to do so and advance the cost thereof. No point of time is specified here as to when the Commissioners may do this. They may do it as soon as the approval of the street becomes final (whenever that may be), or at any time thereafter. It will further be observed that the Commissioners are only authorised to advance

and pay *ad interim* the expense so far as effeiring to vacant or unfeued ground.

So soon as buildings are erected in streets, the Commissioners are entitled to charge the expense so advanced, but without interest, against the feuars erecting the buildings, proportionally to the length of the frontage of their feus or property. There is no provision as to where the interest lost by the Commissioners is to come from; but no doubt, like many other expenses provided for in this new Act, it is intended to come out of the burgh general assessment. See sec. 372.

If the Commissioners only temporarily form and lay out the street somewhat after the manner provided for in secs. 135 and 136, they can call upon the feuars or other persons to pave and flag the street to their satisfaction.

152. Width of New Streets.—From and after the date when this Act comes into force within the burgh, it shall not be lawful to form or lay out any new street, or part thereof, or court, within the burgh, unless the same shall (measuring from the buildings or intended buildings therein at the level of the surface of the boundary of such street) be at least 36 feet wide for the carriageway and foot pavements; and no dwelling-house shall be built in any such street or court which shall exceed in height, from the level of the pavement to the roof of the highest habitable room, one and a quarter times the width of such street, measuring from the front wall of the buildings or intended buildings on each side thereof: Provided always, that where any road or street fronts any links or common, or other open area, or in other exceptional circumstances, the Commissioners may allow buildings of greater height; and provided also, that for the purposes of this enactment a street shall not include a mews or other lane, which may be made 12½ feet wide, or such other width according to the use to be made thereof, of which the Commissioners shall judge, and shall fix the width accordingly; but in no case shall the dwelling-houses fronting such lane exceed in height one and a half times the width of the lane: Provided also, that where a building shall be situated so as to abut on two streets or courts of different levels, the height shall be measured from the street which lies on the higher level.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh," (3) "building." The Act comes into operation on 15th May 1893, or in cases where it is adopted, or where a new burgh is created, at the date when the deliverance of the Sheriff is recorded.

In Pitman *v.* Sandford, 26th Jan. 1882 (9 R., 444), the Lord

President (Inglis) said: "The next question arises on sec. 129; and this requires a more careful consideration. Under this section it is provided 'that houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one-half times the width of the street or court in which such houses or buildings are situate, without the sanction of the Magistrates and Council.' Now, this provision undoubtedly applies to houses and buildings in existing streets, and I cannot doubt that what is provided is that such houses or buildings shall not be increased beyond a certain height, whether they are existing houses or buildings in existing streets, or entirely new houses or buildings which have been erected in place of old houses which have been pulled down. In neither case are they to rise above a certain height without the sanction of the Magistrates and Council. Therefore the provision is plainly applicable to the case which we are now dealing with. But what is the street or court according to the width of which the height of the house is to be regulated? Now, whether a house may be situated in more streets than one it is hardly necessary to consider in the abstract. There may be, there often are, such houses—corner houses, for instance. It cannot be disputed that there are fair reasons for considering the corner house in the present case to be of this class, for it is bounded on the west by Castle Street, and on the south by Princes Street; and very possibly there may be houses which are situated in two streets that lie parallel to one another. If the house is of such dimensions as to reach the whole way back from the one street to the other, it would be very difficult to say that it is not situated in both streets. But this is not the kind of case which the Act appears to provide for at all. The section seems to contemplate that the house or building should be situated in a street, but not in more than one street. Without, however, deciding as to the height of houses which are plainly situated in more than one street, I have no hesitation in saying that the buildings which it is here proposed to erect, which front Princes Street and have their back to Rose Street Lane, are, within the meaning of sec. 129, situated in Princes Street, and therefore that their height must be regulated by the width of that street in which they are so situated. I therefore think that the objection arising on this section of the Statute is not well founded."

Sec. 177 of the General Police Act of 1862 provides that it shall not be lawful to build any court of less than a certain specified width, and that "to any such court in which there shall be more than eight houses, there shall be an additional width of one foot for every such additional house," and that there shall be an entrance of the full width of the court, open from the ground upwards. *Held*, that the section applied to courts to be formed on back ground, exclusively private property. Couper *v.* Surveyor of Maryhill, 6th March 1891 (18 R., 642).

In Walkinshaw *v.* Orr, 28th Jan. 1860 (22 D., 627), a petition and complaint at the instance of parties using a road that had been

turnpike for upwards of forty years, on the ground that it was not of the statutory width of 20 feet, and was not properly fenced, concluded with a prayer that it should be found that the road was not in such a state as to warrant the levying of tolls, or that the trustees should be directed to widen and fence the same. *Held*, that such an application was competent under sec. 117 of the General Turnpike Act. *Observed*, that a provision in a Statute empowering trustees to make and keep a turnpike road of the width of 20 feet, being a provision for the public advantage, is to be considered imperative and not permissive, unless there be other words in the Act controlling its meaning.

The Lord Justice-Clerk (Hope) said: "The allegation, in point of fact, upon which this complaint proceeds, is, that throughout a part of the road in question there is not maintained a clear breadth of roadway of 20 feet; and that, at some points, the breadth is under 16 feet. We have some further allegations as to the obstructions and want of fencing, but the important allegation is, that the roadway is not maintained of 20 feet in width, and that is admitted. It does not appear whether the road was ever wider. That is immaterial, as the question is whether it is now under 20 feet in width; and whether, under a summary petition, the public using the road can obtain a remedy? For the determination of this question, two clauses of the Statute must be construed. First, the 61st section, which prescribes what is to be the width of a legal turnpike road; and, second, the 117th section, which provides a summary remedy in certain cases. By the 61st section it is enacted 'that the trustees of all turnpike roads shall have power, and they are hereby authorised, to widen and extend all such roads, so that the same shall be in all places 20 feet in width of clear passable road.' Such words as these are capable of two constructions, according to the subject-matter and the context. They may mean either that the parties invested with the power may exercise it or not according to their discretion, when the circumstances occur in which it may be exercised; or that, in those circumstances, they are bound to exercise it. Now, I hold it to be a general canon in the construction of Statutes, that where powers are conferred in a Statute for the public benefit, they must be exercised, and the enactment is imperative. This is a case in which the power is given clearly for the public benefit, and therefore, *prima facie*, it appears to me an imperative enactment."

In Partick Police Commissioners *v.* Great Western Steam Laundry Co. Ld., 27th Jan. 1886 (13 R., 500), a Local Road Act prohibited the erection of "all houses, and every other building whatever," within 30 feet of the centre of the road. *Held* (*diss.* Lord Young), that this prohibition did not apply to a parapet wall 1 foot in height, surmounted by an iron railing 5 feet 3 inches in height.

153. Penalty for forming Streets and Courts contrary to Act.—Every person who shall, from and after the date when this Act shall come into operation in the burgh,

form or lay out, or permit or suffer to be formed or laid out, any new street or court, or any part thereof, or who shall build, raise, or add to any house or premises, or permit or suffer the same to be done, contrary to the provisions of this Act, unless the same shall have been formally sanctioned by the Commissioners on a consideration of the special circumstances of the case, which sanction they are hereby empowered to give, shall forfeit and pay a sum not exceeding £20, and a further sum not exceeding £5 per day for every day after the first during which he shall permit or suffer such new street or court, or part thereof, or such house or premises, to remain so formed, laid out, built, or added to as last aforesaid: Provided always, that the provisions of this Act relating to the width and construction of streets or courts shall not extend or apply to any existing streets or courts, which shall be proved to the satisfaction of the Commissioners to have been agreed to, or to have been formed previous to the application of this Act.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh," (16) "premises," (10) "court," (13) "house." See p. 5 as to definition of "person." See sec. 487 for imprisonment in default of paying fines; 500 and 501, penalty on repetition of offences and power to mitigate; and 458 as to punishment of abettors.

IMPROVEMENT OF STREETS.

154. Power to purchase Houses, etc., for additional Improvements.—The Commissioners may, at a meeting to be held for the purpose, resolve to acquire lands or premises within the burgh for the purpose of widening, enlarging, or otherwise improving any of the streets, and they may re-sell any parts of such lands or premises which shall not be required for such purposes; and they may also drain, repair, or otherwise improve courts and places where there may be doubts as to the liability of owners to execute such works; and in localities within the burgh, where houses or other buildings are, in the opinion of the Commissioners, built too close to each other, or have become waste and ruinous, or are liable to other objections on sanitary grounds, it shall also be lawful to the Commissioners to resolve to acquire lands or premises, for the purpose of reserving them

as vacant spaces, or of improving or taking down the buildings, or of otherwise disposing of them so as to improve the sanitary condition of such localities, or for the purpose of widening streets and closes; and the expense of such acquisitions and improvements shall be a charge against the general improvement rate hereinafter authorised to be levied.

In order to acquire such lands and premises, the Commissioners shall have power to purchase and take the same by agreement under the Lands Clauses Acts, and failing such purchase they may present a petition to the Sheriff for authority to put in force the powers of the Lands Clauses Acts with respect to the acquisition of lands otherwise than by agreement in manner hereinbefore provided; and the expense of such acquisitions and improvements and procedure shall be a charge against the general improvement rate hereinafter authorised to be levied.

It shall be lawful for any owner or occupier whose property may be affected, or for the Commissioners, if dissatisfied with the decision of the Sheriff, to appeal to the Secretary for Scotland, who may order further inquiry, or take such other step or steps as he may think desirable in the circumstances; and he may thereafter issue an order either in accordance with the prayer of the application, or with such modifications or alterations as may appear to him to be requisite, and may make such order as he thinks fit in reference to the costs, charges, and expenses incurred in connection therewith.

See sub-head (16), sec. 4, for definition of "lands and premises," (4) "burgh," (31) "street," (22) "owner," (3) "building," (10) "court," (21) "occupier;" sec. 359, "general improvement rate." See sec. 50 as to mode of calling meetings.

It will be observed that the Commissioners are authorised to acquire lands and premises for specific purposes under this section, which are—first, for improving any of the streets; and second, for the purpose of reserving vacant spaces, or of improving or taking down buildings or disposing of them so as to improve the sanitary condition of the locality, or for widening streets and closes, but only in localities within the burgh where houses or buildings are built too close to each other, or are become waste or ruinous, or are liable to other objections on sanitary grounds. These are the only cases where lands and premises can be acquired under this section. The Commissioners may, however, resell any parts of the lands and premises which are not required for the purposes mentioned in the section. But probably it would be incompetent for the Commis-

sioners to apply the lands and premises acquired for the purposes of this section to any other purpose. In an English case, Attorney-General *v.* Mayor, etc., of Southampton (1 Giff., 263; 6 Jur., N. S., 46; 29 L. J., C., N. S., 282), where a corporation under a Local Act obtained a piece of land for the purpose of public recreation, they were restrained by injunction from holding a fair and exhibition of cattle upon it. And in Attorney-General *v.* Corporation of Sunderland (2 Ch. D., 634; 45 L. J., Ch., N.S., 839; 34 L. T., N. S., 921; 24 W. R., 991; 40 J. P., 564), where a corporation had purchased a piece of land for a public pleasure-ground, they were restrained from erecting town buildings on it, but were allowed to erect a museum, public library, and conservatory, as being conducive to the better enjoyment of the pleasure-ground by the public.

As to provisions for dealing with ruinous buildings, see secs. 191–200; for the acquisition and management of open spaces, see secs. 307 and 308; and for obtaining the authority of the Sheriff to put in force the Lands Clauses Acts, see sec. 60.

In Young *v.* Dobson, 2nd February 1816 (F. C., 75), it was held that Magistrates have no right to feu any part of the public street of the burgh. The Lord Ordinary found that the streets of the Burgh of Selkirk consisted of the paved way between the rows of houses on each side, and that the houses, and not the syvers or gutters on each side, were the boundary of the street, and granted an interdict against the proposed building, and the Court adhered.

In Paterson, etc., *v.* Magistrates of St. Andrews, etc., 27th July 1881 (8 R., H. L., 117; L. R., 6 App. Cas., 833), a piece of links ground was held by the Magistrates and Town Council of a burgh for behoof of the inhabitants, and subject to the obligation of preserving it for the purposes of the game of golf. In 1820 the Magistrates feued off a strip along the southern boundary of this piece of ground where it abutted on the high road. On this strip of ground houses were built facing the high road, and the actings of the Magistrates not being timeously objected to, these feus came, in course of time, to be no longer in point of law part of the links. Houses were afterwards built at the north end of these feus, facing the part of the links reserved by the Magistrates, and access was obtained to them along the margin of the links. This becoming cut up by traffic, the Magistrates resolved to form a regular metalled road 21 feet wide on that part of the links which adjoined these feus, for the general use of the public as well as of the feuars. This was objected to as an encroachment on the rights of the inhabitants. *Held* (in affirmation of judgment of Second Division, 10th March 1880, 7 R., 712), that, on the evidence adduced, the formation of the proposed road would not in the meantime interfere with the use of the links by the inhabitants, as heretofore, for the game of golf, and that therefore the Magistrates were entitled in their administration of the burgh property to make the said road, but that they were bound to retain the road and the ground on which it was constructed, subject to the same uses as any other portion of the links, and to take such steps as might be necessary to prevent the acquisition by any person or

persons of any rights over the same which might conflict with the right of the Magistrates to take away or alter said road, or to restrict and regulate the traffic thereon should emerging circumstances render that necessary for the protection of the rights of the inhabitants.

In Grahame *v.* Magistrates of Kirkcaldy, 19th June 1879 (6 R., 1066), by royal charter of confirmation, in 1644, there was disponed to the Magistrates of Kirkcaldy all its lands and pertinents, with the common muir or South Links extending to about eight acres. Though from time to time recognising public rights of bleaching, etc., the Magistrates gradually feued off the South Links for building purposes, till, in 1804, there was only an acre left. A public street was afterwards run through this remaining acre, dividing it into portions, the larger of which was appropriated as a public bleaching-green; the smaller remained open to the public, but in a very neglected condition. In 1877, the Magistrates, as Police Commissioners acting under the General Police Act, 1862, and the Lands Clauses Act, 1845, acquired it from themselves as Magistrates, and were proceeding to erect town stables, etc., on it. In a suspension and interdict brought by one of the inhabitants—*Held*, (1) that the ground was vested in the Magistrates for the common use and enjoyment of the inhabitants, and that neither previous encroachments, nor its neglected condition, nor the fact that it was of little or no real value to the public, entitled the Magistrates to apply it to any purpose inconsistent with such common use and enjoyment; (2) that the Police and Improvement Act, 1862, and the Lands Clauses Act, 1845, did not enable the Magistrates as Police Commissioners to acquire from themselves as Magistrates property vested in them for behoof of the inhabitants, so as to deprive the inhabitants of the uses had of the property from time immemorial.

In the above case, Grahame *v.* Magistrates of Kirkcaldy, 19th June 1879 (6 R., 1066), before interdict was granted, buildings had been completed by the Magistrates, at a cost of £2000. In Grahame *v.* Magistrates of Kirkcaldy, 26th July 1882 (9 R., H. L., 91; L. R., 7 App. Cas., 547), which was a subsequent action at the instance of the interdictor against the Magistrates for declarator that the ground was vested in them for the use of the public, and that they had no right to erect buildings thereon, and for decree ordaining them to remove the buildings already erected, the Magistrates offered to make over a piece of ground, near the ground in dispute, of double the size, for the use of the community. *Held*, in affirming judgment of the Court of Session, 19th June 1881 (8 R., 395), that the interest of the community was to be considered on both sides of the question, and that therefore the offer of the Magistrates should in the circumstances be accepted.

In a dispute between the Magistrates of a royal burgh, and a proprietor therein, relative to the property of a private road therein, the Magistrates produced a title which, *prima facie*, included it, while the latter produced none. It appeared that his predecessors had formerly enjoyed a servitude over it, but that one of them had,

between twenty and thirty years before the question arose, abandoned the use of it, and formed a new access to his lands. *Held*, (1) that the Magistrates were proprietors of the road, because it lay within the burgh, and they were not shown to have parted with it, but, on the contrary, had a title which, *prima facie*, included it; (2) that any right or servitude which the proprietor's predecessors had over it had been abandoned by them.

Corporation of Rutherglen *v.* Bainbridge, 10th Mar. 1886 (13 R., 745; 23 S. L. R., 522).

Improvement of Streets.—In England, "if the alteration of a highway amounts to a diversion of it, the Urban Sanitary Authority must obtain an order of Quarter Sessions, in pursuance of the Highway Act, 1835, 5 & 6 Will. IV. c. 50, secs. 84–91, before they can stop up any part of the existing highway. Thus the Urban Sanitary Authority of an Improvement Act district carried out the diversion of a highway in 1878 without obtaining such an order, and permitted an adjoining owner to build upon the site of the old road. The owner was indicted for thus obstructing the highway, and a verdict for the Crown was upheld, on the ground that it was not competent to the Authority to stop up and enclose this old portion of the road, without observing the proper legal method for such act, namely, procuring an order of Quarter Sessions, for otherwise the highway could not be divested of its character of a public high road. Reg. *v.* Platts (49 L. J., Q. B., 848; 43 L. T., N. S., 159; 28 W. R., 915; 44 J. P., 765). In the foregoing case, it was contended that the Authority had power to effect the alteration under the incorporated provisions of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, secs. 66, 67, as an improvement, but on this point the Court said that, as there were only a few houses on one side of the road, and none on the other, the road was not a 'street' within the Act. See Mayor of Portsmouth *v.* Smith (L. R., 13 Q. B. D., 195; 53 L. J., Q. B., 92); affirmed by House of Lords on another point (L. R., 10 App. Cas., 364; 54 L. J., Q. B., 473; 53 L. J., N. S., 394; 49 J. P., 676)."—Glen, p. 278.

A Local Authority who require lands for the purposes of the Act, are not confined, in exercising their compulsory powers of purchase, to the narrow limits of the property strictly required for the purposes specified, as the cases deciding that railway companies cannot take compulsorily more land than is actually required for their works, do not apply to a corporation taking lands for public improvements and not for gain. Quinton *v.* Corporation of Bristol (L. R., 17 Eq., 524).—Bazalgette, p. 141.

Power to carry out improvement schemes is also given by the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, the administration of which is in the hands of the Commissioners as the Local Authority for sanitary purposes. For the procedure reference is made to the Act itself, but the following sections indicate the general scope of its provisions in regard to improvement schemes. Part I. deals with "unhealthy areas."

"6.—(1) The improvement scheme of a Local Authority shall be accompanied by maps, particulars, and estimates, and (*a*) may exclude any part of the area in respect of which an official representation is made, or include any neighbouring lands, if the Local Authority are of opinion that such exclusion is expedient or inclusion is necessary for making their scheme efficient for sanitary purposes; and (*b*) may provide for widening any existing approaches to the unhealthy area, or otherwise for opening out the same for the purposes of ventilation or health; and (*c*) shall provide such dwelling accommodation, if any, for the working classes displaced by the scheme as is required to comply with this Act; and (*d*) shall provide for proper sanitary arrangements."

For the purpose of the compulsory acquisition of lands and premises, the provisions of the Lands Clauses Acts are incorporated with certain modifications, and special precautions are taken with the view of preventing owners of insanitary premises profiting by their own neglect. (See sec. 21.)

Part II. of the Act deals with "unhealthy dwelling-houses," and provides means of closing such, and in certain cases demolishing them. It also provides means of removing what are termed "obstructive buildings." An obstructive building, in the sense of the Act, is any building which, "although not in itself unfit for human habitation, is so situate that, by reason of its proximity to or contact with any other buildings, it causes one of the following effects, that is to say—(*a*) It stops ventilation, or otherwise makes or conduces to make such other buildings to be in a condition unfit for human habitation, or dangerous or injurious to health; or (*b*) It prevents proper measures from being carried into effect for remedying any nuisance injurious to health, or other evils complained of in respect of such other buildings."

"39.—(1) In any of the following cases, that is to say—(*a*) Where an order for the demolition of a building has been made in pursuance of this part of this Act, and it appears to the Local Authority that it would be beneficial to the health of the inhabitants of the neighbouring dwelling-houses if the area of the dwelling-house of which such building forms part were used for all or any of the following purposes, that is to say, either—(i.) dedicated as a highway or open space, or (ii.) appropriated, sold, or let for the erection of dwellings for the working classes, or (iii.) exchanged with other neighbouring land which is more suitable for the erection of such dwellings, and on exchange will be appropriated, sold, or let for such erection; or, (*b*) Where it appears to the Local Authority that the closeness, narrowness, and bad arrangement or bad condition of any buildings, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defect in any buildings, is dangerous or prejudicial to the health of the inhabitants either of the said buildings or of the neighbouring buildings, and that the demolition or the reconstruction and re-arrangement of the said buildings or of some of them is necessary to remedy the said evils, and that the area comprising those buildings, and the yards, outhouses, and appurtenances thereof,

and the site thereof, is too small to be dealt with as an unhealthy area under Part I. of this Act,—the Local Authority shall pass a resolution to the above effect, and direct a scheme to be prepared for the improvement of the said area."

The expenses of operations under the Housing of the Working Classes Act form a charge against the Public Health Assessment.

Obstructions and Line of Streets.

155. Gates may be erected by Commissioners across any Court.—The Commissioners may erect across the whole or any part of any court an iron gate or gates, for the purpose of preventing the public from passing through the same during such hours as they consider expedient for the purposes of police, and may cause such gate or gates to be locked, and the keys thereof to be kept during the said period by the constable on duty in the district, or by some other person residing in the neighbourhood; but such gate or gates shall be so placed and managed that free and uninterrupted communication shall at all hours exist between every land or heritage in such court, and some street in the neighbourhood.

The object of the section is to prevent a thoroughfare at night through courts, without preventing access to the houses, etc., therein.

For the meaning of the expression "for the purposes of police," see under sec. 122.

156. Commissioners may require Dangerous Openings in Streets and Courts to be built up.—The Commissioners may require any owner or occupier of a land or heritage to build up or cease to use any opening in the foot pavement, or in the causeway of any street or any court, which has been made or is used for the purpose of giving light or access to some apartment in a building adjoining such street or court, or to some cellar or vault underneath the said foot pavement, if such opening extends beyond the footway, or if it is not provided with a sufficient fluted iron grating or other sufficient covering, or if it is insecure or otherwise dangerous to the public; and if such owner or occupier shall not, within eight days after such notice, build up or cease to use any such opening, or to provide the same with a sufficient covering to the satisfaction of the Commissioners, he shall be guilty

of an offence, and shall be liable to a penalty not exceeding 40s.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (31) "street," (10) "court," (3) "building." See sec. 487 for imprisonment in default of paying fines; 500 and 501, as to penalty on repetition of offences and power to mitigate; 336, as to form and service of notice.

157. Houses may be set forward for improving line of Street.—The Commissioners may allow, upon such terms as they think fit, any building within the burgh to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated.

See sub-head (3), sec. 4, for definition of "building," (4) "burgh," (31) "street."

In Michie's Trustees *v.* Grant and Others, 8th Nov. 1872 (11 M., 51), the Aberdeen Police and Water-Works Act, 1862, authorised the Commissioners under it to "allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." *Held*, in a question between two neighbouring proprietors in a street, that this clause authorised the Police Commissioners, within reasonable limits, to allow proprietors to build beyond the limits of their property upon the solum of the street.

Diversion of Streets in England.—"In a case in which a highway had no houses on one side, and only a few on the other, it was held that this section did not authorise the Urban Sanitary Authority to straighten a bend in it without first obtaining an order of Quarter Sessions authorising the diversion. Reg. *v.* Platts (49 L. J., Q. B., 848; 43 L. T., N. S., 159; 28 W. R., 915; 44 J. P., 765)."—Glen, p. 747.

In England, by sec. 156 of the Public Health Act, 1875, it is provided that "it shall not be lawful in any urban district, without the written consent of the Urban Authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same." It was held under this that "the Court will not interfere by injunction to restrain proceedings before Justices on any ground which is merely matter of defence before the Justices, for the Court will assume that the Justices will give full weight to such defences; though it may interfere to prevent a wrongful act, such as exceeding statutory powers by pulling down a house. The Court therefore refused to restrain an Urban Sanitary Authority from taking proceedings under sec. 156, in respect of an alleged bringing forward of the front of a house. Kerr *v.* Corporation

of Preston (L. R., 6 Ch. D., 463; 46 L. J., Ch., 409; 25 W. R., 265)."—Glen, p. 284.

158. Houses projecting beyond line of Street, when taken down to be set back.—When any house or building has been taken down in whole or in part in order to be altered, or is to be rebuilt, the Commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, or such other line as may be fixed by the Commissioners, in such manner as the Commissioners may direct, for the improvement of such street: Provided always, that the Commissioners shall make full compensation to the owner of any such house or building for any damage he may thereby sustain, which compensation may be settled by mutual agreement, or in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts is directed to be settled, and shall form a charge against the general improvement rate.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (31) "street," (22) "owner." See secs. 359 as to general improvement assessment. See sec. 240 as to meaning of "rebuilt."

The words "or such other line as may be fixed by the Commissioners" are new, and do not occur in the corresponding section, 162, of the 1862 Act. Regard must be had to this fact in considering the decisions under that section.

The General Police Act, 1862, sec. 162, enacts that "where any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the Commissioners may require the same to be set backwards to or towards the line of the street, or the line of the adjoining houses or buildings." A house in a burgh which had adopted the Act stood back some feet from the line of the street, and had a small plot of ground in front of it, separated from the street by a low wall and railing. The proprietor proposed to pull down the front wall of the house and advance it to the site of the wall and railing, which projected somewhat beyond the line of the adjoining premises. Held (*aff.* judgment of Second Division), that the wall and railing did not constitute a building in the sense of the section, and that the Commissioners were not empowered to require the proprietor, in rebuilding, to keep back the new front wall of his house in a line with that of the adjoining house.

Observed, that if the Police Commissioners wished to widen the street by setting back the proprietor's garden wall to the line of the adjoining house, they had powers, under sec. 161, to acquire part of

the ground for this purpose, and under sec. 163 they had power to obtain the removal of inconvenient projections. Police Commissioners of Fort-William *v.* Kennedy, 8th July 1878 (5 R., H. L., 215).

In Robertson *v.* Greenock Police Board, 11th Dec. 1883 (11 R., 304), sec. 162 of the General Police Act, 1862, enacts that when any house which projects beyond the regular line of the street, or the front of the house on either side of it, has been taken down in order to be altered, or is to be rebuilt, the Commissioners may require it to be set back to the line of the street, or the line of the adjoining house, provided that the Commissioners shall make full compensation to the owner.

In a burgh which had adopted the Act, one division of a long street consisted on one side of public buildings (with a frontage four feet back from the general line of the street) and of two adjoining houses, Nos. 2 and 4, occupied as one tenement, belonging to one proprietor, with a frontage in line with the general line of the street. In 1878 the proprietor applied to the Dean of Guild for a warrant to rebuild the two houses on the same site; whereupon the Police Commissioners served a requisition requiring the new buildings to be rebuilt four feet back, in line with the adjoining public buildings. The owner did not take down either house, but in 1881 presented a second petition for warrant to take down and rebuild the one house, No. 2, which did not adjoin the public buildings. A second requisition was then made, requiring the petitioner, as owner of the house or building numbered 2 and 4, "and which house or building, or a part thereof, is about to be altered or rebuilt, and which house at present projects four feet beyond the line of the adjoining" buildings, and beyond the line of street from A to B, describing the division of the street, to set back the front of the buildings to be erected to the line of the adjoining public buildings and of the street. In an action brought by the owner of the houses for declarator that he was entitled to build up to the line of his former frontage, the Court held that Nos. 2 and 4 were to be regarded as one building; that the line of the adjoining public buildings was to be taken as the line of the street; and that, therefore, the requisition must receive effect—*diss.* Lord Craighill, who held that Nos. 2 and 4 were to be regarded as separate buildings, and that the pursuer was entitled to rebuild No. 2 on its former site, as it did not project beyond No. 4 or beyond the general line of the street, of which the adjoining public buildings formed a mere fraction.

In Burnet *v.* Bush, 13th November 1849 (12 D., 44), the Police Act for a burgh provided that where any building in a street which projected beyond the adjacent houses was taken down in order to be rebuilt, the Dean of Guild Court might, on application by the procurator-fiscal, order the new building to be erected in a line with those adjacent. Part of a tenement having been taken down to be rebuilt, the procurator-fiscal applied for interdict against the proceedings, as falling under the Act. The tenement in question was separated from those alleged to be adjacent by a lane, and was

situated at the junction of two streets, so that if the whole building were lined back as proposed, part of the front to the other street would be taken away. Note refused. In this case the Lord Justice-Clerk (Hope) said: "Truly, I never saw an attempt to enforce a Statute which would be productive of more injustice. The hotel forms the entrance to Dunlop Street from Argyle Street, and that entrance I conceive to be the most leading and important part of the whole street. It is asserted that 60 feet is the true width of Dunlop Street, and that the houses as they are rebuilt are to be lined back to this line. But the result of this would be at least to cut off 20 feet from the front to Argyle Street, and I cannot see how the complainer can possibly claim a right to interfere with that front. Is the proprietor to lose 20 feet of the breadth of this one tenement? For it is all one tenement. And if the front to Argyle Street is not to be altered, there can be no advantage gained by taking away this part. The breadth of the Argyle Street front forms the breadth of the respondent's house, and it is impossible, by any fair construction of the Statute, to compel him to give up any part of the breadth of his tenement."

Considerable difficulty has been experienced as to the operation of the Turnpike Act and the Roads and Bridges Act with reference to the powers of Local Authorities as to setting back buildings in burghs administered under the Police Acts, as well as under the Roads Acts, and the following opinions may be of service in regard thereto. In a case where a church was erected many years ago, the side wall of which was only 11 feet from the centre of A. street, and which was to be taken down to be rebuilt on the same site. It stood in a corner at the junction of two streets, A. street and B. street. The line of A. street was very irregular as to the width at which the buildings were erected from its centre, and it was desired to make it of an uniform width, and with this view the owners of the church were requested to keep the new building to the line of the houses immediately to the west thereof. The houses immediately to the east were closer to the street than the church, while those on the west were further back. The owners of the church declined to keep back the new building, and the opinion of the Lord Advocate (Sir C. J. Pearson) was taken, when he stated as regards the powers of the Road Trustees:

"I am of opinion (1) that sec. 91 of the General Turnpike Act does not apply to the case of existing buildings being taken down in order to be rebuilt on the same lines; and, further, (2) that that section does not in any view apply to the street in question, because it was a street vested in the Local Authority at the commencement of the Roads and Bridges Act in A., and therefore not included in the definition of 'highway' in sec. 3 of that Act. It is true that in the leading words of sec. 63 of the Local Roads Act, 1863, only the management of the burgh roads is transferred; but the section as a whole imports, in my opinion, such a transfer of the roads as satisfies the words 'vested in the Local Authority' occurring in the interpretation of 'highway' above referred to. I have considered the

effect of sec. 123 of the Roads and Bridges Act, 1878, as applying the 91st section of the General Turnpike Act to the street or road in question; but it does not appear to me to have that effect. It enacts that 'turnpike roads' shall mean and apply to the roads, highways, and bridges placed under the management of the Local Authority by this Act, but B. street was not placed under the management of the memorialists by the Roads and Bridges Act, as applied by the Local Government Act. It was under their management before; and the Roads and Bridges Act was not intended to alter the management of such roads or streets, or to enlarge the powers of Burgh Magistrates in relation to them. I am of opinion that the memorialists have the right claimed (*a*) in a case of the formation of new streets; but (*b*) not in the case of new buildings on old streets; nor (*c*) in the case of old buildings taken down to be rebuilt on the same line. By an old street I mean one vested in the memorialists at the commencement of the Roads Act within the burgh."

In answer to the query, "In the circumstances of the present case, have the memorialists as Road Trustees right to insist on the trustees of the church keeping back the new building to the line of the buildings on the west of it?" Sir Charles Pearson answered, "I think not."

With reference to the powers of the Police Commissioners under the Act of 1862 in the same case, Sir Charles Pearson said: "This seems to me to be entirely a question of fact, as to which I can only judge from the plan laid before me. Sec. 162 of the General Police Act applies only in two cases, namely, where the building in question (*a*) projects beyond the regular line of the street, or (*b*) projects beyond the front of the house or building on either side thereof. The memorial seems to regard the case as being within the first category. I can only say that, looking to the plan, I do not agree with this view, taking the street as a whole; while, if only the division of the street in which the chapel stands is regarded, the facts are quite the other way. Can the case, then, be brought within the second category? I rather think not, though this is a more difficult question. The house on the east projects a good deal further forward than the chapel does. The house on the west is across another street, and, moreover, is not said to give the 'line of the street' at all. That is said to be determined by a boundary wall, Mrs. White's house standing apparently within its own grounds. In these circumstances, I think the memorialists would have a difficulty in bringing the case as stated within the second category, as a wall is not a building, within the meaning of this section. Kennedy *v.* Fort-William Police Commissioners (4 R., 266; *aff.* 15 S. L. R., 765). The Court would be the more ready to come to this conclusion, seeing that sec. 162 provides only for compensation for damage; and as the ultimate purpose of the Commissioners apparently is to acquire the land so as to widen the street, they might appear to be using sec. 162 in order to accomplish indirectly the end provided for by sec. 161."

In answer to the query, "Counsel will advise if, in his opinion, there is a distinction between new streets, new buildings, either in

new or old streets, and reconstruction of old buildings, as to the memorialists' power of interference," Sir Charles Pearson said: "Sec. 162 applies to all 'streets' as defined by the Police Act; and the section itself defines the state of facts which must exist as to any given building before the section can be invoked. The distinctions pointed at in the query, so far as I can follow them, do not apply."

The following opinion was obtained from the Lord Advocate, Mr. J. P. B. (now Lord) Robertson, and Professor Rankine, the facts on which it proceeded being the general principle and application sufficiently brought out therein: "We are clearly of opinion that the 91st section of the Turnpike Act, as incorporated in the Local Act, does not apply to the proposed frontage abutting on the piece of ground here referred to. That ground is not part of any road or street; it was excluded when the Corporation took over the adjoining street; it has not been used as a street or road; it has been treated by the Burgh Authorities in a way inconsistent with that character; and it seems to be the private property of C. D., free from any servitude or right of way. Hence the only mode of preventing Mr. E. from pushing the front of his proposed warehouse up to his boundary, would be to induce C. D. to interfere for the prevention of trespass, or to acquire the land from him if he is willing to convey it—gratuitously, but not otherwise. We are not able to discover in the Acts any authority conferred on the burgh to purchase this land for the making of a new street; since the 42nd section of the Local Act applies only to the widening and improving of existing roads and bridges and making approaches to new bridges; and the formation of a bridge near this place is not now in contemplation. Moreover, to make this piece of ground part of the street, or to recognise it as such, would be to defeat the object of the memorialists; for Mr. E. might meanwhile have commenced his frontage; the 91st section would not for the above reasons apply; and he would probably not come to any 'agreement' under the said 42nd section to surrender any part of his land.

"*Q.* Keeping in view that the solum of the roadway in front of the houses facing the river has been declared to be Mr. E.'s private property, and that the corporation have been interdicted from interfering with it in any way, and that they agreed to its being formed 15 feet in width (exclusive of footway, etc.), would the corporation be entitled to put back the line of his proposed buildings 25 feet from the centre of that road also?

"*A.* This question in effect queries whether the said 91st section applies to the space between the line of houses facing the so-called riverside part of A. street and the proposed warehouse. We are of opinion that it does not. That section applies, in the first place, to turnpike roads already constructed, and is intended to prevent encroachments thereon; and the incorporating section (40) of the Local Act quite consistently restricts its scope to roads and streets already made and constructed, or assumed by virtue of the Local Act and the Police Act—that is, as we understand it, made, con-

structed, or assumed as roads or streets at the date when the question of encroachment arises. But the important question remains behind, whether, by building a warehouse as proposed, Mr. E. would not bring himself under the provisions of the 46th section of the Local Act when fairly construed, and would not therefore be compelled, failing the written consent of the corporation, to leave 40 feet of width between the warehouse and the dwelling-houses. The burgh need not dread being barred by its own proceedings from raising this question; for, even if these have not fallen through, they took place in contemplation of a different state of circumstances, namely, the formation of a street built on one side only. Now, it is true that the 46th section, if strictly construed, relates only to new streets in regard to which the proprietor has once for all made up his mind to build on both sides or on one side only. But we cannot think that the Court would allow such a provision to be evaded by the simple expedient of first building on one side only, and then, after an interval, building on the other. If we are right, it seems to be the sounder view that Mr. E., by erecting a warehouse, would, *ipso facto*, 'make a new street' in the sense of the section. For its purpose undoubtedly is to enable the burgh to impose in regard to new streets (whether public or private in the technical sense of these words) proper precautions in the interests of the public health. At the same time, we do not regard the applicability of this section as by any means clear.

"*Q.* Are Counsel of opinion that under no circumstances is a proprietor entitled to compensation upon being debarred from building by the enforcement of the provisions of the 91st section, read in connection with the 42nd clause of the Local Act and the opening words of sec. 40, whereby the 91st clause of the Turnpike Act is incorporated?

"*A.* We cannot find any warrant for compensation being given in the case figured; either under the 91st section, which conferred no right and imposed no duty on the Turnpike Road Trustees to make compensation, and whose provisions are not altered in this respect by the incorporating clause; or under the 42nd section, which does not apply to the case. These sections relate to different states of circumstances. The former, as has been already said, is intended to prevent encroachment; the latter, to enable the corporation to widen streets where there is admittedly no encroachment. We see no reason for altering the opinion given by us in September 1888; and the suggestion made at the close thereof has not been weakened by anything which has since occurred.

"*Q.* If Mr. E. were to acquiesce in the resolution of the corporation, or to be legally compelled to build back to the 25-feet line, would it devolve upon the corporation or himself to erect a retaining wall to connect the existing one from the point M. to the retaining wall of his new building?

"*A.* It appears to us that there would be no such duty incumbent upon either party. Mr. E. might bring his building up to the proper

bank of the stream; and if he built a retaining wall he would do so only to preserve the security of his property, not in fulfilment of any public duty."

The Lord Advocate, Mr. (now Lord) Robertson, and Professor Rankine gave the following opinion on a somewhat similar point, where it was desired that an owner should set back his building 25 feet from the centre of the road: "We are of opinion that sec. 91 of the General Turnpike Act has been validly incorporated in the Local Act which the memorialists administer, but we are further of opinion that the opening words of the section do not authorise them to proceed as proposed with regard to either of the subjects in question. These words seem to us to be confined to cases in which it is contemplated to erect buildings near a road or street on ground theretofore unoccupied by buildings; or, to put the matter otherwise, that the word 'erect' does not include 're-erect.' See Pitman *v.* Burnett's Trustees, 26th January 1882 (9 R., 444). This is the natural meaning of the terms used, and is supported by the considerations that (1) The other view would involve—contrary to principle and the habitual practice of the Legislature—the expropriation of a valuable right of ownership without compensation. It is one thing to say to a proprietor, through or past whose lands a road or street has been made, that he shall not encroach on it within a certain limit. The land for the road or street has been taken, or must be held to be occupied, on these terms. It is another thing to make a road or street close to an existing house, or to allow a house to be built up to boundary, and then to demand, when it is to be re-erected, that it shall be pushed back so as to widen the highway. (2) To proceed as proposed would, in the words of the Local Act (sec. 40), be "inconsistent with that Act and the Police Act," and especially with the procedure and policy indicated in the Local Act (sec. 42) and the Police Act (secs. 161 to 163).

We may add, (3) That the course proposed would have a direct tendency to deter owners from making improvements on house property.

We have kept in view the mention of new enclosures and plantations in sec. 91. Our opinion is not affected thereby, since the reference is plainly to fences on ordinary country roads, the usual, and not, like buildings, only the occasional boundary of a highway.

. . . . . .

This point is also clear. Sec. 162 applies only to projections beyond the regular line of the street, or beyond the front of adjacent houses, and in both the present cases the fronts are within the line of the street, and it is not proposed to push them further.

Mr. C. S. Dickson, advocate, said: "In answer to the query, 'Are the memorialists entitled to require that the new buildings about to be erected shall be set backwards towards the line of A. street on the east to the modified distance of 6 feet from the present frontage, this being admittedly essential to the improvement of the street?' I have felt this to be a question of very considerable difficulty, but I

have ultimately come to be of opinion that it falls to be answered in the negative. The considerations which have mainly influenced me in arriving at this conclusion are the following. Having regard to the course of A. street, it cannot, in my opinion, be said that there is a 'regular line along its whole length;' it is broken up into divisions, each of which may have a regular line, but no two of which are on the same line—*e.g.*, dealing with the south side, at the extreme west, the buildings, including the fire-engine house, project to the north; from the fire-engine house to and including the corner in question is in one line; from the corner in question to the eastern corner of Mr. B's property is in another line; and the part of A Street immediately further east still is in yet another line. The result of this is, in my opinion, that if the line of the street is to be taken as the datum line, the street must be dealt with in divisions, as was done in the Greenock case. In that view, however, the plot of ground in question would, in my opinion, fall to be dealt with as in the division lying to the west of the close leading to B Place, and the proposed building does not project beyond the regular line of that division.

"If the other datum line in sec. 162 is considered, the following difficulties are, in my opinion, insuperable. A building in the sense of sec. 162 must be a house or similar erection; a mere garden or enclosure wall is not such a building. Partick, etc. Co. (13 R., 500), and cases there cited. The house or building must also adjoin that which it is proposed to set back. The wall bounding the area B. is not therefore a building in the sense of the Statute, and the warehouse A. cannot, in my view, be held to adjoin C. so as to entitle the corporation to require that the line of A. should regulate the line of buildings on C. If the line of the adjoining buildings is to give the rule, then, in my opinion, the line of D. is the proper line, and, admittedly, Mr. B. proposes to build on that line.

"Having regard to these considerations, I am of opinion that this question falls to be answered in the negative.

"*Q.* Is the corporation, under the Local Act or as Road Trustees, entitled to object to the proposed buildings under sec. 91 of the General Turnpike Act, and to require that the proposed buildings be set back a distance of 25 feet from the centre of the street, and that without giving any compensation?

"*A.* I am of opinion that this question falls to be answered in the affirmative. It is to be noted, however, that, in my opinion, under sec. 91, the corporation cannot require that the ground between the building so set back and the street should be given up to be used as part of the street, except by agreement with Mr. B.; all they can require is that it shall not be occupied by buildings above 7 feet high. The object of sec. 91 was apparently to secure that if the Road Trustees should at any time need to acquire ground for widening a road, it should not be occupied by expensive buildings, so as to compel the Trustees to pay a large price for it. Mr. B., therefore, even if the restrictions of sec. 91 were enforced against him, would

still, in my opinion, be entitled to enclose his ground up to the present boundary, so long as the enclosure was not a wall or building above 7 feet high.

"In accordance with what passed at the meeting on the ground, I assume, in answering this question, that prior to the passing of the Act of 1876, the road in question was one of the roads under the Selkirkshire Road Act of 1867, and that sec. 91 of the General Turnpike Act at that time applied to it.

"*Q.* In the case of a house 10 feet high being taken down in order to be rebuilt, would the corporation be entitled to require so much of the new building as is over 10 feet in height to be set back 25 feet from the centre of the road?

"*A.* I answer this question in the affirmative, subject to the following qualifications. Sec. 40 of the 1876 Act only incorporates sec. 91 'so far as applicable to the roads and streets within the extended burgh.' There may be roads and streets in the burgh in the sense of the interpretation clauses of the Acts of 1876 and 1862, to which sec. 91 cannot be held to be applicable, and, of course, the corporation would not have, with regard to these roads and streets, the power to require the new building to be set back in terms of sec. 91."

In English cases, under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), sec. 68, which enacts similar provisions, it has been held that the words "regular line of the street" do not mean a strict mathematical line, but a substantially regular line. Tear *v.* Freebody (4 C. B., N. S., 228). When houses project, and are pulled down, and the land sold for building purposes, new houses may be built on the same line as before, unless compensation be paid. In determining the line, therefore, regard must be had to the frontage of houses previously existing, and which may be rebuilt, as well as to those still standing. Lord Auckland *v.* Westminster Board of Works (L. R., 7 Ch. App., 597).

159. Future Projections of Houses, etc., to be removed on Notice.—The Commissioners may give notice to the owner of any house or building, requiring him to remove or alter any porch, shed, projecting window, step, cellar, cellar door, or window, sign, sign-post, sign-iron, show-board, window shutter, wall, gate, or fence, or any other projection erected or placed, after the application of this Act, against or in front of any house or building within the burgh, and which is an obstruction to the safe and convenient passage along any street, public or private; and if such owner shall not, within fourteen days after the service of such notice, comply with such requirement, he shall be liable to a penalty not exceeding 40s.; and no person shall erect

any projection or make any erection whatever in any street, public or private, without the written consent of the Commissioners, under a penalty of 40s. for each offence: Provided that, in the event of the failure of such person to remove any such projection within three days after being convicted of a contravention hereof, the Commissioners may summarily remove such projection, and recover the expense of doing the same from such person.

See sub-head (22), sec. 4, for definition of "owner," (13) "house," (3) "building," (4) "burgh," (28) "private street," (31) "street." See sec. 487 for imprisonment failing payment of penalty, and 500 and 501 for penalty on repetition of offences and power to mitigate.

In Buchanan *v.* Keating, 8th Dec. 1854 (17 D., 155), it was held (altering judgment of the Sheriff of Perthshire, *diss.* Lord President, *abs.* Lord Rutherfurd) that the Sheriff-Court had no power of interference to review or stay execution of the judgment of the judge of police, ordering a workman to remove a sign alleged to be an obstruction, from the door of a shop of which third parties were tenants,—who were not called as parties to the proceedings in the Police Court, and with whom the only connection which the workman had was, that the tenants had employed him to erect the sign. *Observed*, that the proper course for the tenants to adopt for the protection of their property, was to apply to the Court of Session by suspension and interdict.

In Thomas *v.* Keating, 17th July 1855 (17 D., 1133), a Burgh Police Act declared it to be a punishable offence to have a sign over a shop door projecting beyond a certain distance, and procedure was provided for the punishment of offenders. A workman, who had been employed to erect such a sign, was prosecuted at the instance of the Superintendent of Police, fined by the Police Magistrate, and ordered to remove the sign. The tradesmen who had employed him thereupon applied for interdict against him doing so, and also against the Superintendent of Police and the Police Magistrate. Interdict was refused against the Magistrate, but granted against the other respondents. An action was therefore brought by the Police Commissioners of declarator of their rights, and of the illegality of the proceedings of the tradesmen. Action dismissed as incompetent; altering judgment of Lord Handaside, Ordinary.

In Robertson, etc. *v.* Clydebank Commissioners, 29th May 1891 (7 Scot. Law Rev., 252), it was held that Commissioners are not entitled to compel proprietors to remove a railing enclosing a garden-plot in front of houses.

In Dargie *v.* Magistrates of Forfar, 10th Mar. 1855 (17 D., 730), in an action of damages at the instance of a burgess against the Magistrates and Town Council of a royal burgh, as representing the community, for injury sustained in consequence of their alleged neglect to remove a large stone which obstructed the pavement of a

public street, it was pleaded in defence that the action should have been directed against the individuals who had been guilty of the alleged neglect, and that it was incompetent as laid against the community. Defence repelled; and, in accordance with the decision in the case of Innes *v.* Magistrates of Edinburgh, relevancy of the action sustained, and the pursuer held (*aff.* judgment of Lord Neaves) entitled to an appropriate issue.

In M'Donald *v.* White, 9th June 1882 (9 R., Just., 43), sec. 251 of the General Police and Improvement (Scotland) Act, 1862, enacts that every person who in any "street" or "private street," "to the obstruction, annoyance, or danger of the residents or passengers . . . places or uses any bench or stall on any footway," shall be liable in certain penalties.

The proprietor of a shop was charged under this enactment with "wilfully causing" an obstruction on the footway in front of his house, by means of a bench or stall loaded with flowers.

Held (*diss.* Lord Craighill), that the charge was relevant without the words, "to the obstruction of residents or foot-passengers."

The proprietor of a house was charged before a Police Court with obstructing the footway of a public street by means of a stall loaded with flowers. He objected to the jurisdiction of the Police Court, on the ground that a question of heritable right was involved, alleging that the part of the street on which the obstruction was said to have existed was his private property. The Magistrate convicted the accused, who brought a suspension, but stated that he did not intend to raise the question of heritable right in a proper civil process. The Court refused the suspension. In this case Lord Young said: "I cannot for a moment assent to the view that it is necessary to set forth or to show that some residents or passengers had in fact been obstructed, annoyed, or endangered. If a person were to dig a trench in a street, and then leave the street in that condition all night, I cannot doubt that that would be an obstruction or a danger, although nobody chanced to fall into the trench. It is the nature and character of the thing that makes it an obstruction, not its actual results. It is an obstruction if it necessarily causes obstruction to passengers who chance to be there. Indeed, the alternative in the Statute between passengers and residents shows that this is the true view, for a resident, who is not also a passenger, cannot actually be obstructed. It is in order to prevent obstruction in fact that a penalty is imposed on those who create possible and, if there should in fact be passengers, necessary sources of obstruction. . . .

"The solum of any street may be the private property of an individual. It may suit the convenience of private individuals to turn their property into streets. That frequently occurs. But, having become a street *de facto*, it must be regulated by those provisions and bye-laws which are considered to be necessary for the safety of those passengers whom the proprietor has invited to frequent it. It must be subject to the police rules, and one of these rules is that there shall be no obstruction to those who are invited to make

use of the street. There are many such private streets, the solum of which may be reconverted into its former private uses whenever the proprietor pleases. Now, here the Magistrate was of opinion that the ground on which this obstruction was placed was *de facto* part of a street, and in this suspension we must take the fact to be so. There may be something in the contention that the street at this particular point widens, and in consequence that the ground in dispute does not belong to the street at all. We proposed, therefore, to the suspender that if the matter was of such importance to him he might take the question before a higher tribunal, proceeding in a more solemn manner to have his rights there determined. But this he declined to do, acting no doubt on good advice, on the ground that the matter was not sufficiently valuable to him to make it expedient to incur the expense. What, then, does he ask us to do? He asks us to look at the plans, and then to say that the Magistrate has erred. But, looking at the plans, I cannot say that the Magistrate has erred. I therefore think there was an obstruction here on the public street, and that the conviction must be sustained."

In England, "in a case in which a person had been summoned under the Metropolitan Police Act, 1839, 2 & 3 Vict. c. 47, sec. 60, sub.-sec. (7), for having set up a movable showboard in front of his shop, projecting 11½ inches into the street, at a height of 2 feet 3 inches, it was held that the Magistrate had power to reject as irrelevant evidence proposed to be adduced to prove that witnesses were not incommoded by the projection. Read *v.* Perret (L. R., 1 Ex. D., 349; 41 J. P., 135). Under the present Act (10 & 11 Vict. c. 34), however, it is necessary to show that the projection is 'an obstruction to the safe and convenient passage' along the street.'

"A Bill was filed to restrain a Local Board from removing a wall and railings enclosing a piece of land in front of a house. The evidence showed that the piece of land formed part of the highway, and it was held that the defendants had a right to remove the wall and railings as an obstruction, under sec. 70; and, further, that even if that section did not apply, the Court, having decided that they were an obstruction, would not restrain the Board from removing them. Bagshaw *v.* Buxton Local Board of Health (L. R., 1 Ch. D., 220; 45 L. J., Ch., 260; 34 L. T., N. S., 112; 24 W. R., 231; 40 J. P., 197)."—Glen, p. 748.

In this case the plaintiffs were the occupiers and owners of a house. In front of this house was a narrow piece of ground enclosed with a low wall and iron railings and covered with shrubs and plants, and used as a front garden to the house. The enclosure appeared to have been made in or about 1858. It was observed that a wall enclosing part of a street is an obstruction to the "safe and convenient passage along" the street within the meaning of the Towns Improvement Clauses Act, 1847, whatever may be the width of the unenclosed portion of the street, and that after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction.

"The duty of him who occupies a house abutting on the highway is to repair all known defects of the house and its appurtenances, the non-repair of which may result in danger to the passers-by; and that duty is not discharged by the employment of a contractor to repair such defects. If damage results from the negligence of a contractor so employed, the householder is liable. Thus, where the occupier of a house employed a contractor to repair a lamp projecting from the front wall, about 15 feet above the pavement, and that contractor having done the work badly another was employed, who proceeded to examine the lamp, but the weight of the ladder and rotten state of the bracket caused it to fall and injure a passer-by, the occupier was held liable for the injury. But *quære*, whether he would have been liable had he never known of the decayed condition of the lamp."—Glen, p. 748. Tarry *v.* Ashton (L. R., 1 Q. B. D., 314; 45 L. J., Q. B., 260; 34 L. T., N. S., 97; 24 W. R., 581; 40 J. P., 439).

In this case, held by Lush and Quain, Justices, that the plaintiff was entitled to the verdict, on the ground that, if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to the passengers; and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. By Blackburn, J., on the ground that, under the circumstances of the case, it was shown that defendant knew that the lamp wanted repair in August, and the person he employed having failed to do so, defendant was liable for the consequences of the breach of duty.

A Local Act enacted as follows: "No projection of any kind shall be made in front of any building, over or upon the pavement of any street." The Court held that these words only referred to such projections as would be an obstruction to foot-passengers, and not to projections all the way up a house. In this case the alleged obstruction consisted of an oriel window, the lowest part of which was 15 feet above the pavement. Goldstraw *v.* Duckworth (L. R., 5 Q. B. D., 275; 49 L. J., M. C., 73; 42 L. T., N. S., 440; 28 W. R., 504; 44 J. P., 410).

In connection with this subject, it may be mentioned that the owner of one house may have an easement entitling him to have a sign-board affixed to an adjoining house. Moody *v.* Steggles (L. R., 12 Ch. D., 261; 48 L. J., Ch., 639; 41 L. T., N. S., 25).

In a public road in the Metropolis, having on each side a line of houses and a paved footway immediately in front of them, there was, between each footway and the carriageway, an intermediate space from 33 to 58 feet wide. The occupants of the houses used the parts of the spaces opposite their houses for the purposes of their trades, paying a small yearly rent to the lord of the manor, and subject to such use the public had always passed over the spaces as of right. It was held that the space had been partially dedicated to the public, but was not a street within the meaning of the Metropolis Management Act, 1855; and that a movable shed erected thereon by a publican, without causing any obstruction to the paved footway,

was not an obstruction which the District Board could remove under that Act (18 & 19 Vict. c. 120, secs. 119, 120), which contains provisions similar to secs. 69, 70 of the Towns Improvement Clauses Act. Le Neve *v.* Vestry of Mile End Old Town (27 L. J., Q. B., 208; 8 E. and B., 1054).—Glen, p. 747.

160. Commissioners may cause existing Projections to be removed, and Compensation to be made.—If any such obstructions, projections, or erections were erected or placed against or in front of any house or building in any such street, before the application of this Act, the Commissioners may cause the same to be removed or altered as they think fit, provided that they give notice of such intended removal or alteration to the owner of the house or building thirty days before such alteration or removal is begun; and if such obstructions, projections, or erections shall have been lawfully made, they shall make reasonable compensation to every person who suffers damage by such removal or alteration.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (31) "street," (22) "owner." See secs. 336 to 338 inclusive as to "notice."

In Ireland *v.* White, 3rd Dec. 1889 (6 Scot. Law Rev., 72), it was held that the words "obstruction or projection" in sec. 164 of the Police Act of 1862 did not apply to a plot of ground in front of a villa enclosed and retained by a low wall.

161. Doors in future to be made to open inwards.—All doors, gates, window-shutters, and bars, put up after the application of this Act within the burgh, and which open upon any street, public or private, shall be hung or placed so as not to open outwards, except when, in the case of public buildings, the Commissioners allow such doors, gates, window-shutters, or bars to be otherwise hung or placed; and if, except as aforesaid, any such door, gate, window-shutter, or bar be hung or placed so as to open outwards on any such street, the owner of the premises to which such door, gate, or bar is attached shall, within eight days after notice from the Commissioners to that effect, cause the same to be altered so as not to open outwards; and in case he neglects so to do he shall be liable to a penalty not exceeding 40s.

See sub-head (4), sec. 4, for definition of "burgh," (28) "private street," (31) "street," (3) "building," (22) "owner," (16)

"premises." See secs. 336 to 338 inclusive as to "notice." See sec. 487 as to imprisonment failing payment of penalty, and 500 and 501 for penalty on repetition of offences and power to mitigate.

162. Doors opening outwards may be altered.—If any such door, gate, window-shutter, or bar was, before the application of this Act, hung so as to open outwards upon any street, public or private, the Commissioners may alter the same, so that no part thereof, when open, shall project over any public way.

See sub-head (28), sec. 4, for "private street," (31) "street."

163. Coverings for Cellar Doors to be made by Owner.—When any opening is made in any pavement or footpath as an entrance to any vault or cellar, a door or covering shall be made and maintained by the owner of such vault or cellar, of iron, or such other materials and in such manner as the Commissioners direct, but before such opening is made, the consent of the Commissioners thereto shall be obtained in writing; and if such owner do not within a reasonable time make such door or covering, or if he make any such door or covering contrary to the directions of the Commissioners, or if he do not keep the same, when properly made, in good repair, he shall for every such offence be liable to a penalty not exceeding £5.

See sub-head (22), sec. 4, for definition of "owner." See sec. 487 for imprisonment on failure to pay penalty, and 500 and 501 for penalty on repetition of offences and power to mitigate.

See sec. 156 as to power of Commissioners to require dangerous openings in foot pavement to be built up.

164. Rain-water to be conveyed from Roofs of Houses in Pipes.—The owner of every house or building or covered way shall put up and keep in good condition shoots or rhones or gutters thereon, both at the front and back of such houses or buildings, as also at the sides thereof, in positions to the satisfaction of the Commissioners, and shall connect the same with a pipe or trunk or cistern to carry the water from the roof thereof to the adjacent sewer or drain; and for the latter purpose it shall be lawful for any such owner to take up so much of the pavement, causeway, or flagging of any such street as may be requisite, and to lay down such drains or tunnels, or fix iron drain gutters, under

the direction of the Commissioners; and all damage which may thereby be occasioned to the pavement, causeway, or flagging of the footpath or carriageway, or the sewer or drain, shall be made good at the expense of such owner; and in default of compliance with this enactment, such owner shall be liable to a penalty not exceeding 40s. for every day that he shall so make default, after being required by the Commissioners to comply therewith; and where any railway bridge, aqueduct, or canal crosses any footpath or public thoroughfare, the owner thereof shall erect and place an iron or zinc screen under such bridge, to carry off the rain-water, or the moisture that flows from or percolates through the bridge, to prevent the same falling on persons passing along such footpath or public thoroughfare; and any such owners failing to erect or place such screen shall be liable to a penalty of 40s. for every day that default is made, after being required by the Commissioners to comply with this enactment.

See sub-head (22), sec. 4, for definition of "owner," (13) "house," (3) "building," (31) "street." See sec. 487 for imprisonment failing payment of penalty, and 500 and 501 for penalty on repetition of offences and power to mitigate.

"Allowing rain-water to flow on to a highway from the eaves of houses does not constitute a 'wilfully obstructing the free passage of the highway,' nor is it permitting filth, etc., to run on to the highway within the meaning of sec. 72 of the Highways Act, 1835. Croasdil *v.* Ratcliffe (5 L. T., N. S., 834; 26 J. P., 165)."—Bazalgette, p. 1002.

"Under the provisions of the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, sec. 8, it was held that a nuisance, which was created upon a highway by water percolating through a railway bridge, and dripping on the road beneath, was not 'a nuisance or injurious to health,' because that expression was to be read in the sense of 'a nuisance injurious to health.' Great Western Railway Company *v.* Bishop (L. R., 7 Q. B., 550; 42 L. J., M. C., 120; 26 L. T., N. S., 905; 20 W. R., 969; 37 J. P., 5). This decision has, however, been explained by Stephen, J., as follows: 'In that case the particular nuisance complained of was not only not injurious to health, but it was not a nuisance that in any kind of way related to the health, or even to the permanent comfort, of any of the neighbours. It was a mere common-law nuisance, like the non-repair of a highway. The appellants allowed rain-water to drip from one of their bridges on the highway, and the Court held that that was not the sort of thing the Legislature meant by using the words "nuisance or injurious to health." I think that case does not throw any light

upon what the decision of the Court would have been if the nuisance, though not absolutely injurious to health, was one which would interfere with the permanent comfort of those in the neighbourhood, and might probably become injurious to health. . . . The Court abstained from bringing within the purview of the Nuisances Removal Act a nuisance of an entirely different kind from the nuisances the Legislature intended to deal with.' The learned judge then defined the cases at which the Legislature intended to strike by the present Act, as 'anything which would diminish the comfort of life, though not injurious to health, and anything which would, in fact, injure health.' Bishop Auckland Local Board *v.* Bishop Auckland Iron Company (L. R., 10 Q. B. D., 138; 52 L. J., M. C., 38; 31 W. R., 288; 48 L. T., N. S., 223; 47 J. P., 389)."—Glen, p. 142.

165. Parties aggrieved may appeal to Sheriff.—As regards the improving the line or level of any street, and removing obstructions, or any other work to be executed by the Commissioners, under the provisions of this Act, for the improvement of any street, it shall be lawful for any person whose property may be taken or affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner hereinafter provided.

See sub-head (31), sec. 4, for definition of "street." See sec. 339 as to "appeal."

PLANS OF NEW BUILDINGS, AND REGULATIONS.

166. Petition with Plans and Sections to be lodged.—Every person who proposes to erect any house or building, or to alter the structure of, and to use for human habitation, any existing house or building which had not been previously used for that purpose, or alter the mode of occupancy of any existing house in such a manner as to increase the number of houses or occupants, shall lodge with the Clerk of the Commissioners a petition for warrant so to do, and such petition shall set forth a description of the intended house or building or alteration, and shall be accompanied by a plan of the site, showing the immediately conterminous properties, and also the position and width of any street, court, or footpath from which the property has access, or upon which it abuts; and also plans, sections, elevations, and such detailed drawings as are necessary to

show the height and mode of structure and arrangement of the intended house or building or alteration, and the lines of the intended drainage thereof, and the levels thereof relatively to the street, court, foot pavement, or footpath, and to the sewer or drain with which the soil-pipes and drains of the property to be built or altered are intended to be connected; and in regard to any building of a public character intended as a place of public resort, such plans shall show the arrangements for ventilation and the provision intended to be made for ingress and egress; and all plans to be lodged as aforesaid shall be drawn to a graduated scale as follows, viz. of one and one quarter inch to every 10 feet for buildings under 100 feet long; of one inch to every 10 feet for buildings 100 feet and under 300 feet long; and of three quarters of an inch to every 10 feet for buildings 300 feet long and upwards; and such plans and sections, with such alterations thereon as may be made as after provided, shall be registered and indexed by the Clerk of the Commissioners: and the said plans and sections and register and index shall be open to inspection by any owner or ratepayer upon payment of a fee of 1s.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (31) "street," (10) "court," (22) "owner." This section does not apply to the railways or stations of any railway company or buildings connected therewith, other than dwelling-houses. See sec. 517. See sec. 152 as to width of new streets or courts. See sec. 181 as to ventilation of buildings intended to be used for public meeting; secs. 238–245 as to drainage of houses.

The words "to alter the structure of, and to use for human habitation, any existing house or building which had not been previously used for that purpose," must apparently be read as meaning "to alter the structure of any existing house or building, or to use for human habitation any building not previously so used," for sec. 169 provides a penalty for doing either of these operations without a warrant.

In granting warrant to alter the mode of occupancy of any existing house in such manner as to increase the number of houses or occupants, care must be taken to avoid sanctioning such alteration as might create a nuisance under the Public Health Act, 30 & 31 Vict. c. 101. Sec. 16 of that Act, sub-head (*f*), provides that "any house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates," is a nuisance, and the author of the nuisance or owner of the premises may be ordained (sec. 19) "to limit the number of persons who may be accommodated in any house or part thereof overcrowded, or the number of separate dwellings

into which such house or part thereof may be divided or let for the use of separate families or persons."

The proprietor of a house within the Burgh of Edinburgh, which consisted of a main door flat and a basement flat, proceeded, without applying for a warrant from the Dean of Guild, to fit it for occupation by six tenants (three upon each flat) by erecting partitions so as to convert it into separate dwellings, and introducing new sinks and a second w.-c. The Dean of Guild, on the ground that the alterations were structural and that the sanitary arrangements were defective, granted interdict against the operations, and imposed a penalty upon the proprietor for having proceeded with them without warrant. On appeal, the Court held that the operation did not involve an alteration of structure, and therefore that the Dean of Guild had under the Statute (Edinburgh Municipal and Police Act, 1879) no jurisdiction entitling him to interfere. Somerville *v.* Macgregor, 17th Nov. 1889 (17 R., 46).

As by sec. 201 of this Act the Dean of Guild Court is to come in room and place of the Commissioners for carrying out the provisions of this Act, in so far as they apply to new buildings or alteration of existing buildings, ventilation, etc., application for such alterations will now be necessary for such under this Act.

In Police Magistrates of Tayport *v.* Tayport Patent Slip Co., 24th Oct. 1889 (5 Scot. Law Rev., 418), it was held that the Magistrates of a police burgh are entitled to notice before the building or restoration of a wall enclosing unused ground within their jurisdiction.

In this case the Magistrates of Police of the Burgh of Tayport, acting and constituted under the Police Act of 1862, craved the Court to interdict the defenders from erecting a wall or other building on a part of the ground commonly called the "West Common," belonging to the inhabitants and feuars of Tayport, or at least being ground dedicated to public purposes. The pursuers based this action on the ground that, by sec. 408 of the Police Act of 1862, they had all the powers and jurisdiction within their burgh that a Magistrate or Dean of Guild of a royal burgh had within a royal burgh (Tainsh *v.* Magistrates of Hamilton, 4 R., 315), and therefore ought to have obtained notice before the wall was begun to be built; and on the ground that the erection was an encroachment upon public property, which the pursuers were bound by law to prevent. The defenders denied that the pursuers were entitled to notice of the proposed erection, as the wall was merely a restoration of an old boundary wall, and was entirely upon their own property. It was admitted that there had been no wall on the ground referred to for at least fifteen years, and that if the proposed wall was erected it would enclose a piece of ground adjoining the "West Common," which piece of ground had been treated as part of the common for that period. Interim interdict was granted, and thereafter the defenders submitted to the pursuers the plan and titles of their property, with the view of showing that the wall was proposed to be erected on their own property, and was not an encroachment, as alleged.

In England, by the Public Health Act, 1875, 38 & 39 Vict. c. 55,

sec. 159, it is provided that "the erection of a new building" shall include the re-erection of any building pulled down to or below the ground-floor, the conversion into a dwelling-house of that which was not constructed for human habitation, and the conversion of one dwelling-house into more than one. But this clause does not exhaust the definition of a new building, and there have been many decisions on the question.

A bye-law directed that every building to be erected and used as a dwelling-house shall have an open space exclusively belonging thereto, to an extent of one-third of the entire area of the ground on which the dwelling-house shall stand; and by another bye-law under a general heading of width and level of new streets, provided for the width of new streets, dividing them into front, cross, and back streets, and in a subsequent separate paragraph stipulated that "no dwelling-house should be built immediately adjoining any back street." The proprietor of a house, yard, and coach-house and stables, erected before the constitution of a Board of Health for the district, pulled down the coach-house and stable below the ground-floor, and erected a building partly upon their site and partly upon the yard, with rooms over the ground-floor opening into the yard, and also into an old back street immediately adjoining, but the access to the rooms was by a covered way from the old house, the object of the new building being to increase the accommodation of the old house, which had been converted into a hotel. Treating the old and new buildings either as one building or as separate buildings, the space left in the yard was insufficient within the bye-law, but it was held that there was no violation of the bye-laws either in respect of an insufficiency of space or the building of a dwelling-house adjoining a back street—as, first, the facts showed that there was no new building erected within the Statute and bye-laws, but only an addition to the old building; and, secondly, that the words "back street" must be read as "new back street." *Per* Pollock, C.-B.: "I do not think that the principle is applicable to the merely adding a bedroom or two to an old house already built, and although this may be done on the first occasion a little in excess, and a very great many bedrooms added and the building run up to the height of three or four stories, I do not think that makes any difference." But semble, *per* Martin, B., the bye-laws might have been lawfully framed so as to include the existing buildings. Shiel *v.* Mayor of Sunderland (6 H. and N., 796; 30 L. J., M. C., 215; 25 J. P., 647).

A stable pulled down and re-erected, with a new roof and two new walls in a different place, was held by the Court to be a new building within the provisions of certain bye-laws. The Magistrates had decided that it was not a new building, but the Court held that this was not simply a finding of fact, and could be questioned on a special case. Hobbs *v.* Dance (L. R., 9 C. P., 30; 43 L. J., M. C., 21; 29 L. T., N. S., 687; 22 W. R., 90; 38 J. P., 56).

With respect, however, to certain building operations adjoining and in connection with an old inn, a Magistrate found as follows, in a special case: "The structure is an expensive one, and is in fact a com-

fortable, good-looking dwelling -house, which it previously was not; the old building was partly pulled down to the ground-floor, and the buildings erected on the site thereof are a new building intended for occupation by men and women, and they were not adapted for personal occupation previously;" and he added that he found as a fact that the building came within the definition of a new building in sec. 159. The Court held that the question whether the erection was a new building within the bye-law was a question of fact for the exclusive determination of the Magistrate. *Per* Lord Coleridge, C.-J.: "It is impossible to lay down any abstract definition of a new building. There are so many degrees as to which each particular case must be judged." James *v.* Wyrill (51 L. T., N. S., 237; 48 J. P., 725).

With regard to the person who is responsible under bye-laws for the mode of construction of new buildings, a landowner contracted with B. for the erection of buildings. B. subsequently, with the owner's consent, contracted with C. for the completion of the buildings, and did not further interfere in their completion. Having infringed a bye-law as to construction of walls, it was held that B. could not be convicted under the bye-law, but that C. could. Brown *v.* Edmonton Local Board (45 J. P., 553).—Glen, pp. 289–291.

"A manufacturer, being desirous of pulling down his manufactory and of erecting a new one, sent plans and sections of his proposed new building to the Surveyor of the Council, who returned to him an approval of his plans by the Building and Improvement Committee of the Town Council, but accompanied by a note (in a printed common form), stating that the ratification of the approval of any plans and particulars by the Committee referred only to such matters as were required to be set forth, as described therein in accordance with certain bye-laws; and that the approval of the Committee gave no authority for the making of any projection on the front of any building into any street beyond the proper line of such street, etc. Relying on this approval, the owner pulled down the manufactory, and afterwards received a notice from the Town Council under the Local Government Act, 1858, 21 & 22 Vict. c. 98, sec. 35, which corresponded to sec. 155 of the present Act, that any building thereafter to be built must be built on the line marked red in the plans thereto annexed, which line was about 13 feet beyond the mark on the plans which had been approved by the Committee. It was, however, held that the Town Council were not at liberty to give any such notice after the notice of approval of their Committee given by their Surveyor, and an injunction was granted to restrain the Council from interfering in any way with the erection of the building according to the plans and sections which had been approved. Consequently, sec. 35 of the Local Government Act, 1858, applied to such buildings as had been taken down 'without any previous approval' by the Local Board of a plan for their re-erection. And sec. 34 (which corresponded to sec. 157 of the present Act) empowered a Town Council (being a Local Board under that Act) to make a bye-law requiring a notice, plans and sections of a new building to be

given to the Council. Slee *v.* Mayor of Bradford (4 Giff., 262; 8 L. T., N. S., 491; 9 Jur., N. S., 815).

"This case was followed in one in which a Local Board had passed a resolution that the line of building be erected as shown in a plan sent in by the builder, and at the same time resolved to offer him a certain sum for the land given up for street improvement. The builder pulled down the front wall of the existing building, but, as he did not accept the compensation offered, the Local Board altered their resolution and prescribed a different building line. This it was held they could not do. Masters *v.* Pontypool Local Board (L. R., 9 Ch. D., 677; 47 L. J., Ch., 797)."—Glen, 281.

167. Notice of Petitions to be given to Commissioners, and Proceedings thereon.—The Clerk of the Commissioners shall, at their first meeting, after receiving such petition, give notice thereof to the Commissioners, who may decline to grant warrant for the erection of any new house or building, or for the alteration of the structure of any existing house or building, until satisfied that the plans provide suitably for stability, light, ventilation, and other sanitary requirements thereof.

See sub-head (13), sec. 4, for definition of "house," (3) "building,' (4) "burgh." This section does not apply to the railways or stations of any railway company or buildings connected therewith, other than dwelling-houses. See sec. 517. "Stability" is usually regulated by the Dean of Guild. See secs. 207 to 209 as to the powers and duties of the Dean of Guild Court, and Schedule IV. as to stability, etc. See as to light, secs. 168 to 180, particularly 170 to 173 and 175. See secs. 181 to 185 as to ventilation. The "other sanitary requirements" are not specified; they will include water supply, drainage, w.-c. accommodation, etc. See Mitchell *v.* Dean of Guild of Edinburgh, 18th Mar. 1885 (12 R., 844), referred to under sec. 209, p. 331. See also sec. 201.

In Smellie *v.* Struthers, 12th May 1803 (13 Fac., 219), it was held that a Dean of Guild has no power, for the sake of widening a street, to prevent a proprietor from building upon the limits of his property. It was averred that the Dean of Guild of Glasgow had immemorially exercised the power of not allowing a person to build to the verge of his property. The Court were decidedly of opinion that neither the alleged usage of the Dean of Guild, nor the expediency of widening this particular street, could confer upon that Magistrate the power of taking away any part of the property of individuals.

In Thomson *v.* Dundee Police Commissioners, 8th Dec. 1887 (15 R., 164), under the powers conferred by sec. 63 of the General Police and Improvement Act, 1862, incorporated with the Dundee Police Act, 1882, the Dundee Police Commissioners appointed a Works Committee to superintend the building of houses, etc. This Committee had no express power under the General or Local Act to

delegate its powers. The Committee remitted certain plans to a "Sub-Committee" of their number. The Sub-Committee issued a deliverance in name of "the Commissioners," disapproving of the plans. On appeal, it was held that the Works Committee had no power to delegate its powers, and that therefore the deliverance fell to be quashed.

In England, it has been held that "the Urban Sanitary Authority have not power under the Act (38 & 39 Vict. c. 55), nor could they by a bye-law give themselves the right to disapprove of and prohibit the erection of a building at their own discretion, or for any other reason than that the erection would be in contravention of some valid bye-law or other provision of the law. See the remarks of Lord Blackburn in Robinson *v.* Barton Local Board (L. R., 8 App. Cas.). It was held that, as sec. 158 imposed on the Urban Sanitary Authority the obligation of signifying their approval or disapproval of plans within one month, they could not make a bye-law at variance with this enactment in going beyond it; and that, under a bye-law, which prohibited erections on open spaces belonging to buildings from being made without the approval of the Urban Sanitary Authority, but which specified no time within which approval or disapproval of the erections was to be given, the Urban Sanitary Authority, who had not signified their approval or disapproval within a month after the deposit of plans, could not take proceedings for the recovery of a penalty for breach of the bye-law after the month had elapsed. Clark *v.* Bloomfield (*Times* newspaper, 5th Mar. 1885). It was also held that where a Local Board had not, during the month prescribed by sec. 158, signified the disapproval of plans, they could not afterwards object to the building being erected according to the line laid down on the plan; neither could they under that section pull down a building without giving the owner an opportunity of showing cause why it should not be pulled down. It is too late to object that no plans have been deposited, when an action has been brought to restrain the Authority from pulling down the building. Masters *v.* Pontypool Local Board (L. R., 9 Ch. D., 677; 47 L. J., Ch., 797)."—Glen, p. 297.

168. Regulating existing Buildings for Places of Public Meetings, etc.—The Commissioners shall cause every existing building used or proposed to be used as a place of public amusement or entertainment, or for holding large numbers of people for any purpose whatsoever, to be inspected, and shall, in case of refusal, after hearing the persons interested, direct such means to be taken for providing proper means of access to and exit from such buildings, and for protection from fire and other dangers to the public, as to the Commissioners shall seem fit.

See sub-head (3), sec. 4, for definition of "building." This section

does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

This is a very awkwardly expressed section. The buildings for places of public meeting, etc., are to be inspected, and in case of refusal the Commissioners are to take certain precautions. But what is to be refused? There is no provision for a licence, permission, or application of any kind to be refused, and it is difficult to see how the clause can be rendered operative.

The words "for holding large numbers of people for any purpose whatsoever," are very wide in signification, and may include churches, schools, and even factories and other large works. Sec. 175 provides for the lighting of public buildings and the provision of sufficient ingress and egress. The duty of seeing that precautions are taken against fire in factories is laid on the Commissioners by the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), sec. 7 of which provides:—

"7.—(1) Every factory of which the construction is commenced after the 1st day of January 1892, and in which more than forty persons are employed, shall be furnished with a certificate from the Sanitary Authority of the district in which the factory is situate, that the factory is provided on the storeys above the ground floor with such means of escape in case of fire, for the persons employed therein, as can reasonably be required under the circumstances of each case, and a factory not so furnished shall be deemed not to be kept in conformity with the principal Act, and it shall be the duty of the Sanitary Authority to examine every such factory, and, on being satisfied that the factory is so provided, to give such a certificate as aforesaid.

"(2) With respect to all factories to which the foregoing provisions of this section do not apply, and in which more than forty persons are employed, it shall be the duty of the Sanitary Authority of every district, as soon as may be after the passing of this Act, and afterwards from time to time, to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and, in the case of any factory which is not so provided, to serve on the person being, within the meaning of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, the owner of the factory, a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date; and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements; and, unless such requirements are so complied with, such owner shall be liable to a fine not exceeding £1 for every day that such non-compliance continues. In case of a difference of opinion between the owner of the factory and the Sanitary Authority, the difference shall, on the application of either party, be referred to arbitration, and thereupon the provisions of the First Schedule to this Act shall have effect, except that the parties to the arbitration shall be the Sanitary Authority on the one hand and the owner on the other,

and the award on the arbitration shall be binding on the parties thereto. If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the County Court having jurisdiction where the factory is situate, and thereupon the County Court, after hearing the occupier, may make such order as appears to the Court just and equitable under all the circumstances of the case."

169. Penalty for Erecting or Altering any House or Building without sanction of Commissioners.—Every person who shall erect or begin to erect any house or building, or who shall alter the structure of any existing house or building, or use for human habitation any building not previously so used, or alter the mode of occupancy of any existing house in such a manner as will increase the number of separate houses or occupiers, without a warrant, or otherwise than in conformity with a warrant of the Commissioners, and every person who shall, in the erection or alteration of any house or building, the erection of which has been sanctioned by the Commissioners, deviate from the plan or plans and section or sections so sanctioned, or shall otherwise contravene the building provisions of this Act, shall be liable to a penalty not exceeding £5, besides being bound, if and in so far as required by the Commissioners, to take down and remove the said house or building, or to restore it to the state it was in previous to the alterations thereon, or to alter it in such way as the Commissioners shall direct, so as to make it in conformity with the warrant of the Commissioners.

See sub-head (13), sec. 4, for definition of "house," (3) "building." See sec. 487 for imprisonment failing payment of penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors.

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See cases of Somerville *v.* Macgregor, and Tayport Magistrates *v.* Tayport Slip Co., referred to under sec. 166.

The expression "the building provisions of this Act," will include secs. 166–209 and Schedule IV.

See also sec. 153, which provides that "every person who shall, from and after the date when this Act shall come into operation in the burgh . . . build, raise, or add to any house or premises, or permit or suffer the same to be done, contrary to the provisions of this Act, unless the same shall have been formally sanctioned by the

Commissioners on a consideration of the special circumstances of the case, which sanction they are hereby empowered to give, shall forfeit and pay a sum not exceeding £20, and a further sum not exceeding £5 per day for every day after the first during which he shall permit or suffer such . . . house or premises to remain so . . . built or added to as last aforesaid."

In England, "the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, sec. 76, empowers the District Board to alter or demolish a house where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation; but this does not empower the District Board to demolish the building without first giving the party guilty of the omission an opportunity of being heard; this is on the principle which has been repeatedly recognised by the Courts. See Dr. Bentley's case, cited by Parke, B., in the Hammersmith rent-charge case (4 Exch., 96), that no man is to be deprived of his property without an opportunity of being heard. *Per* Erle, C.-J.: 'I think the Board ought to have given notice to the plaintiff and to have allowed him to be heard. The apparent neglect might have been explained, for it is possible that the regulations may have been complied with though the notice to the Board may have miscarried;' and *per* Willes, J.: 'I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice.' Cooper *v.* Wandsworth Board of Works (8 L. T., N. S., 278; 9 Jur., 1155; 32 L. J., M. C., 185; 14 C. B., N. S., 180; 11 W. R., 648). 'This principle is equally applicable to a Sanitary Authority.' Masters *v.* Pontypool Local Board (L. R., 9 Ch. D., 677; 47 L. J., Ch., 797)."—Glen, p. 294.

In Malcolm *v.* Lang, 15th Mar. 1892 (29 S. L. R., 617), Malcolm built a large advertisement hoarding on his own ground alongside one of the principal streets in Glasgow. Having been convicted in the Glasgow Dean of Guild Court of an offence under sec. 365 of the Glasgow Police Act, 1866, for having erected a building without obtaining a warrant from the Court, on appeal, *held* that the hoarding was not a building within the meaning of the section.

170. Free Space in rear of Houses.—Every building erected for the purpose of being used as a dwelling-house, or any building not previously used as a dwelling-house, when the same is altered for the purpose of being so used, shall have all the rooms sufficiently lighted and ventilated from an adjoining street, or other open space directly attached thereto, equal to at least three-fourths of the area to be occupied by the intended building; and such space shall be free from any erections thereon other than w.-c.'s., ash-pits, coal-houses, or other conveniences, all which conveniences shall, as to

height, position, and dimensions, be erected subject to the consent and approval of the Commissioners: Provided also, that in cases of conversion of a house into a building for business premises, the Commissioners may sanction the erection of saloons upon such open space, of such height and construction as to them shall seem proper, such saloons to continue so long only as such building is so used for business purposes only.

See sub-head (3), sec. 4, for definition of "building," (31) "street." As to width of new streets and courts, see sec. 152. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

In Blakeney *v.* Rattray's Trustees, 10th July 1886 (13 R., 1151), sec. 130 of the Dundee Police Act, 1882, enacts that new buildings within the burgh designed as dwelling-houses shall have a vacant space behind of certain dimensions, but "if in any new building the ground floor is designed for, and to be occupied as shops or business offices, the Commissioners shall, notwithstanding that the building otherwise is intended to be used as a dwelling-house or for dwelling-houses, permit the erection of saloons or warerooms in connection with such shops or offices, and immediately behind the same, . . . but the level of the ceiling shall in no case exceed in height the level of the ceiling of such shops and offices." *Held*, in a question with a conterminous proprietor, that where a shop is designed to include more than the ground floor, the saloon behind may be of the height of the ceiling of the highest shop floor.

In Pitman *v.* Burnett's Trustees, 26th Jan. 1882 (9 R., 444; 19 S. L. R., 411), it was held that sec. 127 of the Edinburgh Municipal and Police Act, 1879, applies only to new streets. Sec. 129 of the Edinburgh Police Act provides that houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one-half times the width of the street or court in which such houses or buildings are situated, without the sanction of the Magistrates and Council. A house in an existing street was to be rebuilt so as to extend back to a narrow mews lane. *Held*, that with reference to this provision the house was to be considered as entirely within the street which it faced on the other side from the mews lane, and its height both to the back and to the front regulated accordingly. *Question*, Whether a house might be situated in two streets within the meaning of the above provision? *Held*, that regulations provided by sec. 163 of the Edinburgh Police Act, with reference to ventilation, are matters committed to the sole discretion of the Dean of Guild, with the exercise of which the Court will not interfere unless an error of a flagrant kind has been committed. *Question*, Whether sec. 163 applies to houses in existing streets? *Opinion* (*per* Lord Shand), That a neighbour is not *in titulo* to object to a

building upon the ground of non-compliance with the provisions of this section. In this case the Lord President (Inglis) said: "There remains only the objection on sec. 163, which provides, 'Every new house shall have, in the rear thereof, an open space adjacent thereto at least equal to one-half of the area to be occupied by the intended house, and such space shall be free from any erections thereon, other than w.-c.'s., privies, ash-pits, coal-houses, or other conveniences for the use of such house; all which conveniences shall, as to height, position, and dimensions, be erected subject to the consent and approval of the Dean of Guild Court: Provided always, that in cases where the thorough ventilation of such house is otherwise secured, or under other special circumstances, the said Court may allow the open space to be reduced in limits; provided also, that in cases of conversion of a house into a building for business premises, the Court may sanction the erection of saloons upon such open space, of such height and construction as to the Court shall seem proper, such saloons to continue so long only as such building is so used for business purposes.' Now, I am inclined to hold that this section applies only to houses built upon ground which has not hitherto been built on,—I mean houses built on a part of the territory of the burgh, which has not hitherto been laid out in streets. But it is not necessary to decide that question. It is quite plain that when the Dean of Guild is called on to act under this section, he is to consider the interest and benefit of the house that is being built, so as to secure its proper ventilation, because, if he is satisfied that the ventilation of the house is fairly provided for, he may dispense in a great measure with the rule laid down in this section. It would be extremely difficult to hold that any one else has a right to interfere in the matter. It is not necessary to get the consent of the Magistrates and Council. The determination of the question is left entirely in the hands of the Dean of Guild, who is to exercise his discretion in the matter. Now, in the present case, the Dean of Guild has applied his mind to the question, and has found that the open spaces left in the area of this building are sufficient for ventilation purposes. They are not very large, certainly, but the Dean of Guild has expressed the opinion that they are sufficient, and when he has decided such a matter of practical skill, the Court would be very slow to alter what he has done. It would only be an error of a very flagrant kind which would induce the Court to reverse the determination of the Dean of Guild, provided he has acted within the jurisdiction conferred on him by the Statute. And he having decided that the ventilation in the present case is sufficiently well provided for, I take leave to doubt the right of the appellants to interfere in the matter. That being so, I think that the judgment of the Dean of Guild on this point also should be affirmed."

See Scott's Trustees *v.* Shaw, 17th June 1892 (29 S. L. R., 767). The Edinburgh Municipal and Police Amendment Act, 1891, by sec. 50, provides that "every new house, and any building altered for the purpose of being used as a house, shall have in the rear thereof a certain open space: . . . Provided always, that in any

case where the thorough ventilation of any house or building is, in the opinion of the Dean of Guild Court, otherwise secured, . . . the said Court may in their discretion allow the open space to be reduced; provided also, that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild may sanction the erection of saloons upon such open space." . . .

The proprietors of a house presented a petition to the Dean of Guild Court, for warrant to convert the ground and basement storeys into business premises, and to erect a workshop on the open ground behind the house. The Dean of Guild granted the prayer of the petition. He also expressed himself satisfied with the ventilation of the house.

Held—aff. the interlocutor of the Dean of Guild—that the building in question rather fell under the second proviso of sec. 50 of the Statute, in which case the Dean of Guild could grant warrant to erect buildings such as were contemplated here, being of the nature of a saloon, but that even if the building was to be regarded as "a house," the Dean of Guild, being satisfied as to the ventilation, could allow the open space behind to be occupied.

Observed, that the ventilation to be attended to was that of the building which it was proposed to erect, and not that of neighbouring houses.

In Glass *v.* Glasgow Master of Works, 5th March 1887 (14 R., 567), plans of buildings proposed to be erected in Glasgow, which were held not to comply with the provisions of sec. 370 of the Glasgow Police Act, 1866, requiring a certain amount of free space in front of the windows of sleeping apartments, the Dean of Guild "finds that the petitioner's plans do not show, in front of the windows of the sleeping apartments on the ground flat to the back of the proposed tenement, the amount of free space required by sec. 370 of the Glasgow Police Act, 1866, and therefore refuses to grant the lining craved, until said objection has been removed, either by an amended plan giving the said required free space in front of said apartments, or by the petitioner undertaking that the same shall not be used as sleeping apartments, and decerns."

"*Note.*—The angling or placing of the windows in the corner of the two kitchens (to be occupied as sleeping apartments) on the plan of the ground floor, instead of normally in the line of the back wall, is clearly an attempt to evade the provision of sec. 370 of the Police Act, and as the free space in front of one of said kitchens is about a fifth less than that which the Act provides for, while in front of the other of said kitchens the free space is much less, the Court cannot consent to pass the plans in their present state." Smellie *v.* Struthers, 12th May 1803 (M., 7588).

No appearance was made for the respondents, and the Court, without delivering opinions, dismissed the appeal. See also Boswell *v.* Magistrates of Edinburgh, 19th July 1881 (8 R., 986), referred to under Dean of Guild procedure, sec. 201,

In England, "a person was convicted of infringing a bye-law,

which required that every house should have 500 square feet in front or rear, free from any erection, by erecting three houses with fences. On the question whether the bye-law was valid, or was *ultra vires*, the Court were clear that the Board had power to make such a bye-law to carry out the object of the enactment, and affirmed the conviction. Adams *v.* Bromley Local Board (37 J. P., 662).

"In another case, where a Local Board of Health made a bye-law, that wherever any open space had been left adjoining to any building, such space should never afterwards be built upon without the consent of the Local Board, and without leaving an open space belonging to such building of a specified size and dimensions. It was held that if the bye-law applied to open spaces belonging to old buildings, it was bad, as exceeding the powers conferred by the Act. Tucker *v.* Rees (7 Jur., N. S., 629; 25 J. P., 789).

"A bye-law provided that 'every building to be erected and used as a dwelling-house shall, during such use, have in the rear, or at the side thereof, an open space exclusively belonging thereto, to the extent of at least 150 square feet, free from any erection thereon above the level of the ground, other than a privy; but where there is a W.-C., and no other privy, an open space of not less than 100 feet may be allowed; and the distance across such open space between every such building and the opposite property at the rear or side, exclusive of any common passage, shall be 10 feet at least; if such building be two storeys in height above the level of such open space, the distance across shall be 15 feet; if such building be three storeys, it shall be 20 feet; if more than three storeys, 25 feet.' With reference to this bye-law, it was held that the space required to be left between the building to be erected, and the opposite property, must be co-extensive with the line of demarcation between such building and such opposite property, and that at no point should a less distance than that prescribed by the bye-law intervene between them, exclusive of any common passage. Anderton *v.* Rigby (13 C. B., N. S., 603; S. C. Nom.). Anderton *v.* Birkenhead Improvement Commissioners (9 Jur., N. S., 1058; 32 L. J., M. C., 37). With reference to a similar bye-law, a public street was held to come within the expression 'opposite property.' Jones *v.* Parry, Law Times newspaper, 28th May 1887, p. 64; 51 J. P., 356, N.).

"A bye-law that no dwelling-house shall be erected without having at the rear or side a sufficient roadway for the purpose of affording efficient means of access to the privy or ash-pit belonging to the same, would be beyond the jurisdiction conferred upon the Local Board by the Act to make bye-laws. But, *per* Cockburn, C.-J., the bye-law might have been valid, if it had been that there should be no privy or ash-pit belonging to the house without adequate means of access. Waite *v.* Garston Local Board (L. R., 3 Q. B., 5; 17 L. T., N. S., 201; 37 L. J., M. C., 19; 16 W. R., 78; 32 J. P., 228; this *obiter dictum* is attributed to Lush, J., in 37 L. J., M. C., 21).

"The following words in a Local Improvement Act, 'Every house to be constructed shall have a *back yard or other vacant ground or area* from the ground upwards, of not less than 8 feet, extending

from the main building for the whole length of such building,' the Court, though no judgment was pronounced on the point, were inclined to think point to a yard at the *back*, and not to an open space *at the side* of the house, and therefore that the leaving an open space of the requisite width at the side of the building was not a compliance with the terms of the enactment. Pearson *v.* Kingston-upon-Hull Local Board (13 L. T., N. S., 180; 3 H. and C., 921; 35 L. J., M. C., 36; 29 J. P., 711).

"A bye-law prohibited persons from building on open spaces belonging to buildings without the approval of the Urban Sanitary Authority. It was held that, inasmuch as there were other bye-laws requiring plans to be deposited, and sec. 158 requires approval or disapproval of such plans to be given within one month, the Urban Sanitary Authority could not make a bye-law inconsistent with this enactment, and therefore proceedings could not be taken for building without approval after the expiration of the month, the disapproval of the Authority not having been signified within the month. Clark *v.* Bloomfield, *Times* newspaper, 5th March 1885." —Glen, p. 292.

A bye-law requiring the extent of yard space belonging to new buildings, and the situation of the w.-c., ash-pit, etc., to be shown on the plans, was held to be valid, but one which imposed a continuing penalty for neglect to send in plans of a new building was held *ultra vires*. Reay *v.* Mayor, etc., of Gateshead (55 L. T., N. S., 92; 34 W. R., 682; 50 J. P., 276, N.).

In another English case, the respondent was convicted of unlawfully permitting to be used as a dwelling-house a certain building, contrary to the West Hartlepool Improvement Act, 33 & 34 Vict., c. 113. In 1867, an owner, wishing to convert his dwelling-house into a shop and warehouse, applied to the Commissioners for permission, which was given, on condition that if again used as a dwelling-house it would be altered so as to leave an open space at the back. The premises were bought by the respondent in 1878, and he knew nothing of the condition. In 1883 it was let for five years, and was latterly used as a restaurant. It was held that the Justices were right, as the Local Act applied to then existing buildings retrospectively. West Hartlepool Commissioners *v.* Levy (50 J., 196). See Lumley's Public Health, p. 207.

171. Limit to Number of Houses in Common Stairs.—No new tenement of houses, except with the authority of the Commissioners, which in special circumstances the Commissioners may grant, shall have more than twelve dwelling-houses entering from one common stair or passage, where the common stair or passage is within the tenement, but where there is an outside stair with balconies, twenty-four houses may be permitted to enter from said common stair or passage, and the width of such stairs, passages,

balconies, and stair landings shall in no case be less than 4 feet, finished size.

See sub-head (13), sec. 4, for definition of "house." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

In Scott *v.* Commissioners of Police of Dundee, 18th Dec. 1841 (4 D., 292; 14 Jur., 121), it was held, on construction of a clause in a Statute relating to the police of a burgh, that the term "tenement of land" was properly applicable to a single or individual building, although containing several dwelling-houses, with separate means of access, but under the same roof and enclosed by the same gables.

172. Height of Rooms.—In every new building to be used as a dwelling-house, and in every building not previously used as a dwelling-house, when altered to be used as a dwelling-house, every habitable room in the ground floor shall be in every part thereof 9 feet 6 inches in height at least from the floor to the ceiling; and every other habitable room, except attic rooms, shall be in every part thereof 9 feet in height at least from the floor to the ceiling, and every habitable attic room shall be at least 8 feet in height from the floor to the ceiling, through not less than one-third of the area of the room, and it shall at no part thereof be less than three feet.

See sub-head (3), sec. 4, for definition of "building."

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

173. Windows in Rooms.—In every new or altered building to be used as a dwelling-house, every habitable room shall have at least one window, and the total area of glass in the windows, clear of the frame and sash, shall be (unless in any case the Commissioners otherwise determine) at least one-tenth of the area of the room, and the top of at least one of the windows shall not be less than 7 feet 6 inches above the floor, and in case of a sash window the upper half at least shall be made to open the full width, and in case of a casement window one-half at least shall be made to open.

See sub-head (3), sec. 4, for definition of "building."

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See Glass *v.* Glasgow Master of Works, referred to under sec. 170.

174. Common Stairs to be kept in Repair.—The owners of premises in or entering from common stairs and common passages shall keep the steps, landing-places, and passages in a proper state of repair, and provide and keep in proper repair rails at the side of such stairs, landing-places, and passages, to the satisfaction of the Surveyor, and when required by him shall fence, in such manner as he shall direct, all windows in such common stairs and passages; and any owner who fails so to do, after notice served on him by the Surveyor, shall be liable in a penalty not exceeding £5.

See sub-head (22), sec. 4, for definition of "owner," (16) "premises." See sec. 487 for imprisonment failing payment of penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors.

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

As to serving of notices, see sec. 336. The notice in this case will bear the name of the Surveyor, not of the Clerk.

See also sec. 316*b* (9), which authorises bye-laws "for regulating the sweeping and cleansing of common stairs, in accordance with the sections of this Act relating to cleansing and fencing and keeping the same clear of obstruction."

See Schedule IV., sub-head (17), as to paving of common passages in new buildings.

In M'Martin *v.* Hannay, 24th Jan. 1872 (10 M., 411), a child was killed by falling through the railing of a common stair where one of the banisters was wanting. *Held*, that the proprietor of the property was liable in damages to the father of the child, in respect that warning of the state of the stair had been given to the factor appointed to look after the property.

See observation by Lord Neaves on contributory negligence in this case.

In Griffin *v.* Tosh, 29th June 1885 (1 Scot. Law Rev., 332), circumstances in which held that a house proprietor is liable for an accident sustained in consequence of the defective state of a railing on a common stair.

This was an action at the instance of Thomas Griffin, stone-breaker, John Street, Dundee, as administrator-in-law of James Griffin, his son, a pupil, residing with him, against William H. Tosh, house proprietor, Craigie Terrace, concluding for £100 as damages, in consequence of injuries sustained by the pursuer's son, caused by his falling through a gap in the railing of the stair leading to the flat of

a tenement in which his father's house was situated. After proof, the Sheriff-Substitute, Campbell-Smith, issued the following interlocutor:—

"*Dundee, 29th June* 1885.—The Sheriff-Substitute, having considered the proof and whole process, finds that, on or about the 16th February 1885, the pursuer's pupil son, James Griffin, fell through a gap in the railing of a tenement belonging to the defender, and sustained bodily injury through the fault of the defender: Finds him entitled to damages from the defender, assesses the sum due in name of damages by the defender at the sum of £30, for which decerns; and, in respect that it is expedient that the said sum of £30 should be applied for the benefit of the pupil James Griffin, ordains the defender to pay to the pursuer, the said Thomas Griffin, the sum of £10 for the immediate use of said pupil, and to deposit the balance, £20, in the Union Bank of Scotland (Limited), Dundee, in the joint names of the pursuer, the said Thomas Griffin, and of the Rev. Robert Clapperton, minister, Dundee, to be held in trust by them, and to be applied by them, in their discretion, for supplying the said pupil with education and other necessaries: Finds the pursuer entitled to expenses, etc. J. C. SMITH.

"*Note.*—The only question in the case of the least difficulty is, whether the gap in the railing through which the boy fell was there through the neglect of the defender. When it got there is far from clear, and how it got there is left entirely in the dark. But I am satisfied it could not have existed at all without the fault of some one, or existed so long as it did without carelessness on the part of the defender's factor."

175. Lighting, etc., of Public Buildings.—Every public building, theatre, or place of public entertainment shall be supplied with means of lighting, and of sufficient ingress and egress for the protection of the public in cases of emergency, to be approved of by the Commissioners from time to time as they shall deem necessary.

See sub-head (3), sec. 4, for definition of "building," (9) "the Commissioners."

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

For the provisions as to licensing, etc., of "theatres and places of public resort," see secs. 395–402. See sec. 168, and note thereto.

176. Pipes to be approved by Commissioners.—No pipe for conveying smoke or heated air shall be fixed in any new building otherwise than in the wall thereof, except in a manner to be approved by the Commissioners.

See sub-head (3), sec. 4, for definition of "building."

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See Schedule IV., sub-head (12), as to thickness of walls of new buildings in which chimneys are placed.

177. Provisions regarding New Buildings.—With regard to new buildings, the rules contained in Schedule IV. of this Act shall be observed, but such rules may be altered by the Commissioners with the approval of the Sheriff.

See sub-head (3), sec. 4, for definition of "building," (30) "Sheriff."

This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

As the Rules in Schedule IV. are not bye-laws in the sense of the Act, the provisions of secs. 316–324, as to the alteration of bye-laws, will not apply to the alteration of these rules. There is no provision requiring the alterations to be published; but it is probable that the Sheriff, following the ordinary practice, will, before approving, order the rules as altered to be kept open to public inspection for a certain period, and that he will afford an opportunity to persons interested to state objections.

It has been held in England that "an Urban Sanitary Authority cannot dispense with the law as laid down in their bye-laws, for it is not for their benefit but for the benefit of the public." Baxter *v.* Mayor, etc., of Bedford—*Times* newspaper, 23rd July 1885.—See Glen, p. 285. But it would appear that the Commissioners are empowered in special circumstances to relax the requirements of this Act as to buildings. See sec. 153.

178. Restriction as to Steam Pipes and Funnels for conveying Smoke.—From and after the commencement of this Act, all steam from high-pressure engines, in or connected with any building, shall be conveyed to and carried away by a high chimney, to the satisfaction of the Commissioners, or otherwise disposed of to their satisfaction, and no pipe or funnel for conveying smoke shall at any time be newly fixed against any building next to any street, public or private, or on the inside of any building, nearer than 9 inches to any timber or other combustible material, nor shall any funnel built or made of brick or stone, or both, be newly placed on the outside of any building next to any such street, so as to extend beyond the general line of the buildings in the street; and if any high-pressure engine shall be used and steam discharged therefrom, except as aforesaid, or if any

pipe or funnel is fixed or placed contrary to this Act, the occupier, or in case of there being no occupier, then the owner of the engine or building, as the case may be, shall, within fourteen days after receiving notice from the Commissioners, cause such engine or pipe or funnel, as the case may be, to be removed, and on default shall be liable to a penalty of 10s. a day for every day during which such default continues after the expiration of the time specified in such notice.

See sub-head (3), sec. 4, for definition of "building," (28) "private street," (31) "street," (22) "owner," (21) "occupier." See secs. 336 to 338 inclusive as to "notice," and 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See sec. 381, sub-head (34), which subjects to a penalty any person who "discharges any smoke or steam from any premises (otherwise than from the top thereof) into any such street, or suffers or permits the condensed water or moisture from any steam-pipe, flue, or funnel to fall into or upon the street."

In Small & Co. *v.* Dundee Police Commissioners, 14th Nov. 1884 (12 R., 123), the Dundee Police and Improvement Act, 1882, sec. 329, provides an appeal by any person "aggrieved by any order or resolution" of the Commissioners, to the Sheriff, or to either Division of the Court of Session, and directs the Court to hear parties and determine the matter of the appeal, and to make such order thereon, "confirming, quashing, or varying" the order or resolution of the Commissioners as they shall think fit.

A person proposing to build brick-kilns, etc., within the burgh, being dissatisfied with the deliverance of the Commissioners, under secs. 121 to 124, upon the plans of his proposed erections, in respect that they required the chimney to be built 150 feet high instead of 80 feet as proposed by him, appealed to the Court of Session.

Held, on a consideration of the reasons of appeal, that there was no sufficient statement to warrant the Court interfering with the judgment of the Commissioners.

In this case the Lord Justice-Clerk said: "This petition is presented under a special clause of the Dundee Police and Improvement Consolidation Act, 1882. The question here relates to a chimney which the complainers wish to erect in certain works belonging to them. In their plans they delineated this chimney as being of a certain height. The Commissioners declined to approve of the plans, in respect of the height of the chimney, which they say is a great deal too low, and ought to be at least 150 feet high. The appeal is

against this non-approval by the Commissioners of the plans as they stand, and the question is, whether we can interpose our authority and approval in place of that of the Commissioners. Now, if a case had been made of the Commissioners having gone materially wrong as to the mode which they took of reaching the determination they came to, or if they had done any other injustice, by not hearing the parties, for instance, I do not say, if specific averments to that effect had been made, that we might not have interfered; but I need hardly say that without a very strong case we cannot interfere and substitute our judgment and approval for the judgment and approval of the Commissioners. The Legislature, I think, presumed special information and capacity on the part of the Commissioners. But there is nothing here stated except that the complainers and the Commissioners have differed as to the height of this chimney, and as to the effect of its height on the surrounding neighbourhood; and that is a matter on which I should trust the judgment of the Commissioners. On the whole matter, I think we should refuse the appeal."

In Lamont *v.* Cumming, 11th June 1875 (2 R., 784), A. erected a mutual gable in a burgh, partly on his own ground and partly on that of B., without leaving fire-places and vents on the side of B.'s property. Afterwards, when B. came to build a house on his ground, he made fireplaces and vents in the gable, and also heightened it. *Held*, that B.'s operations were not in excess of his rights as joint owner of the gable, no injury to A. being alleged. In this case the Lord President said: "We must, therefore, take it that the gable is a mutual gable in the ordinary sense—that is, that it was originally built according to the time-honoured custom of burghs in Scotland, the resulting rights of the conterminous proprietors being very well established in law. The only question then is, whether the defender's operations were illegal and unwarrantable, or, in terms of the pursuer's plea, in excess of the rights of a mutual owner.

"What is alleged against the defender is this, that he has begun to build to the west on his own ground, and has availed himself of the mutual gable; that, in doing so, he has had to raise the gable, as his own house has been built higher than that of the pursuer's; that he has inserted joists in the mutual gable, and has turned a certain recess which was left in it into a fireplace, and has carried up a flue from it through the wall. . . . Therefore I think the defender's right to insert joists, slap out a vent, and make a fireplace, provided no injury is done thereby to the pursuer, is beyond challenge. At the same time, I have thought it right to explain the principles on which I have arrived at that result, because, so far as I am aware, there is no express authority on the point."

"Where the rebuilding of a house to a height greater than its previous height caused the chimneys of the adjoining house to smoke, it was held that no action was maintainable against the person who rebuilt the house, either on the ground that the nuisance complained of had been created by him, or that the owner of the adjoining house had acquired an easement (viz. the right to access of air to his chimney), with which he had interfered. Bryant *v.* Lefevre (L. R.,

4 C. P. D., 172; 48 L. J., C. P., 380; 40 L. T., N. S., 579; 27 W. R., 592)"—Glen, p. 152.

In this case the plaintiff and the defendants were occupiers of adjoining houses. For more than twenty years the occupiers of the plaintiff's house had enjoyed the access of air to the chimneys of it. The defendants took down their house and rebuilt a wall to a greater height, thereby causing the plaintiff's chimneys to smoke. *Held*, following the judgment in Webb *v.* Bird (13 C. P., N. S., 841; 31 L. J., C. P., 335), that no action was maintainable by the plaintiff against the defendants, either on the ground that the plaintiff had acquired an easement, which the defendants had interfered with, or on the ground that the nuisance complained of had been created by the defendants.

In Hill *v.* Hall (L. R., 1 Ex. D., 411), by 3 & 4 Vict. c. 85, sec. 6, "all withes and partitions between any chimney or flue . . . shall be of brick or stone, and at least equal to half a brick in thickness," upon pain of forfeiting a sum of money. A subsequent Local Statute enacted that in the Burgh of H. "the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall from time to time be determined or approved by the corporation," and then, if no direction should be given by the corporation as to constructing chimneys, prescribed certain directions different from those contained in 3 & 4 Vict. c. 85, sec. 6. The appellant within the Burgh of H. built a chimney, which was not in accordance with the provisions of 3 & 4 Vict. c. 85, sec. 6, and he was convicted before Justices of an offence against that Act. *Held*, that the subsequent Local Statute had not repealed 3 & 4 Vict. c. 85, sec. 6, within the Burgh of H., and that the conviction was right.

179. Preventing Building on Ground filled up with Offensive Matter.—It shall not be lawful for any person to erect any building upon any ground which shall have been filled up with any material impregnated with fæcal matter, or with any animal or vegetable or other offensive matter, which, in the opinion of the Medical Officer or Sanitary Inspector, may tend by decomposition or otherwise to the prejudice of the health of any future resident or occupier of such building, or of any resident in the neighbourhood, except upon a certificate of such Medical Officer or Sanitary Inspector that proper precautions, in his opinion, have been taken to obviate any such result; and every person who erects or causes to be erected, either wholly or partially, any building on any such ground, shall for every such offence be liable to a penalty not exceeding £5, and a further penalty not exceeding 40s. for every day during which such build-

ing, or part of a building, shall continue upon any such ground.

See sub-head (3), sec. 4, for definition of "building," (21) "occupier." See sec. 487 for imprisonment failing payment of penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See No. 1 of the rules for new buildings in Schedule IV.

By the Metropolis Management and Building Acts Amendment Act, 1878, sec. 16, the Metropolitan Board of Works were empowered to make bye-laws with respect to "foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections, to be constructed after the passing of this Act, and the mode in which, and the materials with which, such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed, for securing stability, the prevention of fires, and for purposes of health." By sec. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." The Metropolitan Board of Works made the following bye-law: "No house, building, or other erection shall be erected upon any site, or portion of any site, which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site." *Held*, that the meaning of the word "site" in the bye-law was governed by the interpretation of that word in the Act, so that the bye-law did not authorise the Metropolitan Board of Works to direct the removal of fæcal, animal, or vegetable matter in the soil below the level of the bottom of the foundations. Blashill *v.* Chambers (14 L. R., Q. B. D., 479).

But, as the word "site" is not defined in this Act, its use in bye-laws under this Act would not be limited in signification in the manner referred to in the above case.

180. New Houses, etc., to be Surveyed before Occupation.—The Commissioners or their Surveyor may, at any reasonable time, inspect any buildings in progress of construction or alteration, or any work connected therewith, and within one month after any new house or building, or any alteration on the structure of any existing house or building, has been completed, or, before such house or building or any

portion thereof has been occupied, the owner or the builder shall give notice to the Clerk of the Commissioners that the house or building, or any part thereof, is ready for inspection before being occupied, and the said Clerk shall thereupon transmit such notice to the Surveyor of the Burgh, who shall forthwith proceed to survey such house or building or alteration; and if he is satisfied that such house or building is fit for occupation, and is in accordance with the provisions of this Act, he shall grant a certificate under his hand to that effect, and all such certificates shall be entered in the register of plans and sections; and every owner or builder who shall fail to give such notice aforesaid, or shall permit such house or building or altered building to be occupied before a certificate applicable thereto has been obtained, shall be liable to a penalty not exceeding £5, with an additional penalty of 40s. for every day during which such occupation shall continue.

See sub-head (3), sec. 4, for definition of "building," (13) "house," (22) "owner." See secs. 336 to 338 inclusive as to "notice." See sec. 487 as to imprisonment failing payment of penalty, 500 and 501 for penalty of repetition of offences and power to mitigate, and 458 as to punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

For the "register of plans and sections," see sec. 166.

VENTILATION.

181. Regulating Construction of Buildings intended as Places for Public Meetings.—Any person, before beginning to alter or erect any building intended to be used as a church, chapel, or school, or a place of public entertainment, or for holding large numbers of people for any purpose whatsoever, shall give thirty days' notice in writing to the Commissioners, and shall accompany such notice with a plan and description of its proposed construction, with respect to the supplying of fresh air and removing vitiated air; and unless the Commissioners approve thereof, they may cause such building, or such part of it as they consider necessary, to be altered at the expense of the owner, which expense may be recovered as a private improvement expense; but if the Commissioners fail to signify in writing their approval or dis-

approval of such proposal, within seven days after their first meeting occurring after receipt of the notice, the person giving such notice may proceed to erect the building therein referred to in the manner proposed, provided that such building be otherwise in accordance with the provisions of this Act; and with regard to such existing buildings as are, at the application of this Act, or may thereafter be, used for any of the said purposes, the Commissioners may cause the same to be inspected, and may direct such means to be taken for their proper ventilation as to them shall seem fit.

See sub-head (3), sec. 4, for definition of "building," (22) "owner." See sec. 365 as to private improvement assessment, and 336 to 338 inclusive as to "notice." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. The provisions of this section are in addition to those contained in secs. 166 to 169, and 175. See also sec. 201.

See Scott's Trustees *v.* Shaw (19 R., 895), referred to under sec. 170, and Mitchell *v.* Gormans (12 R., 844), referred to under "Dean of Guild," sec. 201; Pitman, etc. *v.* Sandford (9 R., 444), referred to under 170.

182. Persons may Appeal against Determination of Commissioners.—Provided also, if the owner or other person so intending to build, or the owner of any existing building, be dissatisfied with the determination of the Commissioners as to the said proposed manner of construction, he shall have the same right of appeal against the determination of the Commissioners, and such appeal shall be conducted in the same manner, as is herein provided in the case of appeals against any order of the Commissioners with respect to works to be constructed by or subject to the approval of the Commissioners.

See sub-head (22), sec. 4, as to "owner," (3) "building." See sec. 339 as to "appeal." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

This section affords another example of loose expression. Presumably the object is to give a right of appeal to the persons affected by any determination of the Commissioners under the preceding section. But the words "owner of any existing building" are quite general, and, if construed literally, the result will be that any owner of a building in the burgh will have a right of appeal against the determination of the Commissioners in regard to the ventilation

of proposed public buildings. Again, the right of appeal is given to the owner or other person, if dissatisfied with the determination of the Commissioners "as to the said *proposed* manner of construction." Nothing is said as to a right of appeal in a case where the Commissioners direct an alteration in the ventilation of an *existing* building.

183. Ventilation of Habitable Rooms. — Every habitable room built after the commencement of this Act of less area than 100 superficial feet, and without a fire-place, shall be provided with special means of ventilation, to be determined by the Commissioners.

See sub-head (9), sec. 4, for definition of the "Commissioners." The commencement of the Act is 15th May 1893. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See also sec. 16, sub-head (*a*), of the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101), which provides that any "defect of ventilation" rendering any inhabited house, building, premises, or part thereof, injurious to the health of the inmates or unfit for human habitation or use, is a nuisance in the sense of the Act; and any such house which is unfit for habitation may (sec. 19) be closed until it is rendered fit for that purpose.

184. Ventilation of Buildings.—Means of ventilation to be approved of by the Commissioners shall, on their order, after cause shown, be provided in or for every building, whether erected before or after the application of this Act, and in every case by the owner of such building; and any owner who fails to carry into effect the order of the Commissioners in respect to such means of ventilation, shall be liable to a penalty not exceeding 40s. for every day or part of a day during which such failure continues.

See sub-head (3), sec. 4, for definition of "building," (9) "the Commissioners," (22) "owners." See secs. 336 to 338 inclusive as to service of notice, 487 as to imprisonment failing payment of penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

It will be observed that, while sec. 183 applies only to special cases coming within the description given in that section, sec. 184 applies to every building. Under sec. 183 it is unnecessary to aver

the want of ventilation; under sec. 184 the order of the Commissioners is to be given "after cause shown."

In addition to the provisions in this Act, there are special statutory provisions for the ventilation of certain classes of buildings. For the enactments as to the ventilation of factories and workshops, see the Factory and Workshop Act, 1878, 41 Vict. c. 16, sec. 3, and the Factory and Workshop Act, 1891, 54 & 55 Vict. c. 75, sec. 4, also the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, sec. 16 (*g*); as to the ventilation of bakehouses, see the Factory and Workshop Act, 1878, sec. 35, and the Factory and Workshop Act, 1883, 46 & 47 Vict. c. 53, sec. 17; as to the ventilation of dairy premises, see Arts. 7 and 8 of the Dairies, Cowsheds, and Milkshops Order of 1885, issued under the authority of sec. 34 of the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74.

185. Common Stairs, etc., to be properly Lighted and Ventilated.—The owners of all common stairs and common passages constructed or which may be constructed, shall provide proper means of ventilating the same, where practicable, by means of windows or skylights, or otherwise ventilating the same to the satisfaction of the Commissioners or their Surveyor or Sanitary Inspector; and any owner failing so to do, when required by the Commissioners, shall be liable to a penalty not exceeding 40s.

See sub-head (22), sec. 4, for definition of "owner." Sec. 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

The margin says "common stairs, etc., to be properly lighted and ventilated," but the body of the clause refers to ventilation only.

PRECAUTIONS DURING THE CONSTRUCTION OR REPAIR OF BUILDINGS AND STREETS, AND IN REGARD TO OLD AND RUINOUS TENEMENTS.

186. Bars to be erected across Streets during Repairs or Alterations, and Lights placed at Night.—The Commissioners shall, during the construction or repair of any street, and during the construction or repair of any sewers, drains, or other public works, take proper precaution against accident, by shoring up and protecting the adjoining

houses, and may prevent any such street from being used as a common passage or thoroughfare while such works are carried on; and the Commissioners shall cause any sewer or drain or other works, during the construction or repair thereof, to be lighted, fenced, and guarded during the night, so as to prevent accidents; and every person who uses such street while so stopped as a common passage or thoroughfare, or extinguishes any light, without the authority or consent of the Commissioners, shall for every such offence be liable to any penalty not exceeding £5.

See sub-head (31), sec. 4, for definition of "street," (9) "the Commissioners," (13) "house." See sec. 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

It will be observed that under this section the Commissioners are only required to cause any sewer or drain, or other works during the construction thereof, to be lighted, fenced, and guarded during the night so as to prevent accidents. The Commissioners, as already pointed out in the observations under sec. 130, are bound to see that the roads and streets are kept generally in such a state as to prevent accidents. See as to lighting, secs. 99 to 106, and observations thereunder, and sec. 188, and cases and observations thereunder. But they are not liable where they take proper precautions. It is only when they, or those for whom they are responsible, are guilty of negligence. When the accident arises through the fault or negligence of the person, he cannot recover from the Commissioners. See sec. 130.

In Adams *v.* Magistrates of Aberdeen, 28th May 1884 (11 R., 852), the police authorities of a large town had opened the manhole of a sewer in the middle of a thoroughfare in order to clean the sewer. They had set up a winch over the hole, and had protected three sides of it. Two men were at work. A boy of nine years, running along the street and looking over his shoulder, fell into the hole. *Held*, that the police authorities were not responsible for the accident, as they were doing an ordinary act in a proper way with sufficient precautions, and the accident was due entirely to the boy's own carelessness.

In England, "a Local Board, being Surveyors of Highways, were held liable to an action at the suit of a person who, when passing along the highway, was injured by reason of the servants of the Board negligently leaving a heap of stones upon the highway. Foreman *v.* Mayor, etc., of Canterbury (L. R., 6 Q. B., 214; 40 L. J., Q. B., 138; 24 L. T., N. S., 385; 19 W. R., 719). Holliday *v.* St. Leonard, Shoreditch (11 C. B., N. S., 192; 8 Jur., N. S.,

79; 30 L. J., C. P., 361; 9 W. R., 694).—Considered to be overruled.

"An Urban Sanitary Authority, however, are in the same position with respect to actions for non-repair of a highway as the inhabitants of the parish or Surveyor of Highways, and therefore an action against them will not lie for damage occasioned by the mere non-repair of a highway. Gibson *v.* Mayor, etc., of Preston (L. R., 5 Q. B., 218; 22 L. T., N. S., 293; 39 L. J., Q. B., 132; 18 W. R., 689; 34 J. P., 342). So also it was held that the common-law liability of a parish to repair its highway was not transferred to the vestries constituted under the Metropolis Management Acts, and that, therefore, no action lay against a vestry at the suit of an individual who had sustained damage in consequence of a neglect to repair the common highway within the parish. Parsons *v.* St. Matthew, Bethnal Green (L. R., 3 C. P., 56; 37 L. J., C. P., 62; 17 L. T., N. S., 211; 16 W. R., 81).

"On the other hand, Commissioners acting under the Towns Improvement Clauses Acts, 1847 (10 & 11 Vict. c. 34, sec. 49), were held liable to an action in their corporate capacity, at the suit of a person who had suffered damage from a highway being allowed by them to remain in a dangerous condition, because that Act cast on the Commissioners the duty of repairing the highway, and rendered them indictable if they did not repair it. In this action it was held not necessary to aver that the Commissioners had funds. Hartnall *v.* Ryde Commissioners (33 L. J., Q. B., 39; 8 L. T., N. S., 574; 4 B. and S., 361; 11 W. R., 763).

"Where an iron grid, through which water ran from the road into a sewer of the Local Board, was left broken for six months, whereby the plaintiff's horse was injured, the Local Board were held liable as the Sewer Authority. White *v.* Hindley Local Board (L. R., 10 Q. B., 219; 44 L. J., Q. B., 114; 23 W. R., 651; 32 L. T., N. S., 460). Followed and confirmed in Blackmore *v.* Vestry of Mile End Old Town (51 L. J., Q. B., 496; L. R., 9 Q. B., 451; 46 L. T., N. S., 869; 30 W. R., 740). And, in another case, an accident having occurred by reason of the faulty filling up of a trench for a sewer by the Local Board's contractor, the Board were held liable in their joint capacity of Highway and Sewer Authority. Smith *v.* West Derby Local Board (38 L. T., N. S., 716; L. R., 3 C. P. D., 423; 47 L. J., C. P., 607; 27 W. R., 137). See also the case of the Borough of Bathurst *v.* Macpherson, before the Privy Council (L. R., 4 App. Cas., 256; 41 L. T., N. S., 778).

"So, where the grating of a sewer had been left projecting above the surface of a highway, either from its being too high or the roadway being too low, so as to cause a horse to trip up and fall, and thus to be injured, and the owner of the horse had obtained a writ of mandamus to the Board to pay the compensation which had been awarded by an arbitrator, the Rural Sanitary Authority, to whom the sewer belonged, contended, first, that the fault was on the part of the Highway Authority, who had neglected to repair the road up to the level of the grating; and, secondly, there was against them, if

anything, only ground for an action for negligence, the claim being in respect of an actionable nuisance, caused, not by execution of the powers of the Act, but by negligence. The Court said the case was clearly one, not for compensation under the provisions of the Act, but for an action grounded on negligence, as the facts alleged showed that the defect arose, not necessarily from carrying out the powers of the Act, but from negligent and improper execution of them. Reg. *v.* Ware Rural Sanitary Authority (M. S., Q. B. D., 13th Mar. 1880).

"In another case, some horses, whilst going along a highway, stumbled over an iron valve cover connected with the water-works of a Local Board, which projected above the level of the road, and were injured. This projection was due, not to any improper placing or condition of the valve cover, but to the levelling down of the road by ordinary means. The Court held that it was the duty of the Local Board, in their capacity of Water Authority, to prevent the valve which they had constructed from causing danger to passengers on the highway, and that they were liable for negligence in permitting a nuisance, though the projection of the valve was caused by the wear and tear of the highway, and therefore the plaintiff was entitled to recover against the defendants for the injury to his horses. Kent *v.* Worthing Local Board (L. R., 10 Q. B. D., 123; 52 L. J., Q. B. 77; 48 L. T., N. S., 362; 31 W. R., 583; 46 J. P., 788). This decision was, however, questioned by the Court of Appeal in a later case, in which it was held that a water company, authorised or obliged by Act of Parliament to maintain a water-plug in a highway is not liable for damage sustained by a person who falls over the plug by reason of the road having worn away round it, the plug itself being in good order. Moore *v.* Lambeth Water-Works Company (L. R., 17 Q. B. D., 462; 55 L. J., Q. B., 304; 55 L. T. N. S., 309; 34 W. R., 559).

"When damage is caused to land by the removal of minerals and consequent subsidence, the owner has a cause of action whenever and as often as such damage takes place—Darley Main Colliery Company *v.* Mitchell (L. R., 11 App. Cas., 127; 55 L. J., Q. B. 529; 54 L. T., N. S., 882); the original excavation not being the cause of action, but the damage proceeding from it. Bonomi *v.* Backhouse (9 H. L. Cas., 503; 4 L. T., N. S., 754)."—Glen, p. 574.

In Wylie and Lochhead *v.* Police Commissioners of Hillhead, 25th November 1886 (4 Scot. Law Rev., 3), where repairs were being executed on a public street by a body of Statutory Commissioners, it was held that they were liable in damages for an accident that occurred through the want of sufficient danger signals to warn the public that such repairs were going on.

187. Hoarding to be set up during Repairs.—Every person intending to build or take down any building or alter or repair any building, where any street or footway may be obstructed or rendered inconvenient by means of such

work, shall obtain authority from the Commissioners to put up, and, such authority being obtained, shall put up and maintain, to the satisfaction of the Surveyor for such time as he may fix, hoarding or fences, in order to separate the building from such street, with a convenient platform and handrail, if there be room enough, to serve as a footway for passengers outside of such hoarding or fence, and shall in all cases in which it is necessary, in order to prevent accidents, cause the same to be sufficiently lighted from sun-setting to sun-rising; and every such person who puts up such hoardings or fences without previously obtaining the authority of the Commissioners so to do, or who, after such authority, fails to put up and maintain during the time aforesaid and keep lighted during the night such fence or hoarding, or platform with such handrail as aforesaid, or who does not remove the same, when directed by the Commissioners, within a time specified for that purpose, shall for every such offence be liable to a penalty not exceeding £5, and a further penalty not exceeding 40s. for every day while such default is continued; and the Commissioners shall have power to make such charge for the occupation of such ground so enclosed as they shall consider just.

In Gavin *v.* Arrol & Co., 22nd Feb. 1889 (16 R., 509), the contractors for a new line of railway erected a hut for the housing of their workmen in a field which they had purchased. The previously existing direct access to the site of the hut and an adjoining cottage from a neighbouring town, having been permanently interrupted by a new railway cutting made by the contractors, the only remaining access was by a footpath round three sides of the field. In place of this circuitous road, the workmen, message-boys, and others had, within the knowledge of the contractors, formed a beaten track leading off this road by the edge of the cutting direct to the hut. Where the track left the public path, a paling, forming part of a fence erected to guard the cutting, had been turned round by the workmen in charge so as to admit of easier access to the cut. A member of the public, who had been on business at the hut, and was returning from it on a dark night, fell over the cutting and was severely injured. In an action of damages against the contractors, on the ground that there was a duty upon them to have had the cutting fenced and protected, the jury found for the pursuer. On a motion for a new trial, the Court (*dub.* Lord Wellwood) refused to disturb the verdict, holding, upon the evidence, that there was a duty on the defenders to see that the path was not dangerous, and that a plea of contributory negligence had not been substantiated.

See sub-head (3), sec. 4, for definition of "building," (9) "the Commissioners," (31) "street;" see sec. 487 as to imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See cases cited under sec. 130 and also cases under 186 and 188.

188. Penalty for not lighting Deposits of Building Materials or Excavations.—When any building materials, rubbish, or other things are laid, or any hole made, in the streets, whether by order of the Commissioners or not, the person causing such materials or other things to be so laid, or hole to be made, shall, at his own expense, cause a sufficient light to be fixed upon or near the same, and continue such light every night from sun-setting to sun-rising while such materials or hole remains; and cause such materials or hole to be sufficiently fenced and enclosed until they are removed, or the hole filled up or otherwise made secure; and every such person who fails so to light, fence, or enclose such materials or other things, or hole, shall for every such offence be liable to a penalty not exceeding £5, and a further penalty not exceeding 40s. for every day while such default is continued.

See sub-head (3), sec. 4, for definition of "building," (31) "street;" see sec. 487 as to imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See also the case of Virtue *v.* Police Commissioners of Alloa, 12th Dec. 1873 (1 R., 285), where the Commissioners, under the Police Act of 1862, were held liable for damages caused by the negligence of a person in their employment while in the execution of his duty, through failure to properly light, fence, and enclose a trestle or block of wood on the street after sunset. See also Stephen *v.* Police Commissioners of Thurso, 3rd Mar. 1876 (3 R., 535), where Commissioners, under the Police Act of 1850, were held liable in damages for injuries sustained by a person from having fallen over a heap of rubbish left upon the street by a contractor of the Police Commissioners after nightfall, and not fenced or lighted. But see Barton *v.* Kinning Park Police Commissioners, 20th Jan. 1892 (29 S. L. R., 329), where the Commissioners were held not liable in an action of damages for injuries sustained by a person through falling over a heap of mud left lying on the street, as the mud had been collected

according to a reasonable custom, and as the accumulations were of ordinary size, and had not been removed because of a fog. See also Harris (8 R., 613).

In England, where a local Surveyor of Highways, in repairing a road, placed stones thereon, and allowed them to remain at night insufficiently fenced and without sufficient light, it was held that he was properly convicted under sec. 72 of the Highways Act, 1835, of wilfully obstructing the highway. Fearnley *v.* Ormsby (4 C. P. D., 136; 27 W. R., 823; 43 J. P., 384).—See Bazalgette, p. 1004.

189. Penalty for continuing Deposits of Building Materials or Excavations an unreasonable time.—In no case shall any such building materials or other things, or such hole, be allowed to remain longer than may be fixed by the Surveyor, under a penalty not exceeding £5, to be paid for every such offence by the person who causes such materials or other things to be laid, or such hole to be made, and a further penalty not exceeding 40s. for every day during which such offence is continued after the conviction for such offence.

See sub-head (3), sec. 4, for definition of "building;" sec. 487 for imprisonment failing payment of penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

"The public, including the immediate neighbours, must submit to the inconvenience necessarily occasioned by repairing or rebuilding a house, but unreasonable building operations are a public nuisance, and a person suffering particular damage, direct and substantial, and not fleeting and evanescent, is entitled to maintain an action. Interference with the access to a person's premises is such particular damage. Fritz *v.* Hobson (L. R., 14 Ch. D., 542; 49 L. J., Ch., 321; 42 L. T., N. S., 225; 28 W. R., 459)."—Glen, p. 752.

In Cameron *v.* Fraser, etc., 21st October 1881 (9 R., 26), where building operations by an urban proprietor were so carried on as unnecessarily to cause substantial injury to the business and goods of the tenant of adjoining premises—*Held*, that the proprietor was liable in damages, although the execution of the work was entirely in the hands of contractors. In this case Lord Young said: "This is a case raising questions of legal importance, though the value is only about £30, for Mr. Young said he was satisfied with the amount of damages which the Sheriff-Substitute awarded. The case is in no way complicated in point of fact. . . . This may be taken as a safe principle of law, that when a party executes operations on a property (probably the observation may be made generally, but I may be taken now as limiting it to the case of property in towns

where most frequent examples of it are found), however lawful and reasonable these operations may be, he must take care in conducting them to do as little damage as possible to his neighbour. I should have been disposed to think (but it is unnecessary to decide it) that he must make good, by reparation, any special damage caused to another by his operations. I, however, express no decided opinion on that point. But, in saying as much as I have done, I guard myself against being thought to say that a party next door or near to the operations which are carried on is entitled to complain of every little inconvenience to which he is put. Dwellers in towns must put up with little inconveniences, incidental to life in towns. And the same remark is true, though in a less degree, of dwellers in other places. There will be more dust upon some occasions than on others, and there are disagreeables connected with the repairs always going on in towns, to a greater or less extent, which must be put up with, and the occasioning of which will give rise to no claim for damages. It is, however, proved here that the goods in the pursuer's shop were to a large extent destroyed, and that the manner in which the whole operations were carried on was such that people would not resort to the shop, and that the business fell off to an extent which is capable of the most distinct proof. This falling off was not occasioned by any circuity made necessary by an erection on the pavement, but because the atmosphere of the place was rendered such that people would not pass through it—it being the same atmosphere which destroyed the goods in the shop. It is vain to say that damage of that kind and extent was not avoidable, and that repairs and improvements cannot be made without such injury being caused. Being, therefore, of opinion that such injury is established as matter of fact, and without deciding any more general principle of law, I think that sufficient is established to infer liability to make it good."

190. Dangerous Places to be Repaired or Enclosed.—If any building, hoarding, or hole, or any other place, in or near any street be, in the opinion of the Burgh Surveyor, for want of sufficient repair, protection, or enclosure, dangerous to the passengers along such street, the Commissioners shall cause the same to be protected or enclosed so as to prevent danger therefrom, and shall be entitled to recover the expense thereof from the owner of such building or place and the persons who caused such hoarding or hole to be made respectively.

See sub-head (3), sec. 4, for definition of "building," (31) "street," (9) "the Commissioners." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See sec. 201.

In M'Glashan *v.* Macdonald, 24th October 1888 (4 Scot. Law Rev., 401), Commissioners holding under a deed of gift a park containing

a pond expressly designed for the sailing of model yachts and children's boats, and erecting stagings to where the water is two feet deep for the starting of such yachts and boats, are not bound to rail round the stagings and give access thereto only by snibbed gates, or to provide more policemen and watchers than is customary in such a public park.

In Robertson *v.* Adamson, 3rd July 1862 (24 D., 1231), in an action of damages against the proprietor of a work, the pursuers (the wife and children of the deceased) averred that a workman in the defender's employment had been killed by falling, after sunset, from a bridge within the works, which was not alleged to be dangerously narrow, but was unprotected by any kind of parapet, and unlighted by a lamp. *Held* (*diss.* Lord Cowan), that the master was not liable in reparation, in respect that there was (1) no duty or obligation at common law to fence or light the bridge, and (2) nothing in the special contract between master and servant to create such an obligation.

In Lang *v.* Bruce, 5th February 1873 (11 M., 377), by the Glasgow Police Act, 1866, sec. 384, the Master of Works may, by notice, require any proprietor of lands and heritages to fence the same, and a form of notice is provided to which the proprietors may lodge objections, to be disposed of by the Dean of Guild or Magistrate. Upon failure to comply with the notice, or with the Order of the Dean of Guild or Magistrate, the procurator-fiscal in the Dean of Guild Court may, by sec. 325, enforce the same by applying to the Dean of Guild for a warrant to execute the work therein specified. . . . And the Dean of Guild may grant a warrant to execute such work, and shall thereafter ascertain and fix the cost thereof, and decern against the proprietor or proprietors to whom notice was given for the proportion of such cost due by them. *Held*, in an application requiring the owner of a mill-lade to fence it, (1) that it was irrelevant to allege as a defence that the mill-lade ran alongside of a public road, the trustees vested with which were bound and had been in use to fence it; and (2) that, after the failure of the defenders to comply with the notice, the Dean of Guild had erred in ordaining the proprietor to fence the mill-lade, and that a warrant ought to have been granted to the Master of Works to fence the mill-lade, after which the Dean of Guild should fix and decern for the cost thereof.

The Glasgow Police Act authorises the Master of Works to call upon "any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous. *Held*, that this did not authorise him to call upon the proprietor of lands bounded by a public, navigable, and tidal river, along the bank of which the public had acquired a right of foot-path by prescription, to erect a fence between the path and the river. Kerr, Anderson, & Co. *v.* Lang, 1st June 1877 (4 R. 779; *aff.* in H. L., 26th February 1878, 5 R., H. L., 65).

In Walker *v.* Lang, 13th June 1891 (18 R., 928), in terms of sec. 384 of the Glasgow Police Act, 1866, the Master of Works gave notice to the proprietor of a back court, requiring him to fence it, and intimating that if he had any objections he must lodge the same in writing with the Clerk to the Police Commissioners within six days.

No objections were lodged, and thereafter the Dean of Guild, on the application of the procurator-fiscal, after hearing the proprietor's objections but without a record having been made up, pronounced an interlocutor, granting a warrant for the execution of the work at the proprietor's cost, on the ground that there was danger to persons using the court from the want of a fence.

The proprietor having appealed, the procurator-fiscal objected that the appeal was incompetent under sec. 277 of the Act, in respect that no record had been made up.

The appellant contended that, as the public had no right of access to the court, the want of a fence could not be "dangerous" in the sense of the Act, and that the Dean of Guild had exceeded his jurisdiction in granting the warrant.

Held, that the interlocutor was in pursuance of the Act, and that the appeal was incompetent, as no record had been made up.

Opinions, that the Dean of Guild would not have been entitled to refuse a motion to have a record made up.

A procurator-fiscal presented a petition to the Sheriff against (1) certain mill-owners, proprietors of a mill-lade adjoining a public green in a burgh, and (2) the Magistrates of the burgh, proprietors of the green, to have the proprietors of the lade ordained to fence it as being dangerous to the public. The mill-owners did not appear. The Magistrates appeared and opposed the petition, on the ground that the lade was not dangerous, and that the proposed fence would interfere with the public use of the lade for bathing and bleaching. A proof showed that the lade had been unfenced for seventy years, and that occasionally accidents had happened to children. The Court affirmed the judgment of the Sheriff, finding that the lade was dangerous, and ordaining the mill-owners to fence it.

Procurator-Fiscal.—Observations on the duty of procurators-fiscal as regards the protection of the public from danger, Stevenson *v.* Magistrates of Hawick, 19th May 1871 (9 M., 753).

191. Ruinous or Dangerous Buildings to be taken down or secured.—If any building or wall, or anything affixed thereon, be deemed by the Surveyor of the Commissioners to be in a ruinous state, or dangerous to passengers or to the occupiers thereof, or of the neighbouring buildings, he shall immediately cause such occupiers endangered thereby to remove from the occupancy of such buildings until the same are put into a safe condition, and shall cause a proper hoard or fence, or props, to be put up for the protection of

passengers; and shall also cause, if he shall judge necessary, the neighbouring buildings to be properly shored up, and shall cause notice in writing to be given to the owner of such building or wall, if he be known; and shall also cause such notice to be put on the door of such building or on such wall, or on a conspicuous part thereof, or otherwise to be given to the occupier thereof, if any, requiring such owner forthwith to take down, secure, or repair such building, wall, or other thing, or as the case shall require; and if such owner do not begin to repair, take down, or secure such building, wall, or other thing, within the space of three days after any such notice has been so given or put up as aforesaid, and complete such repairs or taking down or securing as speedily as the nature of the case will admit, such Surveyor may make complaint thereof to the Sheriff; and it shall be lawful for the Sheriff, after inquiry, to order the owner of such building, wall, or other thing, to take down, rebuild, repair, or otherwise secure, to the satisfaction of such Surveyor, the same, or such part thereof as appears to them to be in a dangerous state, within a time to be fixed by the Sheriff; and in case the same be not taken down, repaired, rebuilt, or otherwise secured, within the time so limited, the Commissioners shall, with all convenient speed, cause all or so much of such building, wall, or other thing as shall be in a ruinous condition and dangerous as aforesaid, to be taken down, repaired, rebuilt, or otherwise secured in such manner as shall be requisite; and all the expenses of enforcing such removal and of putting up every such fence, and of shoring up such buildings, and of taking down, repairing, rebuilding, watching, or securing such building, wall, or other thing, shall be paid by the owner thereof.

See sub-head (3), sec. 4, for definition of "building," (21) "occupier," (22) "owner," (30) "Sheriff." See secs. 336 to 338, inclusive, as to notice to be given. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See the provisions of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, secs. 29–43, as to houses "in a state so dangerous or injurious to health as to be unfit for human habitation," and as to "obstructive" buildings, referred to under sec. 154, *supra*.

In Lang *v.* Kerr, Anderson, & Co., 26th Feb. 1878 (5 R., H. L., 65),

the Glasgow Police Act authorises the Master of Works to call upon "any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk, . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon which appears to be dangerous." Lands bounded by a public navigable river were chiefly occupied by manufacturing premises, which were enclosed on the river side by a wall, leaving a narrow strip of ground between the wall and the river, over the level portion of which the public had acquired, by prescription, a right of way. *Held—aff.* judgment of First Division—that the Master of Works had no power under the Act to order the proprietors of the land to erect a fence between the footpath and the river, on the ground that the bank was insecure.

Question—per the Lord Chancellor—whether the Act conferred any power on the Master of Works to order a riparian proprietor to erect a fence between his ground and a public navigable river.

In England, "a Local Act provided that, if the City Surveyor certified to the Town Council that any building was dangerous, they might order it to be taken down or repaired without any notice or presentment whatever. The Act also provided that any notices given under it should be deemed to be sufficiently authenticated by the signature of the Town-Clerk. Certain houses in the city became in a dangerous condition, whereupon the City Surveyor certified to the Town Council that the danger was imminent, and the Town-Clerk gave notice to the owner, in the name of the corporation, that they would do what was necessary, under the powers conferred on them by their Acts of Parliament. The Town-Clerk, in giving this notice, had not been expressly authorised either by the Council or by any Committee of it. Certain repairs were then done by the corporation, who recovered the charges incurred in pulling down the buildings before the Stipendiary Magistrate. An action was then brought to recover back these charges. The Court gave judgment for the defendant, saying it was necessary for the public protection that somebody in a large town should be able to act promptly where structures became dangerous; that to hold that the Surveyor's certificate was not conclusive, and to expose the corporation to an action in every instance to determine whether the danger upon which they had acted was in fact imminent, would be entirely to defeat the purpose of the Act; that the directions were given for and in the name of the corporation, and the persons who did the work were employed and paid by them, and they had absolutely ratified what the Town-Clerk had done. Cheetham *v.* Mayor, etc., of Manchester (I. R., 10 C. P., 249; 44 L. J., C. P., 139; 32 L. T., N. S., 28; 39 J. P., 343)."—Glen, p. 750.

192. Expenses to be levied on Owner.—If the owner of such building or wall, or thing affixed thereon, can be found, and if, on demand of the expenses aforesaid, he neglect or refuse to pay the same, the Sheriff shall, on a

certificate of such demand and neglect or refusal, signed by the Clerk, grant decree against such owner for payment thereof, on which decree all legal diligence may proceed, or the Commissioners may proceed against such owner for the recovery of the said expenses, in terms of the general provisions for recovery of expenses under this Act, or otherwise as accords of law.

See sub-head (22), sec. 4, for definition of "owner," (3) "building," (9) "the Commissioners." See sec. 511 as to recovery of expenses. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See secs. 329 to 332 as to recovery of expenses. See also sec. 201.

193. If Owner cannot be found, Commissioners may take the House or Ground, making Compensation.—If such owner cannot be found, or if such expenses are not otherwise fully recovered, the Commissioners, after giving twenty-eight days' notice of their intention to do so, by posting a printed or written notice in a conspicuous place on such building or wall, or on the land whereon such building or wall stood, and by sending through the post-office to such owner's last known address a copy of such notice, may take such building or land, provided that such expenses be not paid or tendered to them within the said twenty-eight days, making compensation to the owner of such building or land in the manner provided by the Lands Clauses Acts in the case of lands taken otherwise than with the consent of the owners and occupiers thereof, and the Commissioners shall be entitled to deduct out of such compensation the amount of the expenses aforesaid, and may thereupon sell or otherwise dispose of the said building or land for the purposes of this Act.

See sub-head (22), sec. 4, for definition of "owner," (3) "building," (9) "the Commissioners," (16) "lands," (21) "occupier." See secs. 336 to 338 inclusive as to "notice." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

194. Commissioners may sell Materials, restoring to the Owner surplus arising from Sale.—If any such building or wall as aforesaid, or any part of the same, be

pulled down by virtue of the powers aforesaid, the Commissioners may sell the materials thereof, or so much of the same as shall be pulled down, and apply the proceeds of such sale in payment of the expenses incurred in respect of such building or wall; and the Commissioners shall restore any surplus arising from such sale to the owner of such building or wall on demand; nevertheless, the Commissioners, although they sell such materials for the purposes aforesaid, shall have the same remedies for compelling the payment of so much of the said expenses as may remain due, after the application of the proceeds of such sale, as are hereinbefore given to them for compelling the payment of the whole of the said expenses.

See sub-head (3), sec. 4, for definition of "building," (9) "the Commissioners," (22) "owner." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

195. Ruinous Buildings belonging to two or more Owners may be sold.—If any houses, buildings, or areas have become waste and ruinous within the burgh, and have become receptacles for filth and other nuisances, or unsafe and unfit for use and occupation, and which, being held by two or more joint owners, cannot be rebuilt or disposed of to advantage without the consent of all the parties interested therein, and the same are allowed to continue in a waste or ruinous or unsafe state, in consequence of the parties being unable or unwilling or delaying to agree as to the sale or rebuilding thereof, it shall be lawful to the Sheriff, upon the petition of the Burgh Prosecutor, or of the Commissioners, or their Surveyor or Sanitary Inspector, or of any owner or party interested in any such houses, buildings, or areas, to call all parties interested therein before the Sheriff, in the usual manner and form followed in his Court, and to order such houses, buildings, or areas to be valued by not less than three men of skill, upon oath, who shall distinguish the portions of the subjects, and the corresponding proportion of the appraised value, which belong to the several parties interested, and thereupon to give each party the option to buy and acquire from, or to sell and convey to the others, their respective portions of or interests in such houses,

buildings, and areas, agreeably to such valuation, or at such other price as shall be agreed on amongst themselves, and that within a reasonable time to be fixed by the Sheriff, not exceeding six weeks.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (4) "burgh," (22) "owner," (30) "Sheriff." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See also the provisions of the Housing of the Working Classes Act 1890, referred to under sec. 154.

Any "defect of structure" or "want of repair," which renders a house injurious to the health of the inmates, or unfit for human habitation or use, is a nuisance under sec. 16, sub-head (*a*), of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101.

196. How Sale to be carried through.—If any of the said parties fail to take advantage of the said option within the time so fixed, or shall not be able to agree as to which shall be the buyer and which the seller, it shall be lawful to the said Sheriff to cause such houses, buildings, and areas to be exposed to sale by public auction, at a price not being less than the appraised value; and in case of no offers, to reduce the upset price from time to time, and to sell the same to the highest bidder, under such regulations, and upon such conditions and after such public notice, by advertisement in the newspapers or otherwise, as the Sheriff shall appoint; and the purchaser thereof shall be then bound, within ten days after the sale, or within such time as may be fixed by the Sheriff, to consign the purchase-money in any bank to be named by the Sheriff, upon a receipt or voucher subject to the orders of the Sheriff, otherwise the sale to be void and null, and the money so deposited shall remain at interest for the behoof of all parties interested therein, and subject to the future orders of the Sheriff.

See sub-head (30), sec. 4, for definition of "Sheriff." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

197. Completion of Purchaser's Title.—Upon such deposit being so made, the Sheriff shall pronounce his decree or warrant declaring the purchase duly completed, and author-

ising immediate possession of the tenements so sold to be given to the purchaser thereof; and such warrant or decree shall, upon being registered in the proper Register of Sasines, be a valid and sufficient title to such purchaser.

See sub-head (30), sec. 4, for definition of "Sheriff." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

198. If Purchaser do not fulfil Conditions of Sale, Tenement may be Re-sold.—In case the purchaser at any such sale as aforesaid shall fail to fulfil the conditions thereof within the time thereby prescribed, it shall be lawful to the Sheriff to cause the tenements to be re-exposed and sold anew; and such sale shall proceed in like manner as the first sale; and the Sheriff shall continue, in case of failure as aforesaid, to cause the said subjects to be re-exposed for sale, until the same shall be sold, and the price thereof consigned or deposited in bank as aforesaid.

See sub-head (30), sec. 4, for definition of "Sheriff." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

199. Apportionment of Price.—Upon the completion of any such sale, the Sheriff shall, on the application of any of the parties concerned, after such inquiry as he may deem expedient, proceed to ascertain and determine the extent and value of the share of each party claiming interest in the tenements so sold, and to apportion the price and order payment thereof to the several parties accordingly, subject always to such finding or order in respect of costs as the Sheriff may pronounce.

See sub-head (30), sec. 4, for definition of "Sheriff." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

200. Ruinous Tenements may be Sold.—If any houses, buildings, or areas have become waste and ruinous, or have become receptacles for filth and other nuisances, or unsafe and unfit for use and occupation, the Commissioners may, by a notice addressed to the owner, if his address shall

be known, or, if not known, by a notice affixed to a conspicuous part of such houses, buildings, or areas, require the same to be rebuilt or otherwise put into a state of repair to their satisfaction, within three months from the date of such notice; and in the event of such requisition not being complied with, the Commissioners may apply to the Sheriff for warrant to sell such houses, buildings, or areas, and it shall be lawful to the Sheriff to order the same to be valued, and exposed for sale by public auction, and to sell the same; and such sale shall be made and carried out, or re-sale effected, the price deposited and applied, and the purchaser's title completed, in the way and manner hereinbefore directed with reference to waste and ruinous buildings, houses, or areas within burgh, held by two or more joint owners.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (22) "owner," (30) "Sheriff." See secs. 336 to 338 inclusive as to "notice." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. See also sec. 201.

See the provisions of the Housing of the Working Classes Act, 1890, referred to under sec. 154; also sec. 16 (*a*) of the Public Health (Scotland) Act, 1867, referred to under sec. 195.

In John Edwards and Spouse *v.* The Parochial Board of Kinross, 2nd June 1891 (18 R., 867), where a Local Authority had partly demolished an untenanted house within their district, on the ground that the state of the roof was dangerous to public safety, it was held that the Local Authority were not protected by sec. 118 of the Public Health Act, 1867, against a claim for damages by the owner, the demolition of houses on account of their danger to public safety being outwith the power of Local Authorities under the Act.

In Crawford *v.* Magistrates of Paisley, 10th Mar. 1870 (8 M., 693), the Magistrates of a burgh being of opinion that a steeple, the property of the burgh, was unsafe, without judicial authority, proceeded to take it down, whereupon an inhabitant of the burgh presented a note of suspension and interdict. Interdict was granted, and the note passed, but subsequently, after a report from a man of skill, the interdict was recalled, and the reasons of suspension repelled. *Held*, that the suspender was entitled to his expenses up to the date of passing the note, in respect that, in the circumstances, he was justified in bringing the process into Court.

Opinions, that as the steeple was part of the inalienable property of the burgh, which the Magistrates were not entitled to take down without judicial authority, except on the ground of absolute necessity, their proper course was to apply to the Sheriff for a warrant to take down the steeple.

DEAN OF GUILD COURT.

201. Dean of Guild Court.—In burghs where there is a Dean of Guild Court at the commencement of this Act, or where such Court shall be established as hereinafter provided, the Dean of Guild Court shall come in room and place of the Commissioners for carrying out the provisions of this Act, in so far as they apply to new buildings, or alteration of existing buildings, ventilation, and precautions during the construction, alteration, or repair of buildings and streets, and to old and ruinous tenements, and to the setting up of hoardings; and in that case all the powers and duties of the Commissioners in reference to these provisions, and also in reference to the inspection of buildings in process of construction or alteration, or any work connected therewith, and the surveying and certifying of buildings before occupation, shall devolve on and be carried out by the Dean of Guild Court and the officers thereof, as herein provided for; but nothing herein contained shall be taken to restrict or prejudice the jurisdiction or to alter the constitution of any Dean of Guild Court as existing at the commencement of this Act.

See sub-head (9), sec. 4, as to definition of "Commissioners," (3) "building," (4) "burgh," (31) "street." The Act comes into operation on 15th May 1893. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

It will be observed that where there is a Dean of Guild Court at the commencement of this Act, nothing herein contained shall be taken to restrict or prejudice the jurisdiction, or to alter the constitution, of this Dean of Guild Court as then existing. By sec. 408 of the 1862 Act, it is provided that the Magistrates and police of a burgh shall have all such and the like jurisdiction within such burgh as any Magistrate of a royal burgh, or any Dean of Guild Court of a royal burgh, has by the law of Scotland within the royal burgh in or for which he acts as such Magistrate or Dean of Guild. Under this section, it was held by Lord Curriehill that the Magistrates of Police of Hamilton, a burgh of regality which had adopted that Act, possessed the powers and jurisdiction relative to buildings pertaining to the Magistrates or Dean of Guild of a royal burgh in Scotland. See Tainsh *v.* Magistrates of Hamilton, 24th Jan. 1877 (4 R., 315). After reclaiming against this interlocutor, the pursuer was advised by the Lord Advocate (Mr. Balfour) to withdraw the reclaiming note and allow the judg-

ment to become final. By the 454th clause of this Act it is likewise provided that "the Magistrates of police of a burgh under this Act, or any one or more of such Magistrates, except where otherwise provided in this Act, including Stipendiary Magistrates and Sheriffs acting in the Police Court, shall within the burgh . . . have the like jurisdiction within the burgh, as any Magistrate of a royal burgh, or any Dean of Guild of a royal burgh has, by the law of Scotland." Where, therefore, there is an existing Dean of Guild Court, the jurisdiction of that Court is co-extensive with that of any Dean of Guild of a royal burgh in Scotland. Moreover, the Court by this section is to come in room and place of the Commissioners for carrying out the provisions of the Act, in so far as they apply to new buildings or alteration of existing buildings. See as to plans of new buildings and regulations, secs. 166 to 180; ventilation, 181 to 185; precautions during the construction, alteration, or repair of buildings and streets, and as to old and ruinous tenements and to the setting up of hoardings, 186 to 200. In that case, all the powers and duties of the Commissioners in reference to these provisions, and also in reference to inspection of buildings in process of construction or alteration, or any work connected therewith, and the surveying and certifying of buildings before occupation, all which is practically embraced in the clauses referred to, shall devolve on and be carried out by the Dean of Guild Court and the officers thereof, as provided for in the Act.

This is not a very good provision, and may lead to confusion in working out the provisions of these clauses of the Act. Considerable care will have to be exercised in putting these provisions into operation.

In burghs, therefore, having a Dean of Guild Court existing at the date of the commencement of this Act, the Court will exercise the ordinary jurisdiction of the Dean of Guild in a royal burgh. With reference to that, Erskine says that "it belongs to the Dean of Guild to take care that buildings within burgh be agreeable to law, neither encroaching on private property nor on the public streets or passages; and that houses in danger of falling be thrown down."—Bk. i. tit. 4, sec. 24. And Bankton says: "This Court has likewise the sole jurisdiction in regulating buildings within burghs, whether in repairing or taking down and rebuilding old buildings or erecting new ones; they are to take care that the streets and common passages of borows be not thereby prejudiced or obstructed, nor the property of neighbouring heritors encroached upon, and that the new buildings be conform to the regulations in the Statute for that purpose. Without their warrant, obtained upon a citation of all parties having interest, no houses within borow can be built or demolished in whole or in part. The order of the Dean of Guild Court, in these cases, is termed a jedge and warrant. It contains the limits or dimensions of the houses or parts of them to be demolished, built, or repaired."—Bankton, bk. iv. tit. 20 (vol. ii. p. 581). The Law Courts Commission of 1870 contains the following description of the Dean of Guild Court: "The jurisdiction of other inferior Courts is for the most part

concurrent with that of the Sheriff; but the Dean of Guild Court, wherever it exists, excludes that of the Sheriff." Magistrates *v.* Sheriff of Stirling, 1752 (M., 7584). It is different in disputes between landlord and tenant. Alexander *v.* Couper, 12th Dec. 1840 (3 D., 249); and in Earl of Kintore *v.* Lyon, 27th Feb. 1802 (M., 7673), it was held that in questions relating to buildings within the burgh, to which the Magistrates are parties, the Sheriff has jurisdiction, and is the proper judge. "The Dean of Guild is one of the burgh Magistrates, an elected officer, whose tenure of office varies from one to three years. His Court at one time had a large jurisdiction in questions arising between merchants, but that has long fallen into desuetude; and its functions have now reference to questions of boundary within burghs, and to questions of the erection, alteration, repair, and pulling down of houses." See 1593, c. 184, where the Edinburgh Court is made the model in matters of merchandise, and the "good towns of France and Flanders" are referred to; 1594, c. 226 (4 Bankton, 20; Erskine, i., iv., 24; Bell's Commentaries, 7th ed., i. 784; 1 Jur. Styles, 4th ed., 580); Milne *v.* Melville, 27th Nov. 1841 (4 D., 111); Lord Deas in Lamont *v.* Cumming, 11th June 1875 (2 Ret., 784). "In practice it has been found necessary, to a considerable extent, to resort to authority other than that of the Dean of Guild. In some towns building has extended over an area far beyond his jurisdiction, which originally extended only to the ancient royalties." See Johnston *v.* White, 18th May 1877 (4 Ret., 721); Adamson *v.* Paterson, 1631 (M., 7483). "In these cases, and also in towns which never were royal burghs, and in which there is no Dean of Guild authority, the ordinary powers of the Sheriff have been called into action, and found sufficient to supply the public wants. In other places, even within the jurisdiction of the Dean of Guild, cases have been found to arise calling for more rapid interference than the forms of his Court permit. The new jurisdiction required as to matters connected with buildings has been generally conferred on the Commissioners of Police."—Law Courts Commission, 4th Report, p. 36.

The jurisdiction of the Court comprehends, in the first place, the examination and sanctioning of plans for the erection, repair, alteration, and taking down of houses and other buildings, including the height and structure thereof; second, the securing the stability and lining of such with reference to the roads and stree of a burgh, the rights of neighbouring proprietrs, and the interest of the public generally; and, thirdly, the repair, demolition, or sale of old or ruinous properties, or those burned and left unrestored.

In Eglinton Chemical Company, Limited, *v.* M'Jannet, 30th Oct. 1890 (18 R., 34), it was held that the Dean of Guild has jurisdiction to require the plans of all new buildings proposed to be erected within burgh to be laid before his Court, although such buildings may be entirely within the enclosed property of the person who is erecting them, and at such a distance from the outside boundaries of it as not to threaten any encroachment on neighbouring properties, or danger to persons using the public thoroughfares.

In the Edinburgh and Glasgow Railway Company *v.* Dymock, 27th Nov. 1847 (10 P., 158), the jurisdiction of the Dean of Guild Court was held not to be excluded by implication by the Statute 7 & 8 Vict. c. 58 (The Edinburgh and Glasgow Railway Company's Act), in reference to the building operations and works of masonry authorised by that Act to be carried on within burgh.

And in Johnston *v.* Edinburgh Gas Light Company, 27th May 1885 (12 R., 974), it was found that, by the Edinburgh and Municipal and Police Act, 1879 (42 & 43 Vict. c. 132), secs. 6 and 154, the Dean of Guild of Edinburgh had jurisdiction in the regality of the Canongate.

A public company, incorporated for public purposes, with power conferred on them by Act of Parliament to erect buildings for carrying out the purposes of that Act, is nevertheless subject to the jurisdiction of the Dean of Guild as regards the erection of such buildings.

A petitioner obtained from the Dean of Guild a lining to buildings, in erecting which he proposed to take advantage of a mutual gable belonging to himself and a neighbouring respondent, and he settled by agreement with the latter certain disputes which had arisen. Farther questions having emerged between the parties, he applied for a new lining, and proposed to erect the buildings entirely within his own grounds. The Dean of Guild refused the petition. On appeal, the Court held that, even if the petitioner was under obligation to erect the buildings in a certain manner, the respondent had mistaken his remedy in objecting to the petition for lining, and remitted the case to the Dean of Guild to consider the question of lining on the plans before him. The Paisley Provident Co-operative Society, Limited, *v.* Buchanan and others, 12th Nov. 1889 (27 S. L. R., 60; 17 R., 66).

And in Allan *v.* Whyte, 20th Dec. 1890 (18 R., 332), it was held that the Dean of Guild of Glasgow was not entitled to refuse his sanction to plans lodged in a process of lining, because there was not exclusively on the applicant's own ground the free space required by the Glasgow Police Act, 1866, secs. 367 and 370, to be in front of a room intended to be used as a sleeping apartment, seeing that there was, in existing circumstances, sufficient free space over ground belonging to a different proprietor.

The 177th section of the General Police Act, 1862, provides that it shall not be lawful to build any court of less than a certain specified width, and that to any such court in which there shall be more than eight houses there shall be an additional width of 1 foot for every such additional house, "and that there shall be an entrance of the full width of the court, open from the ground upwards." *Held*, that the section applied to courts to be formed on back ground exclusively private property. Couper *v.* Surveyor of Maryhill, 6th March 1891 (18 R., 642).

A duly-constituted Dean of Guild Court of a burgh, in terms of its statutory powers, provided that "no building operations of any

kind shall be allowed to be erected, added to, or altered, within the burgh, unless plans thereof have previously been submitted to and approved of" by the said Court. A company who possessed ground of 100 acres within the burgh erected a tannery thereon, 65 feet back from the boundary of their property, without the sanction of the Dean of Guild. On a petition of the procurator-fiscal of Court, the Dean of Guild convicted the company of a contravention of the rules of Court, and fined them £5. This fine not being paid by the company, the respondent poinded certain of their effects. The company then brought an action of suspension and interdict, in order to suspend the conviction and interdict a sale. *Held—dub.* Lord Young—that the company had no right to erect the tannery without first having submitted the plans to the Dean of Guild. Eglinton Chemical Company, Limited, *v.* M'Jannet (28 S. L. R., 41).

With reference to the case of Magistrates of Stirling *v.* The Sheriff, above referred to, which decided that "in questions of neighbourhood the Dean of Guild Court has jurisdiction exclusive of the Sheriff and other inferior Courts, it was held, in the more recent case of Milne *v.* Melville, 27th Nov. 1841 (4 D., 111), in a burgh where there was both a Bailie Court and a Court of the Dean of Guild, that an application as to the re-building of a party-wall, which had been taken down by one of two adjoining proprietors within the burgh, might be competently presented and entertained before the Bailie Court, the Dean of Guild's jurisdiction in such questions not being exclusive. But in More *v.* Bradford, 22nd Nov. 1873 (1 R., 208), where a person pulled down and proceeded to re-erect a warehouse in Dundee, after obtaining the approval of his plans by the Police Commissioners, it was held that, as it did not appear that no question of possessory right or of disputed boundaries was or might be raised or involved between the proprietor and his neighbours, he was not entitled by the above Act to execute the work without obtaining the sanction of the Dean of Guild. In this case Lord Mackenzie said: "In obtaining the approval of the building plans by the Commissioners of Police, the adjoining proprietors are not cited, so that they are in ignorance of the proposed operations. Whenever these operations are of such a nature as to raise or involve no question of possessory right or disputed boundaries—as, for example, where they are entirely within the limits of the applicant's property, and do not extend to his boundaries—it seems reasonable, having regard to the provisions of the Statutes, and it is thereby provided that the Commissioners' warrant shall be sufficient. But where such questions may be raised or involved, as is the case where the operations extend to the boundaries of the applicant's property, the rights of the adjoining proprietors require that they should receive notice of these operations, and accordingly the Statutes leave the jurisdiction of the Dean of Guild entire, in all proceedings before whom such notice requires to be given."

In Stewart *v.* Blackwood, 3rd Feb. 1829 (7 S., 362; 4 F., 453), it was held that the Dean of Guild has jurisdiction, in the first

instance, as to whether a proprietor of the ground floor of a house is entitled, in re-erecting it, to form a sunk storey without the consent of the other proprietors.

In Christie *v.* Wilson, 4th June 1825 (4 S., 71; N. E., 74; 21 F. C., 836), the Dean of Guild was found entitled summarily to ordain a party to rebuild a breach in a house made without authority; and in Smellie *v.* Struthers, 12th May 1803 (13 F. C., 219; Mor., 7588), he was found to have no power, for the sake of widening the street, to prevent a proprietor from building upon the limits of his property.

In Speed *v.* Philip, 16th Mar. 1883 (10 R., 795), the proprietor of a building facing a street in a burgh obtained plans for making extensive alterations thereon, and proceeded to execute them, so far as regarded internal alterations, without obtaining a warrant from the Dean of Guild. He intimated to an adjoining proprietor that he would not proceed further without obtaining judicial authority. The latter, next day, lodged a formal information with the procurator-fiscal of the Dean of Guild Court, stating that he believed his rights were in danger of being interfered with. The procurator-fiscal presented a petition to the Dean of Guild for interdict against the proprietor "altering or interfering with any part of said tenement, or in building up other buildings or erections on the site thereof, . . . until he shall obtain from your honour a legal warrant for doing so." The Dean of Guild having ascertained that the plans included the rebuilding of the tenement fronting the street, and that partition walls and flooring had already been taken out, and other internal alterations made, granted interdict, and fined the respondent £10. On appeal, the Court recalled the Dean of Guild's interlocutor, holding that the application to him was unnecessary, as his warrant was not required for alterations within the buildings which were not dangerous to the lieges, and that it did not appear that the proprietor intended to execute other alterations without judicial authority.

In this case Lord Shand said: "If it had appeared from the averments in this complaint, or from the report of the inspection and the interlocutor of the Dean of Guild, that these operations were dangerous to the lieges, or that the respondent intended to go on without first obtaining a warrant, then I think it would have been competent. But both these elements are wanting. The building is only 20 feet in height, and the operations are all internal, causing no danger to the lieges. The only other question is whether there is danger to the neighbouring proprietor, and the interlocutor and note of the Dean of Guild make it clear that there is not. The appellant intimated to Robertson that he would apply to a competent Court for a warrant when it became necessary, and in that state of the case I think this petition was unnecessary and incompetent. Nothing that we say in the present case will interfere with the Dean of Guild's right and duty to put a stop to operations on buildings within burgh which are likely to cause danger to the lieges."

Not only have the rights of adjoining and conterminous proprietors to be considered, but the interests of the public have to be protected in regard to new buildings and the alteration or re-erection of old buildings, and this duty also falls on the Dean of Guild. Accordingly, in most large towns, regulations as to the form and height of buildings exist, founded either on Statute or immemorial usage; and the Dean of Guild sees that in buildings, these regulations are carried out, and that danger to or encroachment on public or private property is prevented.

The jurisdiction can, however, only be exercised in cases of recent encroachment, and not in cases where the injury has been acquiesced in for a series of years, even though less than seven, and though, consequently, there may not be room for a possessory judgment. Graham *v.* Greig, 6th Dec. 1838 (1 D., 171).

The Dean cannot, however, interfere with a dangerous obstruction on a street, unless it be permanent or structural.

In Donaldson *v.* Pattison, 14th Nov. 1834 (13 S., 27; 10 Fac. Dec., 19), a complaint against the proprietor of a storehouse for loading and unloading carts close to the front wall, and raising heavy bales to the upper flats of the storehouses by cranes, so as to occasion a dangerous obstruction to the public street, held incompetent before the Dean of Guild, in respect that it did not allege any fault in the structure of the building, and did not pray for any alteration of its structure.

Nor is his consent necessary for internal alterations or additions to a building not involving any structural change. Thus, where the proprietor of a house within the Burgh of Edinburgh, which consisted of a main-door flat and a basement flat, proceeded, without applying for a warrant from the Dean of Guild, to fit it for occupation by six tenants, three upon each flat, by erecting partitions so as to convert it into separate dwellings, and introducing new sinks and a second w.-c., the Dean of Guild, on the ground that the alterations were structural, and that the sanitary arrangements were defective, granted interdict against the operations, and imposed a penalty upon the proprietor for having proceeded with them without warrant. On appeal, it was held that the operation did not involve an alteration of structure, and therefore that the Dean of Guild had, under the Statute (Edinburgh Municipal and Police Act, 1879), no jurisdiction entitling him to interfere. Somerville *v.* Macgregor, 7th Nov. 1889 (17 R., 46). See the observations of the Lord Justice-Clerk in this case on the meaning of the words "to alter the structure," quoted on p. 6.

If a competition of heritable right or title arise, the process in the Dean of Guild Court should be sisted to allow the question to be raised by declarator in a competent Court. Thus in Smellie *v.* Thomson, 9th July 1868 (6 M., 1024), a petition was presented to the Dean of Guild in a burgh, for warrant to make alterations on a house possessed by the petitioner, and to which he produced an express title. The petition was opposed by an adjoining proprietor, who alleged that the house fell within his titles, but he did not prove

that he had ever possessed the subjects. The Dean of Guild granted the warrant, and in an advocation the Lord Ordinary sustained his judgment. In a reclaiming note, the advocator prayed the Court to set aside the judgment of the Dean of Guild as incompetent. The Court refused to do so, but sisted the process for a limited time, to allow the respondent to bring a declarator of his heritable right, on condition of his paying the expenses incurred in the Court of Session. As to what is a question of heritable right, see Wales *v.* Wales (16 R., 164).

But where neither petitioner nor respondent set forth on record an *ex facie* good title to a disputed subject, no question of heritable right is raised, and the Dean of Guild may proceed with the application. See Pitman *v.* Burnett's Trustees, 7th July 1881 (8 R., 914), where it was held that a party pleading want of jurisdiction in the Dean of Guild Court, on the ground that the question raised is one of right to heritable property, must set forth upon record an *ex facie* good title to the subjects. In this case it appeared that the petitioners were in right of certain subjects upon which were built the three houses, Nos. 112, 113, and 114 Princes Street, Edinburgh, and the respondents were in right of certain other subjects upon which were built Nos. 115, 116, and 117, being, with that part of No. 1 Castle Street which fronted Princes Street, also belonging to the respondents, the whole property in Princes Street between the house No. 114 and Castle Street. . . . The petitioners proposed to take down their houses and to erect new buildings to be used as a club-house for the Scottish Conservative Club, and this was an application to the Dean of Guild for warrant to do so. It was opposed by the respondents upon different grounds, *inter alia*, upon the following:—At the back of the said houses, and on the other side of the mutual gable which formed the western boundary of the petitioners' property, a passage or lane ran north to Rose Street Lane, and was used as a back entrance to some of the respondents' houses. The operations of the petitioners were calculated to affect this lane. . . . Both parties claimed the right of property in the said lane, but neither set forth a good title to it upon record. . . . The Dean of Guild, upon 16th June 1881, pronounced this interlocutor:—". . . Finds that the petitioners and respondents respectively claim the exclusive right of property in the said lane by virtue of their titles, and the respondents further allege that it has been in their exclusive possession from time immemorial as a part and pertinent of their properties: Finds that a question of heritable right is thus raised between the parties, which cannot be competently decided in this Court: Sists process, *hoc statu*, that the petitioners may, if so advised, raise a declarator to establish their right to the said lane as proposed to be used by them."

The petitioners appealed, and argued it was not enough for the respondents to set forth a vague claim of property. Their titles did not bear the construction they sought to place upon them. The fact was, that neither party had any right to the solum of the lane. The lane was the boundary in each case. The right was one of

common interest, which did not exclude the jurisdiction of the Dean of Guild (Johnstone *v.* White, 18th May 1877, 4 R., 721).

The respondents argued that if they had no right of property, which was not clear upon their titles, they at least had a common interest in the solum of the lane, and had been in the exclusive possession of it. That was a heritable right, and assuming that they could plead the case no higher, that was sufficient to exclude the Dean of Guild's jurisdiction (Anderson *v.* Dalrymple, 20th June 1799, M., 12831).

The Lord President said: "When it is said that a question of heritable right cannot competently be tried in the Dean of Guild Court, that does not by any means imply that no kind of question relating to heritage can be raised and decided in that Court; but if the question raised amounts to a distinct competition of title, then the titles must be cleared by a declarator in this Court. Now, what is the question here? Both the petitioners and the respondents aver, in general terms, that they are proprietors of this lane, and the question is, whether there is a relevant averment to that effect on the one side or the other? I am of opinion that there is no relevant averment of property, either by the petitioners or by the respondents. And when I say this, I mean that in order to a relevant averment of right of property, so as to raise a competition of title, it is essential that the averment should set forth a good title to the subjects *ex facie* of the record; and it appears to me that the title set forth in the record by the petitioners and the respondents respectively demonstrates that neither the one nor the other of them have any right in the solum of the lane. I am therefore of opinion that the Court should repel the fourth plea in law for the respondents, and remit to the Dean of Guild to proceed further with the case."

The Dean of Guild Court has no jurisdiction to consider and decide upon the use a building is to be put to. In Colville *v.* Carrick, etc., 19th July 1883 (10 R., 1241), one of a number of disponees in a street in burgh, from a common author, with similar conditions and restrictions in their titles, applied to the Dean of Guild for a lining and authority to erect a large hall behind the two houses belonging to the applicant. The two houses had been occupied without objection for twenty-three years as a boarding and day school for girls, and the hall was intended to be used for the purposes of the school. Under the titles of the various disponees, they had power to erect behind their houses "such offices as they might consider necessary for additional convenience," but it was provided that, as the houses were "intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading-places of any description, nor should common stairs be erected, nor the house divided into flats, upon any pretext whatever." The Court held that the proposed building was an office for additional convenience, and that the lining must be granted, because, as the Lord Justice-Clerk and Lord Young thought, the Dean of Guild had no jurisdiction to inquire as to the

use of the buildings, or to regulate it if the structure was unobjectionable, or, as Lord Craighill and Lord Rutherfurd-Clark thought, the occupation of the houses as a school having been legalised by long use without objection, the proposed buildings might be used as accessories to that manner of occupation.

Opinions were given by Lord Young and Lord Craighill, that the restriction in the titles did not prohibit the use of the houses as a school. And in Murison *v.* Wharrie, etc., 17th July 1883 (10 R., 1239), it was held that the erection by a feuar, for his own use, of a billiard-room, lavatory, and "snuggery" upon the vacant ground behind his house, was not a contravention of a provision in his title that "it shall be competent" to the feuar "to erect on said back-ground such offices as may be necessary for additional convenience; but such offices . . . . shall not be occupied as dwelling-houses, but be used allenarly as a stable, washing-house, or other offices, by the proprietors or tenants for the time being" of the front tenement.

Nor does it give the Dean of Guild jurisdiction to aver that the result of the proposed use of the property will be to cause a nuisance, the question of nuisance not being one which the Dean of Guild can competently entertain. In Robertson *v.* Thomas, 17th June 1887 (14 R., 822), a petition for a lining was presented in a Dean of Guild Court, and the Burgh Surveyor for the public interest lodged objections, stating that the alterations proposed were of such a nature that they would be a nuisance, that they would cause annoyance and discomfort to the neighbours, danger to the public health, and danger from fire. The respondent also averred that the alterations were in contravention of the Public Health (Scotland) Act, 1867, sec. 16, and the General Police Act, 1862, sec. 177. The petitioner pleaded that the Dean of Guild Court had no jurisdiction to entertain these objections. The respondent was allowed a proof of his averments. The petitioner then appealed to the Court of Session under sec. 36 of the Act 50 Geo. III. c. 112, which allows appeals from interlocutory judgment of inferior Courts, upon the ground, *inter alia*, of incompetency, including defect of jurisdiction. The Court—*diss.* Lord Rutherfurd-Clark—dismissed the appeal, holding that the facts should be ascertained before determining whether the questions raised by the objections feel within the jurisdiction of the Dean of Guild Court.

In North British Railway Company *v.* Moore, 1st July 1891 (18 R., 1021), a piece of ground in a residential district in Glasgow was feued to different persons, by feu contracts which were practically identical in terms. The feuars were taken bound to erect houses, and were prohibited from carrying on certain enumerated kinds of business on the ground feued, "or to carry on any other business, though not above numerated, which may be nauseous or hurtful to the neighbouring feuars . . . . in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued." The contracts further contained stipulations limiting the height of buildings to be erected, and as to the making of sewers, and it was declared that these provisions should be inserted in all

subsequent dispositions of the lands "until complete fulfilment thereof, otherwise the same shall be void and null."

The North British Railway Company, who had acquired one of the feus, applied to the Dean of Guild of Glasgow for authority to erect a shaft on their feu, for the ventilation of a tunnel in an underground railway. The superior did not oppose, but objections were lodged by some of the co-feuars. The Dean refused the petition. On appeal, the Court recalled his deliverance, holding, (1) with regard to the prohibitions which were declared to be a servitude, that there was no contravention unless the proposed erection could be regarded as the carrying on of a nauseous or hurtful business, and that it was premature to decide that the shaft would be nauseous or hurtful; and, (2) with regard to the other prohibitions, following Hislop *v.* Macritchie's Trustees (8 R., H. L., 95), that there was no such mutuality of rights and obligations between the feuars, established either expressly or by implication, as to give the objectors a *jus quæsitum* which would entitle them to enforce the building restrictions contained in the feu contracts.

Lord Trayner said: "I cannot help saying that the three reasons upon which the judgment seems to have proceeded are each and all of them, in my opinion, quite unsound. The last mentioned, but which evidently bulks most largely and most influentially in the mind of the Dean of Guild, is that the proposed erection would be a nuisance. I think that there he anticipates what is not an ascertained fact; and, more than that, that he is assuming a jurisdiction that does not belong to him, because the question whether this is or may be a nuisance is one which the Dean of Guild is not competent to try." See also Manson *v.* Forrest (14 R., 802). At one time it was held competent to inquire whether the use to which a house was to be put would cause a nuisance. Fleming *v.* Ure (1750, M., 13159). See Carrubber's Close *v.* Resch (1762, M., 13175).

But this is subject to the qualification that if the erections proposed are for the carrying on of a work "ticketed by law as a nuisance," the Dean of Guild may refuse a lining. Kirkwood's Trustees *v.* Leith (16 R., 255). In this case the Lord President said: "I think that in this case we ought to follow the same course as was taken in the case of Manson (14 R., 802). I am not disposed to lay down any very stringent or definite rule as to how far the Dean of Guild is entitled, in a question of lining, to entertain an objection such as that which is here taken, to the effect that the proposed erections constitute a nuisance. I can understand that in such cases as those to which Mr. Innes has referred, where certain kinds of works have been ticketed by law as nuisances, the Dean of Guild might refuse a lining, because the law holds that they cannot be carried on without constituting a nuisance. If, for instance, it was proposed to set up a blubber or glue work in one of the divisions of Princes Street, the Dean of Guild might refuse a lining, because the structure which it was proposed to erect was adapted to the purposes of an unlawful trade, and to such purposes only.

"But, in regard to other cases which have been mentioned, I confess

I am not disposed to do anything which would lead to an extension of the jurisdiction of the Dean of Guild. Questions of nuisance are often of very great delicacy, and raise points of law which require the intervention of a higher Court than that of the Dean of Guild. Such questions are among the enumerated cases which are sent to trial by jury, showing plainly the intention of the Legislature, that, being of such importance, they ought to be brought before the highest tribunal only. I think that is a very sound principle, and for these reasons, while I am not disposed to do or say anything which would appear to extend the jurisdiction of the Dean of Guild, I am not disposed to attempt to define the precise limits of that jurisdiction: that is often a very difficult matter. And its limits will in almost all cases depend upon circumstances."

One of the most difficult questions which the Dean of Guild Court may have to decide is whether the proposed alterations or use of the buildings are such as is allowed by the petitioners' title. The restrictions imposed by the title have been classed under the head of "conventional nuisances."

The two points of inquiry are: (1) Whether the alteration contemplated is an infringement of the condition imposed in the title; and (2) What parties have the title to enforce the restriction so imposed.

(1) As to the interpretation of the restriction, there is in this a bias in favour of the free use of property, but to permit of this the interpretation must not be judicial or unduly strained.

In Boswell *v.* Magistrates of Edinburgh, 19th July 1881 (8 R., 986), a lot of building ground, extending from the street in front to a mews lane at the back, having been feued out, the feuar erected on it a tenement, consisting of a main-door house and two flats and attics opening from the common stair. He afterwards sold part of the house, "consisting of the ground and street storeys of the tenement lately erected" by him, "with the area at the back of the said tenement," etc., to one purchaser, and the common-stair houses, with certain rights in the cellarage and front area, but with no express right to or in "the area at the back of the said tenement," to others.

The proprietor of the street and sunk floor, having converted them into a shop, proposed to extend his premises by building a saloon the height of his street floor, terminating in a building at the back facing the mews lane, and rising to a height of 19 feet 9 inches at the ridge of the roof, and 8 feet 9 inches at the wall-head above the level of the top of his street floor. This building was to be brought within 21 feet 6 inches of the back wall of the street floor and of the common-stair floors above.

Held, that there was no limitation on the right of the proprietor of the street floor and back area, and as no injurious diminution of light and air to the flats above was to be apprehended, warrant granted, subject to conditions.

In Russell *v.* Cowpar, etc., 24th February 1882 (9 R., 660), A., the proprietor of the ground storey of a house and of a yard in a town, under a disposition which declared "that the said A., his heirs

and assignees, shall not be allowed to erect any buildings on any part of the said yard, so as in any way to prejudice the lights of the other storeys of the said fore tenement, but to use the same for a garden only," proposed to erect additional buildings on the yard. The owners of the other storeys objected, on the ground that A. was restricted by his titles to the use of the yard as a garden only, and also that the proposed buildings would obstruct their lights. The Dean of Guild, who was a professional architect, repelled the objections. On appeal, the Court held, (1) that there was no absolute restriction against building clearly expressed in A.'s title, the prohibition being intended solely for the protection of the lights of the dominant tenement, and (2) that the question as to the obstruction of the lights of the dominant tenement having been determined by the Dean of Guild, a practical architect, no further inquiry was, in the circumstances, necessary, and therefore refused the appeal.

In Lauder, 16th June 1815, F. C., slaughtering of cattle in the suburbs of Edinburgh found to be a nuisance, from a clause in feu-right prohibiting "any other works than can be reasonably considered as nuisances by the public," and the neighbouring feuars found entitled to complain, though the prohibition was not declared to be a servitude in their favour.

In Porteous *v.* Grieve, 23rd February 1839 (1 D., 641), by his feu-right a vassal was taken bound not "to erect or carry on within the said grounds any brewery, tanwork, brickwork, soapwork, distillery, or any kind of manufactory whatever, or chemical process, whereby a nuisance can be created within any part thereof." He was also bound to erect "substantial dwelling-houses in front, under certain rules, but without prejudice to the building of coach-houses, stables, or other offices behind the said dwelling-houses." *Held*, that by the terms of his feu-right he was prohibited from converting a stable into a place for slaughtering his cattle used in his trade as a butcher.

Opinion, that a slaughter-house was a manufacture in the sense of this clause.

In Finnie *v.* Andrew Usher & Co., 17th December 1891 (29 S. L. R., 273), the owner of a distillery in a burgh petitioned the Dean of Guild for warrant to erect "bonded warehouses, malt barns, and relative stores" on adjoining ground, which was held under a feu-disposition prohibiting the erection of "any distillery, brewery, or other manufacture or chemical process of any kind, which may be nauseous or noxious to the inhabitants of the neighbourhood."

In a question with a co-feuar, held that the proposed buildings would not constitute a contravention of the condition of the feu.

See, for further examples of "conventional nuisances" and building restrictions imposed by petitioner's title, Rankine on Land-Ownership in Scotland, 3rd ed., pp. 358 and 421.

As to (2), where the superior who has imposed the restrictions (or his successor) does not appear in order to enforce it, the question arises, how far those who were not parties to the agreement can enforce its conditions. Adjoining proprietors who do not hold from a common author can, of course, have no title to insist, whether they

are bound in their charters by the same restrictions or not; nor is it sufficient that the adjoining feuars hold of the same superior and under the same restrictions. *Contra* Justice-Clerk Hope, Cockburn *v.* Wallace (4 S., 129; *alt.* 2 W. S., 293); Lord Ardmillan, Robertson *v.* North British Railway Company (1 R., 1213), overruled by Hislop *v.* M'Ritchie's Trustees, *infra*. It must appear from the title, either expressly or impliedly, that it was intended that each feuar should have a title to enforce the conditions against his co-feuars, and this mutuality and community of rights and obligations can only be established (1) by the superior making it an express condition of his feu contract that he will insert the same general restrictions in all feus granted by him in the same street or locality; or (2) by reasonable implication from a reference in all the feu contracts to a common plan or scheme of building prepared and adopted by the superior; or (3) by mutual agreement between the feuars themselves. Hislop *v.* M'Ritchie's Trustees, 23rd June 1881 (8 R., 95, H. L.).

The whole law on this question was reviewed and authoritatively settled by the House of Lords in Hislop's case. Lord Watson said: "(1) Where the superior feus out his land in separate lots for the erection of houses in streets or squares upon a uniform plan; or (2) Where the superior feus out a considerable area, with a view to its being sub-divided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him." In the first case, "the feuar, who stipulates with his superior that a particular restriction shall be imposed on all his fellow-feuars, as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him." In the second case, "the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars (8 R. H., 102, 103, 104)." See Rankine on the Law of Land-Ownership in Scotland, p. 415.

But it must be kept in view that both superior and co-feuar may be barred from objecting to an infringement of building restrictions, by such acquiescence as implies consent to the infringement, or by tacit abandonment of the restrictions. Cases, Rankine, p. 419 (66). Slight deviations permitted do not infer abandonment—Rankine, p. 419 (67); nor material ones made when the co-feuar had no interest to complain—Rankine, p. 419 (68) and p. 420 (74), etc. Acquiescence or abandonment by the superior does not affect the co-feuar, or *vice versa*.—Rankine, p. 419.

Jedge and warrant is an authority granted by the Dean of Guild to rebuild or repair a ruinous tenement within the burgh. This is usually sought by a person having a right to the property, or a portion of it, or by an adjudger or heritable creditor in possession presenting a petition to the Dean of Guild praying the judge to visit the premises, to grant warrant to build in conformity with a plan produced, "and to find and declare the act of rebuilding or repairing to be a real and preferable burden affecting the subjects, the accounts

thereof being cognosced to the Court after the building is completed. The Dean, on this petition, grants warrant to cite all parties interested, and thereafter summons a jury to visit, inspect, and report upon the subjects, upon whose verdict he grants or refuses a warrant for having the work performed. The vouchers of the cost are produced in Court, referred to tradesmen, and, on being approved of, the expenses are declared to form a real burden on the subjects, and entitling the petitioner to possess the subjects until the sum expended, with interest and expenses, etc., repaid to him."—Irons, pp. 200, 201. The extract of the final decree is the warrant for possession and intromission, as well as of the preference, the record of which in the Dean of Guild books is held legal notice of the burden. On repayment, the holder of the warrant must relinquish possession and discharge the burden. Gregory *v.* Burts, 19th July 1788.

When a tenement is ruinous, and has been allowed to remain uninhabited for the space of three years, or where a tenement has been burned and has not been rebuilt within the like period, application may be made to the Court to have the owners ordained to rebuild, in conformity with a plan and elevation produced, and to be approved of by the Dean. If the proprietors fail to rebuild within a year after the order, the houses are to be valued and to be put up for sale, and the price which they bring, after deducting expenses, is directed to be given to the proprietors. In Pollock *v.* Magistrates of Edinburgh, 16th February 1861 (23 D., 555), it was held (*aff.* judgment of Lord Ardmillan) that in the sale of a burnt tenement, under the Statute 1663, c. 6, the Magistrates and Town Council were entitled, before consignation, to deduct from the price the expenses incurred for their valuation and sale; that upon the balance of the price the arrears of feu-duty formed a preferable claim; and (*alt.* judgment of Lord Ardmillan) that, in the circumstances of this case, the expense of the purchaser's title, as well as his composition for entry, formed also a proper deduction from the price.

If no purchasers appear, the Magistrates may rebuild, the expenses of rebuilding being declared to be a real burden affecting the subjects, and warrant is usually granted to let or possess the subjects until fully indemnified. See Act 1663, c. 6; Bankton, bk. iv. tit. 20, sec. 2; Bell's Com. i. 750.—Irons, p. 201.

"In order, also, that the warrants of the Dean of Guild may be carried out in their integrity, he is entitled to stipulate that the petitioner shall grant bond of caution, with sufficient security acted in the books of Court, that the warrant will be fully and fairly implemented under a stipulated penalty, and extract may be superseded till this be done."—Irons, p. 202.

The decrees of the Dean of Guild Court may be enforced by poinding and other diligence. See the case of the Eglinton Chemical Company referred to *supra*; see also Lang *v.* Allan and Mann, 3rd February 1869 (7 M., 473). It was held that a petition to a Dean of Guild praying for the imposition of a fine for a Guild offence, with the alternative of imprisonment, was a proceeding of a criminal nature, and could not be advocated to the Court of Session, although

the defence involved a question of civil property, and although the judgment of the Dean of Guild was *ultra petita*, in so far as it ordained the respondent to remove a fence.

The Court refused to remit to the Court of Justiciary a note of advocation of proceedings of a criminal nature, erroneously presented to the Court of Session.

202. Dean of Guild Court may be Established.—In burghs having no Dean of Guild Court, at the commencement of this Act, it shall be lawful for the Commissioners to establish a Dean of Guild Court, by resolution passed at a meeting specially called for the purpose, and it shall also be lawful for the Commissioners of any burgh having an existing Dean of Guild Court to resolve to discontinue the same as constituted at the commencement of this Act, and to pass a resolution at a meeting specially called for the purpose, establishing a new Court, in terms of the immediately succeeding section of this Act: Provided always, that nothing herein contained shall alter, prejudice, or affect the existing constitution, rights, or privileges of any Dean of Guild Court existing at the commencement of this Act, the members, lyners, or assessors whereof are not, under the existing constitution, wholly appointed by the Town Council of the burgh.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners." The Act commences on 15th May 1893. This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

See observations on preceding section. The Dean of Guild Court to be established under this clause will have the same jurisdiction as a Dean of Guild Court in a royal burgh, and also the jurisdiction for carrying out the provisions of the Act, in so far as they apply to new buildings or alterations of existing buildings, ventilation, and precautions during the construction, alteration, or repair of buildings and streets, and to old and ruinous tenements, and to the setting up of hoardings. See sec. 201.

In burghs having an existing Dean of Guild Court, it may be resolved to discontinue it, but there does not seem to be any good reason for doing this.

In this section, the existing constitution, rights, or privileges of any Dean of Guild Court, existing at the commencement of this Act, is only saved, the members, lyners, or assessors whereof are not, under the existing constitution, wholly appointed by the Town Council of the burgh. This proviso is not in entire accord with the proviso in last section, but probably the latter is broad enough to cover most contingencies.

203. Dean of Guild Court, how Constituted.—The Dean of Guild Court, so established, shall consist of the Dean of Guild, or of the Provost of any burgh not having a Dean of Guild, and not less than two of the Commissioners, who may also be Magistrates, and who shall be elected annually: Provided always, that it shall not be lawful for any member of the Dean of Guild Court to sit as a member of the said Court, when any matter in which he is personally interested is under consideration.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

The constitution here provided for will only affect Courts constituted under this Act. The last proviso is most important and necessary. What construction may be put on the words, "any matter in which he is personally interested," may be inferred from the observations and cases cited under sec. 71. See p. 121; the provision will, in all probability, be liberally interpreted as against a member sitting in the Court.

204. Commissioners may appoint Master of Works, who may also be the Surveyor of Burgh.—The Commissioners may appoint a Master of Works in connexion with the Dean of Guild Court, who may also be the Surveyor of the burgh, at such salary as they shall deem proper, whose duty it shall be to report to the said Court upon all plans lodged with petitions to the Dean of Guild Court, and to see that the orders made by the said Court are duly carried into execution, and from time to time to inspect the works in progress in execution of plans for which warrant has been given by the said Court, and to report to the prosecutor in the said Court any deviation therefrom, and also to perform any other duties which he may be required to perform by the Commissioners; and such Master of Works or Surveyor shall not be connected directly or indirectly with or interested in any contract or works belonging to any branch of the building trade, nor give any assistance or receive any fees in connexion with plans to be submitted to the Court.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

See sec. 73 as to appointment of Surveyor. If the Surveyor be appointed Master of Works, this section assumes that he will be paid a separate salary for the latter office. He must not be "connected directly or indirectly with or interested in any contract or works belonging to any branch of the building trade, nor give any assistance or receive any fees in connexion with plans to be submitted to the Court."

In Lang *v.* Bruce, 5th Feb. 1873 (11 M., 377), by the Glasgow Police Act, 1866, sec. 384, the Master of Works may, by notice, require any proprietor of lands and heritages to fence the same, and a form of notice is provided to which the proprietors may lodge objections, to be disposed of by the Dean of Guild or Magistrate. Upon failure to comply with the notice, or with the order of the Dean of Guild or Magistrate, the procurator-fiscal in the Dean of Guild Court may, by sec. 325, enforce the same by applying to the Dean of Guild for a warrant to execute the work therein specified; . . . and the Dean of Guild may grant a warrant to execute such work, and shall thereafter ascertain and fix the cost thereof, and decern against the proprietor or proprietors to whom notice was given for the proportion of such cost due by them. *Held*, in an application requiring the owner of a mill-lade to fence it, (1) that it was irrelevant to allege as a defence that the mill-lade ran alongside of a public road, the trustees vested with which were bound and had been in use to fence it; and (2) that, after the failure of the defenders to comply with the notice, the Dean of Guild had erred in ordaining the proprietor to fence the mill-lade, and that a warrant ought to have been granted to the Master of Works to fence the mill-lade, after which the Dean of Guild should fix and decern for the cost thereof.

205. Clerk and Prosecutor of Guild Court.—In any Dean of Guild Court, to be established after the commencement of this Act, the Clerk to the Commissioners shall be the Clerk of the Dean of Guild Court, and the Burgh Prosecutor shall be the prosecutor in the Dean of Guild Court.

See sub-head (8), sec. 4, for definition of "Clerk," (4) "burgh." This section does not apply to the railway or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. This section only applies to a Dean of Guild Court established after the commencement of this Act. See sec. 61 as to the Clerk to the Commissioners. See sec. 461 as to the Burgh Prosecutor.

206. Courts to be held.—Dean of Guild Courts shall be held from time to time, and as often as may be necessary, in some convenient place in the burgh.

See sub-head (4), sec. 4, for definition of "burgh." This section does not apply to the railways or stations of any railway company or

buildings connected therewith other than dwelling-houses. See sec. 517. The Court should be held at seasonable hours, in a public place, and open to the public.

207. Guild Court to fix Fees and Charges.—The Dean of Guild Court shall have power from time to time to fix such fees as they may consider sufficient, according to a scale subject to approval by the Auditor of the Court of Session, and they may apply such fees and charges in or towards payment of the salaries of the Prosecutor in the Dean of Guild Court, Clerk of Dean of Guild Court, Master of Works, or Surveyor, or other officers; and any balance of such fees, and of the fines imposed by the said Court, shall annually be paid to the credit of the burgh general assessment, and an account of such fees and fines shall be made annually to the Commissioners; and in the event of the amount of fees and fines recovered in any year being insufficient to meet the expenses of the year, such deficiency shall be made good out of the burgh general assessment.

See sub-head (8), sec. 4, for definition of "Clerk;" sec. 340, as to "burgh general assessment." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517. It will be well to have a table of fees fixed and the scale approved of by the Auditor of the Court of Session at present; the fees in most Courts are regulated by the Act of Sederunt.

208. Service of Petitions, etc.—Any copy of a petition, or any notice to be served upon any owner of lands and premises, or other person whom it is necessary to proceed against or make a party to proceedings before the Dean of Guild Court, may be lawfully and effectually served in the manner hereinafter provided with regard to the service of any notice by the Commissioners.

See secs. 336 to 338 inclusive as to "notice;" sec. 4, sub-head (16) "lands and premises," (9) "Commissioners." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

209. Rules and Regulations for Building.—Every proceeding before the Dean of Guild Court shall be subject to the following rules and regulations:—

It shall commence by an application in writing or in print, or partly in writing and partly in print; and, except where

otherwise specially directed, the subsequent steps may be in writing or *vivâ voce*, as shall be ordered by the Court.

In all other respects the proceedings before the Dean of Guild Court shall be such as apply to the proceedings before the Dean of Guild Court in royal burghs in Scotland; and the judgments of the Court shall be subject to review, as the judgments of such Dean of Guild are subject to review.

See sub-head (4), sec. 4, for definition of "burgh." This section does not apply to the railways or stations of any railway company or buildings connected therewith other than dwelling-houses. See sec. 517.

The proceedings before the Dean of Guild Courts in royal burghs are regulated by the Acts of Sederunt, dated respectively 12th Nov. 1825 (Part III.), 9th Mar. 1826, 6th Mar. 1829, 8th July 1831, 13th Feb. 1845, 10th Mar. 1849, and 15th Feb. 1851. They will be found in Alexander's Abridgments of the Acts of Sederunt and Supplements thereto.

In Dunlop *v.* Dean, 12th Nov. 1824 (3 S., 268 N. E., 188), it was held that the Dean of Guild ought himself to pronounce judgment, his Council being only Assessors.

The judgments of the Dean of Guild are subject to review in the mode provided by the Court of Session Act, 1868. This is done either by writing an appeal on the end of the interlocutor sheet containing the judgment appealed against, or by a separate note of appeal lodged with the Clerk of Court. The note of appeal is in the following terms, or as near thereto as may be: "The petitioner (or respondent, or other party) appeals to the Division of the Court of Session." The note must specify the Division, be signed by the appellant or his agent, and bear the date on which it is signed. Sec. 66.

The Clerk of Court, within two days after the appeal is marked, must notify the appeal to the respondent or his agent, and transmit the process to one of the Principal Clerks of the Division of the Court of Session to which the appeal is taken. Sec. 71.

The appellant, during session, within fourteen days after the process has been received by the Clerk of Court, must print and box the note of appeal, record, interlocutors, and proof, if any, unless, within eight days after the process has been received by the Clerk, he shall have obtained an interlocutor of the Court, dispensing with printing in whole or in part; and in vacation the same procedure must take place, except that, as the prints cannot be boxed till the box-day, a print is deposited with the Clerk, and the prints boxed thereafter.

The note of appeal appears in the Single Bills of the Division of the Court to which the appeal is taken, and, unless technical objection is there stated, is generally sent to the Summar Roll.

The appeal must be taken within twenty days after the inter-

locutor appealed against; but if the judgment be not extracted, it may be appealed against at any time within six months.

In Lawrie *v.* Jackson, 15th July 1891 (18 R., 1154), it was held that an interlocutor by a Dean of Guild, refusing to sist as respondent a person who alleges a material interest, to appear in a petition for authority to take down and re-build a house, is a final interlocutor *quoad* that person, and therefore appealable.

In this case, Jackson, the appellant, put in a minute in which he craved leave to be sisted "as a party to the process, he not having been called as a party, although he is the proprietor of one-half of the double villa immediately adjoining on the south the ground on which the petitioner proposes to erect said tenements." The minute was lodged before the closing of the record. The Dean refused to sist Jackson, who appealed; and the Court recalled the interlocutor of a Dean of Guild refusing to sist as respondent, to a petition for authority to erect new buildings a proprietor, whose property did not immediately adjoin that on which it was proposed to erect the new buildings. Lawrie *v.* Jackson, 15th July 1891 (18 R., 1154).

The Dean of Guild, acting under secs. 150 and 160 of the Edinburgh Municipal and Police Act, 1879, refused to approve plans of new houses about to be erected, because the plans did not provide sufficiently for ventilation, in respect that the w.-c.'s were not shown thereon next to the outer wall. *Held—dub.* Lord Young—that the deliverance was within the powers conferred by the Act, and that cause for disturbing it had not been shown. Mitchell *v.* Gowans, 18th Mar. 1885 (12 R., 844; 22 S. L. R., 556).

A company presented a petition to the Dean of Guild Court of the Burgh of Irvine, asking for warrant to re-erect a cart-shed, which had been blown down, on a piece of ground about an acre in extent, belonging to them, situated within the burgh and a few feet from a public street. Plans were lodged with the petition. This petition was dismissed by the Dean of Guild, as no one appeared before his Court in support of it. The company, nevertheless, proceeded to erect the cart-shed. Thereupon the procurator-fiscal to the Dean of Guild Court presented a petition to that Court, charging the company with having contravened the bye-laws framed in virtue of the powers contained in the Irvine Burgh Act, 1881, by erecting the cart-shed without plans having been previously approved of by the Dean of Guild Court, and without having obtained the Dean of Guild's sanction. The Dean of Guild convicted the company of the contravention charged, and fined them £5. This fine not being paid by the company, the respondent poinded certain of their effects. The company then brought an action of suspension and interdict, to suspend the proceedings and interdict a sale. *Held*, that the company, by their actings, were barred from objecting to the jurisdiction of the Dean of Guild; and, apart from acquiescence, they had no right to erect the cart-shed without first having obtained the warrrant of the Dean of Guild Court. Eglinton Chemical Co., Ltd., *v.* M'Jannet, 30th Oct. 1890 (18 R., 34; 28 S. L. R., 41).

The Dean of Guild Court may resolve, with reference to proceedings therein, what particulars will be required, and give notice thereof by advertisement or otherwise. The Court may also make bye-laws and regulations for carrying such regulations into force, but cannot by any such general resolutions or regulations decide upon the merits of any particular case without hearing and considering the special merits thereof.—See Ersk. bk. i. tit. 4, sec. 22; Regina *v.* the Walsall Justices (3 C., L. R., 100; 24 L. T. 111); Regina *v.* Silveston and Others, 20th June 1873 (31 L. J., M. C., N. S., 93); Macbeth *v.* Ashley, 20th June 1873 (11 M., 708; 17th April 1874, 1 R., H. L., 14). These bye-laws or regulations do not seem to require either to be submitted to the Court of Session, under sec. 39 of the Judicature Act (6 Geo. IV. c. 120), or to get the approval of the Sheriff, the Board of Supervision, or the Secretary of Scotland, under sec. 316 of the Act.

The Lord Advocate (now Lord Watson) and Mr. (now Sheriff) Harper gave an opinion to the following effect, that under the Act of 1862 the Magistrates were entitled to frame regulations and enforce them:—

"We are of opinion that the Magistrates of Police in their Dean of Guild character, under the 408th clause of the Act, are entitled to frame regulations for the conduct and despatch of business in the Dean of Guild Court, so far as not already provided for in the Acts of Sederunt, 12th Nov. 1825, 9th Mar. 1826, 13th Feb. 1845, and 10th Mar. 1849. . . . The Magistrates, in their Dean of Guild character, would be entitled to require observance of any regulations competently enacted by them; and, in the case of any person proceeding with operations, without having complied with such regulations, to interdict such person at the instance of the Procurator-Fiscal. We do not think that the Dean of Guild can competently frame a table of fees without the sanction of the Court of Session."

Surveys and Plans.

210. Commissioners to procure a Map of the Burgh, which is to be open to Inspection.—The Commissioners shall procure, as hereinafter provided, a survey and map or maps, of the burgh, on a scale of not less than 25 inches to a mile, and shall cause to be marked thereon the course of all the existing sewers and drains belonging to them or under their care or management, and, as far as can be ascertained, the lines of pipes or conduits for the collection and distribution of water, the course of the pipes for the distribution of gas, and such other works, with such other particulars as may be necessary in order to show the underground works within the burgh, and shall cause the said

map or maps to be from time to time corrected, and such additions to be made thereto as may show the sewers and drains for the time being belonging to the Commissioners, and such other pipes and underground works as aforesaid; and such map or maps, or a copy thereof, with the date expressed thereon of the last time when it was so corrected, shall be kept in the office of the Clerk of the Commissioners, and shall be open at all reasonable hours to the inspection of the owners or occupiers of any lands or premises within the burgh.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners," (22) "owner," (21) "occupier," (16) "lands and premises." For the definition of "sewer" and "drain," and the distinction between the two, see under sec. 215.

This section is imperative in its terms—"The Commissioners *shall*." The minimum scale is reduced to 25 inches; in the 1862 Act it was 60 inches. The map here referred to will form the basis for adjusting the levels of new streets, sewers, etc. See secs. 146–148, etc.

211. Board of Agriculture to furnish Maps, or cause Surveys to be made.—The Board of Agriculture shall, on the application of the Commissioners, and at their expense, furnish, for the use of the Commissioners, one or more copies of any map of the burgh, or any part thereof, which shall have been made by the Ordnance Survey Department, or shall cause a survey to be made of the burgh on a scale of not less than 25 inches to the mile, by the said Ordnance Survey Department, for such remuneration as shall previously be agreed upon between the said Board and the Commissioners of the burgh.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh."

The statutory provisions as to the survey will be found in the Survey Act, 1841, 4 & 5 Vict. c. 30. By the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30, the charge of the Survey Department was transferred from the Commissioners of H.M. Works to the Board of Agriculture then constituted.

212. Level Lines to be marked on Map, and Bench Marks to be made for denoting the same.—The Commissioners shall cause to be marked on the map so procured by them, a series of marks and figures at convenient

distances on the said map, denoting the height of the ground at every such mark above or below the level of a particular spot within the burgh, which may easily be found and identified, the position of which spot shall be described on the map; and shall also cause to be drawn, wherever practicable, lines of equal altitude at every 4 feet of elevation, or at such other intervals as may appear, upon due inquiry, to be the best adapted for the guidance of works of sewage and drainage, for the collection and distribution of water, and for other purposes within the burgh, for which a knowledge of the levels of the burgh may be necessary, and shall also cause proper bench marks for denoting the levels to be inscribed and marked at convenient distances and places, at the corner of streets, public or private, on posts, houses, or other prominent objects within the burgh.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (31) "street," (28) "private street," (13) "house."

A "bench mark" is "a surveyor's mark, cut in some durable material, as a rock, wall, gate-pillar, face of a building, etc., to indicate the starting, closing, or any suitable intermediate point in a line of levels for the determination of altitudes over the face of a country. It consists of a series of wedge-shaped incisures, in form of the 'broad-arrow,' with a horizontal bar through its apex, thus  When the spot is below sea-level, as in mining surveys, the mark is inverted. [The horizontal bar is the essential part, the broad-arrow being added (originally by the Ordnance Survey) as an identification. In taking a reading, an angle-iron  is held with its upper extremity inserted in the horizontal bar, so as to form a temporary bracket or *bench* for the support of the levelling-staff, which can thus be placed on absolutely the same base on any subsequent occasion. Hence the name."]—Dr. Murray's New English Dictionary.

213. Commissioners may cause Maps to be Engraved, etc.—The Commissioners may cause every such map to be copied, engraved, or printed, and coloured, in such manner as appears to them most convenient, and may defray the costs of any such surveys and maps out of the burgh general assessment.

See sub-head (9), sec. 4, for definition of "Commissioners;" sec. 340, "burgh general assessment."

Besides the ordinary survey sheets in black and white, Ordnance Survey sheets may be had in which the buildings are distinguished by being coloured red. The cost of these, however, is in some cases

considerable, and proposals are at present under consideration for supplying sheets equally serviceable at a less cost.

214. Commissioners to cause Plans to be prepared of New Works or Alterations of Existing Works.—The Commissioners shall cause their Surveyor to prepare plans of any new works, and additions to or alterations of existing works, that may be required for the effectual drainage of lands or premises within the burgh, including provision for properly trapped drains or channels for the removal of all waste water and refuse from such lands or premises, and from the surface of the streets, and also to draw on such plans the lines that appear to him most advantageous for main sewers, and the best outfalls for clearing the whole burgh of surface moisture, and effecting the drainage of the subsoil, and to point out the most approximate means and sites for the collection and sale of filth and refuse for agricultural or other purposes, and also to set forth any other matters which may assist the Commissioners in carrying into execution, in an economical and effective manner, the several works required to be carried into execution under the provisions of this Act, or which appear to be necessary for the health and convenience of the inhabitants of the burgh.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands and premises," (4) "burgh," (31) "street."

The "refuse" for the removal of which drains or channels are to be provided must evidently be fluid refuse, or solid refuse held in suspension in water. The Surveyor is "to point out the most approximate (*sic*) means and sites for the collection and sale of filth and refuse for agricultural or other purposes." See secs. 108 and 219. The word "approximate" here is evidently a mistake for "appropriate," the word used in the 1862 Act. Properly to carry out the provisions of this section will involve the preparation of specifications as well as plans. It will be observed that the last words of the section, "necessary for the health and *convenience* of the inhabitants," are extremely wide in their signification.

PUBLIC SEWERS.

215. Sewers, etc., vested in Commissioners.—All sewers and drains within the burgh, whether existing at the time when this Act comes into force, or made at any time thereafter (except private branch drains, drains made and

used for the purpose of draining, preserving, or improving land, and sewers made under any Local or Private Act of Parliament), shall vest in and belong to and be entirely under the management and control of the Commissioners.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (17) "Local Police Act."

The words "sewer" and "drain" are not defined in this Act, nor in the Public Health (Scotland) Act, 1867. In the English Public Health Act, 1875, 38 & 39 Vict. c. 55, sec. 4, they are thus defined:—

"'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed."

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies, and except drains vested in or under the control of any Authority having the management of roads, and not being a Local Authority under this Act."—Glen, p. 5.

Although the above distinction between "sewer" and "drain" is not strictly followed in this Act, it is in a general way observed; and in Scotland, as in England, a sewer is understood to be a channel or passage constructed or used for the conveyance of waste and feculent fluids, and with which house drains are or may be connected. There have been several English decisions bearing on the distinction between sewers and drains, which will be found referred to in Glen, p. 22.

All the sewers and drains within the burgh, with the exceptions specified, are to "vest in and belong to" the Commissioners. The meaning of the words "vest in," when applied to sewers, is explained as follows:—

"Jessel, M. R., said (in Taylor *v.* Oldham, L. R., 4 Ch. D., 411; 46 L. J., Ch., 105; 35 L. T., N. S., 700; 25 W. R., 303): It was found under the old law, and it was sometimes held, that the Sewer Authorities had only an easement (see Thornton *v.* Mutter, 31 J. P., 419), and it was found to be very inconvenient, and consequently, therefore, in the modern Acts, the property in the sewers has been vested in the Sewer Authorities; that is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement, or right of sewerage or drainage, the absolute property in the sewer (which means not merely the brick tunnel, or whatever it may be made of, forming the sewer, but the whole interior of the sewer—that is, the whole of the soil included in it, and, if I may say so, the barrel of the sewer) is now vested in the Sewage Authorities; and if the sewer is a large one, it amounts in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation.

"This 'vesting' is, however, similar to the vesting of streets by sec. 149, and only gives the Local Authority a modified and limited ownership in the soil. They are not altogether in the same position as a landowner through whose land a sewer runs. And they cannot stop it up, and thereby cause a nuisance to the inhabitants. Attorney-General *v.* Guardians of Dorking Union (L. R., 20 Ch. D., 595; 51 L. J., Ch., 590; 46 L. T., N. S., 573; 30 W. R., 579). James, L. J., in deciding a case relating to the vesting of streets, said: 'It appears to me that it would be a very strong thing indeed to say that because the sewer, the cylinder of iron or brickwork, which is put in the ground for the passage of the sewage, with the enclosed space, is vested in the Public Body, then, if the system of sewage is entirely diverted and a new sewer made, and the materials taken up, and the earthwork filled in, there would still be vested in the Public Body a right of freehold, a right of estate in perpetuity in that portion of the earth, wherever you could ascertain it, which had been at some time or other occupied by the sewer, although every trace of sewer had been obliterated and the space filled up. That would be a very unreasonable interpretation.' Rolls *v.* Vestry of St. George the Martyr, Southwark (L. R., 14 Ch. D., 797; 49 L. J., Ch., 691; 43 L. T., N. S., 140; 28 W. R., 867; 44 J. P., 680).

"The fact that a watercourse, which is the natural drain of a district, is to some extent polluted by sewage, does not entitle the Local Authority, by virtue of their control over sewers, to treat it as a sewer, and connect other drains with it, so as to deprive the proprietors of the adjoining lands of their right to enjoy the use of the comparatively pure water to which they have been accustomed, or so as to create a nuisance. Attorney-General *v.* Hackney Local Board (L. R., 20 Eq., 626; 44 L. J., Ch., 545; 33 L. T., N. S., 244)."—Glen, p. 36.

The principles applicable to the ownership of sewers are also illustrated in the case of a mill-lade in Dicksons & Laing *v.* Burgh of Hawick, etc., 6th November 1885 (13 R., 163), whereby contract of excambion, dated in 1833 (at which date glebes were inalienable except by excambion), the minister of Wilton, with consent of the presbytery, on his part, dispones to Messrs. Dicksons & Laing, *inter alia*, (1) certain parts of the Wilton glebe; and (2) "all and whole that portion of ground, part of the glebe lands of Wilton, occupied by the lately formed mill-lade or dam-course of Wilton Mill, extending from the parts or portions of ground above disponed along the east side of the said glebe to where the said mill-lade or dam-course joins the water of Teviot, which mill-lade or dam-course is 13½ feet in breadth over the said walls throughout the whole length thereof." The deed contained a procuratory of resignation and precept of seisin applicable to the subjects so disponed.

The deed further contained this clause: "And further, the said Dicksons & Laing do hereby become bound to maintain and uphold the arch over the said lately formed mill-lade or dam-course, the surface of which is to be possessed and enjoyed by the said minister and his successors in office, declaring, as it is hereby provided and

declared, that the said Dicksons & Laing shall have access to the said mill-lade or dam-course, or any part thereof, and full power, liberty, and privilege to open up any part thereof at all times necessary for the purpose of cleaning out and repairing the same, and for all other neccessary purposes whatever."

Held, in an action by the disponees against a single successor of the minister, to whom the remainder of the glebe had been feued by authority of the Court of Teinds, under burden of Dicksons & Laing's right, (1) that the contract of excambion conferred on Dicksons & Laing no right of property in the surface of the ground above the mill-lade, but a right of property in the mill-lade itself and the archway in which it ran, with a right of access thereto; and (2) that the right of the minister and his successors in office in the surface of the ground above the lade was a right of property transmissible to singular successors.

For further observations on the meaning of the words "vest in," see under sec. 128 as to vesting of streets.

Questions may arise as to what is a private drain.

In Barony Parochial Board *v.* Cadder Parochial Board, 26th Jan. 1883 (10 R., 510), a Parochial Board, acting as the Local Authority under the Public Health (Scotland) Act, 1867, having petitioned the Sheriff to have a person, on whose ground a nuisance existed, ordained to remove it, were themselves ordained by the Sheriff to execute the necessary works, the Sheriff being of opinion that the "author of the nuisance," in the sense of the Act, had not been discovered. The nuisance complained of consisted of an open ditch into which the sewage of a village was allowed to flow, and the works executed by order of the Sheriff consisted merely in enclosing the flow of water in a pipe, and in making two cesspools. After the works had been executed, the Parochial Board brought an action against the owner of the ground in which the cesspools and pipes had been put, to recover the cost of making these works. The Court assoilzied the defender, being of opinion that, while the Sheriff had erred in not treating him as the author of the nuisance in the sense of the Act, he nevertheless ought to have had an opportunity of removing the nuisance. The cost of the works was, in consequence, paid by the Board out of the public rates.

In 1879, an inferior heritor on the stream into which the pipe discharged its contents brought an action against the Parochial Board, concluding to have them interdicted from discharging or permitting to flow into the stream any sewage or drainage, whereby it became unfitted for the primary purposes. The Parochial Board defended, on the ground that they were not responsible for the discharge of sewage. There was no evidence that the Parochial Board had done anything to facilitate the introduction of sewage into the ditch, or into the pipe and cesspools which had replaced the ditch, but the pipe and cesspools were large enough to meet the requirements of some increase in the population. It was proved that, by use of cesspools, the sewage matter tended to putrefy, and consequently to become more deleterious to those living near to it. But there was

no evidence that the operations of the Parochial Board had in any other way increased the nuisance to the inferior heritor, or that they had done anything else beyond remedying a public nuisance within their parish.

Held, by a majority of seven judges—*diss.* Lord Justice-Clerk and Lord Craighill, and *rev.* judgment of Lord Adam—that, as the drain complained of was not the property of the defenders, and formed no part of a system of drainage under their control, and as they had not caused or contributed to cause the nuisance, they were entitled to be assoilzied.

Lord Young, in whose opinion the grounds upon which the majority of the judges based their judgment are fully stated, said: "In the present action the pursuers complain of nuisance and injury occasioned to them by public drains, alleged to be vested in and under the control of two Public Authorities, viz. that of the Burgh of Kirkintilloch and that of the Parish of Cadder. The former have admitted that the drains for which they are sought to be made responsible are public, and so vested in them and under their control. They have, in short, admitted their responsibility, and come to terms with the pursuers, so as to be out of the case. The latter (that of the Parish of Cadder) deny that there are any public drains in the parish, and particularly—and that is sufficient for their defence here—that the drain referred to in the evidence and argument—for the averments on record are quite general—as issuing into and polluting the Bathlin Burn, to the injury of the pursuers, is a public drain vested in them and subject to their control under the Act. They do so by their denial of the pursuers' averments in Art. 11 of their condescendence, and whether the averments or the denial be according to the truth is the leading question in the case. I say the leading question, because there is a subsidiary question depending on the effect of certain proceedings taken by them (the Local Authority of Cadder), under the Public Health Act, to abate a nuisance injurious to health within their parish, and certain operations on the drain referred to, ordered and executed in consequence of these proceedings, which the pursuers rely upon as raising a responsibility which would not otherwise have existed.

On the leading question the undoubted fact is that there are no public drains in the Parish of Cadder, and so none vested in the Public Authority,—I would add none subject to their control, with the qualification that they are charged with the duty of seeing that no private drain, or indeed anything else in the parish, is in a state injurious to health, and of taking proceedings to have it made innocuous if it be. They are, in short, in the same position with reference to the drains in their parish as any other Parochial Board with reference to the private drains of the parish, there being no public drainage for the whole or any part of it. Whether, looking to the circumstance that there exists in the parish a large and rapidly growing village for which a system of drainage under public control might be desirable, they are chargeable with a failure of duty in neglecting to provide it, I cannot say, having in this case no juris-

diction to determine that question. In point of fact they have not provided it. It is not suggested, and plainly it is not the fact, that there was a single public drain in the parish when the Public Health Act came into operation, or that the Local Authority has acquired one under the Act. The particular drain of which the pursuers complain is unqestionably private, with a private owner responsible therefor. This, indeed, is not disputed. Mr. John Lang is the owner of the land in which it exists, and he must be held to be the owner of the drain, and responsible for its condition and discharge, unless something has occurred to divest him of the ownership, or transfer the responsibility. But nothing of the kind is alleged, unless, indeed, the proceedings of the Local Authority, under secs. 21 and 22 of the Act, may have that effect. These proceedings were commenced in 1873, and had for their object the abatement of a local nuisance, occasioned by the then existing state of the drain. . . . The suggestion that he was thereby deprived of his drain, or of any proprietary right he had before, is, I think, quite extravagant, and equally so the counterpart suggestion that the Local Authority thereby acquired the drain or any proprietary right theretofore belonging to another (10 R., 531). See *per contra*, Lord Craighill's opinion in same case.

In Kirk's Trustees *v.* Magistrates of Leith, 9th Dec. 1880 (not reported, see Appendix), the Lord Ordinary (Lord Adam) found that the sewers and drains interfered with by the defenders were not within the private property of the pursuers, and that the said sewers and drains vested in the defenders in terms of sec. 182 of the General Police and Improvement Scotland Act, 1862, and therefore assoilzied the defenders from the conclusions of the action, whereby the pursuers sought to have it found and declared that the said sewers and drains were within their private property and did not vest in the defenders, and further assoilzied the defenders from the whole subsequent conclusions of the action, and decerned.

In his note Lord Adam said: "With reference to the pursuers' fifth plea in law, it appears to the Lord Ordinary that the sewers and drains interfered with by the defenders were in a street or streets not within the private property of the pursuers, and therefore, that they vested in the defenders. The plea, therefore, must be repelled: It was alleged by the pursuers that the sewer constructed by the defenders was carried through a part of their private property at the end of Union Street, and that they were entitled to compensation therefor; but no question of that kind is raised in this record."

In Jameson *v.* Police Commissioners of Dundee, 10th Dec. 1884 (12 R., 300), where the lands of two burgh proprietors were separated by a stream which, for the prescriptive period, had been used as a public sewer—*Held*, that it was necessary for the proprietors, in order to establish a right to the *alveus* of the stream, in a question with the burgh, to show an express grant to the *alveus*, or some possession of the stream from which a grant was to be inferred, and that possession

sion of the adjoining lands, merely upon mediate titles which included the *alveus*, was not sufficient.

Anciently, the property on the south side of the Seagate, a street of the royal Burgh of Dundee, was bounded on the south by the sea flood, in fact and on title. The Mause Burn, a small natural stream, ran into the sea or tidal water of the Tay at the Seagate, and divided the subjects belonging to A., lying on the south side of the Seagate, from those belonging to B. There was, however, no mention of the Mause Burn in their titles. No immediate grant from the Magistrates was in existence, and the earliest mediate title produced described each property as bounded by the other. Long prior to 1815 the Mause Burn had become practically a public sewer.

About 1815, under the Dundee Harbour Act, Dock Street was formed, in connection with new docks, parallel to the Seagate, and cutting off from the sea a considerable piece of foreshore, which became capable of reclamation, and was gradually reclaimed by the Seagate proprietors, without opposition either on the part of the Crown or the burgh. A. and B. shortly thereafter disponed their portion of the reclaimed ground facing Dock Street to the predecessors of C. and D. The ground so disponed to the predecessors of C. and D. was *de facto* separated by the extended course, more or less artificially straightened, of the Mause Burn through the reclaimed land. C.'s ground was described as bounded by D.'s on the east, and D.'s as bounded by the Mause Burn on the west. Warehouses were built on both C.'s and D.'s ground facing Dock Street, and separated merely by the *alveus* of the burn. In 1854, the Magistrates, as Police Commissioners of Dundee, erected a public urinal over the burn at the Dock Street end. In 1864, the burn was, by the Police Commissioners, enclosed in a built sewer. Neither C. nor D. nor their respective authors, nor A. and B., at any time, made any use of the *alveus* of the stream, or of the space gained by enclosing it.

In an action by C. and D. against the Police Commissioners for declarator of property in the site of the urinal, and for decree for its removal—*Held* (*dub.* Lord Rutherfurd-Clark), that C. and D., being unable to show an express grant by the town of the *alveus* of the stream between their properties, or between the original properties of A. and B., or to instruct possession by themselves or their authors, from which a grant could be inferred, had failed to establish their right.

Sec. 71 of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, enacts a similar provision to sec. 215 of this Act; so that the sewers in the burgh are the property of the Commissioner in two capacities, *qua* Commissioners under this Act, and *qua* Local Authority under the Public Health Act.

216. Power to Purchase, etc., certain Sewers.—The Commissioners may purchase the rights, privileges, powers, and authorities vested in any person for making sewers not hereby vested in the Commissioners, or contract

for the use of any such sewers, or purchase any such sewers, with or without the buildings, works, materials, and things belonging or appertaining thereto; and any person to whom any such rights, privileges, powers, authorities, sewers, buildings, works, materials, or things belong, may sell and dispose of the same to, or otherwise contract with, the Commissioners; and in case of any such sale the purchase-money shall be settled and applied to the same uses and purposes to which the property purchased may have been subject at the time of such sale, and the property purchased shall vest in and belong to the Commissioners, any law to the contrary notwithstanding: Provided always, that notwithstanding any such purchase, any person who previously thereto may have acquired perpetual right to use any sewer so purchased, shall be entitled to use the same, or any other sewer substituted in lieu thereof, in as ample a manner as he would have done if such purchase had not been made.

See sub-head (9), sec. 4, for definition of "Commissioners," (3) "building."

The power to purchase sewers given to Local Authorities by the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, sec. 72, is differently expressed:—"The Local Authority may, in terms of the Lands Clauses Acts, acquire the rights and powers vested in any person to make sewers, or to use any sewer, with or without the buildings and other things thereto pertaining: Provided that they shall make compensation for the right so acquired, and shall also make compensation to the proprietors and occupiers of any lands and heritages which may be damaged by reason of the exercise of the powers hereby conferred, in terms of the said last-mentioned Acts."

The Public Health Act thus gives power to put in force the clauses of the Lands Clauses Acts in acquiring sewers. No such power is given under the present Act, so that, if the Commissioners fail to agree with the owner of any sewer for the purchase thereof under this section, they might proceed under the Public Health Act. And it may be useful to keep in view that, for the purposes of the Public Health Act, the word "land" in the Lands Clauses Acts shall include "water" and the rights thereto. See sec. 89 (1) of 30 & 31 Vict. c. 101.

It will be observed that it is only *the perpetual right* to the use of a sewer that is saved in the proviso at the end of this section; nothing is said of more limited rights.

217. Private Sewers or Watercourses, etc., not to be used without Consent.—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 water-course, 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.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands," (22) "owner," (21) "occupier."

The provisions of this section will not interfere with the right of the Commissioners, as Local Authority under the Public Health Acts, to enter into agreements for the supply of sewage in terms of sec. 74 of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, which provides:—"The Local Authority may from time to time, for the purpose of utilising sewage, agree with any person as to the supply of such sewage or the distribution thereof over land, and as to the works to be made for the purpose of such supply or distribution, and as to the parties to execute the same and to bear the costs thereof, and as to the sums of money, if any, to be paid for that supply: Provided that no contract shall be made for the supply of sewage for a period exceeding five years, unless with the authority of the Board, and not for any period exceeding twenty-five years; and the Local Authority may contract for, purchase, or take on lease any lands, buildings, engines, materials, or apparatus, for the purpose of receiving, storing, disinfecting, or distributing sewage."

In Houldsworth *v.* Burgh of Wishaw, 14th July 1887 (14 R., 920), the proprietor of an estate adjoining a town, part of which was built on land feued from him, constructed sewers so as to carry to his lands, for the purpose of irrigation, the sewage of that part of the town, and he made settling ponds and other works on his estate for that purpose. In 1868, the Commissioners of Police of the town, which had adopted the General Police Act of 1862, executed drainage works, in doing which they took advantage of the proprietor's system of drainage, with his knowledge connecting some of their drains with his sewers and settling ponds. Thereafter the town increased, and the quantity of sewage drained towards the proprietor's lands was thus greatly augmented. The sewage irrigation became

unsatisfactory, and was abandoned. In 1886, the proprietor, in consequence of the nuisance caused by the quantity of sewage sent upon his lands, raised an action against the Commissioners, concluding for declarator that the town was not entitled to send sewage upon the pursuer's lands, and for interdict. *Held*, (1) that no contract by which the proprietor was bound to receive the town sewage upon his lands could be implied from the actings of parties; and (2) that he could not, by having allowed the drainage system of the town to be made so as to join his own, without objection, be held to have acquiesced in their sending sewage upon his lands in time coming, and therefore that he was entitled to decree of declarator and interdict, as craved.

The Public Health Act also protects the rights of owners of irrigation and navigation works, sec. 25, providing:—

"Nothing in this Act contained shall enable any Local Authority or other person injuriously to affect—

"(1) The irrigation of lands in a rural district, or the supply of water used for such irrigation:

"(2) The supply of water required for the purposes of any water-works established by Act of Parliament, or of the compensation water required to be given by the owners of such water-works, unless the Local Authority shall have previously obtained the consent of such owners:

"(3) The navigation on or use of any river, canal, dock, harbour, lock, reservoir, or basin, in respect of which any persons are, by virtue of any Act of Parliament, entitled to take tolls or dues, or the supply of water to the same, or any bridges crossing the same, or any towing-path thereon:

"Provided always, that it shall not be lawful for the Local Authority to execute any works in, through, or under any wharves, quays, docks, harbours, locks, reservoirs, or basins, without the consent in writing in every case of the persons entitled, by virtue of any Act of Parliament, to take tolls or dues in respect thereof; and such persons may, at their own expense, and on substituting other sewers, drains, culverts, and pipes equally effectual, and certified as such by the Inspector to the Local Authority, take up, divert, or alter the level of any sewers and drains, culverts or pipes, constructed by any Local Authority, and passing under or interfering with such rivers, canals, docks, harbours, reservoirs, or basins, or the towing-paths thereof, and do all such matters and things as may be necessary for carrying into effect such taking up, diversion, or alteration."

In seeking an outlet for their sewage, the Commissioners must keep in view the restrictions imposed by the Rivers Pollution Prevention Act, 1876, 39 & 40 Vict. c. 75, which provides, *inter alia*:—

"Sec. 3. Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date

of the passing of this Act, for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act, if he shows to the satisfaction of the Court having cognisance of the case, that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream. Where the Local Government Board are satisfied, after local inquiry, that further time ought to be granted to any Sanitary Authority which, at the date of the passing of this Act, is discharging sewage matter into any stream, or permitting it to be so discharged, by any such channel as aforesaid, for the purpose of enabling such Authority to adopt the best practicable and available means for rendering harmless such sewage matter, the Local Government Board may by order declare that this section shall not, so far as regards the discharge of sewage matter by such channel, be in operation until the expiration of a period to be limited in the order. Any order made under this section may be from time to time renewed by the Local Government Board, subject to such conditions, if any, as they may see fit. A person other than a Sanitary Authority shall not be guilty of an offence under this section, in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any Sanitary Authority, provided he has the sanction of the Sanitary Authority for so doing."

In sec. 20 the word "stream" is thus defined:—

"'Stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette; save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act, by such order as aforesaid."

Sec. 21, which explains the modifications of the Act in regard to Scotland, provides—

"(1) The expression 'Sanitary Authority' shall mean and include the Local Authority in any parish or burgh in Scotland, acting under the Public Health (Scotland) Act, 1867:

"(4) This Act shall be read and construed as if for the expression 'the Local Government Board,' wherever it occurs therein, the expression 'the Secretary of State' were substituted; and the expression 'the Secretary of State' shall mean one of Her Majesty's Principal Secretaries of State."

By the Act 48 & 49 Vict. c 61, sec. 5 (1), the powers of the Secretary for State under the Rivers Pollution Act are transferred to the Secretary for Scotland.

In the case of Milne Home *v.* Police Commissioners of Dunse, 10th June 1882 (9 R., 924), the following interlocutor was pronounced:—"Find and declare that the pursuers have good and undoubted right to have the water of the stream which, after the

confluence of its several sources or upper tributaries near to the town of Dunse, flows eastward through the lands and farm of Crumstane and other lands belonging to William Hay, Esq. of Drummelzier, and thereafter enters and flows on through and *ex adverso* of certain parts of the lands and barony of Wedderburn lying in the county of Berwick, transmitted to and allowed to flow through and *ex adverso* of the said lands and barony of Wedderburn in a state fit for the primary uses and purposes of washing, bleaching, and the watering of cattle; and that the defenders have no right to pollute the said water, or to use it or the bed of the said stream, or of its sources or tributaries, in any way or for any purpose so as to render the said water unfit for any of the primary uses and purposes foresaid, where and so far as it flows through or *ex adverso* of the said lands and barony of Wedderburn: And in respect of the said report and the minute for the defenders, No. 268 of process, Find it unnecessary to dispose further of the conclusions of the summons, and dismiss the same, and decern: Find the pursuers entitled to expenses down to and including the 6th day of July 1880, and remit, etc. *Quoad ultra*, find no expenses due to or by either party."

In Caledonian Railway Company *v.* Baird & Co., 14th June 1876 (3 R., 839), a proprietor erected a village for the accommodation of the miners in his employment on the banks of a stream formerly suitable for primary uses. Drains were provided to carry off surface water and water from washing-houses through filtering beds into the stream, other arrangements being made by the proprietor for the removal of excreta and refuse from the miners' cottages, which, if attended to by the inhabitants, would have prevented such polluting matters from reaching the stream. In an action for interdict against the proprietor at the instance of an inferior heritor, who alleged that the water from the drains polluted the stream, the defender pleaded, (1) that the stream was the natural channel of the drainage of his lands, and (2) that there had been no pollution. *Held*, on consideration of a proof, that pollution of the stream by the drains had been proved, and that, unless the pollution was stopped, the pursuer would be entitled to have his rights protected by interdict against the defender.

Observed (*per* Lord Gifford), that if a landlord cannot erect a village without polluting a pure stream he must not erect it.

But in Burns *v.* Maitland, *Scotsman*, 19th Oct. 1892, Sir James Gibson Maitland, Bart., of Barnton, etc., sought to interdict Mrs. Isabella Burns and her husband Andrew Burns, potato merchant, West Norton, Ratho, from discharging, from their Lochend Cottages, sewage into the burn passing through his farm of Hallyards, Kirkliston, Midlothian. In the Outer House, Lord Kincairney found that the respondents, Mr. and Mrs. Burns, were proprietors of Lochend Cottages, which did not adjoin the burn, and were not bounded by it; that the respondents had laid a drain through land intervening between their houses and the burn from their houses to the burn, and had placed a cesspool in the course of the drain; that the drain had been laid for the purpose of carrying such water and sewage as

was thrown into the sinks at the cottages to the burn; that, in the ordinary and probable use of the sinks, polluting water might be passed through the drain to the burn; that the burn was already polluted so as to be unfit for domestic use, but that it was not proved to be unfit for the use of cattle and horses; and that the respondents were not entitled to increase the impurity of the burn. He therefore interdicted the respondents, as craved. The respondents reclaimed, and the Second Division recalled the Lord Ordinary's interlocutor and refused interdict, on the ground that it was not proved that the respondents had polluted the stream, or that there was any reasonable apprehension that they would pollute it in the future.

Lord Young said: "The complainers' pleas in law are, not only in my opinion, but in the opinion of the Lord Ordinary, unfounded in fact, for the Lord Ordinary states more than once that it was distinctly proved that the water was not polluted, and had not been polluted since the month of January, when the cesspool was put in. But the Lord Ordinary thought that, as it was not certain upon the evidence that pollution might not arise hereafter, interdict ought to be granted. I cannot assent to that. It is a proposition of a very dangerous character, and without either reason or authority to support it, in a case of that sort. A work might be of such a character as that, if allowed to proceed, it might occasion a nuisance. But this is a petty case about the dwellers in those cottages sending the washings of their clothes and their floors through a pipe into the burn; and that the anticipation that people of dirty habits might send down something nastier hereafter should justify interdict, was a proposition to which he could give no countenance at all. I should like to say for myself, that with respect to the ordinary discharges from human dwellings, I am not of opinion that they are in the same position as the discharges from manufactories. I am quite of opinion that the dwellers in houses or cottages, on the banks or in the neighbourhood of a burn, are bound to have due regard for the interests of their neighbours, and not send into the burn matter from their houses which, in the ordinary course of human life, could be avoided. But to say that the residents in cottages on the banks of streams, where there was no artificial water-supply, causing a nuisance which, in the ordinary course of life, would not be produced, were to be interdicted from putting the ordinary discharges from their cottages where they would get into the burn, is a proposition to which I cannot give my assent. Suppose the ground between the cottages and the burn had been 6 instead of 300 yards, and had been laid with concrete; the water was thrown out, and it ran over the concrete and into the burn, and if there was a gutter made to facilitate the flow it would run into it. To deny the right of that would be to deny the right of having human habitations on the banks of a stream, or so near it that water would run into it. They might throw it on the adjacent ground. Why? because it was a necessity of human life. It must find its way from the house somewhere, and it would find its way by the natural slope

of the ground into the burn, and if the proprietor made a gutter to make it run down, I can see no manner of objection to that. The operation of any law to the contrary, and the application of it by the Courts in interdict processes, would have prevented the rise and growth of every town and village in Scotland and England too. I do not think it is reasonable to agree, and I cannot agree, with any observations which might have been made by any learned judges in other cases, and which would lead to the conclusion that what was essential to the course of human life in the neighbourhood or on the banks of streams was to be interdicted if there was impurity occasioned to the water below. I think there must be impurity occasioned to the water below, if it get in and is not previously filtered, which the dwellers in cottages could not do, and which I know of no law requiring them to do."

The other judges concurred in the judgment, on the ground that it was not proved that there had been actual pollution, or that there was reason to apprehend immediate risk of pollution.

In Moncreiffe *v.* Perth Police Commissioners, 4th June 1886 (13 R., 921), a riparian proprietor and owner of salmon-fishings on the Tay, immediately below Perth, where the river is public, navigable, and tidal, sought decree against the Police Commissioners of the burgh—(1) of declarator of his right to have the water of the river sent down to him in an unpolluted state, so as not to destroy or diminish the amenity of the river or injuriously affect his fishings, and of the fact that they had polluted the river so as to cause nuisance to him and injury to his fishings; and (2) of interdict to prevent them from polluting the river by the introduction of sewage. *Held*, (1) that, whether the pursuer as a riparian proprietor of such a river had or had not a title to sue, as to which all opinion was reserved, he had a title to sue as owner of salmon-fishings; and (2) that, although the water had been unfit for primary purposes for more than forty years, and decree of declarator must be refused, he was entitled to be protected by interdict, if necessary, to prevent a re-arrangement of the sewage system of the city, by which the whole sewage, which had hitherto been discharged into the river at three different points above the pursuer's property, and at a distance of from one mile to half a mile from it, was to be all discharged at one point less than half a mile above the pursuer's fishings.

In Magistrates of Portobello *v.* Magistrates of Edinburgh, 9th Nov. 1882 (10 R., 130), it was held that, in proceedings under the Rivers Pollution Prevention Act, 1876, it is competent to appeal the judgment of the Sheriff-Substitute to the Sheriff, and that the Act implies at a record of the evidence led should be kept.

Observed (*per* Lord Justice-Clerk), that where a well-known and recognised jurisdiction is invoked by the Legislature, for the purpose of carrying out a series of provisions which are important for the public, without any specific form of process being prescribed, the presumption is that the ordinary forms of such Court are to be observed in carrying out the provisions, and indeed generally, that the Court has been selected because it is seen to be advisable that

the ordinary rules of such Court, and the forms of its procedure, should be applied to give effect to the provisions of the Act.

In an appeal under the "Rivers Pollution Prevention Act, 1876," the case stated set forth that a Sanitary Authority was, and had been for a long period before the passing of the Act, sending a large quantity of sewage into a watercourse which joined a larger stream, the water in which above the junction was available for most primary purposes, and that the combined stream fell into the sea three miles below the junction; that the effect of this flow of sewage was that in the summer months the greater part of the contents of the combined stream was foully polluted; the case, while it contained the statement that the combined stream had been for more than forty years carrying more or less polluted water to the sea, also stated that the pollution had been largely increased within the last twenty years, but no specific averment was made of a prescriptive right to pollute the combined stream. *Held*, that although the tributary stream was at the date of the Act "mainly used as a sewer," and was therefore excepted from the operation of the Act, the stream into which it flowed was not so used, and that therefore the pollution of the latter must be prevented.

Opinions reserved, as to whether it would be a good answer to a complaint under the Act, that a prescriptive right had been acquired to pollute a stream such as the combined one in question.

In this case the Lord Justice-Clerk said: "Then there is the last point—the point in regard to the heritable right—the right constituted by forty years' possession. I think it plain on the case that there is no such right. The case is, that before 1851 the primary uses were substantially enjoyed. It is of no moment whatever that it was used for the purpose of conveying sewage, provided the primary uses were not thereby destroyed; and it is necessary for the upper heritor to show that the primary uses have been destroyed before the upper heritor can have his prescriptive right to pollute the stream established."

But it must not be forgotten that the powers of riparian proprietors at common law are more effective than any of the statutory provisions for preventing the pollution of streams. The Commissioners are not entitled to interfere with the common-law rights of any person by sending sewage into streams. The fact that sewage has been discharged into a stream for the prescriptive period will not entitle them to increase the amount of sewage so as to affect any rights.

In Scott *v.* Scott, 28th June 1881 (8 R., 851), where A. feued part of his ground for the erection of dwelling-houses, and gave the feuars right to send sewage through a drain passing through the remainder of his ground into an ordinary field drain, which communicated with an open ditch on an adjoining property belonging to B. *Held*, that B. was entitled to interdict against A. discharging the sewage into the said ditch.

In Local Authority of Edinburgh *v.* Henderson, 9th July 1885 (2 Scot. Law Rev., 189), a riparian proprietor, whose lands extended *ad medium filum fluminis*, had under his titles the right

(which he and his predecessors exercised for more than the prescriptive period) to dam back the water of the river, by means of a cauld or weir, for the supply of a mill lower down. At the date when the cauld was erected the stream was fit for primary purposes, but in course of time it became so polluted by the operations of upper proprietors, that in consequence thereof, and of the stagnation of the current caused by the cauld, a deposit of noxious matter was formed in the bed of the river for a considerable distance above the cauld. In a complaint to the Sheriff at the instance of the Local Authority, under the Public Health (Scotland) Act, 1867, founded upon averments to the effect that the bed of the river immediately above the cauld was so foul as to fall within the statutory definition of a "nuisance"—*Held*, (1) that the *alveus* of the river was a "watercourse" within the meaning of the Act, sec. 16 (*b*), and consequently that the application was competent; (2) that the existence of the alleged nuisance was proved; and (3) that the respondent, as "author of a nuisance" in the sense of the Statute, was bound to take such steps as might be necessary for cleansing that portion of the channel of the stream which was upon his property.

The case was afterwards carried to the Bill Chamber by a note of suspension, on the ground that the channel of a river, such as the Water of Leith, is not a "watercourse" within the meaning of the Act, and that the application was therefore incompetent; but the Lord Ordinary on the Bills (Trayner), on 21st Nov. 1885, refused the note, with expenses.

The Commissioners of a burgh were threatened with legal proceedings, to compel them to put an end to a nuisance caused by the discharge of sewage from the burgh into a burn. They took the opinion of Counsel—Mr. (afterwards Lord) Rutherfurd-Clark and Mr. J. B. Balfour—which was to the following effect:—

"From the explanations given at consultation, we understand that although sewage from the burgh has for a long period found its way into the burn, it did not create a nuisance at X., or elsewhere along the course of the burn, until the memorialists' system of drainage was introduced. This being so, the memorialists could not, we think, successfully plead that the burn had been for the prescriptive period dedicated to the reception of sewage, to the extent of entitling them to continue that of which the proprietor of X. complains, viz. a nuisance *ex adverso* of his lands."

Before a watercourse can become a "nuisance" in the sense of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, sec. 16, sub-head (*b*), it must be "so foul as to be injurious to health." The opinion of Counsel was obtained by a Local Authority under that Act, in the following circumstances. A watercourse was polluted by sewage from a burgh, where there was no drainage system. At one point in the course of the stream it was dammed up for the supply of water to a mill, and a nuisance was thereby caused. Counsel (Lord Advocate Balfour), advised:—

"(1) It appears to me that the first and most imperative duty in-

cumbent upon the memorialists is to enforce the removal of the dam, which is undoubtedly an aggravated nuisance, and has been condemned as such by the Medical Officer. By sec. 4 of the Public Health Act, 1867, the 'author of a nuisance' is defined to be 'the person through whose act or default the nuisance is caused, exists, or is continued, whether he be the owner or occupier or both.' Where, therefore, a nuisance exists upon the ground of a proprietor, he is, in the statutory sense, the author of it, and is liable to be proceeded against for its removal, even although he may not himself contribute to the impurities which form the primary cause of it. *Vide* the opinion of the Lord President in the case of the Cadder Local Authority *v.* Lang (6 R., 1242), the opinion of Lord Young in the Barony Parochial Board *v.* Cadder Parochial Board (10 R., 510), and the case of the Local Authority of Govan *v.* Mackinnon, etc., 10th July 1885. In the last-mentioned case, the Local Authority of a burgh lodged a complaint against the proprietors of certain lands divided by a burn, to have it found that the burn was a nuisance, being polluted by sewage. It was proved that the pollution was not caused by the defenders or their tenants, but by persons higher up. The Sheriff, however, decided that the defenders, as owners of the lands on which the nuisance existed, were the authors of the nuisance, and ordained them to abate it, and his judgment was affirmed. W. is therefore, in the statutory sense, the author of the nuisance, and is bound to abate it. I understand he is willing to do so voluntarily; but if not, I consider that it would be the duty of the memorialists to take proceedings against him, under sec. 18 of the Public Health Act, 1867. The petition to the Sheriff should probably pray not only for the removal of the dam, which was erected by the owner or his tenant, but also for the removal of the large quantity of polluted deposit which appears to have gathered in and about the dam.

"(3) It appears to me, upon the information submitted, that questions of much difficulty may arise with the Police Commissioners. Seeing that these Commissioners are, I presume, the Local Authority for the burgh, any proceedings against them would require to be taken under sec. 99 of the Public Health Act, 1867. If the Commissioners had a regular system of drainage vested in them, or under their control, I consider that they would be answerable for the discharge of the polluting matter into the burn by such a system. It appears, however, that there is no public system of drainage or sewerage in the burgh, and it does not appear that the drains originally made by the Road Trustees for carrying off the surface water are now vested in the Commissioners, or are under their control. Further, it does not appear that the 'bores,' by which the owners or occupiers of premises in the burgh discharge their sewerage into the coal wastes, are either vested in or under the control of the Commissioners. The complaint against the Commissioners would therefore seem to resolve very much into this,—that they are allowing the inhabitants to throw polluting matters on to the streets or courts, from which these matters find their way into the burn, and also that

they are permitting inhabitants to discharge sewage, etc., by private 'bores' into the coal wastes, from which it ultimately reaches the burn by the day level. A further difficulty arises from the fact that the burn above the dam has not, as yet at all events, been declared by any public authority to be a nuisance, in the sense of sec. 16 of the Public Health Act of 1867. . . .

"It is to be kept in view that, in order to a watercourse, ditch, etc., being a nuisance under sec. 16 of the Public Health Act, 1867, it must be 'so foul as to be injurious to health,' being much more than is required to entitle a lower riparian proprietor to complain of the pollution of a stream at common law. While, therefore, it may be that the memorialists would, upon further investigation, be in a position to prevail in a proceeding against the Commissioners, under sec. 99 of the Act, I cannot say, upon the information submitted, that they are now in such a position, and it will be for the memorialists to consider whether, instead of embarking upon a doubtful litigation, their best course would not be to try to get the Commissioners voluntarily to adopt some scheme by which the sewage of the burgh would be so disposed of as not to pollute the burn, or at all events not to pollute it to such an extent as to constitute a nuisance in the statutory sense. If any of the lower riparian proprietors consider that they have grounds for taking proceedings by way of interdict, or declarator and interdict, against either the Commissioners or the persons who may be actually discharging polluting matters into the burn, it will be open to them to do so. Whether such proceedings could be met by the plea of prescription, I cannot upon the information before me say."

For further observations on nuisances caused by sewage pollution, see under sec. 219.

In England the law of pollution is similar. "A watercourse, though artificial, may have been originally made under such circumstances as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and therefore, in an action by one riparian proprietor against another for the pollution and division of a watercourse, it was held to be a misdirection of the judge to tell the jury that, if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action." Sutcliff *v.* Booth (32 L. J., Q. B., 136; 9 Jur., N. S., 1037).—Glen, p. 56.

The vesting of sewers in Local Authorities by virtue of sec. 13 (of 38 & 39 Vict. c. 55) does not take away the rights which persons may have obtained by prescription to send their sewage down such sewers. See Attorney-General *v.* Dorking Guardians (L. R., 20 Ch. D., 595; 51 L. J., Ch., N. S., 590; 46 L. T., N. S., 573; 30 W. R., 579).

Sec. 21 gives the owners and occupiers of all premises in the district the right to drain into the sewers of the Local Authority. By sec. 24, where the Local Authority desire to alter their system of sewerage, they must, at the expense of the district, provide communication between their new sewers and the drains of houses which have previously emptied into the old system.

"On the other hand, the Local Authority do not, by virtue of the previously existing prescriptive rights of individuals, themselves possess a prescriptive right to discharge sewage into a stream. Attorney-General *v.* Luton (2 Jur., N. S., 180).

"A person entitled to a limited right, who exercises it in excess so as to cause a nuisance, cannot maintain a right of action for an obstruction of the original right of easement until its exercise has been reduced within its original limits. Thus, if a man has a limited right to the use of a window, and he enlarges it considerably, the only way in which the person who is annoyed by the enlargement of the window can prevent that nuisance, is by erecting a barrier, and stopping the whole up. So, if a limited right to the use of a drain exists, such as to send clean water only through it, and the person claiming that right sends dirty or foul water, the person having the property in the drain may stop the whole of the water from flowing until the use of the right is brought within its original limits. Cawkwell *v.* Russell (26 L. J., Exch., 34); Watson *v.* Troughton (48 L. T., N. S., 508; 47 J. P., 518).

"Nor, if a person have a prescriptive right to drain certain premises into his neighbour's land, can he throw the drainage of other premises into the drain. *Per* James, L. J.: 'If a man has an artificial drain or sewer by which he drains anything, either water or sewage, into his neighbour's land, he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that there is anything in the English law to say that a man has the right to pour in as much sewage water as can come from anywhere, limited only by the size of the particular drain.' Metropolitan Board of Works *v.* London and North-Western Railway Company (L. R., 17 Ch. D., 246; 50 L. J., Ch., 409; 44 L. T., N. S., 270; 29 W. R., 693).

"A reservation in a lease of 'the free running water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers or watercourses made or to be made within, through, or under the said premises,' extends to water and soil coming to and from—though not actually first arising upon or out of—the contiguous land or buildings, but does not extend beyond such 'water and soil,' as are the product of the ordinary use of the land and buildings for habitation, therefore not to the refuse of manufactories and tanyards, etc. Chadwick v. Marsden (L. R., 2 Exch., 285; 36 L. J., Exch., 177; 16 L. T., N. S., 666; 15 W. R., 964).

"With reference to rights of drainage as between adjoining owners, it had been held that the owner of one tenement had a right of action against the owner of an adjoining tenement in respect of the flooding of his premises; such flooding having arisen from an obstruction in a drain upon the adjoining tenement, that prevented water brought by a spout from that tenement to the plaintiff's premises from flowing away again in the manner in which it had been accustomed to flow since the two tenements were in the ownership of the same person. Pyer *v.* Carter (1 H. and N., 916). But

this decision was disapproved by the Court of Appeal, who laid down the rule that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements over the other part which are necessary to the reasonable enjoyment of the part granted, and have been theretofore used for its benefit; but that, except in the case of easements of necessity, there is no similar implication in favour of the grantor, who must expressly reserve in the grant any easement which he intends to reserve over the part granted." Wheeldon *v.* Burrows (L. R., 12 Ch. D., 31; 48 L. J., Ch., 853; 41 L. T., N. S., 327); following Suffield *v.* Brown (4 De G. J. and S., 185; 33 L. J., Ch., 249; 10 Jur., N. S., 111; 9 L. T., N. S., 627).—Glen, p. 40.

"Apart from the express provision contained in the above section (38 & 39 Vict. c. 55, sec. 17), there is an established principle that general statutory powers conferred for carrying out a certain object must be so exercised as not to create a nuisance. Managers of Metropolitan Asylum District *v.* Hill (L. R., 6 App. Cas., 193; 50 L. J., Q. B., 353; 44 L. T., N. S., 653; 27 W. R., 617; 45 J. P., 664). Though, where special power is given or a special duty imposed to do a particular thing in a particular manner, and the thing cannot be so done without necessarily creating a nuisance, the Statute must be taken to have legalised the nuisance. Blantyre *v.* Clyde Navigation Trustees (W. N., 1871, p. 69). And this is so even where there is a discretion with respect to the site to be chosen for establishing that which will cause the nuisance. London, Brighton, and South Coast Railway Company *v.* Truman, Hanbury, & Company (L. R., 11 App. Cas., 45).

"If a stream, into which sewage is discharged by a Local Authority or by a private person, is so polluted as to cause a public nuisance—that is to say, to be injurious to the neighbouring inhabitants generally—proceedings may be taken, either in the name of the Queen by indictment, or in the name and with the consent and fiat of the Attorney-General for an injunction. If the pollution is specially injurious to a particular person, he may bring his action for damages in respect of any injury which he has already sustained, and is also entitled to an injunction to restrain the continuance or commencement of the pollution which has caused or will cause injury to him."—Glen, p. 47.

"In an order for an injunction to restrain the pollution of a stream, it is proper to insert the words, 'to the injury of the plaintiff,' in order to establish a ground for the interference of the Court, and to prevent its authority being invoked for trivial purposes. Lingwood *v.* Stowmarket Company (L. R., 1 Eq., 77; 13 L. T., N. S., 540; 11 Jur., N. S., 993; 14 W. R., 78). The following was the order made in the case:—"Perpetual injunction to restrain the defendants, etc., from discharging from their works, in the Bill mentioned, into the river or stream in the Bill also mentioned, so as to cause it to flow on the plaintiff's lands, etc., in a state less pure than that in which it flowed there previously to the establishment of the said works, *and to his injury* any such refuse or other matter as was dis-

charged by the defendants from their said works into the said river or stream previously to the filing of the said Bill, or any noxious fluid or other foul matters whatsoever.'

"In another case—North Staffordshire Railway Company *v.* Tunstall (39 L. J., Ch., 131)—the Court observed that the order made on that occasion would serve as a model for all similar cases. The order was as follows:—'This Court doth order that an injunction be awarded against the defendants, the Mayor, etc., of the Borough of H., to restrain the said defendants, their servants and agents, from causing or permitting any new outfall into the H. brook, or any new sewer communicating with any outfall into such brook, or any drain or other communication with any such sewer, whereby any sewage water may pass into the H. brook; and it is ordered that an injunction be also awarded against the defendants, the Mayor, etc., of the Borough of H., to restrain the said defendants, their servants and agents, from and after the 1st of January 1870, from causing or permitting the sewage of the Borough of H. to flow or pass through outfall sewer A or outfall sewer B in the information and Bill mentioned, or any new outfall into the said brook, unless and until the same shall be sufficiently purified and deodorised; and it is ordered that the defendants, the Mayor, etc., of the Borough of H., do pay to the plaintiffs, A., B., etc., their costs of this suit and of the information, to be taxed by the taxing-master, and any of the parties are to be at liberty to apply to this Court as they may be advised.'"—Glen, p. 54.

"Generally, with regard to the abatement of a nuisance to property, caused by sewage or otherwise, it has been held that in abating a nuisance to his property a man may be justified in interfering (so far as is necessary) with the property of the wrong-doer, but not in interfering with the property of innocent third persons; and consequently, where there are alternative modes of abating the nuisance, he is bound to choose that mode which may inflict damage, however great, on the wrong-doer, rather than that which would be productive of mischief, however small, to innocent third persons, or to the public. Roberts *v.* Rose (33 L. J., Ex., 241; *aff.* on appeal, L. R., 1 Exch., 82; 35 L. J., Exch., 62; 12 Jur., N. S., 78; 13 L. T., N. S., 471; 14 W. R., 225; 4 H. and C., 103). This case had reference to a watercourse made to carry off the water pumped from a colliery."—Glen, p. 56.

218. Drainage Districts to be formed, subject to Approval of the Sheriff.—The Commissioners shall form the whole burgh into one drainage district, subject to the following exceptions and provisions:—

(1.) Where at the application of this Act separate districts exist, they shall be maintained unless and until they are altered in the manner hereinafter provided.

(2.) The Commissioners may divide the burgh into separate

drainage districts with the approval of the Sheriff, if special and exceptional circumstances exist to the satisfaction of the Sheriff, making it expedient to make such division.

(3.) The Commissioners may unite or alter existing separate districts with the approval of the Sheriff.

(4.) Any alteration of districts existing at the application of this Act shall be subject to such conditions as the Sheriff may impose, having regard to the assessments which have been paid in the existing districts, so as to afford equitable relief to the properties in respect of which such assessments have been paid.

(5.) The Commissioners shall cause their Surveyor to define and describe the several drainage districts, and any alterations that may from time to time be made thereof, upon a plan of the burgh to be made as herein provided for.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (30) "Sheriff."

The general object of this section appears to be to provide for the whole burgh being embraced in one drainage district, and no division of a burgh into separate districts will hereafter be permitted, unless the Sheriff is satisfied that "special and exceptional circumstances exist," making it expedient to make such division. There is no direct provision, either in this Act or in the Public Health Act, for dissolving drainage districts or absorbing them into the burgh, but this object may be attained indirectly under this section by uniting and altering existing districts until the whole burgh forms one drainage district.

As to the assessment of drainage districts, see secs. 362 and 363, *infra*.

The plan upon which the Surveyor is to mark the districts is that referred to in secs. 210–214.

The Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, also contains provisions as to the formation of special drainage districts, see sec. 76 thereof, which provides:—

"Upon requisition to that effect made in writing, by not fewer than ten inhabitants of the district, the Local Authority shall be bound to meet, after twenty-one clear days' notice, and shall consider the propriety of forming part of their district into a special drainage district, and the resolution of the Local Authority at such meeting shall be published in one or more newspapers circulating in the district; and the production of such newspaper, or a certificate under the hand of the Chairman or acting Clerk of the Local Authority (whose signature need not be proved) shall be sufficient evidence of such resolution; and within ten days after the date of such resolution, it shall be competent for any person interested to appeal against the resolution to the Sheriff, and the Sheriff, not

being a Sheriff-Substitute resident within the district, may either approve or disapprove of such resolution, and if he disapproves thereof he may either find that no special drainage district should be formed, or may enlarge or limit the special district, as defined by the resolution of the Local Authority, or may find that a special drainage district should be formed, and may define the limits thereof; and the decision of the Sheriff shall be binding upon the Local Authority, and shall be final, except where it is pronounced by a Sheriff-Substitute, in which case it may be appealed to the Sheriff."

The Public Health Amendment Act, 1882, 45 Vict. c. 11, provides for the alteration and combination of special drainage districts. Where a special drainage district has been formed, the assessment for the expenses is confined to that district by sec. 93 of the Act of 1867. See these sections and the observations thereon in Skelton's Handbook, pp. 72, 91, and 122.

A Local Authority of a rural district, which embraced a special drainage district, were involved in legal proceedings in connection with the drainage works of the special drainage district. The Local Authority were successful, but they had incurred an account of £110, 0s. 9d. for extrajudicial expenses. The maximum assessment under the Public Health Act is 2s. 6d. per £, and it was found that the expenses could not be met out of the current year's assessment, even though levied at the maximum rate. The Local Authority took the opinion of Counsel (Lord Advocate Balfour) on the following points:—

"(1.) Does the assessment for these expenses fall on the special drainage district, or on the whole district of the Local Authority?

"(2.) If Counsel is of opinion that it should be assessed on the special drainage district, would it be competent to assess the whole district of the Local Authority for the deficiency which cannot be exacted from the special drainage district this year, and to assess the latter for the same next year, or in subsequent years, till the sums expended for the expenses are reimbursed."

Counsel advised:

"(1.) I am of opinion that the assessment for the expenses in question forms a proper charge upon, and falls to be levied from, the special drainage district. . . . It appears to me that the expenses are incidental to the drainage of the special drainage district, so as to render sec. 93 of the Public Health Act applicable to them. . . .

"(2.) If the expense in question had been incurred for making sewers or drains, I think it would have been competent to borrow the money, under sec. 86 of the Public Health Act, upon the security of the special sewer assessments and the general assessments, and to recover the money from the general assessments in so far as the special sewer assessments might be inadequate to provide it. *Vide* the case of Tolmie *v.* Parochial Board of Urray, 21st January 1890 (17 R., 1027), which related to the analogous case of a special water supply district. But in the present case the borrowing power has not been exercised, and it seems to me exceedingly doubtful whether, having regard to the terms of sec. 86, that power could be exercised

with respect to such expenses as those in question. I cannot, therefore, advise the memorialists that it would be competent for them to exact from the whole district of the Local Authority the assessment which cannot be recovered from the special drainage district, even with a right to the whole district to be recouped by the special drainage district in after years. It seems to me that the memorialists' best and simplest method would be to apply the proceeds of the assessment upon the special drainage district for the present year, so far as they will go, towards paying the expenses, and to pay the balance in like manner, from assessments levied on the special drainage district in subsequent years, until it (the balance) is wiped off. The memorialists will probably not find it difficult to arrange for having so comparatively small a sum as the balance allowed to stand on personal credit until it is extinguished out of the assessments levied upon the special drainage district."

The Commissioners of newly created burghs must not overlook the enactments of sec. 81 of the Local Government (Scotland) Act, 1889, which will be found under sec. 43 of this Act. See also the case of Edmonstone *v.* Police Commissioners of Kilsyth, 9th June 1882 (9 R., 917), referred to under sec. 21 *supra*.

In Mackay, etc. *v.* Police Commissioners of Maryhill, 6th May 1889 (5 Scot. Law. Rev., 281), the Commissioners of a burgh resolved, in exercise of the statutory powers vested in them under the General Police and Improvement (Scotland) Act, 1862, and the Public Health (Scotland) Act, 1867, and therein-recited Acts, and with a view to the imposition of assessments in respect of the special sewer rate and general sewer rate which they are authorised to levy under either of said Acts, "to form into a separate or special drainage district" a certain specified part of the burgh. *Held*, that the resolution was incompetent in so far as it was founded both on the General Police and Improvement (Scotland) Act, 1862, and the Public Health (Scotland) Act, 1867, and that the procedure should have been under one or other of these Acts.

Question, Whether in such a case the Sheriff has power to award expenses.

In Kirk's Trustees *v.* Magistrates of Leith, 16th June 1880 (not reported, see Appendix), the Lord Ordinary (Lord Adam) assoilzied the defenders from the whole reductive conclusions of the action, and from the first declaratory conclusion of the action, and from the conclusion by which it is thought that they should be decerned and ordained to rectify their division of the Burgh of Leith and relative map, to the effect of excepting the pursuers' properties from Drainage District No. 4, and also assoilzied the defenders from the relative conclusion for interdict.

In his note Lord Adam said: "The pursuers are proprietors of certain heritable subjects in the Burgh of Leith. In the year 1865 the burgh was, in terms of sec. 185 of the General Police and Improvement (Scotland) Act, 1862, divided into nine separate drainage districts. The first matter which the pursuers complain of in this action is that the subjects belonging to them are included in District

No. 4 in place of District No. 3. The proceedings of the Commissioners in dividing the burgh into the several drainage districts seem to have been carried out in conformity with the Statute. They had the approval of the Sheriff. The division has been acted on ever since. They were acting *intra vires* in the matter, and there appears to the Lord Ordinary to be no ground whatever for reducing these proceedings.

"The next matter complained of relates to certain drainage works executed in District No. 4, and the pursuers seek to have reduction of the resolution of the Commissioners ordering these works, and of an interlocutor by the Sheriff, of date 25th July 1876, confirming generally the resolution of the Commissioners.

"The matter of these drainage works is regulated by sec. 392, and subsequent sections of the Act. By sec. 396, a right of appeal to the Sheriff is given to any person aggrieved by any order of the Commissioners relating to such works. The pursuers appealed to the Sheriff against the order of the Commissioners, in so far as the proposed drainage works affected their property. The Sheriff remitted to Mr. David Stevenson, civil engineer, to inquire and report, and after full consideration he to some extent varied the order of the Commissioners, and *quoad ultra* confirmed it.

"It is this judgment of the Sheriff that is now sought to be reduced. It is, however, declared by sec. 397 of the Statute, that the judgment of the Sheriff shall be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way.

"Assuming that the division of the burgh into nine districts is not to be set aside, there seems to be no relevant objection to the resolutions of the Commissioners of 15th October 1877 and 15th October 1878, assessing the owners of lands and premises in the District No. 4.

219. Power to Commissioners to Construct Sewers where none exist, making Compensation to Owners of Property.—The Commissioners shall from time to time, subject to the restrictions herein contained as to the notice to be given and the plans and estimates to be prepared, cause to be made, under the streets or elsewhere, such main and other sewers as shall be necessary for the effectual draining of the burgh, and shall also cause to be made all such reservoirs, sluices, engines, and other works, as shall be necessary for cleansing such sewers, and if needful they may carry such sewers through and across all underground cellars and vaults under any such streets, doing as little damage as may be, and making full compensation for any damage done; and may carry the same into or through any enclosed or other lands, making full compensation to the

owners and occupiers thereof, and they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale, for agricultural or other purposes, as may be deemed most expedient, but so that the same shall in no case become a nuisance: Provided always, that if in making any such main and other sewers, or in repairing, constructing, or enlarging the same or existing drains or sewers, the contents at present carried into any existing outlet shall be diverted therefrom to the prejudice of any actual existing legal right, the Commissioners shall be bound to make compensation therefor; compensation under this section shall be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts is directed to be settled.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street," (4) "burgh," (16) "lands and premises," (22) "owner," (21) "occupier." As to notice, see secs. 220 and 221; as to plans, secs. 214 and 220; and as to estimate, sec. 226.

The terms of this section must be carefully considered before the Commissioners undertake the construction of any sewer. It confers a general power to construct sewers, subject to certain conditions and limitations, but if these are observed the discretion of the Commissioners will not be interfered with.

In Steel *et al. v.* Commissioners of Police of Gourock, 11th July 1872 (10 M., 954), a Local Authority under the Public Health Act, having resolved to carry out a scheme of drainage, certain feuars petitioned the Sheriff for interdict, on the ground that the proposed plan of drainage would cause a nuisance and injuriously affect their property. *Held*, that as the application was really an attempt to bring the resolution of the Local Authority under the review of the Sheriffs, it had been rightly dismissed.

Observed, that if a nuisance is actually created by the operations of a Local Authority, those affected by it have an interest and a right to complain.

Question, Whether the Court would interfere if it were relevantly alleged that the operations of the Local Authority would necessarily cause a nuisance.

In Smeaton *v.* Commissioners of Police of St. Andrews, 17th May 1865 (3 M., 816), it was held that the Court of Session has no jurisdiction to judge of the necessity of drainage and other works undertaken by Commissioners of Police under the Police and Improvement Act, 1862, 25 & 26 Vict. c. 101, by sec. 397 of which an appeal to the Sheriff is allowed at the instance of the aggrieved party. The powers of the Commissioners of Police under the Act are not exhausted by their having given notice of their intention to execute certain works, and these being approved of. They may

afterwards, on giving other notices, change the line of works as may seem expedient.

The power to construct the sewer is accompanied by power to construct any works necessary for cleansing it.

In Swanston *v.* Twickenham Local Board (L. R., 11 Ch. D., 838), entrances or manholes made for the purpose of entering the sewer are part of the sewer, and may be made without purchasing the land for the purpose.—See Bazalgette, p. 54.

Sec. 305 of the English Public Health Act, 1875, enables the Local Authority to obtain access to their sewers through private lands. "In a case in which a sewer was made under a Local Act, and the right of access was only implied, it was held that the Local Authority were not entitled to compensation from a railway company that had rendered the exercise of such right less convenient. Birkenhead Mayor, etc. *v.* London and North-Western Railway Company (L. R., 15 Q. B. D., 572; 50 J. P., 84)."—Glen, p. 60.

The sewers may be carried under the streets, and through and across all underground cellars and vaults under such streets, on condition that as little damage as possible is done, and that compensation is given for any damage that is done.

In Magistrates and Town Council of Leith *v.* Field, 15th Nov. 1878 (6 R., 185), the owner of two private streets lodged a statutory claim of £1250 for (1) ground permanently taken by sewer and drainage works; (2) surface and underground damage, loss, and inconvenience; (3) right of way for the sewers and other works through the ground, including right of access. *Held*, (1) that the Commissioners were not liable in compensation for damage done by merely carrying sewers under a private street, or for way-leave; (2) that under the above claim an issue of damage to certain small parts of the line of streets alleged not to have been converted into private streets or dedicated to the public, could not be tried.

In Caledonian Railway Company *v.* M'Bride, 8th Dec. 1891 (29 S. L. R., 208);—Sec. 328 of the Glasgow Police Act, 1866, authorises the Glasgow Corporation to carry sewers through any lands or heritages within the city, "provided that they may make reasonable compensation to the proprietors of such lands and heritages for any damage" they may suffer.

By sec. 41 of the Glasgow Central Railway Act, 1888, it is provided, for the protection of the corporation—(*l*) that, where any of the works done by the railway company under that Act interfere with any sewer or drain under the control of the corporation, the company shall provide for new or altered works in such way as the corporation may deem necessary, "and for the construction of which they shall be bound to afford all reasonable facilities, and communicate their powers so far as necessary;" and (*o*) that the special provisions contained in that section for the protection of the corporation shall not be deemed to dispense with the provisions of the Railway Clauses Consolidation Act, except in so far as inconsistent therewith.

Sec. 6 of the Railway Clauses Act provides that a railway com-

pany, in exercising the power given them by any special Act to construct a railway, shall make full compensation to all parties interested in lands affected by the construction thereof for all damage.

Held, that a proprietor who complained that his buildings had been injured by operations of the railway company, in constructing a sewer under the provisions of sub-sec. (*l*) of sec. 41 of the Glasgow Central Railway Act, had no claim to statutory compensation, either under the Railway Clauses Act or the Glasgow Police Act, in respect that the damage complained of had not been caused by the construction of the railway, and that the sewer constructed by the railway company had not been carried through any lands or heritages belonging to him.

Power is also given to carry sewers into or through any enclosed or other lands, making full compensation to the owners and occupiers. The compensation under this section is to be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts is directed to be settled. As to power of entry for the purpose of executing works, see secs. 325 and 326.

Negotiations were entered into by a company with the proprietors of a field, to allow of a sewer being made through their property. The company undertook to pay the expense of constructing the sewer, but not any compensation claimed by the proprietors, who were informed by the Burgh Local Authority that compensation would be given by them. On the completion of the sewer, one of the proprietors sent in his claim for compensation, and he was settled with for £3. The other proprietors also claimed compensation, and were more than once asked to furnish the particulars and amount, which they failed to do. After October 1874, nothing more was heard of the claim till August 1880. The Local Authority considered it too late, after a lapse of six years, for the claim to be renewed, and informed the proprietors that it could not be entertained. The proprietors threatened proceedings, and the Local Authority applied for opinion of Counsel, Mr. (afterwards Lord) Kinnear, in the matter.

"*Opinion*, (1) I am of opinion that the proprietors are not barred from claiming compensation. The Local Authority, by the statutory notice, followed by the construction of the sewer in terms thereof within the lands in question, came under obligation to pay to the Messrs. H. whatever compensation they might be entitled to. I see no ground for holding that the claim is lost by mere lapse of time, and the Messrs. H. have done nothing to waive or discharge it. The change of ownership which has taken place may, however, occasion some difficulty as to the title to recover, and in case the claim should be now insisted in at the instance of one of the original proprietors alone, the Local Authority are, in my opinion, entitled to require that he shall show a good title to the whole amount of the compensation (if any be found due), or procure a discharge from his former co-proprietors. (2) If the amount claimed is under £50, proceedings may be taken by way of summary application to the Sheriff, in terms of

sec. 116 of the Statute 30 & 31 Vict. c. 101. If the amount is greater, the Local Authority may be required to proceed under the Lands Clauses Act. Whether proceedings should be in the names of all the original proprietors, or of the remaining proprietor alone, depends upon the conditions upon which Richard and William disposed of their share. (4) The Local Authority cannot bar the claim by lifting the pipes. They have made a statutory contract for the occupation of the land, and have carried the contract into actual execution; and they cannot now undo what has been done, so as to deprive the proprietor of the compensation to which he is entitled for the use already taken of his property. (5) For the reason indicated in the preceding answer, I am of opinion that the Local Authority would not be relieved from their obligation by cutting off the sewage. It is possible that the compensation might be affected by showing that the use taken of the land was merely temporary. But if this were maintained, the landowner would be entitled to require, not merely that the pipes should be removed, but that the land should be restored to the condition in which it was before the sewer was constructed. It is unnecessary to point out that the Local Authority would not be justified in removing a sewer which, in the discharge of their public duty, they had found it necessary to construct, unless they were satisfied that it was no longer required. If it was proper that the sewer should be constructed, the Local Authority must consider whether it would be in accordance with their public duty to remove it, in order to avoid a claim for compensation. The tenant having been already settled with, it does not appear that there can be any further question as to his interest in the matter. (6) If there is any ground in fact for a claim of compensation, I think the claim cannot be successfully resisted. In case proceedings are taken, it will be open to the Local Authority to show that the landowner has suffered no prejudice, and that any compensation should be very trifling, if that contention is justified by the facts. But, *prima facie*, he is entitled to some payment, however small, for the use of his land. The amount should be fixed, if possible, by agreement, or, failing agreement, by arbitration.

"With reference to the explanations which were made to me at consultation, after the foregoing opinion had been given, I am of opinion—(1) That the Local Authority are entitled to remove the pipes and carry the sewage in a different course, if they consider it expedient to do so. (2) That if the new course of drainage would in other respects be equally advantageous, the probability of a claim for compensation being abandoned or diminished is an element which they are entitled to take into consideration in determining which of the two should be adopted. (3) That if the pipes were lifted, and the sewage cut off, Mr. H. could not claim compensation on the footing that the value of his land as feuing-ground was permanently diminished by the construction of the sewer, although, as already explained, he would not be barred from maintaining his right to such compensation as he could still show to be just and reasonable.

"If the memorialists resolve to change the course of the sewage,

they should state their intention to do so, in answer to any claim which may be brought against them upon the hypothesis of the existing sewer forming a permanent injury to the land."

The Commissioners of a burgh formed a sewer, part of which passed through a feu belonging to G. The statutory notices were given, and G. made no objection. The sewer was completed, and any claims made for compensation were settled. After the lapse of fourteen or fifteen years, G. resolved to build two houses on his feu, and found that one would have to be built on the top of the sewer. To obviate any claim, the Commissioners offered to give their statutory consent to a house being built over the sewer; but G. declined, and called on them either to divert the sewer or to pay compensation for way-leave or severance. The former course was impracticable, and the Commissioners took the opinion of Counsel (Sir C. J. Pearson) on the subject of compensation, G. having in the meantime nominated an arbiter, in terms of the Lands Clauses Act.

Sir Charles Pearson said: "(1) I have no doubt that a claim for compensation, such as Mr. G. now makes, admits of being abandoned, if circumstances inferring such abandonment can be proved. But there is no limitation of time in the Statutes; and in my opinion the mere lapse of time is not sufficient to bar the claim. I do not find any facts in the case which should infer a discharge of the claim, and in particular, I do not think that the failure on the part of Mr. G. to state objections to the scheme raises any bar to his now making the claim. (2) I am of opinion that the memorialists cannot get rid of Mr. G.'s claim in the way suggested; although their consent to his building over the sewer will doubtless be taken account of in fixing the compensation. (3 & 4) These are really one question; for a compensation claim is held to be fixed as at the time when it is ascertained, and no interest could be claimed for the antecedent period. I should suppose that the arbiters would fix a capital sum to be now paid, ascertained by considering the damage done in the light of subsequent events, including the fact that the land is now fit for building. (5) As to the claim against the contractor, I should require to be furnished with further particulars; but, on the information before me, I am disposed to think it would be difficult for the memorialists to make such a claim good. With reference to Mr. G.'s recent nomination of an arbiter, the ordinary course, where it is intended to dispute a claim as irrelevant, or as being barred, is to nominate under protest, and then to interdict the claimant from proceeding with the arbitration. But the propriety of doing so depends on whether the grounds for opposing the claim *in toto* are sound, and my opinion being as stated above, I do not recommend the memorialists to incur the expense."

In no case are the Commissioners entitled to create a nuisance, whether by the improper construction of a sewer, or by neglecting to cleanse it, or by the discharge of the sewage. See Steel *v.* Commissioners of Gourock, *supra*.

In England, "an action may be maintained against a Local Authority for not keeping a sewer properly cleansed, whereby it

becomes choked up and the overflow of foul water runs into private premises. Meek *v.* Whitechapel (2 F. and F., 144).

"They are, however, only bound to use reasonable care to keep the sewers vested in them by the Act properly cleansed and emptied, and are not bound so to keep such sewers in all events. Where a jury found that a sewer causing damage and an obstruction thereto were unknown to the defendants, a vestry constituted under the Metropolis Local Management Act, 1855, and that the sewer, but not the obstruction, might have become known to them by exercise of reasonable care, the defendants were held not liable, except in the absence of reasonable care. *Per* Brett, J.: 'Where a Statute imposes a duty on a public body in any but clear and unambiguous terms, such a duty is not absolute, but only a duty to use reasonable care.' Hammond *v.* St. Pancras Vestry (L. R., 9 C. P., 316; 43 L. J.; C. P., 157; 30 L. T., N. S., 296; 22 W. R., 826). If water is supplied to the district by a company, and the Water-Works Clauses Act, 1847, is incorporated with the company's Act, that Act provides for the supply of water by the company for cleansing sewers, drains, and for other public purposes (10 Vict. c. 17, sec. 37)."—Glen, p. 59.

"Care should be taken to construct the sewers and drains of sufficient capacity or dimensions for the conveyance of the ordinary quantity of sewage of the district; for, if new sewers be not so constructed, the Local Authorities will be liable for any damage occasioned by the overflow or bursting, and persons are not bound to incur any expense in protecting their premises from the consequences of negligent construction. The fact that a sewer had been connected with, and caused to discharge its contents into, one of smaller bore, was treated as evidence of negligence in the condition of a sewer, and sufficient to make a Local Authority liable, although the damage complained of arose at the time of an extraordinary storm. But, apparently, they would not be held liable in case a sewer had stood for some years and then burst, for this would be evidence to show that it had been constructed sufficiently well, so far as ordinary seasons were concerned; and the Board are not bound to provide against extraordinary storms or other occurrences which they could not reasonably be expected to foresee. Brown *v.* Sargent (1 F. and F., 112).

"They are not bound to provide sewers sufficient to sustain the pressure caused by extraordinary storms, and if an accident be caused by such a storm, it would be the act of God, and the Authority would not be responsible. Blyth *v.* Birmingham Water-Works Company (11 Exch. Rep., 781; 25 L. J., Exch., 212; 2 Jur., N. S., 333); Whitehouse *v.* Birmingham Canal Company (27 L. J., Exch., 25); Ruck *v.* Williams (27 L. J., Exch., 357; 3 H. and N., 308); Alston *v.* Grant (3 E. and B., 128; 18 Jur., N. S., 332; 23 L. J., Q. B., 163); also Nichols *v.* Marsland (L. R., 2 Ex. D. 1; 35 L. T., N. S., 725; 46 L. J., Ex., 174), which was the case of a lake which burst its embankments after heavy rains; and Box *v.* Jubb (L. R., 4 Ex. D., 76); 48 L. J., Ex., 417; 27 W. R., 415; 41 L. T., N. S., 97); which related to an overflow from a reservoir.

"Commissioners of Sewers who used for the purposes of their

sewage an ancient tidal ditch, which ran along the side of a highway, were held to be under no obligation to fence it, for the protection of passengers on the highway. Cornwell *v.* Metropolitan Commissioners of Sewers (10 Exch. Rep., 771).

"In constructing a sewer, care must be taken that it does not create a nuisance by its discharge. A Local Authority as a body are liable to an action for negligently carrying out works within their powers, so as to cause an injury to any person, and it seems that an injury so caused could not be compensated as 'damages sustained by reason of the exercise of the powers of the Act.' Southampton and Itchin Floating Bridge Company *v.* Southampton Local Board (8 E. and B., 801; 28 L. J., Q. B., 41; 4 Jur., N. S., 1299)."—Glen, p. 57.

But as regards nuisances resulting from the exercise of statutory powers, it is to be observed that if a Statute authorises operations which create a nuisance, without providing means for removing it, a remedy must be sought from Parliament, for otherwise it is irremediable. Blantyre *v.* Clyde Navigation Trustees (W. N., 1871, p. 69).

"It was held in the Queen's Bench Division, by Cockburn, C. J., Lush and Manisty, Justices, that a Sanitary Authority were not justified in attempting to carry out a project for sewerage which, by the description contained in the notices, would cause a nuisance; and that the Court would, by injunction, restrain them from doing so even at the commencement of their operations. Lamacraft *v.* St. Thomas Rural Sanitary Authority (42 L. T., N. S., 365; 44 J. P., 441).

"In laying down a scheme of drainage, care should be taken that the sewage will not be conveyed into any stream or canal, so as to pollute the water which other persons have a right to enjoy, as the Local Authority cannot, under cover of their legislative powers, make a sewer which will have the effect of polluting the water, and they may be restrained by injunction from permitting the discharge of sewage into the stream."—Glen, p. 58.

In Attorney-General *v.* Mayor, etc., of Kingston-on-Thames (34 L. J., Ch., 481), where an information was instituted at the relation of the conservators of the river Thames, to restrain the corporation of Kingston-on-Thames from altering their drains so as to discharge a greatly increased quantity of sewage into the river, the Court considering, upon the evidence, that neither present nuisance nor probability of immediate prospective nuisance had been proved, dismissed the information, without prejudice, however, to future proceedings in the event of nuisance being subsequently occasioned.—Glen, p. 50.

"In Lamacraft *v.* St. Thomas Rural Sanitary Authority (42 L. T., N. S., 365, 44 J. P., 441), which was an action for damages for trespass, and for an injunction, the jury having found that the intended sewer would cause a nuisance, the injunction was granted, as the Statute (sec. 16, Public Health Act, 1875) does not authorise a sewer which would cause a nuisance."—Glen, p. 44.

"Statutory powers, although granted for the public benefit, are only co-extensive with the power to exercise them without an infringe-

ment of the general law; and where the exercise of such powers is not compulsory upon those to whom they are granted, and new and unforeseen circumstances subsequently arise which render the exercise of them a nuisance, an indictment will lie in respect thereof—Reg. *v.* Bradford Navigation (6 B. and S., 631; 11 Jur., N. S., 766; 29 J. P., 613; 34 L. J., Q. B., 191; 13 W. R., 892)—unless the nuisance, the subject of the indictment, is the very thing contemplated by the Legislature. Rex *v.* Pease (4 B. and Ad., 30)."—Glen, p. 47.

"A Local Board was restrained by a decree of the Court, at the suit of an individual, from allowing sewage to flow into a river after a certain date. The Board did not stop the sewage, but, having tried and failed to render it inoffensive, the Court held that they had committed a contempt of Court, and were not excused by the fact that they were acting in the matter on behalf of the public, and carrying out duties imposed upon them by Act of Parliament. An order for sequestration for contempt will be granted against a public body having property vested in it for various public purposes, if it appear to the Court that there is property on which the sequestration would operate, and the Court has power not only to issue but to enforce a sequestration, if its orders be not obeyed. Spokes *v.* Banbury Local Board (35 L. J., Ch., 105; 11 Jur., N. S., 1010; L. R., 1 Eq., 42; 13 L. T., N. S., 428; 14 W. R., 169).

"Where an order of sequestration had been issued against a Local Board, upon an injunction to restrain them from polluting a brook with sewage, and afterwards sewage works had been completed and were in full operation, the defendants applied for the order to be discharged; but the plaintiff alleging that, in consequence of the sewage passing into the brook and a lake on his land after the date of the order, his land had become silted up, and he had expended considerable sums in having the brook and lake cleaned, and asking for an inquiry as to the damage he had sustained, the Master of the Rolls made an order in the following terms:—Declare that the defendants are liable to make good all damage occasioned to the S. estate since the said date, caused by the discharge or flow from the town of T. into the brook or stream called C. of sewage or other offensive matter; direct the amount thereof to be ascertained, and paid by the defendants to the plaintiff or the persons entitled to the said estate. Goldsmid *v.* Tunbridge Wells (W. N., 1872, p. 163)."—Glen, p. 55.

Cases may arise where a stream which passes through a burgh is polluted higher up. In these cases the Commissioners would be entitled to proceed under the powers given by sec. 8 of the Rivers Pollution Act, 39 & 40 Vict. c. 75, by which it is enacted that—"Every Sanitary Authority shall, subject to the restrictions in this Act contained, have power to enforce the provisions of this Act, in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act, which causes interference with the due flow within their district of any such

stream, or the pollution within their district of any such stream, against any other Sanitary Authority or person, whether such offence is committed within or without the district of the first-named Sanitary Authority. Any expenses incurred by a Sanitary Authority in the execution of this Act shall be payable as if they were expenses properly incurred by that Authority in the execution of the Public Health Act, 1875. Proceedings may also, subject to the restrictions in this Act contained, be instituted in respect of any offence against this Act by any person aggrieved by the commission of such offence." . . . See Magistrates of Portobello *v.* Magistrates of Edinburgh 9th Nov. 1882 (10 R., 130), referred to under sec. 217, *supra.*

They might also be able to take action under sec. 99 of the Public Health Act, 30 & 31 Vict. c. 101, which provides—"... Where a nuisance is situated in a district, the Local Authority of which does not cause the same to be abated, and which nuisance is offensive or injurious to another district, the Local Authority of the latter district may call on the first-mentioned Local Authority to take all competent steps for removal of such nuisance; and the said first-mentioned Local Authority shall be bound to do so accordingly; and any expense thereby occasioned to the said second-mentioned Local Authority shall be reimbursed by the first-mentioned Local Authority, the amount of such reimbursement in the case of dispute to be finally determined by the Board."

For further observations as to the pollution of streams by sewage, see observations under sec. 217, and cases cited there; also secs. 222, 223, and 233.

If, in making or altering sewers, the contents at present carried into any existing outlet shall be diverted therefrom to the prejudice of any actual existing legal right, the Commissioners shall be bound to make compensation therefor. Some difficulty may arise in construing the words "at present." Do they mean at the date of the passing of the Act? or at the date of its coming into operation? Probably they will rather be held to be a loose expression equivalent to "at the time the sewer was made or altered."

The Commissioners of a burgh carried their sewage into a burn and caused a nuisance. To remedy it, they proposed to conduct all the sewage into a pipe and carry it into the sea. Surface water and sewage from the burgh had found its way into the burn from time immemorial, but the amount of discharge was largely increased when a supply of water was introduced into the burgh. The Commissioners took the opinion of Counsel—Mr. (afterwards Lord) Rutherfurd-Clark and Mr. J. B. Balfour—as to the rights of an inferior heritor. Counsel said: "If the surface water only found its way to the burn by flowing over the surface of the ground, not in any definite channels, or by percolating through it, the lower proprietor would not, in our judgment, have any legal right to the water; but if the surface water for forty years was collected in definite channels, and therefore flowed into the burn, we consider that he would have such a legal right to it as to entitle him to compensation for the diminution of water-power. The inferior proprietor has, in our opinion, no right to insist

for the continued discharge into the burn of the water brought into the burgh twenty-three years ago, and he would not be entitled to any compensation in respect of the withdrawal of that water, but only in respect of the withdrawal of the water which had flowed for forty years in definite channels into the burn."

In England "it would seem that a right to the flow of sewage in a natural stream, which would, but for such sewage, be pure, would not necessarily be acquired by prescription, but that the persons entitled to divert the sewage from the stream might do so." Gaved *v.* Martin (19 C. B., N. S., 732; 11 Jur., N. S., 1017; 34 L. J., C. P., 353; 13 L. T., N. S., 74)."—Glen, p. 56.

The compensation payable in respect of the diversion of the contents of a sewer is to be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts. The Commissioners of the aforesaid burgh also took the opinion of Counsel as to the nature of the compensation to be given to the inferior proprietor, who stated: "that compensation, however, would, in our view, require to be paid in money, although the amount to be paid might be fixed at that which a compensation reservoir would cost. We are of opinion that the memorialists have no power to acquire land compulsorily for the construction of compensation reservoirs for any riparian proprietor."

It will be observed that there is no provision in this section empowering the Commissioners to construct sewerage works outwith their jurisdiction. If they require to do so, for the purposes of outfall or disposal of the sewage, they may proceed either by Provisional Order, as authorised for that purpose by sec. 45 *supra*, or under the powers of the Public Health Act. The Commissioners of the aforesaid burgh also took the opinion of Counsel on this point: "We are of opinion that the memorialists have not, under clause 186 of the General Police Act, but that they have, under clause 73 of the Public Health Act, power to lay pipes through lands outside the burgh for the purposes of obtaining an outfall to the sea, or conducting the sewage to a place where it could be utilised."

In Police Commissioners of Kirkintilloch *v.* M'Donald, 31st October 1890 (18 R., 67), in a burgh of under 10,000 inhabitants, which had adopted the General Police Act of 1862, the Commissioners of Police introduced a system of public sewers at a cost of over £4000, the proceedings in connection therewith being taken under the Act of 1862.

They were subsequently compelled, in order to dispose of the sewage, to undertake the construction of a system of sewage purification and disposal works, and in order to get compulsory powers to acquire the land for this purpose, they had, as the Local Authority, to obtain a Provisional Order and a Provisional Order Confirmation Act, in terms of the Public Health Act, 1867. The cost of obtaining the Act, and of purchasing the ground and constructing the works, was about £19,000.

The Commissioners having proposed to raise both sums by assessments on owners under the Police Act of 1862, certain owners

contended that the latter sum should be raised, under the Public Health Act, by an assessment upon occupiers.

In a special case, *held* that the expenses incurred in the application under the Public Health Act, 1867, fell upon occupiers, in terms of sec. 94, sub-sec. (2), of that Act, there being a police (but no prison) assessment in the burgh, which was so leviable under sec. 84 of the Police Act of 1862.

Sec. 73 of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, provides:—

"The Local Authority shall have power to construct within their district, and also, when necessary for the purpose of outfall or distribution 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 turnpike 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 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, 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 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 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."

Besides the power to go outside the district, it will be observed that there are other differences between sec. 73 of the Public Health Act and sec. 219 of this Act. In the first place, the terms of sec. 73 of the Public Health Act are permissive—"The Local Authority *shall have power*," etc. But these words are construed as imperative when the exercise of the power is necessary in the public interest.

In Board of Supervision *v.* Local Authority of Montrose, 3rd December 1872 (11 M., 170), it was held that whenever a Local Authority "shall refuse or neglect" to construct the necessary system of drainage in the district under their supervision, the Board of Supervision has a right to present a petition to have them compelled to do so. On a petition and complaint by the Board of Supervision, the Court sisted procedure, to allow a Local Authority reasonable time to discover the most suitable system of drainage, and to have it executed.

Another point of difference is that, in sec. 73 of the Public Health

Act, there is no mention of compensation. It is not provided that compensation is to be made as for land taken under the Lands Clauses Acts. Compensation for any damage done must be given (see sec. 116), but there is no provision imposing an obligation on the Local Authority to acquire the land. The opinion of Counsel—Mr. (afterwards Lord) Rutherfurd-Clark and Mr. J. B. Balfour—already referred to, is to the effect that compensation must be given: "We think, however, that the memorialists would be bound to make compensation for the ground occupied by the pipes outside the burgh."

In England, in North London Railway *v.* Metropolitan Board of Works (1 Johns, 405; 28 L. J., Ch., 909), it is not necessary that the Local Authority should purchase the lands for the purpose of exercising these powers. It is only necessary to make compensation for the damage done. See Bazalgette, p. 54.

"It is not necessary for the Local Authority to purchase or otherwise acquire the land if nothing more is wanted than merely to make a sewer through it. Thornton *v.* Nutter (31 J. P., 419). It is laid down that in the construction of powers conferred by Act of Parliament upon public bodies, acting for the public benefit alone, the intention of the Legislature is not to be measured by the more guarded powers given to companies established for trading purposes. North London Railway Company *v.* Metropolitan Board of Works (28 L. J., Ch., 909; 1 Johns, 405; 5 Jur., N. S., 1121). Under the above section (38 & 39 Vict. c. 55, sec. 16), the Local Authority may construct a sewer above and upon, as well as under, the surface of private lands, without purchasing any of the land to be occupied by it. Roderick *v.* Aston Local Board (36 L. T., N. S., 170; *aff.* on appeal, L. R., 5 Ch. D., 328; 46 L. J., Ch., 802; 36 L. T., N. S., 328; 41 J. P., 516).

"Nor, according to an opinion expressed by Cockburn, C. J., at *nisi prius*, is it necessary for the Local Authority to obtain an order of Justices, under sec. 305, before they enter on the lands to lay the sewer, when the owner or occupier refuses to permit them to enter. In this case, which was an action for damages for trespass and for an injunction, the jury having found that the intended sewer would cause a nuisance, the injunction was granted, as the Statute does not authorise a sewer which would cause a nuisance. Lamacraft *v.* St. Thomas Rural Sanitary Authority (42 L. T., N. S., 365; 44 J. P., 441)."—Glen, p. 44.

In the event of the Commissioners desiring to carry out a joint sewerage scheme with any adjacent burgh, the only means provided in this Act for doing so is by a Provisional Order, in terms of sec. 45. A less expensive procedure is provided by the Public Health Act, 30 & 31 Vict. c. 101, sec. 87 of which enacts—

"Two or more Local Authorities may, with the sanction of the Board, combine together for the purpose of executing and maintaining any works by this Act authorised, in regard to sewerage or drainage, that may be for the benefit of their respective districts; and all monies which they may agree to contribute for the execution and maintenance of such common works shall, in the case of each

Local Authority, be deemed to be expenses incurred by them in the execution of works within their district."

Under the foregoing provision, the Commissioners could also join with the Local Authority of a landward district to carry out sewerage works.

There is another provision in the Public Health Act as to the construction of sewers, which may at times be of use to the Commissioners. Sec. 24 of 30 & 31 Vict. c. 101 provides—

"Whenever any watercourse, ditch, gutter, or drain, along the side of any public road, street, or lane, shall be used or partly used for the conveyance of any water, sewage, or other matter from any premises, and cannot, in the opinion of the Local Authority, be rendered free from foulness or offensive smell without the laying down of a sewer or of some other structure, such Local Authority shall, and they are hereby required, subject to the approval of the Board, to lay down such sewer or other structure within the limits of their district, or, where necessary for the purpose of outfall or distribution of sewage, without their district, and to keep the same in good and serviceable repair; and they may enter any premises for such purposes, and use such part thereof as shall be necessary, and for such use shall pay such damages as may be assessed by the Sheriff on a summary application, and to such party as the Sheriff may direct; provided always, that no damage shall be payable to any person who has caused or contributed to cause such watercourse, ditch, gutter, or drain to become foul or offensive, unless such person shall satisfy the Sheriff that he had justifiable excuse for so doing; and such Local Authority are hereby authorised and empowered to assess the owners of all the premises (according to the yearly value thereof) from which then or at any time thereafter any material other than pure water flows, falls, or is carried into the said sewer or other structure, for payment of all expenses incurred in making and maintaining the same, and that either in one sum or in instalments, as they shall think just and reasonable, and after fourteen days' notice at the least, left with the said owners, if resident within the district, and if not so resident, with the occupiers of the said premises, to levy and collect the sums so assessed, with the same remedies in case of default in payment thereof as are hereinafter provided with reference to the general charge and expenses incurred by the Local Authority under this Act."

220. Commissioners to give Notice of new Levels or Sewers.—Twenty-eight days at the least before making any new sewer where none previously existed, or altering the course or level of or abandoning or stopping any sewer, the Commissioners shall give notice of their intention, by posting a notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the names of the streets and

places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places at the beginning and the end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time when and place where all persons interested in such intended work may be heard thereupon.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street;" secs. 336 to 338 inclusive, as to "notice." As to altering or abandoning sewers, see secs. 224 and 225.

See Phillips *v.* Munro, 21st Mar. 1884 (12 R., 159), as to the necessity for notice, etc.

221. Meeting of Commissioners to hear Objections.—The Commissioners shall meet at the time and place mentioned in the said notice, to consider, in the presence of the Surveyor of the Commissioners, any objections made against such intended work, and all persons interested therein, or likely to be aggrieved thereby, shall be entitled to be heard before the Commissioners at such meeting; and thereupon the Commissioners may, at their discretion, abandon or make such alterations in the said intended work as they judge fit; and no such work to which any objection is made at such meeting shall be executed, unless the Burgh Surveyor, after the person making such objection, or his agent, has been heard, shall certify that the work ought to be executed, nor shall such work be begun until the end of seven days after an order for the execution thereof has been duly made by the Commissioners, and entered in their books.

See sub-head (9), sec. 4, for definition of "Commissioners;" secs. 336 to 338 inclusive, as to "notice."

222. Where Works for Sewage provided, Streams not to be Polluted.—Whenever the Commissioners shall have caused pipes or other works to be laid in or along any river, burn, or watercourse within the burgh, for the purpose of intercepting and conveying away the sewage which would otherwise flow into and pollute the same, it shall not be lawful for any person to introduce into any part of such river, burn, or watercourse, along which such pipes are laid, any sewage or other offensive matter or thing from any source; and the Commissioners are hereby authorised and required to allow

junctions to be made with such pipes or works for the purpose of drainage of any lands and premises which would naturally fall into such river, burn, or watercourse, on such terms as they may arrange with the persons requiring such drainage, and failing such arrangement, on such terms as may be fixed by the Sheriff; and the Sheriff is hereby required to hear and determine any questions affecting such drainage that may be submitted to him; and every person who shall infringe the provisions of this enactment shall be liable to a penalty not exceeding £5, and a further penalty not exceeding 20s. for each day during which such infringement shall be continued.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (16) "lands and premises," (30) "Sheriff;" see sec. 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors. See also the provisions as to refuse from public works, sec. 233. There is in this Act no general provision, further than that contained in sec. 250, entitling any ratepayer to join his drains with the sewers of the Commissioners. A provision to this effect is contained in the Public Health Act, 30 & 31 Vict. c. 101, sec. 77 of which provides:—

"Any owner or occupier of premises within the district of a Local Authority, liable for general or special sewerage or drainage assessment, shall be entitled to cause his drains to empty into the sewers of such Local Authority, on condition of his giving twenty days' previous notice of his intention so to do to the Local Authority, and of complying with their regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the Local Authority to superintend the making of such communications."

In England, in Attorney-General *v.* Kingston-on-Thames (34 L. J., Ch., 481), the power given to Commissioners acting under the Towns Improvement Clauses Act, 1847, to "cause their sewers to communicate with and empty themselves into the sea or any public river," 10 & 11 Vict. c. 34, s. 24, is subject to the condition that they create no nuisance thereby.—Glen, p. 47.

"The right given by the above section (21 of the Public Health Act, 1875) does not enable the owner of premises to drain them into a sewer belonging to the Local Authority of a district which does not include such premises, whether the sewer is within the same sanitary district as the premises or not; but the following section allows him to do so on making terms with the Local Authority to which the sewer belongs.

"A drain from certain cottages and malt kilns had been connected with the sewer of a Local Board with their consent. On a drain from a third kiln being connected with it, the Board, being under an

interim injunction, restraining them from connecting new drains with the sewer, or increasing the volume of the existing sewers, stopped up the drain, so as to cut off not only the flow of refuse from the third kiln, but also from the other two and the cottages. Bacon, V. C., describing the proceeding of the Board as wanton and outrageous, granted a perpetual injunction to restrain the Board from continuing the obstruction, and an inquiry as to damages. Clegg *v.* Castleford Local Board, N. W., 1874, 229.

"An Urban Sanitary Authority, on the other hand, was ruled by Cave, J., to have been entitled to cut off the connection between the drains of a house and their sewer, because the owner had not given the two days' notice of his intention to make the drains, which the bye-laws required, and which, the learned Judge held, the Surveyor had no power to waive or dispense with; the Surveyor had not expressed his satisfaction with the drains, and the owner had disregarded a notice to uncover the drains for the Surveyor's inspection. Baxter *v.* Mayor, etc., of Bedford, *Times* newspaper, 23rd July 1885. . . ."—Glen, p. 61.

"This section (22 of 38 & 39 Vict. c. 55) also appears to give a right of drainage into the sewers to which it applies, and not to give the Local Authority the power to refuse to permit such drainage at their absolute discretion, if the owner or occupier is willing to abide by such terms and conditions as may be settled in the manner provided by the Act. Newington Local Board *v.* Cottingham Local Board (L. R., 12 Ch. D., 725; 48 L. J., Ch., 226; 40 L. T., N. S., 58).

"Malins, V. C., considered that the sewer of the 'Local Authority' meant sewer of the Local Authority of the adjoining district; and that where the sewers of one Local Authority were connected with the sewers of another, an owner of premises not within the district of either Authority, was only required to make terms with the Authority to whose sewers he intended to connect his drains.

"An agreement made with the owner of an estate, under the corresponding section of the Public Health Act, 1848 (11 & 12 Vict. c. 63, sec. 48), was held to be binding upon the corporation, who were the successors of the Local Board of Health that had entered into the agreement, even though it related to the sewage from houses which did not exist at the date of the agreement, and although the corporation were, under a new Act of Parliament, prevented from passing the sewage into the river Thames. Mayor, etc., of New Windsor *v.* Stovell (L. R., 27 Ch. D., 665; 51 L. T., N. S., 626).

"The last clause of sec. 14 provides for the continuance of the rights of persons to use a sewer after the purchase of the sewer by the Local Authority; and sec. 337 contains a saving with reference to cases where yearly sums are payable under the Local Government Act, 1858, Amendment Act, 1861, 24 & 25 Vict. c. 61, sec. 8, for the drainage of premises without the district."—Glen, p. 62.

223. Throwing Rubbish into Streams.—Any person who shall lay or throw, or cause or procure to be laid or

thrown, any rubbish, earth, ashes, corks, straw, soil, filth, or refuse, or any other matter, whether offensive or not, into the channel, or on the banks or on the sides of any river, burn, or watercourse, flowing through or on the boundary of the burgh, shall, upon conviction of such offence before the Magistrate, be liable to a penalty not exceeding 40s.

See sub-head (4), sec. 4, for definition of "burgh;" sec. 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors.

See also sec. 381, sub-head (36), which imposes a penalty on any person who "throws or lays any dirt, litter, or ashes, or nightsoil, or any carrion, fish, offal, or rubbish . . . into the channel or on the banks of any river or into any harbour within the burgh."

See, further, the Rivers Pollution Act, 1876, 39 & 40 Vict. c. 75, sec. 2 of which provides:—

"Every person who puts or causes to be put or to fall, or knowingly permits to be put or to fall or to be carried into any stream, so as, either singly or in combination with other similar acts of the same or any other person, to interfere with its due flow or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this Act.

"In proving interference with the due flow of any stream, or in proving the pollution of any stream, evidence may be given of repeated acts which together cause such interference or pollution, although each act taken by itself may not be sufficient for that purpose."

Sec. 20 of the same Act provides that "'Solid' matter shall not include particles of matter in suspension in water;" and "'polluting' shall not include innocuous discoloration."

224. Commissioners may alter Sewers from time to time.—The Commissioners may from time to time, as they see fit, repair, enlarge, extend, alter, arch, or cover over, and otherwise improve all or any of the sewers vested in them; and if any of such sewers at any time appear to them to have become useless, the Commissioners may demolish and discontinue such sewer, provided that it be so done as not to create a nuisance.

See sub-head (9), sec. 4, for definition of "Commissioners."

The similar provision in the English Public Health Act, 1875, 38 & 39 Vict. c. 55, sec. 18, was held to authorise the covering-in and converting into a pipe-sewer an open watercourse, which the

Court held to be a sewer. Wheatcroft *v.* Matlock Local Board (52 L. T., N. S., 356).

"If a sewer or drain interferes with a river, canal, dock, etc., another may in certain cases be substituted for it under sec. 331 (Public Health Act, 1875). House drains may be disconnected from one sewer and connected with another under sec. 24 of said Act."—Glen, p. 56.

"Sec. 18 of the Public Health Act, 1875, enables the Local Authority to discontinue existing sewers, and to substitute new sewers for old. Sec. 24 is not confined to cases in which they have already acted upon sec. 18, but where they have acted on that section. This section shows that the alteration of house drains, which is thereby rendered necessary, must be carried out at the expense of the district, and is not chargeable on the owner.

"It has happened that a Local Authority, after enforcing the communication of house drains with a particular system of sewers, have found it necessary to change their general scheme of sewerage, and to construct fresh sewers; but the Sanitary Acts contained no provision under which the Local Authority could compel fresh junctions or defray their cost. Sec. 24 now empowers a Local Authority, under these circumstances, to close any such existing drains, on condition of providing others equally effectual and communicating with the new system" (Circular of Local Government Board, 30th Sept. 1875).—Glen, p. 64.

225. Commissioners not to destroy existing Sewers, etc., without providing others.—If any person, by means of any alteration or discontinuance of any sewer, or other proceeding of the Commissioners, be deprived of the use of any sewer or drain which such person was theretofore lawfully entitled to use, the Commissioners shall provide some other sewer or drain equally effectual for such purpose; and if the Commissioners do not, within seven days after notice in writing served upon them, begin, and thereupon diligently proceed, to restore to its former effective state such drain or sewer, or to provide such other sewer or drain as aforesaid, they shall forfeit to the person aggrieved a sum not exceeding 40s. for every day after the expiration of such seven days during which he is deprived of the use of the drain or sewer to which he was so entitled, and is not provided with such other drain or sewer as aforesaid.

See sub-head (9), sec. 4, for definition of "Commissioners."

See sec. 487 for imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors. Also sec. 338 as to notice to the Commissioners.

This section allows seven days to the Commissioners before they are subject to a penalty for failing to provide a new drain as a substitute for one discontinued; but, as the Commissioners are not entitled to create a nuisance, it will be incumbent on them to provide the new sewer before the old one is closed up.

226. Commissioners to cause Estimates to be prepared before Execution of Works.—Before entering into any contract for executing any such work as aforesaid, the Commissioners shall procure from their Surveyor an estimate of the probable expense of constructing the same in a substantial manner, and of the yearly expense of maintaining the same in repair, and such Surveyor shall accompany such estimate with a report as to the most advantageous mode of constructing such work, whether under a contract for constructing the same merely, or a contract for constructing the same and maintaining it in repair during a given term of years.

See sub-head (9), sec. 4, for definition of "Commissioners."

As to contracts and the provisions as to sealing and signing them, see sec. 55, sub-head (2). See also sec. 71, which prohibits any Commissioner having an interest in any contract under this Act.

The corresponding provision of the Public Health Act, 1867, 30 and 31 Vict. c. 101, sec. 80, only applies when the cost is likely to exceed £30.

A contract for the making of drains to the depth of 3½ feet contained a stipulation that the work should be done to the satisfaction of an inspector to be appointed by the employer. The inspector failed to inspect the work, but gave certificates that it had been duly executed, upon the faith of which the employer paid various instalments of the price. The employer subsequently ascertained that the drains fell far short of the stipulated depth.

In an action by the contractor for payment of the remaining instalments—*held*, that he was not entitled to recover, in respect that he had failed to carry out his part of the contract.

In an action by the employer for implement or damages—*held*, that the employer was not entitled to implement or damages, in respect that the work had proceeded at the sight of his representative without objection. Muldoon *v.* Pringle, 9th June 1882 (9 R., 915).

227. Penalty for making Unauthorised Drains.—Every person, not being employed or authorised for that purpose by the Commissioners, who shall make any drain from any lands or premises into any of the sewers vested in the Commissioners, shall be liable to a penalty not exceeding £5; and the Commissioners may cause such drain to be re-made as they think fit, and the expense incurred thereby

shall be paid by the owner of the lands or premises, and that over and above a reasonable sum of money for the use of the sewers, which the Commissioners are hereinafter authorised and required to exact for the use of the sewers.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands and premises." See sec. 487 for imprisonment on failure to pay penalty; secs. 500 and 501 for penalty on repetition of offences and power to mitigate; sec. 458 as to punishment of abettors; sec. 244, which contains provisions as to making of drains without consent of the Commissioners. See sec. 364 as to the cases where the "reasonable sum," herein mentioned, is chargeable for use of the sewers.

In M'Callum *v.* Barrie, 26th February 1878 (5 R., 683), it was held that a resolution to assess all proprietors who had not hitherto been assessed for drainage purposes at the rate of 2s. 6d. per £ on their rental, was *ultra vires*, and that they were not entitled to recover the assessment as a "reasonable sum" under sec. 190 of the 1862 Act, that section requiring inquiry into the circumstances of each case before the sum to be charged was decided upon.

Lord Gifford said: "In the first place, I do not think that sec. 190 ever contemplated a special sewer rate at all. It had in contemplation the special circumstances of each case. It was meant to meet the case of a proprietor who, having built a house or houses without notice to the Commissioners, takes the matter into his own hands, and connects his property with the sewers built by the Commissioners; and the object of the section is, first, to punish him for so doing by making him liable in a penalty not exceeding £5, and then the Commissioners are to be entitled to rebuild the drain or alter it at the expense of the proprietor. Over and above that, they are to be entitled to levy a sum of money for the use of the sewers, which sum is to be a 'reasonable sum.' I am willing to consider this last part of the clause as of general application, and not merely confined to the case where a penalty is exacted. But still the Commissioners must fix a reasonable sum to be paid in this particular case, and in order to do so they must consider the special case in hand. The extent of the proprietor's property must be taken into consideration in fixing the sum of money, and the circumstances in which the connection was made, and the length of the sewer, and various other things. In this case I do not think the Commissioners have done their duty in simply imposing a general assessment of 2s. 6d. in the £ upon all these properties. They never have applied their minds to the special circumstances of each property, and are therefore not under sec. 190."

The General Police and Improvement (Scotland) Act, 1862, 25 & 26 Vict. c. 101, sec. 190, provides somewhat similar to the terms of this section. The Commissioners of Police of a burgh, acting under the powers conferred by the Statute, constructed a system of sewage, and to meet the expense thereof they had, since 1870, levied on the owners of property in the burgh a special sewage rate, which had

still several years to run. In 1888, an inhabitant of the burgh having connected certain newly-erected property with the burgh sewers, the Commissioners of Police fixed a sum of £120 as a reasonable sum to be paid for the privilege, and on a failure to pay sued the owner of the property for the amount. It was admitted that this sum included a sum of £40, said to be a commutation of the special drainage rate. *Held*, that the defender must be assoilzied—(1) because the Statute did not warrant such commutation, and (2) because no decree could pass for the balance of £80, as there was no resolution of the Police Commissioners for that sum. *Opinion* (per Lord Rutherfurd-Clark)—(1) That sec. 190 of the Statute was not confined to the case of a house drain which had been connected with a sewer without the authority of the Commissioners, but that it was intended to be of general application so as to settle the burdens on all lands and premises which were not assessed for the use of the sewer, or which had been built, enlarged, or altered after the assessment was imposed; (2) That this section was not limited in its operation to lands connected with the sewer, after the special rate had come to an end, but that the words "imposed or levied" must be construed as equivalent to "imposed, or in the course of being imposed," and that in all cases where a drain leading from premises such as described were connected with a sewer, a reasonable sum might be exacted. Muirhead, Clerk to Hillhead Police Commissioners, *v.* Renwick, 21st June 1890 (27 S. L. R., 981).

Sec. 79 of the Public Health Act, 30 & 31 Vict. c. 101, is to the following effect:—

"Every person not being authorised by the Local Authority who shall make any drain into any sewer vested in the Local Authority, shall be liable in a penalty not exceeding £5, besides shutting up said drain or paying the expense of shutting it up.

"*Note.*—If damage be caused to the sewers by the unauthorised connection made with them, the person would also be liable in the penalty provided by sec. 101, in addition to the cost of repairing the sewer."—Skelton, p. 75. See also the observations as to the right of drainage into public sewers, quoted under sec. 222, *supra*.

228. Vaults and Cellars under Streets not to be made without Consent of Commissioners.—No building shall be erected over any sewer belonging to the Commissioners, and no vault, arch, or cellar shall be made under the carriageway of any street, public or private, without the consent of the Commissioners first obtained in writing; and if such consent be obtained, all such vaults, arches, and cellars shall be substantially made, and so as not to interfere or communicate with any sewers belonging to the Commissioners; and if, after this Act comes into operation in the burgh, any building be erected, or any vault, arch, or cellar be made

therein, contrary to the provisions herein contained, the Commissioners may demolish or fill up the same, and the expenses incurred thereby shall be paid by the person erecting such building, or making such vault, arch, or cellar.

See sub-head (3), sec. 4, for definition of "building," and observations thereon, (9) "Commissioners," (31) "street," (28) "private street," (4) "burgh." The prohibition of vaults, etc., is limited to the carriageway of the streets, and does not extend to the foot pavements.

The Public Health Act, 30 & 31 Vict. c. 101, sec. 81, provides:—

"Unless with consent of the Local Authority, no building shall be erected over any sewer belonging to the Local Authority, and no vault, arch, or cellar shall be made so as to interfere with any such sewer."

229. Sewers, etc., to be Trapped and Ventilated.—All sewers and drains, whether public or private, shall be trapped and ventilated by the Commissioners or other persons to whom they severally belong.

See sub-head (9), sec. 4, for definition of "Commissioners;" as to public and private sewers and drains, see sec. 215, and observations thereunder. As to ventilation and trapping of house drains, see sec. 241, *infra;* also Schedule IV., Rule No. 15. See also under sec. 219, *supra*, as to nuisance caused by sewers.

The Public Health Act, 30 & 31 Vict. c. 181, sec. 82, provides:—

"All sewers and drains, whether public or private, shall be provided by the persons to whom they severally belong, with proper traps or other coverings or means of ventilation, so as to prevent stench or deleterious exhalation."

230. Ventilation of Sewers.—The Commissioners shall have power, for the purpose of providing ventilation for the existing sewers or drains, or for such sewers or drains as may herafter be constructed, to acquire, by agreement, lands and premises, and to construct all ventilating shafts, furnaces, and other means of ventilating the sewers and other works, which may from time to time be found necessary; and if, for completing any works required in the execution of this provision, it be found necessary to carry them upon, into, or through any enclosed or other private premises, the Commissioners shall have and may exercise the like powers, and be liable to the like conditions and restrictions which are by this Act provided with reference to the construction of sewers.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands and premises."

See sec. 219, *supra*, as to the powers and liabilities of the Commissioners in connection with the construction of sewers. In England, it has been suggested that the erection of a ventilating shaft attached to a private house is within the power of the Local Authority. Swanston *v.* Twickenham Local Board (11 Ch. D., 388; 48 L. J., Ch., 623; 40 L. T., N. S., 734; 27 W. R., 924).

231. Commissioners may arrange with the Occupier of any Manufactory, etc. — The Commissioners may also arrange with the owners or occupiers of any manufactory, gas-work, or brewery, having furnace and chimney shafts so situated as to be available for the ventilation of the adjacent sewers and drains, for such ventilation, or of other suitable premises, to lay and fix such ventilators, pipes, or shafts into, on, or against all such buildings or premises as to them may seem proper, and as may be agreed on, making compensation to the owners thereof.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (21) "occupier," (16) "premises," (3) "building."

232. Costs and Charges. — All costs and expenses which may be incurred by the Commissioners in carrying the provisions for ventilating the sewers or drains into effect, shall form a charge against the "general sewer rate" or against any "special sewer rate" which in their judgment may be properly chargeable therewith.

See sub-head (9), sec. 4, for definition of "Commissioners." See secs. 361–364 as to "general sewer rate," and "special sewer rate."

233. Distillers and others to construct Reservoirs to deposit Refuse.—Any owner or occupier of distilleries, manufactories, or other works, who causes or permits any refuse, refuse water, steam, or other substance fitted to interrupt the free passage of a sewer, or to be otherwise injurious thereto, or to be injurious to the health of persons living in the vicinity, to enter a public sewer, river, or inland loch, or public reservoir or dock, from any such works, shall be guilty of an offence, and shall, on conviction before the Sheriff, be liable to a penalty of £5 for every day or part of a day during which such offence continues, besides being liable for all damages and for all expenses for taking out of the sewer any refuse or substance that may have entered it from his works.

Such owners and occupiers shall construct pools or reservoirs as near their works as possible, for receiving and depositing such refuse and other substances.

If it shall be impracticable, in the judgment of the Commissioners, to render such refuse or other substances inoffensive or innocuous, or to prevent the same from interrupting the free passage of the sewer, or otherwise injuring the same, it shall be lawful for the Commissioners to prohibit and interdict such owner or occupier from permitting the same to run into such sewer from his works aforesaid; and while such prohibition and interdict are in force, or if and so long as the owner or occupier of such works makes no use of the sewers, in consequence of having before this Act came into operation made separate arrangements for the drainage of the works, such owner or occupier shall be entitled to be exempted from the sewer rates to the extent of seventy-five per centum thereof applicable to the whole building, or such part or parts thereof as by such prohibition or previous separate arrangement are deprived directly or indirectly of any benefit from the sewer; provided that the sewer rates payable in respect of the other parts of such distilleries, manufactories, and other works, and all warehouses, offices, and other buildings connected therewith, shall still remain payable; and if the prohibition and interdict be at any time by the Commissioners withdrawn, or the owner or occupier having previous separate arrangements shall begin to use the sewers, then the exemption shall cease so soon as the owner or occupier avails himself to any extent of the withdrawal of the prohibition by permitting the substances prohibited to pass into the sewers, and if the owner or occupier is dissatisfied with the decision of the Commissioners as to the question of practicability aforesaid, or as to the part of the works for which such exemption ought to be made, it shall be lawful for such owner or occupier to appeal to the Sheriff in manner after provided.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (30) "Sheriff." See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

The Commissioners of a burgh discharged their sewage into a

burn, and were called upon by an inferior heritor to cease causing a nuisance thereby. Another riparian proprietor stated that the town's sewage was no nuisance to him, but that the refuse from gas-works, etc., which accompanied it, created a nuisance. The Commissioners took the opinion of Counsel—Mr. (afterwards Lord) Rutherfurd-Clark and Mr. J. B. Balfour—as to the competency of an action against the owners or occupiers of the works in question. Counsel advised:—

"We are of opinion that the memorialists could not, in respect of the complaints of the proprietors along the course of the burn, compel the owners or occupiers of the works to adopt the measures mentioned in sec. 193 of the Police Act. That section declares that the owners or occupiers shall be compellable to adopt the measures in question for receiving and depositing the refuse of their works, 'so far as offensive or dangerous to the health of those living in the vicinity thereof,' that is of their works, and we do not understand that the refuse in question is offensive or dangerous to the health of those living near the works from which it proceeds. Even if by itself, or in combination with other sewage, it caused or contributed to the creation of a nuisance at X., this would be so far from the works as to render the provisions of sec. 193 of the Police Act and sec. 83 of the Public Health Act inapplicable to the case."

Besides the powers at common law for preventing nuisance by the discharge of refuse from works, there are several statutory provisions on the subject.

The provisions of sec. 27 of the Public Health Act, 30 & 31 Vict. c. 101, are:—

"Any person engaged in the manufacture of gas, naphtha, vitriol, paraffin, or dye stuffs, or any other deleterious substance, or in any trade in which the refuse produced in any such manufacture is used, who shall at any time cause or suffer to be brought or to flow into any stream, reservoir, aqueduct, well, or pond, or place for water, constructed or used for the supply of water for domestic purposes, or into any pipe or drain communicating therewith, any product, washing, or other substance produced in any such manufacture, or shall wilfully do any act connected with any such manufacture whereby the water in any such stream, reservoir, aqueduct, well, pond, or place for water shall be fouled, and any person who shall wilfully do or permit to be done any act whereby the water in any stream, reservoir, aqueduct, well, pond, or place constructed for the supply of water for domestic purposes shall be fouled, shall forfeit for every such offence a sum not exceeding £50.

"*Note.*—Similar provisions are found in the Gas-Works Clauses Act, 1847, 10 Vict. c. 15, sec. 21, and the Water-Works Clauses Act, 1847, 10 Vict. c. 17, sec. 62, the penalty in these cases being £200. These Acts are only in force when incorporated with some other Act.

"The pollution of water by discharges from public works is dealt with in sec. 83 (see that section and notes); and the pollution of

streams generally is dealt with in the Rivers Pollution Act. See that Act, *infra*.

"A few years after the passing of the Public Health Act, certain riparian proprietors on the river Almond, in the counties of Edinburgh and Linlithgow, memorialised the Board as to the pollution of the river by paraffin works. The Board expressed the opinion that the memorialists would obtain a more speedy and effectual remedy by means of an action at common law, at their own instance, than by the interposition of the Local Authorities, under the Public Health Act. The powers of Local Authorities as to the pollution of streams are defined by secs. 27 and 83, and the Act contains no express authority for two or more Local Authorities jointly prosecuting offenders. The Board feared that the extent and nature of the pollution were such as to render doubtful a successful issue in any proceedings, joint or separate, which the Local Authorities might take under their limited statutory powers. The rights of proprietors at common law, however, are much more extensive, and the Board saw no impediment to the proprietors being able to vindicate their rights from infringement."—Board's Report, 1872, p. 27. Skelton, p. 34.

By sec. 28 of the Public Health Act, it is provided:—

"Such penalty may be recovered, with expenses, by the person into whose water such product, washing, or other substance shall be conveyed or shall flow, or whose water shall be fouled by any such act as aforesaid, or in default of proceedings by such person, after notice to him from the Local Authority of their intention to proceed for such penalty, or if there be no such person, by the Local Authority; but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it shall have ceased."

And by sec. 29 of the Public Health Act it is provided:—

"In addition to the said penalty (and whether such penalty shall have been recovered or not), the person so offending shall forfeit a sum not exceeding £5 (to be recovered in the like manner) for each day during which such product, washing, or other substance shall be brought or shall flow as aforesaid, or during which the act by which such water shall be fouled shall continue, after the expiration of twenty-four hours from the time when notice of the offence shall have been served on such person by the Local Authority, or by the person into whose water such product, washing, or other substance shall be brought or flow, or whose water shall be fouled thereby; and such penalty shall be paid to the Local Authority or person from whom such notice shall proceed; and all monies recovered by the Local Authority under this or the preceding section shall, after payment of any damage caused by the act for which the penalty is imposed, be applied towards defraying the expenses of executing this Act."

And by sec. 83 of the Public Health Act it is provided:—

"The owners or occupiers of distilleries, manufactories, and other works, shall be compelled, where possible, to dig, make, and construct pools or reservoirs within their own ground, or as near their works as possible, for receiving and depositing the refuse of such works, so far

as offensive or injurious to the health of those living in the vicinity thereof, or to use the best practical means for rendering the same inoffensive or innoxious, before discharging it into any river, stream, ditch, sewer, or other channel.

"*Note.*—The Board, shortly after the passing of the Public Health Act, received a complaint as to the pollution of the river Leven in Fife, by discharges from manufactories. They took the opinion of Counsel, and were advised:—'(1) That "offensiveness," in sec. 83 of the Public Health Act, is to be construed as distinct from "injury to health;" and that, in proceedings under that section, it is not necessary, if the pollution is offensive, to prove also that it is prejudicial to the health of those living in the vicinity thereof. (2) That the manufacturers polluting the river Leven are likewise liable to be prosecuted for penalties, under secs. 27 and 29 of the Act, as persons who wilfully do, or permit to be done, an act whereby the water in a stream is fouled." . . . (4) That the remedy under secs. 27 and 29, and that under sec. 83, are not alternative but cumulative—the former imposing penalties for a thing done, and the latter enacting a remedy whereby the continuance of the mischief may be prevented.'"—Board's Report, 1869, p. 19. Skelton, p. 77.

The Rivers Pollution Act, 39 & 40 Vict. c. 75, enacts various provisions as to refuse from manufactories, etc. See sec. 2, quoted under sec. 223, *supra*.

By sec. 4 of that Act it is provided:—"Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any poisonous, noxious, or polluting liquid, proceeding from any factory or manufacturing process, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

"Where any such poisonous, noxious, or polluting liquid, as aforesaid, falls or flows or is carried into any stream along a channel used, constructed, or in process of construction, at the date of the passing of this Act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried, shall not be deemed to have committed an offence against this Act, if he shows to the satisfaction of the Court having cognisance of the case, that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream."

And by sec. 5 of that Act it is provided:—

"Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this Act, unless, in the case of poisonous, noxious, or polluting matter, he shows to the satisfaction of the Court having cognisance of the case, that he is using

the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting matter so falling or flowing or carried into the stream."

And by sec. 6 of that Act it is provided:—

"Unless and until Parliament otherwise provides, the following enactments shall take effect. Proceedings shall not be taken against any person under this part of this Act save by a Sanitary Authority, nor shall any such proceedings be taken without the consent of the Local Government Board: Provided always, that if the Sanitary Authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings or apply for the consent by this section provided, the person so interested may apply to the Local Government Board; and if that Board, on inquiry, is of opinion that the Sanitary Authority should take proceedings, they may direct the Sanitary Authority accordingly, who shall thereupon commence proceedings.

"The said Board, in giving or withholding their consent, shall have regard to the industrial interests involved in the case, and to the circumstances and requirements of the locality.

"The said Board shall not give their consent to proceedings by the Sanitary Authority of any district, which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

"Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the Sanitary Authority to such proceedings being taken, and such Authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes. The Sanitary Authority shall thereupon allow such person to be heard by himself, agents, and witnesses; and after inquiry, such Authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such Sanitary Authority has taken proceedings under this Act, it shall not be competent to other Sanitary Authorities to take proceedings under this Act, till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent Court under this Act."

And by sec. 7 of that Act it is provided:—

"Every Sanitary or other Local Authority having sewers under their control, shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any Sanitary or other Local Authority to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would, from its temperature or otherwise, be injurious in a sanitary point of view:

"Provided also, that no Sanitary Authority shall be required to give such facilities as aforesaid, where the sewers of such Authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any Court of competent jurisdiction respecting the sewage of such Authority."

Proceedings may be taken in the Sheriff-Court, with an appeal to the Court of Session; and sec. 10 provides that, previous to granting any order, "the Court may, if it think fit, remit to skilled parties to report on the 'best practicable and available means,' and the nature and costs of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report. Any person making default in complying with any requirement of an order of a County Court, made in pursuance of this section, shall pay to the person complaining, or such other person as the Court may direct, such sum, not exceeding £50 a day for every day during which he is in default, as the Court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court; moreover, if any person so in default persists in disobeying any requirement of any such order for a period of not less than a month, or such other period less than a month as may be prescribed by such order, the Court may, in addition to any penalty it may impose, appoint any person or persons to carry into effect such order; and all expenses incurred by any such person or persons, to such amount as may be allowed by the County Court, shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the County Court."

And by sec. 12 of that Act it is provided:—

"A certificate granted by an inspector, of proper qualifications, appointed for the purposes of this Act by the Local Government Board, to the effect that the means used for rendering harmless any sewage matter, or poisonous, noxious, or polluting solid or liquid matter falling or flowing or carried into any stream, are the best or only practicable and available means under the circumstances of the particular case, shall in all Courts, and in all proceedings under this Act, be conclusive evidence of the fact; such certificate shall continue in force for a period to be named therein not exceeding two years, and at the expiration of that period may be renewed for the like or any less period.

"All expenses incurred in or about obtaining a certificate under this section shall be paid by the applicant for the same.

"Any person aggrieved by the grant or withholding of a certificate under this section, may appeal to the Local Government Board against the decision of the inspector; and the Board may either confirm,

reverse, or modify his decision, and may make such order as to the party or parties by whom the costs of the appeal are to be borne as to the said Board may appear just." As explained under sec. 217, *supra*, the powers of the Local Government Board as regards Scotland are now vested in the Secretary for Scotland.

In Guthrie, Craig, & Co. *v.* Brechin Police Commissioners, 18th December 1884 (1 Scot. Law. Rev., 59), it was held that where the liquids issuing from a paper-work, which are chemically objectionable and likely to injure sewage or vegetation, are treated so that the resultant fluid is harmless, the defenders are bound to receive such resultant fluid into the public sewer of the burgh.

This was an action at the instance of Messrs. Guthrie, Craig, Peter, & Co., paper manufacturers, Brechin, against the Brechin Police Commissioners, to have the defenders ordained to allow the pursuers to connect their water with the town drain. A lengthy proof was led, and the Sheriff-Substitute (Robertson) issued the following interlocutor and note:—

"*Forfar, 18th December* 1884.—The Sheriff-Substitute having made avizandum with the proof, productions, and whole process, Finds in fact, that the liquids issuing from the pursuers' paper-works at Brechin, which are chemically objectionable and likely to injure sewage or vegetation, are three in number—namely, 'black boil,' 'spent bleach,' and 'washings:' Finds, that when these three liquids are mixed together and exposed to the action of the air in settling ponds, the resultant fluid is harmless, and such as the defenders may safely allow to be introduced into the public sewer of Brechin: Finds that, since the raising of the present action, the pursuers have produced and brought under the notice of the defenders a plan, which forms No. 36 of Process, showing how they are now prepared to form a series of settling ponds, in which these three liquids will be thoroughly mixed and settled before the defenders will be called upon to receive the resultant fluid into their sewer: Finds in law, and under a sound construction of sec. 7 of the Rivers Pollution Act and sec. 77 of the Public Health Act, that the defenders are bound to receive the resultant fluid issuing from said settling ponds into the public sewer of Brechin; remits to Thos. Stevenson, C.E., Edinburgh, whom failing to Hugh Littlejohn, M.D., Edinburgh, to see the plan No. 36 of Process carried out by the pursuers; and thereafter, and on completion of said plan to the satisfaction of the reporter, ordains the defenders to allow the pursuers to discharge the resultant fluid issuing from said settling ponds into the public sewer of Brechin, on condition of the pursuers complying with the defenders' regulations as to the mode in which the communication between the pursuers' premises and the public sewer is to be made: Finds the defenders entitled to expenses up to and including the first diet of proof in the cause: Finds the defenders liable in expenses from and after that date; remits to the Auditor to tax the accounts of parties, and report accordingly, and finds each party liable for one-half of the reporter's fee; and decerns."

In his note the Sheriff said: "The pursuers are ratepayers in the town of Brechin, and are as much entitled to the use of the public sewer as any other members of that community—always provided they are not seeking to introduce 'any liquid which would prejudicially affect such sewer or sewage-matter conveyed along such sewer.' In resisting the pursuers' demand that the liquids from their paper-works be introduced into the public sewer, the defenders must take their stand upon sec. 7 of the Rivers Pollution Act, and must show that their sewer and sewage will be prejudicially affected by such liquids. The question becomes one for chemical experts. With one exception, the eminent chemists who have been examined in the case certify that, if certain precautionary measures are taken, the fluids from the pursuers' works become innocuous, and may be safely introduced into the public sewer. Their unanimity on this point renders any detailed analysis of the evidence unnecessary. Dr. Wallace of Glasgow, who is one of the defenders' own witnesses, explains how the caustic soda contained in the 'black boil,' the lime contained in the 'spent bleach,' and the acid contained in the 'washings,' neutralise each other, when they are mixed together and exposed to atmospheric influences. This can readily be done, and a harmless liquid obtained, by a series of mixing and settling ponds; and the plan proposed to be carried out by the pursuers, Dr. Wallace considers to be quite satisfactory. The fact that the objectionable liquids must first pass into these settling ponds and there be neutralised by their chemical action on each other, and by the action of the air on them, is a sufficient safeguard to the defenders. The safety of the sewer is not made to depend on the carefulness of the pursuers' workpeople. There is no danger of that sort. It is put out of the power of any careless workmen to flood the sewer with a poisonous liquid. The only access to the sewer will be after these settling ponds have done their work. And when Dr. Wallace was under examination I was very careful to bring this out. I think Dr. Wallace's evidence is conclusive, backed up as he is by all the pursuers' own chemical witnesses. These include the Public Analyst for the city of Edinburgh, and the Professor of Chemistry in Dundee University College. In considering the question of expenses, there is an unfortunate conflict of evidence as to when the pursuers' plan was first submitted to the defenders. I think from the proof, and especially from the evidence of Alexander Peter, the pursuers' managing partner, that this plan in its entirety was not produced or submitted to the defenders' consideration until the first diet of proof in July. A plan had been shown to them before the action was raised, but it certainly was not the completed matured plan, No. 36. This, in my opinion, was first exhibited at the proof in July. I find no trace of it prior to that date either in the process or in the correspondence; and, accordingly, I have given the defenders expenses up to that date, as I think they were justified in resisting the action as laid. The proposal in the pursuers' condescendence is to introduce their drains direct into the sewer. Now, this would have been injurious to the sewer itself, and to the sewage farm.

But as soon as the pursuers proposed to mix and settle their fluids, and thus to be able to offer a harmless resultant fluid to the defenders, the position was changed, and the defenders took on themselves the risk of rejecting such a scheme. At the first diet of proof in July this plan was submitted to them, and, after careful consideration of it, they elected to go on with the litigation. I therefore give expenses to the pursuers from and after that date."

The case was appealed to the Court of Session, and the following is the rubric of the judgment:—

"A manufacturer whose works were within burgh, and who was liable for drainage assessment, presented a petition in the Sheriff-Court, founding on sec. 77 of the Public Health Act, 1867, and sec. 7 of the Rivers Pollution Act, 1876, to have a Local Authority ordained to allow him to empty the drains containing the discharge from his works into the burgh sewers. The defenders, founding on the latter section, stated that the charge in question would prejudicially affect the sewers, and the quality of the sewage. *Held*, upon a report by two men of skill, that the defenders' averments were not proved, and that therefore, under the Statutes, they were bound to allow the pursuers to empty their drains into the burgh sewers." Guthrie, Craig, Peter, & Co. *v.* Magistrates of Brechin, 19th January 1885 (22 S. L. R., 343; 12 R., 469).

For further information as to pollution from manufactories, see Buccleuch *v.* Cowan, 21st December 1866 (5 M., 214); M'Gavin *v.* M'Intyre, 30th May 1890 (17 R., 818).

See Hogganfield Bleaching and Finishing Co., etc. *v.* Duncan Stevenson, 18th November 1892. This was an action by Duncan Stevenson, bleacher, Pollokshaws, heritable proprietor of the lands of Riddrie Park and adjoining subjects in the Barony Parish of Glasgow, against the Hogganfield Bleaching and Finishing Co., Hogganfield, Glasgow, and others, for declarator of his right to have the water of the Molendinar Burn transmitted past his property in an unpolluted state. Interdict was also asked against the defenders allowing the stream to be polluted; and an order was asked upon them to remove all tanks, etc., placed by them in the *alveus*. The defenders denied that they polluted the burn or diminished its flow, and pleaded that the action was barred by prescriptive use of the stream for over forty years. Lord Low found that, for more than forty years prior to 1891, the water of the burn as it flowed through the lands of the pursuer was polluted by discharges from the Hogganfield Bleaching and Finishing Works to such an extent as to render it unfit for domestic use; but that within that period, and particularly prior to 1860, it was fit for the watering of cattle. He held that it was now unfit for the watering of cattle; and in that matter he found for the pursuer. The Lord Ordinary's fourth and fifth findings were: "(4) That the amount of water from the stream which was pumped by the defenders into the public sewer was not sufficient to prejudice, in any material degree, the pursuer's right to have the water of the stream transmitted to him undiminished in quantity; and (5) That the pursuer was not prejudiced or injured

by the filters which the defenders had placed in the bed of the stream." On these points he found for the defenders.

The defenders reclaimed, and the Second Division adhered to the judgment of the Lord Ordinary, except with regard to his fourth finding, on which point they found for the pursuer. The Lord Justice-Clerk said he agreed with the Lord Ordinary on the question of pollution. The fourth finding, however, raised a question of difficulty, and of some importance generally. The facts were that the defenders in their operations took from the burn a quantity of water, which they had used, and which had become unfit for primary purposes, and they pumped that water into a common sewer, so that it should not again reach the stream. Having done that, they sent into the stream a quantity of Loch Katrine water supplied from Glasgow. It might be that by substituting Loch Katrine water for the burn water no harm was done; but that did not settle the question whether, as matter of legal right, the defenders were entitled to insist upon continuing to do so, in view of the right of a lower heritor to have the water of a stream sent down to him undiminished in quantity and undeteriorated in quality. He felt bound to hold that the law, as it had been decided in a series of cases, was that an upper proprietor had no right to substitute other water for the original water of the burn; and if he had no such right, he could not defend himself when called upon to perform his duty at common law, namely, to restore to the stream any water which he took out of it fit for primary purposes. Therefore he could not concur in the fourth finding of the Lord Ordinary. With the fifth finding he agreed, because there was no evidence of any injury to the flow of the stream or to its quality by the use of the filters.

See also the observations as to pollution of streams under secs. 217 and 219.

"A chemical company was held to be liable under the Nuisances Removal Acts, for a nuisance which arose in the sewer of a Sanitary Authority, from the mixture therein of two different liquids flowing through separate drains from the company's premises into the sewers. St. Helen's Chemical Co. *v.* Mayor, etc., of St. Helen's (L. R., 1 Ex. D., 196; 45 L. J., M. C., 150; 34 L. T., N. S., 397; 40 J. P., 471)." —Glen, p. 940.

234. Sewers may be used by Owners and Occupiers of land or premises beyond limits of Burgh.—Any person, being the owner or occupier of any lands or premises beyond the burgh, or not included in any drainage district thereof, and in respect of which he would not be liable for the payment of the rates authorised to be levied under this Act, or the Local Authority of any district under the Public Health Acts, may, with the consent of the Commissioners in writing, upon payment to them of a reasonable sum of money, to be agreed upon between them, at his or

their own expense, and under the superintendence of the Surveyor of the Commissioners, cause to branch into and to communicate with any of the sewers belonging to the Commissioners, any sewer or drain in respect of the said lands or premises or district which may be lawfully made therefrom, of such size and in such form of communication as the Commissioners approve of: But nothing in this Act contained shall affect any right theretofore acquired by such owner or occupier to use any of the sewers or drains belonging to the Commissioners.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (16) "lands and premises," (4) "burgh," (9) "Commissioners."

As to the construction put upon the words "reasonable sum," see notes to secs. 227 and 364.

235. Drains may be made to Discharge below High-water Mark.—If the Commissioners shall consider it necessary for public health that any drain should discharge itself below high-water mark, they shall be entitled, with the consent of the Board of Trade, to construct the requisite works for that purpose, under the regulations provided in regard to works authorised by this Act.

See sub-head (9), sec. 4, for definition of "Commissioners."

The Commissioners of a burgh proposed to carry their sewage in a pipe to the sea, and to discharge it at the mouth of a burn at or above high-water mark. They took the opinion of Counsel as to whether any valid objection could be taken to their action. Counsel, Mr. (afterwards Lord) Rutherfurd-Clark and Mr. J. B. Balfour, advised:—"In our judgment, neither the public nor any constituted Authority could object to the discharge of the sewage into the sea at the point here referred to."

There is a similar provision in the Public Health Act, 30 & 31 Vict. c. 101, sec. 84, with the addition of the words: "without prejudice to any question as to the right to the foreshores."

"A Local Authority issued an order compelling all proprietors to carry their drains to low-water mark. The Board held that the order was one which could not be enforced, and that, if the Local Authority considered the extension of the drains to low-water mark to be necessary in the interests of the public health, they must make the extension themselves, under sec. 84, with the consent of the Board of Trade." —Skelton, p. 77.

236. Power to Borrow Money for the Construction of Sewers.—It shall be lawful for the Commissioners to borrow, for the purpose of making, purchasing, enlarging,

ventilating, reconstructing, and maintaining sewers, and on the security of the said special sewer rates and general sewer rates, such sums of money, and at such times, as the Commissioners shall deem necessary for that purpose, and to assign the said special sewer rates and general sewer rates in security of the money to be so borrowed; and the provisions of this Act, with respect to the borrowing of money and the granting of bonds therefor, and the transference and recording of such bonds, shall be applicable to the borrowing of money for such purpose; and the bonds to be granted for the money so to be borrowed shall, *mutatis mutandis*, be as near as may be in the form set forth in this Act for bonds to be granted for money borrowed under the general powers of this Act, and shall constitute a lien over the special sewer rates and general sewer rates thereby assigned, and shall entitle the creditors therein to recover the sums thereby due from the Commissioners and their officers out of the first and readiest of the said special and general sewer rates: and the money so borrowed shall be applied wholly to the purpose aforesaid, and to no other purpose whatsoever; and the special and general sewer rates shall not be liable for nor be assigned in security of the payment of any sums borrowed by the Commissioners for any other than such purpose.

See sub-head (9), sec. 4, for definition of "Commissioners."

As to "general sewer rate" and "special sewer rate," see secs. 361–364; and as to the provisions for borrowing, and the granting, etc., of bonds, see secs. 374–379, and observations thereunder. In borrowing for sewers, the provisions of sec. 366, which limit to seven years the time during which the general sewer rate and the special sewer rate shall remain burdens on the lands and premises liable for the same, must always be kept in view.

As to the borrowing powers under the Public Health Act, see sec. 86 of 30 & 31 Vict. c. 101; also 38 & 39 Vict. c. 74.

237. Appeal by Persons aggrieved by making, etc., Sewers.—It shall be lawful for any person whose property may be taken or injuriously affected by the making, altering, and maintaining sewers, or who may think himself thereby aggrieved, to appeal to the Sheriff in manner after provided.

See sec. 339 as to "appeal;" sub-head (30), sec. 4, "Sheriff."

In Brand *v.* Smith, 23rd May 1890 (17 R., 790), a person who had received a notice, under the General Police Act, 1862, bearing to be from certain Police Commissioners, that the Commissioners

intended to lay down at his expense drainage pipes to connect the drains of his premises with the main drain, appealed to the Sheriff against this order, on the grounds, first, that the notice had been sent to him without the knowledge or the authority of the Commissioners; and, second, that the operations were in fact unnecessary. The Sheriff found that the notice was unauthorised, but that since the appeal was taken the Commissioners had sanctioned the notice, and had resolved to execute the alterations, and further found in law that the procedure was irregular, and ordained the Commissioners of new to send notice to the appellant; and found with reference to the merits, that the appellant's property was damp and was not drained to the satisfaction of the Commissioners, and to this extent dismissed the note of appeal, and refused to quash the resolution of the Commissioners. The appellant brought an action in the Court of Session for reduction of the Sheriff's interlocutor, on the ground that, in the absence of notice to him, the whole proceedings were null, and for declarator that the notice sent to him was bad. *Held*, that the conclusion for reduction was incompetent, the Sheriff having dealt with a matter within his jurisdiction, and his judgment being declared by the Statute to be final; and that the conclusion for declarator could not be sustained, as by the Sheriff's judgment the validity of the notice was *res judicata*.

Drainage of Houses.

238. Commissioners may construct Drains from Houses, charging Owners, etc., with the Expense.—If any house or building and its pertinents be at any time not drained by a sufficient drain or pipe communicating with some sewer or with the sea, to the satisfaction of the Commissioners, and if there shall be such means of drainage within 100 yards of any part of such house or building, the Commissioners shall construct or lay therefrom a covered branch drain or pipe, of such materials, of such size, at such level, and with such fall, as they think necessary for the drainage of such house or building, its areas, water-closets, and offices; and the expense thereof shall be recoverable from the owner of such house or building, over and above any sum that may be charged for the use of the sewers, as after provided for.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (9) "Commissioners," (22) "owner." See Brand *v.* Smith, under section 237, *supra*. See sec. 85 of the Public Health (Scotland) Act, 1867, which provides:—

"If a dwelling-house, distillery, manufactory, or other work, or any erection or enclosure for the keeping of live stock, within the

district of a Local Authority, is without a drain, or without such drain as is sufficient for effectual drainage, the Local Authority may, by notice, require the owner of such house, distillery, manufactory, work, erection, or enclosure, within a reasonable time therein specified, to make a sufficient drain emptying into any sewer which the Local Authority are entitled to use, and with which the owner is entitled to make a communication, so that such sewer be not more than 100 feet from the site of the said premises of such owner; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place, but not being under any house, as the Local Authority may direct; and if the person on whom such notice is served fails to comply with the same, the Local Authority may, at the expiration of the time specified in the notice, do the work required, and the expenses incurred by them in so doing may be recovered from such owner in a summary manner."

The word "pertinents" is not defined, but it will include what is mentioned in a later part of the section, viz. "areas, w.-c.'s, and offices." This section refers to existing houses, while the following section enacts corresponding provisions with regard to new houses.

As to the sum chargeable for the use of the sewers, see sec. 364, *infra*. See also sec. 316*b* (10) as to power to make bye-laws "for carrying out the provisions of secs. 238 to 256 inclusive."

In England, "it has happened that a Local Authority, after enforcing the communication of house drains with a particular system of sewers, have found it necessary to change their general scheme of sewerage and to construct fresh sewers; but the Sanitary Acts contained no provision under which the Local Authority could compel fresh junctions, or defray their cost."—Glen, p. 65.

In Hall *v.* Batley Corporation (47 L. J., Q. B., 148; 37 L. T., N. S., 710), "where a Local Authority, by agreement with the owner of premises, constructs, so as to communicate with their sewer, a drain from his premises, which they could have required him to make under this section (sec. 23, Public Health Act, 1875), such agreement is not *ultra vires*, and they are responsible to him for any damage caused to his premises by the negligent construction of the drain."—Bazalgette, p. 58.

"This section (sec. 23 of the Public Health Act, 1875) applies to all houses for the time being in existence, and sec. 25 contains a corresponding provision with respect to new and rebuilt houses, but neither of these sections gives the Local Authority the complete power over the drainage of houses which they may acquire by making bye-laws under sec. 157 with respect to the drainage of modern buildings; it can only be put in force where there is no drain, or where the existing drain is not, in fact, sufficient to drain the house effectually.

"'House' and 'drain' are defined in sec. 4.

"There is a doubt arising under the section which does not appear to have been set at rest by judicial decision. It is not clear whether the Authority can order a covered cesspool to be constructed if none exists, and if there is no sewer within the prescribed distance, and

can on non-compliance with the order construct such cesspool and recover the expenses, or can only order the construction of a drain which will empty into some existing cesspool or other lawful receptacle for sewage, and on non-compliance construct the drains and recover the expenses so incurred.

"The provision contained in the last clause of this section will be available in cases where, for the purpose of enforcing the drainage of a row of undrained houses, it would be less expensive to construct a new sewer than to drain the houses into an existing sewer.

"The above section and the next apply to rural as well as urban sanitary districts; but sec. 25 is only applicable to the latter.

"Where a Sanitary Authority constructed a drain by arrangement with the owner, but did the work negligently, they were liable to the owner for damage thereby occasioned to his building." Hall *v.* Mayor, etc., of Batley (37 L. T., N. S., 710).—Glen, p. 63.

239. No House to be hereafter Built without Drains being constructed.— No house or building shall be built upon a lower level than will allow the drainage of the wash and refuse thereof to fall into some sewer belonging to the Commissioners, either then existing or marked out upon the map herein directed to be made by them; and if there be such means of drainage existing within 100 yards of such intended house or building, the Commissioners shall cause a branch drain leading thereunto from the intended site of such house, to be made of such materials, of such size, at such level, and with such fall, as they think fit; or if there be no such means of drainage within 100 yards of any part of the said intended site of such house or building, then such drain shall be made so as to lead into such covered cesspool or other place as the Commissioners direct, not being under any dwelling-house or other occupied building, and shall be constructed and kept in complete repair to the satisfaction of the Commissioners, so as effectually to prevent any leakage or effluvium therefrom, until such sewer as aforesaid is made by the Commissioners, when they shall make a drain to communicate with such new made sewer, and shall demolish and fill up any such cesspool; and all such expenses shall be recoverable from the owners as a private improvement assessment.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (9) "Commissioners;" sec. 365, as to "private improvement assessment." See also sec. 316*b* (10).

For the provisions of this Act as to cesspools, see secs. 252, 254, 255. See also sec. 85 of the Public Health Act quoted under sec. 238, *supra*.

In England, see Finlinson *v.* Porter (L. R., 10 Q. B., 188; 44 L. J., Q. B., 56) "as to right of persons using drain in common to alter the drain and adapt it to the new sewer, where a Local Authority has altered the level of the sewer into which the drain was discharged."—Bazalgette, p. 58.

240. Where Houses are Rebuilt, the Level shall be sufficient to allow a Drain to be constructed.—Whenever any house is rebuilt, the level of the cellar or other lowest floor of such house shall be raised sufficiently to allow of the construction of such drain as is hereinbefore provided in the case of houses to be built after the application of this Act; and whenever any house is taken down to or below the ceiling of the floor commonly called the ground or street floor, for the purpose of being built up again, such building shall be deemed a rebuilding within the meaning of this Act.

See sub-head (13), sec. 4, for definition of "house," (3) "building." See also 316*b* (10).

It will be observed that the definition of "rebuilding" given here applies not merely to this section, but to the whole Act.

241. Ventilation of House Drainage.—Proper ventilation shall, if required by the Commissioners, be provided in the drainage of every house or building by special pipe or shaft, or by such other method as they shall direct; and all other inlets to drains shall be properly trapped.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (3) "building." See also sec. 229, *supra*, and rule 15 in Schedule IV.; see also sec. 316*b* (10).

242. Drains and Cesspools to be kept in good order by Owners.—All branch drains, as well within as without the premises to which they belong, and all cesspools or reservoirs, shall be under the survey and control of the Commissioners, and shall be reconstructed or altered, repaired, and kept in proper order, at the cost and charges of the owners of the premises to which the same belong, or for the use of which they are constructed or continued.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "premises." See also sec. 316*b* (10).

As to construction and repair of cesspools, see secs. 252 and 255. It is not clear what the "reservoirs" mentioned here are; it would probably be held that the section applies only to such reservoirs as may be made in connection with drains, whether for flushing purposes or with any other object.

In the Edinburgh Co-operative Building Company *v.* Magistrates of Leith, 10th Nov. 1887 (not reported), "The Sheriff having heard parties' procurators on the appeal by the Edinburgh Co-operative Building Company, Limited, against the orders by the Provost, Magistrates, and Council of the Burgh of Leith, as Commissioners of Police of the said burgh, for alteration of the drainage of the dwelling-houses Nos. 7–10, 11, 13, and 14 Oakville Terrace, Leith, belonging to the pursuers, and having considered the proof, quashes the orders contained in the notice by Mr. Beatson, the Surveyor for the said burgh, and served upon the appellants, dated 2nd and 19th July 1887: Interdicts the defenders from proceeding to execute the works referred to in the said orders, and decerns: Finds the appellants entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report.

JAS. ARTHUR CRICHTON.

"*Note.*—In 1868 the pursuers acquired a piece of ground extending to upwards of five acres, situated to the east of Lochend Road. On this piece of ground they have erected seven terraces of two-storey dwelling-houses. Oakville Terrace, which is the eastmost of these seven terraces, was built about eight years ago. The houses were erected according to plans submitted to the Dean of Guild Court. Behind or to the east of Oakville Terrace a drain was constructed, and branch drains were brought from each house into this drain, which was continued through the centre house in Oakville Terrace to the main drain running through the centre of the seven terraces. Complaints having been made to the Magistrates that the drainage of Oakville Terrace was defective, the appellants, on 2nd July 1887, received a notice from the Burgh Surveyor requiring them to 'alter, repair, and put in good order the branch drains' connected with the houses belonging to them. This notice being vague and indefinite, a further communication was made to the appellants by the Burgh Surveyor, requiring them to lay drains 'through under each house and join to the main sewer in the street.' The appellants are willing to remedy any defect that may exist in the present system of drainage, but they object to the introduction of a new system of drainage which is objectionable on sanitary grounds.

"The parties have been allowed a proof, from which it appears that nearly all the witnesses are of opinion that the system of carrying drains through under each house is objectionable. But it is said that the present case is an exception to the general rule, and that for the following reasons—(1) The situation of Oakville Terrace is such that the present drains are not easily got at; (2) When the drains are choked it is difficult to find the place where the obstruction occurs; (3) That it is difficult to ascertain who is responsible for the

obstruction; and (4) That the drains cannot be satisfactorily flushed. The Sheriff has been most reluctant to interfere with the orders made by the defenders as Commissioners of Police for the Burgh of Leith, but, after careful consideration of the evidence, he is of opinion that, although the objections above stated to the present system of drainage of Oakville Terrace do to some extent exist, they are not sufficient to warrant the introduction of the system proposed by the defenders, which, on sanitary grounds, is considered most objectionable. Besides, the Burgh Surveyor states in his evidence that 'the present system, to the extent to which it is defective, is capable of cure so far as the drainage of the house is concerned.' It is proved that the present system of drainage can be repaired for about one-half the sum that would require to be expended in introducing the system required by the defenders."

243. Inspection of Drains and Cesspools.—The Surveyor of the Commissioners may, and when requested by the Medical Officer of Health or the Sanitary Inspector shall, inspect any drain or cesspool or reservoir; and for that purpose, at all reasonable times in the day-time, after twenty-four hours' notice in writing to the occupier of the premises to which such drain or cesspool or reservoir is attached, may enter upon any premises, with such assistants or workmen as may be necessary, and cause the ground to be opened where he thinks fit, doing as little damage as may be; and if such drain or cesspool or reservoir be found to be in proper order and condition, he shall cause the ground to be closed and made good as soon as may be; and the expense of opening, closing, and making good such drain or cesspool or reservoir shall in that case be defrayed by the Commissioners; and all branch drains which have been opened for repairs, or for any purpose whatever, shall not be covered up before they have been inspected and tested by the Commissioners or their Surveyor, which inspection and testing shall be made within twenty-four hours after notice has been given by the owner of the branch drain; and any owner or agent or builder who opens or causes to be opened, and who covers up or causes to be covered up, any branch drain, without such notice to the Commissioners or their Surveyor, shall be liable to a penalty of £5; and the Commissioners may order such branch drain to be again uncovered for the purpose of inspection and test, at the expense of the owner or agent or builder who opened or caused the drain to be opened.

See sub-head (9), sec. 4, for definition of "Commissioners," (21) "occupier," (16) "premises," (22) "owner;" secs. 336 to 338 inclusive, as to "notice;" sec. 487 as to penalty for failure to pay fines, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors.

As to power of entry to execute works, see secs. 325 and 326. See also the power of entry given by the Public Health Act, 30 & 31 Vict. c. 101, sec. 17, to officers of the Local Authority when a nuisance is suspected to exist. Any drain or cesspool, "so foul as to be injurious to health," is a nuisance under sec. 16, sub-head (*b*), of that Act.

In England, "the occupier and not the owner is *prima facie* liable for the repair of the drains and sewers of the premises in his occupation; and a declaration against an owner for not cleansing the drains or sewers, not alleging that he was the occupier, or showing a reason for the alleged liability, was held to be bad. Russell *v.* Shenton (11 L. J., Q. B., 289; 3 Q. B., 449; 6 Jur., 1083). The owner in some cases, however, may be liable. Thus it was held that if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for the nuisance being continued or created during the term, owing to his not having taken effectual means to prevent it. So also, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur from want of that care on the part of the tenant. Rex. *v.* Pedley (1 A. and E., 822; 3 L. J., M. C., 119).

"It is an implied condition in all hirings of a furnished house, that it shall be in good and tenantable condition; thus, where a tenant had taken a furnished house for two months, but on entering found a cesspool full of filth beneath the floor, he was justified in rescinding the contract, and was not liable for the rent. Wilson *v.* Finch-Hatton (L. R., 2 Exch. D., 336; 46 L. J., Exch., 489; 36 L. T., N. S., 473; 25 W. R., 537)."—Glen, p. 84.

244. Penalty on Persons Making or Altering Drains, etc., contrary to Orders of Commissioners.—If such drain or cesspool or reservoir be, on inspection, found to have been constructed after this Act came into force, contrary to the directions and regulations of the Commissioners, or contrary to the provisions of this Act, or if any person, without the consent of the Commissioners, shall construct, rebuild, or unstop any drain or cesspool or reservoir, every person so doing shall be liable to a penalty not exceeding £5; and the Commissioners may cause such amendments or alterations to be made in any such drain or cesspool or reservoir as they think fit.

See sub-head (9), sec. 4, for definition of "Commissioners;" see

p. 5, "person;" sec. 487 for imprisonment for failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors. Sec. 316*b* (10) as to bye-laws.

See also sec. 227 as to penalty for making unauthorised drains.

245. Parties Aggrieved may Appeal to Sheriff.— It shall be lawful for any person whose property may be thereby taken or injuriously affected by the construction or use of house or branch drains, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner hereinafter provided.

See sub-head (13), sec. 4, for definition of "house," (30) "Sheriff;" sec. 339 as to "appeal."

See also sec. 237, and case of Brand *v.* Smith referred to thereunder.

SOIL-PIPES AND WATER-CLOSETS.

246. Water and Water-Closets. — Within one month after notice given by the Commissioners in writing for that purpose, the owner of every house or part of a house occupied by a separate family, into which water has not been already introduced, shall, subject to the provisions of any bye-laws made by the Commissioners, introduce water thereto, and shall fit up in some window, recess, or other well-lighted and ventilated place, a sink sufficient to carry off the whole foul water; and after a like notice every such owner shall also, subject as aforesaid, provide for such house or part of a house occupied by a separate family, wherever practicable, a sufficient water-closet: Provided always, that if, in the opinion of the Commissioners, it is not advisable to introduce water-closets into each house, or part of a house, they, after a like notice, may, subject as aforesaid, require the owners of a tenement to construct on each flat, or in some convenient place or places adjacent to such tenement, a sufficient number of water-closets for the separate use of each sex of the inmates and occupiers of the said tenements: Provided further, that this enactment shall not be enforced by the Commissioners where, from water not having been laid under sufficient pressure, or from drains being still unmade, or from any other cause, such works shall be impracticable or inexpedient.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (13) "house," (21) "occupier;" secs. 336 to 338 inclusive as to "notice." Sec. 316*b* (10) as to bye-laws.

In Barclay *v.* Sharpe, 7th June 1836 (11 Fac. Dec., 737), it was held that the proprietor of an upper flat of a tenement in Edinburgh was not entitled to make use, for the purpose of w.-c.'s, of a drain under the ground-floor of the tenement, communicating with the common sewer, without the consent of the proprietor of the said ground-floor.

Under the Public Health Act, 30 & 31 Vict. c. 101, sec. 16 (*a*), any want of "suitable water-closet or privy accommodation or cesspool, and any other matter or circumstance rendering any inhabited house, building, premises, or part thereof, injurious to the health of the inmates, or unfit for human habitation or use," is a nuisance, and the owner may be required (sec. 19) to provide such accommodation; "and if the nuisance proved to exist be such as to render a house or building unfit for human habitation, he (the Sheriff, Magistrate, or Justice) may prohibit the using thereof for that purpose, until it is rendered fit for that purpose, or do otherwise as the case may in his judgment require."

In England, "a Local Board had incurred expenses in making effective the w.-c.'s of certain houses which a person had built, without, it was alleged, proper 'flushing' apparatus. The Board directed a Surveyor to inspect the closets, and he reported that they were insufficient for want of a proper flushing apparatus. They then directed the owner to execute the necessary works, and, on his not doing so, directed it to be done, and obtained from the Magistrates an order upon him to repay the expenses. The Magistrates, without entering into evidence on the question of nuisance, made the order, to remove which into the Queen's Bench Division, with a view to set it aside, application was made to the Court. The grounds upon which the application was urged and supported were, that the Local Board had no power to interfere unless there was a nuisance, or something certain to cause a nuisance, on which the Justices should hear evidence, and that in such a case as this, a mere supposed defect in construction or defect of supply of water, there was no power to interfere in this manner. On the other side, it was contended that the Board had to judge as to the tendency of a thing to produce or cause a nuisance, and that here, upon a proper inquiry and inspection by their officer, the Surveyor, they had formed a judgment on which they were entitled to act, and that view in the result prevailed; for, after a protracted argument, the Court held that they could not review the discretion of the Local Board in such a case. It was, they said, entirely for the Board to exercise their judgment in the particular case, upon the report of their Surveyor; they therefore dismissed the application, and upheld the order. Reg. *v.* Sherbourne Local Board (*Local Government Chronicle*, 1st May 1880, p. 355; *Times* newspaper, 20th March 1880; S. C. Nom.). Bogle *v.* Sherbourne Local Board (46 J. P., 675.)"—Glen, p. 80.

By sec. 37 of the English Public Health Act, 1875, 38 & 39 Vict.

c. 55, it is provided that any enactment requiring the construction of a w.-c. shall be deemed to be satisfied by the construction, with the approval of the Local Authority, of an earth-closet.

247. Owners of Flats of Houses to have Supply-Pipe from Water-Pipe.—It shall be lawful for the owners of any one or more floors or storeys of any house or other building to have a supply-pipe from any water-pipe in the street brought up the common staircase, or along the back or side wall of the tenement on the outside, and either passing underground through the sunken storey or lowest flat, or, where practicable, through any common entry: Provided always, that authority shall be first obtained from the Magistrate, which may be granted summarily on hearing the parties concerned, without written pleading, to lay and put up such pipe; and the expense thereof and of keeping the same in repair, and the damage thereby occasioned to the street and otherwise, shall be defrayed by the person, owner or owners of the properties for which such supply-pipe has been provided; and no person shall have power to join the supply-pipe to any main pipe without the sanction of the Magistrate so obtained, and of any water company or other persons who may supply such water.

See sub-head (22), sec. 4, for definition of "owner," (13) "house,' (3) "building," (31) "street," (19) "Magistrate."

See p. 5, "person;" also sec. 316*b* (10) as to bye-laws.

248. Soil-Pipes may be carried through the different Houses.—Where there are two or more houses in any tenement, the owner and occupier of each house shall permit soil-pipes, if unavoidably necessary, to be carried through the same; and the owner and occupier of the lowest storey shall permit such soil-pipes, if necessary, to be carried through and under the same, and all such owners and occupiers shall at all reasonable times afford access to all such houses for the construction of the works, and for making all repairs necessary thereon, without any claim for compensation: Provided always, that the work shall be so executed at the sight of the Burgh Surveyor, and so as to occasion the least inconvenience to any such owner and occupier, and that any injury done to such houses in the execution of the works shall be forthwith repaired, and that the authority of the

Magistrate shall first be obtained, in the manner hereinbefore provided with respect to supply-pipes from water-mains.

See sub-head (13), sec. 4, for definition of "house," (22) "owner," (21) "occupier," (19) "Magistrate;" also sec. 316*b* (10) as to bye-laws.

See also sec. 326 as to penalty on persons obstructing workmen or others in the performance of any work done under this Act.

See Barclay *v.* Sharpe, referred to under sec. 246.

249. Penalty for introducing Ashes into Soil-Pipes.—The occupier of any house or other place into the cesspool or soil-pipe of which any ashes, or other matter calculated to choke the same, shall be introduced or allowed to enter by him or others in his house, shall be liable in a penalty not exceeding 40s., besides being liable to repair any damage.

See sub-head (21), sec. 4, for definition of "occupier," (13) "house;" sec. 487 as to imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors.

250. Owners of Flats of Houses may erect Waste-Pipes to communicate with Drains.—In all streets and other places where common sewers are or may be constructed, it shall be lawful for any owner of one or more floors or storeys of any house or other building divided into separate floors or storeys (on obtaining authority for the purpose from the Magistrate summarily, on the report and recommendation of the Surveyor, or of such other person skilled in building as any of the Magistrates may appoint, and on hearing the parties interested), to erect a waste or foul-water pipe or soil-pipe with trap in or upon the common staircase, or upon any wall of the tenement on the outside, to communicate with any drain underground leading into the common sewer where there is such drain, and with power to make such drain if none such already exist: Provided always, that the sanction of the Commissioners shall be obtained before connecting such drain with any common sewer in the street; and the expense and damage occasioned by erecting and constructing such pipe, drain, and communication, with the expense of restoring the street, so far as interfered with, and the expense of keeping such drain and communication clean and in good repair, with such reasonable allowance for the use of the common

sewer in the street as the Commissioners may fix, shall be defrayed by the owners of the floors or flats making use thereof, in proportion to their respective rents or annual value, as the same may be ascertained from the valuation roll or police assessment books or otherwise; and in case of dispute among the parties or any of them, relative to their proportion of such expense, the same shall be determined by the Magistrates, or any one of them, in a summary manner, and such decision shall be final.

See sub-head (31), sec. 4, for definition of "street," (13) "house," (3) "building," (9) "Commissioners," (19) "Magistrate," (20) "Magistrates," (22) "owner." See p. 5, "person." See also sec. 316*b* (10) as to bye-laws.

As to reasonable allowance for the use of the common sewer, see sec. 364 and observations under sec. 227.

251. Construction of Water-Closets, etc.—The situation, dimensions, materials, and construction of every water-closet or earth-closet and privy shall be subject to the approval of the Commissioners, and every water-closet, earth-closet, or privy hereafter to be constructed shall be placed in such a position that one of its sides shall be an external wall, with a window therein, containing an area of at least 6 superficial feet, one-half of which shall be made to open; and the cistern which supplies the water-closet (except the service-pipe connected therewith) shall have no communication with the water-closet: Provided that, in the case of water-closets, earth-closets, or privies constructed prior to the passing of this Act, it shall be optional for the Commissioners to require the owner or occupier to comply with the provisions of this section, or otherwise to provide ventilation therefor, and any owner or occupier who is dissatisfied with the requirement of the Commissioners may appeal to the Sheriff, whose judgment shall be final.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (21) "occupier," (30) "Sheriff." See sec. 339 as to "appeal." See also sec. 316*b* (10) as to bye-laws. See Mitchell *v.* Dean of Guild, Edinburgh, 18th Mar. 1885 (12 R., 844), where the Dean of Guild Court of Edinburgh, proceeding under the Edinburgh Municipal and Police Act, 1879, had, *ex proprio motu*, refused to sanction the plans of certain tenements of houses, on the ground that they did not provide suitably for ventilation and other sanitary objects, in respect that the w.-c.'s were not shown next to the outside walls of the proposed tenements. The Court, in an appeal against this

deliverance, to which the Dean of Guild and the other members of his Court, together with the Clerk and Fiscal, were called as respondents, refused to interfere with the discretion of the Dean of Guild Court—Lord Young doubting whether the Dean of Guild had, by the Statute, jurisdiction over the internal arrangements of private houses.

252. Construction of Cesspools, etc.—A cesspool shall not be allowed for any house or building except when unavoidable, in which event it shall be constructed in such situation, and in such manner and under such conditions, as the Commissioners direct. It shall in every case be made water-tight, it shall be arched or otherwise covered over, and shall have a current of fresh air conducted by pipe or shaft thereinto, and a pipe or shaft for ventilation shall be carried up from it, or from the drain communicating with it, from the water-closet or privy, as the Commissioners may direct.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (9) "Commissioners;" see also sec. 316*b* (10) as to bye-laws.

As to cases where cesspools are authorised, see sec. 239.

As to removal, repair, etc., of cesspools, see secs. 254, 255; and as to removal of refuse from cesspools, see sec. 107.

253. Construction of Ash-pits, etc., and Use of same.—The situation, dimensions, drainage, materials, mode of access, and construction of every ash-pit shall be subject to the approval of the Commissioners, and shall be of sufficient size to contain the ashes and dry refuse likely to accumulate between such visits of the scavengers as the Commissioners may prescribe: Provided further, that if any person, not being the owner or occupier of the house or premises to which any ash-pit belongs or is attached, shall deposit or use the said ash-pit for the deposit of ashes or dry refuse, or any other matter or thing, such party shall be guilty of an offence, and on conviction thereof liable to a penalty not exceeding 40s.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (21) "occupier," (13) "house," (16) "premises." See p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 for punishment of abettors. See also sec. 316*b* (10) as to bye-laws. As to removal of refuse from ash-pits, etc., see secs. 107 and 109. As to closing up, repair, etc., of ash-pits, see secs. 254, 255, and 109. As to access to, see sec. 107.

254. Owners to Remove Cesspools after Notice.—

The owner of any privy, ash-pit, cesspool, or midden, extending wholly or partially under or close to any room built before or after this Act comes into operation in the burgh, shall, within one month after notice to that effect from the Commissioners, remove or cleanse and build up such privy, ash-pit, cesspool, and midden.

See sub-head (22), sec. 4, for definition of "owner," (4) "burgh," (9) "Commissioners." See secs. 336 to 338 as to "notice." See also sec. 316*b* (10) as to bye-laws.

Under the Public Health Act, 30 & 31 Vict. c. 101, sec. 16, sub-head (*b*), any privy or ash-pit, "so foul as to be injurious to health," is a nuisance.

255. Power to enforce Conversion of Privies into Water-Closets.—Where any privy, ash-pit, or cesspool is certified by the Medical Officer of Health to be prejudicial to health, of defective construction, or without drainage, or in a bad state of repair, or to be so situate that the removal of filth or refuse therefrom is prejudicial to health, the Commissioners may, by written notice, require the owner of the same, within a reasonable time, to be specified in the notice, to reconstruct or alter or repair such privy, ash-pit, or cesspool, or to convert the privy into a water-closet or earth-closet, all as the case may require, to the satisfaction of the Commissioners; and the Commissioners may, if they think fit, order the removal of such privy, ash-pit, or cesspool.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner;" secs. 336–338 inclusive as to "notice." See also sec. 316*b* (10) as to bye-laws.

Under the Public Health Act, 30 & 31 Vict. c. 101, sec. 16, sub-head (*b*), any privy, ash-pit, or cesspool, "so foul as to be injurious to health," is a nuisance.

256. Urinals, etc., attached to Public-Houses, etc.—The Commissioners may order the owner or occupier of any inn, public-house, beer-house, eating-house, cook-shop, or other place of public entertainment or amusement, built before or after this Act, to provide, within such time as the Commissioners think fit, and thenceforward to maintain, upon or adjoining his premises, water-closets, earth-closets, and urinals, one or more, to the satisfaction of the Commissioners; and if any person fail in any respect to comply with the provisions of this enactment, he shall be liable to a penalty

not exceeding 5s. for every day during which such failure continues after the expiration of fourteen days from the service of such order on him, and the Commissioners may order the owner and occupier of any premises to remove any water-closet, earth-closet, or urinal belonging thereto, where it appears to them so situated or constructed as to be a nuisance or offensive to public decency, or otherwise objectionable, and all such urinals shall be cleansed once in twenty-four hours by the occupier of the house or place to which they belong, to the satisfaction of the Commissioners; and in default thereof, such occupier shall be liable to a penalty not exceeding 40s. for every offence.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (21) "occupier," (16) "premises," (13) "house;" secs. 336 to 338 inclusive as to "notice;" sec. 487 for imprisonment on failure to pay penalty, 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors. See also sec. 316*b* (10) as to bye-laws, and sec. 110 as to public conveniences.

In Adam and another *v.* Commissioners of Police of Alloa, 24th Nov. 1874 (2 R., 143), the Police and Improvement Act, 1862, sec. 135, gives power to the Commissioners to erect public urinals, "but so that such erection shall not become a nuisance," and declares that "any householder (*i.e.* any male occupier of lands and premises of the requisite yearly value), who thinks himself aggrieved thereby, may appeal to the Sheriff in manner after provided." The only subsequent provisions as to appeal are contained in secs. 396 and 397, the former of which allows appeal against an order of the Commissioners, "within seven days next after the making of any such order," and the latter renders the Sheriff's judgment on such appeal final.

Held, that a petition at the instance of the proprietor of a house in a burgh, praying for the removal, as a nuisance, of a urinal erected by the Police Commissioners, was competent at common law.

In England, in Biddulph *v.* Vestry of St. George's (3 De G. J. and S., 493; Bazalgette, p. 64), the question as to whether one place or another is more fit for the erection of a urinal, etc., is for the decision of the Local Authority, but they have no power to erect one where it would be a nuisance to the owners of adjoining property; they may be restrained by injunction from so doing. See Vernon *v.* Vestry of St. James's (L. R., 16 Ch. Div., 449; C. A., 50 L. J. Ch. 81; 44 L. T., N. S. 229; 29 W. R., 222). But it must be shown to be certain or probable that the matters intended to be provided will be, or will create in point of law, a nuisance, before the injunction will be granted.

"With respect to the power conferred by this section to provide conveniences for public accommodation, in proper and convenient

situations, it is to be observed that public bodies, although acting under the general powers given them by the Statute, have not therefore a licence to do whatever they think right; and if the Court is called upon to interfere, it is its duty first to consider whether the proposed exercise of the power is or is not *bona fide*. Therefore, the Court of Appeal being satisfied that a public urinal intended to be erected would not of necessity be a public nuisance, and further, that it was neither certain nor probable that the public body were exceeding or would exceed their powers, and that they were not influenced by any improper motive, dissolved an interlocutory injunction which Stuart, V. C., had issued to restrain the construction of the work. Biddulph *v.* St. George's, Hanover Square (3 De G. J. and S., 493; 33 L. J., Ch., 411; 8 L. T., N. S., 44, 558; 9 Jur., N. S., 953; 11 W. R., 739).

"On the other hand, a urinal was proposed to be erected by a Metropolitan vestry, in a mews which was found to be a 'street,' within 8 feet of the back door of a shop and close to the entrance of wine vaults, and moreover in such a position that numerous young women and girls in employment in the immediate neighbourhood would constantly pass very close to it. This, it was held, would be an intolerable nuisance, and an injunction was granted to restrain the erection of the urinal. Vernon *v.* Vestry of St. James's, Westminster (42 L. T., N. S., 82; affirmed on appeal, L. R., 16 Ch. D., 449; 50 L. J., Ch., 81; 44 L. T., N. S., 229; 29 W. R., 222).

"This decision was followed in a case arising under the present Act, in which Denman, J., granted a mandatory injunction to restrain the continuance of a urinal upon the plaintiff's land, or so near thereto as to cause injury or annoyance to her or her tenants, holding that this was not a matter for compensation under sec. 308, and also that notice of action under sec. 264 was not required. Sellars *v.* Matlock Bath Local Board (L. R., 14 Q. B. D., 928; 52 L. T., N. S., 762).

"In another case, an injunction to restrain an Urban Sanitary Authority from using a urinal erected by them, was refused by Pollock, B., on the ground of the balance of convenience, and because there was strong evidence that there was no appreciable nuisance. Spicer *v.* Mayor of Margate, 4th Sept. 1880 (Law Times newspaper, p. 329).

"Receptacles for the temporary deposit, and other places for the more permanent deposit, of dust, ashes, and rubbish, may be provided by Urban Sanitary Authorities, under sec. 45."—Glen, p. 82.

Supply of Water.

257. Power to Commissioners to construct Public Cisterns and Pumps for Supply of Water to Baths and Wash-Houses.—The Commissioners, except when provision is otherwise made under the authority of an Act of Parliament, shall cause all existing public cisterns, pumps,

wells, conduits, fountains, and other water-works used for the gratuitous supply of water to the inhabitants within the burgh, unless the water therein is found to be dangerous or injurious to health or unfit for dietetic purposes, to be continued, maintained, and supplied with water, or they shall substitute other such works equally convenient, and shall cause them to be maintained and supplied with water; and such public cisterns and other works shall be vested in the Commissioners, and be under their management and control; and the Commissioners may construct and maintain any number of new cisterns, pumps, conduits, fountains, and other water-works for the gratuitous use of any persons who choose to carry the water away, not for sale but for their own private use, and may supply with water any public baths or wash-houses.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (13) "house;" p. 5, "person." For the provisions of this Act as to public baths and wash-houses, see secs. 309–314. Power to erect drinking-fountains and troughs is given by sec. 266.

The Commissioners are not bound to continue public cisterns, etc., where the water is dangerous or injurious to health, or unfit for dietetic purposes. It will be their duty to close such as nuisances, under sec. 16, sub-head (*b*), of the Public Health Act, 30 & 31 Vict. c. 101, which provides that "any well or other water supply used as a beverage or in the preparation of human food, the water of which is so tainted with impurities or otherwise unwholesome as to be injurious to the health of persons using it, or calculated to promote or aggravate epidemic disease," is a nuisance.

In Smith *v.* Police Commissioners of Denny and Dunipace, 8th Mar. 1880 (7 R., H. L., 28), the Public Health Act, 1867, 30 & 31 Vict. c. 101, sec. 89, sub-sec. (4), provides that in certain burghs and parishes, "the Local Authority may cause all existing public cisterns, pumps, wells, etc., used for the gratuitous supply of water to the inhabitants, to be continued, maintained, and plentifully supplied with water."

The Commissioners of Police of a district (embracing the populous village of D.) recently erected into a police burgh under the General Police and Improvement Act, 1862, as Local Authority thereof, proceeded, by virtue of the above provision, for the purpose of preventing pollution of the water, to enclose and cover over a well within their district and insert in it a pump. The well was on private property, but had, without objection, been used for time immemorial, and repaired and cleaned out when necessary by the inhabitants of the neighbouring village of D., who had access to it by an occupation road. The proprietor of the solum of the well brought a suspension and interdict against the Local Authority.

Held, in affirming judgment of Second Division, (1) That a right

aquæ haustus, from the well in question, had been acquired by the inhabitants of the village of D., though it was not a burgh or otherwise incorporated; (2) That the well was therefore a public well in the sense of the Statute; (3) That the Local Authority were not entitled to do anything in the exercise of their statutory powers which was beyond the right of the public whom they represented; but (4) That what they had done with a view of preserving the sanitary condition of the well, without interfering with the complainer's right of property in the solum, was within the right of the public, and therefore of the Local Authority.

The Public Health Act, 30 & 31 Vict. c. 101, also gives powers as to water supply, but it makes a distinction between burghs having a population of 10,000 and upwards, or having a Local Act for police purposes, and burghs having a population of less than 10,000, and not having a Local Act for police purposes. In the latter class of burghs it is provided, sec. 89, sub-head (4):

"The Local Authority may cause all existing public cisterns, pump, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants, to be continued, maintained, and plentifully supplied with water, and may, if they shall think fit, provide and gratuitously supply water for any public baths or wash-houses established otherwise than for private profit, or supported out of any burgh rates."

The Commissioners may also supply water, either gratuitously or on easy terms, to lodging-houses for the working-classes provided under Part III. of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, sec. 69 of which provides: "Any Commissioners of water-works, Trustees of water-works, water companies, gas companies, and other corporations, bodies, and persons having the management of any water-works, reservoirs, wells, springs, or streams of water, and gas-works respectively, may, in their discretion, grant and furnish supplies of water or gas for lodging-houses provided under this part of this Act, either without charge, or on such other favourable terms as they think fit."

"The inhabitants of a certain district were entitled by custom to the flow of water from a certain spring to a spout in the public highway, and to take water therefrom to use for domestic purposes. The defendant, a proprietor of land through which the water flowed from the spring to the spout, abstracted and diverted the water on divers occasions so as substantially and sensibly to diminish the flow of water to the spout. The plaintiffs, being inhabitants of a house within the district, brought an action against the defendant for wrongfully obstructing the flow of water. It appeared that many of the inhabitants had been put to inconvenience on divers occasions by failing to find water on going to the spout, while the flow was so diminished; the jury found that the plaintiffs had not personally suffered any actual inconvenience or damage by want of water; but it was *held*, on a rule *nisi* to enter a nonsuit, that the plaintiffs could maintain the action without having suffered actual damage individually,

for the act of the defendant if continued would be evidence of a right existing in him in derogation of the rights of the inhabitants of the district, among the number of whom were the plaintiffs." Harrop *v.* Hirst (19 L. T., N. S., 426; L. R., 4 Exch., 43; 38 L. J., Exch., 1; 19 L. T., N. S., 426; 17 W. R., 164).

"With regard to the closing of polluted wells, cisterns, pumps, etc., see sec. 70 of the Public Health Act, 1875.

"Although the above section (64) gives the Local Authority power to cause their wells to be maintained and supplied with water, it does not authorise them to enter upon another man's land and help themselves to water; and therefore an injunction was granted to restrain the servant or agent of a Rural Authority from digging holes in a roadway to recover the water which had ceased to flow into their wells by reason of certain operations of the landowner. Edwards *v.* Joliffe (W. N., 1877, p. 120).

"Although water percolating underground in undefined courses is not the property of any person—Chasemore *v.* Richards (7 H. L. Cas., 349; 29 L. J., Exch., 81; 5 Jur., N. S., 873; 33 L. T., O. S., 350; 2 H. and N., 168; 7 W. R., 685), yet no one is entitled so to pollute it as to prevent any other person from enjoying the right of appropriating it. Ballard *v.* Tomlinson (L. R., 29 Ch. D., 115; 52 L. T., N. S., 942; 49 J. P., 693)."—Glen, 112.

258. Commissioners may Contract for Supply of Water.—The Commissioners may contract, for any period not exceeding three years at one time, with the owners of any water-works, or any other person, for such supply of water as the Commissioners shall think necessary for the purposes of this Act.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner;" see p. 5, "person." The Commissioners may also acquire water-works under sec. 261.

"A water company cutting off communication on non-payment of rates is not liable to a penalty, under sec. 43, for not furnishing a supply to a subsequent occupier, who has tendered his own water-rate and the cost of restoring communication, but who has not restored the communication. Nevertheless, the company is not entitled to refuse a supply to an occupier tendering his water-rate, on the ground that rate arrears are due from the previous occupier. Sheffield Water-Works Company *v.* Wilkinson (L. R., 4 C. P. D., 410; 48 L. J., M. C., 45; 41 L. T., N. S., 254; 43 J. P., 703).

"A Local Water-Works Act made it compulsory on a company to supply water for household purposes, but nothing was said as to the mode of measuring the water supplied. It was held that there was no obligation on the consumer to accept the company's meter as the only test of the quantity of water supplied, and that the customer was not bound to tender or pay in advance for the supply of water. It was further held that the company had a right to cut off the supply of water because the customer had not tendered payment for a

separate supply to his bath, which he derived from the same cistern; but the company were not entitled to cut off the supply to the house, because the customer had cut off an outlet pipe from the bath after he had disused the bath. Sheffield Water-Works Company *v.* Carter; Sheffield Water-Works Company *v.* Brooks (L. R., 8 Q. B. D., 632; 51 L. J., M. C., 97; 30 W. R., 889; 46 J. P., 548)."—Glen, p. 737.

259. For ascertaining Price to be paid for Water in case of Dispute.—If the Commissioners, and the owners of any water-works for supplying water within the burgh, with whom the Commissioners may be desirous of contracting for the supply of water to the inhabitants, do not agree as to the terms and conditions of the supply, and the price to be paid for such supply, then such terms and conditions and price (except where by the Act authorising such water-works some other mode of determining such terms and conditions and price shall be provided) shall be settled by arbitration, and for that purpose the clauses of the Lands Clauses Acts with respect to the settlement of disputes by arbitration shall be incorporated with this Act.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (4) "burgh."

260. Fire-cocks may be placed on Pipes of Water Companies.—It shall be lawful for the Commissioners, at the sight of the engineer of any water company established or to be established for supplying water within the burgh, or any company or corporation actually supplying water within the burgh, to place proper fire-cocks upon the pipes belonging to any such company within the burgh, at such convenient distances from each other and at such places as may be considered proper for the supply of the fire-engines when brought into operation, the positions of such fire-cocks being first arranged by the Commissioners with the directors of such water company; and in case of difference of opinion between them, the same shall be determined by the Sheriff, whose judgment thereon shall be final, and not subject to review.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (30) "Sheriff." As to the force of the words "it shall be lawful," see under sec. 9, *supra*. See also the provisions of sec. 292 as to fire-plugs.

"An extraordinary frost caused water to escape from a fire-plug, and damage was thereby caused to adjoining premises, but this was

held to afford no evidence of negligence on the part of the water company. Blyth *v.* Birmingham Water-Works Company (11 Exch., 781; 25 L. J., Exch., 212; 2 Jur., N. S., 333; 26 L. T., O. S., 261; 20 J. P., 247). In a subsequent case, however, where there was no such excuse as that of an extraordinary frost, it was held that there was evidence to go to the jury. Steggles *v.* New River Company (13 W. R., 413).

"By a Local Act a water-works company was bound, at the request of the Town Improvement Commissioners, to fix fire-plugs in their mains, and to repair and keep them in proper order at the cost of the Commissioners, in whom the property in the plugs was vested, by virtue of their Improvement Act. In consequence of the cap of one of the fire-plugs provided under the Act having been broken, a horse placed his foot in the plug-hole and was lamed, and it was held that the water-works company and not the Commissioners were liable for the injury. Bayley *v.* Wolverhampton Water-Works Company (30 L. J., Exch., 57; 6 H. and N., 241; 25 J. P., 199).

"A water-works company, authorised to place fire-plugs in a highway, but having no power to repair the road, is not bound to vary the level of the plugs from time to time as the road wears away, and is therefore not liable for an accident caused by a plug projecting after the road has worn away from it. Moore *v.* Lambeth Water-Works Company (34 W. R., 559).

"A claim for damages against a water-works company, for not keeping their pipes charged, as required by sec. 42 of the Water-Works Clauses Act, 1847, whereby the plaintiff's premises were burnt down, was held not to be sustainable. Atkinson *v.* Newcastle and Gateshead Water-Works Company (L. R., 2 Exch. D., 441; 46 L. J., Exch., 775; 36 L. T., N. S., 761; 25 W. R., 794; 46 J. P., 183); Couch *v.* Steel (3 E. and B., 402; 23 L. J., Q. B., 121; questioned). And a plea to an action for damage by fire, that the fire-plug to the main was opened for extinguishing another fire, which was the cause of the default in the supply of water, was held good. Campbell *v.* East London Water-Works Company (26 L. T., N. S., 475; 36 J. P., 711)."—Glen, p. 115.

261. Commissioners may provide sufficient Supplies of Water, and may erect Water-Works, etc.—The Commissioners may provide the burgh with such a supply of water as may be proper and sufficient for the purposes of this Act, and may maintain such a constant flow of water, by means of a reservoir or reservoirs, or otherwise, as may be requisite for the health of the inhabitants or the amenity of the burgh, and for private use to the extent required by this Act; and for other purposes, or any of them, the Commissioners may from time to time contract with any person whomsoever, or purchase, take upon lease, hire, construct,

lay down, and maintain such reservoirs and water-works, and do and execute all such works, matters, and things as shall be necessary and proper, including the opening of streets, public or private, from time to time, for the purpose of laying down, altering, or repairing water-pipes therein; and any water-works company, or owners or lessees of reservoirs, may contract with the Commissioners to supply water for the purposes of this Act in any manner whatsoever, or may sell and dispose of or lease their reservoirs and water-works to the Commissioners; and the Commissioners may provide and keep in any water-works constructed or laid down by them under the powers of this Act, a supply of pure and wholesome water, and the water so supplied may be constantly laid on at such pressure as will carry the same to the top storey of the highest dwelling-house within the burgh; and the Commissioners, by means of such reservoirs and water-works, or either of them, may maintain such a constant flow of water as may be requisite for the health of the inhabitants or the amenity of the burgh: Provided always, that before constructing or laying down any water-works under the powers of this Act, within any limits within, for, or in respect of which any water-works company or Water Commissioners shall have been established for supplying water, the Commissioners shall give notice in writing to every water-works company or Water Commissioners, within whose limits the Commissioners may be desirous of laying on or supplying water, stating the purposes for and (as far as may be practicable) the extent to which water is required by the Commissioners; and it shall not be lawful for the Commissioners to construct or lay down any water-works within such limits, if and so long as any such company or Water Commissioners shall be able and willing to lay on water proper and sufficient for all reasonable purposes for which it is required by the Commissioners; and in case any difference shall arise as to whether the water which any such company is able and willing to supply or lay on is proper and sufficient for the purposes for which it is required by the Commissioners, or whether the purposes for which it is required are reasonable, the same shall be settled by the Sheriff, upon summary application by either of the parties, and the decision of the Sheriff shall be final.

See sub-head (9) sec. 4, for definition of "Commissioners," (4) "burgh," (31) "street," (28) "private street," (22) "owner," (13) "house," (30) "Sheriff;" secs. 336 to 338 inclusive as to "notice," sec. 339 as to "appeal."

As explained under sec. 257, the Public Health Act, 30 & 31 Vict. c. 101, makes a distinction between burghs over and burghs under 10,000 inhabitants. Sec. 88 provides: "With respect to burghs having a population of 10,000 or upwards according to the census last taken, or having a Local Act for police purposes, it shall be lawful for the Local Authority, if they think it expedient so to do, to contract or arrange with any water company established by Act of Parliament for a supply of water, or, where there is no such company, themselves to provide a supply of water, to such extent as may be necessary for the sanitary and other public purposes of this Act hereinbefore provided."

The above section is to some extent modified by sec. 1 of the Public Health Amendment Act of 1871, 34 & 35 Vict. c. 38, which enacts that where the Local Act in any burgh does not provide sufficiently as to water supply, such burgh shall come under the provisions of sec. 89, instead of sec. 88 of the principal Act. In the case of burghs under 10,000 in population, and not having a Local Act, sec. 89, sub-head (1), enacts as follows:—

"The Local Authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the inhabitants, and for that purpose may conduct water from any lake, river, or stream, may dig wells, make and maintain reservoirs, may purchase, take upon lease, hire, construct, lay down, and maintain such water-works, pipes, and premises, and do and execute all such works, matters, and things as shall be necessary and proper for the aforesaid purpose, and may themselves furnish a supply of water, or contract or arrange with any other person to furnish the same; and for the purposes aforesaid, the Local Authority shall be held to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts: Provided always, that they shall make reasonable compensation for the water so taken by them, and for the damage which may be done to any lands by reason of the exercise of the powers hereby conferred in terms of the said Acts; and further, that for the purposes of this Act the words "lands" and "land" in the said Acts and in this Act shall include "water" and the right thereto; provided also, that it shall not be lawful for the Local Authority to provide or supply water in any burgh, parish, or district, which any company, established by Act of Parliament, is authorised to supply with water, unless the Local Authority shall previously have purchased or acquired the undertaking of such company."

In Peterhead Granite Polishing Co. *v.* Parochial Board of Peterhead, 24th Jan. 1880 (7 R., 536), the diversion of springs, which feed a stream, by a Local Authority in the exercise of their powers under sec. 89 of the Public Health Act, 1867, does not entitle a lower riparian proprietor on the stream, who is not proprietor of the

ground on which the springs are situate, to compel the Local Authority to go through the forms prescribed by sec. 90, as for the purchase of his interest in the stream, but only entitles him to compensation as for land injuriously affected, to be ascertained according to the mode pointed out by sec. 116.

In Simson *v.* the Police Commissioners of Bonnyrigg, 28th March 1890 (not reported), Lord Kincairney issued the following interlocutor:—"Having resumed consideration of the cause, and at a previous stage heard Counsel, repels the first plea in law for the defenders, and also their plea that the action is incompetent; finds that there are no relevant averments which warrant the conclusions of the summons; dismisses the action, so far as regards the first special conclusion, as unnecessary: *Quoad ultra*, assoilzies the defenders from the conclusions of the action, and decerns; finds the defenders entitled to the expenses of the action, except the expenses incident to and occasioned by their third and fourth pleas; finds the pursuer entitled to said latter expenses; allows accounts of said expenses to be lodged, and remits them to the Auditor of Court to tax and to report."

His Lordship's note, which is as follows, explains the bearing of the action:—"Since the year 1858 the village of Bonnyrigg has been supplied with water by the Bonnyrigg Water Company, which was incorporated under the Joint-Stock Companies' Act for the purpose, *inter alia*, of supplying the village. In 1865, the householders of Bonnyrigg adopted the General Police Act, including the enactments relative to the supply of water, but no measures in regard to the water supply appear to have been taken in consequence until the Police Commissioners contracted with the Bonnyrigg Water Company for the supply of the burgh for three years from Whitsunday 1883. That contract was renewed for three years from Whitsunday 1886. It expired at Whitsunday 1889, and has not been renewed.

"The Commissioners of Police have now no contract for the supply of water to the burgh, and they have at present made no provision for it. The Commissioners have not thought proper to state their reasons for not renewing the contract with the water company, further than by saying that they do not deem it necessary or expedient in the interests of the burgh to make a new agreement. It might have been more satisfactory and perhaps equally reasonable had the defenders indicated their reasons. The position they have taken up is, however, quite intelligible. They aver, and nothing to the contrary is suggested, that the Bonnyrigg Water Company is able and willing to supply the burgh.

"In these circumstances, this action has been raised by the pursuer, who is tenant of a house in Bonnyrigg. The summons concludes for declarator that the Police Commissioners are bound to provide to the pursuer, and 'the other inhabitants and householders' of Bonnyrigg, a supply of water, under the provisions of the General Police Act, sufficient for the purposes of that Act, and for private use 'to the extent required by the Act, and to levy the necessary assessment to defray the cost thereof as provided by the Statute,' and that they are bound, in particular, to construct and lay down works, or to contract

with the Bonnyrigg Water Company 'for the supply of water, proper and sufficient for the domestic or private uses of the pursuer and other inhabitants of said burgh, for the purposes of said Act, and to provide all necessary appliances for said purposes, and to levy such assessment therefor as provided by said Act.'

"The summons contains another conclusion about existing wells, but that is separate and very subordinate, and will be noticed afterwards.

"The defenders have stated various preliminary pleas. They have pleaded that the pursuer has no title to sue, that the action is incompetent, and that the pursuer is not the true *dominus litis*. I thought it necessary to dispose of this last plea in the first place, and, after a proof on the point, I, on 6th March, pronounced an interlocutor by which I repelled it.

"Little or nothing was urged at debate in support of the plea of incompetency, and, so far as I see, there is no foundation for it. The plea of want of title was, however, pressed, and reference was made in support of it to the case of Murray *v.* Robertson, 13th Dec. 1867 (5 S. L. R., 104). But that is not a satisfactory authority. It is not clearly reported, and was decided against the pursuer, not on the law but on the facts. Still I think, that the defender's plea that the pursuer cannot be heard in any interest but his own is well founded. He cannot surely be allowed to ask, in name of his neighbours in the village, for declarator that they should be assessed. Lauder *v.* Spence, 17th May 1821 (1 S., 2nd ed., 13); Ewing *v.* The Glasgow Commissioners of Police, 19th January 1837 (Fac. Col.; affirmed, M. L. and R., 147). But although that be so, it does not follow that the action may not be sustained, so far as it relates to the pursuer's individual rights. If it be true that the defenders are under a legal obligation to do what the pursuer demands, the pursuer must be entitled to establish and enforce that obligation. Blackie *v.* Magistrates of Edinburgh, 20th March 1884 (11 R., 783), affirmed 18th Feb. 1886 (13 R., H. L., 78), is a good authority in favour of the pursuer's title.

"The question whether the pursuer has stated a case which entitles him to judgment or inquiry must therefore be considered.

"The action is based on the General Police Act only, and the record contains no reference to the Public Health Act. The main argument amounted, I think, to this, that the Police Commissioners, by adopting the General Police Act, and in particular the clauses in regard to water supply, acquired a power, and therefore came under an obligation, to supply the burgh with water, either by the construction of water-works themselves, or by contracting with the Bonnyrigg Water Company. It is necessary to consider what the power of the Commissioners of Police in the matter really was, and, with this view, to have special regard to the proviso in sec. 220 of the General Police Act, by which it is enacted that 'it shall not be lawful for the Commissioners to construct or lay down any water-works within the limits in respect of which any water-works company shall have been established for supplying water, if and so long

as any such company shall be able and willing to lay on water proper and sufficient for all reasonable purposes for which it is required by the Commissioners.' Now the Bonnyrigg Water Company is incorporated for the very purpose of supplying Bonnyrigg, and no question is raised about the ability and willingness of that company to do so, and it seems to me to follow that the Police Commissioners of Bonnyrigg have really no power, not to speak of obligation, to construct water-works for the supply of Bonnyrigg. All that they have power to do—leaving out of account the subordinate question about wells—is to contract with the Bonnyrigg Water Company for the supply of the burgh, and that no doubt they have power to do, under sec. 217 of the Act. At all events, seeing that there is no suggestion of unwillingness on the part of the water company to contract, any difference as to terms being determinable by arbitration under the provisions of sec. 218.

"This primary question is therefore narrowed to this, Can the Commissioners of Police be compelled, at the suit of an individual householder, to enter into a contract with the Bonnyrigg Water Company for the supply of water for the burgh? That question resolves itself into these two—(1) Are the Commissioners of Police under an absolute obligation to enter into such a contract? and (2) If not, have any special circumstances been averred which, if assumed to be true, would give rise to such an obligation?

"The argument for the pursuer was mainly directed to the first of these questions, and was rested on the maxim that a power for the public benefit is an obligation. That there is a legal maxim to that effect, or to some such effect, of wide application, cannot be doubted. It was expressed by the Lord President (then Lord Justice-Clerk Inglis), in the case of Walkinshaw *v.* Orr, 28th Jan. 1860 (22 D., 627, 631), in these terms: 'I hold it to be a general canon in the construction of Statutes, that where powers are conferred in Statute for the public benefit, they must be exercised, and the enactment is imperative.'

"The pursuer pressed this canon as absolute, but I doubt the application of the dictum of the Lord President to this case, and I venture to think that, although generally true, it cannot be said to be of universal application, and it must, I think, suffer some qualification whenever the power is coupled with a discretion. The scope and limits of the maxim were very carefully considered in the House of Lords in the case of Julius *v.* The Bishop of Oxford, Mar. 1880 (5 H. L., 214), where the Court did not enforce the exercise of a statutory power. So in the case of the Newport Bridge (29 L. J., M. C., 52), the Justices in Quarter Sessions who had power to widen a bridge were not compelled to do so; because, seeing that considerations of cost and of proportionate benefit were involved, it was thought to be left in their discretion to make the order or not. In the case of Julius, Lord Cairns stated the law thus: 'The words 'it shall be lawful' . . . do not themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object

for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Those . . . who contend that an obligation exists to exercise the power . . . must . . . show in the circumstances of the case something which, according to the principles I have mentioned, creates the obligation.' I incline to think that the words 'it shall be lawful,' or such words, are properly speaking neither permissive nor mandatory, but empowering and facultative. The thing authorised is, by force of these words, brought within the scope of the function which it is the business of the person or persons empowered to perform, and it is a question in each case whether an occasion has arisen which calls for the exercise of the power.

"The power applicable to the present circumstances is conferred by sec. 217, which provides 'that the Commissioners may contract for any period, not exceeding three years at one time, with the owners of any water-works, or any other person, for such supply of water as the Commissioners shall think necessary for the purposes of this Act.'

"It seems past dispute that there is a great deal in this section which is discretionary only, and cannot be obligatory. The amount of the supply appears left entirely to the judgment and discretion of the Commissioners, and also the duration of the contract within the limit of three years. It seems very difficult to hold that a power to enter into a contract, for a period limited to three years, implies an obligation to renew the contract when the period for which they judged it expedient to contract has expired. That would be to extract from a provision limiting the duration of a contract the inference that it must be perpetual.

"Sec. 220 empowers the Commissioners to construct water-works for the supply of water, and there may be much of what is empowered in that section which is also imperative. But the application of that section to this case is not direct, because of the proviso at the end of it saving the rights of water-works companies already established; and, as I read that proviso, it implies that the Commissioners may lawfully leave the supply of the water in the hands of the existing water company if they are supplying it in a satisfactory way.

"Sec. 221 provides that where the Commissioners are able and willing to supply the houses or tenements with water for domestic and ordinary purposes, the owners of such houses and tenements shall be entitled to obtain such supply. In the manner specified it is surely impossible to extract an obligation on the Commissioners out of a power to be exercised only when they are 'willing.'

"The language of sec. 216 contrasts with that of 218, 220, and 221. It provides that the Commissioners *shall* cause all existing 'cisterns, pumps, wells, conduits, fountains, and other water-works used for the gratuitous supply of water to the inhabitants within the burgh, to be continued, maintained, and supplied with water, or they

shall substitute other such works equally convenient, and *shall* cause them to be maintained and supplied with water, . . . and the Commissioners *may* construct and maintain any number of new cisterns, etc.' I find it difficult to hold that the Commissioners are, under this section, under the same obligation to construct new water-works as they are to maintain the water-works existing.

"On the whole, I cannot sustain the argument of the pursuer, to the effect that an obligation on the Commissioners to contract for the supply of water for the burgh arises from the mere fact that the clauses of the Police Act as to water supply have been adopted, and that the Commissioners have under these clauses power to contract.

"The next question is, Whether there are any special circumstances averred on record which can convert the Commissioners' power into an immediate duty, or which call for inquiry in reference to the alleged obligation on the Commissioners to contract with the water company. Many such circumstances might be imagined, but I do not think that any such are averred.

"It is not averred that the Commissioners acted corruptly in abstaining from renewing their contract with the water company. It is not said that any of their nnmber had an interest in the water company, or that in what they did or abstained from doing they sacrificed the burgh to the water company. No bad motive of that kind is alleged. If it had been the case, it would have been totally different. It is not averred that, at the date of the action, the supply of water in the burgh was deficient. There is a statement that the water rates charged by the water company are excessive and inequitable, but there is no statement of the rates charged when there was a contract with the water company, showing whether a contract between the Commissioners and the water company would be beneficial to all the inhabitants of the burgh. There is nothing averred inconsistent with the idea that a contract with the water company might be injurious to the general interests, and it is not said that any person but the pursuer objects to the course taken by the Commissioners.

"It does seem singular that the Commissioners, after assuming the responsibility of the water supply of the burgh for six years, under contract with the water company, should suddenly and without vouchsafing any reason—at least to the Court—entirely change their policy. But the mere change, even coupled with the absence of explanation, does not, in my opinion, warrant the interference of the Court. It is not expedient that the Court should assume the functions of the Local Authority, and interfere with the Police Commissioners in the exercise of their functions, without some *prima facie* case of corruption, or gross mismanagement, or oppression or hardship.

"I have therefore come to the conclusion that the defenders are entitled to absolvitor from the conclusion that they are bound to construct works or contract with the water company for supplying the burgh.

"There is a subordinate conclusion, to the effect that the defenders

are bound 'to cause all existing public cisterns, pumps, wells, conduits, and other water-works which have been in use within the burgh for the gratuitous supply of water, to be supplied with water for the gratuitous use of the inhabitants, and to maintain such cisterns, pumps, wells, and conduits, and other works, for such use, or to substitute other such works equally convenient to pursuer and other inhabitants of said burgh.' I think the action, as far as regards this conclusion, should be dismissed, not because the conclusion misstates the duty of the defenders, which it does not, for the conclusion is nothing but a quotation from sec. 216 of the General Police Act, but because I find no case laid for it on record. The only averment on the subject is in Cond. 13, and I do not find there any averment that the defenders have interfered with any public wells in Bonnyrigg, or have failed to maintain them.

"On consideration, I have come to think that the pursuer should be allowed the expenses incident to the plea that the pursuer was not *dominus litis*, and that, *quoad ultra*, the defenders should be found entitled to expenses."

See also Macfarlane *v.* Motion, 11th July 1884 (Reid's Digest of Poor Law Cases, Part II. p. 50). This was a note of suspension and interdict which the Lord Ordinary (Adam) refused. His Lordship observed: "No objection is stated to the amount of assessment, and there is no doubt that the Parochial Board of the Barony Parish are the Local Authority within the district, and the parties whose right and duty it is to enforce payment of the water assessment, which they are bound to raise and levy within the district, in terms of sec. 94 of the Public Health Act. But the complainers plead that the Parochial Board have no right to supply water within the district, in respect that the Glasgow Water Commissioners are authorised to supply water in the district, and the Board have not purchased or acquired their undertaking. The plea is founded on sec. 89 of the Public Health Act, which provides that it shall not be lawful for the Local Authority to provide or supply water in any burgh, parish, or district, which any company, established by Act of Parliament, is authorised to supply with water, unless the said Local Authority shall previously have purchased or acquired the undertaking of such company. The facts upon which the plea in this case is founded are, that the district in question is within the limits of the Glasgow Commissioners Act, as defined by sec. 82 of that Act, and within which the Commissioners are undoubtedly authorised to supply water, while the Parochial Board have undoubtedly not acquired their undertaking. I should have thought it might very well have been maintained that the provision in the Public Health Act was introduced for the benefit of the companies there referred to, and that it could not be founded on by a third party, when, as in this case, the water was supplied with the consent of and under arrangement with the company; but however that may be, I do not think it has any application to the present case, because the Glasgow Water Commissioners are, by 36 Vict. c. 36, sec. 8, specially authorised to enter into agreements for the supply of water to any corporation, Local Authority, or water supply

district within the limits of their Act of 1855, either for domestic or other purposes. In this case they have entered into an agreement with the Local Authority for a water supply to the district in question. It seems to follow as a necessary consequence, that the Legislature intended that the Local Authority who had thus acquired a supply of water from the Commissioners should have power to supply it to the district under its authority. It is not conceivable that such agreements should have been authorised for any other purpose, and the power to assess necessarily follows.

But the complainers further plead that they have right to require the Glasgow Water Commissioners to provide them with a supply of water for trade and domestic purposes, and that they cannot be deprived of that statutory right by any agreement between the Water Commissioners and the Barony Parochial Board. It is clear enough that the Glasgow Water Commissioners are not bound to provide the complainers with a supply of water either for trade or for domestic purposes. It would appear that the Commissioners are not bound in any case to supply water for trade purposes. As regards water for domestic use, it would appear that there are certain limits specified in sec. 83 of the Act of 1855, called the limits for compulsory supply, within which the Commissioners are bound to provide a sufficient supply of water for domestic purposes; and that beyond the limits for compulsory supply, and within the limits of the Act as specified in sec. 82, the Commissioners are authorised, but not bound, to supply water for domestic purposes. The complainers' premises are situated within the limits of the city, but beyond the limits for compulsory supply, and therefore they have no right to require the Commissioners to supply them with water either for domestic or trade purposes. The complainers say that they do not require and do not get any water from the Parochial Board. The assessment, however, is for domestic purposes, and the complainers are liable to be assessed whether they require water or not; it is not alleged that they have ever refused a supply of water."

The Commissioners will have to consider whether, in providing a water supply, they ought to proceed under this Act or under the Public Health Act. In the larger burghs the powers given by the Public Health Act are so meagre, that the Commissioners will doubtless proceed under this Act. In considering which Act to follow, the following points are to be kept in view:—There is no power given under this Act to acquire land compulsorily, under the Lands Clauses Acts, save in the case of burghs of less than 5000 inhabitants (see sec. 262), whereas, under the Public Health Acts, all burghs under 10,000 inhabitants have such power; the maximum assessment under this Act, when the powers as to water are in force, is 4s. per £ (see sec. 340), while under the Public Health Act it is 2s. 6d. per £; under the Public Health Act power is given to form special water supply districts in burghs under 10,000 (see sec. 89, sub-head (5),—which need not be quoted here, as it is identical, *mutatis mutandis*, with sec. 76, quoted under sec. 218, *supra*,—while there is no such

power under this Act; borrowing powers are given by the Public Health Act to burghs under 10,000, but not to larger burghs, while under this Act (sec. 374) any burgh may borrow for water supply purposes; the Public Health Act authorises the Local Authority to provide a supply of water "for domestic use" (sec. 89, sub-head (1)), and it is only when there is a surplus not required for domestic purposes that water can be supplied for public baths and wash-houses, or for trading or manufacturing purposes (see sec. 89, sub-head (3)), while under this Act the purposes for which the Commissioners may introduce water are not so restricted; under the Public Health Act (sec. 92), two or more Local Authorities may combine for the execution of water-works for their joint benefit—under this Act, such combination cannot be accomplished save by means of a Provisional Order under sec. 45.

See Lord Blantyre *v.* Dumbarton Water Commissioners, 11th May 1888 (15 R., H. L., 56; Court of Session, 3rd Mar. 1886, 13 R., 636), where B., who was proprietor of the lands surrounding Loch H., and on both sides of Loch H. Burn, for some distance after it left the loch, in 1854 disponed to D., an inferior heritor, along with two mills on Loch H. Burn, his "whole rights of water and water-power, and other rights connected with the mills hereby disponed, including all right" he had "to dam up and draw water from Loch H., or to form embankments or breastworks at said loch," but so that the water of the loch should not be raised more than 3 feet above its then existing level. At the same time, he expressly reserved his rights in the aforesaid loch and burn, excepting his rights therein connected with the mills and "other rights above conveyed or granted," and particularly his right to use the water-power for driving agricultural machinery.

In 1883 the Water-Works Commissioners of the Burgh of Dumbarton obtained compulsory powers to take the water of Loch H. for the supply of the inhabitants; but their Special Act (sec. 9) provided that they must discharge into Loch H. Burn a regular supply of 320,000 gallons a day, which should "be deemed to be compensation to mill-owners and other persons interested in the waters flowing down the stream called Loch H. Burn for the water intercepted and appropriated for the purposes of this Act;" and also (sec. 10) that "nothing in this Act contained shall be held to prejudice or affect the rights (if any) of B. in the loch known as Loch H., or to prevent him from claiming" from the Commissioners compensation for any such rights which should be injuriously affected by their operations. The Commissioners acquired, by private agreement, all the rights of D. in Loch H. and Loch H. Burn, and proceeded to take water from the burn at a point close to the loch to supply the town of Dumbarton. B. claimed compensation, not only for land taken and wayleave, but for rights and interests in the water of the loch and burn injuriously affected. The Commissioners maintained that, as the water had been taken from the burn, B.'s claim was excluded by the statutory compensation given under sec. 9.

Held, that the grant of the above-mentioned servitude to D. was

limited to the use of water for the mills, and that the Water-Works Commissioners were bound to compensate B. for the water taken from the loch for the supply of the town of Dumbarton.

In England, "Hall, V. C., said 'that the scope and effect of sec. 52 (of 38 & 39 Vict. c. 55) was that the Local Authority were not to throw away the money of the ratepayers in constructing water-works, where there was an existing body which could provide a proper water supply without recourse being had to such money. It was an unreasonable construction of the section to hold that a company was not 'able and willing to supply water unless they had all the works for such a purpose executed and completed down to the minutest detail.' Evidence had been given on the part of the company that they had a supply of water sufficient to furnish 20 gallons per head per day for a population of 9500 persons, whereas the population required to be served was only 5556, and the Local Board had themselves estimated that 15 gallons per head would be a sufficient supply. It also appeared that £5000 had already been expended on the projected works, which, it was said, could be completed within five months. The Vice-Chancellor was therefore satisfied upon the evidence that the plaintiffs were a company 'able and willing' to provide a proper supply within the meaning of the section, and the Local Authority ought, therefore, to hold their hands and not rush into expense which might prove to be unnecessary. He considered that, under the circumstances of the case, the plaintiffs had a *locus standi*, and were entitled to sue the Local Board.' His Lordship accordingly granted an injunction to restrain the Local Board from constructing and maintaining any water-works within the district of the company. Newhaven and Seaford Water Company *v.* Newhaven Local Board (L. R., 30 Ch. D., 350; 53 L. T., N. S., 571; 34 W. R., 172)."—Glen, p. 102.

262. Burghs having less than 5000 Inhabitants may obtain from the Sheriff Compulsory Powers for Water Supply.—In every burgh having less than 5000 inhabitants at the date of the last census, if the Commissioners resolve that, in order to obtain a supply of water for the burgh, it is necessary for them to acquire land otherwise than by agreement, they may, instead of proceeding under the Public Health Acts, present a petition to the Sheriff in manner hereinbefore provided, and obtain his authority to put in force the provisions of the Lands Clauses Acts with reference to the acquisition of lands otherwise than by agreement.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners," (16) "lands," (30) "Sheriff;" sec. 60 for application to Sheriff for power to put in force the Lands Clauses Acts.

The provisions of the Lands Clauses Acts as to acquisition of land

otherwise than by agreement, may be put in force under sec. 90 of the Public Health Act, but only by obtaining a Provisional Order. The procedure under sec. 60 of this Act is simpler and less expensive, but a difficulty may arise from the fact that under the Lands Clauses Acts the word "land" does not include water. Sec. 89, sub-head (1), of the Public Health Act, 30 & 31 Vict. c. 101, provides that "for the purposes of this Act the words 'lands' and 'land' in the said Acts (*i.e.* the Lands Clauses Acts) and in this Act shall include 'water,' and the right thereto." See under the previous section, also under sec. 347, *infra*, as to the differences between this Act and the Public Health Act.

263. Service Pipes to be laid by Owners.—Where the Commissioners resolve to supply the houses or tenements within the burgh with water for domestic and ordinary purposes, the owners of such houses and tenements shall be entitled to obtain such supply by connecting a service pipe with the main pipes to be laid down by the Commissioners, the expense of such service pipes and of connecting the same with the main pipes being defrayed by such owners; and where the houses and tenements generally in any street within the burgh shall be supplied with water by means of such service pipes, it shall be competent to the Commissioners to require the owner of any tenement in such streets not so supplied to take a supply of water by connecting a service pipe with the main pipe as aforesaid; and in the event of refusal or delay on the part of such owner to comply with such requisition, it shall be lawful for the Commissioners to enter such house or premises and proceed to lay down such service pipe themselves, and to recover the expense thereof from such owner; and wherever it is practicable all supplies of water for domestic use shall be taken direct from the main or service pipes and not from cisterns.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (4) "burgh," (22) "owner," (31) "street," (16) "premises." For the definition of the expression "water for domestic and ordinary purposes," see sec. 265.

See sec. 246, which requires that a month's notice must be given by the Commissioners when requiring an owner to introduce water to his house.

The powers under the Public Health Act (30 & 31 Vict. c. 101) for compelling owners to provide water supply to their houses are not so extensive. Sec. 89, sub-head (2), provides: "If any house within the district is without a proper supply of water at or near the

same, the Local Authority shall compel the owner to obtain such supply, and to do all such works as may be necessary for that purpose."

Cisterns for domestic supply are not to be used where it is practicable to take the water direct from the main or service pipes. Where cisterns exist, bye-laws may be made under sec. 316*b* (3), "for inspecting and periodical cleaning of cisterns erected in buildings for the use of two or more families."

As to the communication pipes to be laid by the inhabitants, see also secs. 48–53 of the Water-Works Clauses Act, 1847, 10 Vict. c. 17, incorporated with this Act by sec. 267 hereof. In an English case, Clover *v.* East London Water-Works Company (17 L. T., N. S., 475), it was held that a water-works company is not liable for the negligence of an occupier in opening a street under one of these sections (sec. 52).

"Notice the obligation to keep the supply of water pure and wholesome. A Local Authority supplying water, and only required to keep a supply of pure and wholesome water 'in the mains,' was held not to be liable for injuries sustained by the consumer from the contamination of water by the leaden communication pipes, although such pipes were 'to be deemed to belong to them.' Milnes *v.* Mayor, etc., of Huddersfield (L. R., 11 App. Cas., 511; 56 L. J., Q. B., 1; 55 L. T., N. S., 617; 34 W. R., 761; 50 J. P., 676)."—Glen, p. 104.

264. Water to be used only for Domestic and Ordinary Purposes, unless by Agreement with Commissioners.—No person shall be entitled, without special agreement with the Commissioners, to use the water supplied through the pipes of the Commissioners, except for domestic and ordinary purposes; but where there is a supply of water more than is required for such domestic and ordinary purposes within the burgh, it shall be lawful for the Commissioners to contract with any person or persons within the burgh to supply any public baths and wash-houses, works, manufactories, or other premises within the burgh with water, at such rate and upon such terms and conditions as may be agreed on; or, in the event of disagreement, either as to the ability of the Commissioners to give the supply, or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff, upon summary application by either of the parties, and the decision of the Sheriff shall be final: Provided that, when water is thus supplied from such surplus, it shall not be lawful for the Commissioners to charge the parties obtaining the same both with the portion of the burgh general assessment applicable

to water supply, and also for the supply of water obtained by them; but the Commissioners may either charge the said assessment leviable on such premises, or charge for the supply of water furnished to the same, as they shall think fit; and it shall also be lawful for the Commissioners to dispose of any surplus water, not required for any purpose within the burgh, to any person or persons outside the burgh, at such rate and upon such terms and conditions as may be agreed on.

It shall further be lawful for the Commissioners to dispose of any surplus water, not required for any of the purposes aforesaid within the burgh, to the Commissioners or Trustees of any harbour, or other person owning or managing any harbour, within or near to the burgh, for the purpose of supplying vessels within the harbour, and for the extinction of fires in such vessels, or in any buildings or other property within the limits of the harbour, and subject to the administration of such Commissioners or Trustees of the harbour or other persons, and such Commissioners or Trustees of the harbour, or other persons, may demand and levy from the owner, master, agent, manager, or other person in charge of any vessel applying for and receiving such supply of water, a reasonable sum of money in respect thereof; and in the event of disagreement as to the rate, terms, or conditions on which such supply shall be given by such Commissioners or Trustees of the harbour, or other persons, to such vessels, the same shall be fixed by the Sheriff upon summary application by either of the parties, and the decision of the Sheriff shall be final.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (13) "house," (30) "Sheriff," (3) "building," (22) "owner," (16) "premises;" sec. 339 as to "appeal," sec. 340 as to "burgh general assessment;" p. 5, "person."

The sums obtained for surplus water supplied for trade purposes have been held to be "profits," for the purposes of the income-tax. See Glasgow Water Commissioners *v.* Miller, 22nd Jan. 1886 (13 R., 489), and Allan *v.* Hamilton Water-Works Commissioners, 22nd Feb. 1887 (14 R., 485).

The provision of the Public Health Act as to water for trade purposes is as follows (30 & 31 Vict. c. 101, sec. 89, sub-head (3)):—

"The Local Authority, if they have any surplus water, after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths and wash-houses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the Local Authority and the persons desirous of

being so supplied: Provided that, when water is thus supplied from such surplus, it shall not be lawful for the Local Authority to charge the parties obtaining the same both with the special water assessment and also for the supply of water obtained by them, but the Local Authority may either charge the special water assessment leviable on such premises, or charge for the supply of water furnished to the same, as they shall think fit."

In Local Authority of the Parish of Beith *v.* Muir, 4th May 1887 (3 Scot. Law. Rev., 319), it was held that the tenant and occupier of a hotel situated within a special water supply district, who used the water supply introduced into his premises for washing bottles, vessels, and measures, and for mixing with liquors sold in the ordinary course of his business, used such water "for trading or manufacturing purposes," in the sense of sub-sec. (3) of sec. 89 of the Public Health Act of 1867; but that the Local Authority having imposed a special water assessment on the hotel, and having accepted payment thereof for the current year, were not entitled, during the course of that year, to have him interdicted from taking or using for trading purposes the supply of water provided by them for their special water supply district.

265. Supply of Water for Domestic Purposes.—A supply of water for domestic and ordinary purposes shall not include a supply of water for cattle or for horses, or for washing carriages, or for steam-engines, or for railway purposes, or for warming or ventilating purposes in public buildings, or for working any machine or apparatus, or for any trade, manufacture, or business whatsoever, or for watering gardens by means of any tap, tube, pipe, or other such like apparatus, or for fountains, or for flushing sewers or drains, or for public baths or wash-houses, or for any ornamental purpose whatever.

See sub-head (3), sec. 4, for definition of "building," (13) "house."

The definition given in the Water-Works Clauses Act, 1863, 26 & 27 Vict. c. 93, sec. 12, is: "A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages, where such horses or carriages are kept for sale or hire, or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

See Skelton's Hand-book of Public Health, p. 84, for some Sheriff-Court decisions on the interpretation of "domestic purposes."

In the case of Menzies *v.* Police Commissioners of Inverkeithing (not reported), Lord Trayner delivered the following judgment as to the meaning of domestic and ordinary purposes:—"The question in this case is whether the water used by the pursuer for washing his horse and carriage falls within the statutory description of water

used for 'domestic and ordinary purposes.' If it does, the pursuer is entitled to have it in return for the ordinary water rate levied by the defenders. If it does not, he can only obtain it under special agreement.

"The solution of the question depends on the construction put on secs. 221, 222, and 225 of the Police and Improvement (Scotland) Act, 1862. By sec. 221, persons in the position of the pursuer are entitled to a supply of water for 'domestic and ordinary purposes,' and by sec. 222 it is provided that no person shall be entitled, without special agreement with the Commissioners, to use the water supplied by the Commissioners, 'except for domestic and ordinary purposes.'

"In construing the words quoted, they must be taken in their popular and usual signification, and they must all be taken into account. That being so, I cannot adopt the suggestion that the words mean no more than 'ordinary domestic purposes,' for that is only the meaning of the words 'domestic purposes;' such a rendering of the words would leave out a part of the statutory description. When the Statute refers to 'domestic and ordinary purposes,' I must conclude that it means domestic purposes and something more, that it means domestic purposes, and purposes not domestic, but which are at same time ordinary or usual purposes. I think the water used by the pursuer to wash his horse and carriage is used for an ordinary purpose, and therefore is within the description of the supply to which he is entitled without special agreement. This view is strengthened by a consideration of sec. 225, which provides that 'a supply of water for domestic and ordinary purposes shall not include a supply of water for cattle, or for horses, or for washing carriages, where the horses and carriages are kept for hire, or are the property of a dealer,' etc. The fair implication of that provision in my opinion is, that in any other cases than those provided for, the use of water for washing a horse or carriage is included in the supply for domestic and ordinary purposes. This, I take it, means that where the horses and carriages are *not* kept for hire, or are not the property of a dealer, there can be no charge for water, this being held to be included in the ordinary water-rate. I think this also an equitable result, for if the pursuer is not entitled to water to wash his horse and carriage, I can see no reason why he should be charged water-rate at all on the rent of his stable and coach-house. I cannot take the view put forward by the defenders, that the water used by the pursuer for washing his horse and carriage is used by him in his 'business.' I think that view is not warranted by any reading, however strained, of sec. 225.

"The existing bye-laws passed by the Commissioners, and confirmed by the Sheriff, present no difficulty in the way of the pursuer's success in this action, if the view I have expressed of the meaning of the Statute is sound. Such bye-laws are only authorised and are only effectual where they are 'not repugnant to the provisions of this Act' (sec. 375). In my view the bye-laws are repugnant to a sound construction of secs. 221, 222, and 225, if they authorise a special charge for the water in question. I think it,

however, open to question, whether the bye-laws do authorise such a charge."

"*Meaning of 'Domestic Purposes.*'—Water used for watering a horse and washing a carriage was held to be used for 'domestic purposes' within the meaning of an enactment similar to the above section. Busby *v.* Chesterfield Water-Works and Gas-Light Co. (E. B. and E., 176; 27 L. J., M. C., 174; 4 Jur., N. S., 757).

"On the construction of the New River Company's Acts, the company were held not to be bound to supply water for watering the roads and gardens on the Thames Embankment at the limited rates fixed by the Special Act, but were entitled to claim rates to be fixed by agreement. Metropolitan Board of Works *v.* New River Co. (37 L. T., N. S., 124).

"A person who used water for a fixed bath in a dwelling-house was held not to be liable to an extra charge, which was payable on a supply for 'baths, wash-houses, or public purposes.' Weaver *v.* Cardiff Corporation (48 L. T., N. S., 906); see also Sheffield Water-Works Company *v.* Bingham (*Local Government Chronicle*, 23rd July 1881, p. 595).

"Water used for a pleasure-garden was held to be for a 'domestic purpose.' Bristol Water-Works Company *v.* Uren (L. R., 15 Q. B. D., 637; 54 L. J., M. C., 97; 52 L. T., N. S., 655; 49 J. P., 564). And so also was water supplied for the use of a workhouse. Liskeard Union *v.* Liskeard Water-Works Company (L. R., 7 Q. B. D., 505; 30 W. R., 292; 45 J. P., 436)."—Glen, p. 799.

266. Drinking Fountains.—The Commissioners may from time to time erect and maintain, or allow to be erected and maintained, in any street or public place, any ornamental drinking fountain or trough.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street." See sec. 257 as to power of the Commissioners to keep such fountains supplied with water.

267. Incorporation of certain Provisions of the Water-Works Clauses Acts.—With respect to the supply of water, all the clauses and provisions of the Water-Works Clauses Acts, 1847 and 1863, and any Act amending the same, with respect to the following matters—that is to say: The construction of the water-works, the communication pipes to be laid by the inhabitants, waste or misuse of the water supplied by the undertakers, guarding against fouling the water of the undertakers, the payment and recovery of the water rates, the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to Justices or to the Sheriff shall, so far as the same are not varied by the provisions of this Act, be incor-

porated with this Act; and the expression "the undertakers" in the said Water-Works Clauses Acts shall, in reference to this Act, mean the Commissioners under this Act: Provided always, that the water to be supplied by the Commissioners need not be constantly laid on under pressure; and provided also, that for shops the water rate, or portion of burgh general assessment applicable to water, shall be chargeable only on one-fourth of the rental of the premises, unless in special circumstances the Commissioners see cause to charge the ordinary rates, and in that case it shall be lawful for any person who may think himself thereby aggrieved to appeal to the Sheriff in manner hereinafter provided.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "premises." See sec. 353 as to "recovery of assessment," 487 as to "imprisonment on failure to pay penalty," 500 and 501 "for penalty on repetition of offences and power to mitigate," and 458 as to "punishment of abettors." See sec. 340 as to "burgh general assessment," sec. 339 as to "appeal;" and see the provisions of the Acts incorporated, 10 Vict. c. 17, and 26 & 27 Vict. c. 93.

In Cowan and Mackenzie *v.* Law, etc., 8th March 1872 (10 M., 578), the Trustees acting under the Edinburgh and District Water-Works Act applied to Parliament for powers to bring in an additional supply of water. This application was opposed by a number of rate-payers. The Bill was passed by the House of Commons, but was thrown out by the House of Lords. Great expenses had been incurred in promoting the Bill, and the Trustees proposed to defray these out of the trust funds. *Held* (*diss.* Lord Deas), that the above-mentioned Acts did not authorise the Trustees to apply to Parliament for the additional powers sought, and interdict granted against paying the costs out of the trust funds.

It was *held* (*diss.* Lord Deas), that sec. 35 of the Water-Works Clauses Act, 1847, 10 & 11 Vict. c. 17, in requiring Water Trustees "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants in the town or district," does not impose an obligation on the Trustees to provide additional sources of supply if the existing sources are insufficient.

"*Misuse of the Water supplied.*—A Local Board being proprietors of water-works may supply a public fountain gratuitously for a limited purpose, and a person taking the water for another purpose will be liable to a penalty under the Water-Works Clauses Act, 1847, 10 Vict. c. 17, sec. 59; and although a fountain erected on a highway may be a public nuisance (*i.e.* by obstructing the highway), the water with which it is gratuitously supplied remains the property of those who supply it, and cannot be taken for any other purpose than that for which it was supplied. In the case in which this was decided, an inhabitant had presented to the town an ornamental fountain, with a

trough or basin, which was set up in one of the public streets, and the Local Board supplied it with water on market-days for the use of cattle in the market, and for horses, if yoked, when passing to and fro. The respondent kept horses, and with a view to evade payment of the rate for the supply of water to his stable, took his horses to the fountain to drink. Hildreth *v.* Adamson (30 L. J., M. C., 204; 2 L. T., N. S., 359; 8 C. B., N. S., 587; 25 J. P., 645)."—Glen, p. 113.

"*Fouling Water by Manufacture properly carried on.*—Where a manufacturer discharged arsenic and other injurious matters from his works into a stream, which he might have avoided doing by certain expedients, it was held that he could not defend himself in an action arising therefrom, by showing that his trade was a lawful trade, carried on in a proper manner. Stockport Water-Works Company *v.* Potter (7 Jur., N. S., 880; 31 L. J., Exch., 9; 7 H. and N., 160).

"As regards nuisances to a stream, the defendant, the owner of an ancient paper-mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before this change, the refuse arising from the paper manufacture had been discharged into a stream which ran past the plaintiff's house. It was held by Cairns, L. C., on appeal from a decree of Stuart, V. C., that the easement to which the defendant was entitled was to be presumed to be not a right to foul the stream by discharging into it the washings produced by the boiling up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the onus lay on the plaintiff to prove any increase of pollution. Baxendale *v.* M'Murray (L. R., 2 Ch. App., 790; 15 W. R., 32). An order, in the nature of an injunction, has, however, now been made against the manufacturer in the County Court, under the Rivers Pollution Prevention Act, 1876. Watford Rural Sanitary Authority *v.* M'Murray, 14th Sept. 1885 (M. S., Watford County Court)."—Glen, p. 119.

"*Prescriptive Right to cause Pollution.*—Where noxious matter percolates through the soil from gas-works to a well, such percolation will render defendants liable to a penalty of £200, under sec. 50 of the Lighting and Watching Act, above mentioned, in places where that Act has been adopted. A well, disused and covered over by the owner for several years, on account of such contamination, does not cease to be a well within the Act, even though the plaintiff has accepted the use of substituted wells of the defendants, nor can a licence to pollute be inferred therefrom. Keating, J., doubted whether a man could by deed give an irrevocable licence to pollute a well. A prescription to foul a well will be defeated by variation and excess in the degree of fouling during the prescribed period. *Per* Brett, J.: "Where an Act of Parliament, making an act illegal, comes into force while the prescription is running, the prescription,

when acquired by due lapse of time, will be an answer to an individual, suing as an individual, notwithstanding the statutory illegality. Millington *v.* Griffiths (30 L. T., N. S., 65)."—Glen, p. 119.

"*Pollution of Water by Gas Washings.*—An action was brought against a gas company to recover the penalty of £200, under sec. 68 (of the Public Health Act, 1875), and also damages for fouling a stream which belonged to the plaintiff, not at the place where it was first polluted, but lower down on its course. No 'washing or other substance produced in making or supplying gas' was discharged, but the stream was fouled in connection with the making of gas. The jury having found a verdict for £100 damages, the question whether the plaintiff was entitled to recover the penalty also was reserved by Lush, J., who held, upon further consideration, that the plaintiff was a person entitled to sue for the penalty; that the penalty was recoverable by the first person of those entitled to sue that brought an action for it; that the word 'stream' in the section applies to a running stream, and to one which is not entirely vested in a single proprietor. It was admitted that the recovery of damages was not a bar to the recovery of a penalty also. Stansfield *v.* Yeadon and Guisley Gas Company (*Local Government Chronicle*, 5th June 1880, p. 448; *Times* newspaper, 10th May 1880).

"The Water-Works Clauses Act, 1847, 10 Vict. c. 17, secs. 62, 63, also contains provisions under which penalties may be recovered by action in the High Court of Justice, in respect of the pollution of water by gas-makers. Those penalties, like the penalties imposed by the above section, are not recoverable summarily; but smaller penalties may be recovered summarily under sec. 64 of the Water-Works Clauses Act, 1847, and in proceeding to recover such penalties it would not be necessary to prove any negligence or wilful act on the part of the gas-makers.

"Similar provisions for the recovery of a penalty of £200 by action are contained in the Lighting and Watching Act, 3 & 4 Will. IV. c. 90, sec. 50; see Millington *v.* Griffiths (30 L. T., N. S., 65), and in the Gas-Works Clauses Act, 1847, 10 Vict. c. 15, secs. 21–29.

"These statutory provisions will not prevent a person from being liable to be indicted at common law, as in Rex *v.* Medley (6 C. and P., 292), if he creates a public nuisance by fouling a stream with gas washings.

"With regard to the pollution of streams by sewage, or otherwise than in connection with gas-making, see the note to sec. 17 (Public Health Act, 1875).

"A person who so contaminates water percolating underground as to pollute his neighbour's well, may be restrained by injunction. Ballard *v.* Tomlinson (L. R., 29 Ch. D., 115; 52 L. T., N. S., 942; 49 J. P., 693)."—Glen, p. 117.

"*Involuntary Pollution.*—It would appear from the following case that an involuntary or unknown proceeding would be within the first prohibition of the above section. A Gas Company's Act provided 'that if the company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond, or place for water within the limits of the Act, or into any drain, sewer, or ditch com-

municating therewith, any washing, substance, or thing which shall be produced in the making or supplying gas, or shall do any act to the water contained in such stream, etc., whereby the water therein shall be fouled or corrupted, then the company shall forfeit for every such offence the sum of £200.' This was held to make the company liable for the pollution of the plaintiff's well by gas washings which escaped through a crack in the floor of a tank, although the injury was not attributable to their negligence, but to the subsidence of the land through mining operations, of which the company were not aware; for they were bound to insure the public from any inconvenience. It was also held that a well was a 'place for water' within the meaning of the Act. Hipkins *v.* Birmingham and Staffordshire Gas-light Company (29 L. J., Exch., 169; 1 L. T., N. S., 303; 6 Jur., N. S., 173; 5 H. and N., 74). In the Exchequer Chamber (30 L. J., Exch., 60; 7 Jur., N. S., 213; 6 H. and N., 250; 24 J. P., 438)."—Glen, p. 118.

"*Wilful Pollution.*—With reference to the second prohibition in the above section, the following case may be cited. The appellant, acting in the exercise of a supposed right, threw rubbish into a beck at a point about four miles from the river Aire, into which the beck flowed at a place where that river was navigable, and was convicted under an Act, 14 Geo. III. c. 96, sec. 97, which imposed a penalty on 'any person who shall wilfully throw soil, rubbish, etc.,' into the rivers there mentioned, 'or any drains, trenches, or water-courses thereunto belonging.' The conviction was held to have been wrong, on the ground that the watercourses, etc., did not include tributary streams not forming part of the navigation; but Bramwell, B., further considered that the Act pointed to a knowingly wrongful act on the part of the doer, and greatly doubted whether there had been a wilful throwing in of rubbish within the Statute, since the act was done in exercise of a supposed right. Smith *v.* Barnham (L. R., 1 Exch. D., 419; 34 L. T., N. S., 774)."—Glen, p. 118.

"*Action for fouling Water.*—It may be questionable whether, if a stranger foul the water of an artificial stream which a third party has been licensed to use, such third party may maintain an action against the stranger for the damage he may have occasioned. Yet if the third party, by the permission of the owner of the stream, has caused the water from it to flow into his own pipes or cisterns on his own premises, he can then maintain such action, if the stranger had no right to foul the water, and the foulness of the water has caused damage. It will be no answer to the action in such case that the actual injury to the plaintiff has been caused by his use of the fouled water, for the principle that a party cannot recover for an injury to which he has himself contributed does not apply where the act of the defendant has been wrongful and wilful, and the act of the plaintiff which contributed to the actual damage has been something he was lawfully entitled to do. Thus a person was permitted by the owners of a canal to insert in it a pipe, conveying the water to a cistern on his premises, whence it was drawn into his boilers to work his steam engines; and the defendant fouled the water in the canal, where-

by, the water being still used by the plaintiff, his boilers became injured.

"The plaintiff was held by the Court of Exchequer to be entitled to maintain his action. Whaley *v.* Laing (2 H. and N., 476; 26 L. J., Exch., 327). In the Exchequer Chamber the judges were divided as to the sufficiency of the second plea of the defendant, namely, that the waters of the canal ought not to have run and flowed and been without the disturbance and pollution in the declaration mentioned, but held that the judgment ought to be arrested, the majority being of opinion that the declaration was bad, on the ground that it did not allege that the plaintiffs had any right to take the water of the canal. Laing *v.* Whaley (3 H. and N., 675, 901; 27 L. J., Exch., 422; 31 L. T., O. S., 368)."—Glen, p. 120.

For further observations on the pollution of water supplies, see under secs. 217, 219, and 233, *supra.*

268. Bye-laws in reference to Water.—It shall be lawful for the Commissioners to make bye-laws regulating all or any matters and things whatsoever connected with the water to be supplied within the burgh through their pipes.

See sub-head (9), sec. 4, as to definition of "Commissioners," (4) "burgh." The bye-laws must be in conformity with law. See secs. 316 to 324 as to bye-laws and observations thereunder.

269. Provisions with respect to Supplying Water not to apply in certain Cases.—The provisions of this Act with respect to supply of water shall not apply in the case of any burgh which is or may be before the 31st day of December 1894, supplied with water under the powers of any Local Act or Acts.

See sub-head (4), sec. 4, for definition of "burgh."

HACKNEY CARRIAGES, OMNIBUSES, AND PORTERS.

270. Hackney Carriages to be Licensed.—The Magistrates may from time to time license to ply for hire, within five miles from the principal post-office of the burgh, such number of hackney coaches, omnibuses, or carriages of any kind or description, adapted to the carriage of persons, as they shall think fit, and they shall also license all other carriages let for hire within the burgh.

See sub-head (4), sec. 4, for definition of "burgh," (20) "Magistrates," (5) "carriage;" see p. 5, "person."

The Glasgow Police Act, 1866, sec. 184, imposes a penalty upon persons letting a hackney carriage for hire within the city without a licence. Sec. 218, after defining "stage carriage," enacts: "The expression 'hackney carriage' shall mean every other wheeled carriage, whatever be its form or construction, which shall stand on hire or ply for a passenger for hire within the city, except a carriage let out to hire as a job carriage by the day, month, or other longer period, or a carriage kept by a proprietor within his own premises, unyoked, for the purpose of being let out to hire as a job carriage for any shorter period. The expression 'job carriage' shall not include any carriage licensed in pursuance of this Act." Sec. 219 enacts: "Nothing in this Act contained shall prevent any carriage proprietor from having one or more 'job carriages,' not being licensed carriages, at any railway station within the city."

Held, that the exemption in sec. 219 does not entitle a person to keep unlicensed carriages standing at a railway station and plying for hire for shorter periods than a day, and that a person who had done so was guilty of a contravention of sec. 184. Duncan *v.* Neilson, 1st Feb. 1892 (29 S. L. R., 479).

See Gairns *v.* Main, 16th Mar. 1888 (15 R., Just., 51), which practically implies that the Magistrates' licences only apply to cab-drivers within the limits fixed by the Act.

Plying for Hire.—In England, "with reference to the above section (10 & 11 Vict. c. 89, sec. 45), it has been held that the penalty attaches, although the road on which the carriage plies for hire is a turnpike road under the management of Turnpike Trustees. Sims *v.* Matlock Bath (32 J. P., 134).

"A piece of ground adjoining a railway station and belonging to the railway company, metalled, and separated from the highway only by a gutter, was used as an approach to the station. Private carriages stood there, but no hackney or public carriages except those belonging to the appellant, who had the sole right of standing carriages on the ground in question for the purpose of plying for hire. Being convicted in a penalty for allowing his carriages to ply for hire without a licence, on appeal, it was held that the place was not a 'street' within the meaning of the Act, for the places included in the word 'street' were places over which the public had a right of passage, and that the conviction was wrong. Curtis *v.* Embery (L. R., 7 Exch., 369; 42 L. J., M. C., 39; 21 W. R., 143).

"A 'hackney carriage' is defined by the Metropolitan Hackney Carriage Act of 1831, 1 & 2 Will. IV. c. 22, sec. 2, as a carriage with two or more wheels, which shall be used for the purpose of standing or plying for hire in any public street or road at any place within a certain distance from the general post-office. The driver of a licensed cab, waiting, by arrangement with a railway company, on their private property, for any passenger arriving by train to hire his cab, was held not liable to a penalty under that Act—(secs. 35, 42), or the Act of 1853 (16 & 17 Vict. c. 33, sec. 17), for refusing to be hired. Case *v.* Storey (L. R., 4 Exch., 319; 38 L. J., M. C., 115; 20 L. T., N. S., 618; 17 W. R., 802); followed in Curtis *v.*

Embery, *supra*, and in Skinner *v.* Usher (L. R., 7 Q. B., 423; 41 L. J., Q. B., 158; 26 L. T., N. S., 430; 20 W. R., 659). But the words 'public street or road' being omitted from the definition of 'hackney carriage' in the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115, sec. 4), the owner and driver of an unlicensed fly, waiting in a railway station enclosure to take any of the passengers as a fare, were liable to a penalty under sec. 7 of that Act for plying for hire with an unlicensed hackney carriage. Clarke *v.* Stanford (L. R., 6 Q. B., 357; 40 L. J., M. C., 151; 24 L. T., N. S., 389; 19 W. R., 846); followed in Allen *v.* Tunbridge (L. R., 6 C. P., 481; 40 L. J., M. C., 197; 24 L. T., N. S., 796; 19 W. R., 849).

"It will be no answer to an information for plying for hire without a licence from the Local Board, that the hackney carriage is licensed under 2 & 3 Will. IV. c. 120, by the Inland Revenue authorities. Buckle *v.* Wrightson (5 B. and S., 854; 11 L. T., N. S., 341; 34 L. J., M. C., 43; 11 Jur., N. S., 281; 13 W. R., 92)."—Glen, 771.

"By a Local Act (4 Vict. c. 16, sec. 145), 'if the driver of any hackney carriage shall be found standing or plying for hire within the limits of the Act, without a licence,' etc., he shall be liable 'to a penalty,' and as there was no definition of a hackney carriage in the Act, it was held that the words 'hackney carriage' must be taken to mean a carriage exposed for hire to the public, whether standing in a public street or in a private ground." Bateson *v.* Oddig (43 L. J., M. C., 131; 30 L. T., N. S., 712).—Glen, p. 769.

"*Endorsement of Licence.*—The proprietor of a metropolitan stage carriage has no right to deteriorate the value of a licence of a conductor in his employment, which has been duly obtained by the conductor under the Metropolitan Hackney Carriage Act, 6 & 7 Vict. c. 86, sec. 8, by writing across it words injurious to the character of the conductor, even though the writing may be true." Rogers *v.* Macnamara (14 C. B., 27; 23 L. J., C. P., 1; 17 Jur., 1166).—Glen, p. 773.

271. Regulations for Hackney Carriages. — With respect to hackney carriages, the regulations contained in Schedule V. of this Act shall be observed, but such regulations may be altered by the Magistrates, with the approval of the Sheriff.

See sub-head (30), sec. 4, for definition of "Sheriff," (20) "Magistrates," (5) "carriage."

272. Regulations as to Omnibuses or Carriages plying within Burgh.—The Magistrates may prevent, within the limits of their jurisdiction, the plying or running of omnibuses, tramway cars, or other carriages for the conveyance of passengers which shall be in a state of dis-

repair or insecurity, or not adapted in all other respects for the conveyance of passengers with safety and comfort, or drawn by horses not sufficiently strong or in good condition, or not sufficiently trained or broken-in, and that by refusing, suspending, or recalling licences, and imposing penalties not exceeding for each offence £5 on the owners or contractors, guards or drivers, of such omnibuses, tramway cars, or other carriages, which shall, on the complaint of the Burgh Prosecutor, be found by the Magistrate before whom such owners, contractors, guards, or drivers may be brought, to be in an unsafe or unfit state for the conveyance of passengers, or drawn as aforesaid; and the Magistrates are further empowered to make bye-laws for regulating the number of passengers to be carried by and times of running of such omnibuses, tramway cars, or other carriages, the places at which the same shall stand, the time at which the same shall start, and all other matters tending to promote regularity and public convenience and safety, and also for insuring good conduct on the part of the passengers or other persons making use of such omnibuses, tramway cars, and other carriages, and to enforce such bye-laws against persons found guilty of any breach thereof, upon the complaint of the Burgh Prosecutor and under a like penalty, and they may alter and repeal such bye-laws from time to time.

See sub-head (22), sec. 4, for definition of "owner," (20) "Magistrates," (5) "carriage."

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

In Gairns *v.* Main, 16th Mar. 1888 (15 R., Just., 51), it was held that the bye-laws made by the Magistrates of a burgh under sec. 308 of the General Police Act, 1862, for the regulation of hackney carriages "plying for hire within" the burgh, do not apply to all hackney carriages passing through its streets, but only to those licensed by the Magistrates of the burgh.

But in Croall *v.* Linton, 29th May 1869 (7 M., 849), it was held that the powers conferred by the Act 30 & 31 Vict. c. 58 (Edinburgh Provisional Order Act), on the Magistrates of Edinburgh to make bye-laws for omnibuses and other carriages for the conveyance of passengers, "regulating the number of passengers to be carried by and times of running of such omnibuses or other carriages, the places at which the same shall stand, the times at which the same shall start, and all other matters tending to promote regularity and public convenience," extend to the regulation of all omnibuses and

other public carriages running within the burgh, though on their way to places beyond the jurisdiction of the Magistrates.

In King *v.* Hart, 9th June 1882 (5 Coup., 16; Johnston's Digest, 490), the Magistrates of a burgh having, in virtue of the powers conferred by sec. 309 of the General Police Act, 1862, framed and enacted bye-laws for the regulation of omnibuses, of which bye-law 5 enacted that "all omnibuses shall stand in and depart from County Square," a proprietor of omnibuses in the burgh, who started his omnibuses from his own yard without causing them first to stand in County Square, upon being convicted and sentenced for having contravened bye-law 5, appealed. *Held*, that although the Magistrates might fix, by a bye-law, a stance at which omnibuses should stand, and from which they should start, it was *ultra vires* to compel all omnibuses to stand at the stance so fixed before starting, where the proprietors desired that they should start from another place. Conviction and sentence suspended accordingly.

In Broadfoot *v.* Hinshelwood, 8th Jan. 1869 (Guthrie, p. 105), it was held that an omnibus proprietor is not bound to carry any one whose clothes are in such a condition as to be offensive or injurious to other passengers.

See Jencks *v.* Coleman (2 Sumner, R., 221, 224, quoted in Story on Bailments, sec. 591; Tarbell *v.* Central Pacific Railway Company (34 Cal., 616; 40 Vermt., 88).

In Shaws *v.* Croall & Sons, 1st July 1885 (12 R., 1186), the driver of a cab had drawn up his cab on a stance at a railway station in line with other vehicles, there being a van immediately in front of his horse, and other cabs behind his. The stance was within an enclosure railed off from the public street. The driver got down from his box, took a bag of oats from a place where it was kept at a distance of 10 feet from his horse's head, filled his horse's nosebag, and then took the bit out of his horse's mouth, and put on his nosebag. He then turned away to put back the bag of oats in its place. As his back was turned, the horse, which was a quiet beast, from some unexplained cause, ran off. There was a regulation by the Magistrates that the driver of a hackney carriage, when the same was on a stance, should either sit on the box or stand at the horse's head. *Opinions*, that there was no *culpa* on the part of the driver, inferring liability against him or his employers for damage done by the horse in its flight.

See Auld *v.* M'Bey, 17th Feb. 1881 (8 R., 495). Two omnibuses were being driven along a narrow road at a moderate speed, and a number of children were running after the first omnibus. One of the children, a boy of six years of age, having fallen, the driver of the second omnibus was so near that he could not pull up his horses in time, and the wheel of his omnibus went over the boy and killed him. In an action of damages by the father of the boy, *held*, that it was the duty of the driver of the second omnibus to keep a sufficient distance between his own omnibus and the one in front, to allow him to draw up if one of the children fell, and, having

failed to do so, that the proprietor of the omnibus and the driver were liable in damages.

In Ramsay *v.* Thomson & Sons, 17th Nov. 1881 (9 R., 140), a passenger who had alighted from a tramway car at one of its stopping places, and was crossing from the car to the left hand and nearer pavement, ran against and was knocked down by a waggonette going in the same direction as the car, and passing it on the left-hand side. In an action of damages brought against the owners of the waggonette for injuries received, in consequence of the collision, defenders assoilzied; the Lord Justice-Clerk and Lord Craighill holding that fault had been proved on the part of the driver of the waggonette, but that the passenger had, by his own want of caution, contributed to the accident; Lord Young holding that fault on the part of the driver of the waggonette had not been proved.

See the observations in this case on the rule of the road, and the proper side on which to pass tramway cars.

In Frasers *v.* Edinburgh Street Tramways Company, 2nd Dec. 1882 (10 R., 264), a boy, six years old, while attempting to cross a street, was run over and seriously injured by a tramway car. In an action for damages at his instance against the tramways company, in which he had obtained a verdict from a jury, the Court (*diss.* Lord Fraser) allowed a new trial, on the ground that it was proved that he had been guilty of contributory negligence.

Held, that the general rule now is, where a new trial is granted, to reserve the question of the expenses of the first trial to await the result of the second.

In M'Dermaid *v.* Edinburgh Street Tramways Company, Limited, 24th Oct. 1884 (12 R., 15), a cab had stopped to take in a passenger in a steep and narrow street; one of its wheels rested upon a tramway rail. The driver of a tramway car proceeding down the incline saw the obstruction 50 yards away, and whistled. He was going slowly, but he did not stop his car, because he expected up to the last moment that the cab would be drawn out of his way, and then, from the steepness and greasiness of the street was unable to do so. The car caught the cab, and damaged both it and its horse. In an action of damages against the tramway company, *held*, that their driver was in fault in not stopping his car when he first saw the cab, and that the cabman was not guilty of any contributory negligence.

In Wilson *v.* Boyle, 12th Nov. 1889 (27 S. L. R., 57), a carter who was ordered by his employer to take a horse and cart to a particular destination, objected, on the ground that the route would bring the horse into the immediate neighbourhood of steam-engines, at sight of which he became unmanageable. The employer promised him assistance, and sent a man along with him; but, in spite of his help, the horse on meeting a steam-engine became unmanageable, and inflicted severe injuries on the carter. The latter raised an action, alleging that his employer was in fault in using the horse for carting in the neighbourhood of steam-engines, and for sending to the help of the pursuer an inexperienced and incompetent man.

The defender alleged that the pursuer had accepted the known risk of the service.

At the trial, the presiding judge directed the jury to consider—"(1) Whether, having regard to the condition of and character of the horse in question, the defender was to blame for its being used in carting as it was in the place and at the time of the accident? (2) Whether the defender was to blame for sending Patrick Laden to assist the pursuer in managing the horse, in respect he (Laden) was an inexperienced and incompetent carter, and so unfit for the duty? (3) Whether the pursuer knew the condition and character of the horse, and did, with that knowledge, and of the danger to which he was exposed, undertake the charge of it?" He requested the jury, in the event of their being of opinion that there was fault, to specify in what respect. The jury stated, in answer, "That they found, by a majority of nine to three, that the defender was blameworthy in having the horse in his possession, for use by his carters, not being broke to steam-engines; and found, unanimously, that the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it." The judge told the jury that these findings amounted to a verdict for the defender, and directed them to return that verdict accordingly.

Held, that although the jury had not, in terms, returned a finding on the second question, their answer to the first question implied an answer to the second, and a bill of exceptions disallowed.

Liability for Negligence of Driver.—In England, "by arrangement between the registered proprietor and the licensed driver of a hackney carriage, plying for hire under the Metropolitan Hackney Carriage Acts (1 & 2 Will. IV. c. 22; 6 & 7 Vict. c. 86), the driver paid a certain sum each morning for the uncontrolled use of the carriage and two horses during the day, and the fares earned each day belonged to the driver. The horses were fed at the expense of the proprietor, and his name appeared upon a plate on the carriage. A loss having been occasioned to a person hiring the carriage, from a breach of contract by the driver safely and securely to carry, it was held that, under the circumstances and looking to the provisions of the above Statutes, the driver was to be considered as the servant or agent of the proprietor of the carriage, with authority to enter into contracts for the employment of the carriage, and that the proprietor was therefore liable for the loss occasioned by breach of contract. Powles *v.* Hider (6 El. and Bl., 207; 25 L. J., Q. B., 331; 2 Jur., N. S., 472)."—Glen, p. 774.

273. Cabmen's Shelters. — The Commissioners may authorise suitable erections for the use, convenience, and shelter of drivers of hackney carriages, omnibuses, and tramway cars, or of carters or porters, to be placed in such of the streets of the burgh as they may think fit, and may make regulations for the management and use

of such places, and the conduct of the persons resorting thereto.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street," (4) "burgh," (5) "carriage."

In England, a Paving Act authorised the Commissioners to direct and regulate the hackney coach stands within their districts.—*Held*, that they might remove a hackney coach stand altogether, if it obstructed the public street. Rex. *v.* Rawlinson (9 W. and R., 7).

274. Shoeblack Stands. — The Commissioners may authorise suitable movable stands, for the purpose of enabling persons to follow the occupation of shoeblacks, to be placed in such streets as they may think fit, and they may make regulations for the conduct of such persons, and the use by them or the public of such stands.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street;" see p. 5, "person."

In England, "where a Local Board made a bye-law under a Local Improvement Act, 'that the several places in the district where painted boards shall from time to time be placed by the Local Board of Health, to distinguish them as stands, shall be stands for such number of carriages,' etc., the bye-law so made was held to be valid; and it was further held, that it was not necessary that the exact position of the stands should be set out in the bye-law. Reg. *v.* Bennett (4 H. and N., 127; 32 L. T., O. S., 299). S. C. Bennett *v.* Blackpool Local Board of Health (28 L. J., M. C., 203). Reg. *v.* Kenyon (*ibid.*).

"The cases in which it was so decided also establish that the jurisdiction of the Local Board extends to the sands of the sea-shore between high and low water-mark. See, however, Reg. *v.* Musson, and 31 & 32 Vict. c. 122, sec. 27."—Glen, p. 776.

275. Magistrates may License Porters and others who apply for Licence and Badge of Office.—It shall be lawful for the Magistrates to license all persons who may be desirous of becoming porters, messengers (that is to say, persons following the business of carrying errands, messages, parcels, or luggage for hire), chimney-sweepers, golf cadies, or vendors of newspapers or small wares within the burgh, after being satisfied as to their character and qualifications, and to grant them a licence badge, for which a small sum shall be exigible, and which badge shall be held during their good behaviour; and the Magistrates may also make bye-laws to regulate the conduct of all such persons and their charges, and from time to time to rescind, alter, or amend such bye-

laws, and shall set down what penalties shall be incurred by persons breaking or evading any of them, not exceeding the sum of 10s. for each offence.

See sub-head (4), sec. 4, for definition of "burgh," (20) "Magistrates."

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors. The bye-laws must be in conformity with law. See secs. 316–324 as to bye-laws, and observations thereunder.

276. Restriction as to Vending by Children.—No child under the age of twelve years shall be permitted to vend newspapers or other articles within the burgh, who has not obtained a licence and a licence badge from the Magistrates; nor shall any child under the said age in any case be permitted to vend newspapers or other articles after nine of the clock at night; and the Magistrates shall from time to time make such bye-laws as shall to them seem proper to regulate the conduct of such children; and the parents and guardians of any child under the said age who knowingly suffers such child to vend newspapers or other articles without such licence, or after the said hour of nine of the clock at night, or to contravene any of the bye-laws made by the Magistrates, shall be liable on conviction to a penalty not exceeding 20s. for each offence; and any person supplying newspapers for the purpose of sale by any child, knowing such child to be under twelve years of age, and that such child has no licence, shall be liable on conviction to a penalty not exceeding 40s. for each offence.

See sub-head (4), sec. 4, for definition of "burgh," (20) "Magistrates;" see p. 5, "person."

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors. The bye-laws must be in conformity with law. See secs. 316–324 as to bye-laws, and observations thereunder.

MARKETS.

277. Commissioners' Powers as to Markets, etc.—The Commissioners shall have power to do the following things, or any of them:—To improve any existing market-

places; to provide a market-place, and construct a market-house and other conveniences for the purpose of holding markets; to provide houses and places for weighing carts; to make convenient approaches to such market; to provide all such matters and things as may be necessary for the convenient use of such market; to take stallages, rents, and tolls in respect of the use by any person of such market-house: But no market shall be established in pursuance hereof, so as to interfere with any rights, powers, or privileges enjoyed by any person, without his consent.

For the purpose of enabling the Commissioners to establish markets in manner aforesaid, or to improve and regulate markets already established in any burgh, there shall be incorporated with this Act the provisions of the Markets and Fairs Clauses Act, 1847, and the Markets and Fairs (Weighing of Cattle) Act, 1887, in so far as the same relate to markets—with respect to the holding of the market or fair and the protection thereof, and with respect to the weighing of goods and carts, and with respect to the stallages, rents, and tolls, and with respect to bye-laws: Subject to this proviso, that all tolls leviable by the Commissioners in pursuance of this Act shall be approved of by the Sheriff.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (4) "burgh," (30) "Sheriff."

In Henderson *v.* Earl of Minto, 1st June 1860 (22 D., 1126), parties describing themselves as "residing in and inhabitants of" a village not incorporated in any way, and not having any charter as a burgh, brought an action of declarator—1. Of right to "the free use," as in times past, of a muir, the property of the defender. *Held* (*aff.* judgment of Lord Neaves), that so vague a claim was not admissible as a subject of action. 2. Of right of holding markets on the muir. They did not connect themselves in any way with the property, nor did they produce a grant of holding markets. *Held* (*aff.* judgment of Lord Neaves), that the pursuers had no title to sue. 3. There were other conclusions, but it was held that these were not supported by relevant statements, except as to a claim of right of way, which, however, was misdescribed in the conclusions, though not in the condescendence annexed, by using the word "south-east" instead of "south-west." *Held*, that the allowance of an amendment being matter of discretion, it was inexpedient, when the substantial part of the action was being thrown aside, to allow amendment as to this branch of the action, the party's right to bring a new action not being impaired.

See with regard to the law of markets in Scotland, Blackie *v.* Magistrates of Edinburgh, 5th February 1884 (11 R., 783), affirmed

18th Feb. 1886 (13 R., H. L., 78), and particularly the learned and exhaustive observations of Lord Fraser on the law of markets.

Prior to 1823, the fruit and vegetable market of Edinburgh was in use to be held by the Magistrates, in virtue of their exclusive right to hold fairs and markets, conferred by royal grant and legislation following thereon, in public streets of the city at places varying from time to time. In that year a piece of ground was set apart and enclosed for the purpose. In 1860 the ground occupied by the market was acquired by a railway company, under an Act providing that they should be bound to construct and make over to the Magistrates another market-place, not in the open street, but enclosed, and of not less accommodation than that then existing; and the company in 1869 agreed with the Magistrates to provide such a market-place, and constructed and gave over to the Magistrates, in implement of the obligation, a new market-place. In 1874 an Act was passed, of which sec. 8 provided that "the corporation may cover in, in a suitable and convenient manner, the fruit and vegetable market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, and may make such internal and other arrangements and divisions in regard to stands, stalls, and shops as to them may seem suitable: Provided always, that the ground floor only of such market-place shall be used for such fruit and vegetable market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place, may be let or used by the corporation for such purposes, and for such rents or rates, as to them shall seem proper." Increased dues were paid by the gardeners for their stances in respect of these improvements. The market-place, under the bye-laws of the Magistrates, comprehended not only the market-house, but the streets, etc., within 100 yards, measured from any part of it. The market was held in the mornings of three days in each week. The Magistrates having given, for a public exhibition, the use of the market-place, for a period of three weeks, so as to exclude the market-gardeners and their customers from the market-house, and caused the market to be held on the public street, within the 100 yards' radius, an action was raised by the market-gardeners to try the question of the power of the Magistrates so to act. *Held* (*aff.* judgment of First Division), (1) that the market-house was the "market-place," within the meaning of sec. 8 above quoted, and was held by the Magistrates primarily for use as a fruit and vegetable market; and (2) that it was beyond the powers of the Magistrates to exclude the market-gardeners, and the public using the market-house, from the use of it for three weeks continuously, assigning them only unenclosed ground on the neighbouring streets. *Opinion* (*diff.* from First Division), that the Magistrates had no discretion to exclude the public from the use of the market during market hours, whether such exclusion was to the extent of causing serious and material inconvenience or not. Blackie and Others *v.* Magistrates of Edinburgh, p. 501, 18th Feb. 1886 (13 R., H. L., p. 78).

In November 1892, the Magistrates and Town Council of a royal burgh took the opinion of the Lord Advocate (Balfour) on the subject of markets. The circumstances were as follows:—By the burgh charter, granted by King James VI. in 1599, power was given to hold a weekly market on Saturday, and four annual fairs. Complaints had been made as to the obstruction and annoyance caused by the sale of cattle by auction on market-days at the market-cross, being the part of the High Street where markets were in use to be held, and Counsel's advice was asked as to the Magistrates' power to cause the sale of cattle to take place at a more convenient and appropriate place. The possible bearing of sec. 251 of the General Police Act, 1862 (sec. 381 (1) of the 1892 Act) was referred to. It was pointed out that the sale of cattle by auction is a modern practice, and that the auction sales took place in High Street at some distance from the market-cross, beyond the area occupied by the weekly market, but within the limits to which the half-yearly term fairs extend,—half-yearly fairs having come in place of the four fairs mentioned in the burgh charter. In reply to queries, the Lord Advocate (J. B. Balfour) replied:—

"1. I do not think that, for the purposes of the present question, there is any distinction in law between sale of cattle or other animals by burgesses or others themselves in open market, and the sale of such animals by auction. Both are lawful methods of selling; and although the fact that sales by auction may lead to larger bodies of persons congregating than private sales, might form a ground for the memorialists varying the site of the market, or for their making provisions for reasonable transit being secured while the sales are proceeding, it does not appear to me that the memorialists would be entitled to prohibit a sale merely because it was by auction.

"2. I do not think that any of the rights of public market granted by the burgh charter are affected or restricted by the provisions in sec. 251 of the General Police Act which has been quoted, or by other sections of the Act giving the Police Commissioners power to regulate street traffic and prevent obstructions. Sec. 251 provides penalties for various offences, but it does not authorise the imposition of any penalty for selling animals in a market, or market-place, or fair lawfully appointed for that purpose; and it appears to me that where markets and fairs have from time immemorial been held at particular places in a royal burgh, having a grant of market rights, these places would be held to be lawfully appointed in the sense of the Act, unless and until the Magistrates and Town Council provided some other convenient place, and declared that it should in future be the place for holding the markets and fairs.

"3. I am of opinion that the memorialists would not at common law, as Magistrates and Town Council, be entitled to prohibit cattle or other animals from being sold on market or fair days respectively, whether by auction or otherwise, on the High Street, within the places where markets and fairs have been in use to be held, unless they provided another convenient place, or other convenient places, for conducting such sales. But I consider, especially having regard

to the opinion delivered in the House of Lords in the case of the Magistrates of Edinburgh *v.* Blackie, etc., that the Magistrates and Town Council would, at common law, be entitled to change the site of the markets or places for selling cattle for some other convenient place. I think, however, that it is very doubtful whether the Magistrates could fix such a place beyond the limits of the burgh, unless they could show that there was no convenient place within the burgh, and that the place fixed outside of it was itself convenient. By prohibiting the sale of cattle at the accustomed places in the High Street, without providing any other convenient places, the Magistrates and Council would in effect be extinguishing a right of market held under royal grant, and this they have not, in my judgment, power to do. I consider, however, that the Magistrates and Council have power to prohibit the sale of cattle at parts of the High Street, or other places in the burgh, where it has not been the practice to hold such sales, provided always that they allow such sales to continue in places where they have been in use to be held.

"4. I am of opinion that the memorialists, as Commissioners of Police, are not entitled to prohibit cattle from being sold by auction or otherwise, on the High Street, at the place where they have been in use to be sold at weekly markets, or to prohibit such sales at the periodical fairs, at places where they have been in use to be sold at these fairs; but I consider that they have power to prevent such sales from being held at other places than those where it has been the practice to hold them, at the markets and fairs respectively, or at new sites for markets which may have been substituted by the Magistrates and Council for those at which the markets and fairs have previously been held."

In answer to the question, How the memorialists could best remove the obstruction and annoyance caused by the auction sales in the High Street, the Lord Advocate said:—

"5. The only effective mode by which it appears to me that the memorialists could accomplish the object which they have in view, would be by providing a new and convenient market-place within the burgh, and declaring that it is in future to be the place for the sale of cattle and other animals, in lieu of those previously used for that purpose. It does not seem to me that any material difference will be made by the variation in the language of sec. 381 of the General Police Act, 1892, as compared with sec. 251 of the Police Act of 1862. I think the words in the Act of 1892, 'or other place lawfully appointed by the Commissioners for that purpose,' have reference (primarily at least) to the statutory powers which Commissioners of Police have of establishing new markets. *Vide* sec. 364 of the Act of 1862 and sec. 277 of the Act of 1892. I do not find in either Act any power conferred upon Commissioners of Police to suppress markets held under royal grants at particular places from time immemorial.

"6. As I have already stated, I consider that the providing of a new and convenient market site within the burgh would be a condition precedent to the power of the memorialists to prohibit the

selling of cattle at the ordinary place of market, and I consider that they would only be entitled to levy such dues at the substituted place as they have been in use to levy at the present place. The power of levying tolls conferred by secs. 364 of the Act of 1862, and 277 of the Act of 1892, appears to me to relate to new markets established by the Commissioners under one or other of these sections; but I do not think that the fact of the Commissioners establishing such a new market would entitle them, either in their capacity of Magistrates and Council, or of Commissioners, to suppress an existing market held under royal grant."

In Murray *v.* Magistrates of Forfar, 12th Nov. 1892 (reported *Scotsman*, 14th Nov. 1892), Dr. William F. Murray, Forfar, sought to have the respondents interdicted from letting a portion of the Market Muir for ten years for the purpose of being used as an auction mart by the tenants. Lord Kincairney said that the proposed transaction involved—(1) the exclusion of the public, *qua* such, from the portion of the Muir to be let; (2) the use of it by the tenants as an agricultural market; and (3) the surrender by the Magistrates of their power, *quoad ultra*, to regulate the use of it. That was the transaction which the complainer sought to prevent by this interdict. He maintained that the Market Muir had been dedicated to the public of Forfar for the purpose of recreation; that it was held by the Magistrates in trust for that use; and that, therefore, no part of it could be lawfully withdrawn from the public use. The Magistrates maintained that the proposed lease of part of the Muir as an auction mart was within their powers. The question, therefore, was not whether the Magistrates had power to alienate or feu the whole of the Muir, or any part of it, for any purpose they pleased, but whether they could lawfully devote a part of it to this particular use. Neither, on the other hand, was the question whether they could permanently occupy the stance for holding markets under their own control, but whether they could let a part of the Muir to tenants for that purpose. The Market Muir of Forfar was an open space, slightly exceeding 9 acres in extent, situated in the vicinity of the town, on the north-east side of it. The site which it was proposed to enclose and use as an auction mart was on the south side of the Muir. The proof of public use of the Muir for the purpose of recreation was, his Lordship thought, much as was usually led in such cases. There were no records which carried it back beyond living memory, and it had been proved that the public had been in use to play various games on the Muir, such as golf, cricket, shinty, and other games, and of using it generally as a public green without any direct permission from the Magistrates, or any direct interference by them, and that a part of the Muir had been so used from time immemorial. It had been maintained that the proof as to playing games was but scanty, and as to playing golf contemptible and ridiculous, and it was true that the Muir was never a very ample space, and never was and certainly was not now the ideal of a golfing links, according to present requirements. Still the proof of the public use for playing games, such as they were, was as much as

could be reasonably expected. Perhaps the most striking proof of the use of the Muir for public recreation was to be found in the conditions of roup of the grazing of the Muir from 1850 downwards, in which there was expressly reserved liberty to the inhabitants to play at golf and other games. The title of the Magistrates was a Crown charter of confirmation and infeftment, dated in May 1665, and the salient features of the case were—(1) the charter contained no grant of common ground; (2) the primary use of the Muir must be held to be for holding markets; (3) the old part of the Muir had been used for purposes of recreation from time immemorial, and the other part since its acquisition not quite forty years ago; (4) various portions of it had been alienated publicly from time to time; and (5) the present alienation was for the purpose of a market. His Lordship had formed the opinion that the character and the amount of the public use which was made of this Muir warranted the conclusion that the old part of the Muir was by the Crown grant dedicated to public uses. He thought, however, that this Muir was not dedicated to public uses solely, but to be used as a public market also. But these two uses were compatible, and it appeared to him that the Muir was not the less a public green because it was a Market Muir. He also held that the previous alienations of the Market Muir did not of themselves afford any answer to the complainer's case. The conclusion at which he arrived was that it was not lawful for the Magistrates to grant the lease which they proposed of any part of the old Muir, but that it was competent for them to grant a lease of the excambed part. Findings were pronounced accordingly, to the effect that the Market Muir of Forfar consisted of two portions—the one held under an original Crown charter, dated in 1665, the other acquired by the Magistrates by excambion with the proprietor of the adjoining lands of Carsegray in 1853; that the old portion of the Muir had from time immemorial, and the new portion had from the date of its acquisition, or shortly thereafter, been used as a place for holding markets, and also for purposes of public recreation; that the Magistrates held the old portion subject to the public right of recreation thereon, and were not entitled to alienate any portion thereof, or to let it on lease, or to withdraw it from public use; and that the Magistrates held the new part of the Muir without any such limitation. Interdict was accordingly granted in regard to the ground forming part of the original Muir, but refused in so far as regards the part acquired in 1853, and the complainer was found entitled to expenses, subject to a modification of one-third.

In England, a Local Board, acting under the powers of the Local Government Act and the Market and Fairs Clauses Act, made bye-laws directing that cattle markets and an annual show of horses should be held in prescribed places, and appointed a toll for cattle, horses, etc., exposed for sale in such markets. An auctioneer, at the time when these markets were established, possessed a building called the "Agricultural Hall," which was erected before the bye-laws were made. His dwelling-house was separated from the hall by a harness-room and stable, and he sold cattle, etc., by auction in

the hall on market days. The Court held that, having regard to the nature and extent of the auctioneer's premises, they were not part of his dwelling-place or shop, within the meaning of the above section, and that the business carried on by him was not a "right, power, or privilege," which he enjoyed when the market was established, within the provisions of the Local Government Act, 1858, 21 & 22 Vict. c. 98, sec. 50, which was similar to the last clause of sec. 166 of the Public Health Act, 1875. Fearon *v.* Mitchell (L. R., 7 Q. B., 690; 41 L. J., M. C., 170; 27 L. T., N. S., 33; 36 J. P., 804).

A vessel moored to a wharf on a canal within the limits of a Local Market Act was held not to be a "shop," within the exception, "any shop attached to and being part of any dwelling-house," in which goods subject to tolls might be sold without incurring the penalty provided by the Act. But to bring a shop within the exemption, it need not be attached to any part of the dwelling-house of the person who sells the goods. It was also held in the same case that a sale by auction in a shop attached to and being part of a dwelling-house is privileged. Wiltshire *v.* Baker, Wiltshire *v.* Willett (11 C. B., N. S., 240; 31 L. J., M. C., 8; 5 L. T., N. S., 355; 10 W. R., 44, 89; 26 J. P., 312).

In the following case, a place where goods were sold was held not to be a shop within the meaning of sec. 13. The appellant exposed laces, tapes, buttons, and combs for sale in a structure within a burgh, but not within the limits of the market, as fixed by the bye-laws. The main supports of the structure consisted of poles or pieces of wood (formerly used as a stall in the market-place) let into the ground in a public-house yard. The structure consisted of the upright posts fixed in the ground, of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side, so as to shelter the sellers on one side and the buyers on the other. The sellers were protected behind a wooden framework. The stall was fitted with a door which might be locked, and a window-frame, and it had shelves. The structure was of a slight character, and not weather-proof. It was let by the week, and was not rated to the local taxes. Pope *v.* Whalley (11 L. T., N. S., 769; 34 L. J., M. C., 76; 11 Jur., N. S., 444; 6 B. and S., 303; 13 W. R., 402; 29 J. P., 134).

By sec. 38 of the Swansea Corporation Act, 1863, every person exposing for sale in any place within the borough, "except in his own dwelling-place or shop," any articles in respect of which tolls are by the Act authorised to be taken in the market, is liable to a penalty. A person having exposed for sale two hundred sheep in an open yard separated from his house by a small covered space, and extending about 160 feet from the street doors, was held to have been rightly convicted of a contravention of the Act. M'Hole *v.* Davies (L. R., 1 Q. B. D., 59; 45 L. J., M. C., 30; 33 L. T., N. S., 502; 24 W. R., 343; 40 J. P., 548).

A person was convicted under sub-sec. (13) for having exposed goods for sale under a wooden shed affixed to his house or shop, and

supported on wooden posts. This shed had been erected for a period of eighteen years, and previous to its erection there had been stone flags built into and forming part of the house, beyond which they projected 3 feet, the flags still remaining beneath, and assisting to support the wooden shed. Under these circumstances, it was held that the wooden shed was part of the appellant's house or shop, and so came within the exception in the above section of the Act. Ashworth *v.* Heywood (L. R., 4 Q. B., 316; 20 L. T., N. S., 432: 10 B. and S., 309; 38 L. J., M. C., 91; 17 W. R., 668; 33 J. P., 565).

"In a case in which a person sold articles liable to toll in a skittle ground, enclosed, roofed in, and having a door leading into the street, and let to him for two days, it was held that the place was not his shop within the meaning of the Act. Hooper *v.* Kenshole (L. R., 2 Q. B. D., 127; 46 L. J., M. C., 160; 36 L. T., N. S., 111; 25 W. R., 368; 41 J. P., 182)."—Glen, p. 722.

Disturbance of Market.—"As an ordinary rule, the sale of a man's own goods in the regular and ordinary course of business in his own shop, away from the market, is not a disturbance of a market, and something more must be shown to make it a disturbance—as, for instance, that under pretence of carrying on his business he takes in the goods of other people, and enables them to be sold at the shop, or that he goes into the market to solicit people to come out to him. Mayor, etc., of Manchester *v.* Lyons (L. R., 22 Ch. D., 287; 47 L. T., N. S., 677).

"The right of the owner of a market to prevent tradesmen from selling marketable articles in their shops within the limits of his franchise, without paying the market dues, may be gained by immemorial custom or prescription, when such a right cannot be inferred from the existence of a mere grant of a market. Mayor, etc., of Penrhyn *v.* Best (L. R., 3 Exch. D., 292; 48 L. J., Exch., 103; 38 L. T., N. S., 805; 27 W. R., 126; 42 J. P., 629).

"A new market held in the same town with an old market, if held upon the same day, is a disturbance of the latter by intendment of law; but if it be held on a different day it is only evidence for the jury of disturbance. Dorchester, Mayor of, *v.* Ensor (L. R., 4 Exch., 335; 39 L. J., Ex., 11; 21 L. T., N. S., 145; 34 J. P., 167).

"An interlocutory injunction to restrain holding a market on Mondays as intended, at the instance of owners of market tolls under a grant of Henry III., which gave them the right to hold a market on Thursdays, was discharged by the Court of Appeal, on the defendants undertaking to keep an account, because their proceedings, if found at the hearing to be wrong, would not inflict irremediable damage on the plaintiff; while, if the defendants were successful, there would be great difficulty in estimating the amount of damage that they had sustained. Elwes *v.* Payne (L. R., 12 Ch. D., 468; 48 L. J., Ch., 831; 41 L. T., N. S., 118; 28 W. R., 234)."—Glen, p. 722.

"In a case in which a person was charged under a Local Act with selling goods within the limits of a market without a licence or having paid the toll, it was held that the offence was not to be con-

doned by the offender paying the toll, but he was still liable to the penalty. Carter *v.* Parkhouse (22 L. T., N. S., 788; 34 J. P., 438)." —Glen, p. 722.

"This expression has reference to the boundaries of the district, and not of the market. Casswell *v.* Cook (31 L. J., M. C., 185; 11 C. B., N. S., 637; 27 J. P., 183)."—Glen, p. 721.

"The sale of an article liable to toll is not a sale within this section, if the sale be without the limits of the Act, although the delivery be within such limits. Therefore, a defendant who contracted to kill and deliver, within the limits of the Act, a certain number of pigs, for the sale of which within the limits a toll was payable under the Special Act, was not liable to a conviction under this section. Bourne *v.* Lowndes (31 L. T., O. S., 114; 22 J. P., 354).

"So, evidence of the sale of an article, by sample, in a shop near to the corn market, on a market day, is not *per se* evidence of an infringement of the market. Brecon, Mayor, etc., *v.* Edwards (8 Jur., N. S., 461),

"In a case in the Irish Courts, market tolls were held not to be leviable on a sale in or under premises in a city, if the corn was outside the city, or (according to the opinion of the majority of the Court) even if the corn were within the city. Webber *v.* Adams (5 Irish C. L. Rep., 146)."—Glen, 721.

"And in another Irish case it was held that the bulk of the goods must be within the prescribed limits at the time of sale. Newtonards Town Commissioners *v.* Woods (11 Irish C. L. R., 506)."—Glen, p. 721.

Tolls.—"A toll exacted in a market held on a highway is not a toll for passing and repassing; but it imparts a licence to rest and stay upon the land for the purpose of selling marketable commodities, and the spot in which the articles are exposed for sale in effect becomes part of the market. Lawrence *v.* Hitch (L. R., 3 Q. B., 521; 9 B. and S., 479; 37 L. J., Q. B., 209; 18 L. T., N. S., 483; 16 W. R., 467).

"With regard to fees payable by custom, it was held that it was no objection to an alleged custom to fish, that the fee alleged to have been paid for the licence was not a fixed fee, but one of reasonable amount. Mills *v.* Mayor of Colchester (L. R., 3 C. P., 575).

"A Local Act authorising toll to be taken from the occupiers of stalls for the sale of certain articles, according to the dimensions of the stalls, was held not to authorise toll to be taken in respect of the articles sold, but only in respect of the space occupied by the stall; and that, therefore, the articles in question might be sold elsewhere than in the market-place without contravention of sec. 13. Casswell *v.* Cook (31 L. J., M. C., 185; 11 C. B., N. S., 637; 27 J. P., 183)." —Glen, p. 721.

Saving for Privileges.—"The mere fact that a person held a market previously to the establishment of one by the Local Authority, does not give him a right, power, or privilege within sec. 166. Fearon *v.* Mitchell (L. R., 7 Q. B., 690; 41 L. J., M. C., 170; 27 L. T., N. S., 33; 36 J. P., 8ff4).

"A market may be held by custom in a public highway. See Rex *v.* Smith (4 Esp., 110); Elwood *v.* Bullock (6 Q. B., 411; 13 L. J., Q. B., 330; 8 Jur., 1044). And statutory provisions giving the Local Authority the control of the streets do not abrogate the right to hold the market. *Per* Lord Selborne, L. C.: Certain things, which in the absence of market rights might be nuisances in public streets, were treated as nuisances, which the Local Authorities might abate, in those Acts of Parliament (the Metropolitan Paving Acts, 12 Geo. III. c. 38; 28 Geo. III. c. 60; 57 Geo. III. c. 29). But not a word was said about the market, not a word from which it could be inferred that it was meant to repeal market rights or to treat as nuisances things which could be justified as market rights. Great Eastern Railway Company *v.* Goldsmid (L. R., 9 App. Cas., 927; 52 L. T., N. S., 270). See also Attorney-General *v.* Horner (L. R., 11 App. Cas., 66; 55 L. J., Ch., 193; 54 L. T., N. S., 281; 34 W. R., 641). Horner *v.* Whitechapel (51 L. T., N. S., 414)."—Glen, p. 314.

Change of Site of Market.—"Where a corporation elect to proceed under the Act, instead of asserting their common-law right as a corporation, they will be bound to proceed according to the provisions of the Act. Thus, although there may be a clear right at law in the corporation of a borough to change the site of a market, yet if the corporation proceed under the Act to change such site, and transfer and regulate the market, they must not exceed the powers conferred upon them by the Act, although less extensive than their rights at common law. Ellis *v.* Corporation of Bridgenorth (4 L. T., N. S., 112; 2 J. and H., 67).

"From time immemorial a market had been held in the High Street of a borough; the plaintiff in an action was the owner and occupier of a house in the High Street, and he and others had from time immemorial erected stalls opposite their respective houses, and exposed goods for sale, free of stallage. The defendants in the action were the lords of the manor and owners of the market, and they removed the market to another place under the Local Government Act, and so injured the plaintiff. It was held that there was sufficient connection between the enjoyment of the house of the plaintiff and the enjoyment of the stall to satisfy the rule of law; see Ackroyd *v.* Smith (10 C. B., 164); Bailey *v.* Stephens (12 C. B., N. S., 91; 31 L. J., C. P., 226; 6 L. T., N. S., 356); that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof; and that, whatever was the origin of the plaintiff's right, he was entitled to compensation for the injury sustained by the removal of the market. Ellis *v.* Bridgnorth Mayor (9 Jur., N. S., 1078; 15 C. B., N. S., 52; 32 L. J., C. P., 273; 8 L. T., N. S., 668; 12 W. R., 56)."—Glen, p. 313.

Purchase of Rights in Markets.—"A corporation purchased an ancient franchise, which was for holding a market on Saturdays in one of the townships of their borough. A Local Act subsequently empowered them to hold markets on any day, at any place in the

borough, and to charge tolls which were higher than the old accustomed tolls, and certain new tolls. It was held by the Court of Appeal, that as under the Act there was a change of time, place, and charges, an imposition of new charges, and an extension of the market from the township to the borough, the effect of the Act was to substitute the new market rights for the old, and to extinguish the ancient franchise. Mayor, etc., of Manchester *v.* Lyons (L. R., 22 Ch. D., 287)."—Glen, p. 313.

Sale of Unwholesome Food.—"The exposure for sale in a public market of meat unfit for food is an offence indictable at common law. Reg. *v.* Stephenson (2 F. and F., 106). And by the Markets and Fairs Clauses Act, 1847, a penalty is imposed on persons selling or exposing for sale any unwholesome meat or provisions in the market or fair (10 Vict. c. 14, sec. 15).

"A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser. Smith *v.* Baker (40 L. T., N. S., 261)."—Glen, p. 193.

Provision of Conveniences.—"The owners of a market for the sale of cattle, who received tolls for cattle brought into the market, put up some railings round a statue in the street where the market was held. In an action to recover damages for the loss of a cow that had tried to jump the railings and had been killed, the jury found that the railings were kept negligently in not being of a sufficient height, and it was held on appeal that the action was maintainable because there was a *prima facie* duty on the owners of the market to provide a reasonably safe place for the receipt and storage of cattle which were brought into the market at their invitation and for their profit, and it was not found that the dangerous condition of the railings was obvious to persons using the market. Lax *v.* Darlington Mayor, etc. (L. R., 5 Exch. D., 28; 49 L. J., Q. B., 105; 41 L. T., N. S., 489; 28 W. N., 221; 44 J. P., 312)."—Glen, p. 313.

Slaughter-Houses.

278. Commissioners may License Slaughter-houses.—The Commissioners may provide, establish, improve, or extend, within or without the burgh, fit shambles or slaughter-houses for the purpose of slaughtering cattle, and for that purpose may borrow such sums of money as they shall find necessary, on the security of the burgh general assessment, and of the rates to be taken and levied for the use of such shambles and slaughter-houses, and of the shambles or slaughter-houses and ground on which the same

are erected, or on any one or more thereof, and they may also license such slaughter-houses as they may from time to time think proper, for slaughtering cattle within the burgh.

And where in any burgh the Commissioners, or their predecessors in office, shall have provided and established such shambles or slaughter-houses, and shall have paid for that purpose moneys out of the police or other funds under their charge, the Commissioners may repay such moneys out of the burgh general assessment, or out of any moneys borrowed on the security thereof, in so far as the moneys so paid exceed in amount the moneys borrowed for the purposes of such shambles or slaughter-houses, under the powers of any Special Act or Provisional Order, and may for the purpose of such repayment borrow money on the security of the burgh general assessment; and they may also apply any funds under their charge towards the maintenance and management of such shambles or slaughter-houses, and the payment of any feu-duties or other annual burdens affecting the same, in the event of the rates levied for the use thereof not being sufficient for those purposes.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (5) "cattle." See sec. 340 as to "burgh general assessment." See secs. 374 to 379 as to borrowing money.

The following is the definition of "slaughter-house" given in the English Public Health Act, 1875, 38 & 39 Vict. c. 55:—"Slaughter-house" includes the buildings and places commonly called slaughter-houses and knackers' yards, and any building or place used for slaughtering cattle, horses, or animals of any description for sale.

In Pentland *v.* Henderson, 2nd March 1855 (17 D., 542), a petition was presented to the Sheriff of Edinburgh, for interdict against an alleged nuisance, arising from the use of certain premises as a slaughter-house, which petition the Sheriff dismissed as incompetent, on the ground that one of the respondents was in possession of the sanction of the Magistrates, under the Leith Municipal Act, which also contained a penalty, to use the premises for slaughtering purposes,—and that the petitioners had taken no previous steps to obtain from the Magistrates the recall of the sanction. *Held* (*aff.* judgment of Lord Neaves, Ordinary), that any sanction given by the Magistrates did not amount to a legal warrant to the party obtaining it to commit a nuisance, and that such sanction was not final to the effect of precluding an application at common law for the abatement of that nuisance by those who were injured by it.

See Caldwell and Others *v.* Stranraer Police Commissioners, 28th Jan. 1885 (1 Scot. Law Rev., 90), where it was *held* (1) that the sum paid for the site of a slaughter-house by the Police Commissioners of a burgh, to themselves as Harbour Trustees, was illegally charged against the ratepayers, in respect that the transaction was contrary to the provisions of the Police and Harbour Acts; (2) that payments made to Commissioners of Police, so far as representing profit to them, were illegal and fell to be deducted from the burgh account; (3) that relief from assessment for police rates, granted by the Police Commissioners to themselves as Harbour Trustees, was illegal, and that the sum due for that assessment fell to be added on the credit side of the burgh account.

The words "within or without the burgh" are new, and remove the doubt formerly entertained as to the power of the Commissioners to provide a slaughter-house beyond their jurisdiction. But, in going outside, a certain amount of inconvenience may arise (*e.g.* in enforcing their own bye-laws, and possibly in being subject to bye-laws made by another Local Authority), and if the Commissioners find it necessary to go beyond the burgh, they ought to consider whether it might not be advisable to have the boundaries extended so as to include the proposed site.

From the words, "and they may also license," etc., it might be inferred that licensed slaughter-houses belonging to private persons might co-exist along with the public slaughter-house belonging to the Commissioners; but it will be seen from sec. 284 that when a public slaughter-house has been provided no other place within the burgh can be used as a slaughter-house.

The Commissioners have a discretionary power whether they will or will not license a slaughter-house, and as there appears to be no power to revoke a license once granted (save under the provisions of sec. 282), it will be their duty, before licensing, to ascertain that the site and construction of the premises are satisfactory. In England, similar powers as to licensing are given to Urban Authorities by the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, secs. 125–127; and the Local Government Board, in a memorandum accompanying model bye-laws for slaughter-houses, state (Seventh Annual Report (1878), Ap. p. 120):—

"In framing a model series of bye-laws under that enactment, the Board have considered that the statutory terms do not warrant the extension of the scope of the bye-laws to regulations directly affecting the structure of the premises.

"But as regards premises for which, under sec. 126, the licence of the Sanitary Authority will be required, the Board have been advised that, in the exercise of the discretionary power of licensing which has been conferred upon the Sanitary Authority, the following rules as to site and structure should influence their decision upon each application for a licence:—

"1. The premises to be erected, or to be used and occupied as a slaughter-house, should not be within 100 feet of any dwelling-house; and the site should be such as to admit of free ventilation by direct

communication with the external air, on two sides at least of the slaughter-house.

"2. Lairs for cattle in connection with the slaughter-house should not be within 100 feet of a dwelling-house.

"3. The slaughter-house should not in any part be below the surface of the adjoining ground.

"4. The approach to the slaughter-house should not be on an incline of more than one in four, and should not be through any dwelling-house or shop.

"5. No room or loft should be constructed over the slaughter-house.

"6. The slaughter-house should be provided with an adequate tank or other proper receptacle for water, so placed that the bottom shall not be less than six feet above the level of the floor of the slaughter-house.

"7. The slaughter-house should be provided with means of thorough ventilation.

"8. The slaughter-house should be well paved with asphalte or concrete, and laid with proper slope and channel towards a gully, which should be properly trapped and covered with a grating, the bars of which should be not more than three-eighths of an inch apart.

"Provision for the effectual drainage of the slaughter-house should also be made.

"9. The surface of the walls in the interior of the slaughter-house should be covered with hard, smooth, impervious material, to a sufficient height.

"10. No w.c., privy, or cesspool, should be constructed within the slaughter-house.

"There should be no direct communication between the slaughter-house and any stable, w.c., privy, or cesspool.

"11. Every lair for cattle, in connection with the slaughter-house, should be properly paved, drained, and ventilated.

"No habitable room should be constructed over any lair."—Model Bye-laws for Sanitary Authorities.

As to the rates for the use of the public slaughter-house, see sec. 284. There was some doubt whether, under the Act of 1862, the Commissioners could charge the police assessment with any portion of the cost of the slaughter-house (see interlocutor of Sheriff Spittal under section 284, *infra*); but now they are authorised to apply "any funds under their charge" to this purpose.

279. No Slaughter-houses in future to be erected without a Licence.—No place shall be used or occupied as a slaughter-house within the burgh unless and until a licence for the erection thereof, or for the use or occupation thereof as a slaughter-house, has been obtained from the Commissioners; and every person who, without such licence,

uses as a slaughter-house any place within the burgh, shall for each offence be liable to a penalty not exceeding £5, and a like penalty for every day after the conviction for such offence upon which such offence is continued.

See sub-head (13), sec. 4, for definition of "house," (4) "burgh," (9) "Commissioners;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

In Bowie *v.* Douglas, High Court, 25th Jan. 1845 (2 Brown, 377), it was held that, under the Police Act, 3 & 4 Will. IV. c. 46, sec. 112, the Magistrates of a burgh were not entitled to prevent the erection of slaughter-houses beyond the statutory limits of the burgh, and suspension, accordingly, of a conviction and sentence against a party charged with having infringed the alleged jurisdiction of the Magistrates beyond these limits. But see sec. 284 and observations thereunder.

See Wotherspoon *v.* Lang, 23rd April 1868 (1 Couper, 33). In an appeal to the Circuit against the sentence and conviction of a Police Magistrate, a remit was made to the Sheriff to take a proof as to where an alleged contravention of sec. 55 of the Glasgow Markets and Slaughter-houses Act, 1865, had been committed, to enable the Court to determine the question of jurisdiction, and to report to the next Circuit Court of Justiciary; and, upon the proof led, the Court held that unenclosed premises belonging to a railway company, which were at all times accessible to the public, and were paved and lighted like the public streets, fall within the words in said section, "a public place within the limits of this Act," and the jurisdiction sustained.

The licence by the Commissioners under this section will not affect the necessity of also obtaining their consent, *qua* Local Authority, under the Public Health Act, 30 & 31 Vict. c. 101. Sec. 30 of that Act provides:—

"The business of a blood-boiler, bone-boiler, tanner, slaughterer of cattle, horses, or animals of any description, soap-boiler, skinner, tallow-melter, tripe-boiler, or other business, trade, or manufacture injurious to health, shall not, after the passing of this Act, be newly established or enlarged in any building or place within any burgh or village, or within 500 yards therefrom, without the consent in writing of the Local Authority previously had and obtained, and published in one or more newspapers circulating within the district; and if any question arises under this section as to the existence or limits of a burgh or village, or as to the extent included within the said 500 yards, or as to whether a business, trade, or manufacture, other than those above specified, is injurious to health, or as to whether such consent ought to have been given, any such question shall be finally determined by the Board; and the party dissatisfied may bring the same before the Board within twenty-one days after the resolution or order of the Local Authority has been published as

aforesaid; and any person contravening this enactment shall, in addition to the discontinuance of such business, trade, or manufacture, be liable for each offence to a penalty not exceeding £50, and a further penalty not exceeding 40s. for each day during which the offence is continued; and the Local Authority may from time to time make such bye-laws, with respect to any such businesses so newly established, as they may think necessary, and in order to prevent or diminish the noxious or injurious effect thereof."

The foregoing section applies to all slaughter-houses within the burgh, and it is held by the Board of Supervision that if the Commissioners provide a public slaughter-house, or enlarge one already provided, consent to it by themselves, *qua* Local Authority, must be given and published in terms of the foregoing enactment. When they provide a slaughter-house outside their own jurisdiction, they must obtain the consent of the Local Authority of the district in which it is situated, if within the statutory distance.

Neither the consent of the Local Authority nor the licence of the Commissioners will authorise any person to erect or use a slaughter-house so as to cause a nuisance. See Pentland *v.* Henderson, under sec. 278, *supra*. Under sub-head (*e*) of sec. 16 of the Public Health Act, 30 & 31 Vict. c. 101, "any work, manufactory, trade, or business injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health," is a nuisance.

In Local Authority of Corstorphine *v.* Dixon and Snow, 26th October 1885 (2 Scot. Law Rev., 16), it was held that a slaughter-house is not a nuisance under the Act 30 & 31 Vict. c. 101, sec. 16, unless it be so conducted as to be injurious to the health of the neighbourhood. The decision of the Sheriff in this case is contrary to an opinion of Counsel (Geo. Young, E. S. Gordon, and Geo. Monro) obtained by the Board of Supervision:—

"We answer the first branch of the query in the affirmative; and with reference to the second, we find it impossible usefully to say more (speaking generally and without reference to any particular case) than that the offensiveness must be such as seriously to interfere with the comfort of life in the neighbourhood, and such as *may* be detrimental to health, although it should be impossible to prove that it had been or necessarily must be so."—Skelton, p. 22.

See sec. 381, sub-head (5), as to penalty for slaughtering or dressing animals in the street.

"To slaughter cattle on the private premises of an inhabitant of a town was held to be no offence under a Local Act, which followed closely the language of the Markets and Fairs Clauses Act, unless the cattle were slaughtered for sale as human food. Elias *v.* Nightingale (8 E. and B., 698; 27 L. J., M. C., 151; 4 Jur., N. S., 166). And in another case it was held that a conviction for 'using' an unlicensed slaughter-house, under sec. 126, could not be sustained against a person who merely paid the owner of the premises for being allowed to kill animals there. Reg. *v.* Heyworth (14 L. T., N. S., 600; 30 J. P., 428)."—Glen, p. 755.

New Slaughter-houses.—"One who rebuilds a ruinous part of a licensed slaughter-house, and adds a little to the area enclosed within the walls of the premises when rebuilt, does not require a fresh licence for the enlarged premises, as they continue, notwithstanding the addition and partial rebuilding, the same place which has been used and duly licensed. Hanman *v.* Adkins (40 J. P., 744). So a stable which formed an original portion of premises licensed as a slaughter-house for pigs, which stable was afterwards converted into another slaughtering-shed, and used for slaughtering bullocks and sheep therein, was held to be covered by the original licence, and not to require a fresh licence. Brighton Local Board *v.* Stenning (15 L. T., N. S., 567)."—Glen, p. 754.

Licences.—"The Manchester Police Act empowers the Town Council of the borough to grant licences for the erection of slaughter-houses. A person having applied for a licence, the Markets Committee inspected the site, and recommended the grant of a licence. The Committee then passed a resolution to grant the licence, and communicated the same to the applicant, and the resolution was confirmed by the Town Council. An information having been laid against the applicant for the licence for using a slaughter-house without a licence, contrary to the Police Act, it was held that, though it was usual afterwards to grant a formal licence in a certain printed form, still the grant of a licence was complete on the confirmation of the resolution and communication thereof to the applicant, and operated as a licence. Howarth *v.* Mayor of Manchester (6 L. T., N. S., 683).

"A Local Act passed subsequently to the Local Government Act, 1858, provided that a company formed thereby for the purpose of managing the property of the corporation of Brecon might, with the consent of the corporation, erect slaughter-houses in the borough. The company erected slaughter-houses with the consent of the corporation, testified in writing; but the corporation afterwards, when acting as the Local Board, refused to license the buildings as slaughter-houses. It was held in the Exchequer Chamber, reversing the decision of the Court of Exchequer, that the consent given by the corporation under the Local Act included the licence required by the Towns Improvement Act. Anthony *v.* Brecon Markets Company (L. R., 7 Exch., 399; 41 L. J., Exch., 201; 26 L. T., N. S., 979; 21 W. R., 27)."—Glen, p. 754.

In this case Willes, J., said: "A licence to erect a slaughter-house means, *prima facie*, to erect a slaughter-house *which shall be used as a slaughter-house*, and not that there should be two separate licences, one for the erection, and another for the use."

Meaning of "Establishment" of a Trade.—"What is the establishing a business within the above prohibition is illustrated by the following case:—A company, established under a Local Act, erected a market in the district before the Public Health Act, 1848, was adopted. No part of the market had been previously used as a slaughter-house; but in November 1865 the company erected slaughter-houses, and the slaughtering of cattle was commenced in

them in March 1866; the course of business being that the company permitted owners of cattle, by their own servants, to slaughter their beasts on the company's premises, the owners using the tackle in the building, and paying 2s. for each beast slaughtered. The company having been convicted, it was held that they had offended against the enactment, 11 & 12 Vict. c. 63, sec. 64, as they and they only had newly established the business of a slaughterer of cattle, and no one else under the circumstances could have been convicted of the offence. Liverpool New Cattle Market Company *v.* Hodgson (36 L. J., M. C., 30; L. R., 2 Q. B., 131; 8 B. and S., 184; 15 L. T., N. S., 534; 18 W. R., 563; 31 J. P., 245)."—Glen, p. 181.

280. Officer of Health to report on Sanitary Condition of Slaughter-houses.—The Medical Officer of Health of the burgh shall report to the Commissioners on the sanitary condition of all slaughter-houses belonging to or licensed by the Commissioners at least twice every year, and he, as well as the Sanitary Inspector, and any other person who may be specially appointed by the Commissioners for the purpose, shall have right of access to such slaughter-houses at all reasonable times for the purpose of inspecting the same.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (13) "house."

See sec. 325 as to power of entry, and sec. 326 as to penalty for obstruction. See also the powers given by sec. 17 of the Public Health Act, 30 & 31 Vict. c. 101.

281. Commissioners may make Bye-laws for Regulation of Slaughter-houses, etc.—The Commissioners shall from time to time make bye-laws, to be confirmed in the manner herein provided, for the licensing, registering, regulation, and inspection of slaughter-houses, and preventing cruelty in slaughter-houses, and for keeping the same in a cleanly and proper state, and for removing filth at least once in every twenty-four hours, and for having them properly floored, drained, and provided with a sufficient supply of water, and they may impose pecuniary penalties on persons breaking such bye-laws: Provided that no such penalty exceed for any one offence the sum of £5, and in the case of a continuous violation of such bye-laws, the sum of 10s. for every day during which such nuisance shall be continued after the conviction for the first offence.

See sub-head (9), sec. 4, for definition of "Commissioners," (13)

"house;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors. The bye-laws must be in conformity with law, see secs. 316 to 324 as to bye-laws and observations thereunder.

In framing bye-laws as to the removal of filth from slaughter-houses, it must be kept in view that by sec. 107, *supra*, "slaughter-house manure, whether such slaughter-house is or is not the property of the Commissioners," is vested in the Commissioners in the same manner as other filth and manure within the burgh.

Model bye-laws for slaughter-houses have been issued by the Local Government Board, London, and will be found in their Report (1878), Ap., p. 120.

Under sec. 30 of the Public Health Act, 30 & 31 Vict. c. 101, the Commissioners as Local Authority are empowered to make, with respect to the slaughter-houses coming under that section, such bye-laws "as they may think necessary, and in order to prevent or diminish the noxious or injurious effect thereof."

282. Licence of Slaughter-houses may be Suspended, in addition to Penalty imposed. — The Magistrate before whom any person is convicted of killing or dressing any cattle contrary to the provisions of this Act, or of the said bye-laws, in addition to the penalty imposed, may suspend, for any period not exceeding two months, the licence granted to such person; and such Magistrate, upon the conviction of any person for a second or other subsequent like offence, may, in addition to the penalty imposed, declare the licence granted to be revoked; and whenever the licence of any such person is revoked as aforesaid, the Commissioners may refuse to grant any licence whatever to him.

See sub-head (19), sec. 4, for definition of "Magistrate," (6) "cattle," (9) "Commissioners;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 as to penalty for repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

There is no provision for the renewal of the licence annually or at any other interval, and presumably it remains in force until suspended or revoked in terms of this section.

If a slaughter-house is a nuisance under sub-head (*e*) of sec. 16 of the Public Health Act, 30 & 31 Vict. c. 101, the author of the nuisance may (sec. 19) be required to discontinue the business or prevent the injurious effects thereof.

283. Penalty for Slaughtering Cattle during Suspension of Licence, etc.—Every person who, during the period for which any such licence is suspended, or after the

same is revoked as aforesaid, slaughters cattle in the slaughter-house to which such licence relates, or otherwise uses such slaughter-house, or allows the same to be used as a slaughter-house, shall be liable to a penalty not exceeding £5 for such offence, and a further penalty of £5 for every day on which any such offence is committed after the conviction for the first offence.

See sub-head (13), sec. 4, for definition of "house," (5) "cattle," p. 5 "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

284. If Commissioners provide Slaughter-houses, no other places to be used.—If the Commissioners have provided under any former Act or resolve to provide and establish, and do provide and establish, shambles or slaughter-houses, as herein provided, no person shall thereafter slaughter any cattle or beasts, or scald or dress the carcases of any slaughtered cattle, or cause the same to be done, within the boundaries of the burgh, elsewhere than within the said slaughter-houses, under a penalty of £5 for each offence; provided always that this enactment shall not apply to any owner or occupier within the burgh who may keep any cattle or beasts within the burgh, and who may kill the same for his own or family consumption; and it shall be lawful for the Commissioners to charge, for the use of the said slaughter-houses, such reasonable rate or sum as may be agreed on between them and the persons using the same; and in case of difference as to the rate to be taken for the use of such slaughter-houses, the same shall, upon the application of either party, and after seven days' previous notice to the other party of such intended application, be fixed by the Sheriff in a summary manner, and the decision of the Sheriff shall be final.

And to prevent evasion of the use of such slaughter-houses, all persons who shall, after such slaughter-houses are provided, bring within the boundaries of the burgh, for sale or consumption therein, the carcase or part of a carcase of any cattle or beast slaughtered within the distance of two miles beyond such boundaries elsewhere than in slaughter-houses provided or duly licensed in pursuance of any Act of

Parliament shall, on bringing such carcase or part of a carcase within the said boundaries, be liable in payment to the Commissioners of the amount of the rates or sums then being levied for cattle or beasts slaughtered in such slaughter-houses provided by them: Provided that where, before the passing of this Act or within one year thereafter, any burgh shall have erected slaughter-houses, no other slaughter-house shall be erected within the distance of two miles from the existing boundaries of such burgh, unless either it is erected with the consent of the Commissioners of such burgh or is situated within the area of another burgh.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (4) "burgh," (5) "cattle," (22) "owner," (21) "occupier," (36) "Sheriff," p. 5 "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and 458 as to punishment of abettors.

In Derrick *v.* Black, 10th December 1889 (17 R. (Just.) 9), the General Police and Improvement (Scotland) Act, 1862, by sec. 363, provides that where the Police Commissioners of a burgh have provided and established shambles or slaughter-houses within the burgh, "no person shall thereafter slaughter any cattle or beasts . . . within the boundaries of the burgh in which such slaughter-houses are provided, or within a distance of two miles beyond such boundaries, elsewhere than within the said slaughter-houses."

A butcher who carried on business in the burgh of Kirkcaldy, where a slaughter-house had been provided in terms of the above enactment, slaughtered certain animals in the legalised slaughter-house of the burgh of Dysart which was within two miles of Kirkcaldy, and was convicted of a contravention of the Act.

In an appeal the accused contended that there was an implied exception of the legalised slaughter-houses of an adjoining burgh.

Held, that no such exception was implied, but that the words "no person" fell to be construed as "no person carrying on the business of a butcher within the burgh," and that in that view the butcher had contravened the enactment, and was liable in the penalties provided.

In Magistrates of Edinburgh *v.* Watson, 20th June 1879 (6 R., 1097), the Edinburgh Slaughter-house Acts gave power to the Magistrates to levy from all persons who should bring within the bounds of police for sale the carcase or any part of the carcase of any cattle slaughtered beyond two miles' distance of said bounds, except "cured or preserved butchers' meat," the same dues as those leviable from a flesher renting a booth in the slaughter-house. *Held*, that meat from America, preserved in a fresh state by ice, did not fall within the exception of "cured or preserved butchers' meat."

A question was raised as to slaughter-houses and the dues to be charged therefor in a case brought before Sheriff Spittal, who pronounced the following interlocutor, which fully explains itself:—"In the years 1878–80 the Police Commissioners of S. erected slaughter-houses for the burgh, under the provisions of the General Police and Improvement Act, 1862, at a cost of £850, borrowing the money for this purpose in terms of sec. 358 of the Act. . . . It appears that, in the management of slaughter-houses, one of three courses is in use to be adopted: (1) A certain number of booths having been erected, a fixed rent is charged for a single or a joint booth, one booth being reserved as a common booth, for use by those who may not require a sole or joint one and who merely pay a certain fixed rate per head for the animals slaughtered. (2) The booths are not let to individuals severally or jointly but are all common, a certain rate per head being charged for the animals slaughtered. (3) The booths other than the common one are let, a rate per head being charged in addition, the rate being heavier to those who use merely the common booth than to those who, or in conjunction with another flesher, rent a separate booth. The S. Commissioners adopted the first of these courses, and in October 1879 fixed the rate of their four private booths at £13 each, expecting to draw in addition some revenue from the common booth, and so make in all sufficient revenue to meet the ordinary expenditure."

In 1882 the Commissioners raised the rent of the booths to £16, and in 1885 they raised it still further, and charged for a single booth £14, 10s. and for a double booth £18. In 1887 they found that the annual expenses of the slaughter-house amounted to £61, 5s., and that there was a deficit of £24, 2s. 7d. on the slaughter-house account. They therefore proposed to raise the rates still further, and to charge £17 for a single booth and £10, 10s. for the half share of a joint one. The fleshers objected, and offered £8 for a single booth and £4 for a half share of a joint one. The interlocutor proceeds:—

"The Commissioners hold that they are not entitled under the Police Act to take from the general assessment any sum to make up the deficiency between the income and expenditure on the slaughter-houses account, that the slaughter-houses must be self-supporting, and that it is necessary to provide from the slaughter-house revenue not only for their annual expenditure, amounting at present to £61, 5s., but also for gradual extinction of the deficiency of £24, 2s. 7d.

"The fleshers, on the other hand, argue that the Police Act does not enjoin that the slaughter-houses are to be self-supporting, and indeed that this idea is excluded by the terms of sec. 363, which provides, not for the imposition of such rates as shall make the premises self-supporting, but merely for the imposition of 'reasonable rate or sum for the use of the slaughter-houses;' and they contend further, that under sec. 84, which empowers the Commissioners to assess all occupiers of lands or premises within the burgh in the

sums necessary to be levied for the police purposes of this Act, it is lawful to charge part of the expense of the slaughter-houses against the general assessment.

"This raises a nice question which, so far as I am aware, has not yet been decided in any of our courts, and I am not inclined to decide it at present. [This is no longer a question. The Commissioners may now apply any funds under their charge to the maintenance and management of the public slaughter-house. Sec. 278.]

"The parties have come to the Court to have a reasonable rate fixed, and I think that can be safely and satisfactorily done without deciding the abstract question of law.

"It seems to me that, on the one hand, it might be unreasonable if the Commissioners sought to make a profit out of the slaughter-houses, and by the imposition of heavy rents or rates to create an annual surplus which they devoted to purposes unconnected with the slaughter-houses.

"On the other hand, it might fairly be held to be unreasonable, in the interests of the general community, if the Commissioners provided the fleshers with slaughter-house accommodation at such easy rates as to incur an annual deficit and necessitate an increase of the general taxation.

"I think the reasonable view in the circumstances of the case is that taken by the Commissioners, viz., that the slaughter-houses should be self-supporting. The annual sum requiring to be provided is, as we have seen, £61, 5s., which includes the annual instalment for paying off the debt. That debt is, of course, becoming less year by year. The deficit of £24, 2s. 7d. has not to be taken into calculation, because that can easily be wiped out in a few years by the annual income amounting to about £6 derived from the common booth. At present two single booths and three half booths are let, one half booth being vacant. Assessing the let booths and half booths, as the Commissioners have proposed, at £17 for a single booth and £10, 10s. for half booth, would bring an income of £65, 10s., being £4, 5s. more than is necessary. Assessing each let single booth at £16 and each let half booth at £9, 15s. would bring in an income of £61, 5s., the exact sum needed. The rents offered by the fleshers seem to me to be very much too low. It must be kept in mind that the fleshers in the burgh pay no rates in addition to their rents, as is the custom in some burghs. If they did, then the rents charged all along would probably have been unreasonably high. It is impossible, in the absence of precise information as to the number of animals slaughtered annually, to pronounce a decided opinion on the matter, but it occurs to me that if the fleshers were to get their choice of paying the low rents they propose, *together with rates*, or of paying the rents now proposed by the Commissioners without rates, they would, after a short trial of the combined rent and rates system, petition for adoption of the Commissioners' proposal.

"Of course, it will be open to the Commissioners to reduce the rents gradually, if the slaughter-house account permits.

"I therefore find and determine that the rents to be paid for the booths in the slaughter-houses in the burgh of S. be as follows:—For one booth, £16 per annum; for one half booth, £9, 15s. These rates to remain in force until altered by mutual agreement between the Police Commissioners and the persons using the said slaughter-houses, or until application shall be made to the Court *de novo* by either party for the fixing and determining of a rate for the use of said slaughter-houses in terms of sec. 363 of the General Police and Improvement (Scotland) Act, 1862."

The Commissioners of a burgh erected a public slaughter-house outside the burgh, and about a mile distant from the boundaries. For some time it was used by the local butchers, but latterly, owing to the distance, it fell into disuse, and most of the butchers erected private slaughter-houses just outside the burgh. The Commissioners wished to improve their slaughter-house, and to bring under their own supervision all the animals slaughtered for sale within the burgh, but before spending money on improvements they were anxious to be assured that they had powers to enforce the use of the public slaughter-houses by all the butchers. They asked the opinion of the Board of Supervision, and were informed in reply:—

"Under the Burgh Police Act, 1892—(1) The Commissioners may improve their slaughter-house, and for that purpose borrow the sums necessary (sec. 278). (2) No place within the burgh can be used as a slaughter-house without the licence of the Commissioners (sec. 279). (3) If the Commissioners have provided a slaughter-house, no other place within the burgh can be used (sec. 284). (4) If the Commissioners have erected, or within a year do erect, a slaughter-house, no new slaughter-house shall be erected within two miles without their consent (sec. 284). (5) But it appears to the Board that the Act of 1892 gives no direct power to suppress the existing private slaughter-houses outside the burgh. It provides, however, an indirect means of dealing with them. The Commissioners may charge on meat slaughtered within two miles and not within their slaughter-house, and brought into the burgh for sale or consumption therein, the same dues as they charge at their slaughter-house (sec. 284). The only exception is in the case of meat killed in 'slaughter-houses provided or duly licensed in pursuance of any Act of Parliament.' The slaughter-houses outside the burgh were apparently erected without the consent required by sec. 30 of the Public Health Act, and accordingly do not come within the exception. Looking to these provisions the Board are of opinion that the Commissioners' course is clear. Any active proceedings against the private slaughter-houses outside the burgh must, in the view of the Board, be at the instance not of the Commissioners but of the Landward Local Authority."

285. Places for Slaughtering Horses to be Licensed.—It shall not be lawful to use any place within the burgh for the slaughtering of horses, or as a place of deposit for the

carcases of the animals, unless and until every such place is licensed by the Commissioners, who are hereby authorised to give and recall such licences at pleasure; and it shall not be lawful to carry or convey within the burgh any dead horse unless in a covered cart or waggon, or unless the dead carcase be sufficiently covered; and any person who shall offend against this enactment shall be liable to a penalty not exceeding £10, and a further penalty not exceeding £2 for every day on which such offence shall continue.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

Slaughtering Horses. — Sec. 9 of 12 & 13 Vict. c. 92, which imposes a penalty on any person who, having the management of any place for the purpose of slaughtering horses or other cattle not intended for butchers' meat, shall use or permit to be used any horse or other cattle brought to such place for the purpose of being slaughtered, applies to private as well as to licensed slaughter-houses. H. had the management of the kennels of a hunt, where there was a place used solely for the purpose of slaughtering horses sent as food for the hounds. H. received a horse for that purpose, and permitted him to be worked. *Held*, that H. was guilty of an offence under the above section. Colam *v.* Hall (6 Q. B., 206).

See sec. 316 *b*, which gives power to make bye-laws—"(1) For inspecting all places where horses are killed and carrion is kept or sold, and keeping such places in a cleanly and proper state, and removing the filth therefrom, and requiring that all such places shall be provided by the occupiers with proper paving, drainage, and a sufficient supply of water;" and (6) "For reducing or removing the noxious or injurious effects attending the business of a blood-boiler, bone-boiler, tanner, slaughterer of horses or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade, or manufacture."

Sec. 30 of the Public Health Act, 30 & 31 Vict. c. 101, applies to the business of a slaughterer of horses. See under sec. 279, where the section is quoted.

See also sec. 381 (19), *infra*, which imposes a penalty on any person who "conveys in any open cart or carriage, or otherwise, through any public thoroughfare, the carcases, or any parts thereof, of animals slaughtered for sale, without the same being properly covered up from public view, or exposes such slaughtered carcases, or any parts thereof, or their skins or offals, outside of any shop in any street, or uses machines to mince or hash animal food to the annoyance of the residents."

286. Saving for Acts, etc., relating to Dairies, Slaughter-houses, etc.—Nothing in or done under this Act shall interfere with the operation or effect of the Contagious Diseases (Animals) Acts, 1878 to 1890, or of any order, licence, or act of the Board of Agriculture made, granted, or done, or to be made, granted, or done thereunder, or of any order, regulation, licence, or act of a Local Authority made, granted, or done, or to be made, granted, or done, under any such order of the Board of Agriculture, or prohibit or interfere with the slaughter of any animals in accordance with the provisions of the said Act or of any such order, licence, or regulation.

This Act is not to affect the powers of slaughtering cattle for the purposes of the Contagious Diseases (Animals) Acts, nor the powers of Local Authorities under these Acts to provide places for the slaughter of foreign animals, etc.

The rubric says, "Saving for Acts, etc., relating to dairies, slaughter-houses, etc," but in the provisions of the Contagious Diseases (Animals) Acts as to dairies, there is no reference to slaughtering, and nothing with which the provisions of this Act are likely to interfere.

287. Offences under 29 & 30 Vict. c. 16.—The provisions of the Cattle Sheds in Burghs (Scotland) Act, 1866, or any Acts amending the same, may be carried into effect and enforced in the burgh by the Magistrates, and offences against the same may be tried by the Magistrate as police offences, and the penalties may be recovered and applied in the same way as penalties for police offences under this Act.

See sub-head (4), sec. 4, for definition of "burgh;" secs. 500 and 501 as to recovery of penalties, and 458 as to punishment of abettors.

PUBLIC CLOCKS.

288. Power to Commissioners to provide Public Clocks.—The Commissioners may from time to time provide and maintain such clocks as they consider necessary, and cause them to be fixed upon or against any public building, or, with the consent of the owner or occupier, upon or against any private building, the situation of which may be convenient for that purpose, and from time to time

alter and remove any such clocks to such other like situation as they shall consider expedient, and the Commissioners may from time to time light all clocks belonging to or hired by or lent to them, or which may be dedicated for public purposes: Provided that, in the case of any post-office or other Government building, the consent of the post-office or other Government authority in charge of such building shall be first obtained to the fixing, alteration, and removal of any such clock.

See sub-head (9), sec. 4, for definition of "Commissioners," (3) "building," (22) "owner," (21) "occupier."

FIRE AND FIRE ESTABLISHMENT.

289. Penalty for wilfully setting Chimneys on Fire.—Every person who wilfully sets or causes to be set on fire any chimney shall be liable to a penalty not exceeding £5: Provided always, that nothing herein contained shall exempt the person so setting or causing to be set on fire any chimney from liability to be indicted or prosecuted therefor before any criminal Court.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

290. Penalty for allowing Chimneys to catch Fire.—If any chimney catch or be on fire, the person occupying or using the premises in which such chimney is situated shall be liable to a penalty not exceeding 10s., unless he shall prove, to the satisfaction of the Magistrate, that such fire was in nowise owing to omission, neglect, or carelessness of himself or servant, and such person shall pay the expenses incurred in extinguishing the fire, as the same shall be fixed by the Magistrate.

See sub-head (16), sec. 4, for definition of "premises," (19) "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

291. Fire-Engines may be Provided.—The Commissioners may purchase or provide such engines for extinguishing fire, and such water-buckets, pipes, and other

appurtenances for such engines, and such fire-escapes and other implements for safety or use in case of fire, and may purchase, keep, or hire such horses for drawing such engines, as they think fit, and may build, provide, or hire places for keeping such engines with their appurtenances, and may employ a proper number of persons to act as firemen, and to be named the fire-brigade, and may appoint a Firemaster, who may be the Chief Constable, and who shall be the superintendent of the fire-brigade, and may provide suitable dwellings for such Firemaster and firemen, and make such rules for their regulation as they think proper, and give such Firemaster and firemen such salaries and such rewards for their exertions in cases of fire as they think fit.

See sub-head (9), sec. 4, for definition of "Commissioners." The rules and regulations must be in conformity with law, see sec. 55, sub-heads (4) and (6). As these regulations affect only the servants and officers of the Commissioners, they do not come under the requirements of publication and confirmation applicable to other bye-laws. See secs. 316 and 318.

292. Index-plates showing Position of Fire-plugs.—The Commissioners may cause to be put up, at or upon the railings or in or upon the walls of buildings or elsewhere in the streets, public or private fire-alarms, battery-boxes, and index plates, or make markings showing the position of the fire-plugs in such streets or places, and may put down fire-plugs in any footpath or street whether public or private, and may attach telephone or telegraph wires necessary for the working of the fire establishment to any land or heritage, without being liable to any claim for compensation for so doing; and any person who shall cause any obstruction to the putting up of such plates or markings, or who shall pull down, injure, deface, or destroy the same, or shall wantonly ring any such fire-alarm, shall be liable to a penalty not exceeding £5 for each offence; and any person feeling himself aggrieved as to the mode in which the Commissioners may carry out any of the powers herein contained may appeal to the Sheriff, whose decision shall be final: Provided that no such telephone or telegraph wires shall be used, nor shall the powers herein contained be in any way exercised, in contravention of the exclusive privileges conferred on

Her Majesty's Postmaster-General by the Telegraph Act, 1869.

See sub-head (9), sec. 4, for definition of "Commissioners," (3) "building," (31) "street," (28) "private street," (16) "lands," (30) 'Sheriff;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, sec. 458 as to punishment of abettors, and sec. 339 as to "appeal." As to the power of the Commissioners to place fire-cocks on the pipes of water companies, see sec. 260. Under sec. 380, sub-head (6), any person who destroys, pulls down, injures, or defaces any notice of the position of a fire-plug or hydrant, is liable in a penalty.

293. Power to enter and break open Premises in Case of Fire.—The fire-brigade may enter, and, if necessary, break into any building in the burgh being on fire, or any buildings or lands adjoining or near thereto, without the consent of any owner or occupier thereof respectively, and may do all such acts and things as they may deem necessary for extinguishing fire in any such building, or for protecting the same or rescuing any person or property therein from fire; and any damage done in the exercise of such powers shall be deemed to be damage done by fire.

See sub-head (3), sec. 4, for definition of "building," (4) "burgh," (16) "lands," (22) "owner," (21) "occupier;" see sec. 325 as to general powers of entry, and sec. 326 as to penalty on persons obstructing.

294. Senior Officer of Fire-Brigade to have Control of Operations.—The senior officer of the fire-brigade present at any fire shall have the sole charge and control of all operations for the extinction of such fire, whether by the Commissioners' engines or appliances or any other or others, including the fixing of the positions of fire-engines and apparatus, the attaching of hose to any water pipes or water supply, the shutting off the water from other parts of the building on fire or of adjoining buildings against which the water is to be directed.

See sub-head (9), sec. 4, for definition of "Commissioners," (3) "building."

295. Power to shut up Streets temporarily.—The senior officer of the fire-brigade or of police present on the occasion of any fire shall be entitled, where he considers

the same necessary to enable the fire-brigade better to discharge their duties, or for the protection of the hose or other appurtenances, or for the safety of the public, to shut up temporarily by means of a guard of constables or other persons, or a rope, chain, tressels, or barricade, any street, court, or passage in or near the place where such fire exists; and every person wilfully using such street, court, or passage, while it is temporarily shut up, without the consent of the fire-brigade or police, shall be liable to a penalty not exceeding £5.

See sub-head (31), sec. 4, for definition of "street," (10) "court;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

296. Burgh Prosecutor, etc., shall examine Witnesses as to Cause of Fire.—The burgh prosecutor or depute burgh prosecutor shall examine and take the evidence of all or any parties reasonably supposed by him to be able to give information as to how the fire originated, and any parties refusing to be examined shall be liable to a penalty not exceeding £10; but parties suspected of wilful fire-raising shall not be bound to give evidence or be examined by the burgh prosecutor or depute burgh prosecutor relative to such fire.

See sec. 461 as to burgh prosecutor and depute burgh prosecutor, sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

297. Police may retain Possession of Premises till Case reported to Burgh Prosecutor.—The Chief Constable or chief officer of police shall, if he consider it necessary for the ends of justice, be entitled to retain possession of the premises in which the fire has occurred until twenty-four hours after the circumstances of the fire have been reported to the burgh prosecutor.

See sub-head (16), sec. 4, for definition of "premises," (4) "burgh;" see secs. 78–95 as to Chief Constable, etc.

298. Fire Police permitted to go beyond the Limits of the Burgh in certain Cases.—The Commissioners or the Firemaster may use such engines, with their

appurtenances, and the said firemen, beyond the boundaries of the burgh, for extinguishing fire in the neighbourhood of the burgh; and the owner or, if the Commissioners think fit, the occupier of the premises where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the Commissioners a reasonable charge for the use of such engines, with their appurtenances, and for the attendance of such firemen; and in case of any difference between the Commissioners and the owner or occupier of such premises, the amount of the said expenses and charge shall be determined by the Sheriff, whose decision shall be final, and the amount of the said expenses and charge shall be recoverable by the Commissioners as any debt may be recovered.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (22) "owner," (21) "occupier," (16) "premises," (30) "Sheriff;" sec. 511 as to recovery of expenses.

See Police Commissioners of Perth *v.* Christie, 9th June 1885 (1 Scot. Law Rev., 340), in which it was held that the owner of a property beyond burgh where a fire had occurred, and to which the fire-engines had been sent, was liable only for one-half the expense.

On 24th October 1884 a fire occurred at Pottie Mill, Glenfarg, belonging to Mr. Christie of Cowden, and the Perth engine having been sent for, expenses for the use of the engine, hires, and firemen's wages were incurred, to the amount of £23, 17s. Mr. Christie disputed liability to relieve the Commissioners of these expenses on various grounds. He pleaded that the engine not being sent for by any one on his behalf, but by his tenant, he (the tenant) was the only person liable. Mr. Christie also pleaded that there was no propriety in the Commissioners sending the engine so far as Pottie Mill, seeing he had not sent for it, and that in any event, under the Police Act, he was only liable for one-half of the Commissioners' charges; he also complained of these charges as excessive. By sec. 347 of the Police Act, Commissioners are entitled to send their engines beyond their boundaries to extinguish fires, and the owner and occupier of the premises where the fire occurs are liable jointly to defray the expenses incurred; in the event of dispute as to the amount of these expenses, or the propriety of the Commissioners sending their engine (where the propriety is disputed), the Act declares the decision of the Sheriff thereon to be final. The Sheriff-Substitute (Graham) issued the following interlocutor:—

"*Perth, 9th June* 1885.—The Sheriff-Substitute having heard parties' procurators, finds that on 24th October 1884 the fire-engine and hose belonging to the pursuers, the Police Commissioners of Perth, were sent to the premises belonging to the defender at Pottie Mill, to assist in extinguishing the fire which had broken out there;

that the sending of the engine and firemen for the extinguishing of said fire was a proper act on the part of said Commissioners, and that the account now sued for in name of expenses, and as charge for the use of the fire-engine and appurtenances thereby incurred, is reasonably charged; that while under sec. 347 of the Police and Improvement (Scotland) Act, 1862, it is provided that when the engines and firemen have been sent beyond the boundaries of the burgh, as in the present case, the owner and the occupier of the premises where the fire shall have happened shall in such cases jointly defray the actual expenses which may be thereby incurred, in the present instance the owner of the premises is alone sued, and that no proof is offered of the amounts of the respective interests of the owner and occupier of the premises in the subject as affected by the fire: Finds in point of law that, in the circumstances, the said interests of the owner and occupier are to be presumed to be equal, and that the liability of each for the expenses incurred is to be held as equally incurred between them: Therefore, finds the defender liable to the pursuers in the sum of £11, 18s. 6d., being one-half of the amount sued for, and decerns therefor; finds neither party entitled to expenses, and decerns.

"*Note.*—I cannot hold that the provision in the Statute, to the effect that the owner and occupier shall jointly defray the expenses attending the sending of the fire-engines in such cases as the present, is to be taken as imposing a joint and several liability upon the owner and occupier of the premises affected by the fire, apart from the interest which they respectively have in the premises; and it appears to me that the proper course of the Commissioners, in suing for payment of the expense so incurred, is to cite both of those parties for their respective interests; and these interests being determined by admissions or proof, to have the joint liability of the parties fixed accordingly. When this is not done, and where no evidence is adduced as to the particular interest in the premises affected by the fire, of the party who alone is sued, there does not seem to be any other course open than to hold that the joint liability of the owner and occupier is equal, and to find accordingly."

This judgment was acquiesced in.

In Walker *v.* Magistrates of Glasgow, 16th Jan. 1884 (11 R., 420), sec. 166 of the Glasgow Police Act provides that "the proprietor and occupier of every land or heritage within the city in which a fire breaks out shall be jointly and severally liable to pay the treasurer, as a contribution towards the expenses of the fire-brigade in extinguishing the fire, 'the sum of £15 sterling,' or whatever less sum is equal to one-half of the said expenses." *Held*, that on a sound construction of this section, a proprietor within the city, who had paid the sum of £15 for the services of the fire-brigade in extinguishing a fire which broke out in his premises, was further liable to pay a sum equal to one-half of the expenses of extinguishing the fire in a neighbouring house which belonged to him, and to which it had spread.

In England "a haystack caught fire and was burnt. During the

burning a fire-engine was sent from the neighbouring town, and played upon the fire until the water supply was exhausted. It was held that the owner of the haystack was liable for the expense of the engine's attendance, as 'the owner of the lands and buildings where such fire shall have happened,' under sec. 33, if he was the occupier of the land on which the haystack stood, but not if he was merely permitted to keep the haystack on the ground where he had lately purchased it. Lewis *v.* Arnold (L. R., 10 Q. B., 245; 44 L. J., M. C., 68; 32 L. T., N. S., 553; 23 W. R., 729; 39 J. P., 519)."—Glen, p. 767.

299. Statement of Expenses attending Fires to be made up by Firemaster.—The Firemaster shall make up and deliver to the Commissioners a statement of the whole expense attending each fire, which shall include the wages payable to the firemen and other persons employed at it, the rewards or premiums which he recommends to be given to them, the outlay incurred in taking them and the engines to the spot where such fire occurred, and in obtaining a supply of water, and other the like expenses; and such statement, in so far as approved of or as altered by the Commissioners, shall be *primâ facie* evidence of the amount of expenses attending the said fire.

See sub-head (9), sec. 4, for definition of "Commissioners."

PUBLIC BATHING, ETC.

300. Bathing-machines and Bathing.—Where any part of the seashore or strand of any river used as a public bathing-place is within the burgh, the Magistrates may make bye-laws for the following purposes—that is to say:

For fixing the stands of bathing-machines on the seashore or strand, and the limits within which persons of each sex shall be set down for bathing, and within which persons shall bathe; for regulating the occupation of such stands of bathing-machines, and apportioning the same temporarily among the owners of such machines for the time; for preventing any indecent exposure of the persons of the bathers; for regulating the manner in which and the times at which the bathing-machines shall be used, and the charges to be made for the same; for insuring that the bathing-machines shall be kept in a proper state of repair; for regulating the

distance at which boats and vessels let for hire for the purpose of sailing or rowing for pleasure shall be kept from persons bathing within such prescribed limits; when bathing-machines are not used, the Magistrates shall have power to regulate the places and hours for both sexes bathing.

See sub-head (4), sec. 4, for definition of "burgh," (22) "owner," (20) "Magistrates." The bye-laws must be in conformity with law. See secs. 316 to 324 as to bye-laws and observations thereunder. See sec. 303 as to jurisdiction of Commissioners over the seashore.

In M'Kenzie *v.* Whyte, 14th Nov. 1864 (4 Irvi., 570), a complaint setting forth that certain parties had been guilty of "the crime of indecent exposure of the person," in so far as, "at or near a part of the river South Esk situated opposite or near to Brechin Castle they did wickedly and feloniously expose their persons in an indecent and unbecoming manner, and did take off their clothes and expose themselves on the banks of the said river in a state of nudity, to the annoyance of the lieges" held irrelevant, and a conviction proceeding thereon suspended.

In England, with regard to the right of placing bathing-machines on parts of the sea-beach which are private property, the following is to be noted:—Before bathing-machines came into use, certain parts of the seashore at Hastings had been used from time immemorial for the purpose of bathing. In 1855 bye-laws were made under the Public Health Act, 1848, prohibiting persons from bathing from the shore, except from bathing-machines, the owners of which were obliged to obtain a licence from the Local Board of the district to let such machines for hire, but the Court held that such licence did not confer a right on the proprietors of bathing-machines to place them on the shore, without the permission of the owner of the shore. Mace *v.* Philcox (9 L. T., N. S., 766; 15 C. B., N. S., 600; 33 L. J., C. P., 124; 10 Jur., N. S., 680; 12 W. R., 670).

"It is unlawful for men to bathe without any screen or covering so near a public footway frequented by women, that exposure of the persons of the men must necessarily occur; and men who so bathe are liable to an indictment for indecency. It will be no defence that there has been, as long as living memory extends, an usage so to bathe at the particular place, and that there has been no exposure beyond what was necessarily incident to such bathing. Reg. *v.* Reed (12 Cox, C. C., 1). It is also indictable for a man to undress himself on the beach and to bathe in the sea near inhabited houses from which he may be distinctly seen; although such houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. Rex. *v.* Crunden (2 Camp., 89)."—Glen, p. 777.

301. Power to provide Drags, Life-buoys, etc.—The Commissioners may from time to time provide and

maintain drags, life-buoys, and other implements for the prevention of drowning, and employ such persons as superintendents and servants for that purpose, on such terms, and allow them such wages and rewards for exertion, and make such bye-laws for their government as the Commissioners think fit.

See sub-head (9), sec. 4, for definition of "Commissioners." The bye-laws must be in conformity with law. See secs. 316 to 324 as to bye-laws and observations thereunder; but as these bye-laws would affect only officers or servants of the Commissioners, they would not require to be confirmed and published like other bye-laws. See also sec. 55, sub-heads (4) and (6), as to power to make regulations and bye-laws.

302. Precautions in Skating and Bathing.—Every person who persists in going upon the ice on any skating-pond, loch, pool, or place partly or wholly within the burgh belonging to or under the charge of the Commissioners, or open to the public, at any time when placards are exhibited or other signals intimating that it is in a dangerous state, and every person who wilfully breaks the ice on any such pond or place, and every person who goes beyond the ropes or danger signals at any open bathing-place under the charge of the Commissioners, shall be guilty of an offence, and, on conviction, liable to a penalty not exceeding 40s.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

303. Seashore adjoining Burgh. — Subject to the rights of the Crown, with consent of the Board of Trade, and without prejudice to any existing right of property, the Commissioners shall have jurisdiction over the seashore down to low-water mark, and the strand adjoining the same, within or *ex adverso* of the burgh, for the purpose of preventing nuisance, and preserving and improving the amenity of the burgh, with power to the Commissioners to make bye-laws for regulating the use of such seashore and strand by the public for bathing, recreation, and general purposes; and, without prejudice to any existing right of property, from and after this Act coming into operation, no sewage or other offensive matter shall be allowed to run over such seashore or strand.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh." The Act comes into operation on 15th May 1893. The bye-laws must be in conformity with law, see sec. 55, sub-head (6). See secs. 316 to 324 as to bye-laws and observations thereunder. See sec. 300 as to bye-laws for regulation of bathing. See also sec. 381, which deals with offences committed in the streets, and, for the purposes of that section, "street" shall include any harbour and the strand and sea-beach down to low-water mark. See especially sub-head 36.

In Macpherson *v.* Mackenzie, 21st May 1881 (8 R., 706), it was held that a charter of royal burgh is a *habile* title on which to prescribe a right to exact harbour and shore dues, and that the usage of exaction for more than the prescriptive period will fix the limits of the right.

The proprietor of lands within a burgh brought a declarator of property of the foreshore *ex adverso* of these lands against the Magistrates of the burgh (and also against the Crown, who did not defend), and produced as his title a disposition to the foreshore dated in 1884. This disposition was deduced from a barony title which did not include the foreshore *per expressum*, and on which possession of the foreshore had not followed. *Held*, (1) that as the inhabitants of the burgh had been in use from time immemorial to resort to the foreshore in question for the purposes of recreation, the Magistrates had a title to challenge the pursuer's alleged right of property; and (2) that on the titles produced he had failed to instruct such a right. Defenders therefore assoilzied. Keiller *v.* Magistrates of Dundee. Scott *v.* Magistrates of Dundee, 7th December 1886 (14 R., 191; 24 S. L. R., 120).

A proprietor of land within the extended area of a royal burgh, who held a conveyance from the Crown, dated in 1853, "of all right, title, and interest of Her Majesty, her heirs and successors, in a portion of the foreshore *ex adverso* of the property lying between high-water mark and a line of railway formed along the foreshore"—*Held*, in a declarator at his instance against the Magistrates, (1) to have a right of property in this piece of foreshore, but (2) to have no title to exclude the inhabitants of the burgh from resorting thither for purposes of recreation, they having so used it from time immemorial. Keiller *v.* Magistrates of Dundee. Scott *v.* Magistrates of Dundee (24 S. L. R., 120). It was further held that the Statute 1 & 2 Will. IV. c. 96, an Act to extend Royalty of Dundee, did not transfer the property of the foreshore of the extended royalty of Dundee from the Crown to the community, but that it gave the Magistrates a title to administer it and use it for public purposes, subject to the limitations attaching to the right of the Crown itself.

In Jameson *v.* Police Commissioners of Dundee, 10th December 1884 (12 R., 300), where two properties within burgh were separated by a stream, which for the prescriptive period had been used as a public sewer—*Held*, that it was necessary for the proprietors, in order to establish a right to the *alveus* of the stream, in a question with

the burgh, to show an express grant to the *alveus*, or some possession of the stream from which a grant was to be inferred, and that possession of the adjoining lands merely upon mediate titles, which included the *alveus*, was not sufficient.

Circumstances in which *held*, that the riparian proprietors had acquired no right which entitled them to interdict the Police Commissioners, as coming in place of the Magistrates of the burgh, making use of the *alveus* between their properties.

304. Special Enactments where Seashore and Strand are within Burgh.—Where, and in so far as the seashore and strand of the sea or of any tidal river, so far as the tide flows, are within the boundaries of the burgh, subject to the rights of the Crown, with consent of the Board of Trade, and to any existing rights of property, the following enactments shall be applicable to the burgh:—

(1.) No boat or vessel shall be let for hire by any person for the purpose of sailing or rowing for pleasure from the seabeach or any pier or jetty within the boundaries of the burgh, except under licence from the Magistrates, who shall have power to require that every boat or vessel let for hire as aforesaid shall be made good and seaworthy to their satisfaction, and to impose such other conditions in granting a licence as they may think necessary for the safety of the lieges, and such licence, when granted, shall continue in force until the term of Whitsunday in each year, and no longer, unless sooner revoked or suspended, which the Magistrates are hereby authorised to do on legal conviction of any violation of any conditions of such licence; and if any person shall within the burgh let for hire any boat or vessel for the purpose aforesaid without having first obtained a licence, or after the revocation or suspension thereof, or shall contravene the terms of such licence, such person shall for each offence be liable to a penalty not exceeding £5.

(2.) The Magistrates shall have jurisdiction over the seabeach or strand down to low-water mark within the boundaries of the burgh, for the purpose of preventing the riding or driving of any horse or carriage, except for such times and hours as the Magistrates shall see fit, and of regulating the hiring of ponies and donkeys for pleasure riding thereon, and shall have power to make bye-laws for said purposes, and to

impose a penalty for breach thereof, not exceeding the sum of 40s. for any one offence.

(3.) No person shall erect any booth, stall, or stand for the sale of goods, wares, or merchandise of any kind, on the sea-shore or strand within the burgh, except under authority from the Magistrates, and only at such places thereon as they may appoint; and any person who shall contravene this enactment shall be liable to a penalty not exceeding 40s.

See sub-head (4), sec. 4, for definition of "burgh," (20) "Magistrates," (5) "carriage," p. 5 "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors. See secs. 316–324 as to bye-laws. See also sec. 381 as to offences in the streets, the word "street" for the purposes of that section including the strand and sea-beach down to low-water mark.

In Reney *v.* Magistrates of Kirkcudbright (30 S. L. R., 8), a vessel on entering a harbour grounded, and the owner sued the Harbour Trustees for the injuries she received. The master of the ship was in command, and had the helm, being assisted by two local fishermen. The accident occurred within the jurisdiction of the harbour-master, who gave directions from the shore in answer to inquiries from those on board. The harbour-master was ignorant that the tide had begun to ebb, and a wrong course was steered. *Held* (reversing judgment of First Division), that the defenders were liable in damages, as the harbour-master was in fault in the directions he gave.

In England it has been held that "the latter clause of sec. 172 of 38 & 39 Vict. c. 55, extends to steam-boats which make pleasure trips and take passengers for hire or reward, and which by so doing come within the term 'pleasure boats.' Pringle *v.* Fenwick, *in re* River Dee, Chester (Q. B. D., 10th June 1875, M.S.)."—Glen, p. 321.

305. Saving Rights of the Crown in the Foreshore.—Nothing contained in this Act shall authorise the Commissioners or Magistrates to take, use, or in any manner interfere with any portion of the shore or bed of the sea, or of any river channel, creek, bay, or estuary, or any right in respect thereof, belonging to the Queen's most Excellent Majesty in right of Her Crown, and under the management of the Board of Trade, or of Her Majesty's Commissioners of the Woods and Forests, without the previous consent in writing of the Board of Trade, or of the Commissioners of the Woods and Forests respectively, on behalf of Her Majesty; neither shall anything in this Act contained extend to take away, prejudice, diminish,

or alter any of the estates, rights, privileges, powers, or authorities vested in or enjoyed or exercisable by the Queen's Majesty, her heirs or successors.

See sub-head (9), sec. 4, for definition of "Commissioners," (20) "Magistrates."

In Agnew *v.* Lord Advocate, 21st January 1873 (11 M., 309), in a question between the Crown and a vassal—*Held*, (1) that when an estate on the seashore, whether barony or not, is held under a Crown charter which does not by express grant or specific boundary extend the right of the vassal beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land; but (2) that in such a case the charter may be shown to include the foreshore by such long-continued possession thereof as can only be ascribed to a right of property.

Circumstances in which *held*, that Crown grants of lands on the seashore, with parts and pertinents, had been explained by possession of the foreshore as including a grant thereof.

Observed, that the taking of sea-ware for the purpose of making kelp was to be regarded as the exercise of a right of property, and not of servitude.

The Crown has a right of property in the foreshore, not as being one of the *regalia minora*, but as a portion of the *solum* of the country, and may alienate the same, subject to the burden of certain public uses which attaches to it, whether held in property by the Crown or by a subject.

The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*.

Special Orders.

306. Special Orders, Procedure and Restrictions in Cases of.—Where by this Act the Commissioners are empowered to do anything by Special Order only, it shall not be lawful for them to do such thing unless the resolution so to do shall have been agreed to by two-thirds of the Commissioners present at a meeting whereof special notice has been given, and has been confirmed by two-thirds of the Commissioners present at a subsequent meeting, held not sooner than four weeks after the preceding meeting, and which subsequent meeting has been advertised once at least in each of the weeks intervening between the two meetings in some newspaper circulating within the burgh, if any be, or otherwise in some newspaper circulating in the county in which the burgh is situated, and of which special notice in writing has been given

to each of the Commissioners: Provided always, that after any resolution has been confirmed at a subsequent meeting as aforesaid, the Commissioners shall not proceed to carry the same into effect until after the expiration of one month from the date of such second meeting, and during such month such resolution shall be advertised once at least in each week in such newspaper as aforesaid, and public notice thereof shall also be given by means of placards posted in public places within the burgh, and reference shall, in such advertisement and notice, be made to some place provided by the Commissioners where the plan or particulars of the work or matter to which such resolution relates may be gratuitously seen by the ratepayers; and if, before the expiration of such month, a representation in writing by seven or more householders against carrying into effect such resolution or any part thereof be lodged with the Commissioners, such resolution, or such part thereof as such representation applies to, shall not be carried into effect unless confirmed by a majority of the householders qualified and voting at the poll to be taken thereanent; and upon such representation being lodged as aforesaid, the Commissioners, or the Chief Magistrate of such burgh, shall be bound to direct a poll to be taken in the manner herein prescribed in regard to polls for the adoption of this Act, and the whole enactments and procedure provided in regard to such polls shall, so far as applicable, extend and apply to the poll hereby authorised and directed to be taken: Provided always, that where any such representation applies to part only of such resolution, the Commissioners may either carry into effect the remainder of such resolution or rescind the same, as they think fit; but provided also, that if the said resolution shall not be so confirmed, it shall be lawful for the Commissioners, as often as they shall think proper thereafter, but not sooner than one year from the date of any preceding resolution, by such and the like procedure, again to adopt the same, but such resolution shall always be subject to be confirmed by the electors in the event of a representation being made thereagainst, all in manner above provided.

In Stirling, etc., *v.* Hutcheon, etc., 25th May 1874 (1 R., 935), by the General Police Act, 1862, Commissioners of Police of burghs (not being royal or parliamentary burghs) may adopt the Act by a

Special Order, as defined in the Act. Sec. 365 enacts that it shall not be lawful for the Commissioners to do anything by Special Order unless the resolution to do the same shall have been agreed to by the Commissioners at a special meeting, and confirmed at a second meeting held not sooner than four weeks after the former meeting, which subsequent meeting has been advertised once in each of the intervening weeks in a local newspaper. Sec. 20 enacts that the resolution, on being confirmed at the second meeting, shall be reported to the Sheriff, who shall, within forty-eight hours, pronounce a deliverance finding that the Act has or has not been adopted. It is further enacted that the Sheriff's deliverance shall be final, and "shall not be subject to be set aside, or reviewed, or affected by any Court of judicature, upon any ground or in any manner of way whatever."

In an action of reduction brought in the Court of Session to set aside the resolution of the Police Commissioners of a burgh to adopt the Act, and the deliverance of the Sheriff finding that the Act had been adopted, on the ground that the statutory advertisement in the local newspaper had been omitted, the defenders pleaded that the action was excluded by the finality clauses of the Act—*Held* (*rev.* judgment of Lord Mackenzie), that, in consequence of the failure to give notice by advertisement, the subsequent proceedings were outwith the Statute, and, along with the Sheriff's deliverance following thereon, fell to be reduced.

Question, whether it was competent for the Sheriff, acting under sec. 20, to inquire judicially whether the previous procedure has been regular.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners," (14) "householder." See secs. 336 to 338, inclusive, as to "notice." See sec. 50 as to notices of meetings to be sent to Commissioners, and observations thereunder. The section (sec. 306) prescribes that, "upon such representation being lodged as aforesaid, the Commissioners, or the Chief Magistrate of such burgh, shall be bound to direct a poll to be taken in the manner herein prescribed in regard to polls for the adoption of this Act; and the whole enactments and procedure provided in regard to such polls shall, so far as applicable, extend and apply to the poll hereby authorised and directed to be taken." There is, however, no poll prescribed to be taken as to the adoption of the Act, and no enactments or procedure in the Statute with reference thereto.

307. Lands and Grounds for Public Recreation.—The Commissioners may after resolution, by Special Order, as herein defined, purchase, rent, or otherwise provide lands, grounds, or other places, either within the burgh, or at a reasonable distance therefrom, not exceeding two miles from the boundary of the burgh, to be used as a pleasure ground or place of public resort or recreation; and the Commissioners may from time to time level, enclose, drain, plant, light, and

otherwise lay out and improve any such public lands or grounds for the more convenient use and enjoyment thereof, and make and maintain roads to and within, and seats on the same, and make bye-laws for the regulation thereof; but nothing in this section shall affect the powers of the Commissioners under the Public Health Acts or the Public Parks (Scotland) Act, 1878.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands," (4) "burgh."

Sec. 58 of the Public Health (Scotland) Act, 30 & 31 Vict. c. 101, provides:—"The Local Authority may provide, maintain, lay out, and improve grounds for public recreation, and support or contribute towards any premises provided for such purposes by any person whomsoever." But the Public Health Act gives no power to borrow for such purposes, or to make bye-laws.

The Public Parks (Scotland) Act, 1878, 41 & 42 Vict. c. 8, gives power to Local Authorities of burghs to provide and maintain public parks and pleasure grounds, whether within or without their district. They may acquire lands for this purpose otherwise than by agreement, under the powers of the Lands Clauses Acts, but this can only be done by means of a Provisional Order. The expenses are to be met out of the "local rate," which is defined to be "any one of the assessments mentioned in sec. 95 of the Public Health (Scotland) Act, 1867." The assessments mentioned in that section are—the prison assessment, the police assessment, and the assessment for relief of the poor. Power is also given to borrow on the credit of the local rate. Bye-laws may be made for the regulation of the parks, etc., and these may provide "for the removal from such parks, public walks, or pleasure grounds of any person infringing any such bye-law, by any officer of the Local Authority or constable." The bye-laws must be confirmed by the Secretary for Scotland.

Under sec. 316 (*a*), sub-heads (3) and (8), bye-laws may be made for pleasure grounds. Sec. 381 deals with police offences in the streets, and the word "street" is declared to include "public parks, links, common, or open area, or space." There is a proviso in sub-head (26) of sec. 381, that "games may be played on any rinks, links, common, or public park, subject to the power of regulation by bye-laws as herein provided."

In England, "a municipal corporation had purchased land to be added to a public garden or park, and some years afterwards determined to use a small portion of the added land as a site for town buildings and offices, as well as for a museum, public library, school of art, and conservatory. On an information praying that the corporation might be restrained from appropriating any portion of the park as a site for town buildings, or for any erection or building not needed for or incidental to the maintenance of the parks as public walks or pleasure grounds, Bacon, V.-C., held that no portion of the

land could be appropriated for any of the above mentioned objects, except the museum and conservatory. On appeal, however, it was held that a free library was also allowable, as being conducive to the better enjoyment of the public walks and grounds as such; and the injunction did not extend to 'a free public library, museum, or conservatory, open for the use, convenience, and recreation of the persons frequenting such walks and pleasure grounds.' Attorney-General *v.* Corporation of Sunderland (L. R., 2 Ch. D., 634; 34 L. T., N. S., 921; 45 L. J., Ch., 839; 24 W. R., 991; 40 J. P., 564). In a previous case it had been held that recreation grounds, when provided, could not be diverted to any other purposes than those contemplated by the Statute; and where, by an Act of Parliament, a corporation were directed to cause a piece of land to be drained and levelled, and kept in proper condition for the purposes of public recreation, the Court of Chancery restrained the corporation from permitting a cattle fair to be held on it. Attorney-General *v.* Southampton Corporation (1 Giff., 363; 6 Jur., N. S., 36; 29 L. J., Ch., 282; 1 L. T., N. S., 155).

"An action was brought to restrain the corporation of L. from closing against the public, in favour of persons paying for admission, a park provided by the corporation, under a Local Act authorising them to purchase lands for the purpose of providing additional places for public amusement or recreation. Jessel, M. R., considered that this park was appropriated for public use and recreation, and that this meant for free and gratuitous use, and if the corporation imposed payments on any person for the right of entering the park, the public were excluded from such use. He held, however, that certain other provisions of the Local Act gave them the necessary authority to close the park and also to make a profit by its use, and refused the injunction. Attorney-General *v.* Mayor, etc., of Leeds (24 S. J., 539).

"An injunction was granted by Hall, V.-C., restraining a Local Board from letting a recreation ground belonging to them to an athletic and football club, or to any persons on their behalf, on a certain day on which they had intended to let the club have the exclusive use of the ground. The Vice-Chancellor said that it appeared to him that the ground in question, though it might have been sometimes used for special objects—as, for example, an annual fair—had been acquired by the Local Board as a recreation ground for the people of their district, and that being so it was not competent to them to exclude the general public therefrom, even for a single day. Attorney-General *v.* Loughborough Local Board (*Times* newspaper, 31st May 1881).

"A bye-law imposing a penalty on owners of any fowls, ducks, geese, etc., which should enter the pleasure grounds, was held to be *ultra vires*. Torquay Local Board *v.* Bridle (L. T., 2nd Dec. 1882; 47 J. P., 183).

"Under the Metropolitan Commons Act, 1866, a bye-law prohibiting the delivery of any sermon, without the written consent of the Metropolitan Board of Works, was held valid. De Morgan *v.* Metro-

politan Board of Works (L. R., 6 Q. B. D., 155; 49 L. J., M. C., 51; 28 W. R., 489; 42 L. T., N. S., 238; 44 J. P., 296)."—Glen, p. 307.

"A bye-law relating to a common provided that no person shall shoot or chase game or other birds or animals on the common. The respondent carried a tame pigeon and a falcon, and, when on the common, let them both go, and ran after them for half a mile, watching the chase. *Held*, that this was an offence within the meaning of the bye-law. Harper *v.* Mitchell (44 J. P., 183.)"—Lumley's Public Health, p. 218.

308. Commissioners may manage Open Spaces, etc.—The Commissioners may accept the management and control of any park or open space devoted to the public use in or near the burgh; and it shall be lawful for the Commissioners to apply money levied under the burgh general assessment, or under the Public Health Acts or under the Public Parks (Scotland) Act, 1878, for the purpose of maintaining commons, parks, or open spaces, and for defending public rights therein.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh;" see sec. 340, burgh general assessment. See the following cases: Graham *v.* Police Commissioners of Kirkcaldy, 19th June 1879 (6 R., 1066); Paterson, etc., *v.* Magistrates of St. Andrews, 10th Mar. 1880 (7 R., 712); and Magistrates of Dundee, etc, *v.* Keiller, etc., 7th Dec. 1886 (14 R., 191).

In a declarator at the instance of the Magistrates of a burgh of barony for determining the property of an open space of ground adjoining the harbour of the burgh, and situated between it and the town, a grant to the bailies, council, feuars, and inhabitants of the haven and harbour, with customs, etc., and the common lones, gaits, wynds, vennels, and common passages, to and from the town and haven, held to be a sufficient title to the open space. Magistrates of St. Monance *v.* Mackie, 5th March 1845 (7 D., 582; 17 Jur., 286).

In England, "in the following case the Consistory Court of London authorised the construction of footpaths in a portion of a churchyard which had been closed for burials under an Order in Council, and also the erection of gates, the removal of high walls which obstructed the free circulation of air, and the planting of trees and flowers; but held that it was not competent to the Court to grant a faculty authorising a churchyard to be appropriated as a public garden. *In re* St. Georges-in-the-East Rector and Churchwardens (L. R., 1 P. D., 311). Following Reg. *v.* Twiss (L. R., 4 Q. B., 407; 38 L. J., Q. B., 228; 20 L. T., N. S., 522; 17 W. R., 765).

"In the metropolis disused burial-grounds may be transferred to the Metropolitan Board of Works, or to a District Board or Vestry, to be preserved as open spaces accessible to the public. 44 & 45 Vict. c. 34, secs. 4 and 5."—Glen, p. 308.

309. Public Baths and Drying-Grounds.—The Commissioners may after resolution, by Special Order, as herein defined, but not otherwise, purchase, rent, or otherwise provide, either within the burgh, or at a reasonable distance therefrom, suitable and convenient premises to be used for public baths and wash-houses, and public covered or open bathing-places, and public drying-grounds, for the use and accommodation of the inhabitants within the burgh in washing and drying clothes and other articles, and may fit up the same respectively with all requisite and proper conveniences, and from time to time enlarge, renew, and repair the same respectively, and afford the use thereof respectively to such inhabitants at such reasonable charges, and under and subject to such bye-laws as the Commissioners may deem expedient; and every person who offends against any such bye-laws shall be liable to a penalty not exceeding 40s. for every offence.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (16) "premises," (17) "house." The bye-laws must be in conformity with law. See secs. 316 to 324 as to bye-laws and observations thereunder, sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offence and power to mitigate, and sec. 458 as to punishment of abettors.

Sec. 316, sub-head (*a*) (3), gives power to make bye-laws "for preserving and regulating public bleaching-greens, drying-greens and grounds, public wash-houses, baths," etc. etc.

In an Irish case, "it was held by the Lord Chancellor of Ireland, confirming the decision of the M. R., that where a Town Council contracted to purchase baths and wash-houses commenced by a private society on lands held under a sub-lease, being portion of lands comprised in a demise from the owner in fee, so that they were subject to a rent above that in the sub-lease, as well as to the covenants and conditions in the original-lease, they were not compellable to complete their contract, as it would have been a breach of trust on their part to purchase lands, the interest in which might be lost by the default of others. Mulholland *v.* Belfast Corporation (9 Ir. Ch. R., 204, 292)."—Lumley's Public Health, p. 653.

Liability for Negligence.—In England, "the corporation of a town caused a wash-house to be erected, with a wringing-machine, under the Baths and Wash-houses Acts, which vests such houses in the corporation, the actual management being in the Council, the members of which are not to be personally liable. The machine was originally intended to be worked by hand, and being worked by steam a projecting rod was needlessly retained, which went round with great rapidity, and had no protection. The persons who used

the wash-house paid for the use of it, and a woman using the machine, without negligence on her part, was caught by the rod when revolving, and thereby received an injury. Under these circumstances it was held that the corporation were liable to an action for the injury so received. Cowley *v.* Sunderland, Mayor, etc., of (6 H. & C., 565; 4 L. T., N. S., 120; 30 L. J., Exch., 127; 9 W. R., 668; 25 J. P., 434)."—Glen, p. 717.

310. Proportion of Baths for Working Classes.—The number of baths for the use of the working classes provided by the Commissioners shall not be less than twice the number of the other baths of higher class.

See sub-head (9), sec. 4, for definition of "Commissioners." The Baths and Wash-houses Act, 1847, 10 & 11 Vict. c. 61, sec. 5, which is not applicable to Scotland, makes a similar enactment in regard to the numbers of washing-tubs or troughs in public wash-houses.

311. Charges for Use of Baths.—The Commissioners may make such reasonable charges for the use of baths, bathing-places, wash-houses, and drying-grounds as they think fit.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house." This section merely repeats part of the enactment in sec. 309. The Baths and Wash-houses Act, 1847, 10 & 11 Vict. c. 61, fixes a maximum charge for baths and wash-houses for the labouring classes. See the Schedule to that Act.

312. Recovery of Charges for Use of Baths, etc.—For the recovery of the charges at such wash-houses and drying-grounds, the officers, servants, and others having the management thereof may, at the period of using the same, or at any subsequent time, detain the clothes or other goods and effects, in or upon any such wash-house or drying-ground, of any person refusing to pay the charge to which such person may be liable, or any part thereof, till full payment thereof be made; and in case such payment be not made within seven days, the Commissioners may sell such clothes, goods, and effects, or any of them, returning the surplus proceeds of such sale, after deducting the unpaid charge and the expenses of such detention and sale, and the unsold articles, if any, on demand to such person.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house;" see sec. 369 as to recovery of expenses. Neither the

Commissioners nor their tenants will be in safety to sell under this section without a further warrant of a competent Court.

The rubric says, "Recovery of charges for use of baths, etc.," but the section refers only to wash-houses and drying-grounds.

313. Publication of Bye-laws in regard to Baths, etc.—A printed copy or sufficient abstract of the bye-laws made by the Commissioners relating to the use of such baths, bathing-places, and wash-houses, so far as regards every such bath, bathing-place, or wash-house, shall be put up in such bath-room, bathing-place, and wash-house.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house." The word "such" is evidently a misprint for "each."

314. Sale of Baths, etc., on discontinuing them.—Whenever any of such public baths, bathing-places, wash-houses, or drying-grounds are deemed by the Commissioners to be unnecessary, or too expensive to be kept up, the Commissioners may after resolution, by Special Order, as herein defined, but not otherwise, discontinue the same, and sell the lands, buildings, and materials for the best price that they can reasonably be obtained, and convey the same accordingly; and the purchase-money shall be paid to the treasurer of the Commissioners, and be disposed of for behoof of the burgh as the Commissioners direct.

See sub-head (13), sec. 4, for definition of "house," (9) "Commissioners," (16) "lands," (3) "building," (4) "burgh," (8) "treasurer."

315. Commissioners may erect a Public Hall, etc.—The Commissioners may after resolution, by Special Order, as herein defined, but not otherwise, acquire ground for the erection of, and may thereafter erect thereon, a public hall and offices, and a court hall and police offices, with all public conveniences thereto, and also such number of houses for the accommodation of constables as they may consider necessary, or may acquire any building or block of buildings already erected, and which may be suitable for such halls and offices, and may repair the same from time to time, and they may also contribute towards the expenses of enlarging any existing town-hall, or municipal buildings, the property of the burgh, and furnish and fit up the same, and employ proper persons

to take care thereof; and for that purpose it shall be lawful for them to apply, for a period not exceeding twenty years, the general improvement assessment hereby authorised to be levied, or such portion thereof as they may think proper, towards the expense of such acquisition, erection, furnishing, and fitting up; and they shall be and are hereby authorised, upon the security of the said general improvement assessment, to borrow, as hereinafter provided with regard to the borrowing of money, such sum as they may require for that purpose.

See sub-head (9), sec. 4, for definition of "Commissioners," (13) "house," (3) "building," (4) "burgh," (359) "general improvement assessment." See secs. 374 to 379 as to borrowing money.

As to power of two or more contiguous or adjacent burghs to combine in providing a common hall and offices, see sec. 57.

BYE-LAWS TO BE MADE BY VIRTUE OF THIS ACT.

316. Bye-laws.—The Commissioners may from time to time make bye-laws as they think fit for the purposes after mentioned, videlicet:—

A.—For General Purposes.

(1.) For preventing nuisances and annoyances in any street, or any other place within the burgh.

See Eastburn *v.* Wood, *infra*, p. 499.

Under sec. 380, sub-head (10), any person who "commits a nuisance" is subject to a penalty; and by sec. 381 a penalty is imposed on persons causing various nuisances and annoyances in the streets.

The word "nuisance" has a double signification. It may mean "statutory nuisance," such as the nuisances defined in the Public Health Act, 30 & 31 Vict. c. 101, sec. 16. Or it may mean a "nuisance at common law."

"Nuisance as a branch of the customary law of Scotland includes within its scope the following subjects:—(1) Pollution of water; (2) Pollution of air; (3) Unusual noise or vibration; (4) Unnatural heat; (5) Dangerous nuisances, *i.e.* proceedings calculated to make life uncomfortable, by apprehension of danger; and (6) Nuisances *contra bonos mores*, *i.e.* exhibitions and proceedings calculated to excite disgust, or injure the moral susceptibilities of an ordinary man. Whenever any of the above, caused or done by one person, interferes with the legitimate enjoyment of another, by creating

danger to life or health, material discomfort and annoyance, or real substantial injury to property, a nuisance is occasioned, which the person injured, unless barred by some valid defence, is entitled to put down by an action at common law."—Broun's Law of Nuisance, p. 1.

(2.) For controlling persons offering to purchase or sell old clothes.

See definition of "broker" in sec. 4, sub-head (2), also the provisions of secs. 433 to 453, *infra*.

(3.) For preserving and regulating public bleaching-greens, drying-greens and grounds, public wash-houses, baths, gymnasiums, pleasure-grounds, and places of public resort or recreation, and open spaces, and preventing offences, nuisances, and annoyances therein.

See also sub-head (8) of this section, which makes a somewhat similar provision. As to public wash-houses, baths, pleasure-grounds, etc., see secs. 307 to 314.

(4.) For fixing the times of lighting and extinguishing the lights in common stairs, passages, or private courts, and the order or rotation in which the occupiers of houses or flats in common stairs, passages, or private courts shall be responsible for the lighting and extinguishing of such lights.

See secs. 104 and 105.

(5.) For regulating the beating or shaking of carpets, rugs, or mats, in streets or courts, and open spaces and squares held in common, and the hours within which carpets, rugs, or mats may be beaten or shaken.

See sec. 381, sub-head (29), which imposes a penalty on any person who in any "street"—as defined in that section—"beats or shakes any carpet, rug, or mat, contrary to the bye-laws of the Commissioners."

(6.) For regulating the fencing, pulling down, clearing out, or securing of ruinous or unclaimed lands and heritages.

See secs. 191 to 200.

(7.) For regulating the driving of cattle through the streets, and prescribing through what streets and at what hours cattle may be driven.

See definition of "cattle" in sub-head (6) of sec. 4. Sec. 380, sub-head (7), imposes a penalty for ill-treating or over-driving any

animal; and sec. 381, sub-head (13), imposes a penalty on any person who "leads, drives, or rides any horse or other animal, or draws or drives any cart or carriage upon any footway, or fastens or places any horse or other animal so that it stands across or upon any footway."

(8.) For the better preservation of any common, links, bleaching-green, recreation-ground, open area or space, or other places of public resort or recreation existing within the burgh, and for regulating the use of the same, and for ensuring good order in the use thereof: Provided that, if any adjoining burgh has any right or interest in such common, links, open area or space, or other place of public resort or recreation, all such bye-laws shall also be subject to the consent and approval of the Magistrates and Council or the Commissioners of such burgh; and in case of any difference or dispute the Sheriff shall hear the parties, and decide all questions in reference to such bye-laws, and his decision shall be final.

See sub-head (3) of this section, which makes a similar provision.

(9.) For providing that drift logs of wood are secured by the owners.

See definition of "owner" in sec. 4, sub-head (22).

(10.) For carrying out or enforcing any other provisions of this Act not herein specially mentioned.

See under sec. 317 for note as to the general power of Magistrates to make bye-laws.

B.—For Sanitary Purposes.

(1.) For inspecting all places where horses are killed, and carrion is kept or sold, and keeping such places in a cleanly and proper state, and removing the filth therefrom, and requiring that all such places shall be provided by the occupiers with proper paving, drainage, and a sufficient supply of water.

See *infra*, sub-heads (5) and (6), which refer, *inter alia*, to carrion and to slaughtering of horses. Sec. 285 provides for the licensing of places for slaughtering horses.

(2.) For removing the contents of ash-pits, dung-steads,

drains, cesspools, water-closets, lavatories, baths, and privies within reasonable periods; for preventing foul water soaking from any house or building, and for preventing any ash-pit, dungstead, privy, drain, ditch, cesspool, dunghill, or manure heap from being a nuisance or annoyance.

See sec. 107 as to the duty of the Commissioners to cause all the dust, night-soil, etc., found "in privies, sewers, cesspools, houses, or other premises, to be collected and removed at such convenient hours and times as they shall consider proper." See also sec. 109 as to removal of refuse, sec. 123 as to emptying and cleansing of public necessaries, dungsteads, etc.; also secs. 252–255 as to cesspools, ash-pits, privies, and middens. To constitute a nuisance under the Public Health Act, 30 & 31 Vict. c. 101, sec. 16, sub-head (*b*), an ash-pit, etc., must be "so foul as to be injurious to health."

(3.) For inspecting and periodical cleaning of cisterns erected in buildings for the use of two or more families.

Sec. 263 provides that "wherever it is practicable all supplies of water for domestic use shall be taken direct from the main or service pipes and not from cisterns."

(4.) For regulating the time and mode of the removal of any offensive matter or thing.

This matter is dealt with in sec. 125.

(5.) For regulating the keeping of depôts of bones, carrion, rags, or any other offensive matter or thing.

As to *carrion* see sub-head (1), *supra*. "Any collection of bones or rags injurious to health" is a "nuisance" under the Public Health Act, sec. 16, sub-head (*e*), of 30 & 31 Vict. c. 101.

(6.) For reducing or removing the noxious or injurious effects attending the business of a blood-boiler, bone-boiler, tanner, slaughterer of horses or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade, or manufacture.

Bye-laws may be made for the same purpose under sec. 30 of the Public Health Act, 30 & 31 Vict. c. 101, but they apply only to businesses established after the passing of that Act.

As to slaughter-houses, see secs. 278–287, particularly sec. 281 as to bye-laws, and sec. 285 as to places for slaughtering horses.

(7.) For providing that cattle, dogs, and poultry shall not be kept in such places or in such manner as to be a nuisance or annoyance to the inhabitants; for prescribing the situa-

tions or places in which swine may be kept, and for prohibiting, on cause shown, the keeping of swine.

"Any stable, byre, pig-sty, or other building in which any animal or animals are kept in such a manner as to be injurious to health" is a nuisance under sub-head (*c*) of sec. 16 of the Public Health Act, 30 & 31 Vict. c. 101.

See secs. 386 and 387 as to stray cattle; sec. 389 as to keeping of dogs, fowls, or other animals; sec. 390 as to stray dogs. Sub-head (37) of sec. 381 imposes a penalty on anyone who "keeps any swine near any dwelling-house so as to be a nuisance or an annoyance to the residents or passengers." See M'Creadie *v.* M'Broom, *infra*, p. 498.

"A bye-law prohibiting the keeping of pigs within 50 feet of a dwelling-house, situated in a rural sanitary district, was held to be unreasonable, and therefore void and unenforceable. Heap *v.* Burnley Union (L. R., 12 Q. B. D., 617; 53 L. J., M. C., 76; 32 W. R., 738; 48 J. P., 359).

"And a bye-law made by a Town Council under the Municipal Corporations Act, 1835, 5 & 6 Will. IV. c. 76, sec. 90, imposing a fine upon every person 'who shall keep, or suffer to be kept, any swine within the said burgh, from the 1st day of May to the 31st day of October, inclusive, of any year,' was bad, for it was directed generally against the keeping of swine, and not merely against the keeping of them so as to be a nuisance. Everett *v.* Grapes (3 L. T., N. S., 669).

"But a bye-law forbidding the keeping of pigs within 100 feet of a dwelling-house, and another ordering certain drainage to be provided wherever pigs were kept, were held not to be unreasonable bye-laws, and in order to a conviction it was not necessary to prove that the infraction of either bye-law caused a nuisance."—Glen, p. 89.

(8.) For requiring owners or occupiers of houses and buildings to keep clean closes, areas, courts, passages, stairs, roofs of out-houses, and common water-closets, and thoroughfares owned or occupied by them; and also for paving private courts, common passages, and common areas other than bleaching-greens.

See sec. 120, *supra;* also sub-heads (36) and (42) of sec. 381. See also Schedule IV., Rule (17), which provides:—

"All private courts, common passages, and common areas (other than bleaching-greens), shall be paved with natural or artificial stone, or such other material as the Commissioners shall approve, and be provided with proper and sufficient means for taking off the surface water."

(9.) For regulating the sweeping and cleansing of common stairs in accordance with the sections of this Act relating to cleansing, and fencing and keeping the same clear of obstruction.

The sections of this Act relating to cleansing are 107–127; secs. 115 and 117 relate to cleansing of common stairs; sec. 174 to the fencing and repair of common stairs.

(10.) For carrying out the provisions of secs. 238 to 256, both inclusive.

These sections refer to the drainage of houses, soil pipes, w.-c.'s, etc.

The Commissioners may from time to time repeal, alter, or amend any such bye-laws, provided the bye-laws after such repeal, alterations, or amendment, be not repugnant to the law of Scotland or the provisions of this Act, and be reduced into writing, and have affixed thereto the signatures of three of the Commissioners, and also of the Clerk, and if they affect other persons than the officers or servants of the Commissioners, be confirmed and published as herein provided.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh," (13) "house," (10) "court," (16) "lands," (9) "Commissioners," (30) "Sheriff," (22) "owner," (21) "occupier," (3) "building," (27) "private court," (8) "Clerk," (5) "cattle;" see p. 5 "person." See secs. 336 to 338 as to notice; see sec. 55, sub-head (6), and observations thereunder.

In Kerr *v.* Auld, 19th Dec. 1890 (18 R., 12), the Greenock Port and Harbours Act, 1866, by sec. 93, authorises the Harbour Trustees to make bye-laws, *inter alia*, "for regulating the conduct of the owners, masters, and crews of vessels propelled by steam, with regard to the rate of speed at which they may proceed within the port and harbours."

The Harbour, Docks, and Piers Clauses Act, 1847, sec. 83, provides that Harbour Trustees may make bye-laws for the purpose of "preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier."

Greenock Harbour Trustees made a bye-law purporting to regulate the speed of vessels in the fairway of the navigable channel of the river Clyde, *ex adverso* of the harbour works.

Held, that as the fairway of the navigable channel of the river Clyde, *ex adverso* of the harbour works, was not within the harbour, the bye-law was *ultra vires* of the Trustees.

In M'Creadie *v.* M'Broom, 19th Jan. 1860 (22 D., 405), it was held that, under sec. 7 of the Nuisances Removal Act, the Local Authority

for the execution of the Act has not power to declare what is to be considered a nuisance; and a warrant for removal of a pig-stye, following on a complaint that it was within the distance of 10 yards from a dwelling-house, and in contravention of a bye-law enacted by the Parochial Board, declaring that no pig should be kept within 10 yards of a dwelling-house, reduced, in respect the Statute only authorises the removal as nuisances of animals kept so as to be injurious to health, and the interlocutor of the Justices did not find that the pig was so kept.

In Eastburn *v.* Wood, 14th July 1892 (29 S. L. R., 844), sec. 57 of the Local Government (Scotland) Act, 1889, enacts that the County Council may make "such bye-laws as to them seem meet . . . for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county."

A bye-law providing that "every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint, or in any other way, or who, without authority, affixes or causes to be affixed to any church, chapel, or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice-board, lawfully exhibited, any bill or other notice," should be liable in a penalty—*Held* to be *ultra vires* of the County Council under the said section.

In this case, Lord Young said: "The question which is before us in this case is, whether the County Council of Midlothian had power to make the bye-law No. 1, against which the appellants have been held to have offended. It is an interesting case, because it is the first instance of the making of local legislation which has come before us. Under sec. 57 of the Local Government Act the County Council is entitled to make bye-laws, in fact to legislate in regard to certain matters within the county of Midlothian, viz., the prevention of vagrancy, and the prevention and suppression of nuisances within the county. They have made this piece of legislation upon which these two appellants were convicted, and we are asked to say whether it is in the power of the Council to pass such a bye-law. The first question is, whether we have power to determine that question? I am of opinion that we have the power. The question has been frequently raised and decided in the English Courts, and always in the view that the Courts have the power to consider whether the right to make any particular bye-law is within the jurisdiction of the County Council.

"We are therefore asked if it was in the power of the County Council to make this bye-law. Their power depends upon the words of sec. 57 of the Local Government Act. That section provides that the County Council may make 'such bye-laws as to them seem meet for the administration of the affairs of the county for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in

force throughout the county.' This is a limited power of general legislation granted to the County Council for the suppression of vagrancy, and nuisances which are not otherwise punishable summarily by Statute. Now, the County Council, in the first of the bye-laws framed by them to this end, enacted that 'every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint, or in any other way, or who, without authority, affixes or causes to be affixed to any church, chapel, or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice-board lawfully exhibited, any bill or other notice,' should be liable in a penalty. Now, there are three enactments contained in this clause. The first has nothing to do with the question whether authority is given or not, or whether the consent of the owner and occupier is given, which elements are only applicable to the second and third enactments in the clause. Under the first, if any one is so wicked as to write upon or mark walls with chalk, he is to be punished at once. Now, one would not say that that was a very happy specimen of legislation, and really penal legislation requires more consideration and more skill than has here been resorted to to express it.

"But the particular enactment in clause 1, with which we are now concerned, is the third, 'or, without the consent of the owner or occupier, affixes or causes to be affixed to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice-board lawfully established, any bill or other notice.' So that any person putting up any notice on a tree or dyke within the county of Midlothian, without the consent of the owner or occupier, is to be subject to a penalty of 40s.

"Is it within the power of the County Council to make such an enactment? There is nothing said here about nuisance. I quite appreciate the desirability of putting a stop to what is popularly called the bill-sticking nuisance, and I do not think it would require any very great skill to frame an enactment to suppress it; but to say that anybody who puts up a bill upon any fence at the side of the road within the county of Midlothian is to be liable to a penalty of 40s., and in default to imprisonment, is extravagant as a piece of serious legislation. Nuisance may be brought into any case of bill-sticking by the character or size of the bill, the place selected for putting it up, or other reasons, but to say that every bill stuck upon a fence by the roadside is a nuisance is to say what cannot be maintained as a legal proposition. A notice put up on a fence by the roadside that a charity sermon is to be preached in the parish church for behoof of the destitute sick, would be a bill put up in the county of Midlothian, and probably the owner and occupier of the lands enclosed within the fence might not have been convened to give their consent to the putting up of the notice, so that that would be an offence under this section. I may notice that the announcement of such a sermon would of itself be an offence under another of these

bye-laws, viz., the 5th. That section provides that 'every person found begging' (it is not said where, except within the county of Midlothian), 'or placing themselves, or otherwise acting so as to induce or for the purpose of inducing the giving of alms,' is to be liable to summary conviction and a penalty of 40s. The purpose of a charity sermon is to induce the giving of alms, and the notice might make the person who put it up liable for the penalty. Now, I think the provisions of section 5 are just as clearly beyond the powers of the County Council as those of the first, although it is not necessary for the Court to decide that point. The practical conclusion I arrive at is, that if the County Council are going to penally legislate upon bill-sticking, which may be a nuisance, they must really resort to some one with intelligence enough to frame the enactment. Bill-sticking may subject those transgressing to a penalty and imprisonment, and may be put down by a bye-law applicable to the case. This bye-law, however, is not limited to any case, it refers to the county of Midlothian; and if the Convener of the county were to ask in his library for charity in support of any object, he would be liable in a penalty, upon the law as so expressed.

"There is another enactment—the second—to which I should like to call attention (although it is not within the case), which has regard to what may be called the paper nuisance—a very serious one. It is a very serious one, especially in the streets of Edinburgh, where whole newspapers seem to be thrown down and allowed to blow about, and its suppression is worthy of attention. The second enactment runs thus: 'Every person who causes any hand-bill, waste or soiled paper, rags or other similar material to be strewn, laid down, or to fall upon any street, road, or other thoroughfare, or adjoining fences,' is to be liable in a penalty.

"One of the first cases which occurs to one is that of a paper-chase. Any boy laying down paper as scent at the part of a fence leading into a field and adjoining a thoroughfare could, under the enactment, be punished by fine or imprisonment, although there was no nuisance whatever. That is altogether unreasonable, and the enactment might be quite easily expressed so as to repress the paper nuisance without using language which would comprehend such a case as that.

"Therefore, upon the case before us, my opinion is that this local bye-law was beyond the powers given by the Act of 1889 to the County Council to suppress nuisances by means of a bye-law. That is sufficient to dispose of the case, and to set aside the conviction."

The Local Government Board, London, in issuing sets of model bye-laws for various purposes, gave, in an accompanying circular, dated 25th July 1877, their views on the general provisions of the law as to bye-laws:—

"The Board now desire to advert to those provisions of the Public Health Act, 1875, to which, as affecting bye-laws generally, the attention of Sanitary Authorities should be directed.

"It is provided by sec. 182 that 'no bye-law made under this

Act by a Local Authority shall be of any effect if repugnant to the laws of England or to the provisions of this Act.' From this enactment several important rules may be deduced. A bye-law to be in harmony with the laws of England must be certain and determinate, and likewise reasonable, and hence arises the necessity for the use of certain and definite language in prescribing rules which are destined to have, locally, the binding effect of a Statute.

"The Board have, from time to time, had occasion to point out to Sanitary Authorities that the assumption in their bye-laws of the power of suspending the operation of particular provisions in individual cases, is open to much objection. Frequently, the conditions under which this power may be exercised, have been left undetermined in the bye-laws; and the result is to impart a general uncertainty to provisions of which the precise scope should be clearly defined. Again, the Board have been called upon to criticise bye-laws which, while purporting to lay down rules enforceable by penalties, ignore the necessary details and substitute vague conditions which render compliance with the bye-laws dependent upon the approval, by the Sanitary Authority or their officers, of the mode of proceeding in each case. Such bye-laws, also, are open to objection on the ground of uncertainty, and they do not fulfil the purposes for which the power of making bye-laws was conferred upon Sanitary Authorities. The Board think that every person who, by neglect of the rules which a bye-law is intended to prescribe, may be rendered liable to a penalty, is entitled to demand from those who impose such rules a clear statement of the course of action which must be followed or avoided.

"Further, a bye-law must be reasonable. The exercise of the power which the Legislature has confided to Sanitary Authorities must frequently bring them into contact with important interests. Within certain limits, they may regulate the conduct of persons employed in certain specified callings. They may impose restrictions upon the enjoyment of individual rights and privileges. Trade and property may, under certain conditions, be affected by their action. These considerations point to the necessity for prudence and deliberation in the choice of bye-laws, so that the duties and restraints which they create may not interfere oppressively with individual freedom of action.

"A bye-law under the Public Health Act, 1875, will also be invalid if it be repugnant to the provisions of that Act. Parliament has specified a variety of purposes for which bye-laws may be made. For those purposes alone are bye-laws authorised; and, as the Court of Queen's Bench decided in the case of Reg. *v.* Wood (5 E. and B., 49; 3 C. L. R., 1134), Reg. *v.* Rose, 24 L. J., N. S, M. C., 130; 1 Jur., N. S., 802), Sanitary Authorities cannot legally assume the power of making bye-laws for carrying out the general objects of the Act. It follows, therefore, that every bye-law must be strictly limited with reference to the terms of the specific enactment from which its force is derived. Any attempt, by the strained construc-

tion of any such enactment, to extend the range of a bye-law, should especially be avoided. But, while it is of primary importance in framing a bye-law to consider closely the language of the statutory provision which declares its purpose, the exact meaning of that language can never be safely determined without careful comparison of other enactments relating to the same or to kindred topics.

"It must always be remembered that bye-laws are designed to supplement, and not to vary or supersede, the express provisions of the Statute law. In the Public Health Act, 1875, and in the incorporated clauses, the subject of bye-laws may sometimes appear identical with those of specific enactments. But in all such cases a closer examination will show that the subjects are not really identical.

"And, however difficult it may be to detect the points of difference in a few exceptional instances, a safe rule may be deduced from the obvious considerations that a bye-law that merely repeats a statutory enactment is, to that extent, surplusage, and that a bye-law which aims at altering or amending such an enactment is rendered invalid by the proviso in sec. 182 of the Public Health Act, 1875." —Local Government Board's Report, 1877–78, pp. 63, 64.

The following provisions of the Interpretation Act, 1889, 52 & 53 Vict. c. 63, are applicable to bye-laws made under this section.

By sec. 31 it is provided :—

"Where any Act, whether passed before or after the commencement of this Act, confers power to make, grant, or issue any instrument, that is to say, any Order in Council, Order, warrant, scheme, letters-patent, rules, regulations, or bye-laws, expressions used in the instrument, if it is made after the commencement of this Act, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."

And by sec. 32, sub-head (3), it is provided :—

"Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or bye-laws.

And by sec. 36, sub-head (2), it is provided :—

"Where an Act passed after the commencement of this Act, or any Order in Council, Order, warrant, scheme, letters-patent, rules, regulations, or bye-laws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day." See also sec. 17, which is quoted under sec. 15 of this Act, *supra*, p. 33.

"A bye-law is a law made with due legal obligation, by some authority less than the Sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority, and not provided for by the general law of the land."—Lumley on Bye-laws, p. 2.

Of the Authority for making the Bye-Laws.—"Now the authority is established (1) by necessary implication, (2) by charter, (3) by express statute, (4) by custom.

"1. As to the implication. It is laid down in many cases and decisions that where a corporation is created by charter which contains no provision on the subject, the corporate body has, as a necessary incident, power to make rules, ordinances, and statutes for the rule, government, and well-ordering of the subjects of the incorporation, and in relation to the purpose for which the same is instituted. See the case of Sutton's Hospital (10 Co., 31 A.; Jenk. Cen., 273); Norris *v.* Staps (Hob. 211, 1 Roll. Abr., 513); Davenant *v.* Hurdes (Moo, 584); City of London *v.* Wood (12 Mod., 686); The K. *v.* Westwood (7 Bing. 1); and the judgment of Tindal, C. J., in Veley *v.* Burder (12 Ad. and E., 303)."—Lumley on Bye-Laws, p. 7.

"The same authority which makes a bye-law may subsequently repeal it absolutely, or substitute another for it. Newling *v.* Francis (3 T. R., 198); The K. *v.* Ashwell (12 East. 22); K. *v.* Westwood (4 B. and C., 806)."—Lumley on Bye-Laws, p. 60.

"But although a bye-law may be repealed by the authority which made it, it cannot be set aside by usage. Hence in Sills *v.* Brown (9 Carr. and P., 604), where a bye-law relative to the navigation of the Thames had been given in evidence, Coleridge, J., refused to allow evidence to be given to show that in practice the bye-law had been contravened.

"Perhaps where an ancient bye-law is relied on, it might be competent to show that, by long subsequent adverse or inconsistent usage, a presumption of a rescinding or repealing of the bye-law arose.

"In Shaw *v.* Furze (1 L. J. R., N. S., Q. B., 216), it was sought to show that a general bye-law made by the corporation of London did not extend to an isolated part of the city by reason of non-user therein, but the attempt did not succeed."—Lumley on Bye-Laws, p. 63.

"But, where bye-laws are passed for the general government or regulation of any particular place, they operate upon all persons for the time being within the range of the jurisdiction of the body framing them. They thus take effect upon persons who may be temporarily or casually living in the place, and are not domiciled or settled inhabitants. Such persons are sometimes termed *strangers*, in reference to this subject."—Lumley on Bye-Laws, p. 67.

"A bye-law has the same force within its limits, and with respect to the persons upon whom it lawfully operates, as an Act of Parliament has upon the subjects at large. Hopkins *v.* Mayor, etc., of Swansea (4 M. and W., 640), *per* Lord Abinger, C. B. (*aff.* 8 M. and W., 901). The Sanitary Authority cannot dispense with the law as laid down in their bye-laws, for it is not for their benefit, but for the benefit of the public. Baxter *v.* Mayor, etc., of Bedford (*Times* newspaper, 23rd July 1885).

"Local Authorities have no general power to make bye-laws for carrying out the purposes of the Act, but only such as carry out the special powers of the Act. *Per* Lord Campbell, C. J.: 'We cannot, by any strained construction, apply the words of the Statute to cases which they do not include." Reg. *v.* Wood (5 E. and B., 49; S. C., Nom.); Reg. *v.* Rose (24 L. J., M. C., 130; 1 Jur., N. S., 802; 19 J. P., 676). And if a Local Authority in making a bye-law exceed their jurisdiction, the subsequent allowance of the bye-laws by the Local Government Board will not preclude inquiry into the validity of the bye-law. Where, therefore, on an information for an infringement of a bye-law, it was objected that the making of such bye-law was not authorised by the Act, but the Justice held that, inasmuch as it had been allowed by the Secretary of State, he could not entertain the objection, and convicted the defendant, the Court quashed the conviction on *certiorari*, though the Statute enacted that no proceeding touching the conviction of any offender against the Act shall be removable by *certiorari*, holding that the Justice had acted without jurisdiction. Reg. *v.* Wood (5 E. and B., 49; S. C., Nom.); Reg. *v.* Rose (24 L. J., M. C., 130; 1 Jur., N. S., 802; 19 J. P., 676).

"The bye-law must not only be in terms authorised by the Statute, but it must itself be reasonable; otherwise it will be bad and unenforceable. Where the bye-law of a burgh provided that no person should erect any booth, or place any caravan for the purpose of any show or public entertainment, in any public place within the burgh, without the licence of the Mayor, and that any such licence given at any other than fair times should be revoked by the Mayor, if three inhabitants, householders, residing within 100 yards of the place from which it was granted, should memorialise the Mayor to revoke it, such bye-law was held to be unreasonable, and therefore bad. Ellwood *v.* Bullock (13 L. J., M. C., 330).

"*Per* Pollock, C. B., with regard to bye-laws *ultra vires*, 'Persons empowered to make bye-laws have no right to invest themselves with powers which the law will not sanction.' And, *per* Bramwell, B., 'It is about the same as a policeman who thinks he is not entitled to a staff unless he breaks somebody's head with it.' Brown *v.* Holyhead Local Board (1 H. and C., 601; 32 L. J., Exch., 25; 7 L. T., N. S., 332; 11 W. R., 71; 27 J. P., 184)."—Glen, p. 356.

"A bye-law may be good in part and bad in part, and so may be enforceable as regards the good part. Reg. *v.* Lundie (31 L. J., M. C., 157; 5 L. T., N. S., 830; 10 W. R., 267). But this is only where the two parts are entire and distinct from each other. Reg. *v.* Faversham (8 T. R., 356).

"A bye-law, whether by charter or Statute, cannot be made in forfeiture of a right unless expressly authorised. Kirk *v.* Nevil (1 T. R., 118).

"Powers given to make bye-laws, though in general terms, are limited to objects contemplated by the Statute, and a general power

to make bye-laws for the good management of a navigation was held not to authorise a bye-law that the navigation should not be used on a Sunday. Calder Navigation Company *v.* Pilling (14 M. and W., 76; 14 L. J., Exch., 223; 9 Jur., 377)."—Glen, p. 358.

"A person having been previously convicted under a bye-law for having built a party-wall not of the thickness prescribed by the bye-law, was some time afterwards again summoned and convicted in respect of the same wall, and adjudged to pay a penalty of 5s. a day for seven days as for a continuing offence. But the Court held that the conviction could not be supported. The words 'continuing offence' in 11 & 12 Vict. c. 63, sec. 115, the Court said, must be read to mean an offence which was from its nature susceptible of continuance—such as improper drainage, etc.—and could not apply to the case of a party-wall when once finished. The fact that the Local Board were empowered, by 21 & 22 Vict. c. 98, sec. 34, to pull down walls improperly built, was a sufficient answer to any argument that, unless a continuing penalty were enforced, the intention of the Acts could be defeated. If the offence complained of were within the bye-law, it would be more proper to hold the bye-law unreasonable than to allow a penalty to be enforced, which might continue for the length of a man's life. Marshall *v.* Smith (L. R., 8 C. P., 416; 28 L. T., N. S., 538; 42 L. J., M. C., 108; 37 J. P., 471)."—Glen, p. 359.

Bye-laws, secs. 316 to 324.—"1. A bye-law must be consistent with and not repugnant to the general law (5 Co., 63). But 'a bye-law cannot be said to be inconsistent with the laws of this kingdom merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do.' Edmonds *v.* Waterman's Company (24 L. J., M. C., 124; 1 Jur., N. S., 727, *per* Lord Campbell, C. J.).

"2. The bye-law must provide something in addition to the general law, and therefore must not re-enact it. R. *v.* Saddlers' Company (3 E. and E., 80). Harrison *v.* Evans (6 Bro., P. C., 181). But this rule does not render a bye-law void where, though the matter is already prohibited by law, the bye-law superadds a penalty to meet the injury caused to the particular body affected by the offence or default. City of London *v.* Vanacre (1 Salk., 142; 1 Ld. Raym., 500; Carth., 483).

"3. The bye-law must not make a provision in respect of a matter already provided for by law other than the general law has prescribed. Thus, in Calder and Hebble Navigation Company *v.* Pilling (14 M. and W., 76), a company having power to make bye-laws for the good and orderly use of the navigation and the well-governing of the bargemen, etc., made a bye-law to close the navigation on Sunday, and imposing a penalty of £5: this was held an illegal bye-law.

"4. The bye-law must be certain, definite, and free from ambiguity, and the penalty must be certain.

"5. The bye-law must be general and obligatory on all persons equally and indiscriminately.

"6. The bye-law must be *reasonable.*

"7. The bye-law must be positive.

"8. It must not be *ultra vires.*

"Bye-laws are divisible, and a bye-law may be good in part and bad in part, provided that the two parts be entire and distinct."—See Bazalgette, p. 147.

Rawlinson on the Municipal Corporations Act says, in a note (pp. 106–7), "Every bye-law must be reasonable, and not inconsistent with any Statute, or with the general principles of the law of the land, or contrary to the provisions of the particular charter under which the persons making it act."—See p. 127 of Irons' Manual.

"6 H. L. C., 419. All persons dealing with the officers or agents of corporations are bound to know that they act either under its charter or bye-laws, or the usages which may be shown to exist defining the extent of their authority. They must, in doubtful cases, acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that. Risley *v.* Indiana, etc., Railroad Company (1 Hun., 202, 205). And see M'Cullough *v.* Moss (5 Den., 567). Adriance *v.* Roome (52 Barb., 399). Dabney *v.* Stevens (40 How., Pr. Rep., 341)."—Brice on *Ultra Vires*, p. 591.

"As to 5, Bye-laws.—Corporations aggregate, being, as it were, semi-political, though inferior communities, require the establishment of fixed and known rules, in accordance with which their internal government shall be carried on. The law has deemed it the more advisable course to leave these rules for the most part to the discretion of the corporations, and those composing them, who may reasonably be supposed to know what is most conducive to their own interests and welfare. Consequently corporations have inherent in them the power to make all such bye-laws as are requisite for the due management of their affairs, and for determining the conditions of membership. These bye-laws must not be opposed to, or inconsistent with, the statute or common law of the realm, nor contradictory to the charter of incorporation. See Dunstan *v.* Imperial Gas Company (3 B. and Ad., 125). Elwood *v.* Bullock (6 Q. B., 383). Everett *v.* Grapes (3 L. T., N. S., 669). Shillito *v.* Thomson (1 Q. B. D., 12)."—Brice on *Ultra Vires*, p. 7.

"It should also be noticed here that no additional or fresh liability can be placed on individual corporators—that a corporation cannot, by resolution or bye-laws, impose personal and individual liability upon its members, unless the power is specifically granted in the constating instruments. In Trustees of Free Schools in Andover *v.* Flint (54 Mass., 13 Metc., 540), approved and followed in Reid *v.* Eatonton Manufacturing Company (2 Amer., 563; 40 Ga., 98), the defendant was the treasurer and a member of a corporation. The corporation being in want of money, met and passed a bye-law that 'the members of this association pledge themselves in their

individual as well as their collective capacity to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation, agreeably to the direction of the directors.' Flint, as treasurer and on behalf of the corporation, afterwards executed a note which was sued upon, and the corporation having no effects it was sought to render him personally liable in virtue of the above resolution. The Supreme Court of Massachusetts decided that the corporation had no power to impose such liability."—Brice on *Ultra Vires*, p. 813.

In Slattery *v.* Naylor, 29th Feb. 1888 (13 L. R., App. Cas., 446), it was held that a bye-law, made in pursuance of sec. 153 of the Municipalities Act, 1867, empowering Municipal Councils to make bye-laws for regulating the interment of the dead, is not *ultra vires*, by reason of its prohibiting interment altogether in a particular cemetery, and thereby destroying the private property of the owners of burial-places therein.

Quære, whether and under what circumstances bye-laws can be set aside as unreasonable. . . . The jurisdiction of testing bye-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.

We are dealing with the proceedings of a Local Authority in a colony where the extent of area is large, and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It creates a Representative Council, elected annually by the constituency, and gives to it jurisdiction over the large range of affairs enumerated in sec. 153, and some other sections. By sec. 158 it is enacted that all bye-laws "consistent with the provisions of this Act, and not repugnant to any other Act or law in force in the colony of New South Wales, shall have the force of law when confirmed by the governor, and published in the Government Gazette, but not sooner or otherwise." The provision is made for laying copies of such bye-laws before both Houses of Parliament.

It is certainly not clear that Courts of law are not precluded by sec. 158 from inquiry whether or no a bye-law is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every bye-law that it shall be reasonable, that a power to make bye-laws means a power to make reasonable bye-laws, and that no bye-law can acquire the force of law under sec. 158, except such as are consistent with the implied as well as the express provisions of the Act. According to this argument, the question whether a bye-law is reasonable is only one branch of the question whether it is *ultra vires*.

317. Bye-laws may be Enforced by Imposition of Penalties.—The Magistrates and the Commissioners, by the bye-laws authorised by this Act so to be made by them respectively, may impose such reasonable penalties as they think fit, not exceeding 40s. for each breach of such bye-law, and in case of continuous violation of such bye-laws the sum of 10s. for every day during which such violation shall be continued; and may regulate the fees to be paid to them or to their officers, or others employed by them in connection with the inspection of plans, records, or other documents in their possession, and with applications for their sanction or authority to the execution of works to which by this Act such sanction or authority is requisite: Provided always, that such bye-laws be so framed as to allow the Magistrate before whom any penalty imposed thereby is sought to be recovered to order the whole or part only of such penalty to be paid, or to remit the whole penalty.

See sub-head (9), sec. 4, for definition of "Commissioners," (20) "Magistrates," (19) "Magistrate;" see p. 5 "person," sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

At common law, Magistrates seem to have authority to make necessary bye-laws in conformity with the law of the land. Erskine, Bk. i. tit. iv. sec. 22, says, "Though the jurisdiction of royal burghs may be exercised by the Provost as Chief Magistrate, it is generally a bailie who sits as judge. But in matters of police, or of common concernment to the community, the Magistrates and Town Council must concur, as the full representatives of the community. In this capacity they make bye-laws not repugnant to the laws of the realm or set of the burgh."

With reference to this power, the Lord Advocate, Mr. (now Lord) Robertson, in answer to the question, "Have the memorialists (Magistrates and Council) power apart from the Act (the General Police Act) to regulate the traffic in the important thoroughfares?" said: "This is an important question, upon which there is little authority. It seems to me, however, to be consistent with principle and custom, and not inconsistent with personal liberty, that the Magistrates of a burgh should have such power of regulation. The text in Erskine seems to me to apply. It is manifest that such a power must be exercised with great moderation and reserve. The present proposal does not appear to me to exceed those limits. I answer the query in the affirmative."

"On a conviction for neglecting to give notice and deposit plans

of a new building, a penalty of 40s. was imposed, and a further penalty of 20s. for each day that the work should continue or remain, contrary to the provisions of the bye-laws. Objection was taken that there were two distinct penalties, while only one offence was charged, but the Court overruled the objection. James *v.* Wyrill (51 L. T., N. S., 237; 48 J. P., 725)."—Glen, p. 359.

318. Bye-laws to be Confirmed.—No bye-laws made under the authority of this Act, except such as relate solely to the Commissioners or their officers or servants, shall come into operation until the same be confirmed by the Sheriff, or in the case of bye-laws relating to sanitary matters, by the Board of Supervision, and authenticated by the signature of the Sheriff, or the Chairman of the Board respectively; and it shall be incumbent on the Sheriff, on the request of the Commissioners, to inquire into any bye-laws tendered to him for that purpose, and to allow or disallow the same as he may think fit. Before coming into operation the said bye-laws shall also be confirmed by the Secretary for Scotland.

See sub-head (9), sec. 4, for definition of "Commissioners," (30) "Sheriff," (1) "Board of Supervision."

319. Notice of Confirmation to be given.—No such bye-laws shall be confirmed unless notice of the intention to apply for a confirmation of the same has been given in one or more newspapers circulating within the burgh, if any be, or otherwise in some newspaper circulating in the county in which the burgh is situated, one month at least before the hearing of such application; and any person desiring to object to any such bye-law, on giving to the Magistrates and the Commissioners respectively notice of the nature of his objection ten days before the hearing of the application for the allowance thereof, may, by himself, or his counsel or agent, be heard thereon, but not so as to allow more than one objecting party to be heard on the same matter of objection without leave of the Sheriff.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners."

320. A Copy of Proposed Bye-laws to be open to Inspection.—For one month at least previous to any such application for confirmation of any bye-law, a copy of

the proposed bye-law shall be kept at the office of the Clerk of the Commissioners, and all persons may at all reasonable times inspect such copy without fee or reward; and the Magistrates and the Commissioners respectively shall furnish every person who applies for the same with a copy thereof, or of any part thereof, on payment of 6d. for every hundred words so to be copied.

See sub-head (8), sec. 4, for definition of "Clerk," (9) "Commissioners," (20) "Magistrates;" see p. 5 "person."

321. Publication of Bye-laws.—Bye-laws, when confirmed, shall be printed; and the Clerk to the Commissioners shall deliver a printed copy thereof to every person applying for the same, at a charge not exceeding 1d.; and a copy thereof shall be painted or printed or placed on boards, which shall be hung up on the front or in some conspicuous part of the principal office of the Commissioners, and also on some conspicuous part of the works or locality to which the same relate, for a period of not less than three months after the date of such confirmation; and any such Clerk who does not allow the same to be inspected at all reasonable times shall for every such offence be liable to a penalty not exceeding £5.

See sub-head (8), sec. 4, for definition of "Clerk," (9) "Commissioners," p. 5 "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

See sub-head (13) of sec. 380, which imposes a penalty on any person who "destroys, pulls down, injures, or defaces . . . any board on which any bye-law or part of a bye-law of any lawful authority is painted or placed."

322. Bye-laws to be Binding on all Parties.—Bye-laws, when so confirmed and published, shall be binding upon and be observed by all parties, and shall be sufficient to justify all parties acting under the same.

As to the effect of bye-laws and the extent of their operation, see under sec. 316.

323. Evidence of Bye-laws.—The production of a written or printed copy of any bye-laws, authenticated by the signature of the Clerk, shall be evidence of the existence and of the due making of such bye-laws, and of the proper publi-

cation thereof, in all prosecutions under the same, unless proof to the contrary be adduced by the party complained against.

See sub-head (8), sec. 4, for definition of "Clerk."

324. Burgh Bye-laws not Annulled.—Nothing herein contained shall be held to annul the bye-laws, rules, orders, or regulations in force in any burgh, except in so far as they are inconsistent with the provisions of this Act.

See sub-head (4), sec. 4, for definition of "burgh."

EXECUTION OF WORKS.

By Commissioners.

325. Commissioners Empowered to enter upon Premises for Purposes of this Act.—The Commissioners shall for the purposes of this Act have power, by themselves or their officers, to enter at all reasonable hours in the daytime into and upon any premises within the burgh, as well for the purpose of inspection as for the purpose of executing any work authorised to be executed by them under this Act, without being liable to any legal proceedings on account thereof: Provided always that, except when herein otherwise provided, the Commissioners or their officers shall not make any such entry, unless with the consent of the occupier, until after the expiration of forty-eight hours' notice for that purpose given to the occupier.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "premises," (4) "burgh," (21) "occupier;" see secs. 336 to 338 as to notice. Sec. 17 of the Public Health Act, 30 & 31 Vict. c. 101, gives the Local Authority and their officers a power of entry to premises where a nuisance is believed to exist, "to inspect the same at any time between nine in the morning and six in the evening, or at any hour when the operations suspected to cause the nuisance are in progress or are usually carried on." The same Act, by sec. 75, gives special powers of entry in connection with sewers and drains.

What may be reasonable hours in the day-time is not defined. In England, under the Public Health Act, 1875, a similar right of entry may be exercised between nine o'clock forenoon and six o'clock afternoon.

In Gunn *v.* Cadenhead, 25th May 1888 (15 R. (Just.), 57), the Public Health (Scotland) Act, 1867, provides, sec. 68, that "the keeper of a common lodging-house shall at all times when required

by any officer of Local Authority, give him free access to such house, and every part thereof." The keeper of a common lodging-house, on access to his house being demanded by two officers of the Local Authority, refused access — (1) To a room which opened off a licensed room, and could only be entered through it (this room had not been observed when the premises were inspected with a view to licence being granted, and was not itself licensed); (2) To two rooms which were licensed, but which he had shut off entirely from the rest of the house, which had a separate access to the street, and which, after giving notice to the Local Authority that he had ceased to use them as part of the lodging-house, he had let to a monthly tenant. *Held*, that in refusing access to the first-mentioned room he had contravened the Statute.

Opinions, That in refusing access to the other two rooms he had not contravened the Statute, but that his conduct in doing so would have justified the Magistrates in cancelling the licence.

326. Penalty on Persons Obstructing Commissioners or Workmen employed by them. — Every person who shall at any time obstruct the Commissioners, or shall resist, obstruct, or molest any workman or other person employed in the execution of any duty or the performance of any work, by virtue of this Act, or of any warrant of the Magistrates, or any of them, or of any bye-law, regulation, or order of the Commissioners, or shall aid or incite any persons so to do, shall for every such offence be liable to a penalty not exceeding £5; without prejudice to any such workman or other person, on whom any assault or offence may have been committed, to sue in any competent Court for compensation, damages, or expenses for any injury or loss he may thereby have sustained.

See sub-head (9), sec. 4, for definition of "Commissioners," (20) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

By Owners or Occupiers.

327. Commissioners, in default of Owner or Occupier, may Execute Works, and Recover Expenses. —Whenever, under the provisions of this Act, any work of any kind is required to be executed by the owner or occupier of any premises, and default is made in the execution of such

work, the Commissioners (whether there be a penalty imposed for the default or not), may cause such work to be executed, and the expense incurred by the Commissioners in respect thereof shall be repaid to them by such owner or occupier.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (16) "premises," (9) "Commissioners;" sec. 369 as to recovery of expenses, and sec. 365 as to private improvement expenses.

In England, "where a Sanitary Authority constructed a drain by arrangement with the owner, but did the work negligently, they were liable to the owner for damage thereby occasioned to his building." Hall *v.* Mayor, etc., of Batley, 37 L. T. (N. S.), 710.—Glen, p. 64.

328. Occupier, in default of Owner, may Execute Works, and Deduct Expenses from his Rent.—Whenever default is made by the owner of any premises in the execution of any work which by the provisions of this Act falls to be executed by him, the occupier of such premises may, with the approval of the Commissioners, cause such work to be executed, and the expense thereof shall be repaid to such occupier by the owner of such premises, and such occupier may deduct the amount of such expense out of the rent from time to time becoming due to such owner.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (16) "premises," (9) "Commissioners."

329. How Expenses are to be Recovered from Owner.—If the owner of any premises made liable by the provisions of this Act for the special sewer rate, general sewer rate, or reasonable sum for use of sewers, private improvement expenses, or any charge for the repayment to the Commissioners of any expenses incurred by them, do not, as soon as the same become due and payable from him, pay such rate or charge, or repay all such expenses to the Commissioners, the Commissioners may, without prejudice to the preferable right and summary mode of recovery and the power herein contained, recover such rate, charge, or expenses, with the legal interest thereof from the time when the same was due and payable, from such owner, in the same

manner as any debt may be recovered by the law and practice of Scotland.

See sub-head (22), sec. 4, for definition of "owner," (16) "premises," (9) "Commissioners;" see sec. 362 as to special sewer rate, sec. 361 general sewer rate, sec. 364 reasonable sum for use of sewers, sec. 365 private improvement expenses, and sec. 369 as to recovery of expenses.

330. Power to Levy Charges on Occupier, who may Deduct the same from his Rent.—The Commissioners may, by way of additional remedy, require the payment of all or any part of such rate, charge, or expenses, and interest, payable by the owner for the time being from the person who then or at any time thereafter occupies any such premises under such owner; and in default of payment thereof by such occupier, on demand, the same may be levied by seizure and sale of the goods and effects of such occupier, in the same manner as the burgh general assessment may be recovered from him under this Act; and every such occupier shall be entitled to deduct from the rent payable by him to his landlord so much as is so paid by or recovered from him in respect of any such charge or expenses and interest.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "premises," (21) "occupier;" p. 5, "person;" sec. 340 as to burgh general assessment, secs. 352 to 358 as to recovery of expenses.

See sec. 100 of the Public Health Act, 30 & 31 Vict. c. 101, which contains a similar provision.

In Greenock Board of Police *v.* Liquidator of the Greenock Property Investment Society, 13th Mar. 1885 (12 R., 832), the Greenock Police Act, 1877, sec. 408, provided that "all expenses of streets and sewers and other expenses . . . made payable by or recoverable from the feuar or proprietor of any lands or heritages, with such interest thereon as by this Act or any such bye-law is provided for, shall be a real burden and charge on such lands or heritages, in priority to any incumbrance or charge on or affecting the same, and created subsequently to the date when the petition for authority to execute the work on account whereof the expenses are payable was presented," etc. Under the interpretation clause of the Act, sec. 3, "proprietor" included "heritable creditors, or other persons . . . in the actual enjoyment of, or who shall take the rents and profits or produce of such lands and heritages."

Sec. 441 provided that "where the proprietor of any lands or heritages" was liable for any sum due in pursuance of the provisions of the Act, the Board might recover it "from the occupier of such lands or heritages, to the extent of the rent due by such occupier at

the date when notice of the said claim shall be given; . . . and the occupier shall, after such notice, be bound to retain and account to the Board or to such officer for any rent due by him, and shall be entitled to an abatement from his landlord corresponding to the sums so retained and accounted for."

A heritable creditor came into possession of certain properties upon which an assessment was leviable in terms of the Act, his bond being prior in date to the application for authority to execute the works in question. *Held*, that the assessment was a preferable claim on the rents to that of the heritable creditor for interest on his bond.

Payment of Expenses by Occupier.—"The Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, sec. 96, contains a similar provision for the recovery of expenses from the occupier, and the deduction of them from the rent payable by him to his landlord. Under that provision the tenant of a house received notice from the vestry of the parish to pay his rent to them on account of the expenses of paving a road, and the landlord, being aware of such notice, after the rent became due, but before the tenant had paid any part of it to the vestry, put in a distress. In an action for wrongful distress it was held that, as the landlord's right of distress was not taken away by the Act, the tenant was not protected till he had actually paid his rent to the vestry. Ryan *v.* Thomson, L. R., 3 C. P., 144; 37 L. J., C. P., 134; 17 L. T. (N. S.), 506; 32 J. P., 135."—Glen, p. 173.

331. Occupier not to be liable for more than Amount of Rent due.—No occupier of any premises shall be liable to pay more money in respect of any sums charged by this Act on the owner thereof than the amount of rent due from him for the premises in respect of which such rate, charge, or expenses and interest are payable at the time of the demand, or which at any time after such demand shall have accrued and become payable by him, unless he neglect or refuse, upon application made to him for that purpose by the Commissioners, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable; but the burden of proof that the sum demanded of any such occupier is greater than the rent which is due by him at the time of such demand, or which has since accrued, shall lie upon such occupier: Provided further, that nothing herein contained shall be taken to affect, abridge, or alter any claim of relief or otherwise competent to such owner or occupier respectively against each other under any special contract made between them re-

specting the payment of the expenses of any such works as aforesaid.

See sub-head (21), sec. 4, for definition of "occupier," (16) "premises," (22) "owner," (9) "Commissioners."

See sec. 100 of the Public Health Act, 30 & 31 Vict. c. 101, which contains a similar provision.

In England, "by an agreement for a lease, the landlord agreed to repair the demised premises, and also to pay and discharge all rates, taxes, tithes, and other charges payable in respect of the premises. Part of these premises consisted of a piece of ornamental water; a deposit of mud formed in this water, consisting partly of decayed vegetable matter and house drainage, which became a nuisance. The Local Authority took proceedings against the tenant, as the person by whose default the nuisance arose, and ultimately made an order upon him for the removal of the nuisance. The tenant had previously to the making of the order, but after the commencement of the proceedings against him, entered into an agreement with a person for the removal of the deposit and the cleansing of the ornamental water, to the satisfaction of the inspector of nuisances, for the sum of £100, which he paid upon the completion of the work, and for the recovery of which he afterwards sued his landlord; but it was held that the latter was not bound, under the covenant to repair, to cleanse the ornamental water; and with respect to so much of the sum paid as was paid for the removal of the nuisance, the plaintiff was not entitled to recover it under the agreement, as a charge payable in respect of the premises or as money paid for the defendant at his request. Bird *v.* Elwes, L. R., 3 Exch., 225; 18 L. T. (N. S.), 727; 37 L. J., Exch., 91; 16 W. R., 1120; 32 J. P., 694.

"A lessee covenanted 'to pay and discharge all manner of taxes, rates, charges, assessments, and impositions, then or at any time to be charged, assessed, or imposed upon the premises, or in respect thereof by authority of Parliament, or otherwise howsoever;' and during the term a notice of the existence upon the premises of a nuisance injurious to health, arising from the bad condition of the drains, was served on the lessee by the Sanitary Authority under sec. 94, requiring the lessee to construct proper and sufficiently covered drains emptying into the main sewer. The lessor, upon the lessee's refusal, executed the required works, and sued him for the expenses upon the covenant in the lease; but the Court held that, by the Act, the duty of performing the work was cast upon the lessor, and that, therefore, the lessee was not bound to pay the expenses under the covenant. Rawlins *v.* Briggs (L. R., 3 C. P. D., 368; 47 L. J., C. P., 487; 27 W. R., 138; 24 J. P., 791); followed in Hill *v.* Edward (W. N., 1885, p. 32), with reference to paving expenses in the metropolis.

"Private improvement expenses under a Local Act were held not to be recoverable by the landlord under his tenant's covenant to pay 'all taxes, rates, assessments, and impositions in respect of the premises.' Tidswell *v.* Whitworth (L. R., 2 C. P., 326).

"Similar expenses under the Metropolis Local Management Acts were so recoverable on the tenant's covenant to pay 'all taxes, rates, duties, and assessments taxed, assessed, or imposed on the tenant or landlord in respect of the premises.' Thomson *v.* Lapworth (L. R., 3 C. P., 149); and see Payne *v.* Burridge (12 M. and W., 727).

"Such expenses were not recoverable from the landlord by a tenant who had covenanted to pay 'all taxes, rates, assessments, and outgoings, taxed, rated, charged, assessed, or imposed upon the premises, or upon the landlord or tenant in respect thereof.' Crosse *v.* Raw (L. R., 9 Exch., 209; 43 L. J., Exch., 144; 23 W. R., 6). This decision was followed with reference to a similar covenant, in which the word 'outgoings' occurred, although that word was omitted from the *reddendum*, which only provided that the rent should be paid clear of rates, taxes, and reductions. Gardner *v.* Furness Railway Company (47 J. P., 232).

"By a contract for the sale of three houses, the vendor agreed to discharge 'all rates, taxes, and outgoings' up to the time of completion, and such rates and outgoings were to be apportioned if necessary. The purchasers, having paid the expenses of improving the adjoining street, brought an action to recover the amount from the vendor, in which it was held that the charge for improving the street was an 'outgoing' which the vendor had bound himself to discharge, and which the purchasers were therefore entitled to recover from him, and that the expenses in question being for improving a street were not capable of being apportioned. Midgley *v.* Coppock (L. R., 4 Exch. D., 309; 48 L. J., Exch., 674; 40 L. T., N. S., 870; 43 J. P., 683). And in another case a covenant in a lease to pay 'all rates, taxes, charges, and assessments whatever, which were, are, or may be charged or assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof," was held binding in respect of expenses incurred by a Local Board under the Public Health Act in making up a new street, such expenses being, under that Act, 'charges on the premises.' Hartley *v.* Hudson (L. R., 4 C. P. D., 367; 48 L. J., C. P., 701; 43 J. P., 784).

"The tenant of certain premises was bound by his lease to 'bear, pay, and discharge' certain specified rates, and 'all the taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise.' The drainage of the premises having been defective, the Sanitary Authority caused a notice to be served upon the owners of the premises, requiring them to abate the nuisance, and the notice not having been complied with, the Authority obtained an order from a Justice to the like effect. The owners then executed the works necessary to enable them to obey the order, and sought to recover the costs of them from the defendant under the covenant. The Court of Appeal (Brett., L.-J., *diss.*) held that an action for the recovery of the costs was maintainable. Budd *v.* Marshall (L. R., 5 C. P. D., 481; 50 L. J., C. P., 24; 42 L. T., N. S., 793; 29 W. R., 148; 44 J. P., 584).

"The same Court, however, held that a covenant to pay certain

specified rates, and 'the Board of Health, Metropolitan, and other district rates and assessments, taxed, rated, charged, assessed, or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof,' did not make the occupier liable, under the Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, sec. 96, for the proportion of the expenses of paving a new street; for such expenses were not by that Act charged on the premises, nor on the occupier, though they might be recovered from him in the first instance, but on the owner in respect of the premises. Allum *v.* Dickinson (L. R., 9 Q. B. D., 632; 52 L. J., Q. B., 190; 47 L. T., N. S., 493; 30 W. R., 930; 47 J. P., 102).

"This was followed in a case in which a sum assessed under the Metropolis Management Acts upon the owners of premises, as their proportion of the expense of paving a new street, was held not to come within a covenant in a lease to pay 'all rates, taxes, and assessments payable in respect of the premises during the tenancy,' but to be a charge imposed upon the owner for the permanent improvement of his property, and therefore not recoverable from the tenant. Wilkinson *v.* Collier (L. R., 13 Q. B. D., 1; 53 L. J., Q. B., 278; 51 L. T., N. S., 299; 32 W. R., 614). But in a later case such charges for paving were considered to be 'outgoings payable either by the landlord or tenant in respect of the premises.' Aldridge *v.* Ferne (L. R., 17 Q. B. D., 212; 55 L. J., Q. B., 587; 34 W. R., 578).

"In a case in which there was no such special covenant, a tenant recovered from his landlord the expense which he had incurred in complying with a notice under the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, secs. 12–14, from a Metropolitan District Board, to make good the drainage of his premises, although the Act only provided that in the event of the occupier not complying with a Justice's order to do the work he should be liable to a penalty, and the Board might do the work themselves, and then recover the expenses from the owner. Castleberg *v.* Kenyon (*Times* newspaper, 16th June 1879).

"With reference to this class of covenant, it may be mentioned that a 'parliamentary tax' is one imposed directly by Act of Parliament, and does not include a sewers rate made by Commissioners of Sewers. Palmer *v.* Earith (14 M. and W., 428)."—Glen, p. 489.

332. Commissioners may allow Time for Repayment by Owners. — Where any such rate, charge, or expenses payable to the Commissioners by any owner of any such premises shall amount to more than half of the net annual value of such building or lands, the Commissioners may, at the request of any such owner, allow time for the repayment thereof, and receive the same by such instalments as they, under the circumstances of the case, consider reasonable, but so that the same be repaid by annual instal-

ments of not less than one-seventh part of the whole sum originally due, with interest for the principal money from time to time remaining unpaid after the yearly rate of five pounds in one hundred pounds during the period of forbearance; and all such instalments when due shall be recoverable in like manner as the original sum.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "lands and premises," (3) "building;" sec. 369 as to recovery of expenses. See also sec. 366 as to such rates and expenses continuing burdens on lands for seven years.

333. Proceeding in case of Occupiers opposing Execution of Act.—If the occupier of any premises prevent the owner thereof from carrying into effect in respect of such premises any of the provisions of this Act, after notice of his intention so to do has been given by the owner to such occupier, the Magistrate may make an order in writing requiring such occupier to permit the owner to execute all such works as may be necessary for carrying into effect such provisions; and if, after the expiration of ten days from the date of such order, such occupier continue to refuse to permit such owner to execute such works, such occupier shall, for every day during which he so continues to refuse, be liable to a penalty not exceeding £5; and every such owner, during the continuance of such refusal, shall be discharged from any penalties to which he might otherwise have become liable by reason of his default in executing such work.

See sub-head (21), sec. 4, for definition of "occupier," (16) "premises," (22) "owner," (19) "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences, and power to mitigate, and sec. 458 as to punishment of abettors.

Sec. 113 of the Public Health Act, 30 & 31 Vict. c. 101, provides a similar penalty in the case of an occupier obstructing the owner.

Claim of Right.—"A person charged under the Public Health Act, 1848, 11 & 12 Vict. c. 63, sec. 148, with obstructing the works of a local Board of Health was not necessarily entitled to have the case dismissed by the Justices because the obstruction took place in the assertion of a private right; nor were the Justices warranted in refusing as frivolous an application to state a special case. Reg. *v.* Pollard (14 L. T., N. S., 599)."—Glen, p. 562.

334. Respecting Existing Contract for Building.—Nothing in this Act contained shall extend to or make

void any agreement in writing entered into before this part of this Act comes into operation in the burgh for erecting or altering any building, but the same shall be performed, with such alterations as may be rendered necessary by this Act, and as if such alterations had been stipulated for in such agreement; and the difference between the cost of the work according to the agreement, and the cost of such work as executed according to the provisions of this Act, shall be ascertained by the parties to the respective agreements, and paid for, or deducted, as the case may require; and if the said parties do not agree upon the amount of such difference, the same shall, on a request of either party (notice being given to the other), be decided by the Surveyor to the Commissioners, and for his trouble in making such decision each of the said parties shall pay to the said Surveyor such sum, not exceeding £1, to be disposed of for such purposes of this Act as the Commissioners shall direct.

See sub-head (4), sec. 4, for definition of "burgh," (3) "building," (9) "Commissioners."

See also sec. 19, *supra*, as to saving of contracts.

335. Respecting Contracts for Leases.—Nothing in this Act contained shall affect any lease, or agreement for a lease, whereby any person may be bound to erect buildings upon any building ground within the burgh, but the buildings mentioned in such lease or agreement shall be erected, according to the conditions which may be rendered necessary by this Act, in the same manner as if this Act had been in operation at the time of making such lease or agreement, and the same had been made subject thereto, and that without either party being entitled to any compensation.

See sub-head (3), sec. 4, for definition of "building," (4) "burgh;" see p. 5, "person."

Form and Service of Notices.

336. Form and Service of Notices.—Unless otherwise herein expressly provided, the following provisions shall apply to the making, giving, delivering, or service of any notice, order, resolution, requisition, demand, or other instrument under this Act, or any bye-laws in force:—

(1.) It may be in print or writing, or partly print and partly writing, and may be authenticated by the name of the Clerk or other proper officer being affixed thereto in print or writing.

See sub-head (8), sec. 4, as to definition of "Clerk," (22) "owner," (21) "occupier," (16) "premises," (3) "building," (20) "Magistrates;" see p. 5, "person." See sec. 20, Interpretation Act, 1889, as to meaning of writing.

It will be observed that this section applies to the making, giving, delivering, or service of any notice, order, resolution, requisition, demand, or other instrument under this Act, or any bye-laws in force, *unless otherwise herein expressly provided.* Where, therefore, there is an express method of notice provided by any section of the Act, it must be followed, and care ought to be taken that the mode prescribed is followed. See Campbell *v.* Leith Police Commissioners, 28th Feb. 1876 (8 M., H. L., 35). But where there is no express provision for a specific mode of notice, then the procedure in this section must be followed.

The first thing to be observed is that the notice or order must in itself be clear, precise, and such as will reasonably convey to the party upon whom it is served what it is the Commissioners require. In Youden *v.* Jackson, 16th July 1887 (14 R., 1001), a notice that Commissioners "intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the waggon road, to make the roadway thereof, and a footway on both sides with kerb and gutter; plan of the said intended works may be seen by all persons interested therein, at the office of the Commissioners, Bank Street, Leven," and fixing a day for hearing parties, was held by the Second Division to be sufficient. But in the more recent case of Campbell *v.* Magistrates of Edinburgh, 24th Nov. 1891 (19 R., 159), the First Division held that notices to pave or causeway a street, under the provisions of the Edinburgh Municipal and Police Acts, which merely called upon the proprietors "to free the foot-pavements or foot-paths of said street (Rossie Place) from obstructions, and to properly level, make up, construct, pave, and complete the same to the reasonable satisfaction of the Magistrates and Council, within one month from and after the 22nd October 1891," were insufficient, in respect that they did not sufficiently specify the nature of the work required to be done. In that case the Lord President (Lord Robertson) said: "The Magistrates have acted upon the theory that all that they have to do is to serve notices which amount to nothing more than a reminder to the proprietor of the terms of a section of the Act of Parliament. The notice tells him that the street must be properly levelled, made up, constructed, paved, and completed, but as to the way or manner in which the proprietor is to set to work, the notice is absolutely silent. We have to consider, having regard to the alternative provisions contained in the Act for paving or causewaying the streets, whether that was an adequate requisition

or notice. It is to be observed that the Statute contemplates that the proprietor shall be apprised of what the Magistrates call upon him to do at his own hands, and that, failing his doing this himself, the Magistrates may do it themselves. I take it that, according to the statutory provision, a proprietor is entitled first of all to know specifically what he is required to do, in order that he may consider whether he can conveniently undertake the work at his own hand, or whether he will allow the second alternative of the section to come into play, under which the Magistrates do it at his expense. There might be circumstances under which the proprietor would prefer to execute the work himself, and a great deal must necessarily depend upon the nature and quality of the work he was called upon to perform. Accordingly, I think the Magistrates are bound to give, not minute details of the work to be done, but an indication of it sufficiently specific to enable the proprietor to take advantage of the provisions of the Statute, and to judge between the alternatives which are offered to him. . . . . I think the simple plan is for the Magistrates to make up their minds in the first instance, before they send out their notice, what it is reasonable to ask, and to state what they require. I do not think that we are making an undue demand upon the Magistrates in laying down that their notice, which is the statutory communication of their requirements, and from the date of which the time for appealing runs, must contain further information, and must state specifically what the proprietor is called upon to do. This does not imply that the notice requires to enter into minute specification, for this is not necessary to apprise the proprietor of what he is interested to know, where the matter in hand is the construction of a carriage-way or the making-up of a footpath. I am clearly of opinion that this notice is bad, and that the Court should sustain the appeal."

An appeal against a conviction by the Magistrates of a burgh for a contravention of sec. 130 of the General Police and Improvement (Scotland) Act, 1862, was sustained, on the ground that certain letters from the Superintendent of Police to the proprietor of subjects within the burgh did not amount to the requisition and order by the Commissioners required to be served under said section before jurisdiction arose to the Magistrates. See Thomas Kirkpatrick *v.* Police Commissioners of Dumbarton, 29th May 1870 (1 Couper, 434).

It is of the utmost importance that the notice given should be under and in terms of the proper section of the Act founded on, as well as of this section, otherwise the Commissioners will not be entitled to recover any expenses incurred by them. See Magistrates of Edinburgh *v.* Paterson, 3rd Dec. 1880 (8 R., 197), referred to under sec. 133, p. 208.

And where a notice has been given under a certain section or sections, to do a work in a specified manner, it will not be safe for the Commissioners to do the work in a different way from that specified in the notice, otherwise they will not be entitled to assess for the expenses incurred. See Hillhead Police Commissioners *v.*

Martin and Bruce, 27th Nov. 1889 (17 R., 125), referred to under sec. 133, p. 209.

Where Commissioners may have given a notice under a wrong section of the Act, it is competent for them, at least before the work is executed, to give a new notice whenever the mistake is discovered. In Campbell *v.* Leith Police Commissioners, 26th Feb. 1870 (8 M., H. L., 31), the Lord Chancellor (Hatherley) said: "This whole question of whether or not the notice was a due notice was one which might easily have been avoided and cured, on the part of the respondents, if there had been only a reasonable compliance with the suggestion which was made as to the propriety of giving another notice, which could in no way have damaged or interfered with the powers which they might have been called upon to exercise." And the same rule applies even with regard to notices of assessment. See MacIntosh *v.* Leith Police Commissioners, 18th May 1875 (12 S. L. R., 455), where Sheriff Hamilton held, that when Commissioners had proceeded to deal with a private improvement assessment under clause 152 of the 1862 Act, where it was found that it should have been allocated in terms of clause 151, and when, therefore, the assessment following thereon was illegal, the Commissioners were entitled to rectify, begin *de novo*, and give new notices to levy the assessment under the proper clause of the Act, and this judgment was confirmed on appeal.

The notice "may be authenticated by the name of the Clerk or other proper officer being affixed thereto in print or writing." It will be a safe proceeding to assume here that, according to the recognised canon of construction of such words occurring in Statutes, as laid down by judicial authority, that the word "may" ought to be read as "shall," so that all notices be duly authenticated in the manner prescribed.

In England, "under the Public Health Act, 1848, 11 & 12 Vict. c. 63, sec. 150, a notice could only be served by post on an owner whose place of abode was not within the district, and it was required in such case to be directed to him by name. *Per* Pollock, C. B.: The service of notice under that Act was only required where the section had been resorted to to cure a defect in the wording of the notice; and if the notice were such as would be good at common law, compliance with sec. 150 would not be required. *Per* Pigott, B.: 'I think that if the Magistrates found that notice was given to the servant of the person who was called on to do these works, and then that that servant handed the notice to his master, they would be bound to find that the master had been served.' Waterloo with Seaforth Local Board of Health *v.* Bibby (10 Jur., N. S., 519; S. C., Nom. Mason *v.* Bibby, 2 H. and C., 881; 33 L. J., M. C., 105; 9 L. T., N. S., 692; 12 W. R., 382).

"*Per* Barons Martin and Pigott: A merchant's place of business was his 'place of abode' within the corresponding section of the Public Health Act, 1848, which used that expression instead of 'residence.'

"Service of a notice under sec. 69 of the Public Health Act, 1848,

on a person *de facto* receiving the rent, was held to be a service on the 'owner' within the meaning of the second section of that Act. Peek *v.* Waterloo with Seaforth Local Board of Health, 2 H. and C., 700; 33 L. J., M. C., 11; 9 L. T. (N. S.), 338; 9 Jur. (N. S.), 1344; 12 W. R., 252.

"Where there was a corporate meeting held under the provisions of an Act of Parliament, with a chairman duly authorised to preside over it, a demand made by a collector for payment of poor-rates at that meeting was sufficient. Curtis *v.* Kent Water-Works Company (7 B. and C., 314)."—Glen, p. 508.

(2.) It shall be sufficiently given to any owner or occupier of any property, if addressed simply to the "owner" or "occupier" of the premises (naming them) to which it relates.

The notice will be sufficiently given to any owner or occupier if addressed simply to the "owner" or "occupier" of the premises (naming them) to which it relates. The definition of "owner" given in sub-head (22), sec. 4, and "occupier," sub-head (21), ought specially to be kept in view here.

(3.) It may be served upon the person to whom it relates either personally or through the post-office, addressed to him at his usual or last known place of abode or business, or by delivering the same to some inmate there, or in case of an occupier to an inmate of the building to which the document relates, or if the building is unoccupied and the place of abode of the person after due inquiry cannot be found, by affixing the same or a copy thereof upon some conspicuous part of such building, or in case of a person employed on any ship or vessel by leaving it in the hands of a person on board thereof and connected therewith; and where any owner resides beyond the jurisdiction of the Magistrates of the burgh, such owner may be cited by delivering the citation to his known factor or agent, or person drawing the rents; or if there be no factor, agent, or person drawing the rents, the occupier of the premises, or any of them, may be cited, and shall take burden for the owners, and have right of relief against them.

As to serving by post, it was held, in Leith Police Commissioners *v.* Kirk, referred to in Appendix, that a notice addressed "George Kirk's Trustees, per Mrs. Kirk, Leith Walk, Leith," and posted to that address, was sufficient service. See also sec. 26, Interpretation Act, 1889, 52 & 53 Vict. c. 63.

As to what is a "conspicuous" part or place, see Campbell *v.* Leith Police Commissioners, 28th Feb. 1870 (8 M., H. L., 31; Lord Chancellor's observations, p. 32), and Youden *v.* Jackson, *supra*.

Where the question of time enters into the service of the notice, it will be well to keep in view Wilson, 1st Dec. 1891 (19 R., 219), where it was held that, in order to comply with the provisions of sec. 67 of the Bankruptcy (Scotland) Act, 1856, there must be an interval of six days after the close of the day of the Gazette notice of the award of a sequestration, and the date to be fixed for the election of a trustee. And also Lang's Trustee *v.* Steele, 23rd Feb. 1892 (19 R., 488). The Bankruptcy Act, 1856, sec. 98, enacts that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." On 26th October, one of the commissioners in a sequestration sent a notice to the Gazette calling a meeting of the creditors. The Gazette containing the notice was published on 27th October, between six and seven P.M. On the afternoon of the 27th October the commissioner sent a notice of the meeting to the trustee, but this notice was not delivered to the trustee till ten A.M. on the 28th, in consequence of its being contained in a registered letter, which could not be delivered after business hours on the 27th, the trustee's office being then shut. In an appeal by the trustee against a resolution passed at the meeting—*held*, that due notice had not been given to the trustee, and therefore that the meeting had not been duly called.

With regard to the occupier of the premises taking burden for the owners, and having right of relief against them, see secs. 330 to 332 inclusive.

337. Power to Cancel or Vary Notice.—It shall be lawful for the person sending such notice to cancel it, or to give a new notice to the same or to any other person in respect of the matter, or for the enforcement of the obligation referred to in it: But nothing herein contained shall authorise the withdrawing or cancelling of notices given under the Lands Clauses Acts, unless and except in so far as allowed by such Acts.

See p. 5 as to "person;" see sec. 336 as to "notice." See Campbell *v.* Leith Police Commissioners, and MacIntosh *v.* Leith Police Commissioners, referred to *supra*.

338. Service of Notice on Commissioners.—Any notice to, or demand on, the Commissioners under this Act may be served on the Commissioners by being delivered to the Clerk, or by being sent through the post in a registered letter, directed to the Clerk of the burgh according to its corporate name, in which latter case service shall be deemed to be effected on the burgh on the day on which such letter would be delivered in the ordinary course of post.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "Clerk," (4) "burgh;" sec. 336 as to "notice." See also sec. 56, *supra*, as to service of actions on the Commissioners.

In Steele and others *v.* Strathie, 23rd Feb. 1892 (29 S. L. R., 382), the Bankruptcy (Scotland) Act, 1856, by sec. 98, provides that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." A commissioner called a meeting by a notice in the Gazette, which is published in the evening. Upon the afternoon of the day of publication he sent notice to the trustee, by a registered letter, which was not delivered until the following morning. *Held*, that the requirement of the Statute had not been complied with, as the notice to the trustee had not been timeously given.

APPEAL.

339. Appeal.—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, or resolution, or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session, by lodging a note of appeal within fourteen days after intimation of the order or deliverance of the Commissioners complained of, or within fourteen days after the commission of the act complained of, with the Sheriff-Clerk of the county in which the burgh is situated, if the appeal is made to the Sheriff, or with any Principal Clerk of Session at Edinburgh, if the appeal is made to the Court of Session, which note of appeal shall state the grounds of such appeal, and be signed by the appellant or his counsel or agent; and the Sheriff or Court shall order a copy of the appeal to be served on the Clerk to the Commissioners, and appoint him within six days after such service to lodge answers thereto, and shall thereafter hear parties and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, varying, or redressing the order, resolution, deliverance, or act appealed against, and shall award such costs to either of the parties as the Sheriff or Court shall think fit: Provided always, that the judgment of the Sheriff-Substitute shall be subject to review by the Sheriff, and, subject to

this appeal to the Sheriff, the judgment of the Sheriff-Substitute shall be final, and not subject to review by any other Court.

See sub-head (9), sec. 4, for definition of "Commissioners," (30) "Sheriff," (8) "Clerk;" p. 5, "person."

The appeal clause is a most important section, and requires to be carefully considered. An appeal is given to (1) any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under the Act, (2) to any person whose property may be affected, or who thinks himself aggrieved, by any order, or resolution, or deliverance, or act of the Commissioners, made or done under any of the provisions herein contained, "unless otherwise in this Act specially provided." So far as we have observed, there is no clause prohibiting an appeal against any of the matters against which an appeal is given by this clause, so that practically an appeal may be taken against any order, etc., within the scope of these two clauses.

The appeal may be made either (1) to the Sheriff, by lodging a note of appeal with the Sheriff-Clerk of the county in which the burgh is situated, or (2) to the Court of Session, by lodging a note of appeal with any Principal Clerk of Session at Edinburgh.

The note of appeal in either case must state the grounds of appeal, and be signed by the appellant or his counsel or agent.

The note of appeal must be lodged within fourteen days after intimation of the order or deliverance of the Commissioners complained of, or within fourteen days after the commission of the act complained of. It will be found much more convenient to make the appeal within the fourteen days after the order of the Commissioners in respect of which the person feels himself aggrieved, than to wait for the commission of the act complained of. In the latter case the appellant may find himself rather late in obtaining the redress he desires. See Lord Young's remarks in Phillips *v.* Dunoon, *infra.*

The Sheriff or Court of Session, on receiving the note, shall order a copy of the appeal to be served on the Clerk to the Commissioners, and appoint him within six days after such service to lodge answers thereto. The copy note of appeal to be served on the Clerk should contain the grounds of appeal. See sec. 338 as to service of the note of appeal.

The Sheriff or Court of Session thereafter must hear parties and determine the matter of the appeal. In doing so, though the Act does not so provide, there is, of course, power inherent in the Court to allow proof, or make a remit, or take such other procedure as may be necessary to satisfy the demands of justice. After doing this, the Court or Sheriff is to make such order on the appeal, either confirming, quashing, varying, or redressing the order, resolution, deliverance, or act appealed against, and award such costs to either of the parties as the Sheriff or Court shall think fit. The judgment of the Sheriff-Substitute shall be subject to review by the Sheriff,

and, subject to the appeal to the Sheriff, the judgment of the Sheriff-Substitute shall be final, and not subject to review by any other Court.

The finality of the Sheriff's judgment only, however, applies where he does not exceed his powers, nor deviate from the Statute; or, to put it otherwise, whenever the Sheriff acts *ultra vires*, or goes outwith the Act of Parliament, the finality clause will not protect his judgment.

In Anderson, etc., *v.* Widnell, etc., 6th Nov. 1868 (7 M., 81), at a meeting of householders of a burgh it was resolved to adopt the General Police Act, but the meeting failed to fix the number of Commissioners to carry the Act into operation, as is directed by sec. 36. *Held*, in a reduction, (1) that the Act had been validly adopted; but (2) that a subsequent meeting had no power to elect Commissioners, and the election and all subsequent proceedings set aside as incompetent.

"Now, all that had been done was done under the Sheriff's order, and the proceedings had been transmitted to him, upon which he had pronounced a deliverance declaring that the Act had been adopted, and that it applied to the burgh, and caused the deliverance to be recorded in the Sheriff-Court books of the county; and by the 37th clause of the Act it is provided that 'such deliverance of the Sheriff shall be final.' Yet the Court held that this finality only covered what had been regularly done in the execution of the Act, but was of no avail in preserving from challenge anything done outwith the Act."—Irons' Manual, p. 152.

In Lord Advocate *v.* Police Commissioners of Perth, 7th Dec. 1869 (8 M., 244), a suspension and interdict against proposed operations of a body of Police Commissioners, alleged to be in violation of the Statute under which they were acting, held competent, notwithstanding that the Statute provided for an appeal to the Sheriff. See the remarks of the Lord Justice-Clerk (Moncreiff), in this case, *infra*.

In Stirling *v.* Hutcheon, 25th May 1874 (1 R., 935), by the General Police Act, 1862, Commissioners of Police of burghs (not being royal or parliamentary burghs), may adopt the Act by a Special Order, as defined in the Act. Sec. 365 enacts that it shall not be lawful for the Commissioners to do anything by Special Order, unless the resolution to do the same shall have been agreed to by the Commissioners at a special meeting, and confirmed at a second meeting, held not sooner than four weeks after the former meeting, which subsequent meeting has been advertised once in each of the intervening weeks in a local newspaper. Sec. 20 enacts that the resolution, on being confirmed at the second meeting, shall be reported to the Sheriff, who shall, within forty-eight hours, pronounce a deliverance finding that the Act has or has not been adopted. It is farther enacted that the Sheriff's deliverance shall be final, and "shall not be subject to be set aside, or reviewed, or affected by any Court or judicature, upon any ground or in any manner of way whatever."

In an action of reduction brought in the Court of Session to set aside the resolution of the Police Commissioners of a burgh to adopt the Act, and the deliverance of the Sheriff finding that the Act had been adopted, on the ground that the statutory advertisement in the local newspaper had been omitted, the defenders pleaded that the action was excluded by the finality clauses of the Act. *Held* (*rev.* judgment of Lord Mackenzie), that, in consequence of the failure to give notice by advertisement, the subsequent proceedings were outwith the Statute, and, along with the Sheriff's deliverance following thereon, fell to be reduced.

Question, Whether it is competent for the Sheriff, acting under sec. 20, to inquire judicially whether the previous procedure has been regular. In this case the Lord President (Inglis) said: "It is abundantly clear that no such resolutions can be confirmed with effect by the Sheriff unless they are resolutions made and passed in terms of this Statute. In the case of a Special Order, which is the one we are dealing with, it is not a Special Order unless the provisions of sec. 365 have been complied with. Suppose it was a resolution of a single meeting instead of a resolution of two meetings, it would not be a good Special Order, and could never be made final by anything that followed upon it. In short, it appears to me that the finality intended to be provided by sec. 20 of the Statute is a finality in regard to that which the Sheriff has to do and to judge of, but nothing more. The Sheriff has no evidence before him—I do not see how he can have—as to whether the advertisements have been properly made in the case of a Special Order, or whether all the provisions of sec. 365 have been complied with. What he has got to look to is the terms of the resolution where there is but one, or of the resolutions where there are two, in the case of a Special Order; and if he finds upon the face of these resolutions, that they bear that this Act has been adopted in whole or in part, then he is bound to find and declare accordingly. The finality intended, I apprehend, is, that it shall not be in the power of any one hereafter to say that the resolution is not explicit to the effect of adopting the Act in whole or in part, or of refusing to adopt it, as the case may be. But when the resolution or the Special Order, which is laid before the Sheriff, is liable to fatal objections, founded on violations of the Act of Parliament, there can be no finality in these resolutions; and the mere fact that the Sheriff has pronounced a deliverance echoing the resolutions, and has recorded his deliverance in the Sheriff-Court books or the burgh books, can never make them good. It is impossible, I think, to hold that this is the finality contemplated by this Act of Parliament. The resolution is bad: the Special Order is bad. It is not a Special Order under the Statute, because it has not complied with the conditions of the Statute, and therefore it must be reducible. There is no finality declared as regards the Special Order. The deliverance of the Sheriff is merely something that has followed upon it, to give it publicity and effect, if it be a good Special Order. And therefore it appears to me that the resolutions themselves being bad and

reducible, the deliverance of the Sheriff upon them falls as a matter of course, and is not protected by that clause of finality which for other purposes is undoubtedly availing."

In Simpson *v.* Board of Trade, 29th Mar. 1892 (19 R., 66), it was *held*, that sec. 542 of the Act 17 & 18 Vict. c. 104, declaring that all orders, decrees, and sentences pronounced under the authority of the Act should be final, and not subject to suspension, except on the ground of corruption or malice, did not exclude a suspension on the ground that the prosecutor had no authority under the Statute to prosecute, and that the complaint and conviction were not in terms authorised by the Statute.

The Merchant Shipping Act, 1854, sec. 520, provides that, "for the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be."

A seaman was charged in the Sheriff-Court of Renfrewshire with a contravention of sec. 255 of the Merchant Shipping Act, 1854, in so far as he had at Brisbane and Melbourne respectively wilfully and fraudulently made a false statement of his own name to the masters of two ships, the one belonging to the port of Melbourne and the other to the port of Glasgow.

Opinions, That, under the provisions of the Merchant Shipping Act, 1854, the Sheriff had jurisdiction to entertain the charge.

The Merchant Shipping Act, 1854, sec. 531, enacts that in Scotland summary prosecutions under that Act may be brought "at the instance of the Procurator-Fiscal of Court, or at the instance of any party aggrieved, with concurrence of the Procurator-Fiscal of Court."

By sec. 6 of that Act, the Board of Trade were empowered "to carry into execution the provisions of the Act."

Held, that a complaint against a seaman for contravention of sec. 255 of that Act was not competently brought at the instance of the Board of Trade with consent and concurrence of the Procurator-Fiscal.

The Summary Procedure Act, 1864, sec. 18, sub-sec. (6), enacts, that in cases where, under the authority of any Act of Parliament, a penalty is or shall be declared to be recoverable by arrestment, poinding, or distress and sale, or imprisonment, or by any combination of these forms of diligence other than before provided for, the judgment may be expressed in Form No. 6 of Schedule K., so far as applicable, "and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in the said Form No. 6."

The Form No. 6 in Schedule K., after giving a form of judgment, with warrant for poinding and sale, and a form of warrant of imprisonment to be issued after the officer's report, continues: "If, at the hearing, it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place

of the warrant annexed to the judgment in the preceding form, say, and in respect it is inexpedient to issue a warrant of poinding and sale (or of arrestment, poinding, and sale), ordain instant execution by imprisonment, and grant warrant to officers of Court to apprehend," etc.

Opinions, That a conviction (under sub-sec. (6)) ordaining instant execution by imprisonment, and not setting forth that it was inexpedient to issue a warrant of poinding and sale, was invalid.

Opinions, That certain circumstances attending a conviction of a seaman for an offence against the provisions of the Merchant Shipping Act, 1854, did not amount to oppression on the part of the Board of Trade.

The four objections stated by the complainer were—(1) oppression; (2) no jurisdiction; (3) bad instance, in respect complaint at instance of Board of Trade, while it should have been at instance of Procurator-Fiscal; and (4) that sentence ordered instant imprisonment, whereas imprisonment was only to follow after arrestment and poinding.

With regard to the third, the Lord Justice-General (Robertson) said: "I am bound to say that I think this complaint is bad, and that this is a defect entering completely into the essence of the proceedings, and fatally vitiating them. An objection of this kind is not excluded by the wide terms of sec. 542, because, if the view I have stated be well founded, this was not a proceeding under the Act founded upon.

"That is enough for the decision of the case, because the conviction must be quashed. But another point has been argued to us, and I think the parties are entitled to our judgment upon it. It is pointed out that this conviction adjudges the person complained against to forfeit and pay a sum of £10 of penalty, with £1. 10s. expenses; and, in default of immediate payment thereof, adjudges him to be imprisoned for the space of thirty days. Now, I think that that is an error, and I think again that it is a fatal error. . . . Therefore, in my opinion, that is a fatal objection to the sentence; and I think it a matter of high importance, that Magistrates should not abridge the number of steps by which imprisonment is reached as a punishment of a statutory offence. In this case, for aught that appears, this £10 might have been recovered by an arrestment and poinding, and no necessity have arisen for imprisonment. I mention that, however, merely as illustrating the expedience and importance of the statutory provisions. Upon this, therefore, as well as upon the bad instance, I think the conviction must be quashed."

But, on the other hand, unless there be excess of power, deviation from the Statute, or irregular proceedings on the part of the Commissioners, relevantly averred, the Court will not interfere with the discretion vested in the Commissioners by the Statute.

Thus, in Guthrie and others *v.* Miller, 25th May 1827 (5 S., 711), it was laid down that the Court will not interfere with the exercise of the discretionary powers vested in Commissioners of Police under a Local Police Act, except in cases of excess of power, or deviation

from the Statute. See the remarks of the Lord Justice-Clerk (Boyle) and Lord Alloway in this case, *infra.*

In Nicol *v.* Magistrates of Aberdeen, 20th Dec. 1870 (9 M., 306), the Lord President said: "But then it is said, in the next place, that this is an improper transaction altogether for a Municipal Corporation to enter into, and that, if it was not absolutely beyond their powers, it is at all events a matter in which they ought to be controlled by the interposition of this Court, and prevented from coming to a decision, upon the ground that the transaction is plainly an inexpedient and improper one for the benefit of the community, and such as no Municipal Council should embark in. Undoubtedly that raises a question of very great importance. It is in the jurisdiction of this Court to interfere and control the proceedings of a Municipal Council upon sufficient ground—upon the ground either that there is plain excess of power on the part of the Council, or upon the ground that what they are proceeding to do is plainly against the interests of the community which they represent; but where there is no excess of legal power, it certainly requires a very strong case to induce the Court to interfere with the discretion which the law vests in the Municipal Council in the first instance." And Lord Kinloch said: "The only other ground of suspension which I have felt myself called on to consider is, that the proposed purchase is so grossly inexpedient and improper as to call on the Court to interdict it. I have no doubt of the competency of the Court, not merely to control such acts of a Town Council as are *ultra vires* in respect of intrinsic illegality, but also such as are so manifestly inexpedient and improper as to go beyond the bounds of fair administration. The case, however, must be a very clear and strong one to warrant the interposition of the Court. With the discretion of the Town Council, when acting within the bounds of administration, the Court is not entitled to interfere."

In Steel *et al. v.* Commissioners of Police of Gourock, 11th July 1872 (10 M., 954), a Local Authority under the Public Health Act having resolved to carry out a scheme of drainage, certain feuars petitioned the Sheriff for interdict, on the ground that the proposed plan of drainage would cause a nuisance, and injuriously affect their property. *Held*, that as the application was really an attempt to bring the resolution of the Local Authority under the review of the Sheriff, it had been rightly dismissed.

Observed, That if a nuisance is actually created by the operations of a Local Authority, those affected by it have an interest and a right to complain.

Question, Whether the Court would interfere if it were relevantly alleged that the operations of the Local Authority would necessarily cause a nuisance.

Robert Small & Company *v.* The Commissioners of Police for Dundee, 14th Nov. 1884 (12 R., 123). The Dundee Police and Improvement Act, 1882, 45 & 46 Vict. c. 185, sec. 329, provides an appeal by any person "aggrieved by any order or resolution" of the Commissioners, to the Sheriff, or to either division of the Court of

Session, and directs the Court to hear parties and determine the matter of the appeal, and to make such order thereon, "confirming, quashing, or varying" the order or resolution of the Commissioners, as they shall think fit.

A person proposing to build brick-kilns, etc., within the burgh, being dissatisfied with the deliverance of the Commissioners, under secs. 121 to 124, upon the plans of his proposed erections, in respect that they required the chimney to be built 150 feet high instead of 80 feet, as proposed by him, appealed to the Court of Session.

Held, on a consideration of the reasons of appeal, that there was no sufficient statement to warrant the Court interfering with the judgment of the Commissioners.

In Phillips *v.* Dunoon Police Commissioners, 21st Nov. 1884 (12 R., 159), sec. 146 of the General Police Act, 1862, empowers the Police Commissioners to cause any streets within their jurisdiction "to be raised, lowered, altered, and formed," as they think fit, and gives any person considering himself aggrieved right of appeal to the Sheriff, as after provided. Sec. 394 provides that twenty-eight days "before fixing the level of any street, which has not been theretofore levelled," the Commissioners shall give notice of their intention, specifying time and place where all persons interested may be heard thereon. By sec. 395, after hearing parties, the Commissioners are to pronounce an order, abandoning, altering, or for the execution of the work in their discretion. And, by sec. 396, appeal to the Sheriff, in manner provided, is given to any person aggrieved by the order of the Commissioners. With regard to other appeals to the Sheriff allowed by the Act, sec. 397 provides merely that they shall be disposed of summarily. In both classes of appeal the Sheriff's judgment is final. The Police Commissioners of a burgh, in rebuilding a bridge within burgh, proceeded, without any notice, slightly to alter the levels of the street which formed the access to it on either side. A proprietor of premises fronting the street near the bridge applied for interdict against them interfering, without the statutory notice, with the levels of the street, and craved an order on them to restore matters to their former condition. He averred that the street had not previously been levelled. This was denied by the Commissioners, though they did not state when it had been levelled. *Held*, (1) that unless it were proved that the street in question had not previously been levelled, the case fell under sec. 146, which permitted the Commissioners to proceed without notice, though it gave an appeal to the Sheriff; (2) that, as the complainer's resort to his common-law remedy of interdict depended on the applicability of sec. 394, and as the applicability of that section depended upon the street not having previously been levelled, the onus lay on the complainer of proving that fact (*diss.* Lord Rutherfurd-Clark, who was of opinion that sec. 394 applied whenever the alteration on a street amounted to re-levelling).

In this case (12 R., 159) Lord Young said: "The General Police and Improvement Act, 1862, makes provision for levelling streets. It also makes provision for repairing, improving, and maintaining

them. It provides an appeal to the Sheriff by any individual proprietor, or even any member of the public who considers himself aggrieved by the action of the Police Commissioners—not always or even generally an appeal in the sense with which we are familiar, but in a more popular sense, in which appeal is equivalent to addressing one's self with a complaint. In the majority of sections in which appeal is mentioned, it is not appeal in a regular judicial process that is intended, but merely a direction or permission to the person who conceives himself aggrieved, to address himself to the Sheriff and to state his grievance, who will give redress if in his opinion the circumstances warrant it.

"Under secs. 394, 395, and 396 of the Act, an appeal of a more formal kind is provided.

"The ordinary and less formal appeal is given under sec. 146, as well as under a great many other sections.

"The latter words of sec. 397 make provision for the summary disposal of all appeals to the Sheriff not otherwise specially provided for. And, though no form of appeal is suggested, it is plain that there must be a written note to the Sheriff stating the alleged grievance, asking him to satisfy himself whether such grievance exists, and if so, to give such relief as he thinks right.

"But sec. 394 makes provision for a more formal appeal, in certain matters where the Police Commissioners require to precede their action by public notice, appointing a time when any persons who object to the Commissioners' proceeding shall be heard before the Commissioners themselves. What the Commissioners may order after such hearing is subject to appeal to the Sheriff, under sec. 396, and that appeal is not only against an order or deliverance entered in the Commissioners' books, but is to be taken by notice to the Commissioners, accompanied by a statement in writing of the grounds of appeal.

"The present case is presented to the Sheriff on the footing that the operations complained of were only lawful under sec. 394—that is, on previous public notice, etc.—and therefore the application proceeds on the assumption that the Local Authority, having done what they did without notice, have put themselves without the Statute; and the complainer maintains that the operations actually performed must be undone, leaving the Commissioners to proceed under the Statute, if they still want to carry them out.

"If the operations were of the character provided for under sec. 394, I do not think it follows—though on this point I pass no decided opinion—that what has been actually done, I assume irregularly, must be undone. The Statute does not provide that, and it would be a very unfortunate thing indeed, to my mind, if such provision had been made, so that the undoing was inevitable. The result might be to ordain very proper operations, and operations which would just have to be done over again, to be undone. Now, it does not always follow in law, that what has been done irregularly shall be undone. Many cases may be figured in which that would be quite extravagant, and in which things done irregularly, if found after

inquiry to be such that if done regularly they ought to have been done, must be allowed to stand. Even if the operations fell under the provisions of sec. 394, we might still give the complainer opportunity to state his complaint, and to convince the Sheriff that there was something about the operations performed in respect of which they ought not originally to have been commenced or performed, and the Sheriff could then give redress, if he thought proper.

"Though the foregoing remarks are not necessary to the decision of the present case, they are not by any means foreign, I think, to the matter before us, and may guide the parties in their future conduct. If they take the line which I venture to indicate to them, they will still appeal to the Sheriff in the popular sense of the term, and ask him if, in his opinion, there is any grievance, anything which ought not to have been done, to see it redressed, and parties restored against it."

In Brand *v.* Police Commissioners of Arbroath, 23rd May 1890 (17 R., 793), the Lord President said: "By the Statute, the Sheriff's interlocutor in every case of this kind, where an appeal is made to him against something which has been done or left undone by the Commissioners, is declared to be 'final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way.' No doubt, if the Commissioners or the Sheriff dealt with something which was not within their jurisdiction, the case would fall under the principle applied in the cases which have been cited to us. But the matter which was dealt with here was as to the necessity of constructing a drain upon the pursuer's premises, a matter specially given to the Commissioners by the Statute—that is, a matter on which they may make orders, and these orders may be appealed to the Sheriff. The matter is thus undoubtedly within the jurisdiction both of the Commissioners and of the Sheriff. Mere irregularities of procedure certainly do not open the way to appeal; that is the very thing which is intended to be shut out by the Statute. If the Commissioners and the Sheriff deal with a matter within their jurisdiction, and do not overstep the limits of the Statute, I do not see how the Court can interfere. These are the principles on which the cases cited to us under the Debts Recovery Acts and the other Statutes were decided."

In M'Callum *v.* Barrie, 26th February 1878 (5 R., 686), Lord Young said: "The Commissioners have probably a large discretion in fixing the amount, with their exercise of which the Court will not interfere on other than clear and urgent grounds, but I am not, as at present advised, prepared to hold that they have absolute power, or that their exaction is not examinable by the Court to which they resort to enforce it."

In England the same principle applies. Cockburn, C. J., said, *In re* Broughton Local Board of Health, 12 L. T. (N. S.), 310): "Sec. 137 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, sec. 137, does not apply if the Local Board have acted without jurisdiction. If they have done anything irregularly, which is

nevertheless within their jurisdiction, the section would apply, but here it is said they have made a rate when they had no right to make it."—Glen, p. 497.

Remedy for Persons aggrieved other than Statutory.—Persons aggrieved against any act or order of the Commissioners, where such is *ultra vires* or outwith the Statute, are not limited to the remedy provided by the Act. Both the Supreme and Sheriff Courts will give redress against any proceeding of the Commissioners which is in excess of their powers, or where they have deviated from the statutory provisions. In Campbell *v.* Leith, 29th June 1865 (3 M., 1035), and 21st June 1866 (4 M., 853), the Court, in a suspension and interdict by Mr. Campbell, to prevent the Commissioners carrying out a resolution to pave and causeway a private street, on averments that the proceedings of the Commissioners were *ultra vires*, that the statutory notice had not been given, and that the street in question was not a private street, disregarding a plea by the respondents that the complainants had failed to appeal to the Sheriff, in terms of the Statute, against the order of the Commissioners for the execution of the said work, that the said order was therefore final, held that they had jurisdiction to inquire into the matter, and, before answers, allowed pursuers a proof of their averments; and the House of Lords sustained the suspension and interdict, holding that the Commissioners had given notice under the wrong section of the Act. So, likewise, in the Lord Advocate *v.* Perth, 7th December 1869 (8 M., 244). In that case the Lord Justice-Clerk (Moncreiff) said: "In the ordinary case, it would now, I think, be held that where statutory powers are given, and a statutory jurisdiction is set up, all other jurisdictions are excluded, and it appears to me that of late the views entertained on this point have been less strong than those expressed in the case of Bremner (Fac., 4th December 1817). Accordingly, if in the present case it turns out on inquiry that the proposed operations are quite within the Statute, I should be for refusing the note, as I consider that, in regard to questions arising in the administration of the Statute and within its admitted scope, the Sheriff is the sole judge, and he is final. If, however, the complainer's allegations be true, the proposed operations are admittedly outwith the Statute, and *ultra vires;* and I know of no case in which the common-law jurisdiction of the Supreme Court has been held to be excluded where the act proposed to be done is prohibited by Statute." So, likewise, in Millar's Trustees *v.* Leith, 19th July 1873 (11 M., 932), the principle laid down by the Lord Justice-Clerk was recognised and followed. This was an action of declarator at the instance of two joint-proprietors against the Leith Police Commissioners, to have it found that a piece of ground in the burgh, which the Commissioners had treated as a private street, was not a private street, but the private property of the pursuers. The pleas stated in the defence were, *inter alia*, that the pursuers having failed to object to the execution of the said work in manner provided by the Act, the whole proceedings of the Commissioners were now final and not subject to review, and the pursuers were

barred from complaining of or objecting thereto. The Lord Ordinary (Jerviswoode) sustained their plea, and dismissed the action. The Second Division, however, on reclaiming note, considered that the question of jurisdiction, and the finality of the proceedings by the defenders, depended upon the result of an inquiry into the fact of the ground, when interfered with by the Commissioners, being strictly private street, or private property belonging exclusively to the pursuers. For, on the one hand, if the ground was possessed by the pursuers as their private exclusive property, and not a street at all in any proper sense, it was manifest that the Commissioners, having interfered with it, might justly be held to have exceeded their statutory powers, and in that case to have no defence to this action, on the principle of construction recognised by this division of the Court, in the case of the Perth Commissioners *v.* Lord Advocate, 7th December 1869 (8 M., 244). And, on the other hand, it was considered that if the ground, having regard to the condition in which it was at the date of the operations, came within the description of private street, the defence, in that view of it, must be sustained. Accordingly, a proof before answer was allowed, on advising which the Lord Ordinary's interlocutor was adhered to. See also Adam & Spowart *v.* James Moir, junior, Clerk to Alloa Police Commissioners, 24th November 1874 (2 R., 143), where an application was made at the instance of the owner and tenant of two shops and a dwelling-house in Alloa, complaining of the erection of a urinal, and craving its removal; the complainants averred that no notice was given of the Commissioners' intention to erect a urinal, that it was erected illegally, and was a nuisance. In the Sheriff-Court a proof was allowed, but the respondents appealed to the Court of Session. The Court adhered to the interlocutor appealed against, holding that a petition at the instance of a proprietor of a house in a burgh, praying for the removal, as a nuisance, of a urinal erected by the Police Commissioners, was competent at common law. Lord Neaves said: "That if the petitioners establish their averments of nuisance, they place the Commissioners outwith the Statute altogether; for the Statute does not give them power to erect a nuisance." See also Shand *v.* Henderson, 28th July 1814 (2 Dow's Appeals, 519). In this case the Lord Chancellor (Eldon) said: "The authority of the Commissioners, then, extended only to such matters and differences as might arise from what should be done in pursuance or in execution of the powers thereby granted. But the Act having required that a particular line should be followed, if that line had not been followed, and the company had cut through an individual's grounds without his consent, he apprehended that it was impossible to say that they were proceeding in pursuance and in execution of the powers thereby granted. They were only doing so when they proceeded according to the exact terms and provisions of the Act. . . . One was anxious, therefore, to point out that their principle in England was this—that the company should not be interfered with if they acted within their powers; but that for the very reason that such large

powers were given, the Court would keep them strictly within the limits of those powers. . . . If the acts done were within the powers given, the probability was that the Legislature intended to give a local summary jurisdiction, and not to leave the company in every question that might arise to be dragged before the Court of Session. But if the acts done were not within the powers, then redress was to be sought for the wrong in the same manner as for other wrongs. It appeared to him, looking at all the circumstances, . . . that if these acts were not such as the Act of Parliament authorised, their Lordships had no right to send the appellant to the Commissioners, and, of course, the Court of Session had no right to do so."

On the other hand, it has been authoritatively settled by the Court, in a number of decisions, that where the Commissioners are acting within their powers, and in terms of the Statute, the Court will not interfere with the exercise of the discretionary powers vested in the Commissioners of Police under Police Acts. Guthrie and another *v.* Millar, 25th May 1827 (5 S., N. E., 663). Lord Justice-Clerk Boyle said, in this case, that "if the Court saw a case of wilful denial of rights under the Statute, or a clear excess of power, we would interfere." And Lord Alloway said: "The doctrine laid down from the chair as to jurisdiction cannot be disputed. The great distinction is, that when this Court has no previous jurisdiction, it requires express terms to exclude; but when there is no previous and radical jurisdiction, and the jurisdiction is created by the Statute, the question comes to be determined on this ground, Have the parties entrusted with powers exceeded them? For where they keep within the bounds of the Statute which commits to them a discretionary power, unless excess of that power is pointed out, this Court cannot well interfere. There must be a local power for exercising this discretion, and it could not be more fairly vested than it is here; and, in so far as they merely exercise that discretion, I would not interfere." What may be considered excess of power or deviation from the Statute is always a question of circumstances. In Guthrie *v.* Millar, before referred to, Lord Justice-Clerk Boyle said: "It would be absurd for this Court to sit here and decide all the questions which fall under the ordinary duty of Commissioners of Police. . . . We cannot be called on to fix whether there is to be a lamp at this point and a watchman at that;" and the Court accordingly declined to interfere with the exercise of the Commissioners' discretionary power. So, likewise, in Smeaton *v.* Police Commissioners of St. Andrews, 17th May 1865 (3 M., 816), where it was held that the Court of Session has no jurisdiction to judge of the necessity of drainage works under the Act, there being a statutory remedy provided for those aggrieved in such matters. In that case the Lord Ordinary (Mure) said: "The Lord Ordinary cannot adopt the construction that whenever the necessity of a proposed work is disputed, and the non-necessity is offered to be proved, there is an excess of power on the part of the Commissioners which will let in the jurisdiction of

the Supreme Court. It, on the contrary, appears to him that the question, Whether any particular work is necessary for the drainage of the burgh? is one which is, by the Statute, left to the Sheriff, and which is proper as well as competent for him to determine. . . . If the averment, that works of which notice has been given are unnecessary, is sufficient to oust the jurisdiction of the statutory judge and let in that of the Court of Session, it appears to the Lord Ordinary that there will be few cases in which this Court might not be called on to interfere; and that the benefit of the local jurisdiction, which the Statute contemplates, would thus be done away with."

In Leith Police Commissioners *v.* Campbell, 21st December 1866 (5 M., 247), it was held that, under the General Police and Improvement (Scotland) Act, 1862, the jurisdiction of the Sheriff, as to whether a street is a public or a private street within the meaning of that Act, is final and privative. In this case the Lord Justice-Clerk (Inglis) said: "A reduction, therefore, of the Sheriff's decree, on the ground that he had gone wrong in deciding that a certain street was a public street or a private street, as the case might be, is clearly incompetent. The only remaining question is, supposing the Sheriff to have gone wrong in his interpretation of the Statute, to have misunderstood what the Statute gave him power or directed him to do, whether it is competent to the Commissioners to come here with the view of quashing the proceedings, and commencing new proceedings before the Sheriff? In dealing with this point, I think it important to consider whether this Court had jurisdiction in the subject of the action antecedent to the Statute or not; for if this Court had jurisdiction, it is difficult to oust its jurisdiction; but if it had not, it is more easily to be inferred that the Statute was intended to give the Sheriff a privative jurisdiction. Now, the subject of this action is entirely a matter of burgh police, with which this Court never had anything to do; and this Statute has, I think, for its object to introduce a procedure very summary and final. I think the fair construction of the Statute is, that the question whether a street be a public or a private street, for the purposes of the Act, shall be decided by the Sheriff, and that there is no other form in which the proceedings of the Commissioners can be reviewed; in short, that the Sheriff's jurisdiction is privative. But where a clear case is alleged of the Sheriff having exceeded his powers under or deviated from the Statute, the Court will give redress." In The Lord Advocate *v.* The Perth Police Commissioners, before referred to, the Lord Justice-Clerk (Moncreiff) said: "I know of no case in which the common-law jurisdiction of the Supreme Court has been held to be excluded where the act proposed to be done is prohibited by Statute. It is quite true that the complainer might have got redress in a more summary form by going to the Sheriff. But what if his appeal had been dismissed? In that case, assuming the complainer's allegations to be true, the Sheriff would have sanctioned an illegal act, and the complainer would have been entitled to invoke the jurisdiction of the

Supreme Court to give him a remedy. A clause of finality cannot protect the Sheriff's judgment, when, taking an erroneous view of the Statute, he either refuses to sanction a lawful act, or sanctions an unlawful one. It applies only to those matters of detail which concern the due and proper administration of the Statute, and which are best disposed of by the sound discretion of a local judge." See also Erskine *v.* Kerr, 15th December 1857 (20 D. 277; 30 Jur., 140).

PART V.—RATING AND BORROWING POWERS.

Assessment for General Purposes.

340. Commissioners to levy Burgh General Assessment.—Once in each year the Commissioners (being summoned in manner hereinbefore directed by notices, which shall state that the meeting is for the purpose of laying on an assessment) shall assess all occupiers of lands or premises within the burgh, according to the valuation roll made up, or according to an estimate of the valuation roll about to be made up, in terms of the Acts in force for the valuation of lands and heritages in Scotland for the time, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the general purposes of this Act, and shall fix a day on or before which the same shall be payable, and another day upon which appeals by any person complaining that they have been improperly assessed shall be lodged with the Clerk or Collector, and another day or days on which such appeals shall be heard by the Commissioners; and the rate of assessment and day fixed by the Commissioners for payment shall be published by handbills posted in the burgh, or by advertisement in one newspaper published or circulating therein: Provided always, that such assessment shall be imposed as from the term of Whitsunday in any one year to the term of Whitsunday in the following year, and shall not in any year exceed a rate equal to 4s. in the £ of the gross yearly rent or value of such lands or premises where the Commissioners have supplied or resolved to supply the burgh with water in terms of this Act, or otherwise at a rate equal to 2s. in the £ of the gross yearly rent or value of such lands or premises; and such assessment shall, for the purposes of

this Act, be called the Burgh General Assessment: Provided further, that when in any burgh under the provisions of any Act of Parliament, a higher rate of assessment is now and has been in use to be levied upon lands or premises above a certain fixed rent than upon lower rental lands or premises, it shall be in the power of the Commissioners, in laying on the assessment under this Act, to continue the same relative rates of assessment if they think proper.

See sub-head (9), sec. 4, for definition of "Commissioners," (21) "occupier," (16) "lands and premises," (4) "burgh," (8) "Clerk," "Collector."

Once in each year, generally at the meeting in the month of October, the Commissioners are to assess all occupiers of lands or premises within the burgh in the sums necessary to be levied for the purposes of the Act. See sec. 50 as to mode of summoning meetings.

By sub-head (3), sec. 55, it is provided that the Commissioners shall estimate, assess, levy, and apply the sums of money hereby authorised to be raised for the purposes of this Act. An estimate ought therefore to be prepared of the sum necessary to be raised in view of the different purposes of the Act to which the burgh general assessment may be applied; upon this basis the assessment will be laid on, according to the valuation roll made up, or according to an estimate of the valuation roll to be made up in terms of the Valuation Acts. In M'Lachlan *v.* Tennant, 4th May 1871 (4 Jur., 390), it was held incompetent to adduce evidence to contradict the valuation. See *infra*, under sec. 349.

In M'Ghie, etc. *v.* The Police Commissioners of Glasgow, 4th March 1891 (7 Scot. Law Rev., 140), it was held that an assessment based on the valuation roll and not on the actual rent was correct, and appeal dismissed.

As to laying on of assessment in accordance with valuation roll, see also Burgh of Partick *v.* Marshall, 16th Feb. 1881 (8 R., 480), referred to under sec. 345, *infra*.

In Lanarkshire County Council *v.* Wishart, 14th July 1891 (Sheriff Court Reports, 295), the "yearly value" to be entered in the valuation roll is the rent at which "in their actual state" subjects might be reasonably expected to let from year to year; and when the Assessor had entered certain houses, part of other subjects, as "unfinished, £50," this entry was held as a mere memorandum, and as showing that they were not assessable.

Opinion, That the Assessor can deal with subjects only as in their actual state when the roll is made up. See Paterson, 1878 (9 R., 1237).

The words "subject to the exceptions hereinafter provided" seem to refer (1) to the owners who may be assessed in virtue of secs. 344, 345, and 346, instead of the occupiers, and (2) to the lands or premises, the annual value of which for the assessments under the

Act is, by sec. 347, only to be taken at one-fourth of the annual value as entered in the valuation roll.

The Commissioners are to fix a day on or before which the assessment is to be payable. This is usually, in practice, about the 11th November. They must fix another day upon which appeals by any person, complaining that he has been improperly rated or assessed, may be lodged with the Clerk or Collector. This is generally fixed about the 1st and 3rd day of November. They must also fix another day or days on which appeals shall be heard. This is usually fixed about the 6th, 7th, or 8th day of November. The rate of assessment and day fixed for payment must be published by handbills posted in the burgh, or by advertisement in one newspaper published or circulating in the burgh. The posting of handbills is the mode adopted in most burghs as being the better method of advertising. See handbills in Appendix. The assessment must be imposed as from Whitsunday in one year to Whitsunday of the following year. See sec. 346 as to assessing persons occupying for periods less than a year.

The assessment must not in any year exceed a rate equal to 4s. in the £ of the gross yearly rent or value of such lands or premises, where the Commissioners have supplied or resolved to supply the burgh with water in terms of this Act, or otherwise at a rate equal to 2s. in the £ of the gross yearly rent or value of such lands or premises.

A doubt having arisen as to the powers of Police Commissioners in assessing for water, the opinion of Counsel was taken as to whether they were entitled, in assessing for police purposes, to assess for water at a rate exceeding 1s. per £, but keeping the whole annual assessment under the maximum rate of 2s. 6d. per £, or are they limited to a rate of 1s. per £ for water, however low their rates may be for other police purposes? The following is the opinion given by Mr. (now Lord) Shand:—

"I am of opinion that the memorialists are entitled, in assessing for police purposes, to assess for water at a rate exceeding 1s. per £, provided the whole annual assessment do not exceed the maximum rate of 2s. 6d. per £. The 84th clause of the Statute is expressed in such terms as to admit, in one view, of the inference being drawn that 1s. per £ was deemed by the Legislature a sufficient allowance to make for a water rate—for while 1s. 6d. is stated as the maximum assessment for proper police purposes, 2s. 6d. is the maximum where, in addition to these purposes, the enactments of the Act with respect to water have been adopted. I do not think, however, that this inference can be carried so far as to give to the language of the Statute the restricted effect of an enactment that the maximum assessment for water rates under it is fixed at 1s. The Statute is not framed on the principle of defining the maximum rate of assessment for each particular purpose for which the Act may be adopted in different places. It deals with the gross maximum rate only, and protects the ratepayers against these gross rates being exceeded. Thus, if the portion of the Act relating to lighting and cleansing the burghs alone were adopted, this would obviously be an

adoption of a very limited part of the police purposes of the Act, so far as regards the expense which might be incurred, yet under sec. 84 a rate of 1s. 6d. might be competently levied. I do not think it can be truly said that the rate for water is treated differently from the rates for other purposes, or that, according to a sound construction of the Statute, there is a specification of the maximum rate for water, but for none of the other purposes for which rates are levied. It appears to me that the Legislature roughly fixed the rate of 2s. 6d. where the enactments of the Act in regard to water were adopted, and 1s. 6d as the rate where these clauses were not adopted, but leaving the *administratus* for the general good of the burgh a full discretion in fixing the particular rates applicable to particular purposes, so long as they kept within the maximum rates on the whole. It is not stated in the memorial whether all the police purposes of the Act have been applied or enforced so as to create expense, but my opinion would be the same whether the whole or a part only of the purposes of the Act have been actually enforced and have caused expense."

Although it is not expressly provided here that the portion of the burgh general assessment applicable to water is to be kept distinct from the remainder, it will be necessary to fix the water assessment separately, seeing that certain subjects are to be assessed for water on one-fourth of the annual value. (See secs. 267 and 347.)

The assessment leviable under this section is for "the general purposes of the Act." No definition of "general purposes" is given, but it may be assumed that the expression includes all the purposes for which provision is made in the Act, save those for which special assessments are leviable. It is expressly provided by sec. 360, that the cost of maintenance of the foot pavements (after the Commissioners have resolved to maintain them) shall be met out of the burgh general assessment, but that assessment will not be applicable to any of the purposes for which the general improvement assessment, the sewer assessment, and the private improvement assessment are leviable, save in the circumstances provided for by sec. 372. By sec. 59 it is provided that the assessments leviable under this Act are "vested in the Commissioners and their successors, for the uses and purposes mentioned in this Act, and for no other purposes whatever." See the observations under sec. 59, and sub-head (3) of sec. 55, as to purposes to which the assessments may not be applied.

In Wakefield *v.* Commissioners of Supply of Renfrew, 29th Nov. 1878 (6 R., 259), the Commissioners of Supply of a county are, by the County General Assessment Act, 1868, 31 & 32 Vict. c. 82, empowered to levy, for the purposes of that Act, an assessment in lieu of the "rogue money," to be called the "County General Assessment." Out of this assessment (sec. 3), "the following salaries, fees, outlays, and expenses," "may be defrayed," viz. "the salaries or fees of clerks, treasurers, collectors, auditors, and other officials necessarily employed in conducting the affairs of each county, to-

gether with the necessary outlays of such officials, in so far as not covered by their salaries or fees."

In a suspension and interdict against the Commissioners of Supply of a county defraying out of the "county general assessment" the expenses of an opposition to the General Roads and Bridges (Scotland) Bills, 1876 and 1877, by which the interests of their county were specially affected—*held* (*diss.* Lord Mure), that the business in connection with which the account was incurred not being connected with the conduct of the affairs of the county, as committed by Statute to the care of the Commissioners of Supply, it was *ultra vires* of them to apply, toward payment of these expenses, any part of the county general assessment.

In England, it is held that "rates levied under the Public Health Act, 1875, constitute a statutable fund, which can only be legally applied to the purposes contemplated by the Statute, and not to any other. On this point the following passage from the judgment of the Court of Queen's Bench, which, though referring to the poor-rate, appears to be equally applicable to sanitary rates, may be quoted: "In the present case we are thrown necessarily on the Statute of Elizabeth; the overseer is a statutable officer, dealing with a statutable fund, and accountable for its application to statutable purposes. The language of that Statute leaves no doubt. The relief and the employment of the chargeable poor are its objects; the fund is created for them, and cannot be diverted from them, unless to objects specifically engrafted on them by subsequent Statutes, of which this is not one. No usage, however proper in itself, or however uninterrupted, can prevail against that which the plain construction of a Statute forbids." Reg. *v.* Stewart (12 A. and E., 777).

Powers given to a corporation are always to be exercised in subjection to the special purposes of the corporation. This is not a mere canon in the English municipal law, but a great and broad principle, which must be taken, in the absence of proof to the contrary, as part of any given system of jurisprudence. Pickering *v.* Stephenson (L. R., 14 Eq., 322; 41 L. J., Ch., 493; 26 L. T., N. S., 608; 20 W. R., 654).

A rate made for (amongst other purposes) defraying the expenses of an accountant and his assistant in examining the accounts of the Board, was quashed by the Sessions on appeal. The Court of Queen's Bench, whilst confirming the judgment of the Sessions, said, "There may be, no doubt, circumstances under which it would be perfectly legal to employ an accountant; but of these circumstances the Sessions are to judge. Here it appears that the Sessions inquired into all these circumstances, and heard evidence on both sides. The result of their inquiry is, that in their judgment the charge could not be justifiably imposed upon the ratepayers. If it were for us we should concur in their judgment." Reg. *v.* Worksop (21 J. P., 451).

The purchase of a gold chain for the mayor of a burgh, out of the

burgh funds was held to be illegal. Attorney-General *v.* Batley, Mayor, etc. (26 L. T., N. S., 392).

A vestry incorporated under the Metropolis Management Acts was held to have no power to apply the rates in paying the expenses of a dinner, or a ball, or other ceremonies in connection with the opening of a new vestry hall. Attorney-General *v.* Bermondsey (L. R., 23 Ch. D., 60; 52 L. J., Ch., 567; 48 L. T., N. S., 445; 31 W. R., 463).

With regard to the legality of the purchase by Local Authorities, at the cost of the funds under their control, of periodical publications, which contain reports of decisions of the Courts of law, or other information connected with matters subject to their jurisdiction, see the memorandum of the Local Government Board of the 16th June 1884, in Part III. of this work (*infra*, p. 548).

Costs of Legal and Parliamentary Proceedings.—By the Municipal Corporations (Burgh Funds) Act, 1872, when, in the judgment of a "governing body" in any district acting under any General or Local Act of Parliament for the management, improvement, cleansing, paving, lighting, and otherwise governing places or districts, it is expedient for such governing body to promote or oppose any Local or Personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the burgh fund, burgh rate, or other the public funds or rates under the control of such governing body, to the payment of the costs and expenses attending the same—35 & 36 Vict. c. 91, sec. 2. But in certain cases the sanction of the Local Government Board or Secretary of State, and of the ratepayers, must be previously obtained—35 & 36 Vict. c. 91, sec. 4.

That Act does not, however, take away or diminish any rights or powers possessed by a governing body, or inhabitants of a district, independently of the Act—35 & 36 Vict. c. 91, sec. 8; and Jessel, M. R., therefore held that a municipal corporation were entitled to incur expense in opposing a Bill in Parliament, without having previously complied with the requirements of the Act. He held that such corporations, who had been reduced by the Municipal Corporations Acts, 1835, from the position of owners to that of trustees, possessed the ordinary right of trustees to defend their trust property and rights as trustees from attack, at the expense of the trust-estate, and consequently might defray out of the rates the expenses of attack made upon their rights by a Bill in Parliament for the establishment of a market in their district. Attorney-General *v.* Mayor, etc., of Brecon (L. R., 10 Ch. D., 204; 48 L. J., Ch., 153; 40 L. T., N. S., 52; 27 W. R., 332).

The Court of Appeal held that overseers were entitled to oppose, at the cost of the poor-rate, a Bill in Parliament which threatened to throw an additional burden on that rate. Reg. *v.* Sibly (54 L. J., M. C., 23; 49 L. T., N. S., 183; S. C., Nom.); Reg. *v.* White (L. R., 14 Q. B. D., 358; 33 W. R., 248; 49 J. P., 294); following Rex *v.* Inhabitants of Essex (4 T. R., 591).

The costs of proceedings by indictment in Chancery, by action, or otherwise, taken by a Local Authority, with the consent of the Attorney-General, for the protection of watercourses from pollution by sewage, or taken by them for the abatement of nuisances, may be defrayed as expenses incurred in the execution of this Act (secs. 69, 107).

It was held that, although the expenses of a Chancery suit, *bona fide* and necessarily incurred, might properly be defrayed from the produce of a general district rate, the expenses of defending *quo warranto* proceedings, incurred in the merely personal affair of individual members of a Local Board, could not be lawfully charged to the ratepayers of the district, and that consequently a rate was bad, which appeared by the estimate to have been made for the purpose of defraying these costs. The Court also held that the Local Board were not justified in opposing the Bill of a Gas and Coke Light Company in Parliament, either by the result or by any anterior prospect of advantage to be gained to the ratepayers, if the opposition had been successful. In delivering judgment, Lord Campbell, C. J., said: "The Act of Parliament is a most beneficial one, but it is liable to great abuse. This is an Act under which there may be great jobbing, and, while it is the duty of the Court to assist Local Boards in carrying out the Act for the public benefit, it is also our duty to guard the ratepayers from a misapplication of the funds. If the expense of opposing Bills in Parliament is to be charged upon the rate, it may lead to great abuse. I do not say that a case may not arise where it would be a very good thing for the ratepayers that a private Bill should be opposed in Parliament, and for the expenses of which the rate might be liable; but it should clearly appear that such opposition is for the benefit of the ratepayers, and, above all, it is advisable that the Local Board should, in the first instance, call a meeting of the ratepayers, and have their previous assent to the opposition." Reg. on prosecution of Worksop Local Board *v.* Marris (28 L. T., 266; 5 W. R., 254; 21 J. P., 580). Subsequently the person employed in preparing statistics and giving evidence before a Committee of the House of Commons on behalf of the Local Board, in opposition to the Gas Company's Bill, sued four members of the Local Board who were parties to the resolution authorising the opposition to the Bill, and it was decided that they were not liable. Bailey *v.* Cuckson (32 L. T., O. S., 124; 7 W. R., 16). It was held that the previous sanction of the vestry to the litigation of an appeal against the poor-rate by the overseers, was unnecessary. Reg. *v.* Street (18 Q. B., 682; 22 L. J., M. C., 29).

"An injunction was granted to restrain a municipal corporation from applying the burgh fund towards defraying the expenses of a Bill before Parliament for improvements and increased powers, it being alleged that there was no surplus of the burgh fund. Attorney-General *v.* Corporation of Norwich (12 Jur., 424; 21 L. J., Ch., 139). The Court does not justify applications to Parliament by trustees at the expense of the trust-fund in the first in-

stance; but if the Court authorise the application, it will also authorise the payment of the expenses out of the trust-fund. The Court refused to allow money raised for poor-rates under a Local Act to be applied in payment of the expenses of a Bill in Parliament, promoted by the guardians, but rejected. Attorney-General *v.* Southampton Corporation (13 Jur., 669)."—Glen, p. 393.

The assessments levied under this Act are not applicable to the purposes of other Acts administered by the Commissioners, unless there is statutory provision to that effect. Thus, the Commissioners cannot legally apply the assessment under this Act to meet the cost of works undertaken under the Public Health Act. See Kirkintilloch Police Commissioners *v.* M'Donald, 31st Oct. 1890 (18 R., 67).

The following memorandum of the Local Government Board as to the legality of expenses incurred by Local Authorities in purchasing periodical publications may be a guide to Police Commissioners:—

"'16*th June* 1884.

"'The Local Government Board have recently had under consideration the question of the legality of the purchase by Local Authorities, at the cost of the funds under their control, of periodical publications which contain reports of decisions of the Courts of law, or other information connected with matters subject to their jurisdiction.

"'Hitherto the Board have generally considered that the local rates could not legally be expended in the purchase of the publications referred to.

"'Recently, however, they have seen reason to doubt whether this view could be supported, and they have therefore consulted the Law Officers of the Crown upon the point. The effect of the opinion given by the Law Officers is, that if the publications referred to contain information so immediately connected with the discharge of their duties by the Local Authorities as to be likely to enable them to discharge those duties more efficiently than they could without such publications, the Local Authorities may legally make the purchase at the cost of the rates.

"'The Board think it desirable to communicate this opinion to the auditors for their future guidance. It will, of course, be for the auditor, subject to appeal to the Board, to decide, in regard to any particular publication, whether it does or does not contain information of the character described; and he should satisfy himself, with reference to the special circumstances of each case, that not more copies of any periodical are purchased than are reasonably necessary.

HUGH OWEN, *Secretary.*

LOCAL GOVERNMENT BOARD, WHITEHALL,
16*th June* 1884.'

For exemptions from assessment, and restricted values on which assessment to be imposed, see under secs. 347 and 373, *infra.*

341. Payment of Damages occasioned by Mobs.—Out of the burgh general assessment it shall be lawful for the Commissioners to defray, to such extent as they think proper, such claims for damages sustained in consequence of any riot or tumult within the burgh as may be established to their satisfaction, or, if the Commissioners think proper, they may at any time impose and levy a special assessment on all occupiers of lands or premises within the burgh, according to the said valuation roll, for the sums estimated by them to be necessary for the purpose of paying such damages, and the occupier shall be entitled to deduct one-half of the rate levied under this assessment from the next rent payable to the landlord; and such special assessment being so imposed and levied, the Commissioners shall, out of the proceeds thereof, discharge such claims, the same being established to their satisfaction, and the Commissioners shall be bound, out of the burgh general assessment, or out of such special assessment as aforesaid, to relieve the county authorities of any claims for damages for which the county authorities may be found liable in respect of any riot or tumult within the burgh.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (21) "occupier," (16) "lands and premises;" sec. 340 as to "burgh general assessment."

See Magistrates of Fraserburgh *v.* Burnett, 23rd May 1875 (Guthrie's Select Sheriff-Court Cases, p. 101), where it was held that the Magistrates of a burgh of barony, by entering into agreement under the County Police Act of 1857, for consolidating the burgh police force with that of the county, do not amalgamate the burgh with the county to the effect of throwing upon the county liability to make good losses caused by riots within the burgh under 3 Geo. IV. c. 33.

342. Commissioners may levy Proportion of Burgh General Assessment.—Where in any burgh an assessment for general purposes has been imposed previous to the application of this Act, and is leviable for a period ending on a day prior to the term of Whitsunday immediately following such application, it shall be lawful for the Commissioners under this Act to impose and levy a proportion of the burgh general assessment hereby authorised, corresponding to the time intervening between the date

when such period ended and the said term of Whitsunday.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners;" sec. 340, "burgh general assessment." The Act comes into operation on 15th May 1893.

343. Remission of Assessments. — The Commissioners may, on the ground of the poverty or inability of any person liable to the burgh general assessment under this Act, remit, in whole or part, payment of the said assessment by such person in such manner as the Commissioners shall, in their discretion, think just and reasonable, but upon no other account whatsoever.

See sub-head (9), sec. 4, for definition of "Commissioners;" p. 5, "person;" sec. 340 as to "burgh general assessment."

In Govan Police Commissioners *v.* Armour, 3rd February 1887 (14 R., 461), sec. 54 of the Roads and Bridges Act, 1878, enacts, that the amount required for the purposes of the Act "shall be levied by the Local Authority at such rates as may be necessary for the purpose, by an assessment to be imposed and levied on all lands and heritages within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which such assessments are imposed." *Held* (*diss.* Lord Rutherfurd-Clark), that under this enactment the Commissioners were to levy from the individual owners and occupiers such equal rate per £ as would produce the aggregate sum required, and that the principle of Galloway *v.* Nicolson, 19th March 1875 (2 R., 650), under which the aggregate sum required would have been divided into two equal parts, and the one part levied from the owners as a class, and the other from the occupiers as a class, did not apply.

Under the General Police and Improvement Act, 1862, assessments are levied from the occupiers of lands and heritages, and from the owners of subjects let at a rent under £4, in place of the occupiers (but subject to deduction of one-fourth); and sec. 89 makes provision for a deduction from the assessment where premises have been unoccupied for part of the year.

Under the Roads and Bridges Act, 1878, an assessment on lands and heritages falls to be paid, one-half by the owner and the other half by the occupier; and by sec. 86 the Act provides that "the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment."

Held, on a construction of the foregoing and relative provisions of the above Acts, that the occupiers of houses within a burgh, under the Roads and Bridges Act, 1878, are entitled to the

exemptions provided to occupiers by secs. 87, 88, and 89 of the General Police and Improvement Act, 1862, but that the exemptions were inapplicable to an assessment imposed on owners as such.

Held, further, that sec. 86 of the Roads and Bridges Act, in giving the Local Authority power to relieve occupiers of lands and heritages under the annual value of £4, on the ground of poverty, was not inconsistent with, and did not supersede the power given, under sec. 88 of the General Police and Improvement Act, to remit payment of the assessment under the Roads and Bridges Act, on the ground of poverty, irrespective of the amount of rent.

It was observed by Lord Young, in delivering the judgment of the Court in Hogg *v.* Parochial Board of Auchtermuchty, 22nd June 1880 (7 R., 986): "I think it proper to say that *in dubio* I should deem it the duty of the Court to reject any construction of a modern Statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.

344. Assessments not to be imposed on Occupiers of Premises under £4.—The Commissioners shall assess the owners, in place of the occupiers, of all lands or premises let at a rent of or under £4, and levy such assessment on such owners; but the Commissioners shall allow to such owners a deduction from such assessment equal to one-tenth of the amount thereof, and such assessment shall be recoverable from such owners along with any penalty which may have become exigible thereon, in the same way as is herein provided with respect to the recovery thereof from occupiers; and every such owner charged with and paying such assessment shall have relief against the occupiers of such lands or premises for the full amount thereof, without deduction, if and in so far as such assessment may by law be properly chargeable upon such occupier.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (21) "occupier," (16) "lands and premises;" sec. 353 as to recovery of assessments.

345. When Owners Responsible. — Owners who shall let for rent, or hire lands or premises for less than a year, shall themselves be responsible for the said assessment, and the same may be recovered from such owners.

See sub-head (22), sec. 4, for definition of "owner," (16) "lands and premises;" sec. 353 as to recovery of assessments; sec. 350 as

to power to require owners to furnish a written statement of the period for which premises are let.

In Burgh of Partick *v.* Marshall, 16th February 1881 (8 R., 480), sec. 84 of the General Police Act enacts: "Once in each year the Commissioners . . . shall assess all occupiers of lands or premises within the burgh, according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, . . . in the sums necessary to be levied for the police purposes of this Act, . . . and shall fix a day on which the same shall be payable: . . . Provided always, that such assessment shall be imposed as from the 15th day of May in one year to the 15th day of May in the following year—and shall not exceed a rate equal to . . . "

Sec. 89 enacts: "The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands and premises, but deduction shall be allowed by the Commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year, shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the Commissioners shall judge expedient."

On 8th September 1879, the Commissioners of Police in a burgh resolved to assess for the year from 15th May 1879 to 15th May 1880, according to the valuation roll for that year—(which was not then completed, in so far as appeals against it could not be finally disposed of prior to 30th September), at a certain rate per £, and declared that the owners of premises let for periods less than a year should be responsible for the rates their tenants failed to pay.

The owner of houses let continuously for a year in successive short periods, sometimes to the same tenant and sometimes to various tenants, objected to an assessment levied upon him as an owner responsible for his tenants—(1) On the ground that the assessment was not valid, having been imposed at a time when the valuation roll had not been finally completed; and (2) that sec. 89 only applied in cases where a house let for periods less than a year was vacant for some portion of the year. Objections repelled.

346. Assessment on Premises occupied for part of a Year.—When any lands or premises in respect of which the said assessment might be imposed upon the occupier, not being premises usually let for any period shorter than one year, shall not be occupied by the same occupier for the whole year from the term of Whitsunday in any year till the term of Whitsunday in the year following, but shall be occupied for part of such year by a new

occupier, it shall be lawful to the Commissioners to impose and levy on and from such new occupier who occupies the same for any part of such year, whether his name appear in the valuation roll or not, a proportion of such assessment for that year, corresponding with the period of his occupancy, and on and from the owner of such lands or premises the proportion of such assessment, if any, corresponding with the period during which such lands or premises were occupied during the said year by any other occupier.

See sub-head (16), sec. 4, for definition of "lands and premises," (21) "occupier," (9) "Commissioners."

In Auld *v.* M'Murrich, 23rd Jan. 1891 (7 Scot. Law Rev., 111), it was held that under the Greenock Police Act, 1877, tenants who have entered into occupancy after the annual valuation roll has been made up, are liable to be assessed only on the actual rent payable by them for the period between the date when their occupancy began and the following term of Whitsunday.

347. Arable Land, etc., how to be Valued.—The annual value of the following lands or premises shall, for the assessments under this Act, be held to be one-fourth of the annual value thereof entered in the said valuation roll, viz.:—

1. All lands and premises used exclusively as a canal or basin of a canal, or towing-path for the same, or as a railway or tramway, constructed under the powers of any Act of Parliament for public conveyance, excepting the stations, depôts, and buildings, which shall be assessable to the same extent as other lands and premises within the burgh, and all bridges, frontages, and ferries not being private property:

2. All the underground gas and water pipes, or underground works of any gas or water company or corporation:

3. Salmon fishings, and all woodland, arable, meadow, or pasture ground, or other ground used for nurseries, market gardens, or for agricultural purposes:

And where the Commissioners shall have supplied or resolved to supply the burgh with water in terms of this Act, the annual value of all quarries and manufactories within the burgh shall, as regards the burgh general assessment, so far as is applicable to water, subject to the exception hereinafter provided, be held to be one-fourth of the annual value thereof,

entered in the valuation roll; without prejudice, however, to the Commissioners entering into agreements for the supply of water to such lands and premises in manner hereinbefore provided; and in the event of any dispute arising as to the lands and premises falling under the above exceptions, it shall be lawful for the owner or occupier of such lands and premises to present a petition to the Sheriff, praying to have the same declared, for the time being, liable to assessment upon the said proportion of their value only; the judgment, if by the Sheriff-Substitute, may be appealed to the Sheriff, whose decision shall be final: Provided always, that where in any burgh such lands or premises as are in this section specified were, prior to the passing of this Act, liable to be assessed under any General or Local Police Act, or under the Public Health Acts or the Local Government (Scotland) Act, 1889, on the annual value thereof, and moneys have been borrowed on the security of the assessments so authorised, or some of them, such lands or premises shall, in the case of any such burgh where the assessments on the security of which such moneys have been borrowed have been imposed, be liable to be assessed on the annual value thereof and in the same manner as heretofore, until such borrowed moneys have been repaid.

See sub-head (16), sec. 4, for definition of "lands and premises," (3) "building," (4) "burgh," (9) "Commissioners," (22) "owner," (21) "occupier," (30) "Sheriff;" sec. 340 as to "burgh general assessment."

The lands and premises specified in sub-heads (1), (2), and (3) hereof are to be assessed on one-fourth of the annual value. This reduced valuation seems to apply to all the assessments, and not solely to the burgh general assessment. Where the Commissioners have supplied, or resolved to supply, water under this Act, quarries and manufactories are also to be assessed on one-fourth; but the reduction in the case of these subjects applies only to the water-rate, or the portion of the burgh general assessment applicable to water. In the 1862 Act (sec. 90) mines and minerals were classed along with quarries and manufactories, but they are not alluded to here.

Along with this section must be read the proviso in sec. 267, *supra*: "Provided also, that for shops the water-rate, or portion of burgh general assessment applicable to water, shall be chargeable only on one-fourth of the rental of the premises, unless in special circumstances the Commissioners see cause to charge the ordinary rates, and in that case it shall be lawful for any person who may

think himself thereby aggrieved to appeal to the Sheriff in manner hereinafter provided."

The proviso at the end of sec. 347 demands attention. It provides that where any of the subjects specified in this section were, prior to the passing of this Act (*i.e.* 28th June 1892), assessed on the annual value either (1) under any General or Local Police Act, or (2) under the Public Health Acts, or (3) under the Local Government Act, and money was borrowed on the security of these assessments, such subjects shall be liable to be assessed on the annual value and in the same manner as heretofore, until such borrowed moneys have been repaid. This will introduce some complications into the rating of the burghs to which it applies, but it will probably not be of very wide application. The assessments under the Public Health Acts are levied in the same manner either as the police assessment or as the poor-law assessment. In burghs, certain subjects, which are virtually the same as those specified in sec. 90 of the General Police Act of 1862, with the addition of mines, minerals, and quarries, are rated on one-fourth, and for the water assessment manufactories are also rated on one-fourth. See the Public Health Act, 1867, 30 & 31 Vict. c. 101, secs. 94 and 95; and the Amendment Act of 1871, 34 & 35 Vict. c. 38, sec. 1; Skelton, pp. 93–100, and 115. The poor-law assessment is not levied on the annual value as appearing on the valuation roll, sec. 37 the Poor Law Act, 1845 (8 & 9 Vict. c. 83), requiring certain deductions to be made. The assessment under the Local Government Act is levied on the annual value as appearing in the valuation roll. See sec. 27, sub-head (3), of the Local Government Act, 1889, 52 & 53 Vict. c. 50.

In the case of burghs created after the passing of the Local Government Act (26th August 1889), regard must be had to the provision in sub-head (3) of sec. 81 of that Act, which is saved by sec. 43 of this Act. See sec. 43, *supra*, and notes thereto.

In Templeton *v.* Glasgow and South-Western Railway Co., 1st Nov. 1870 (9 M., 57), it was held that a portion of a line of railway was liable to be assessed as "premises" in the sense of the Police Act of 1850.

The Commissioners of Police of a burgh, in the sense of the Police and Improvement Act, 1850, imposed an assessment for the years ending Whitsunday 1866, 1867, and 1868, upon a portion of a line of railway within the burgh, fixing the value at a proportion of the value appearing in the valuation roll for the parish. No separate valuation of property within such police burghs was required by the Valuation Act, 1854.

Objection by the railway company, that the assessment was illegal, as the value had not been fixed by the Railway Assessor, in terms of the Valuation Act—*repelled.*

In Police Commissioners of Oban, etc., 15th Dec. 1885 (13 R., 339), it was provided by sec. 51 of the Oban Burgh Act, 1881, that the public water-rate and police rates should, as regarded a certain railway, so far as within the burgh, be assessed upon one-fourth of

the annual value "of the railway and sidings, stations, depôts, and buildings"—*held*, that the station refreshment room, although let to a tenant, was part of the "buildings," within the terms of the above clause.

In Ferrier *v.* Assessor for Edinburgh, 20th July 1892 (19 R., 1074), where a municipal corporation allows land held by it to be used for public recreation, it should be entered in the valuation roll at an annual value equal to the rent which might be obtained if the lands were let and the public excluded; but if the land is held subject to servitudes of way, or other restrictions which are binding on the corporation, the land should be valued at the rent which might be obtained for its use, subject to these restrictions.

"In England, the premises of a 'market gardener and nurseryman,' which were almost entirely covered by glasshouses or greenhouses used for growing grapes, vegetables, and flowers on prepared beds, were held to be rateable to the general district rate on the lower scale as a market garden or nursery ground. Purser *v.* Worthing Local Board (L. R., 18 Q. B. D., 818; 56 L. J., M. C., 78).

A wet dock was held to be "land covered with water," and therefore rateable at the fourth of the rate for houses, etc. But the land adjacent, including landing-places, coal-hoists, machinery, etc., not being part of the dock, was held not to be rateable on the lower scale. Reg. *v.* Newport Dock Company (2 B. and S., 708; 9 Jur., N. S., 73; 31 L. J., M. C., 266; 6 L. T., N. S., 456).

In another case, however, where the occupants of docks covering an area of 165 acres, of which 95 formed a wet dock or tidal basin, in the parish in which the provisions of the Watching and Lighting Act had been adopted, were rated as "occupiers of houses, buildings, and property other than land," within sec. 33 of that Act, 3 & 4 Will. IV. c. 90, sec. 33, at a rate three times greater than that at which the occupiers of land were rated, it was held by Lord Campbell, C. J., Wightman and Crampton, Justices, that the dock or basin was property *ejusdem generis* with houses and buildings, and therefore that the occupiers of the docks were rateable at the higher rate; but Erle, J., considered that they were rateable at the lower rate, as the area of 95 acres was "land." Reg. *v.* Peto (5 Jur., N. S., 1209; S. C. Peto *v.* Overseers of West Ham (28 L. J., M. C., 240; 2 E. and E., 144; 7 W. R., 586; 23 J. P., 422).

A Local Act provided that "the occupiers of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorised to be levied by the Act, at one-fourth part only of the net annual value;" and it was held that a reservoir within a burgh, belonging to a water-works company supplying the burgh with water, was rateable to the burgh rate at only one-fourth part of its net annual value; but that the pipes and mains of the company within the burgh were rateable to the full extent, and not merely to one-fourth part of their net annual value as "land covered with water." Reg. *v.* Birmingham Water-Works Company (1 B. and S.,

84; 4 L. T., N. S., 242; 25 J. P., 308); see also East London Water-Works Company *v.* Leyton Sewer Authority (40 L. J., M. C., 190; L. R., 6 Q. B., 669; 20 W. R., 98). With regard to the rating of water-works, see also the note to sec. 51"—Glen, pp. 99, 407.

Railways.—"With reference to the provision that the occupier of lands 'used only as a railway' is to be assessed at one-fourth only of the net annual value, it was held that this partial exemption extends to the line of railway and so much of any platform, etc., as constitutes the side of the railway, and to land used as sidings, turn-tables, etc.; but that adjuncts, such as stations, offices, and warehouses, which are ancillary to the railway properly so called, although necessary for the working of traffic, are not part of the railway within the meaning of the proviso; and therefore that land used for those purposes must be assessed at its full annual value. And it was explained by Erle, J., that 'the general scheme of the enactment is, that the occupiers of the classes of property most benefited by the expenditure of the district rates shall be liable to be rated at a higher rate, the occupiers of the classes less benefited at the lower rate; and the class of property most benefited is that which is occupied immediately for the purpose of residence; and the kinds of property not so occupied are not to be rated so highly.' South Wales Railway Company *v.* Swansea Local Board, 4 E. and B., 189; 24 L. J., M. C., 30; 1 Jur. (N. S.) 327. By a Borough Improvement Act, authorising a rate to be levied, it was enacted 'that the occupiers of any land used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament, should be rated at one-fourth part only of the net annual value.' Certain sidings and turn-tables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were found in the special case to be necessary for conducting the traffic of the railway. On appeal against a rate made on the railway in respect of such land, it was held that it was rateable at one-fourth only of the net annual value. Midland Railway Company *v.* Birmingham Council (13 L. T., N. S., 404; 30 J. P., 197).

"In assessing a railway and sidings, etc., to a general district rate, the sidings, turn-tables, and a strip of land adjacent, are all to be treated as part of the railway, except such part of the strip of land as is not necessary to the use of the railway proper. North-Eastern Railway Company *v.* Scarborough Local Board (1 E. and E, 98; 28 L. J., M. C., 41; 5 Jur., N. S., 622; 7 W. R., 37; 33 J. P., 244). A railway company, by receiving wharfage dues in respect of a piece of land between the actual line of rails and a navigable river, were thereby estopped from saying that the land was not a wharf but a railway, and from having it rated at one-fourth of the net annual value as land used for a railway. Reg. *v.* Taff Vale Railway Company (22 J. P., 21).

"A railway constructed without parliamentary powers is not within the Act, and is therefore not to be rated at a reduced rate. North-Eastern Railway Company *v.* Leadgate Local Board (L. R., 5 Q. B.,

157; 22 L. T., N. S., 62; 39 L. J., M. C., 65; 18 W. R., 691)." —Glen, p. 408.

348. Assessment Roll to be made up.—The Commissioners shall annually cause to be made up a roll or book of assessment from the valuation roll aforesaid, showing the yearly rent or value of the lands and premises in the burgh liable to be assessed under this Act for the assessments herein authorised to be levied, and according to which such assessments under this Act are intended to be levied; and such roll or book of assessment shall be open to inspection by all ratepayers in the hands of the Collector or other officer appointed by the Commissioners for that purpose, during the whole period which shall intervene between the date of laying on the annual assessment and the day appointed for payment thereof; and the Commissioners shall have power to rectify any error which may be found in such roll or book.

See sub-head (9), sec. 4, for definition of "Commissioners," (16) "lands and premises," (4) "burgh," (8) "Collector." As to altering and amending the roll, see sec. 351.

In Lanarkshire County Council *v* Wishart, 14th July 1891 (7 Scot. Law Rev., 295), the "yearly value" to be entered in the valuation roll is the rent at which, "in their actual state," subjects might be reasonably expected to let from year to year; and when the Assessor had entered certain houses, part of other subjects, as "unfinished, £50," this entry was held as a mere memorandum, and as showing that they were not assessable.

Opinion, That the Assessor can deal with the subjects only as in their actual state when the roll is made up. See Paterson, 24th May 1878 (9 R., 1237).

In M'Lachlan *v.* Tennant, 4th May 1871 (43 J., 390), where an assessment has been made for the poor or other purpose, according to the existing valuation roll, and the party assessed and thinking himself aggrieved has neglected the proper statutory means of redress—*held*, that it is incompetent, in subsequent proceedings, to adduce evidence to contradict the valuation roll.

Appeal from the Sheriff Small-Debt Court *sustained*, on the ground that such evidence had been admitted.

349. Town-Clerk or other Person to allow Collectors access to Valuation Roll.—To enable the Commissioners to make up the roll or book of assessment from the valuation roll, the Assessor, Town-Clerk, or County-Clerk, or other person in the actual possession thereof, shall be bound, without making any charge, to exhibit or give

access to the valuation roll in his custody to the Commissioners, and the assessment roll shall be made with all despatch after the meeting of the Commissioners at which the general assessment is resolved on, and the collector or such other officer as may be appointed by the Commissioners shall prepare the assessment roll, under the orders of the Commissioners.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "Clerk" and "Collector."

350. The Commissioners may require Owner to furnish written Statement.—It shall be lawful for the Commissioners to require an owner to furnish a written statement of the period or periods for which the lands and premises of which he is owner are let to the respective tenants or occupiers thereof, and of the rents for which the same are let, all which the said owner shall be bound to furnish within seven days of his being required in writing so to do; and if such owner shall fail, without reasonable excuse, to furnish such written statement, he shall be liable to a penalty not exceeding £10; and if such owner shall present, or cause to be presented, any false statement of the period or periods, or the rents for which any lands or premises belonging to him are let, knowing the same to be false, he shall be liable to a penalty of £20.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "lands and premises," (21) "occupier;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors. See also secs. 345 and 346 as to the liability of owners for assessments on premises let for periods less than a year.

351. Commissioners may Alter and Amend the Roll.—The Commissioners may from time to time amend the roll or book of assessment, or any assessment therein contained, by inserting therein the name of any person who ought to have been assessed, or who since the making thereof has become liable to be assessed, or by striking out the name of any person who, according to a written certificate by the Assessor, ought not to have been assessed, or by correcting the amount of any rent or assessment which may have been inaccurately entered; and no such alteration shall be held to

vitiate the assessment, or render it less operative; but every such alteration shall be made within one year after the expiry of the year for or applicable to which the said assessment shall have been fixed or laid on.

See sub-head (9), sec. 4, for definition of "Commissioners;" see p. 5, "person."

352. Notices to be given of Assessment, and may include other Assessments.—The Collector shall issue schedules or notices to every person liable for payment of any assessment; and may include in one schedule notice of any or all assessments, or rates leviable by the Commissioners, or the Magistrates and Council, from the owners or occupiers of lands and premises within the burgh.

See sub-head (8), sec. 4, for definition of "Collector," (9) "Commissioners," (22) "owner," (21) "occupier," (10) "lands and premises," (4) "burgh;" secs. 336 to 338 inclusive as to "notice."

The schedule or notice should specify the date when the assessments are made payable. See sec. 353.

In Magistrates of Leith *v.* Lennon, 18th Feb. 1881 (18 S. L. R., 313), the Magistrates of a burgh sued L. for £34, as the amount of assessments due by her under the General Police and Improvement Act, 1862, in respect of subjects belonging to her in the burgh. L. lodged defences, in which she stated that, prior to the raising of the action, no demand had been made for, or notice given of, the assessments now sued for, and tendered £25 in full of all claims. This tender the pursuers judicially accepted. *Held* (*rev.* Lord Rutherfurd-Clark, Ordinary, who decerned against the defender for expenses), that, in the circumstances, the pursuers having failed to instruct that they had given any notice to defender, or made any extra-judicial demand, must pay the expenses of the action which they had raised.

353. Recovery of Assessments.—It shall be lawful for the Collector, on the expiration of the time specified in such notice, to recover any arrears of assessment due by any person or by any number of persons, either according to the ordinary procedure before any competent Court, or by obtaining from the Sheriff or any of the Magistrates a summary warrant to recover such arrears, with the addition of ten per centum thereon; and such person or persons shall thereupon be bound to pay such ten per centum, which warrant the Sheriff or Magistrates shall grant, on production of a certificate by the Collector that he had given to each such person a

notice requiring him to make payment of the amount due by him within fourteen days thereafter, that the said period had expired, and that the said amount was still truly due; and such warrant shall authorise the Collector or officers of Court to enter into any premises in the occupancy of any person so in arrear, and to poind, seize, remove, or secure any goods and effects therein belonging to or in the lawful possession of such person or persons, or so much thereof as will fully satisfy the arrears due by him or them, with the said addition of ten per centum thereon; and such warrant shall also authorise the Collectors or officers of Court or licensed auctioneer, after the lapse of four days, in the event of non-payment of the said arrears and costs, to sell or dispose of the said goods and effects by public auction on three days' notice, and apply the price in payment of the said arrears and ten per centum thereon due by such person, and the balance shall be paid to such person, and the Collector shall, for a period of three months after the date of every sale, preserve evidence of the amount of such proceeds and the disposal thereof, and such warrant shall also decern and ordain instant execution by arrestment; and the proceedings in the application for issuing and putting in force such warrant may be in the form of Schedule VIII. of this Act.

See sub-head (30), sec. 4, for definition of "Sheriff," (20) "Magistrates," (16) "premises," (8) "Collector;" see p. 5, "person;" secs. 336 to 338 inclusive as to "notice."

354. Appeal against oppressive Proceedings of Collector.—The proprietor of any goods and effects which have been either poinded or sold in pursuance of the provisions hereinbefore contained, and who feels aggrieved by any proceeding under such warrant, may present a petition to the Sheriff or Magistrate who granted the warrant, and the Sheriff or Magistrate shall thereupon summarily call before him the party complained of and such petitioner, and, without written pleadings, shall inquire into and decide any dispute, question, or claim of damage raised by such petition, and may award expenses to either party; but, except to the effect and in the manner hereinbefore provided, it shall not be competent for any person to make, nor for any Court of law to entertain, any complaint with respect to any warrant granted by the Sheriff

or Magistrate in pursuance of the provisions hereinbefore contained, on any account or pretence whatever, or with respect to any proceeding of the Collector or of any officer or licensed auctioneer in the execution of such warrant; and the decision of the Sheriff or Magistrate on any such dispute, question, or claim shall be final, and not subject to any form of review or stay of execution.

See sub-head (30), sec. 4, for definition of "Sheriff," (8) "Collector," (19) "Magistrate."

355. Recovery of Rates from Persons Removing.—In case any person quits, or is about to quit, any lands or premises before he has paid all assessments due by him, and fails to pay the same on demand, the Collector, or any officer of the Sheriff or Police Court, or any police constable, may, by warrant under the hand of the Sheriff or any of the Magistrates (which warrant the Sheriff or a Magistrate is hereby authorised and required to grant, without issuing any previous summons to said person, after proof to his satisfaction of such removal or intended removal, or that there is any reason to suspect the same), poind and distrain the furniture, goods, and chattels, or other effects found in such lands or premises, and sell the same, returning the surplus (if any), after having deducted the reasonable expenses attending such proceedings, distress, and sale, together with the assessments so due, to the owners of such furniture, goods, and chattels, or other effects, upon demand.

See sub-head (30), sec. 14, for definition of "Sheriff," (8) "Collector," (19) "Magistrate," (20) "Magistrates;" see p. 5, "person."

Where the Commissioners under the Edinburgh and Leith Sewerage Act, 1864, made a connection between their main drain and certain subjects which had been sold, but to which the purchaser had not entered—*held*, that the cost thereof fell on the seller. Currie *v.* M'Gregor, 16th Nov. 1871 (44 J., 68).

356. Misnomers, etc., not to affect Proceedings for Recovery of Assessments.—No misnomer, mistake, or informality committed in any proceedings in assessing, levying, or recovering the burgh general assessment, or any other assessment, rate, charge, or expenses under this Act, shall prejudice the recovery thereof, nor shall such proceedings fall, lapse, cease, or abate by the death, resignation, or

removal of the Collector instituting the same, or by any change in the persons holding office as Commissioners; but it shall be lawful for the Collector for the time to prosecute and follow forth procedure commenced and carried on in the name of any previous Collector, in all respects as if such procedure had been taken by himself; and it shall not be competent for any person to sue, nor for any Court of law to entertain, any action or proceeding against the Commissioners, or the Collector, or officers, or other persons employed in executing any warrant in reference to any assessment, rate, charge, or expense under this Act, by reason of any misnomer, mistake, or informality, if the goods or other effects seized or sold under such warrant were *bonâ fide* the property or in the lawful possession of the person actually liable in payment thereof under the provisions of this Act.

See sub-head (16), sec. 4, for definition of "lands and premises," (8) "Collector," (30) "Sheriff," (22) "owner," (20) "Magistrates," (19) "Magistrate;" see p. 5, "person."

357. Assessment to be recoverable beyond Burgh.—In case any person liable in payment of any of the assessments herein authorised to be levied shall remove to any place beyond the burgh, it shall nevertheless be lawful for the Commissioners, and their Collectors and Treasurers or other officers, or any police constables, to put the decrees and warrants which may be granted for the recovery of such assessment in manner before mentioned into execution within or beyond the burgh, in the same manner as if such person had continued to reside within the burgh, such decrees or warrants being first endorsed by a Magistrate, or Sheriff, or Justice of the Peace for the burgh or county within which they are to be put into execution.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners," (8) "Collector" and "Treasurer," (30) "Sheriff;" sec. 353 as to recovery of assessment; see p. 5, "person."

358. Common Good may contribute towards the Purposes of Act.—When the provisions of this Act shall be in operation in any burgh possessed of any free income arising from the common good of such burgh, after deduction of the interest of any debt which such burgh may owe, and also the necessary annual outgoings of such burgh,

there may be annually contributed therefrom such a reasonable proportion towards the purposes of this Act as the Town Council of such burgh, having due regard to the extinction of the capital of such debt, shall think just: Provided that nothing herein contained shall prejudice the rights of the creditors of any burgh secured by Local Acts of Parliament or otherwise; and further, that the application of this Act to any burgh shall not relieve the common good of such burgh from payment of any sum which such burgh is bound by any Local Act to contribute towards the police expenses of the burgh.

See sub-head (4), sec. 4, for definition of "burgh."

GENERAL IMPROVEMENT ASSESSMENT.

359. General Improvement Assessment.—Whenever the Commissioners in any burgh shall resolve, in manner hereinbefore provided for, to make provision for the general improvement of the burgh, it shall be lawful for them to charge, in equal proportions, all owners and occupiers of lands or premises within such burgh, with reference to the said valuation roll and to all the provisions of this Act applicable to the burgh general assessment, which shall apply to the improvement assessment as if they were here repeated, with a special assessment not exceeding 3d. in the £ of the gross rent or yearly value of such lands or premises, over and above any other assessment or rate to which such persons may be liable under this Act; and such special assessment shall, for the purposes of this Act, be called "the General Improvement Rate," and shall be leviable either from the owner or occupier of such lands or premises in equal proportions, or in whole from the occupiers thereof, but in the latter case the occupier shall be entitled on payment thereof to deduct from his rent the proportion payable by the owner; and such assessment, so far as the occupier is concerned, shall be recoverable in the same manner as the burgh general assessment is authorised to be recovered.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (22) "owner," (21) "occupier," (16) "lands and premises;" sec. 340 as to "burgh general assessment," sec. 353 as to

recovery of assessment. See Govan Police Commissioners *v.* Armour, referred to under sec. 343.

For purposes to which the general improvement rate is applicable, see secs. 154 and 315. It is specially provided that this assessment shall be called the "General Improvement *Rate*," but in the heading to the section, and in the rubric, as well as in sec. 315, the expression "General Improvement *Assessment*" is used.

Foot Pavements Assessment.

360. Assessment for Maintenance and Repair of Foot Pavements. — Whenever the Commissioners shall resolve, in manner hereinbefore provided for, to undertake the maintenance and repair of the foot pavements in any burgh, and after they have called upon all owners to have their foot pavements before their properties put in a sufficient state of repair, the cost of such maintenance and repair shall form part of the burgh general assessment, and such assessment shall be recoverable in the same manner as the burgh general assessment is authorised to be recovered.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (22) "owner;" sec. 340 as to "burgh general assessment," sec. 343 as to recovery of assessments; see sec. 142 as to resolving to undertake maintenance of foot pavements.

In Lord Advocate and Barbour *v.* Lang, 30th Nov. 1866 (5 M., 84), it was *held* (*diss.* Lord Curriehill), that the Crown, not having been expressly made liable by a Local Public Act, was exempt from the burden of maintaining the foot pavement opposite its property; and *observed*, that there was no distinction in regard to the Crown's right of exemption between a burden thus imposed and an assessment leviable for the same purpose.

Sewer Assessments.

361. Commissioners may impose a General Sewer Rate distinct from other Rates.—The Commissioners shall, if necessary, impose upon owners a sewer rate, to be called for the purposes of this Act the "General Sewer Rate," distinct from any other rate which they are authorised to make under this Act, to be applied in maintaining and clearing and ventilating the sewers, and all other expenses connected with such sewers not herein otherwise provided for, or which may not be fully defrayed by the special sewer

rate hereinafter provided for, and for securing and paying off any moneys which may be borrowed on the security of the special sewer rate under the provisions of this Act, and the interest of such moneys which the special sewer rate shall be insufficient to defray.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner;" see sec. 362 as to special sewer rate, secs. 366–369 as to collection and recovery of "general sewer rate."

In Edmonstone *v.* Kilsyth, 9th June 1882 (9 R., 917; Johnston's Digest, 483), the Local Authority of a parish in 1875 created a portion of it into a "special drainage district," under sec. 76 of the Public Health Act, 1867. Thereafter, in 1877, and before any operations were projected or executed in the "special drainage district" so created, the General Police Act, 1862, was adopted in a populous part of the parish. The Police Commissioners appointed under that Act proceeded to carry out a general scheme of sewers and drains throughout the whole area under their jurisdiction, which included, besides other lands, the above mentioned special drainage district, and, to meet the expense so incurred, laid on assessments under the powers given them by the 1862 Act. An owner of mines and minerals partly within and partly beyond the "special drainage district," but wholly within the police area, presented a suspension and interdict against these assessments, on the grounds, (1) that the lands and heritages within the special drainage district fell to be assessed separately, and (2) that the assessments fell to be laid on minerals at one-fourth of their value, in terms of sec. 94 of the Public Health Act, and not at the full value, as authorised by sec. 98 of the Act of 1862. The Court *repelled* the reasons of suspension.

In Kirkintilloch Police Commissioners *v.* M'Donald and others, 31st Oct. 1890 (18 R., 67), where a burgh of ten thousand inhabitants had adopted the General Police Act of 1862, the Commissioners of Police introduced a system of public sewers at a cost of over £4000, the proceedings in connection therewith being taken under the Act of 1862. They were subsequently compelled, in order to dispose of the sewage, to undertake the construction of a system of sewage purification and disposal works, and in order to get compulsory powers to acquire the land for this purpose, they had, as the Local Authority, to obtain a Provisional Order and a Provisional Order Confirmation Act, in terms of the Public Health Act, 1867. The cost of obtaining the Act, and of purchasing the ground and constructing the works, was about £19,000. The Commissioners having proposed to raise both sums by assessment on owners under the Police Act of 1862, certain owners contended that the latter sum should be raised under the Public Health Act by an assessment upon occupiers. In a special case, *held*, that the expenses incurred in the application of the Public Health Act, 1867, fell upon occupiers in terms of sec. 94, sub-sec. (2), of that Act, there being a police

but no prison assessment in the burgh, which was so leviable under sec. 84 of the Police Act of 1862.

362. Where new Sewers are made, Commissioners may impose a Special Sewer Rate.—Whenever the Commissioners shall resolve to make any new sewer, they may charge owners of all the lands or premises within the burgh, or where there are separate drainage districts within the respective districts, with a special sewer rate over and above any other assessment or rates to which such persons may be liable under this Act, and such rate shall, for the purposes of this Act, be called the "special sewer rate."

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "land and premises," (4) "burgh."

In Greenock Board of Police *v.* Liquidator of the Greenock Property Investment Society, 13th March 1885 (12 R., 832), the Greenock Police Act, 1877, sec. 408, provided that "all expense of streets and sewers, and other expenses . . . made payable by, or recoverable from the feuar or proprietor of any lands or heritages, with such interest thereon as by this Act or any such bye-law is provided for, shall be a real burden and charge on such lands or heritages in priority to any incumbrance or charge on or affecting the same, and created subsequently to the date when the petition for authority to execute the work on account whereof the expenses are payable was presented," etc. Under the interpretation clause of the Act (sec. 3), "proprietor" included "heritable creditors, or other persons . . . in the actual enjoyment of, or who shall take the rents and profits or produce of such lands and heritages." Sec. 441 provided that where "the proprietor of any lands or heritages" was liable for any sum due in pursuance of the provisions of the Act, the Board might recover it "from the occupier of such land or heritages, to the extent of the rent due by such occupier at the date when notice of the said claim shall be given . . . and the occupier shall, after such notice, be bound to retain and account to the Board or to such officer for any rent due by him, and shall be entitled to an abatement from his landlord corresponding to the sums so retained and accounted for." A heritable creditor came into possession of certain properties upon which an assessment was leviable in terms of the Act, his bond being prior in date to the application for authority to execute the works in question. *Held*, that the assessment was a preferable claim on the rents to that of the heritable creditor for interest on his bond.

In M'Callum *v.* Barrie, 26th Feb. 1878 (5 R., 683), Police Commissioners who had constructed sewers under the Police and Improvement Act, 1862, having passed a resolution to assess all proprietors who had not hitherto been assessed for drainage purposes at the rate of 2s. 6d. per £ on their rental, raised an action in the Sheriff-Court against an owner of property in the burgh for

payment of his share of this assessment, calling it a "special sewer rate." *Held*, that an assessment of such a general nature was *ultra vires* of the Commissioners, and that they were not entitled to recover the assessment as a reasonable sum, under sec. 190 of the Act, that section requiring inquiry into the circumstances of each case before the sum to be charged was decided upon.

Observations, per Lord Young, upon the power of the Court of Session to review the decision of Commissioners fixing a "reasonable sum."

Under sec. 185 of the Act of 1862, a burgh was divided into nine drainage districts. The last districts to be dealt with were Nos. 6 and 9, and the special sewer rate amounted to 8s. 6d. and 9s. 3d. per £ respectively. The Commissioners fixed 2nd April 1890 as the date when these rates became payable. A Local Act provided that, from and after Whitsunday 1890, the burgh should be treated as one drainage district "subject always to the payment of all drainage assessments which may have been imposed under that Act (*i.e.* the Act of 1862) on any such districts prior to the said term of Whitsunday, by the persons liable for the same." At the meeting for hearing appeals on 25th March 1890, the Commissioners were urged to spread the payment of the rates over a period of years. The Commissioners submitted the following queries for the opinion of Counsel—Sir C. J. Pearson and Mr. Graham Murray:—

QUERIES.

"1. Can the Town Council legally declare the assessments which have been imposed to be payable by instalments over a period of years, as desired by the appellants?

"2. If so, (*a*) Is there any limit? and if so, what? (*b*) Would the three years' lien attach to each successive instalment? (*c*) How could the interest on the principal sum, which would accrue after 2nd April, be got? (*d*) Assuming, after the three years' lien lapsed, the question were raised at law, by a singular successor, and decided against the Town Council, would any personal pecuniary liability attach to the Council? Or how could the deficiency be made up?"

OPINION.

"1. We are of opinion that the memorialists cannot legally extend the payment of the assessments imposed to a period of years, by declaring them payable by instalments.

"In our view, the Act of 1862 contemplated only one form of assessment, viz. an assessment imposed and levied annually or at shorter periods. If it were wished to spread an expenditure over a longer period, that result might be reached by the device of borrowing; but the assessment for repayment of the sum borrowed fell, as before, to be annually imposed and levied.

"There are many things in the Act which seem to us inevitably to lead to this view.

"1. There is no special mention of instalments, as would be natural if they were legal.

"2. The words of sec. 106, 'yearly, half-yearly, or at such other periods,' are, in our view, indicative of a *diminuendo*, not of a *crescendo* scale. The words as to the 'day' for payment and for appeals in the same section are singularly inapplicable to an assessment over a lengthened period.

"3. The directions as to surplus in sec. 108 are clearly in view of a yearly assessment.

"4. It being clear that if an assessment spread over a long period was allowable, the *persons* liable would frequently change, it would be expected that provision would be made for a real remedy—but sec. 104, *prima facie*, limits the *real* remedy to three years. It is arguable otherwise, but in our view it will not do to rest faith on the words 'from the date when respectively payable,' because the declaration is that they shall be good against 'singular successors,' which seems to have in view the relationship of successor to the person in right of the subject at the date of the imposition of the assessment.

"5. The terms of sec. 386 which bind the Commissioners to repay the moneys borrowed from the readiest of the moneys to be raised under the *annual assessment*. We were referred in the interests of the appellants to sec. 404. We think that has nothing to do with a special sewer rate, but with the repayment of moneys which the Commissioners have expended in doing what the owners themselves ought to do. It really furnishes an argument the other way, because it shows that the Statute mentions instalments when it means to make them legal.

"Schedule E is also equally little to the purpose. It must be read with sec. 105, which shows clearly that it deals with statement of arrears; as to which a provision of several columns is evidently appropriate.

"For these reasons we come to the conclusion that it is not legal to assess except by the year or smaller periods.

"No doubt there is a hardship in levying a large assessment at once. This could have been obviated by borrowing, and assessing year by year. But, unfortunately, the provisions of secs. 109 and 110 of the Act of 1889 are imperative and unambiguous. Their effect is to stop for ever, after Whitsunday 1890, the power of assessing the old special drainage district, and thus practically to stop the method of borrowing for this particular expense which might otherwise have been adopted. It would be obviously unjust to borrow and then repay by assessment over the whole burgh, *i.e.* over the special districts which have long ago paid for ever their special sewer rate."

363. Separate Districts to bear their Share of Expenses.—The Commissioners may, in making the said assessments for the burgh, or for separate and distinct districts

thereof, appoint, if they see fit, Surveyors, Collectors, and other officers for such burgh, or for every such district, and they shall cause separate and distinct accounts to be kept of all moneys collected and received under any rate in each distinct district, and of all payments and disbursements in respect thereof; and they shall apply the moneys to be collected and received from each distinct district, under any such rate as aforesaid, for the several purposes to which the same may be lawfully applied under the authority of this Act, but so nevertheless that each district shall, as near as may be, bear its own expenses; and in case any such expenses shall apply to or be incurred in respect of two or more districts, the same shall be apportioned and divided between such districts in such manner as the Commissioners shall consider fair and equitable.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (8) "Collector."

The Commissioners of a burgh, which was divided into two drainage districts, contemplated the formation of sewage works, which were equally serviceable for both districts. They took the opinion of Counsel, Mr. (afterwards Lord) Rutherfurd-Clark, and Mr. J. B. Balfour, as to the method of assessing the districts for the expense of the works. Counsel advised: "We think the proper method to allocate the assessment would be upon both districts according to their rental, which would be practically the same thing as allocating it upon the whole burgh without distinction of districts."

364. Premises subsequently built or enlarged to pay reasonable Sum for use of Sewers.—The Commissioners are hereby authorised to charge a reasonable sum of money, for the use of the sewers, against the owners of all lands or premises which were not assessed, either under this or any other Act, for the expense of making such sewers, or which shall have been built, enlarged, or altered after the assessment for making the same was first imposed or levied; and the Commissioners shall fix and determine the sum to be paid as they shall consider just; and in fixing such reasonable sum, the Commissioners shall take into consideration the value and efficiency of such sewer, and the same may be recovered in the same manner as any assessment under this Act.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (16) "lands and premises;" see also sec. 227, and observations thereunder.

In Macknight *v.* MacGregors, 23rd Dec. 1871 (10 M., 289), the Edinburgh and Leith Sewerage Act of 1864 made provision for equalising the incidence of the expense of constructing sewers, as between the owners of present and future buildings using such works, by authorising the Commissioners to levy an assessment in respect of the use of their sewers, upon subjects built subsequently to the construction of these sewers. *Held*, that it was reasonable to assess the owners of new buildings for the use of the sewers at the same rate as had been levied from owners for their construction, the Statute having provided for an equitable application of any surplus which might be accumulated by such assessment.

Macknight *v.* Oman's Trustee, 29th Nov. 1872 (11 M., 154; 45 Jur., 95). Sec. 47 of the Edinburgh and Leith Sewerage Act, 1864, enacts that "the owners of all lands, etc., any sewer, outfall, or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the Commissioners of a reasonable sum of money for the use of the said main or branch sewers;" and sec. 3 of the General Police Act, 1862, incorporated therewith, declares that the word "owner" shall include joint-owner, etc., "or other person in the actual possession or receipt of the rents of tenements," etc. *Held*, that a trustee in a sequestration was "owner" of the bankrupt's property in the sense of sec. 47, and that the Commissioners were not bound to claim in the sequestration an assessment which had been imposed before the bankruptcy, the trustee being bound to pay it as a condition of his taking possession of the property on drawing the rents.

In M'Callum *v.* Barrie (5 R., 683), see under sec. 362, Lord Young said: "I am of opinion that no case for such a special sewer rate is set forth on record or established. When the nature of the case was explained, we were told that the Commissioners relied on sec. 190 of the Police Act. But that section does not authorise a special sewer rate, or any rate at all. It empowers the Commissioners, when they find out that any of their sewers are being used by persons who are not assessed, to exact a 'reasonable sum' from these persons in lieu of the assessment for making the sewers used by them. I agree with Lord Gifford that this action is not valid under sec. 190. I agree also that the grounds upon which the Sheriffs found their judgments are not good, although they are right in the result. The action falls to be dismissed, reserving—although I consider it unnecessary to express the reservation—to the Commissioners their right to exact a reasonable sum, under sec. 190, for the use by the respondent of sewers, to the expense of making which he has not contributed. Such reasonable sum truly comes in place of assessment for the cost of construction, and an action to recover it must, I think, be rested on an averment of facts sufficient to show *primâ facie* that it is reasonable. The Commissioners have probably

a large discretion in fixing the amount, with their exercise of which the Court will not interfere on other than clear and urgent grounds. But I am not, as at present advised, prepared to hold that they have absolute power, or that their exaction is not examinable by the Court to which they resort to enforce it."

Lord Rutherfurd-Clark said, in Commissioners of Police of Hillhead *v.* Renwick, 21st June 1890 (17 R., 1042): "I think that I give consistency to the section by reading the words in question as meaning, on taking the use, or getting the use of sewers. The lands on which the burden is imposed are conceived of as not using the sewers, either as not being within the burgh at the time when the sewers are made, or as not having any or sufficient buildings to require such a use. But when the use is taken, I think that there may be perfect fairness in requiring the owner to pay a reasonable sum, though he is liable for the special rate as well. He takes the benefit of a sewer to the making of which he has contributed nothing or little. He has to pay the special rate in the future; but that may not fairly represent the benefit which he derives. Accordingly, I think that the Legislature meant to empower the Commissioners to exact a reasonable sum as an equalising rate on his taking that use. They, as charged with the interests of the burgh, and all and each of its inhabitants, are the judges of the amount, not necessarily without control; but unless their power were capriciously or oppressively exercised, it would be difficult to set aside their judgment."

Private Improvement Expenses.

365. Assessment for Private Improvements.—Where, by the provisions of this Act, the owner or occupier respectively, as the case may be, of any premises is directed or is bound to do any work, in relation to the same, and the work, through the failure or delay of such owner or occupier to execute it, shall be done by the Commissioners, or where expenses are incurred by the Commissioners for or in respect of any premises, in order to carry out the provisions of this Act, the Commissioners shall charge such owner or occupier of the premises with the said expenses, over and above any assessments or rates to which such owner or occupier may be liable under this Act, and such expenses shall, for the purposes of this Act, be called "private improvement expenses," and may be recovered in the same manner as any assessment under this Act.

See sub-head (22), sec. 4, for definition of "owner," (21) "occupier," (16) "premises," (9) "Commissioners;" see also sec. 372 as

to cases where the Commissioners are unable to recoup themselves out of private improvement assessment.

The Lord Chancellor, in the case of Campbell *v.* The Leith Police Commissioners, 28th Feb. 1870 (8 M., H. L., 31; 42 Jur., 310), as to this, makes the following observation: "In this case (as to paving a street under clause 150), it may well be that there has not been a distinct order upon Mr. Campbell to do the work which he has disobeyed, and it has therefore fallen upon the Commissioners to do it; but there has been a distinct neglect upon the part of Mr. Campbell, and other persons interested in this property, to flag and pave the street, and it has fallen upon the Commissioners to do that under sec. 150 of the Act. He clearly, therefore, is in the position of one who, though he may not have been ordered to do it, and failed, is in the position of one who has failed to do it, and it has been done by the Commissioners."

See also the Lord Chancellor's remarks as to the Schedule, quoted in Appendix.

"And it appears to me that beyond all doubt this which the Commissioners are now purporting to do in the case before us, namely, to repair a private road which the owner has neglected to repair, and to expend money in order to make that reparation, would involve the necessity of assessing the owners, as directed by sec. 151; and, as there were more owners than one, then it would clearly not be a sum to be recovered from one individual, but would be a private improvement assessment."

In Cadder Local Authority *v.* Lang, 11th July 1879 (6 R., 1242), it is enacted by the Public Health Act, 1867, sec. 18, that on the application of the Local Authority, a Magistrate may decern for the removal of a nuisance; sec. 19, "The author of the nuisance or owner of the premises may be ordained . . . to do such . . . works or acts as are necessary to remove the nuisance;" sec. 22, "In case of non-compliance . . . with any decree foresaid, the Sheriff, Magistrate, or Justice may, on application by the Local Authority, grant warrant to such person or persons, as he may deem right, to . . . remove or remedy the nuisance."

The Sheriff granted warrant to the Local Authority to remove a nuisance, and afterwards decerned in their favour for the cost against the owner of the ground. This decree was quashed by the High Court of Justiciary, on the ground that the Sheriff had not first given the owner an opportunity of removing the nuisance himself.

In an ordinary action by the Local Authority against the owner for the cost of the works, the owner was assoilzied, on the ground that the works were not executed under proper legal authority.

Mode of Collecting Special Rates.

366. Certain Rates to continue Burdens on Lands, etc.—Such special sewer rate, general sewer rate,

and private improvement expenses shall, with the legal interest thereof, from the time when the same shall be declared payable, together with all expenses incurred in the recovery thereof, continue burdens on the lands or premises liable for the same, or in respect of which the same shall be payable, but that only for seven years from the date when the same shall be respectively payable, as against *bonâ fide* singular successors or heritable creditors, and (if the ground is unbuilt on) also superiors.

See sub-head (16), sec. 4, for definition of "lands and premises;" sec. 361 as to general sewer rate, sec. 362 as to special sewer rate, and sec. 365 as to private improvement expenses. See also the opinion of Counsel under sec. 362.

In MacKnight *v.* Paterson, 29th Nov. 1872, 11 M. 154, a case under the Edinburgh and Leith Sewerage Act, which incorporated many of the clauses of the Police Act of 1862, and sec. 73 of which was in terms similar to this section, Lord Benholme said: "Now, sec. 73 ascertains the quality of these impositions. They are to continue 'burdens on the lands and heritages' liable for the same. The word 'burden' is there used in a special sense. It does not mean all heritable and feudal burdens, but such a burden as runs with the lands and passes with their possession. Whoever takes the land is liable for the assessment, and I cannot see again why this special character should apply to the one set of assessments and not the other."

The Greenock Police Act, 1877, by sec. 408 provides that the expenses of streets and sewers shall be a real burden on lands and heritages in priority to any incumbrance. Sec. 441 provides that when the proprietor of any lands is due any sum, the Board may recover from the occupier. By the interpretation clause the word "proprietor" includes "heritable owners or other persons who shall be in the actual enjoyment of, or who shall take the rents and profits or produce of the lands or heritages." The Police Board made a claim under this Act against the liquidator of a Property Investment Society who had entered into possession of certain heritable properties in the burgh over which the Society held bonds, for the sums due by and chargeable on the properties as their share of the expense of streets and sewers. The Board maintained that these assessments should be treated as charges upon the rents, after deducting feu-duties, taxes, repairs, etc., but in priority to the interest on the bonds. The liquidator founded on sec. 408, and maintained that there was no preference, as the Society's bonds were prior in date to the petitions for authority to execute the work. *Held*, that the terms of sec. 441 were so inconsistent with the construction which the liquidator sought to put upon sec. 408, that this argument, rested as it was merely on an implication, could not receive effect, and that therefore he was bound to pay the past-

due assessments out of the rents, after deducting feu-duties, taxes, repairs, etc., but in priority to the interest on the bonds. The Board of Police of Greenock *v.* The Greenock Property Investment Society in Liquidation, 13th Mar. 1885 (22 S. L. R., 535).

367. Collector of Rates to grant Certificate.—The Collector in any burgh shall, when required by any person, be bound to furnish to such person a certificate under his hand, in the form of Schedule VI. of this Act, showing, with reference to any premises, what arrears of such rates or expenses, if any, are past due, and the name of the owner and occupier of such premises as appearing in his book, and also whether any and what instalments of such rates or expenses are still chargeable in respect of such premises: Provided always, that for each certificate in respect of premises separately entered or charged in the assessment books, he shall be entitled to a fee of 2s. 6d. from the person requiring the same, for which fee the Collector shall be bound to account to the Commissioners.

See sub-head (8), sec. 4, for definition of "Collector," (4) "burgh," (16) "premises," (22) "owner," (21) "occupier," (9) "Commissioners;" see p. 5, "person;" see sec. 63 as to penalty on Collector who fails to account to the Commissioners.

368. Rates and Private Improvement Expenses, how to be imposed, and how Appeals to be entered and disposed of.—The said special sewer rate, general sewer rate, and private improvement expenses, may be imposed and levied yearly, half-yearly, or at such other periods as the Commissioners may think fit, and shall be payable at such times as they appoint; and at the meeting imposing the same the Commissioners shall appoint a day upon which such rates and expenses shall be payable, and another day upon which appeals by any parties complaining that they have been improperly rated or charged may be lodged with the Clerk or Collector, and another day or days on which appeals in reference to such rates or expenses shall be heard by the Commissioners; and notice to each party intended to be so rated or charged, stating the particulars of the intended rates or expenses as regards such party, and specifying the several days fixed by the Commissioners as aforesaid, shall be sent by the Clerk or Collector, at least two weeks preceding

the day which may be fixed for hearing the appeal of such party, and the decision of the Commissioners upon all such appeals shall be final; but the Commissioners may rectify such rates or expenses so appealed against.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "Clerk," "Collector;" see sec. 362 as to special sewer rate, sec. 361 as to general sewer rate, sec. 365 as to private improvement expenses, secs. 336 to 338 inclusive as to "notice," sec. 354 as to "appeal." See also the opinion of Counsel under sec. 362.

369. Recovery of the said Rates and Expenses.—As soon as may be, after disposing of the appeals against any such rates or expenses, the Commissioners shall cause to be made up a roll or book of assessment, or separate rolls or books of assessment, applicable thereto, and the same, or a copy thereof, docqueted and signed by the Clerk, and any two of the Commissioners, shall forthwith be delivered over to the Collector, as the rule for levying and collecting the said rates or expenses; and if the said rates or expenses shall not be paid when the same fall due, the Collector shall take legal proceedings for recovery of the same, together with the legal interest thereof from the day fixed for payment thereof as aforesaid, in the same way and manner as is hereinbefore provided for recovery of the burgh general assessment under this Act, or the said rates or expenses, or any part thereof; and interest, with the expenses attending the recovery of the same, may be recovered in the same way and manner as debts are recoverable by the law of Scotland.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "Clerk," "Collector;" sec. 340 as to burgh general assessment.

It will be observed that if the rates are not paid when due, the Collector shall take legal proceedings for recovery of the same. The obligation to do this is therefore imperative, and a Collector failing to implement the statutory obligation will run the risk of being held liable in any loss which may thereby be occasioned.

It will further be observed that he is not only to sue for the rates overdue, but also "the legal interest thereof from the day fixed for payment." This also is imperative, and no discretion is given to dispense with the payment of the interest. The auditor, in conducting the annual audit, ought to see that these provisions are duly attended to.

370. In case of Bankruptcy, Assessments to be preferable to Private Debts.—Such burgh general assessment and general improvement rate shall, during the year of assessment, and for the period of six months thereafter, in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all debts of a private nature due by the parties assessed.

See sec. 340 as to burgh general assessment, and sec. 359 as to general improvement rates.

Sec. 1, sub-head (1) (*a*) of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), provides that, *inter alia*, "all parochial or other local rates" becoming due within twelve months prior to the bankruptcy, shall be paid in priority to all other debts.

371. Application of Surplus Assessment.—Where the amount of any rate, charge, or assessment is more than sufficient to meet the charge for the service to which the same applies, any balance remaining over at the end of the financial year shall be credited to that service, and shall be applied *pro tanto* in diminishing the amount of the rate to be estimated for that service during the year next ensuing; and if any such rate, charge, or assessment for any year shall not be sufficient for the purpose for which it was imposed and levied, the Commissioners shall be, and they are hereby authorised and required to make provision for the payment of such deficiency by rate, charge, or assessment for the purpose in the following year or years, until the same shall be fully paid, but so that the total rates, charges, or assessments shall not exceed the amount authorised by this Act.

See sub-head (9), sec. 4, for definition of "Commissioners."

372. Recoupment of Arrears of Private Improvement Expenses.—Where the Commissioners are unable to recoup themselves out of any private improvement assessment for any expenses to which they may have been put for works, the cost of which fell to be met by private improvement expenses, it shall be lawful for the Commissioners to take such expenses out of the burgh general assessment.

See sub-head (9), sec. 4, for definition of "Commissioners;" sec. 365 as to private improvement assessment, sec. 340 as to burgh general assessment.

If any question arise as to the construction of this clause, it ought to be kept in view that it will be very strictly construed, and its application limited to the express cases for which it provides. If the failure to recoup should arise from any failure or neglect, or want of due diligence on the part of the Commissioners, or their officials, with their consent or knowledge, it is very doubtful if the benefit of this section would be sanctioned.

INCIDENCE OF ASSESSMENT.

373. Exemption and Savings.—(1.) No assessment authorised by this Act shall be imposed on any lands or premises exempt by Act of Parliament at the commencement of this Act from any corresponding assessment authorised to be imposed by the General Police Acts, or the Local Police Acts respectively applicable to the burghs named in Schedule II. of this Act annexed, or any portion of a Local Police Act expressly saved by this Act, unless and until such exemption is repealed by Provisional Order, confirmed by Parliament, as hereinbefore provided.

(2.) Where, prior to this Act coming into operation in any burgh, the power of imposing assessment is by any Local Act restricted in amount in any portion of the burgh:

(*a*) For a definite period—such restriction shall continue until the expiration of such period:

(*b*) For an indefinite period—it shall be lawful for the Commissioners, at a meeting specially called for the purpose, after a month's previous notice, to resolve that such restriction shall continue for a definite period and no longer, but any owner or occupier or other person interested who considers himself aggrieved by such resolution may appeal to the Sheriff, who shall have powers to confirm or to cancel, or, with the consent of the Commissioners, to modify, such resolution, and his decision shall be final.

(3.) It shall be lawful for the Commissioners, at a meeting called for the purpose, after a month's previous notice, to resolve for a definite period to exempt from any of the assessments, or to restrict any of the assessments with respect to any portion of the burgh, on the ground of its being newly included within the boundaries, or its not being built upon, or upon any other ground to be specified in the resolution.

(4.) In the case of any assessment under this Act, the whole or a portion of which is directed to be levied from the owner or from the occupier respectively, where under the provisions of any Local or General Police Act an assessment for the same or similar purposes is authorised to be levied in any burgh, and such assessment or such portion thereof is thereby directed to be, or is in use, to be levied from the occupier instead of from the owner, or from the owner instead of the occupier, respectively, whether with recourse to either against the other, for the whole or any part of the assessment or not, it shall be lawful for the Commissioners, by a majority of not less than two-thirds present and voting, at a meeting specially called for the purpose, to resolve that such assessment or portion thereof shall continue to be levied under this Act from the same parties, being owners or occupiers respectively, from whom it was previously in use to be levied, and with the same right of recourse, if any, for a definite period of years, to be specified in the resolution, and such resolution may be renewed from time to time.

(5.) Nothing contained in this Act shall alter or affect the obligations of landlord and tenant as between themselves, in reference to any assessment to be imposed in virtue hereof, under any lease of lands or premises entered into prior to the application of this Act, but such assessment as between such landlord and tenant shall be payable during such lease by the tenant, if previous to the passing of this Act a similar assessment was leviable from him.

See sub-head (16), sec. 4, for definition of "lands and premises," (4) "burgh," (9) "Commissioners," (22) "owner," (21) "occupier;" secs. 336 to 338 inclusive as to "notice," sec. 354 as to "appeal." See sec. 15, which provides that where Part V. of this Act is adopted only in part by any of the burghs mentioned in Schedule II., such adoption shall include the provisions relating to incidence of assessments.

Exemption from Assessment.—By various Acts of Parliament, certain lands or premises are exempt from assessment, and these exemptions are saved by this section until the exemption is repealed. Among these are the following:—

Churches, Chapels, and Burial Grounds.—"By 37 & 38 Vict. c. 20, no assessment or rate under any General or Local Act of Parliament for any county, burgh, parochial, or other local purpose

whatsoever, shall be assessed or levied upon or in respect of any church, chapel, meeting-house, or premises in Scotland, exclusively appropriated to public religious worship, or upon or in respect of any ground exclusively appropriated as burial ground: provided also, that such exemption shall continue, although such church, chapel, meeting-house, or other premises, or any room belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."

Scientific or Literary Societies.—"By 6 & 7 Vict. c. 36, 28th July 1843, it is enacted that no rates of any kind shall be leviable upon any property belonging to or occupied by any literary, scientific, or art society, when solely occupied for the transaction of its business, or for carrying into effect its purposes, provided that such society is supported wholly or in part by annual contributions, that the members thereof receive no dividend or other money profit, and that it shall have received the certificate of the barrister-at-law or the Lord Advocate."

Sunday and Ragged Schools.—"Under 32 & 33 Vict. c. 40, 26th July 1869, all authorities levying rates upon occupiers may exempt buildings, or parts of buildings, used exclusively for Sunday or ragged schools, from payment of any rate. A Sunday-school is defined to mean any school where religious instruction is given gratuitously to children or young persons on Sunday, or where classes or meetings are held on week-days, with the same object in view. A ragged school is a school used for the gratuitous education of young people of the poorest classes, and from which no pecuniary benefit is derived, except by the teachers."

Militia Stores.—"The Act 17 & 18 Vict. c. 106, sec. 36, enacts that no place provided for the keeping of militia stores, under this or any former Act, nor any buildings or premises appurtenant thereto, shall be liable to be valued or assessed to any county, burgh, parochial, or other local rates or assessments."

Volunteer Stores.—"The Act 26 & 27 Vict. c. 65, sec. 26, provides that the commanding-officer shall appoint a proper storehouse for the depositing and safe keeping of such arms, ammunition, or stores. Every such storehouse shall be free from all county, parochial, or other local rates and assessments."

Crown property is also exempt from assessment. Property held by the Crown, such as barracks, post-office, inland revenue buildings, and lands or premises held and used by the Crown for national purposes, are also among the subjects of exemption. Thus in Advocate-General *v.* Edinburgh, 22nd January 1850 (12 D., 456), it was decided that a building held in property by the Crown, and occupied exclusively for public and national purposes, is not liable to police or other local assessments; and in Lord Clerk-Register *v.* Edinburgh, 19th May 1826 (1 Fac., 579), the General Register House was found not liable to police assessment, under an Act which expressly excepted certain other public buildings.

In Parochial Board of Langholm *v.* Commissioners of Supply of Dumfriesshire, 23rd June 1885 (Scot. Law Rev., 265), it was held

that police stations are exempt from poor and school rate as well as from income-tax.

Lands and Premises held for Charitable Purposes.—By many Local Acts these are also exempt from assessment, and where such exemptions exist they will continue under this Act till repealed.

In Chalmers' Hospital *v.* Magistrates of Edinburgh, 8th March 1881 (8 R., 577), the Edinburgh Municipal and Police Act, 1879, sec. 70, exempted from burgh assessment "any house or building which is solely occupied for purposes of public charity, or any premises exempted from taxation by public law." The directors of a charitable hospital in Edinburgh, in order to extend the usefulness of the hospital, opened certain additional wards—which they had otherwise not sufficient funds to support—to patients who should pay 3s. per day for board. *Held*, that the fact that certain patients contributed to the cost of their own maintenance did not deprive the hospital of the character of a building "solely occupied for purposes of charity," and that it was entitled to exemption.

In Surveyor of Taxes *v.* Fasson, 19th May 1883 (10 R., 870), it was held that a house erected within the grounds of a large public infirmary, for the residence of the medical superintendent, was to be regarded as part of the infirmary, and was thus exempt from assessment for inhabited house duty.

But the exemption must be clear and express, otherwise it will not apply. In the British Fisheries Society *v.* Henderson, 27th February 1866 (4 M., 492), it was held that a society incorporated by Statute, which had authority to appoint constables within the limits of a harbour belonging to it, was nevertheless liable to assessment under the General Police Act, 20 & 21 Vict. c. 72, for support of the police of the county in which the harbour was situated, there not being in the society's Special Acts any provision exempting it from such assessment.

If the exemption be clearly expressed, it will apply, Thus in North British Railway Company *v.* Commissioners of Supply for Lanark, 10th December 1868 (7 M., 201), a Railway Act provided that the ground conveyed to the company should "not be liable for any duties or casualties to the superiors, nor for land-tax, nor any public or parish burdens." *Held*, in conformity with Scottish North-Eastern Railway Company *v.* Gardiner (2 M., 537), that the company was exempt from assessment for police, prison, and county rates.

In England, "by the Telegraph Act, 1868, all land, property, or undertakings, purchased or acquired by the Postmaster-General under that Act, shall be assessable and rateable in respect to local, municipal, and parochial rates, assessments, and charges, at sums not exceeding the rateable value at which such land, property, and undertakings were properly assessed or assessable, at the time of such purchase or acquisition, 31 & 32 Vict. c. 110. sec. 22. A mandamus does not lie to the Postmaster General to pay the rate, for the Treasury alone are to decide what sum is payable under the

Act. St. Marylebone *v.* Postmaster-General (28 L. T., N. S., 336; 37 J. P., 196)."—Glen, p. 409.

In Robertson *v.* The Local Authority of Cults, 11th July 1883 (20 S. L. R., 766), on a construction of the Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, sec. 89, it was held that an inhabitant of a special water supply district, who keeps cows and sells their milk, is liable to a special assessment for water rates in respect of them, and is not exempt on the ground that they are domestic animals, and that the water taken for them is for domestic use. The question was raised, Whether, in the event of the inhabitant refusing to pay the additional assessment so imposed, the Local Authority would be entitled to the remedy of cutting off the water supply from him, by disconnecting the private service pipe from the main, and the Court indicated that the Local Authority had also this remedy.

Borrowing of Money for the General Purposes of this Act.

374. Power to Commissioners to borrow Money for the purposes of this Act.—It shall be lawful for the Commissioners to borrow and take up, for any of the purposes of this Act, or for repayment of any moneys borrowed for such purposes under this or any former Acts, which shall have fallen due to the lenders thereof, such sum or sums and at such time or times as the Commissioners shall deem necessary for such purposes: Provided always, that in all cases where it shall be necessary to borrow any sum or sums for the said purposes of this Act, it shall be lawful for the Commissioners, and they are hereby required, at their first annual meeting for assessment after such borrowing, if the respective rates of assessment then leviable do not amount to the respective maximum rates by this Act authorised, to assess all owners or occupiers of premises within the burgh, respectively liable in the several assessments under this Act, in such additional assessments, beyond the sums necessary for such respective purposes, as will produce a fund equal to three per centum per annum upon the sum or sums of money so borrowed respectively, and also to the annual interest of such borrowed sum or sums, which sum of three per centum per annum the Commissioners shall annually appropriate, set apart, and invest, at the highest rate of interest which can be had for the same, in the public funds, or in any chartered or other bank,

or on heritable security, as a sinking fund, applicable and to be applied by the Commissioners from time to time to the repayment of the moneys borrowed, until the respective debts shall be extinguished; or the Commissioners may agree with the lender, so that the said amounts of three per centum shall annually be receivable by him in liquidation *pro tanto* of the principal debt: Provided always, that such additional assessment shall at no time increase the whole assessment leviable beyond the maximum rates of assessment, as the case may be, allowed by this Act; and provided also, that no sum of money shall be borrowed until an estimate of the amount required shall have been laid before the Commissioners, or until the expiration of six weeks after public notice shall have been given by the Commissioners of the amount so proposed to be borrowed, and the purpose to which the borrowed money is to be applied, in some newspaper in ordinary circulation within such burgh; and provided further, that the proposal to borrow shall be disposed of at the next meeting of the Commissioners six weeks after such public notice, and that the sum borrowed shall not exceed the amount so advertised, without a further estimate and notice in manner above provided.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (22) "owners," (21) "occupiers," (16) "premises;" sec. 50 as to meeting of Commissioners and notices necessary.

It will be observed that the Commissioners are only authorised to borrow (*a*) for the purposes of the Act, or (*b*) for repayment of any moneys borrowed for such purposes, under this or any former Acts, which shall have fallen due to the lenders thereof. There is no definition of the words "purposes of the Act." In the 1862 Act, the words "police purposes," except where otherwise limited, meant and included the whole Act, except the enactments under the head with respect to the promotion of public health. The purposes of this Act may therefore be assumed, unless otherwise expressly limited, to include the whole provisions of this Act, but nothing outwith the same. In repaying loans under any former Act, care will require to be exercised in view of the expression that this can only be done of any moneys borrowed "for such purposes."

The section is not very clearly arranged, and it may be well to point out that the next matter to attend to is the proviso at the end, that no sum of money shall be borrowed until an estimate of the amount required shall have been laid before the Commissioners, or until the expiration of six weeks after public notice shall have been given by the Commissioners of the amount so proposed to be borrowed,

and the purpose to which the borrowed money is to be applied, in some newspaper in ordinary circulation within such burgh; and provided further, that the proposal to borrow shall be disposed of at the next meeting of the Commissioners, six weeks after such public notice, and that the sum borrowed shall not exceed the amount so advertised, without a further estimate and notice in manner above provided.

The word "or" in this proviso is clearly a slip. The notice must not be regarded as an alternative but as a supplement to the estimate, the "or" having not an alternative, but a copulative signification, as indicated by the use of the conjunction "and" in the expression "estimate and notice" at the end of the section. In short, the "or" should be read "nor."

Then, at the first annual meeting for assessment after borrowing, the Commissioners are required, if the respective rates of assessment then leviable do not amount to the respective maximum rates authorised by the Act, to assess the owners and occupiers liable in the several assessments, in such additional assessments as will produce a fund equal to three per centum per annum on the amount borrowed for the redemption of the loan.

The additional assessment must at no time increase the whole assessment leviable beyond the maximum rates allowed by the Act.

The 1862 Act did not contain the proviso as to agreeing with the lender to receive the three per centum in liquidation of his debt. A burgh desirous of borrowing had a proposal to enter into an arrangement with an English banking company upon this plan, but, being doubtful of its legality, took the opinion of Counsel, Mr. Mackintosh (now Lord Kyllachy) who said:—

"I am of opinion that the memorialists are entitled to enter into an arrangement with the proposed lenders, by which they shall bind themselves and their successors in office to make, by way of deposit with the lenders' bank, the annual "appropriation and investment of a sum of five per centum per annum on the amount borrowed, which by sec. 384 of the Statute they are required to make with a view to the creation of a sinking fund.

"I do not consider that the Commissioners are limited to Scotch banks in making this deposit, and I am therefore of opinion that neither they nor their successors could be compelled to discontinue the deposit with the lenders, or to uplift the deposits previously made. It is a different and more difficult question whether the Commissioners could bind their successors to continue the deposits in question, or to adhere to any particular mode of investment of the instalments of the sinking fund, but, on the whole, I am of opinion that such an arrangement is not prohibited by the Act, and is within the powers of the Commissioners, who may, I think, make all ordinary and reasonable stipulations in connection with loans, which they are empowered to effect. I do not see that any interest of the ratepayers can be prejudiced by the proposed arrangement, at all events if the rate of interest allowed by the lenders upon the deposits is to be at or over the rate charged upon the loan; or, in

other words, if matters are made to be in the same position as if the instalments were applied from time to time in liquidation of the loan—which latter is a procedure which sec. 384 expressly contemplates."

The General Police and Improvement (Scotland) Act, 1862, provides, sec. 196, that the Police Commissioners of a burgh are "entitled to borrow for the purpose of making, enlarging, re-constructing, and maintaining sewers," on the security of the sewer rates, "such sums of money as the Commissioners shall deem necessary for that purpose, and to assign the . . . rates in security of the money so to be borrowed," and declares that the provisions of the Act, with regard to the borrowing of money and granting of bonds in security, shall apply to money borrowed for purposes falling under this section.

Sec. 384—"It shall be lawful for the Commissioners to borrow and take up for any of the purposes of this Act, other than the construction, alteration, or maintenance of sewers as hereinbefore provided," any sums of money thought necessary. The Commissioners are authorised "to assess all owners or occupiers of premises within the burgh, respectively, liable in the several assessments under this Act, in such additional assessments, beyond the sums necessary for such respective purposes, as will produce a fund equal to five per centum per annum upon the sum or sums so borrowed respectively, and also to the annual interest of such borrowed sum or sums, which sum of five per centum per annum the Commissioners shall annually appropriate, set apart, and invest . . . as a sinking fund, applicable and to be applied by the Commissioners from time to time to the repayment of the moneys borrowed, until the respective debts shall be extinguished."

The Commissioners of a police burgh raised a sum of money upon the security of the special sewer rate of a separate drainage district, for the purpose of constructing sewers. The sewers were constructed, and the Commissioners, believing themselves authorised by sec. 384 of the General Police Act, 1862, imposed an assessment upon the separate drainage district, which in their opinion was sufficient not only to pay the interest upon the borrowed money, but also to form a sinking fund for repayment of the capital within twenty years. Certain ratepayers objected to assessment, on the ground that it was *ultra vires* of the Commissioners. *Held*, that the assessment was legal, because either (1) sec. 384 of the Statute applied to the matter of borrowing money for making sewers, and the Commissioners had acted within the provisions of the Statute; or, (2) if it did not, sec. 196 imposed no directions as to the manner of borrowing, or the time within which the money was to be repaid; that therefore the action of the Commissioners was not forbidden by the Act, and, as an act of administration, was within their powers. Macdonald *v.* Mickel, 17th March 1892 (29 S. L. R., 530).

In Clydebank Commissioners *v.* Paterson, etc., 15th May 1891 (7 Scot. Law Rev., 253), it was held that the phraseology of clauses 196 and 197 is general, and sufficiently comprehensive to

include power to borrow money for purchasing sewers, and that the assessment therefore is leviable on owners of lands, under clause 96; and that clause 394 is not intended to apply to every slight deviation of a side drain, which it may be found necessary to disturb, whilst carrying out a general drainage scheme.

The additional sum raised by assessment to form a sinking fund, for repayment of the money borrowed to meet the expense of water-works, is not to be regarded as profits of the undertaking for the purposes of the income-tax.

In Glasgow Water Commissioners *v.* Miller, 22nd Jan. 1886 (13 R., 489), the Glasgow Corporation Water Commissioners, by Local Act, were empowered (1) to levy a compulsory rate on all dwelling-houses within the municipal boundaries; (2) to fix a rate for persons who chose to take water beyond the boundaries; and (3) to sell water to manufacturers and others. The Act required the Commissioners in each year to fix a rate within the compulsory area, sufficient, with the other income, to defray the annual interest on debt, annual expenses, and a sum to form a sinking fund for the redemption of debt, and directed that any surplus in any one year should be applied to reduce the rate within the compulsory area in the following year. *Held*, that while the rates levied within the compulsory area were to be regarded as sums levied to defray the cost of water supply within the district, so that any surplus remaining over could not be regarded as profit, any surplus of rates above outlay collected beyond the compulsory area, from sales to manufacturers, was profit, which went to reduce the cost of water supply to those within the compulsory area, and was liable to assessment for income-tax under Schedule D.

375. Commissioners not to be personally liable.—No Commissioner, or officer acting under the Commissioners, shall be personally liable for the repayment of any money so borrowed, but all such obligations shall be deemed and be taken to be granted on the sole security of the rates and assessments, authorised to be assessed and levied as hereinbefore provided, and on the public halls or buildings or other works for which the loan or money borrowed is applied.

See sub-head (9), sec. 4, for definition of "Commissioners," (3) "building."

In Royal Burgh of Renfrew *v.* Murdoch, 2nd June 1892 (19 R., 822), the Town Council of a burgh, which had adopted the Burgh Harbours (Scotland) Act, 1853, borrowed, in terms of the Act, a sum of money for the extension and improvement of the harbour of the burgh, and granted a bond and disposition in security to the lender, in the form of Schedule B of the Act. The bond bore: "We hereby bind the burgh to pay" to the lender the sum borrowed, ". . . and we hereby assign to him the rates authorised to be levied at the said harbour" by the Act.

The harbour rates having become insufficient to pay the interest on the bond, and the Town Council having declined to pay it out of the common good of the burgh, the lender charged the burgh for payment.

In a suspension of the charge, the complainers pleaded that the obligation in the bond was limited to the harbour rates.

The Court repelled the reasons of suspension, holding that the burgh was liable for the debt.

376. As to Bonds to be Granted.—All bonds for moneys to be borrowed as aforesaid shall be signed by three Commissioners and the Treasurer of the Commissioners, and may be in the form and tenor following, videlicet:—

"Number [*here state the number*].

"By virtue of the Burgh Police (Scotland) Act, 1892, we, the Commissioners of the burgh of [*insert the name of the burgh, and if a royal burgh such shall be stated, as*, we, the royal burgh of], in consideration of the sum of [*insert the sum in words*] instantly advanced and paid to us for the purposes of the said Act, by *C.D.* of *E.*, do hereby bind and oblige the said burgh, out of the first and readiest of the moneys to be raised under the annual assessments, by the said Act authorised to be imposed and levied, and designated the assessment or rate (*as the case may be*), to pay at the term of [*insert term of payment*] to the said *C.D.*, his executors or assignees, the said sum of [*state the sum*], and also the interest thereof at the rate of [*insert the rate of interest*] per centum per annum from the date hereof, at the terms of Whitsunday and Martinmas in each year until the said sum is paid; and for the further security of the said *C.D.* we do hereby assign to him, his executors or assignees, such proportion of the said moneys to be raised under the said annual assessment as shall be equivalent to the said sum now paid to us, and the interest thereon as aforesaid from the date hereof to the term of payment; and we consent to the registration hereof for preservation and execution.—In witness whereof [*insert testing-clause in common form*].

"*K L.*, witness.
"*M.N.*, witness.

L. S.

"*A.B.*
"*C.D.* } Comrs.
"*E.F.*
"*G.H.*, Treasurer."

And till repayment such bonds respectively shall form a lien on the rates and assessments under this Act assigned by such bond, and shall entitle the creditor under the same to recover the contents thereof from the Commissioners and their officers, out of the first and readiest of such rates and assessments.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "treasurer," (4) "burgh."

It will be observed that bonds are to be signed by three Commissioners and the Treasurer, not by the Clerk, as is required in the case of ordinary deeds. See sec. 55, sub-head (2).

377. Bonds may be Transferred by Indorsement.—Such bonds may be assigned by indorsation on the back thereof, in the form and tenor following, videlicet:—

"I, *C.D.* within designed, do transfer this bond, with all right, title, or interest which I have under the same, to *E.F.*, his [*or* her, *or* their, *as the case may be,*] executors and assignees.—In witness whereof [*insert testing-clause in common form*].

"*K.L.*, witness. "*C.D.*"

"*M.N.*, witness.

See sec. 378 as to notification of assignations to the Clerk, and their registration.

378. Bonds to be Recorded, and Assignations to be Registered.—There shall be kept, at the office of the Clerk to the Commissioners, a register of such bonds, and within fourteen days after the date thereof an entry shall be made in the register of the number and the amount and date thereof, and of the names and description of the parties thereto, as stated in the deed, and also the interest payable on the same. Every such register shall be open to public inspection during office hours, at the said office, without fee or reward, and any clerk or other person, having the custody of the same, refusing to allow such inspection, shall be liable to a penalty not exceeding £5. Before such bond is delivered to the creditor, a certificate of such entry shall be endorsed on such bond, and signed by the Clerk of the Commissioners; and all assignations of such bond shall be notified to the Clerk to the Commissioners, who shall enter in the register aforesaid the date of the assignation, the names of the parties thereto, the number of the bond, and the date it was notified or intimated; and a certificate of such entry shall be endorsed

on the said bond, and signed by the Treasurer and Clerk; and the said bond being so certified, the assignee, his executors and assignees, shall thereafter be entitled to the benefit of such bond, in terms of such assignation.

See sub-head (8), sec. 4, for definition of "Clerk," (9) "Commissioners;" sec. 487 as to imprisonment on failure to pay penalty, and secs. 500 and 501 for penalty on repetition of offences and power to mitigate, secs. 336 to 338 inclusive, as to "notice."

A Clerk to Commissioners had omitted to register a bond for borrowed money, and to indorse a certificate of registration thereon before delivering the bond to the creditor. In an action of declarator, Lord Young appointed the Commissioners to cause a certificate of registration to be endorsed on each of the bonds libelled, and found that the bonds were valid and binding. The Commissioners expressed their readiness to do anything to assist the pursuers, and to comply with any order of the Court in the case. Gilmour *v.* Campbell, 19th Dec. 1874 (not reported; Irons' Manual, p. 131, and Ap. p. 207).

379. Public Works Loan Commissioners may lend Money.—It shall be lawful for the Public Works Loan Commissioners, acting in the execution of the Public Works Loans Acts, and of any Act amending or continuing the same, to make advances to the Commissioners upon the security of all or any of the moneys or rates to be assessed or levied by them under this Act, and without requiring any further or other security than a mortgage of such moneys or rates, repayable by such instalments within a period not exceeding thirty years, as shall in each case be agreed upon: Provided that nothing in this section shall be held to limit the powers of borrowing conferred upon Local Authorities in Scotland by the Public Health (Scotland) Act, 1867, Amendment Act, 1875; and the reference in that Act to any enactment hereby repealed shall be deemed to refer to the corresponding enactment in this Act.

See sub-head (9), sec. 4, for definition of "Commissioners."

The principal Act under which the Public Works Loan Commissioners are empowered to lend is the Public Works Loans Act, 1875, 38 & 39 Vict. c. 89. Schedule I. specifies the purposes for which they may grant loans, and these include "any work for which Police Commissioners are authorised to borrow under the General Police and Improvement (Scotland) Act, 1862, and any Act amending the same." But unless authorised specially by Statute, the rate of interest is five per centum.

By the Public Health Amendment Act, 1875, 38 & 39 Vict. c.

74, provision is made for the Public Works Loan Commissioners lending, at a low rate of interest, to Local Authorities or Police Commissioners for works under the Sanitary Acts. The expression "Sanitary Acts" is defined as including Part IV. secs. 6 and 10, and Part VI. sec. 2, of the General Police Act of 1862. The corresponding provisions of this Act are secs. 215–237, 257–269, and 374–379. But, in practice, sewers and water are the only purposes for which the Loan Commissioners lend to the Police Commissioners, under the Public Health Amendment Act, 1875. The recommendation of the Board of Supervision is required to these loans.

"*Mode of Repayment of Loans.*—Loans under the Public Health Amendment Act, 1875, are usually repaid by equal annual instalments of the principal, with a yearly diminishing amount of interest. They may also be repaid, by way of annuity, in equal annual sums of principal and interest, during the whole period of the loan."

"*Period of Repayment.*—The Act sanctions the repayment of loans being spread over a period of fifty years. But, in practice, it is not usual to spread them over more than from thirty to forty years; the general principle being that all works should be paid for by the generation by which they are undertaken."

"Loans obtained by County Councils must be repaid in thirty years. See Local Government Act, sec. 67, (2)."

"*Rate of Interest.*—The following is the scale of interest charged on loans:—

"Repayable within a period not exceeding thirty-five years, 3½ per cent.; repayable within a period exceeding thirty-five years, but not exceeding forty years, 3¾ per cent.; repayment within a period exceeding forty years, but not exceeding fifty years, 4 per cent.—See Report of Public Works Loan Commissioners for 1885–6, p. 6."

"*Loans for Harbours.*—The Local Authority is authorised to charge the Public Health Assessment for the purpose of aiding in raising loans for harbours, etc., or in guaranteeing the principal and interest of such loans. See the Public Works Loans Acts, 1882, sec. 7; and 1887, sec. 4 (2)."—Skelton, p. 121.

See also Local Authorities Loans (Scotland) Act, 1891.

PART VI.—OFFENCES AND PENALTIES.

OFFENCES.

380. Penalties for Offences. — Every person who is guilty of any of the following acts or omissions within the burgh shall, in respect thereof, be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods, hereinafter mentioned, videlicet:—

To a penalty of £10, or alternatively, without penalty, to imprisonment for sixty days, every person who—

(1) Wilfully or indecently exposes his person.

See sub-head (4), sec. 4, for definition of "burgh," (3) "building," (16) "premises," (21) "occupier," (20) "Magistrates," (31) "street;" p. 5, "person," (5) "carriage;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

Indecent practices with female children under the age of puberty, are punishable with an arbitrary fine.—Alison's Principles of Criminal Law, i. 225.

The "assaulting of young girls, and using lewd and indecent practices and behaviour towards them, as also the feloniously and publicly exposing the private parts of the body in a shameless, indecent manner," are relevant charges. A conviction of an offence so expressed was obtained in the case of Smyth, 20th July 1819 (Shaw, Just., 2).

In the case of H.M. Advocate *v.* Philip, 2nd Nov. 1855 (2 Irv., 243), a panel was convicted of using lewd, indecent, and libidinous practices and behaviour towards a girl under puberty, and of assault in a lewd, indecent, and libidinous manner on a girl of twelve years of age, or thereby, and was sentenced to transportation for fifteen years. An objection was stated to the indictment, in so far as it charged using lewd, indecent, and libidinous practices and behaviour towards a girl *about* the age of puberty, and that charge was withdrawn by the prosecutor. A direction was given to the jury that the description in the indictment "of twelve years of age or thereby," was applicable to a girl who appeared on the proof to be within sixteen days of thirteen years.

In M'Kenzie and others *v.* Whyte, 14th Nov. 1864 (4 Irv., 570), the complaint set forth that certain parties had been guilty of "the crime of indecent exposure of the person," in so far as "at or near a part of the River South Esk, situated opposite or near to Brechin Castle, they did wickedly and feloniously expose their persons in an indecent and unbecoming manner, and did take off their clothes and expose themselves on the banks of the said river in a state of nudity, to the annoyance of the lieges." *Held* irrelevant, and a conviction proceeding thereon suspended.

Indecent Exposure.—It has been held in England that a person indecently exposing his person in a public omnibus, in the sight and view of several passengers travelling therein, in such a manner that any one coming in might see the exposure, is guilty of a misdemeanour, and indictable for a nuisance at common law. If an indictment for such a nuisance fail to conclude, *ad commune nocumentum*, the omission is cured by the Statute 14 & 15 Vict. c. 100, sec. 24. The Queen *v.* Holmes (22 L. J., N. S., M. C., 122).

(2.) Occupies a building or part of a building, and suffers any breach of the peace or riotous or disorderly conduct

within the same, or occupies a building or part of a building or other place of public resort for the sale or consumption of provisions or refreshments of any kind, and knowingly harbours prostitutes, or suffers persons of notoriously bad fame, or dissolute boys or girls, to assemble therein.

In Kirkton *v.* Cadenhead, 30th Oct. 1880 (4 Coup., 366), a publican charged with breach of the conditions of his certificate, by permitting or suffering women of notoriously bad fame to assemble and meet together in his public-house, upon a complaint containing two separate charges, on being convicted and sentenced to pay a *cumulo* fine applicable to both charges, appealed, on the ground that facts found proved were not sufficient in law to warrant a conviction under the second charge. *Held*, that upon the facts stated the second charge had not been established, and as the fine could not be apportioned, the appeal sustained and the sentence set aside.

Opinion, per Lord Young, That to support such a charge of breach of certificate, it must be proved that the assembling or meeting had reference to the bad character of the persons assembling.

Opinion, per Lord Adam, That the notoriety of the bad character necessary to establish such a charge is not sufficiently proved by the statement of police officers, who also stated that they did not know if such notoriety extended beyond the police force. In this case there was nothing to show that the publican knew the character of the parties, and there was nothing in their appearance or conduct on the occasions libelled to lead to the inference of bad character.

In the case of Maxwell *v.* Malcolm, 12th Nov. 1879 (7 R., Just., 5), one of the terms and conditions on which the certificate for public-houses is granted is, that the holder "do not permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble and meet" within his premises. Circumstances which held sufficient to justify a conviction against a public-house keeper for "permitting women of notoriously bad fame to assemble and meet within his public-house."

In Prentice *v.* Linton, 7th Feb. 1883 (5 Coup., 210), it was held that it was unnecessary, in a conviction following upon a complaint which charged the two offences under sec. 278 of the Edinburgh Municipal and Police Act, 1879, of keeping and managing a brothel, and of knowingly harbouring prostitutes, to find the accused guilty of each offence by separate findings, and in the sentence to separate the amount of penalty applicable to each ; and a conviction following upon such a complaint sustained, which found the complaint proved, and sentenced to a *cumulo* penalty, with imprisonment for a period mentioned until said fine paid.

Sec. 337 of the General Police and Improvement (Scotland) Act, 1862, enacts, that every person occupying or keeping any house or other premises within a burgh, who shall permit any breach of

the peace within his premises, "or shall knowingly harbour prostitutes, or permit or suffer men and women of notoriously bad fame, or dissolute boys and girls, to meet and assemble therein, or shall knowingly lodge, entertain, or harbour, to the annoyance of the inhabitants, any prostitute, or idle rogue or vagabond, shall be liable," etc In Abbot *v.* Grant, 26th May 1882 (9 R., Just., 26), the occupier of a house was charged under the foregoing enactment, in so far as he, on certain days within his house, "did knowingly harbour prostitutes," viz. two women, whose names are given. The accused was convicted of "the contravention charged," and took a case under the Summary Prosecutions Appeal Act, 1875, for the opinion of the Court on the question, "Was the respondent bound to libel and prove that the appellant's knowingly harbouring of prostitutes was to the annoyance of the inhabitants?" In the case the Magistrate stated that the three police constables had deponed to the two women being prostitutes, and the women themselves deponed that they lodged with the accused, paying him so much per week. No other facts were stated the appellant having assumed in argument that the facts, as stated in the case, were the whole facts proved. The respondent moved the Court to remit the case for amendment, on the ground that other facts had been proved which it had not been thought necessary to state, in order to raise the question of law. The Court (*diss.* Lord Adam) refused the motion, and quashed the conviction, on the ground that the mere lodging of prostitutes was not an offence under the Statute.

In Milton *v.* M'Phee, 27th Oct. 1892 (10 R., Just., 20), the occupier of a house was charged under the Glasgow Police Act, 1866, secs. 136, 137, and 142, with knowingly suffering her house to be used for the purpose of harbouring prostitutes for the purpose of prostitution. The person appealed to the Court of Justiciary, and contended that as only one other prostitute had been found in the house besides the appellant herself, no contravention of the Statute had been proved, and that the complaint was irrelevant from want of specification, in respect that the names of the prostitutes alleged to have been harboured had not been libelled. The Court dismissed the appeal.

Various Local Police Acts have similar provisions, and in a case in the Edinburgh Police Court the question arose whether a conviction under the Glasgow Police Act could be founded on by the prosecutor for a similar offence under the Edinburgh Police Act, so as to warrrant the Magistrate in imposing the penalty for a second offence. Acting Sheriff-Substitute Baxter decided that it could not. The decision appears sound, as a conviction under a Local Police Act should have no effect beyond the jurisdiction to which that Act applies.

Prostitutes.—In England, a licensed alehouse is a place of public resort for the sale of refreshments, within the Town Police Acts, 10 & 11 Vict. c. 89, sec. 35, and the keeper of it is liable to penalties under that section for allowing prostitutes to assemble therein; although he may also at the same time be guilty of an offence against the tenor of his licence, under the 9 Geo. IV. c. 61. Cole *v.* Coulton (29 L. J., N. S., M. C., 125).

Brothels.—By sec. 10 of 32 & 33 Vict. c. 99, every person who keeps

any place where excisable liquors are sold, etc., and knowingly permits or suffers thieves or reputed thieves to meet or assemble therein, shall be liable to a penalty. The keeper of such a place, who knowingly permitted thieves or reputed thieves to meet and assemble therein, at a meeting held for the purpose of collecting money to pay for the defence of a person about to be tried upon a criminal charge, and not in pursuance of any unlawful design, or for the purpose of concerting crimes, or for misbehaviour, was found to have been properly convicted under the above section. Marshall *v.* Fox (40 L. J., N.S., M. C., 142).

Disorderly Characters.—In Greig *v.* Bendino (27 L. J., N. S., M. C., 294; 31 L. T., 97), the defendant had permitted twenty prostitutes, of whose character he was aware, to meet together and remain in his coffee-house, with a number of men, but no disorderly conduct was proved to have taken place there, and the Justices dismissed the information; the Court of Queen's Bench held, under a Local Act, similar in terms to an alehouse licence, that proof of disorderly conduct was not necessary to justify a conviction; but that, as it did not appear that the prostitutes were allowed to remain beyond the time necessary for taking refreshment, the Justices were not bound to convict.

In Belasco *v.* Hannant, and Barton *v.* Hannant (31 L. J., N. S., M.C., 225; 6 L. T., N. S., 577), which were decided under the Refreshment Houses Act, 23 Vict. c. 27, where the Magistrate stated, in the special case, that he found that several prostitutes assembled at night in the house, not really to take refreshment, but in "furtherance of prostitution," the Court held that, although no act of drunkenness, indecency, or impropriety was proved, as the landlord knew the women were prostitutes, there was sufficient evidence to support the conviction. It is for the prosecution to say for what purpose they are there; and if there is reasonable evidence that they are present for the purpose of pursuing their calling, the Justices are justified in convicting.—Oke's Magisterial Synopsis, 13th ed., vol. i. p. 524.

(3.) Publishes, prints, or offers for sale or distribution, or sells, distributes, or exhibits to view, or causes to be published, printed, exhibited to view, or distributed, any indecent or obscene book, paper, print, photograph, drawing, painting, representation, model, or figure, or publicly exhibits any disgusting or indecent object, or writes or draws any indecent or obscene word, figure, or representation in or on any place where it can be seen by the public, or sings or recites in public any obscene song or ballad.

Indecency.—A herbalist who had publicly exposed and exhibited in his shop, on a highway, a picture of a man naked to his waist, and covered with eruptive sores, so as to constitute an exhibition offensive and disgusting, was held guilty of a nuisance, although there was nothing immoral or indecent in the picture, and his motive was innocent. The Queen *v.* Grey, 1864 (4 F. and F., 73).

Printing and Publishing.—In some counts of an indictment, the defendant was charged with unlawfully and knowingly obtaining and procuring indecent and obscene prints and libels, in order and for the purpose of afterwards publishing and disseminating them; in other counts, with unlawfully and knowingly preserving and keeping in his possession indecent and obscene prints and libels, with the intent and for the purpose of afterwards publishing and disseminating them. *Held*, on writ of error, that the former counts were good, as the obtaining and procuring the indecent prints and libels, for the purpose alleged, was an act done in commencing a misdemeanour, and therefore an indictable offence, but that the latter counts were bad, as they alleged no act done, and the possession of the prints and libels might have been come by innocently. Dugdale *v.* The Queen (22 L. J., N. S., M. C., 50).

See 52 & 53 Vict. c. 18, the Indecent Advertisement Act, 1889.

By this Act, persons affixing indecent or obscene pictures, or written or printed matter, on conspicuous places, or delivering or attempting to do so, or exhibiting such to any person in the street, or throwing such down the area of a house, are liable to a penalty, or imprisonment (sec. 3). Any person sending others to do these acts is also liable to a penalty or imprisonment (sec. 4). Any advertisement relating to venereal diseases is printed or written matter of an indecent nature, within the meaning of sec. 3, if affixed to the conspicuous places defined (sec. 5). A constable or other peace-officer may arrest, without warrant, any person whom he finds committing such offence (sec. 6). See sub-sec. (5) as to posting of indecent placards.

In Dingwall *v.* Stevenson, 2nd Nov. 1892 (30 S. L. R., 43), a person was charged upon a complaint which set forth that he had "contravened secs. 3 and 5 of the Indecent Advertisement Act, 1889, in so far as . . he did . . deliver to . . a pamphlet entitled 'The Guide to Reason,' relating to nervous debility or other complaint or infirmity arising from or relating to sexual intercourse, in contravention of the sections above libelled." It was held that the complaint was irrelevant—by the Lord Justice-Clerk and Lord Rutherfurd Clark, on the ground that it did not set forth that the pamphlet was an advertisement; by Lord Trayner, on the ground that it did not set forth that it was of an indecent or obscene nature.

To a penalty of £5, every person who—

(4.) Being the occupier of a building or part of a building, or other place of public resort for the sale or consumption of provisions or refreshments of any kind, knowingly suffers to remain in his premises any constable on duty, unless for the purpose of quelling any disturbance or restoring order, or directly or indirectly supplies such constable with intoxicating or excisable liquor.

The General Police Act, 1857, sec. 24, enacts that "if any victualler, etc., shall knowingly harbour or entertain any constable,

appointed under this Act, or permit such constable to abide or remain in his house, etc., to the neglect of his duty, during any part of the time appointed for his being on such duty," such victualler shall be subject to a penalty.

In Greig *v.* Stewart, 23rd Feb. 1877 (4 R., Just., 13), a publican was charged under this section before the Police Court of A., in so far as he did knowingly harbour or entertain X., Y., and Z., police constables for the A. district, ... being then constables within the meaning of the said Act, or did permit the said X., Y., and Z. to abide or remain in his said house, etc., to the neglect of their duty, during part of the time appointed for their being on such duty." It was proved that two of the constables were in uniform, and on duty, and the other one not; that all three did together enter the publican's premises, purchase and consume a certain quantity of liquor, but that they did not sit down, and only remained four or five minutes. The publican was convicted of the offence charged, and fined in a slump sum. Conviction quashed, on the ground that it was general, in respect of harbouring, etc., all three constables, while, as regards one of these, it was clear the offence had not been committed.

Observations on the prohibition contained in the General Police Act, 1857, sec. 24, against publicans harbouring police constables during the hours of duty:—

In Beggs and others *v.* Procurator-Fiscal of Police Court, Glasgow, 6th Feb. 1878 (15 S. L. R., 347), conviction against police constables for entering a public-house "during hours of duty," and taking refreshment there "while not in discharge of duty," sustained, and appeal dismissed.

By sec. 16 of the Licensing Act, 1872, applicable to England, "If any person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior of such constable, he shall be liable to a penalty, etc."

A constable on duty and in uniform went to the house of a licensed person. He was there supplied with some brandy by a servant. He did not go there by the authority of a superior officer, nor was the brandy supplied by the authority of any superior officer. The licensed person was not present at the time; he did not know that the brandy was supplied, nor had he given any express authority to the servant to supply it. *Held*, that under the above section he was liable to be convicted. Mullins *v.* Collins (43 L. J., N. S., M. C., 67).

But see Greenhill *v.* Stirling (12 R., Just., 37), where express orders not to supply given.

(5.) Affixes or causes to be affixed to or on any place where it can be seen by the public, or delivers or exhibits or causes to be delivered or exhibited to any inhabitant or passenger in or near any street, or sends or causes to be sent through the post-office any bill or printed or written paper of an obscene or indecent nature.

See under sub-head (3), *supra*.

(6.) Being the occupier of a building or part of a building, or other place of public resort for the sale or consumption of provisions or refreshments of any kind, or for the sale or consumption of tobacco or cigars, opens his premises for business before five o'clock in the morning, or keeps them open or does business therein after midnight, unless specially allowed by the Magistrates.

In England, the resident occupier of a house called the Café, in Lower Temple Street, Birmingham, in which were found, between eleven and twelve o'clock at night, seventeen females and twenty gentlemen, who paid for and were supplied with cigars, coffee, and ginger-beer, which they consumed there, was convicted of keeping open such house without taking out a licence under the Act 23 Vict. c. 27, sec. 6, to keep a refreshment-house, and this was affirmed on appeal, on the ground that the house was "kept open for public refreshment, resort, and entertainment," and required such a licence. Muir *v.* Keay (44 L. J., N. S., M. C., 143).

A shop consisting of one room only, open in front, without seats of any kind, in which ginger-beer and lemonade are supplied to be drunk at the counter, and kept open for that purpose till two or three o'clock A.M., is a house open for public refreshment, resort, and entertainment, within the meaning of the Act 23 Vict. c. 27, sec. 6, and requires a licence—Cleasby, B., *dissentiente*. Howes *v.* The Board of Inland Revenue (45 L. J., N. S., M. C., 86).

(7.) Cruelly beats, or ill-treats, over-drives, over-loads, abuses, or tortures, or causes or procures to be cruelly beaten, ill-treated, over-driven, overladen, abused, or tortured, any animal, or impounds or confines, or causes to be impounded or confined, any animal, and refuses or neglects to provide and supply such animal with fit and wholesome food and water.

Cruelty to Animals.—In Wright *v.* Rowan, 23rd Jan. 1890 (17 R., Just., 28), A., residing in Irvine, the owner of a horse, was charged with contravening the Prevention of Cruelty to Animals Act, 1850, by causing it to draw a cart when it was unfit to be worked, from having an open sore beneath the saddle. At the time of the alleged cruelty the horse was being worked by A.'s servant in Ayr, and it was not proved that A. had any knowledge of the condition of the horse at the time. *Held*, that personal knowledge of the condition of the horse, or, at least, good reason to believe that suffering would be caused to the animal, was necessary to the commission of the offence, and therefore, that, on the facts proved, A. was not liable to be convicted.

"In England, the owner of a horse, who, knowing it to be incurably diseased and in pain, merely omits to have it slaughtered, commits no offence within sec. 2 of the 12 & 13 Vict. c. 92. But if he keeps the animal in such a manner that it is inevitably put to intense pain in moving about a field in its efforts to graze, in order to support life, he thereby commits an act of cruelty, and an offence under the Act of "torturing or causing the animal to be tortured" as much as if he had actually tortured it with his own hand. Everett *v.* Davies (38 Law Rep., 360; 26 W. R., 332)."—Oke's Magisterial Synopsis, vol. i. p. 384.

Cutting Cocks' Combs, 12 & 13 Vict. c. 92, sec. 2.—Upon an information against the respondents, under 12 & 13 Vict. c. 92, sec. 2, for cutting the combs of cocks, evidence was given that the operation caused great pain, and was inflicted in order to fit the birds for one or other of two purposes: cock-fighting or winning prizes at exhibitions. The Magistrates having referred to the Court the question whether the case was one of the class contemplated by the Statute, *held*, by Kelly, C. B., that the respondents did, as a matter of fact, "cruelly ill-treat, abuse, or torture the birds;" that, as a matter of law, the act could not be justified by the purpose of cock-fighting, and that the respondents ought to have been convicted. By Cleasby, B. (without expressing any opinion upon the facts), that neither the purpose of cock-fighting nor that of winning prizes at exhibitions would prevent the case from being within the Statute. Murphy *v.* Manning (2 Ex. D., 307).

In Renton *v.* Wilson, 3rd July 1888 (15 R., Just., 84), in a complaint against a cattle-dealer for a contravention of the same Statute, 1850, by sawing off the horns of oxen close to the skull, it was proved that the operation caused great pain to the animals operated on, but that it was in common use throughout the counties of Fife, Forfar, and Kincardine, as a means of preventing the cattle doing each other harm by goring one another, or when in trucks; and that in other districts, operations securing the same result, but painless, were made use of. The Sheriff-Substitute acquitted the accused. In an appeal the Court affirmed the judgment, holding that the operation being a customary operation, for a legitimate and useful purpose, did not infer a contravention of the Act.

The Court of Appeal in Ireland, in a similar case, arrived at the same result as the Scotch Court, while in England a different view was taken. In a later Scotch case the Court of Justiciary confirmed their previous opinion. Todrick *v.* Wilson, 13th March 1891 (18 R., Just., 41).

In Cornelius *v.* Grant, 8th June 1880 (7 R., Just., 13), A. was walking along the street, when a large dog attacked two small dogs which accompanied him. For a considerable time A. endeavoured in vain to separate the dogs, and finally struck the large dog twice with a knife, thereby inflicting two wounds, of which the dog subsequently died. *Held*, that A. was not guilty of "wanton cruelty," within the meaning of sec. 1 of the Prevention of Cruelty to Animals (Scotland) Act, 1850.

In Anderson *v.* Wood, 29th Nov. 1881 (9 R., Just., 6), a complaint under the same Statute, which set forth that the panel, a cab-driver, did cruelly ill-treat, or cause to be ill-treated, a horse in his possession, or under his charge, by causing or allowing said horse to remain yoked to a cab on the public road . . . during the night of the 18th and morning of the 19th October 1881, said horse suffering severely from hunger, cold, and exposure, held relevantly libelled (*diss.* Lord Young, who held that the facts libelled did not necessarily involve cruelty in the sense of the Statute).

Observations, per Lord Young and Lord Craighill, on Lord Neaves' opinion in Wilson *v.* Johnstone (1 R., Just., 16):—

In Wilson *v.* Johnstone, 28th May 1874 (1 R., Just., 16), it was held that a complaint against a butcher for contravention of the same Statute was relevantly laid, which set forth the designation and residence of the accused, and that on a certain date or dates, and at a certain place (where he conducted part of his business, and which was in the immediate neighbourhood of his residence), he did cruelly ill-treat, etc., or cause or procure to be cruelly ill-treated, etc., certain oxen, by leaving them without food, although the complaint did not set forth personal knowledge of the facts complained of.

In Sharp *v.* Mitchell, 23rd May 1872 (2 Coup., 273), a complaint which charged a contravention of sec. 1 of the same Statute, by keeping or herding, or causing 400 sheep to be kept or herded, on land bearing grass or other food totally insufficient to feed or sustain such a number of sheep, and failing to supply such sheep, or cause them to be supplied with sufficient food, whereby said sheep were cruelly treated, and part thereof died, held irrelevant, in respect that it did not contain any averment or intention to injure, or of knowledge on the part of the accused that the supply of food was insufficient.

In Jack *v.* Campbell, 29th Oct. 1880 (8 R., Just., 1), a dog trespassing in a field chased a rabbit therein. A coachman in the employment of the proprietor of the field followed the dog, and, when within five yards, shot at and hit it, the gun being loaded with No. 4 or 5 shot. The dog ultimately recovered, but suffered much pain for a considerable time. The coachman was convicted on a charge of "wanton cruelty," under the Prevention of Cruelty to Animals (Scotland) Act, 1850. On appeal, the Court quashed the conviction.

Power to impound stray cattle is given by sec. 386 of this Act.

Cruelty to Animals.—In England, the keeper of a common pound is not, as such, within the words in sec. 5 of 12 & 13 Vict., c. 92, "a person who impounds or confines, or causes to be impounded or confined," animals brought to his pound; he is, therefore, not under an obligation to provide such animals with food and water, nor subject to the penalty for not doing so. Dargan *v.* Davies (46 L. J., M. C., 122).

See Johnstone and others *v.* Abercrombie, 23rd Dec. 1892. This was a suspension of a conviction upon a complaint charging the complainers with an offence against the Act for the Prevention of Cruelty

to Animals. The charge was that the complainers, Robert Johnstone, labourer; Samuel Craig, fireman; James Graham, labourer; and William Pirrie, planer, Paisley, did, on 11th June 1892, on the west side of Torrhall Garden, in the parish of Kilbarchan, wantonly and cruelly ill-treat, abuse, or torture, or cause or procure to be wantonly and cruelly ill-treated, abused, or tortured, two or more cocks, by wantonly and cruelly fighting said cocks, or causing them to be fought, armed with metal spurs, whereby one of the cocks was killed and another was grievously wounded and disabled. The charge was at the instance of John Abercrombie, Procurator-Fiscal, Paisley, and the Justices found it proven, and imposed a fine of £3 on Pirrie, or thirty days' imprisonment, the other three being sentenced to thirty days' imprisonment, without the option of a fine. The Court held the judgment to be unsound, and quashed the conviction.

To a penalty of 40s., every person who—

(8.) Alters or defaces the name or address, or the distinctive mark or inscription on any barrel, box, bag, plank, or other article which does not belong to him, without the authority of the owner.

(9.) Behaves in a riotous, violent, or indecent manner.

In Ferguson *v.* Carnochan, 8th July 1889 (16 R., Just., 93), under a complaint for a breach of the peace, it was proved that the accused, in his house, which was situated in a street in a burgh, had, early on Sunday morning, for a considerable period, used loud language, and oaths and imprecations, which had been heard by two constables, at a distance of thirty yards from his house.

The Court sustained a conviction, holding that the acts proved amounted to a breach of the peace, as being acts calculated to cause reasonable apprehension to the lieges.

Hendry *v.* Ferguson, 13th June 1883 (10 R., Just., 63). A Police Court complaint charging a man with having, within a hall occupied by the Salvation Army, and during a meeting of a branch of that Army, conducted "himself in a riotous, outrageous, and disorderly manner, by then and there shouting and screaming at the top of his voice, or otherwise creating a noise and disturbance, whereby the said meeting was interrupted and disturbed, and a breach of the peace committed," held to be a relevant complaint, and a general conviction following thereon sustained.

In Armour *v.* Macrae, 9th Mar. 1886 (13 R., Just., 41), it was held that a complaint, setting forth that the accused had been guilty of a breach of the public peace, in so far as at a public political meeting, when the meeting was invited to put questions to a parliamentary candidate, the accused, instead of asking questions, "addressed the meeting, and upon being called to order by the chairman, refused to obey him, and persisted, notwithstanding repeated calls to obey him, in refusing to do so, and did behave in

an excited and disorderly manner, and did interrupt, obstruct, and disturb the proceedings of the said meeting, and did persist in so doing, though warned and admonished by the chairman and others to desist therefrom, in consequence of which a disturbance was created, and the chairman had to bring the meeting to a close," by all or part of which parties present at said meeting, or some of them, were annoyed and alarmed, and a breach of the public peace was committed, was not relevant.

Bewglass and others *v.* Blair, 10th Feb. 1888 (15 R., Just., 45). *Held*, that a summary complaint, setting forth that, time and place libelled, certain persons, duly designed, did "form part of a disorderly crowd of persons, and behave in a disorderly manner, and annoy and disturb the lieges, and commit a breach of the public peace," was a relevant complaint under the above Act.

In Deakin and others *v.* Milne, 27th October 1882 (10 R., Just., 22), four persons were charged in the Police Court of a burgh with breach of the peace, and also "with breach of the terms of a proclamation made and published by the Magistrates" of the burgh, "by virtue of the powers conferred on them by the Act," 1606, c. 17 ("an Act for the Staying of Unlawful Conventions within a burgh, and for assisting of the Magistrates in the execution of their offices").

The accused were convicted of both the offences charged, and fined. They took a case.

The following facts were stated:—The accused were members of a body known as the "Salvation Army." The proclamation (which did not bear to be founded on the Act, 1606, c. 17) was to the effect that the Magistrates, finding that processions of the Salvation Army were leading to riotous proceedings, and were likely to cause a breach of the peace, thereby prohibited all such processions, and gave notice that all persons thereafter taking part therein would render themselves liable to prosecution. This proclamation had been duly published. On the occasion libelled, the "accused marched in procession carrying a flag" through various streets of the town, "singing and shouting aloud at the top of their voices, so loud, as deponed to by one of the witnesses, as to be heard over half of the town, waving their arms and gesticulating in a grotesque manner, causing the assemblage of a mob of persons, and obstructing the whole passage of the said streets from pavement to pavement on each side, to the annoyance of the lieges, and causing a breach of the peace, and in violation of the terms of the said proclamation."

The appellants contended (1) that on the facts proved no breach of the peace at common law had been committed, and (2) that it was beyond the powers of the Magistrates to issue the proclamation, whether at common law or under the Act libelled, which the appellants alleged to be in desuetude, and, at all events, not applicable to their case.

The Court dismissed the appeal, and affirmed the determination of the Magistrates.

In Hutton *v.* Main, 5th November 1891 (19 R., Just., 5), a police complaint charged that on a particular evening, and on a street in Leith, the accused persons "did loudly read, sing, pray, and preach, and did continue to do so for half-an-hour, by which a large crowd was collected, and the residents and others in the neighbourhood were annoyed and disturbed." *Held*, that this did not constitute a relevant charge of any offence at common law, and conviction following thereon set aside.

The Glasgow Police Act, 1866, sec. 135, sub-sec. (5), imposes a penalty on "every person who is riotous, disorderly, or indecent in his behaviour." In Ritchie *v.* M'Phee, etc., 25th October 1882 (10 R., Just., 9), a person was charged with a contravention of this section, by having, at a certain place and on a certain date, "been riotous and disorderly in his behaviour, by shouting aloud, by all which or part thereof a noise and disturbance was created, and a large crowd assembled, and the lieges were annoyed." The accused was convicted of the offence libelled. *Held*, that the complaint was irrelevant from want of specification, and conviction therefore quashed.

In Durrin and Stewart *v.* Mackay, 14th March 1859 (3 Irv., 341), two persons were apprehended on an evening by the police, but were liberated on finding bail to appear in the Police Court on the following day. On that day evidence was led against them, but the case was delayed. They were thereafter served, for the first time, with a criminal complaint, and on the day following the service they were tried and convicted. *Held*, under the circumstances, that there was no ground for setting aside the sentence as illegal.

Disorderly conduct is a police offence, and may be dealt with summarily in the Police Court.

Circumstances in which leave to amend a bill of suspension of a Police Court sentence was refused:—

In Law and Turner *v.* Linton, 18th November 1861 (4 Irv., 106), certain persons were charged in the Police Court of Edinburgh, under the Edinburgh Police Act of 1848, with breach of the peace by disorderly conduct, and two of them with suffering disorderly conduct at the same time and place. The charge of breach of the peace having been found not proved, and the persons charged with suffering disorderly conduct having been convicted, a suspension, at their instance, on the ground that the riot not having been proved, they could not be legally convicted of suffering it, refused.

Refusal to separate the trials of several panels is not a relevant ground of suspension, unless it amounts to oppression.

In Jackson *v.* Linton, 27th February 1860 (3 Irv., 563), in a suspension of a sentence of imprisonment, pronounced against the suspender in Edinburgh Police Court, on complaint at instance of Chief Constable and Procurator-Fiscal of Court, it was urged that, it having been decided in the case of Ure, 15th February 1858 (3 Irv., 10), that attempt to steal was not a crime known to the

law, the complaint of attempting to pick pockets was more vague and objectionable, and the charge, consequently, irrelevant. The Lord Justice-Clerk, Inglis, said: "A good deal of the difficulty which occurs on first reading this complaint arises from its being assumed on both sides that this is a libel, and that we are bound to consider it as a libel.

"But I am satisfied that it is not necessary, in the Police Court, that such a charge should be put into the shape of a proper libel. It is not necessary to set forth, in an abstract proposition, the offence meant to be charged, and then to set forth the *species facti* in a regular minor proposition. On the contrary, when we come to consider the matter, such a form of complaint would not only be inconvenient, but would put a stop to the trial of what are properly police offences. I think the mode of charging the offence here is sufficient, and that it is sufficient in a police offence to charge a prisoner with attempting to pick pockets at a particular time and place. As to its criminality, I have never had any doubt. It is a breach of the peace, and a breach of the peace with a felonious intent. I think, therefore, that the offence itself was clearly chargeable as a police offence, and that it is properly set forth here."

A similar decision was given in the case of Kane *v.* Lang (High Court), 5th March 1860. The suspender was there charged with having contravened sec. 173 of the Glasgow Police Act, "actor, or art and part, in so far as the said Michael Kane did, on the morning of Tuesday, the 21st day of January current, permit a breach of the peace, or riotous or disorderly conduct, within the house or premises occupied or rented by him," etc. He was convicted, and fined in the sum of £10. He brought a bill of suspension of the sentence, on the ground, *inter alia*, that it was not sufficient merely to charge a person with permitting a breach of the peace. It was necessary that the complaint should specify the facts, to show whether they warranted the charge.

The Lord Justice-Clerk said: "The clause of the Act of Parliament makes it an offence to permit a breach of the peace within any house occupied by the offender." The charge here is, that the suspender committed this offence. If we required a proper libel here, I should say that this is not a proper libel. It has, properly speaking, no minor proposition, but in such police cases no libel is required at all. It is sufficient that the prosecutor should say that, at a certain time and place, an offence cognisable by the Police Act was committed. The other judges concurred, and the bill of suspension was refused, with expenses.

In Stevenson *v.* Lang, 7th Sept. 1878 (4 Coup., 76), upon a complaint brought under clause 135, sub-sec. (5), of the Glasgow Police Act of 1866, 29 & 30 Vict. c. 273, charging the crime of being "riotous and disorderly in his conduct by throwing pease-meal or soot, or otherwise creating a noise or disturbance," the Stipendiary Magistrates sentenced a youth of fifteen years of age to receive fifteen stripes. The Statutes set forth in the warrant upon which the sentence proceeded were the Acts 14 & 15 Vict. c. 27, and 25

Vict. c. 18. The sentence which had been asked in the complaint was a fine, or alternatively imprisonment, in support of a suspension of the sentence. It was pleaded (1) That the complaint did not set forth a relevant charge; (2) That a different penalty had been imposed from what the Statute stated and contemplated, and from what was craved; (3) That the sentence was illegal, because one of the Statutes on which it proceeded had been repealed, and the other did not apply. *Held*, apart from the other questions raised, that the conviction fell to be quashed, in respect, (1) that the Act 14 & 15 Vict. c. 27, was repealed, and the Act 25 Vict. c. 18, gave no warrant for whipping, except in the case of boys not above fourteen; and (2) that the whipping was not sanctioned by the common law in such a case as that in question.

(10.) Commits a nuisance, or uses any obscene, abusive, or indecent language to the annoyance of any person.

The expression "commits a nuisance" is vague, and no definition is given of nuisance as here used; but the phrase is part of common speech, and is well understood.

In England, "an owner of property was held not to be justified in giving a person into custody, found (popularly speaking) committing a nuisance against his premises, unless he was fairly justified in believing that the person had the intention to soil or deface the premises within the meaning of the Metropolitan Police Act, 2 & 3 Vict. c. 47, sec. 54, or the intention to commit damage or injury, or spoil the premises within the meaning of the Malicious Injuries to Property Act, 24 & 25 Vict. c. 97, sec. 52; nor was he entitled to notice of action for having given the persons into custody without such justification. Bayley *v.* Alfred (10 L. T., N. S., 523)."—Glen, 765.

(11.) Is drunk while in charge in any street or other place of any carriage, horse, cattle, or steam-engine, or when in possession of any loaded firearms.

See sec. 382 as to habitual drunkards.

In England, in Martin *v.* Pridgeon (28 L. J., N. S., M. C., 179; 33 L. T., 119), the defendant was summoned, under sec. 29 of the Towns Police Clauses Act, 1847, for being drunk and riotous in a street; the drunkenness in the street was proved, but not the riotous conduct, and the Magistrates convicted him of drunkenness under the 21 Jac. I. c. 7; it was held (Lord Campbell, C. J., and Coleridge, J.), that it was not a case of variance with this section of 11 & 12 Vict. c. 43, for the variance meant is a difference between the mode of stating and the mode of proving the same thing in substance, but that this was a proof of something totally different, and the defendant's appeal was allowed, but without costs. This case is confirmed by Soden *v.* Gray (7 L. T., N. S., 324); and Reg. *v.* Brickhall (33 L. J., N. S., M. C., 156; 10 L. T., N. S.).

(12.) Uses any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace.

See under sub-head (9), *supra*.

In Stirling *v.* Murray, 13th June 1883 (10 R., Just., 59), sec. 251 of the General Police and Improvement (Scotland) Act, 1862, renders persons liable to fine or imprisonment, "who, in any street, . . . to the obstruction, annoyance, or danger of the residents or passengers, . . . shall use any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

A complaint bore that the accused had contravened this enactment, in so far as he had used "abusive or insulting words towards J. F., to wit, 'You are a damn beast,' whereby such words so used were calculated to provoke a breach of the peace."

The accused, having been convicted, brought a suspension, pleading that the complaint was irrelevant, in respect that it did not set forth that the words were used to the obstruction, annoyance, or danger of the residents or passengers.

The Court suspended the conviction.

It will be observed that the present Statute does not limit the offence to one committed in a street. See Ferguson *v.* Carnochan (16 R., Just., 93).

A complaint under the same section, which libelled as an offence against the above enactment, the marching along a street playing on a flute the tune of "Boyne Water," which was characterised merely as "abusive or insulting to all or one or more" of the residents or passengers, and whereby it was alleged merely that a crowd was collected, and the residents or passengers, or some of them, obstructed or annoyed or put in danger, was found irrelevant under the Statute and at common law, inasmuch as it did not specify the character and associations of the tune, and circumstances under which it was specially calculated to create a breach of the peace.

Sentence pronounced on the above-mentioned complaint suspended by the High Court of Justiciary, notwithstanding the provision in sec. 430 of the General Police Act, 1862, that suspensions of judgments by virtue of the Act, "must be presented to the next Circuit Court," on the ground that the judgment complained of was outwith the Act.—Marr *v.* M'Arthur, 28th May 1878 (5 R., Just., 38).

In Clark *v.* Lang, 10th May 1876 (3 Coup., 268), it was held that a complaint which charged a contravention of sec. 135, art. 17, of the Glasgow Police Act, 1866, in so far as the accused did at a time and place libelled "use words or behaviour towards" a person named and designed, "with intent to provoke a breach of the peace, or whereby a breach of the peace may have been occasioned," was

not sufficiently specific, and a conviction thereon "of the offence libelled" set aside accordingly. *Held*, that an appeal upon the above grounds was not excluded by the provisions for finality of judgment, in secs. 131 and 132 of the said Police Act, said provisions being applicable only where there was an *ex facie* good complaint and conviction.

In Banks *v.* M'Lennan, 16th November 1876 (4 R., Just., 8), A. was charged at common law before the Sheriff with "the crime and offence of disorderly conduct in a public street" (in a town where there was no Police Magistrate), by using insulting and abusive language to, or of and concerning B., who was then peaceably passing along said street, calling aloud that the said B. was a thief, and using other grossly offensive words of the like nature, all in a manner calculated and intended to provoke a breach of the public peace." *Held*, that the charge was not relevant.

Breach of the Peace.—A party was fined 15s. by the Chief Magistrate of Kilsyth for a breach of the public peace. The statement in the complaint was that "he did assault and give threatening language" to parties named. The complaint found not to be relevant, and conviction quashed. Galbraith *v.* Muirhead, 17th Nov. 1856, (High Court, 2 Irv., 520).

(13.) Destroys, pulls down, injures, or defaces any board or convenience for the reception or exhibition of advertisements, or any advertisement, placard, or bill affixed thereto, or any placard or notice issued and put up by or under the direction of any lawful authority, or any notice of the position of a fire-plug or hydrant, or any board on which any bye-law or part of a bye-law of any lawful authority is painted or placed.

By sec. 292, any person who pulls down, injures, defaces, or destroys any index-plates or markings showing the position of fire-plugs, is liable to a penalty of £5.

(14.) Damages, defaces, or makes any mark on any drinking fountain or trough, or on any work appurtenant thereto, or pollutes or makes unfit for drinking by man or animal the water in any such fountain or trough, or washes in or permits to enter into that water any dog or other animal under his charge or accompanying him.

(15.) Prints or otherwise makes, or circulates or uses, for any purpose whatever, any sham bank note, or a paper or document resembling in size, figure, and colour any bank note of any banking company.

In Her Majesty's Advocate *v.* Clunie, 14th Mar. 1882 (9 R., Just., 15), it was held (*diss.* Lord Craighill) that sec. 6 of the Act

(45 Geo. III. c. 89), which imposes certain penalties on those who possess or have in their custody "any forged or counterfeited bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank post bill, knowing the same to be forged or counterfeited," applies, so far as bank notes are concerned, to notes of the Bank of England only, and objections to the relevancy of a charge libelling possession of forged notes of the Royal Bank of Scotland sustained.

In England, the Act 24 & 25 Vict. c. 98, sec. 16, extends to the engraving without authority of notes purporting to be notes of a banking company carrying on business in Scotland only; notwithstanding that sec. 55 enacts that nothing in the Act contained shall extend to Scotland. The Queen *v.* Brackenridge (1 C. C., 133).

381. Penalties for certain Police Offences.—Every person who in any street (and for the purposes of this section "street" shall include any harbour, railway station, canal, depôt, wharf, towing-path, public park, links, common, or open area or space, the strand and sea-beach down to low-water mark, and all public places within the burgh), commits any of the following offences, shall be liable to a penalty not exceeding 40s. for each offence, viz.:—

See sub-head (31), sec. 4, for definition of "street," (4) "burgh," (9) "Commissioners," (13) "house," (3) "building," (16) "premises," (22) "owner," (21) "occupier;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

See Wotherspoon *v.* Lang, 23rd April 1868 (1 Coup., 33) where unenclosed premises belonging to a railway company, which were at all times accessible to the public, and paved and lighted like the public streets, fell within the term "a public place" in the meaning of the Glasgow Slaughter Houses Act, 1865.

In Heatherton *v.* Watson, 30th Oct. 1879 (7 R., Just., 5) a coachman was convicted of an offence under sec. 251 of the General Police and Improvement Act, 1862, "in so far as, on the 4th August 1879, he did, to the obstruction, annoyance, and danger of the residents or passengers, exercise two horses on the foreshore, within the parliamentary boundaries of the burgh of North Berwick."

Sec. 251 provides that "every person who in any street, . . . to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty," etc., and sub-sec. (1) narrates as an offence, "exercising any horse or animal."

On appeal, the Court held that the foreshore was not a "street" within the meaning of the section, and on that ground quashed the conviction.

It may be that, under different circumstances, the foreshore might be held to be a "street." The Lord Advocate, Mr. (now Lord President) Robertson, expressed the opinion that, "if the decision in the North Berwick case laid down a rule that, whatever use may be made of it in any particular place, there can nowhere be a street on open foreshore, then the present query must be answered in the negative. The report of the case, however, does not seem to warrant this construction. Treating the question, then, as open, I consider that foreshore may or may not be a street in the sense of the Act, according to the use made of it. In the case stated, the facts seem to warrant the conclusion that it is. It is right, however, to add that I consider this a doubtful question."

The facts upon which this opinion was given were stated as follows: "The beach is almost daily used by cabs and private carriages, but is not used by carts for ordinary purposes, and only when the horses are driven across to wade in the sea. But there is a large number of horses and carriages used for bathing. The sands are open to cart and carriage traffic. There is an old cart road, part of the county system, called the "king's road," leading to it from the great post road at the west end of the town; and when the east section of the terrace at J. was made, there was a causeway carriage access constructed from the post road, in place of an existing road, which had to be interfered with in carrying out the operations. This was done on the requirement of the County Road Superintendent, who claimed a right for vehicles to enter the beach from the post road at that place, an access having existed there from time immemorial. Besides these, there are carriage entrances from the High Street by Bath Street, Melville Street, and Pitt Street, the retaining wall of the terrace not having been built across the foot of these streets, which were left open because of the right to use the beach for carts and carriages."

In Duffie *v.* M'Cormick, 24th May 1892 (29 S. L. R., 660), by sec. 123 of the Roads and Bridges (Scotland) Act, 1878, which incorporates sec. 96 of the General Turnpike Act, 1831, it is enacted that if any person shall drive any horse or carriage of any description upon any footpath or causeway, on or by the side of any turnpike road, made or set apart for the use or accommodation of foot-passengers, he shall be liable in a penalty.

A turnpike road, as it ran through a police burgh, formed the main street of the town. Down to the year 1878 the Turnpike Road Trustees maintained the carriageways of uniform breadth situated in the centre of the street. In 1878, under sec. 47 of the Roads and Bridges Act, the Turnpike Road Trustees were succeeded by the Police Commissioners in the control and management of the highway within the burgh. On either side of the carriageway were strips of ground of irregular breadth, popularly known as loanings. The Turnpike Road Trustees never did anything for these loanings, but the Town Council, and latterly the Police Commissioners of the burgh, had maintained them as footpaths for over forty years.

Held, that the Police Commissioners were entitled to prosecute

under the Roads and Bridges Act, 1878, any person driving carts or carriages on the loanings.

Sec. 123 of the Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51), incorporates a number of clauses of the General Turnpike Act (1 & 2 Will. IV. c. 43) dealing with offences on roads; see particularly sec. 96, which refers to many of the offences to which this section applies.

In Johnstone Commissioners *v.* Robertson & Son, 25th Nov. 1884 (1 Scot. Law Rev., 33), it was held, it is only in so far as not inconsistent with the Police Act in force in a burgh that the several sections of the General Turnpike Act to which sec. 123 of the Roads and Bridges (Scotland) Act relates, are extended and applied to the highways made, or to be made, within the burghs of a county.

In England, it has been held that a river is a highway. *Ex parte* Grant (29 L. T., 266). With respect to what is an "open and public place," *in Re* Freestone (25 L. J., N. S., M. C., 121) the point was taken and decided that a railway carriage was not such a place within the Act; but the conviction in that case was loosely drawn; and from the observations of Pollock, C. B., it would appear that if the commitment showed the carriage to be on the line of the railway it would have been good as being on a "highway."

In the case of Hirst *v.* Molesbury (40 L. J., N. S., M. C., 76; 23 L. T., N. S., 555), in a complaint laid on offence 20, under the repealed Act of 31 & 32 Vict. c. 52, sec. 3, where a man, while in certain enclosed grounds, to which all the public were admitted on paying 3d. each, went up to another man who was offering to bet odds against various dogs which were about to run in the grounds, and took odds upon one of the dogs, handing a sovereign to the man, and who returned him half a sovereign, the Court of Queen's Bench, without deciding whether the grounds are such a "place" as the Act contemplated, decided that the case was not one within the Statute, as the appellant was not playing or betting *with a* coin as an 'instrument of gaming.' Simply depositing money as a bet is not 'playing or betting.' The Statute only makes the current coin of the realm an "instrument of gaming" when used as a means of wagering or gaming, which it was not under the 5 Geo. IV. c. 83.—Oke's Magisterial Synopsis, i. 824.

As to what is a "place of public resort," in *Ex parte* Davis (26 L. J., N. S., M. C., 178) it was held that the platform of a railway station is such a place. In Reg. *v.* Taylor and Jones (21 J. P., 488), a steamboat lying at a quay was held by Wightman, J., not to be such a place. In *Ex parte* Cross (26 L. J., N. S., M. C., 28; 28 L. T., 257), the place was described in the commitment as "a public thoroughfare, and one of the places of public resort," and was held good. It appears from that case that a street, highway, or place which does not lead to a river, quay, etc., nor is adjacent to a place of public resort, may be described as a "place of public resort," as the above commitment in effect alleged. Sewell *v.* Taylor (29 L. J., N. S., M. C., 50; 1 L. T., N. S., 37) decided that the place need not be permanently or continuously public in its nature to be "a

place of public resort," and that private premises on which a sale by public auction is held on a particular occasion are, for that occasion, a "place of public resort," and Cole *v.* Coulton (29 L. J., N. S., M. C., 125; 2 L. T., N. S., 216) decided that an alehouse was such a place within the Police of Towns Clauses Act.—Oke's Magisterial Synopsis, i. 826.

(1.) Exposes for show, hire, or sale (except in a market or market-place or fair or other place lawfully appointed by the Commissioners for that purpose) any horse or other animal; or shoes, bleeds, or farries any horse or animal (except in cases of accident); or cleans, dresses, exercises, or breaks or turns loose any horse or animal; or makes or repairs any part of any cart or carriage (except in cases of accident where repairs on the spot are necessary):

(2.) Turns loose, or suffers to be at large, any bull or other dangerous animal, without being secured by means of a rope attached to a ring through the nose of such animal, or otherwise:

Sec. 2 of the Dogs Act, 1871, enacts that "any Court of Summary Jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control." *Held*, that the Act was not restricted in its application to dogs dangerous to human beings. Henderson *v.* Mackenzie, 18th Mar. 1876 (3 R., 623).

In Hennigan *v.* M'Vey, 12th Jan. 1882 (9 R., 411), it was held that the owner of a boar is bound to secure it, and is responsible for any damage that may result from his precautions proving inadequate.

In Phillips *v.* Nicoll, 28th Feb. 1884 (11 R., 592), it was held that a butcher was responsible for damage done by a cow belonging to him, which was startled and became unmanageable while being led in a halter by one man along the streets of a town, from the slaughter-house, where it had passed the night. There was skilled evidence to the effect that animals became excitable on smelling the blood and offal of a slaughter-house, and that in such a condition they should be handled with special caution.

See also Harpers *v.* Great North of Scotland Railway Company, 9th July 1886 (13 R., 1139), where it was held (*diss.* Lord Justice-Clerk Moncreiff), that a person conveying a bull through the streets of a town is not liable to passengers on the streets for damage caused through the bull breaking loose, if he has used the precautions which are usual and reasonably safe in the circumstances, even although there are other methods of removing bulls which are more secure and are well known.

(3.) Exposes to public view any stallion or bull when serving any mare or cow:

(4.) Sets on or urges any dog or other animal to attack, worry, or put in fear any person or animal:

(5) Slaughters any cattle or dresses any part thereof, except in the case of any cattle over-driven, or which may have met with any accident, and which, for the public safety or other reasonable cause, ought to be killed on the spot:

(6.) Having the care of any cart or carriage, does not have and use bridles and reins with bits sufficient to enable him to regulate the speed of the horse or other animal drawing the same, or who, not using bridle or reins, does not walk on the causeway close to the side of the animal drawing such cart or carriage (or to the side of the first of such animals, if there be more than one), or who rides on the shafts thereof, or otherwise than on the fore-part of such cart or carriage, and in such a position as readily to see immediately before and on either side thereof, or who is at such a distance from such cart or carriage, or in such a position therein, as not to have due control over every animal drawing the same; or who does not, in meeting any other carriage, keep his cart or carriage to the left or near side, or who, in passing any other carriage, does not keep his cart or carriage on the right or off side of the road (except in cases of actual necessity, or some sufficient reason for deviation); or who wilfully prevents any person or carriage from passing him, or any cart or carriage under his care:

In M'Kechnie *v.* Couper, 20th Jan. 1887 (14 R., 345), it was held that foot-passengers on a country road, with footpaths on either side, are entitled to walk upon the road itself, and the drivers of vehicles are bound to keep clear of them.

In Anderson *v.* Blackwood, 14th Jan. 1886 (13 R., 443), it was held, in an action of damages by a man who in broad daylight had been knocked down and injured when walking in the carriageway of a road (with a pavement on each side) close to a town, by a van, which came up behind him, that the owner of the van was liable in damages, as it was the duty of the driver, in such circumstances, to be able to pull up and not to run over a foot-passenger.

In Grant *v.* Glasgow Dairy Company, 1st Dec. 1881 (9 R., 182), in an action of damages for injuries received by a young child through being run over in the street by a milk van, it was proved, (1) that the accident happened in day-light; (2) that the driver, at the time of the accident, was not occupying the high driving seat, but was seated near the shaft, and had not a sufficiently wide view of the street; and, (3) that the van was being driven at a consider-

able speed. The Court held that the accident was caused by the negligence of the driver, and that the child was entitled to damages, which they assessed at £50.

In Gibson *v.* Milroy, 20th March 1879 (6 R., 890), the driver of a pony carriage, on a dark night in January, between seven and eight o'clock, while driving without lights, at the rate of about six miles an hour, knocked down a foot-passenger on the carriageway of a public road which had a footpath on one side, it was held, in the circumstances of the case, that he was liable in damages. See also Jardine *v.* Stonefield Laundry Company, 24th June 1887 (24 S. L. R., 599).

In England, a driver seen riding upon his waggon is *primâ facie* a fit subject for punishment, but if he showed that he was compelled to do so from a sudden fit of illness, or from some accident, which prevented him from walking, he would avoid the penalty. Bazalgette, p. 808. See also Cotterill *v.* Starkey (8 C. and P., 691). See observations of Lord Young in Ramsay *v.* Thomson, 17th Nov. 1881 (9 R., 140), as to the rule of the road, quoted under Hackney Carriages, p. 442.

(7.) At the same time drives more than two carts or carriages; and, while driving two carts or carriages, has not the halter of the horse in the last cart or carriage securely fastened to the back of the first cart or carriage, or has such halter of a greater length from such fastening to the horse's head than four feet, or who does not otherwise securely retain control by means of a halter over the horse in the second cart or carriage:

(8.) Rides or drives furiously, recklessly, or carelessly, any horse or any horse attached to a cart or carriage, or drives furiously, recklessly, or carelessly, any animal:

See Grant *v.* Glasgow Dairy Company (9 R., 182), *supra*, under sub-head (6).

As to furious driving of hackney carriages, see No. 16 of Regulations in Schedule V. See also English cases, Lynch *v.* Nurdin (1 A. and E., Q. B., 29); Williams *v.* Richards (3 C. and K., 81); Davies *v.* Mann (10 M. and W., 546).

(9.) While in charge of any cart or carriage used for the conveyance of goods, or otherwise for slow traffic, does not draw his vehicle to the near or left side of the road, when required by any person in charge of a private carriage or a cab, or other such vehicle used for swift traffic, so as to allow the swift vehicle to pass the slow vehicle:

Sec. 50 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), enacts, "If any person, without lawful excuse (the proof whereof shall lie

on him), wilfully does any of the following things, namely, interferes with, removes, or alters any part of a tramway," etc., "places or throws any stones," etc., "on any part of a tramway; does, or causes to be done, anything in such manner as to obstruct any carriage using a tramway, or to endanger the lives of persons therein or thereon, or knowingly aids or assists in the doing of any such thing, he shall be liable" to a penalty, etc.

In Hall and Mark *v.* Linton, 29th Oct. 1879 (7 R., Just., 2), an appeal case, stated by a Magistrate who had convicted two persons of an offence under this section, by having, without lawful excuse, wilfully driven a janker cart in such a manner as to obstruct a carriage using the tramways, set forth the following facts: That the appellants were driving two horses tandem, drawing an unloaded janker cart, 19 feet long, up a steep and narrow street along the tramway line, followed by a tramway carriage, the conductor of which signalled to them to draw aside; that the appellants continued to proceed along the line for a short distance till level ground was reached, thereby compelling the tramway carriage to travel at a walking pace; that no other vehicles were in the street at the time; that two witnesses for the defence had stated that the cart could not have been removed from the line without endangering the safety of the public; that the Magistrate had convicted, (1) because the tramway car was improperly and unwarrantably interrupted in its progress by the janker cart; and, (2) because there was opportunity for the janker cart to get out of the way of the car, but the parties in charge, without justifiable reason, refused to do so. *Held*, that the facts stated did not support a charge of wilful obstruction in the sense of the Act, and conviction quashed.

(10.) Causes any cart or carriage, with or without horses, or any beast of draught or burden, to stand longer than is necessary for loading or unloading goods, or for taking up or setting down passengers (except hackney carriages, and horses and other beasts of draught or burden standing for hire in any place appointed for that purpose by the Commissioners or other lawful authority), or by any means wilfully interrupts any public crossing, or by any means wilfully causes any obstruction in any public footpath or other public thoroughfare:

In Bailey *v.* Linton, 27th Nov. 1871 (10 M., 167), a person having been convicted by a Sheriff sitting as a Judge of Police, of a contravention of sec. 99 of the above Act, by wilfully obstructing a public thoroughfare, brought a suspension of the conviction on the grounds, (1) that the place was not a public thoroughfare, and, (2) that, as a question of heritable right was raised, the Sheriff had no jurisdiction. Suspension refused, it being held that the Sheriff had power to decide what was a public thoroughfare in the sense of the Act, and that his judgment was final.

Sec. 251 of the Police and Improvement (Scotland) Act, 1862, 25 & 26 Vict., enacts: "Every person who, in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction, be liable to certain penalties;" that is to say, "every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare . . . every person who shall jostle or annoy any person passing thereon."

In Wemyss *v.* Black, 19th Mar. 1881 (8 R., Just., 25), a complaint set forth that three men were guilty of contravention under above section, in so far as they did, on the High Street of Kirkcaldy, "to the obstruction or annoyance of the residents or passengers, wilfully cause an obstruction in the public footpath of said street by means of congregating."

In a suspension of a conviction obtained on this complaint, *held*, that the complaint did not set forth any offence under the section libelled, and that the conviction, being outwith the Statute, was not protected by the finality clauses from suspension, and conviction quashed.

Opinion, per Lord Justice-Clerk, that the conviction was valid.

In Black *v.* Simpson, 7th Feb. 1883 (5 Coup., 212), suspension of a conviction and sentence pronounced upon a complaint libelling a contravention of sec. 251, sub-sec. (10), of the same Statute, by allowing a horse yoked to a waggonette to remain opposite to a house specified longer than was necessary for taking up and letting down passengers, was sustained, notwithstanding that no objection had been taken to the complaint before the Police Court; it being held that there was no offence libelled either at common law or under the Statute.

Sec. 149, sub-sec. (47), of the Glasgow Police Act, provides that "every person who occasions any kind of obstruction, nuisance, or prejudices or annoys in any manner whatsoever, any other person using the same, or annoyance in any road, street, court, or common stair, or obstructs or incommodes, hinders or prevents, the free passage along or through the same," shall be liable to a penalty. In Shaw *v.* Bell, 8th June 1891 (3 White, Just., 20), a complaint set forth that the appellant, "on the 7th day of February 1891, occasioned an obstruction, nuisance, or annoyance in Argyle Street, Glasgow, by collecting a crowd of people opposite the shop No. 20 Argyle Street aforesaid, and thereby obstructing the footpavement, incommoding and preventing the free passage along said street, and interfering with access to the shops and business premises on each side of No. 20 Argyle Street aforesaid, said crowd having been collected by the said William Grisdale Bell having wilfully and pertinaciously exhibited, on a lamp suspended in the doorway of said shop, a printed document bearing the words, 'Dumbarton, 0; Heart of Midlothian, 1,' being the result of a football match played at Hampden Park, Glasgow, on said date, for the express purpose of

attracting the attention of passers-by, exciting their curiosity, and causing them to stand in crowds reading the said document, and notwithstanding his having been warned to remove the same, in contravention of the Glasgow Police Act, 1866, particularly sec. 149, art. 47, thereof." *Held*, that the complaint was irrelevant.

In England, an appellant had an auction caravan standing in the market-place of a town, for which he paid a rent or toll to the Improvement Commissioners, appointed by a Local Act the lords of the manor. The caravan was only 3 feet from a public street of the town, and the attendance of buyers led to the thoroughfare being obstructed. The Justices convicted the appellant, under sec. 28 of the Town Police Clauses Act, 1847 (in similar terms to this section), of causing an obstruction in a thoroughfare. It was *held*, on a case stated, that what the appellant did was not an offence within the Act. Ball *v.* Ward (33 L. T., N. S., 170; 40 J. P., 213).

(11.) Without proper precautions, and in such manner as to be dangerous to the safety of passengers, conveys or causes to be conveyed any long, large, or heavy, keen-edged or sharp-pointed article:

(12.) Conveys or causes to be conveyed on any cart or carriage any large box, barrel, or basket, and does not sufficiently secure such article by chains or ropes to protect the public against the risk of injury:

(13.) Leads, drives, or rides any horse or other animal, or draws or drives any cart or carriage, upon any footway, or fastens or places any horse or other animal so that it stands across or upon any footway:

See *infra*, sub-head (40); also case of Duffie *v.* M'Cormick, *supra*.

(14.) Places or leaves and does not remove immediately therefrom any furniture, goods, or other articles, or places or uses any standing place, stool, bench, stall, or showboard on any footway of any street, or public thoroughfare, or places any shade, awning, or other projection over or along any such footway, unless the same is 8 feet in height at least in every part thereof from the ground:

See Leisk *v.* Galloway, 12th Nov. 1884 (12 R., Just., 5); see sec. 383 as to power to remove articles placed in streets, secs. 159 and 160 as to projections over thoroughfares.

Sec. 251 of the General Police and Improvement (Scotland) Act, 1862, enacts that every person who in any street or private street, "to the obstruction, annoyance, or danger of the residents or passen-

gers . . . places or uses any bench or stall on any footway," shall be liable in certain penalties.

The proprietor of a shop was charged under this enactment with "wilfully causing an obstruction" on the footway in front of his house by means of a bench or stall loaded with flowers.

Held (*diss.* Lord Craighill), that the charge was relevant without the words, "to the obstruction of residents or foot-passengers."

The proprietor of a house was charged before a Police Court with obstructing the footway of a public street by means of a stall loaded with flowers. He objected to the jurisdiction of the Police Court, on the ground that a question of heritable right was involved, alleging that the part of the street on which the obstruction was said to have existed was his private property. The Magistrate convicted the accused, who brought a suspension, but stated that he did not intend to raise the question of heritable right in a proper civil process. The Court refused the suspension. M'Donald *v.* White, 9th June 1882 (9 R., Just., 43).

(15.) To the annoyance or obstruction of the residents or passengers, carries about on any carriage or on horseback, any picture, placard, notice, or other advertisement:

(16.) Places, hangs up, or exposes for sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same project into or over any footway, or beyond the line of any house, shop, or building at which the same are so exposed:

The Aberdeen Police and Water-Works Act, 1862, sec. 134, enacts: "Every person who, in any street or in any public place within the limits of this Act, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall for every such offence be liable to a penalty" specified —that is to say, "*inter alia*, every person who places, hangs up, or otherwise exposes to sale any goods, wares, merchandise, matter or thing whatsoever, so that the same project into or over any footway, or beyond the line of any house, shop, or building, at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway."

Held, that a shopkeeper who was proved to have had, during a whole day, a quantity of drapery goods hung over the front of his shop, except the windows, so that the goods projected over the footway of the street to an extent varying from 6 to 11 inches, within 6 feet from the level of the footway, had rightly been convicted of a contravention of the foregoing enactment, although it was not proved that any persons had actually been obstructed by the goods. Taylor *v.* Lamb, 4th Nov. 1887 (15 R., Just., 18).

In Buchanan *v.* Keating, 8th Dec. 1854 (17 D., 155), it was held, altering the judgment of the Sheriff of Perthshire (*diss.* Lord President, *abs.* Lord Rutherford), that the Sheriff-Court had no power of interference to review or stay execution of the judgment of the Judge

of Police ordering a workman to remove a sign—alleged to be an obstruction—from the door of a shop of which third parties were tenants, who were not called as parties to the proceedings in the Police Court, and with whom the only connection which the workman had was, that the tenants had employed him to erect the sign.

Observed, That the proper course for the tenants to adopt for the protection of their property was to apply to the Court of Session for suspension and interdict.

In Thomas *v.* Keating, 17th July 1855 (17 D., 1133), a Burgh Police Act declared it to be a punishable offence to have a sign over a shop door projecting beyond a certain distance, and procedure was provided for the punishment of offenders. A workman, who had been employed to erect such a sign, was prosecuted at the instance of the Superintendent of Police, fined by the Police Magistrate, and ordered to remove the sign. The tradesman who had employed him thereupon applied for interdict against him doing so, and also against the Superintendent of Police and the Police Magistrate. Interdict was refused against the Magistrate, but granted against the other respondents. An action was therefore brought by the Police Commissioners of declarator of their rights, and of the illegality of the proceedings of the tradesman. Action dismissed as incompetent, altering judgment of Lord Handyside, Ordinary.

(17.) To the annoyance or danger of the residents or passengers, hangs or places any linen or clothes or other such article on any rail or fence of any premises:

In Leith School Board *v.* George Drever and others, 1st Feb. 1892, the Leith School Board craved interdict against the respondents placing poles projecting from their windows, and hanging clothes thereon. The poles, with the clothes, hung over the playground of one of the schools belonging to the petitioners, and the clothes hung in such a manner as to allow the water to drop on the children, as well as to affect the light of persons occupying the houses below. The respondents claimed the right to do so as a pertinent of the property occupied by them, and in respect that they had been allowed to do so for a considerable time without objection on the part of the petitioners. The respondents asked a proof, and the petitioners pled that the action was irrelevant. The following is the interlocutor pronounced:—"The Sheriff-Substitute having heard parties' procurators, and having considered the record with the productions, finds that the first plea-in-law for the defenders is not insisted on, and that the other defences are irrelevant: Repels the defences, and decerns against the defenders, in terms of the prayer of the petition: Finds the pursuers entitled to expenses, and remits the account thereof when lodged to the auditor to tax and to report. HUBERT HAMILTON.

"*Note.*—The Sheriff-Substitute is unable to discover in the defences any good or even plausible objection to the interdict prayed for in this petition.

"The pursuers' title to the ground in question is apparently unrestricted. The defenders at any rate do not produce or allege the existence of a competing title.

"On the other hand, the right claimed by the defenders of liberty to encroach on the pursuers' ground in the manner described on record, is a kind of right hitherto unknown to our law, and which, in the absence of authority, cannot be recognised as a 'pertinent' of the subjects and occupied by the defenders.

"The main object of the petition being to prevent the communication of infectious disease to the children attending the school mentioned on record, the Sheriff-Substitute would suggest that the interdict be enforced only during school hours, so as to lessen the inconvenience which the defenders say will be entailed upon them by the granting of the petition."

The respondents appealed to the First Division of the Court of Session, when the following interlocutor was pronounced:—"The Lords having considered the appeal, record, productions, and whole process, and heard counsel for the parties, adhere to the interlocutor of the Sheriff-Substitute, dated 1st Jan. 1892, appealed against; affirm the same, and decern; find the pursuers entitled to additional expenses, since the date of the said interlocutor, and remit the account thereof, together with the account of expenses in the Sheriff-Court, to the auditor to tax and to report, the latter account to be taxed as directed in the interlocutor of the Sheriff."

(18.) Writes on, soils, defaces, or marks any wall, fence, hoarding, door, gate, or building, or without authority from the owner or occupier affixes or causes to be affixed to any building, or to any wall, fence, door, gate, or hoarding, any bill or other notice, or wilfully breaks, destroys, or damages any part of such wall, fence, hoarding, door, gate, or building, or any tree, shrub, seat, or other thing:

The Glasgow Police Act, 1866, by sec. 149, imposes a penalty on "every person who is guilty of any of the following disorderly acts or omissions . . . in any street, namely," *inter alia*, sub-sec. (28), "who affixes, without the consent of the proprietor and occupier, to any building any bill or notice." In Kidger *v.* M'Phee, 22nd Nov. 1888 (16 R., Just., 24). The occupier of a building was charged under this section with affixing, "without the consent of the proprietors," certain bills to the wall of the building occupied by him, and was convicted. In a suspension, the Court held that the section did not apply to the case of the occupier or owner of the building placing bills upon it, but only to third parties, and therefore that the charge and whole proceedings thereon were outwith the Statute and illegal, and quashed the conviction.

Objection to the competency of the suspension founded on secs. 131 and 132 of the Statute, which exclude review, except by the

next Circuit Court, repelled, on the ground that the complaint and conviction were *ex facie* illegal.

In a Justice of Peace Court, a plea of guilty was not authenticated in terms of sec. 14 of the Summary Procedure (Scotland) Act, 1864. The accused brought a suspension. They admitted that they had actually tendered the plea. The Court (*dub.* Lord Justice-Clerk) refused the bill, being of opinion that, as the accused admitted that they had tendered the plea, the objection resolved itself into an objection to want of form, of the class contemplated by sec. 34 of the same Act.

In a Justice of Peace Court, two persons pleaded guilty to the crime of malicious mischief, in having destroyed seven trees growing near a high road, the property of a private person. They were each sentenced to thirty days imprisonment, without the option of a fine. Suspension, on the ground that the sentence was oppressive, refused. Mackay *v.* Patrick, 25th Oct. 1882 (10 R., Just., 10).

(19.) Conveys in any open cart or carriage, or otherwise, through any public thoroughfare, the carcases, or any parts thereof, of animals slaughtered for sale, without the same being properly covered up from public view; or exposes such slaughtered carcases, or any parts thereof, or their skins or offals, outside of any shop in any street; or uses machines to mince or hash animal food, to the annoyance of the residents:

Sec. 285 requires that carcases of horses shall be covered, and imposes a penalty of £10 for any offence against that enactment, with a further penalty of £2 for every day on which the offence shall continue.

(20.) Carries, rolls, or drives any cask, tub, hoop, or wheel, or any ladder, plank, pole, timber, log of wood, basket, board, or tray, upon any footway, except for the purpose of loading or unloading any cart or carriage, or of crossing the footway:

(21.) Places any line, cord, or pole, across, upon, or over any part of any street, or hangs or places any clothes thereon, or on the outside of any window fronting any street, or on the outside of any other window, so as to hang down in front of the window of any other person, or shakes carpets or mats from any window:

See Leith School Board *v.* Drever and others, *ante*, p. 617.

(22.) Being a common prostitute or street-walker, loiters

about or importunes passengers for the purpose of prostitution:

The Edinburgh Provisional Order, 1867, sec. 100, subjects, on conviction, to a penalty any common prostitute who, "in or near any street or court, loiters or importunes passengers for the purpose of prostitution." In M'Donald or Ford *v.* Linton, 9th July 1879 (6 R., Just., 49), a complaint which charged a prostitute with "importuning for the purposes of prostitution," passengers in the street from the windows of the house occupied by her, was found irrelevant under the above section.

(23.) Habitually or persistently importunes or solicits, or loiters about for the purpose of importuning or soliciting women or children for immoral purposes:

(24.) Is drunk and incapable, and not under the care and protection of some suitable person:

See sec. 382 as to habitual drunkards.

(25.) To the danger or annoyance of the residents or passengers, wantonly discharges any firearm, or recklessly makes use of any sling or catapult or similar article, or throws or discharges any stone or other missile, or makes any bonfire, or sets fire to and throws any firework:

Sub-head (25), sec. 80, of the Explosive Substances Act, 1875, 18 Vict. c. 17, provides:—"If any person throw, cast, or fire any fireworks in or into any highway, street, thoroughfare, or public place, he shall be liable to a penalty not exceeding £5."

In Simon *v.* Reid, 20th Mar. 1879 (4 Coup., 220), it was held that, in order to constitute the offence in sec. 96 of the General Turnpike Act, 1831, of discharging any gun, pistol, or other firearms upon a public road, etc., it must be libelled and proved that it was done to the annoyance of the passengers, and a conviction for such offence set aside in respect of the failure of the prosecutor to prove such annoyance.

(26.) To the danger or annoyance of the residents or passengers plays at any game, throws any snowball, or makes or uses any slide upon ice or snow, or flies any kite; but games may be played on any rinks, links, common or public park, subject to the power of regulation by bye-laws as herein provided:

Power to make bye-laws for public parks is given by sec. 307, also sec. 316*a*, (3) and (8).

Playing Games in Street.—In England, "W. was charged with playing at football in a street, being a highway. A constable proved that the defendant played with hundreds of persons, and that two horses drawing carts near the place were frightened, but no persons were called to prove that they were annoyed. The Justices having convicted W., it was held that there was ample evidence before the Justices to sustain the conviction. Woolley *v.* Corbishley (24 H., 773)."—Glen, p. 765.

(27.) Cleanses, hoops, fires, washes, or scalds any casks or tubs, or hews, saws, bores, or cuts any timber or stone, or slacks, sifts, or screens any lime, or during the erection or demolition of any house or building, or otherwise, lays down or removes any lime or other material without the same being sufficiently watered to prevent the same being carried or blown about:

See Cameron *v.* Fraser, 21st Oct. 1881 (9 R., 26), referred to at p. 300, and particularly the observations of Lord Young, quoted.

(28.) Throws or lays down any stones, coals, slate, shells, lime, bricks, timber, iron, or glaziers' chips, or the sweepings of any house, shop, warehouse, or other premises, or other materials (except building materials so enclosed as to prevent mischief to passengers), except for the purpose of housing or removing the same, or suffers such material to remain for a longer period than is necessary:

(29.) Beats or shakes any carpet, rug, or mat, contrary to the bye-laws of the Commissioners:

Sec. 316*a*, (5), gives power to make bye-laws for regulating the beating of carpets, etc. See also sub-head (21) of this section as to shaking carpets or mats from a window.

(30.) Fixes or places any flower-pot or box or other heavy article at any upper window, without sufficiently guarding the same to prevent it from falling:

(31.) Unnecessarily, or without taking due precaution to prevent accidents, throws from the roof or any part of any house or building any slate, brick, wood, rubbish, snow, or other thing:

(32.) Permits any female to stand on the sill of any window, in order to clean, paint, or perform any other operation upon the outside of such window, or upon any house or

other building, unless such window be in the sunk or basement storey:

(33.)-Wilfully jostles or annoys any person:

(34.) Discharges any smoke or steam from any premises (otherwise than from the top thereof) into any such street, or suffers or permits the condensed water or moisture from any steam-pipe, flue, or funnel to fall into or upon the street:

See sec. 384 as to smoke nuisances, and sec. 178 as to steam-pipes and funnels for smoke.

(35.) Leaves open any vault or cellar, or the entrance from any street to any cellar or room underground, without a sufficient fence or handrail, or leaves defective the door, window, or other covering of any vault or cellar, or does not sufficiently fence any area, pit, or sewer left open, or leaves such open area, pit, or sewer without a sufficient light after sunset to warn and prevent persons from falling thereinto:

See secs. 156 and 163 as to openings into vaults and cellars, and secs. 186–190 as to fencing and lighting openings in streets, etc.

(36.) Throws or lays any dirt, litter, or ashes or night-soil, or any carrion, fish, offal, or rubbish, on any street, back area, court, except for the purpose of immediate removal, or on any place, or strand and sea-beach down to low-water mark, or into the channel or on the banks of any river or into any harbour within the burgh, or causes or allows any such matter, solid or liquid, to fall or run on any street, or lays down salt on any street or footway in time of snow: But it shall not be deemed an offence to lay sand or other materials in any street in time of frost to prevent accidents, or litter or other suitable materials to prevent the freezing of water in pipes, or in case of sickness to prevent noise, if the person laying any such things causes them to be removed as soon as the occasion for them ceases:

See sub-head (42) *infra*, as to accumulations of filth, etc.; sec. 223 as to throwing rubbish into streams, also sec. 124 as to removal of dung, and sec. 303 as to sewage running over seashore or strand.

In Glass and Dempster *v.* Linton, 27th Oct. 1882 (5 Coup., 160), two persons were convicted of a contravention of the bye-law authorised by the Edinburgh Municipal and Police Act, 1879, which prohibits

the throwing or scattering any sand or rubbish on any street, etc.: objected in a bill of suspension that the bye-law not being made in accordance with the provisions of the Statute, the conviction was without statutory warrant, and illegal: objection repelled, the proceedings found orderly proceeded with, and the bill refused. *Held*, also, that the suspenders could not be heard to plead that they had acted under the instructions of the Edinburgh Tramway Company, in whose employment they were, in respect that the fact was not before the Court.

(37.) Keeps any swine near any dwelling-house so as to be a nuisance or an annoyance to the residents or passengers:

See sec. 316*b*, (7), as to bye-laws for keeping of swine. As every sub-head is qualified by the words at the beginning of the section, it may be doubted if this sub-head could apply to swine kept in private premises.

In England, a bye-law made by a Rural Sanitary Authority, purporting to act under the powers of secs. 44 and 276 of the Public Health Act, 1875, prohibiting the keeping of swine within a distance of 50 feet from any dwelling-house within their district, was held unreasonable and bad. Heap *v.* Burnley Union (12 Q. B. D., 617; 53 S. J., M. C., 76; 32 W. R., 661; 48 J. P., 359).

See also Wanstead *v.* Wooster, L. T., 31st May 1873, p. 81; 37 J. P., 403; Everett *v.* Grapes, 3 L. T., N. S., 669.

(38.) Every baker who carries any board or basket, or chimney-sweeper who carries any ladder, besom, or sack on the footpath or foot pavement, except for the purpose of crossing the same:

See sub-head (11), *supra*, as to carrying of dangerous articles.

(39.) Carries any basket, creel, or other burden, so as to obstruct or annoy any passenger on the footpath or foot pavement, except for the purpose of crossing the same:

(40.) Conducts any wheeled vehicle on the footpath or foot pavement, except a perambulator or invalid carriage:

See sub-head (13), *supra*, as to driving on footways, also case of Duffie *v.* M'Cormick at beginning of this section.

(41.) In vending coals or other articles, shouts or calls out, or uses any bell or horn, or other instrument, to cause annoyance to any inhabitant, after being requested by a constable or inhabitant to cease:

(42.) Accumulates within any enclosure, area, house, building, garret, cellar, or other apartment, any dung, soil, dirt, ashes, filth, or other offensive matter or thing:

See sec. 123 as to cleaning of dungsteads, sec. 120 as to cleaning of courts, etc., and sec. 316*b*, (8), as to bye-laws for cleaning of closes, areas, etc.

(43.) Places or throws upon any footpath or foot pavement any orange rind or peel, or other thing likely to cause danger to passengers:

(44.) Wilfully and wantonly disturbs or annoys any inhabitant by pulling or ringing any door-bell, or knocking at any door, or wilfully and unlawfully extinguishes the light of any lamp or stair gas:

See sec. 100, which imposes a penalty of £10 on any person convicted of extinguishing a public lamp.

"In England, the mere fact of a man being instructed to deliver papers at the house of a third person is no answer to a complaint against him, charging him with having 'wilfully and wantonly' disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night. Clarke *v.* Hoggins (11 C. B., N. S., 545)."—Glen, p. 765.

(45.) Without proper precautions, places or leaves any petroleum, paraffin, naphtha, detonator, dynamite, or other combustible or explosive material, to the danger of any person:

See the Explosive Substances Act, 1875, 38 Vict. c. 17, also the English case of Regina *v.* Lister, 1857 (26 L. J., M. C., 196; Broun on Nuisance, p. 72).

In Walker *v.* Lamb, 16th Feb. 1892 (19 R., J. C., 50), a person was convicted of a contravention of sec. 140 of the Aberdeen Police Act, 1862, upon a complaint which set forth that he permitted to remain on a piece of land occupied by him in Aberdeen, a large quantity of paraffin, "which was injurious to health and offensive to the occupiers of premises adjoining." It was proved that the paraffin was offensive and injurious to the health of his neighbours. *Held*, that the words, "any matter or thing whatever, injurious to health or offensive to" the occupiers of adjoining premises, were to be read as meaning any matter or thing *ejusdem generis* with those specified, and did not apply to goods stored for commercial purposes, although they might be injurious to health and offensive to the neighbours, and conviction quashed.

(46.) While in charge of any horse, cart, or carriage, falls asleep, or leads or drives any cart or carriage under his charge abreast of another or not in line, or, when required by any constable or other person, refuses to allow a free space between every two of such carts or carriages, for the purpose

of crossing, or does not gives his name and address when required by any person reasonably apprehending danger.

(47.) In raising or lowering, or causing to be raised or lowered, any article to or from any building by means of a chain or rope, does not sufficiently secure such article, and provide and use means for protecting the public against the risk of injury.

See Donaldson *v.* Pattison, 14th Nov. 1834, 13 S., 27; and Nelson *v.* Scott, Croall, & Sons, 30th Jan. 1892, 19 R., 425.

(48.) Rides on or hangs from the back of any cart or carriage, or tramway car, without authority from the owner or person in charge thereof.

(49.) Affixes or causes to be affixed to any building any sign, signboard, or insignia of trade, without the consent of the owner and occupier, or affixes or causes to be affixed or suffers to remain any projecting sign, signboard, advertising board, or insignia of trade, without the consent of the Commissioners.

See secs. 159 and 160 as to projections.

See Thomas *v.* Keating, 17th July 1855 (17 D., 1133; 27 Jur., 584), referred to under sub-head (16), *supra;* and M'Arly *v.* French's Trustees, 8th Feb. 1883, 10 R., 574.

(50.) Being the owner of any cart or carriage used for the conveyance of goods, or plying for hire, allows the same to be used without having his Christian name, surname, and place of abode painted in a straight line horizontally upon some conspicuous part on the off or right side of such cart or carriage, in legible letters, either of a dark colour upon a light ground, or of a light colour upon a dark ground, not less than one inch in height, with numbers, beginning with number one where more of such carriages respectively than one shall belong to the same owner, and proceeding in regular progression.

In England, an information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Will. IV. c. 50, sec. 76. The cart was a light spring cart with two wheels, used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty, under 32 & 33 Vict. c. 14, sec. 18. The Magistrates dismissed the information. *Held*, that the "cart or carriage" contemplated by sec. 76 of 5 & 6 Will. IV. c. 50, was *ejusdem generis* with a waggon, and that this

was not such a cart, and that the Magistrate was therefore right. Danby *v.* Hunter (5 Q. B. D., 20).

(51.) Being the owner of any cart or carriage, permits the same to be driven by any person who is not of the full age of fourteen years, or in any street puts a cart or carriage, and the animal yoked to the same, or any unyoked or saddled horse, temporarily under the charge or care of a person who is not of the full age of fourteen years.

(52.) On being authorised to open the carriageway or foot pavement, shall neglect sufficiently to protect such opening at all times, and to light the same at night.

See Hunter *v.* Turnbull, 10th March 1824, 2 S., 786, see *ante*, p. 195.

See sec. 131 as to consent of Commissioners to alterations of streets, also secs. 188–190 as to precautions when hole made in street.

Pavement taking up.—In England, F. being bound by covenant in his lease to lay down pavement, ordered his pavior to lay down Rowley ragstone, being under the impression he was bound to use that material. W. informed F. that he was not bound to use Rowley ragstone, and recommended blue brick, and undertook to indemnify F. against the consequences of taking up the former and substituting the latter, which F. agreed to on Monday. The first pavement was in pursuance of the original order laid down on Tuesday morning, and approved by the Borough Surveyor (the control of the pavement being vested in the Town Council), but it required to lie two days more to consolidate. On Wednesday morning W. took it up, and substituted blue bricks. *Held*, W. having obtained authority to replace the first pavement before it was laid down, the Justices properly refused to convict W. of the offence of wilfully taking up pavements within the Towns Improvement Act, 10 & 11 Vict. c. 34, sec. 56. Till *v.* Walker (24 J. P., 774).

(53.) Stands or loiters on the footway, or sits or lies, to the obstruction or annoyance of the residents or passengers, on the footway or street.

Provided also that nothing contained in this section shall prejudice or affect any bye-laws lawfully made by any Harbour Commissioners or Trustees, or any prosecutions for offences under the same.

382. Habitual Drunkards.—It may be charged as an aggravation of the offence of being drunk and incapable, that the accused person has within the twelve months preceding been three times previously convicted of such offence; and if

the accused person is convicted, and such aggravation is proved, the Magistrate may impose an additional penalty not exceeding 40s. in respect of such aggravation, and may sentence such person to imprisonment for any period not exceeding fourteen days, without the option of a fine.

See sec. 487 as to imprisonment on failure to pay penalty, and secs. 500 and 501 for penalty on repetition of offences and power to mitigate.

See sec. 380, sub-head (11), and sec. 381, sub-head (24).

383. Power to remove Articles placed in Streets.—If any matter or thing whatever shall be placed or allowed to remain in any street, to the obstruction, annoyance, or danger of the residents or passengers, it shall be lawful to the Chief Constable or other constable to remove or cause the same to be immediately removed to any place of safety, there to remain at the risk of the owner and person offending, and to detain the same until the expenses of removal and detention are paid; and if such expenses are not paid within seven days, to sell or dispose of the same, and apply the proceeds as the Magistrate shall direct.

See sub-head (31), sec. 4, for definition of "street," (22) "owner;" see also secs. 122 and 124 as to laying down dung, etc., secs. 189 and 190 as to deposits of building materials, and sec. 381, sub-heads (10), (14), (16), (17), and (28).

384. Prevention of Nuisance arising from Smoke.—Every person who so uses, or causes or permits or suffers to be used, any furnace or fire (except a household fire) as that smoke issues therefrom, unless he proves that he uses the best practical means for preventing smoke, and has carefully attended to and managed the said furnace or fire, so as to prevent as far as possible the escape of smoke therefrom, shall be liable to a penalty not exceeding 40s. in respect of any such act or omission, and to a further penalty not exceeding £5 in respect of every day, or part of a day, during which such act or omission continues after the imposition of the first-mentioned penalty, or in respect of every act or omission of a like nature which occurs within one month after such imposition. This enactment shall apply to any person in charge of a steamer plying on a river or estuary of the sea within the jurisdiction of the Magistrates of the

burgh: Provided that nothing in this Act shall be construed to extend to mines, so as to interfere with or obstruct the efficient working of the same, nor to the smelting of ores or minerals, nor to the calcining, puddling, and rolling of iron and other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes respectively.

See sub-head (22), sec. 4, for definition of "owner;" see sec. 487 as to imprisonment on failure to pay penalty, and secs. 500 and 501 for penalty on repetition of offences and power to mitigate; see also sec. 381, sub-head (34), and sec. 178.

By sec. 16 of the Public Health Act, 30 & 31 Vict. c. 101, the following are declared to be nuisances under that Act:—

"(*h*) Any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible matter used in such fireplace or furnace, and is used within any burgh, for working engines by steam, or in any mill, factory, dye-house, brewery, bake-house, or gas-work, or in any manufactory or trade process whatsoever.

"(*i*) Any chimney, not being the chimney of a private dwelling-house, sending forth smoke so as to be injurious to health: Provided that in places where, at the time of the passing of this Act, no enactment is in force compelling fireplaces or furnaces to consume their own smoke, the foregoing enactment as to fireplaces and furnaces consuming their own smoke shall not come into operation until the expiration of one year from the date of the passing of this Act."

Sec. 99 of the same Act declares that "it shall be the duty of the Local Authority . . . . to enforce the provisions of any Act that may be in force within its district, requiring fireplaces and furnaces to consume their own smoke."

See also the Smoke Nuisance Abatement (Scotland) Act, 1857, 20 & 21 Vict. c. 73, and the Amendment Acts of 1861, 24 Vict. c. 17, and 1865, 28 & 29 Vict. c. 102, which apply to burghs of not less than 2000 inhabitants.

In Local Authority of Dumfries *v.* Murphy, 14th March 1884 (11 R., 694), it was found that to amount to this nuisance as defined in sec. 16, sub-sec. (*h*), of the Public Health Act of 1867, a furnace must be shown not to consume its own smoke, either by reason of faulty construction, or by reason of systematic misuse. That a well-constructed furnace had on ten occasions in a period of four months sent out quantities of offensive black smoke, held not to be evidence of such systematic misuse as to bring it under the terms of that section.

Observations on the duty and powers of the Local Authority in investigating an alleged nuisance of this kind:—

The Smoke Nuisance (Scotland) Abatement Act, 1857, imposes certain penalties on the use of furnaces not constructed to consume their own smoke, "employed in the working of engines by steam, whether locomotive or otherwise, in any place to which this Act

shall apply, or on board of any steam vessel stopping at or in any such place, or in or at any port, pier, landing-place, or harbour within the same, or when plying upon any part of a river which, at such part, shall not exceed a quarter of a mile in breadth," or on the negligent use of such furnaces when properly constructed. Sec. 14 of the same Act with reference to royal burghs, declares that the word "place" shall include the whole area contained within the parliamentary or police limits of the burgh, and the Smoke Nuisances (Scotland) Acts Amendment Act, 1865, extends this definition to other burghs. *Held*, in Campbell *v.* Auld, 27th Oct. 1882 (10 R., Just., 28; 5 Coup., 152), that an offence could not be committed on board a vessel sailing in a part of a river more than a quarter of a mile broad, although within the parliamentary or police limits of a burgh to which the Act applied.

In England, "it was held, by Blackburn, J., and Mellor, J. (Lush, J., dissenting), that the nuisances enumerated in sec. 19 of the Sanitary Act, 1866, which gave definitions similar to those in sub-secs. (5)–(7) of the Public Health Act, must be regarded as if they had been included in the nuisances specified in sec. 8 of the Nuisances Removal Act, 1855, and that a nuisance caused by smoke, from furnaces used in the manufacture of bichrome, a product of ore and minerals, was excepted by the proviso, 18 & 19 Vict. c. 121, sec. 44, which contained a similar clause to sec. 334 of the present Act, from the summary provisions of the Acts. Blackburn, J., in delivering judgment, said that, as, instead of re-enacting the Act of 1855, the Legislature had directed that the two Statutes were to be read together, he thought that sec. 19 of the last Act, containing the list of mischiefs defined to be a 'nuisance,' should be read as a continuation of sec. 8 of the former Act; and then came sec. 44 of the former Act, which excepts all factories used for working up metals. He quite agreed that this was an absurdity; nevertheless the Legislature had done it, and though he did not think they had intended to say what they did, he did not see that it was possible to put any other construction on the Acts. Norris *v.* Barnes (L. R., 7 Q. B., 537; 41 L. J., M. C., 154; 26 L. T., N. S., 622; 20 W. R., 703; 41 J. P., 150).

"The proceeding should be taken against the owner or occupier, and not against the person who lights the fire. Barnes *v.* Akroyd (L. R., 7 Q. B., 474; 41 L. J., M. C., 110; 26 L. T., N. S., 692; 20 W. R., 671; 37 J. P., 116).

"It was held not to be necessary, on an information under the nuisances removal clauses of the Sanitary Act, 1866, 29 & 30 Vict. c. 90, sec. 19, to show that black smoke sent forth from a chimney is injurious to health as well as a nuisance. Gaskell *v.* Bayley (30 L. T., N. S., 516; 38 J. P., 805).

"Generally the word nuisance is applied to something which causes a continued annoyance, rather than to a single act, the effect of which is temporary; but in the following case an order of abatement of a nuisance made by Justices was not complied with, and subsequently nineteen summonses were issued for disobedience of

the said order, alleging the disobedience to have occurred on nineteen distinct days, and such summonses were returnable, and heard on the same day, when the judges convicted on each of the summonses, and imposed a penalty of 10s. upon each summons, with a separate set of costs in respect of each summons and conviction. It was held that the sending forth black smoke from the chimney was the nuisance, and that each summons was issued in respect of a distinct offence, and that the convictions were right. Reg. *v.* Waterhouse (41 L. J., M. C., 115; 26 L. T., N. S., 761; L. R., 7 Q. B., 545; 20 W. R., 712; 36 J. P., 471). A person was convicted in August of allowing black smoke to issue from his factory chimney. In October he was again convicted for allowing black smoke to issue from the same chimney; but it appeared that there were two furnaces which communicated with the same chimney, and that the smoke on the second occasion did not issue from the same furnace as on the first. It was contended that this was only one offence, and that he could not be twice convicted for it. The Court, however, thought the chimney did not mean merely the orifice, but that it extended from the fire to the exit, and that therefore two offences had been committed. Reg. *v.* Brayshaw, *Times* Newspaper, 8th May 1873.

"The Birmingham Improvement Act, 1851, which incorporates the Towns Improvement Clauses, 1847, provides that the Justices before whom any person is summoned for an offence under sec. 108 of that Act, 10 & 11 Vict. c. 34, sec. 108, may remit the penalties if they shall be of opinion that such person has so constructed or altered his furnace as to consume as far as possible all the smoke arising from it, and has carefully attended to the same, and consumed as far as possible the smoke arising from such furnace. The defendant, a wire-drawer, having been convicted of negligently using his furnace so as not to consume its smoke, and the evidence being to the effect that the quantity of smoke emitted might be greatly reduced by keeping partially open the door of the fireplace, or by the use of a ventilator, actually attached to the fireplace, but not used; but that if the external air were thus admitted the temperature of the furnace would not be uniform, and that the process of annealing the metal for the purpose of making wire would be rendered impossible, the Court quashed the conviction, holding that the effect of the qualification introduced by the Local Act was to exempt from a penalty where the smoke was consumed as far as possible, consistently with carrying on the trade in which the furnace was used. Cooper *v.* Woolley (L. R., 2 Exch., 88; 36 L. J., M. C., 27; 15 L. T., N. S., 539; 15 W. R., 450; 31 J. P., 135).

"The Railways Clauses Act, 1845, enacts that 'every locomotive steam-engine to be used on a railway shall be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company shall forfeit £5 for every day during which such engine shall be used on the railway;' (8 Vict. c. 20, sec. 114), where, under this Statute, Justices convicted

a railway company, on the ground that one of their engines did not, in fact, consume its own smoke, the Court remitted the case to the Justices, with their opinion that if the engine was constructed on the principle required by the Statute, and the not consuming its own smoke was occasioned by the negligence of the servants of the company, the company were not liable. Manchester, Sheffield, and Lincolnshire Railway Company *v.* Wood (6 Jur., N. S., 70; 29 L. J., M. C., 29; 2 E. and E., 344; 1 L. T., N. S., 31; 24 J. P., 38). But now, by the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, sec. 19, where proceedings are taken against a company using a locomotive steam-engine on a railway, on account of the same not consuming its own smoke, then, if it appears to the Justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company, or of any servant in the employment of the company, such company shall be deemed guilty of an offence under the section of the Railways Clauses Consolidation Act, 1845, above quoted.

"The Smoke Nuisance Abatement Metropolis Act, 1853, 16 & 17 Vict. c. 128, makes provision for the abatement of nuisance arising from the smoke of furnaces in the metropolis, and from steam vessels above London Bridge. With regard to steam vessels it imposes penalties on the owners, masters, or other persons having charge of the vessels, 16 & 17 Vict. c. 28, sec. 2, but allows the Justices to remit the penalties if they are satisfied that the furnaces consume the smoke as far as possible, and have been carefully attended to, 16 & 17 Vict. c. 28, sec. 3. By an Amending Act of 1856, 19 & 20 Vict. c. 107, sec. 1, 'all steam vessels plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light shall be subject to the provisions of the said recited Act relating to steam vessels above London Bridge.'

"Under this enactment it was held that a steam vessel not carrying passengers, but employed in towing ships for hire to and from the various docks on the Thames, for the most part between London Bridge and the Nore Light, but occasionally going eastward of the Nore Light as far as the Downs, was within the Statute when towing a ship from Limehouse to Blackwall. Walker *v.* Evans (2 E. and E., 356; 6 Jur., N. S.. 71; 1 L. T., N. S., 59; 29 L. J., M. C., 22).

"The nuisance arising from smoke alone, unaccompanied by noise, or from noise alone, or effluvia alone, may be the subject of substantial damages in an action at law. And wherever a jury would give substantial damages at law in respect of any of these causes of action, an injunction will be granted to restrain the continuance of them, and the mere discontinuance of a nuisance after the filing of a bill for an injunction is not in itself a ground for dissolving it. Where the nuisance is of such a nature as to be capable of renewal, the injunction will be made perpetual. Crump *v.* Lambert (15 L. T., N. S., 600; L. R., 2 Eq., M. R., 409; affirmed on appeal, 17 L. T., N. S., 133).

"Where the rebuilding of a house to a height greater than its previous height, caused the chimneys of the adjoining house to smoke, it was held that no action was maintainable against the person who rebuilt the house, either on the ground that the nuisance complained of had been created by him, or that the owner of the adjoining house had acquired an easement, viz. the right to access of air to his chimney with which he had been interfered. Bryant *v.* Lefevre (L. R., 4 C. P. D., 172; 48 L. J., C. P., 380; 40 L. T., N. S., 579; 27 W. R., 592)."—Glen, p. 149.

385. Regulation of Street Traffic.—The Magistrates may from time to time make bye-laws and issue notices and orders:—

(1.) Regulating the traffic, or any particular traffic in streets within the burgh:

(2.) Diverting temporarily out of any street or streets, traffic of every kind, or such particular kinds of traffic as may be specified in any such order or notice:

(3.) Prescribing the streets in or through which particular kinds of traffic shall not be permitted, or where permitted the hours within which they are permitted:

(4.) Prohibiting or regulating public processions:

And every breach of any such bye-law, notice, or order shall be deemed an offence against this Act, and every person committing such an offence shall be liable to a penalty not exceeding 40s.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate. See Croall *v.* Linton, 29th May 1869 (7 M., 849), p. 440.

In Deakin *v.* Milne, 27th Oct. 1882 (10 R., Just., 22), four persons were charged in the Police Court of a burgh with breach of the peace, and also "with breach of the terms of a proclamation made and published by the Magistrates" of the burgh, "by virtue of the powers conferred on them by the Act" 1606, c. 17, "an Act for the Staying of Unlawful Conventions within burgh, and for assisting of the Magistrates in the execution of their offices."

The accused were convicted of both the offences charged, and fined. They took a case.

The following facts were stated. The accused were members of a body known as the "Salvation Army." The proclamation, which did not bear to be founded on the Act 1606, c. 17, was to the effect that the Magistrates finding that processions of the Salvation Army were leading to riotous proceedings, and were likely to cause a breach of the peace, thereby prohibited all such processions, and

gave notice that all persons thereafter taking part therein would render themselves liable to prosecution. This proclamation had been duly published. On the occasion libelled the "accused marched in procession carrying a flag" through various streets of the town, "singing and shouting aloud at the top of their voices, so loud, as deponed to by one of the witnesses, as to be heard over half of the town, waving their arms and gesticulating in a grotesque manner, causing the assemblage of a mob of persons, and obstructing the whole passage of the said streets from pavement to pavement on each side, to the annoyance of the lieges, and causing a breach of the peace, and in violation of the terms of the said proclamation."

The appellants contended, (1) that on the facts proved no breach of the peace at common law had been committed; and, (2) that it was beyond the powers of the Magistrates to issue the proclamation, whether at common law or under the Act libelled, which the appellants alleged to be in desuetude, and, at all events, not applicable to their case.

The Court dismissed the appeal, and affirmed the determination of the Magistrates.

386. Power to Impound Stray Cattle.—If any cattle be at any time found at large in any street of the burgh, without any person having the charge thereof, any constable or officer of police may, if he cannot readily find the owner thereof, seize and impound such cattle, and may detain the same until the owner thereof pay to the Commissioners a penalty not exceeding 40s., besides the reasonable expenses of impounding and keeping such cattle.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh," (9) "Commissioners," (22) "owner;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate. See also sec. 380, sub-head (7), as to penalty for neglecting to provide impounded animals with food and water.

Straying Cattle.—Sec. 74 of 5 & 6 Will. IV. c. 50, authorised the Surveyor or any other person to seize and impound cattle "found wandering, straying, or lying or being depastured on any highway, or on the sides thereof, without a keeper (except on such parts of any road as lead or pass through or over any common or waste or unenclosed ground"), but that section has been repealed by the Highway Act, 1864, 27 & 28 Vict. c. 101, sec. 25, without any corresponding re-enactment; but the power to seize and impound under the common law is assumed (according to the opinion of the law-officers of the Crown) in the provision of sec. 25, enacting a penalty against the owner of cattle straying, etc. . . . As to the term "straying," it was held in Morris *v.* Jeffries (35 L. J., N. S., M. C., 143; 13 L. T., N. S., 629), that if an animal is under the control of some person it is not liable to seizure, not being straying; but in Lawrence

v. King (37 L. J., N. S., M. C., 78; 18 L. T., N. S., 356), it was held that the liability to the penalty may be incurred if sheep are allowed to lie about a highway, although under the control of a keeper at the time they were so found lying about.—Oke's Magisterial Synopsis, vol. i. pp. 493–495.

387. Power to Sell Stray Cattle for Penalty and Expenses.—If the said penalty and expenses be not paid within three days after such impounding, the person by whom such cattle were seized and impounded as aforesaid, or other person appointed by the Commissioners for that purpose, may proceed to sell such cattle, or cause the same to be sold; but previous to such sale seven days' notice thereof shall be given to or left at the dwelling-house or place of abode of the owner of such cattle, if he be known, or if not, then notice of such intended sale shall be given by advertisement, to be inserted seven days before such sale in some newspaper published or circulating within the burgh in which the seizure was made; and the money arising from such sale, after deducting the said sums, and the expenses aforesaid, and all other expenses attending the impounding, advertising, keeping, and sale of any such cattle so impounded, shall be paid to the Commissioners, and shall be by them paid on demand to the owner of the cattle so sold: Provided such balance be claimed within six months of such sale, and in default of such claim the balance shall be applied to the purposes of this Act.

See sub-head (9), sec. 4, for definition of "Commissioners," (22) "owner," (4) "burgh."

388. Removal of Furniture.—It shall be lawful for any constable to stop and convey to the police office, and there detain, until due inquiry can be made, any cart or carriage, and any person in charge thereof or connected therewith, found within the burgh employed in removing furniture, or any person carrying furniture, between the hours of eight in the evening and six in the morning, except at the usual terms of removing observed within the burgh.

See sub-head (4), sec. 4, for definition of "burgh."

Sec. 1 of the Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), provides: "Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred shall, unless it is otherwise specifically stated, be held, in the case of Great Britain, to be Greenwich mean time."

389. Dogs or other Animals, if a Nuisance or Annoyance, to be Removed, etc.—Every person who shall keep, or suffer to be kept, within any house, building, cellar, court, or area, or other premises, any dog, or any fowl, or any other animal, which is a nuisance or an annoyance to the inhabitants in the neighbourhood, and shall not remove the cause of such nuisance or annoyance within such time as the Magistrate shall determine, which he is hereby authorised to do in a summary manner; and every person who shall suffer to be at large or have at large any ferocious, rabid, or vicious dog, not being muzzled, and every person who shall, after notice given by the Magistrates, which they are hereby authorised to issue, directing that dogs should be confined on account of any suspicion of canine madness, suffer any dog to be at large, or have the same at large during the time specified in such notice, all such persons shall be liable to a penalty not exceeding 40s.; and any constable may seize and take possession of any dog or other animal, being a nuisance or an annoyance as aforesaid, and not removed, if so ordered, or any ferocious, rabid, or vicious dog, not being muzzled as aforesaid, or any dog not confined after such notice, and the Chief Constable may cause any dog so seized to be destroyed; and he may also cause to be destroyed any dog reasonably suspected to be in a rabid state, or which has been bitten by any other dog reasonably suspected to be in a rabid state.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (10) "court," (16) "premises;" secs. 336 to 338 inclusive as to "notice," sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

In M'Kirdy *v.* M'Callum, 25th June 1855 (2 Irv., 202), a person was cited to appear before the Greenock Police Court, on a charge of harbouring and keeping two vicious dogs, and allowing the same to go at large. The citation bore to proceed on the Act 3 Vict. c. 54 (being an Act for improving the harbour of Greenock). He attended and was fined. Having brought a suspension of this conviction, he objected, (1) that the citation contained a fatal misdescription of the Act of Parliament, the Greenock Harbour Act being the Act 5 Vict. c. 54, and being moreover inapplicable to the case, while the Greenock Police Act, which was applicable, was the Act 3 Vict. c. 27; (2) that the complaint was irrelevant, in respect that it did not set forth that the owner knew the dogs to be vicious.

Held, that the objection to the relevancy was not well founded, but the proceedings set aside, on the ground that the Magistrates of Greenock sitting in the Police Court had no jurisdiction to try the offence charged, either on the citations given or without citation.

In Henderson *v.* M'Kenzie, 18th Mar. 1876 (3 R., 623), sec. 2 of the Dogs Act, 1871, enacts that "any Court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control." *Held*, that the Act was not restricted in its application to dogs dangerous to human beings.

In Cornelius *v.* Grant, 8th June 1880 (7 R., Just., 13), A. was walking along the street, when a large dog attacked two small dogs which accompanied him. For a considerable time A. endeavoured in vain to separate the dogs, and finally struck the large dog twice with a knife, thereby inflicting two wounds, of which the dog subsequently died. *Held*, that A. was not guilty of "wanton cruelty," within the meaning of sec. 1 of the Prevention of Cruelty to Animals (Scotland) Act, 1850.

In this case, Lord Young said: "There is one observation of a general nature which I feel inclined to make, and it is this, that people who keep dogs, and especially large dogs, are too often regardless of their neighbours in large towns, and in populous places in the vicinity of large towns. I have great sympathy with the attachment that arises between men and dogs, but I confess that I think that dogs such as this one are entirely out of place in cities, and people who keep them should consider that if everybody kept one the place would be uninhabitable."

390. Stray Dogs.—Any constable may take possession of any dog found straying in the burgh, and not under the control of any person, and may detain such dog for five clear days at a police station or other place selected by the Chief Constable, and during that time it shall be properly fed; and if, at the expiration of that time, such dog be not claimed, and all expenses incurred by its detention paid, the same may be sold or destroyed. When any dog taken possession of by any constable wears a collar, with the adddress of any person inscribed thereon, a letter stating the fact of such dog having been taken possession of shall be forthwith sent by the Chief Constable, by post or otherwise, to the address inscribed on the collar.

See sub-head (4), sec. 4, for definition of "burgh;" see 34 & 35 Vict. c. 56, the Dogs Act, 1871.

391. Street Musicians.—It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from

the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding 20s.

See sub-head (31), sec. 4, for definition of "street," (14) "householder," (13) "house;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

392. Use of Steam Whistles and Trumpets.—No person shall, without the sanction of the Commissioners, use or employ in any manufactory or any other place, any steam whistle or other similar call for the purpose of summoning or dismissing workmen or persons employed, and every person offending against this enactment shall be liable to a penalty not exceeding £5, and to a further penalty not exceeding 40s. for every day during which such offence continues: Provided always, that the Commissioners, in case they have sanctioned the use of any such instrument as aforesaid, may at any time revoke such sanction on giving one month's notice to the person using the same.

See sub-head (9), sec. 4, for definition of "Commissioners;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

393. Penalty for Betting in Streets.—If any two or more persons assemble together in any street or open place within the burgh, for the purpose of engaging in lotteries, betting, or gaming, each of such persons shall be liable to a penalty not exceeding 40s.

See sub-head (31), sec. 4, for definition of "street," (4) "burgh;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

394. Rules for Persons using Bicycles, etc.—Bicycles, tricycles, velocipedes, and other similar vehicles are hereby declared to be carriages within the meaning of this Act, and the following rules shall be observed by any person or persons using such carriage:

(1.) During the period between one hour after sunset and one hour before sunrise, every person using such carriage shall

carry attached to his vehicle a lamp, which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so lighted and kept lighted as to afford adequate means of signalling the approach of the carriage:

(2.) Upon overtaking any cart or carriage, or any horse, mule, or other beast of burden, or any foot-passenger, every such person shall, within a reasonable distance, from and before passing such cart or carriage, horse, mule, or beast of burden, or such foot-passenger, by sounding a bell or whistle, or otherwise, give audible and sufficient warning of the approach of the carriage:

And any person who breaks either of these rules shall be liable for any one offence to a penalty not exceeding 40s.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

Theatres and Places of Public Resort.

395. Theatres, etc., to be Licensed.—It shall not be lawful for any person to have or keep any house or other place of public resort within the burgh for the performance of stage plays or other theatrical representations, or any circus, or any place for entertainments in the nature of dramatic entertainments or exhibitions, or any other place of public resort for public dancing, music, or other entertainment of a like kind (all which places are hereinafter shortly described or referred to as theatres or other places of public amusement), into which admission is obtained by payment of money or for money consideration, without being duly licensed by the Magistrates, without prejudice to any powers pertaining by Statute to the Lord Chamberlain.

See sub-head (13), sec. 4, for definition of "house," (4) "burgh." See Linton *v.* Beaumont, under sec. 397.

Theatres.—In England, a dramatic performance called a duologue, in which two persons appeared in different costumes and characters, holding dialogues with each other, is within the definition of "stage play" in the Statute 6 & 7 Vict. c. 68, secs. 2, 23, and the keeper of the house in which the performance takes place, without authority, is liable to a penalty. Thorne *v.* Colson (3 L. T., N. S., 697; 25 J. P., 101).

A booth used as a temporary and portable theatre is a "place," within the meaning of the 6 & 7 Vict. c. 68, sec. 11.

The manager of a booth, used as a portable theatre, not being a patent theatre, or duly licensed as a theatre, who, with a company of strolling players, caused to be acted therein a stage play for hire, the booth being on a private piece of ground, rented for the purpose of holding a pleasure fair, not legal or licensed in any way, is liable to a penalty under sec. 11. Fredericks *v.* Payne (32 L. J., N. S., M. C., 14).

396. Terms of Licence.—The fee to be paid for each licence shall not exceed 20s., and no licence shall be granted to any person except the actual and responsible manager of any such theatre or other place of public amusement, and the name and place of abode of such manager shall be printed on every playbill or other public notice announcing any representation at such theatre or other place of public amusement; and such manager shall become bound himself, in such penal sum as the Magistrates may require, not exceeding £50, with two sureties, to be approved of by the Magistrates, in such further sum not exceeding £20 each, as the Magistrates in like manner may require, for the due observance of the conditions of the licence and of the bye-laws from time to time in force in the burgh during the currency of such licence for the regulation of such theatre or other place of public amusement, and for securing payment of the penalties which such manager may be adjudged to pay for breach of any of such bye-laws or of this Act.

See sub-head (4), sec. 4, for definition of "burgh;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

397. Public Shows, etc., not to be opened or set up in Burgh without sanction of Magistrates.—No public show of any description whatever, whether in open ground or in any house or building, or caravan or tent, and no swings or hobby-horses, and no shooting-gallery, singing or dancing saloon, or bowling or nine-pin alley, and no place for playing skittles (all which are hereinafter shortly described or referred to as public shows and other like places of public entertainment), shall be opened or set up within the burgh without the permission of the Magistrates; and it shall be

lawful for the Magistrates to regulate, restrain, remove, or prohibit all such public shows and other like places of public entertainment, and to make and establish regulations and prohibitions to that effect; and if any person shall open or set up, or be concerned in opening or setting up, any such public show or other like place of public entertainment, without the sanction or permission of the Magistrates, or shall contravene any such regulation or prohibition, all such persons shall, for every such offence, be liable to a penalty not exceeding £5, and also to a continuing penalty of £5 for every day during which the offence is committed or continued.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (4) "burgh;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

Sec. 287 of the Edinburgh Municipal and Police Act, 1879, enacts that the "Magistrates may license any house, building, or other premises to be used for any public show, exhibition, circus, or other representation or public entertainment," under such regulations and conditions as they think fit; and that every person opening any public show, etc., without a licence, shall be liable in a penalty. In Linton *v.* Beaumont, 18th July 1883 (10 R., Just., 80), certain premises were open nightly (except Sunday) from seven till twelve o'clock, to any one on payment of sixpence, in return for which a ticket was given, entitling the holder to one refreshment, such as a cup of coffee or a glass of lemonade. Additional refreshment might be obtained on further payment. The refreshments were served in a large room capable of accommodating upwards of 200 persons, and provided with small tables and chairs. Music was played at intervals during the evening, the performers being stationed on a raised platform at one end of the room. *Held*, that these premises were not used for a public entertainment in the sense of the Act, and did not require a licence.

Place of Public Resort.—In England, a private house, in which a sale by public auction is held, is for the time a place of public resort, within the meaning of the Vagrant Act, 5 Geo. IV. c. 83, sec. 4. Sewell *v.* Taylor (29 L. J., N. S., M. C., 50).

398. Burden of Proof of Licences.—Where in any case money or other reward shall be taken or charged directly or indirectly as an entrance fee, or where the purchase of any article is made a condition for the admission of any person into a theatre or other place of public amusement, and it shall be proved that such theatre or other place is used for

any public performances, or for any of the purposes of public amusement hereinbefore specified, the burden of proof that such theatre or other place of public amusement is duly licensed shall devolve on the party accused, and, until the contrary is proved, such theatre or other place of public amusement shall be taken to be unlicensed, and every person acting therein shall be liable to a penalty not exceeding 40s. for each offence.

See p. 5 as to definition of "person;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

399. Bye-laws may be made as to Places of Public Amusement.—The Magistrates may from time to time make bye-laws for the due licensing of theatres and other places of public amusement within the burgh, and may provide in such bye-laws for the suppression of riots and disorderly conduct, and for the prevention of smoking within such theatres or other places, and for regulating the times at and during which the same shall severally be allowed to remain open.

See sub-head (4), sec. 4, for definition of "burgh," (20) "Magistrates;" see secs. 316–324 as to bye-laws.

400. Penalty for Breach of Bye-laws.—In case of riot, or of the breach of any bye-laws made by the Magistrates, taking place in any theatre or other place of public amusement, the Magistrates, after hearing the holder of the licence, may order the same to be closed, or may suspend the licence thereof for any period they think fit, and during that period such theatre or other place of public amusement shall be deemed to be unlicensed, and the manager thereof shall, in addition to any other penalty he may incur, be liable to a penalty not exceeding £5 for each day on which he continues to contravene or offend against such bye-laws.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

401. Constables may enter certain Premises.—Any constable shall have power, by virtue of his office, at

any time to enter any premises or other place of the following description, and every part thereof, viz.:—

(1.) Any place to which the public are admitted, by payment or otherwise, used for the purpose of a theatre, public show, or other place of public amusement or entertainment:

(2.) Any music, singing, or dancing saloon, or any shooting gallery, or bowling or nine-pin alley, or any place for playing skittles, or any eating-house, coffee-house, or other such place:

(3.) Any victualling house, public-house, house, or building in which wine, spirits, beer, cider, or other excisable or fermented or distilled liquors are sold or suspected to be sold, whether licensed or not:

(4.) Any house or building, or brothel for the reception of prostitutes, or usually frequented by thieves or loose and disorderly persons:

(5.) Any building or part of a building which is kept or used for a purpose in respect of which a licence is required by the provisions of this Act:

(6.) Any ship or other vessel not being employed in Her Majesty's service:

And every occupier or keeper of any such premises or other place, or other person having the charge thereof, who shall not admit such constable when required, shall be liable to a penalty not exceeding £10.

See sub-head (16), sec. 4, for definition of "premises," (13) "house," (3) "building," (21) "occupier;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

402. Unlicensed Theatres may be entered and Occupants removed.—Any Magistrate may, by order in writing, authorise any constable to enter into any building or part of a building suspected to be kept or used for stage plays or dramatic entertainments, or as a circus, or as a public show, or for any of the purposes hereinbefore specified, into which admission is obtainable by payment of money or for money consideration, and which is not licensed in accordance with the requirements of this Act, at any time when the same is

open for the reception of persons resorting thereto, and to remove any person found therein without lawful excuse; and every person keeping, using, or knowingly letting any building or part of a building or any place for the purposes aforesaid, or any of them, which building, part of a building, or place shall be unlicensed as aforesaid, shall be liable to a penalty not exceeding £20, and every person being therein without lawful excuse shall be liable to a penalty not exceeding 40s., and the burden of proving that any such building, part of a building, or place is a licensed theatre or circus, or that any public show is sanctioned by the Magistrates, shall be upon the person keeping or conducting the same.

See sub-head (3), sec. 4, for definition of "building;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

Disorderly Houses and Gambling Houses.

403. Suppression of Brothels.—The Magistrate may, on a complaint by the Burgh Prosecutor, grant warrant to enter into and search from time to time, during any period not exceeding thirty days from the date of such warrant, any house or building, or part of a house or building, or other place, which on examination of the Chief Constable or an inspector or lieutenant of police, and at least one other person not holding any office or situation under this Act, the Magistrate is satisfied there is reasonable ground for believing to be kept, managed, or used, or suffered to be used as a brothel; and any constable, under authority of such warrant, may take into custody and convey to the police office the occupier of such house or building, or part of a house or building or place, or any person found therein who either temporarily or permanently manages or assists in the management of such brothel, and every such person shall be liable, on conviction before the Sheriff or two Magistrates of being the occupier of, or of temporarily or permanently managing or assisting in the management of such brothel, to a penalty not exceeding £20, or to imprisonment, without the option of a fine, for any period not exceeding sixty days, and failing payment of any such penalty, to imprisonment not exceeding sixty days,

and the conviction of any such person as aforesaid shall, *ipso facto*, void and terminate any lease, or any arrangement to let such house or building, or part of a house or building, from and after the date of such conviction: Provided always, that all legal rights of the owner thereof for rent or otherwise, for the year current at the date of such conviction, and consequent voidance or termination of lease, or let, or arrangement to let, shall remain unaffected, and may be enforced as if no such voidance or termination had followed such conviction.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (21) "occupier," (22) "owner," (30) "Sheriff;" sec. 487 as to imprisonment on failure to pay penalty, and secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

See sec. 380, sub-head (2), and cases thereunder. Abbott *v.* Grant (9 R., Just., 26.)

In Prentice *v.* Linton, 7th Feb. 1883 (5 Coup., 210), it was held that it was unnecessary, in a conviction following upon a complaint which charged the two offences under sec. 278 of the Edinburgh Municipal and Police Act, 1879, of keeping and managing a brothel, and of knowingly harbouring prostitutes, to find the accused guilty of each offence by separate findings; and in the sentence to separate the amount of penalty applicable to each; and a conviction following upon such a complaint sustained, which found the complaint proved, and sentenced to a *cumulo* penalty with imprisonment for a period mentioned until said fine be paid.

The Edinburgh Municipal and Police Act, 1879, sec. 278, enacts that any person who shall be convicted of keeping or managing any brothel, or of knowingly harbouring prostitutes, "shall, in respect of the first offence, be liable to a penalty not exceeding £20, or to imprisonment, without the option of a fine, for any period not exceeding sixty days; and in respect of the second or any subsequent offence, to a penalty not exceeding £40, and, failing payment of the penalty, to imprisonment for any term not exceeding three months, or to imprisonment, without the option of a fine, for any period not exceeding three months."

Sec. 342 enacts that "in every action or prosecution under this Act before the Judge of Police, except where otherwise provided, in which a fine," etc., "shall be imposed or awarded, the person found liable shall be sentenced to imprisonment till the said fine be paid." *Held*, in Paton *v.* Linton, 8th June 1880 (7 R., Just., 11), in an appeal from the Edinburgh Police Court, that a sentence fining the accused, and adjudging the accused "to be incarcerated in the prison of Edinburgh, therein to be detained until the said fine be paid, but not exceeding sixty days from" the date of sentence, was competent in the case of a person convicted of a first offence under sec. 278.

The Glasgow Police Act, 1866, imposes certain penalties on the proprietor or occupier of any building which he uses, or knowingly suffers to be used, "for the purpose of harbouring prostitutes for the purpose of prostitution."

In Milton *v.* M'Phee, 27th Oct. 1882 (10 R., Just., 20), the occupier of a house was charged under this Act with having knowingly suffered her house to be used "for the purpose of harbouring prostitutes for the purpose of prostitution." She was convicted of the offence libelled, and took a case.

The facts as stated were:—A warrant to search the appellant's house had been granted, on the complaint of a neighbour, supported by the evidence of the police, that there was reasonable ground for believing that the house was used for the purpose of prostitution. The appellant was herself a prostitute. When the police entered, under the search-warrant, there were found in the house three men, but only one other prostitute besides the appellant. The men did not deny that they had resorted to the house as a brothel.

The appellant contended:—(1) that as only one other prostitute had been found in the house besides the appellant herself, no contravention of the Statute had been proved; and (2) that the complaint was irrelevant from want of specification, in respect that the names of the prostitutes alleged to have been harboured had not been libelled.

The Court dismissed the appeal.

404. Remedy where Room used for Meetings becomes a Nuisance. — The Magistrates, on their being satisfied, on the complaint of two or more householders residing in any common tenement or any building, that any house, room, or apartment therein, used for entertainments, is a nuisance, may order the person having or keeping the same, to discontinue the use thereof till the nuisance be abated, and every person continuing to use such house, room, or apartment for such purposes, while any such order is in force, shall be liable, on conviction before the Sheriff or two Magistrates, to a penalty not exceeding £10, or to imprisonment for a period not exceeding sixty days.

See sub-head (14), sec. 4, for definition of "householder," (3) "building," (13) "house," (20) "Magistrates," (30) "Sheriff;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

405. Penalty on Persons keeping places for Baiting Animals, and on Persons found therein.—Every person who within the burgh keeps, or uses, or acts in the

management of any house, room, pit, or other place for the purpose of fighting, baiting, or worrying any animals, shall be liable to a penalty of not exceeding £5, or, in the discretion of the Magistrate before whom he is convicted, to imprisonment, with or without hard labour, for a time not exceeding one month without any penalty being imposed; and the Magistrate may, by order in writing, authorise the Chief Constable, with such constables as he thinks necessary, to enter any premises kept or used for any of the purposes aforesaid, and take into custody all persons found therein without lawful excuse, and every person so found shall be liable to a penalty not exceeding 5s.; and a conviction for this offence shall not exempt the owner, keeper, or manager of any such house, room, pit, or place from any penal consequences to which he is liable for the nuisance thereby occasioned.

See sub-head (4), sec. 4, for definition of "burgh," (13) "house;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec, 458 as to punishment of abettors.

In Brown *v.* Renton, 18th Dec. 1891 (19 R., Just., 22), it was held that a charge under sec. 2 of the above Act (Prevention of Cruelty to Animals Act, 1850, 13 & 14 Vict. c. 92), of encouraging, aiding, and assisting at the fighting or baiting of cocks in a plantation and an old road, was an irrelevant charge, in respect that these places were not said to be, and clearly were not, places "kept or used" for the purpose of cock-fighting.

406. Penalty against practising Games of Hazard, etc.—All persons who shall be found in possession of, or shall exhibit implements or articles for practising games of hazard, in order to induce or entice, or who shall induce or entice, any person to play at any game of hazard, or who, by any fraudulent act or device, shall cozen and cheat, or attempt to cozen or cheat, any person out of any money or property, on conviction shall be imprisoned for any term not exceeding sixty days, and shall also at the same time be sentenced to repay any money or restore any property which they may have obtained by means of any such offence, and failing such payment or restoration, may, under the same procedure, be committed to or detained in prison for any further term not exceeding sixty days.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500

and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors; see 32 & 33 Vict. c. 87, the Prevention of Gaming (Scotland) Act, 1869; see also Melvin *v.* Lamb, 3rd Nov. 1890 (18 R., Just., 70).

407. Gaming Houses. — It shall be lawful for the Chief Constable or any constable of police, having good grounds for believing that any house, room, or place is kept or used as a gaming or betting house, to enter such house, room, or place, and, if needful, to use force for the purpose of effecting such entry, and to take into custody all persons who shall be found therein, and to seize all tables for and instruments of gaming found in such house, room, or place, and all moneys and securities for money found therein; and the owner or keeper of such gaming or betting house, or other person having the care or management thereof, and also any person who shall act in any manner in conducting such gaming or betting, shall be liable in a penalty not exceeding £50; and upon conviction of any such offender, all such tables and instruments of gaming shall be destroyed, and all the moneys and securities for money which shall have been seized as aforesaid shall be paid over to the Collector of Police, and applied in the same way and manner as penalties by this Act are directed to be applied; and every person found within such premises, without lawful excuse, shall be liable in a penalty not exceeding £10.

It shall not be necessary, in support of any prosecution under this Act for gaming in or suffering any game or gaming in such gaming or betting house, or for keeping or using or being concerned in the management or conduct of such house, to prove that any person found playing at any game was playing for any money, wager, or stake.

See sub-head (13), sec. 4, for definition of "house," (22) "owner;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, sec. 458 for punishment of abettors, and sec. 498 as to application of penalties.

In Lord Adv., Bernard, Greenhuff, and others, 19th Dec. 1838 (2 Swinton, 236)—(1) the opening and keeping of a common gaming house, for the playing of games of chance for money, for the profit of the keepers, and where games of chance are commonly and publicly played for money, found an indictable offence at common law. (2) A panel who pleaded guilty to a charge of opening and keeping

a gaming house of the above description in Edinburgh, sentenced to two months' imprisonment.

In Henretty *v.* Hart, 17th Dec. 1885 (13 R., Just., 9), the Betting Act, 1853 (extended to Scotland by the Betting Act, 1874), sec. 3, enacts that "any person who, being the owner or occupier of any house, office, room, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person" for the purpose of betting, shall be liable in certain penalties.

On an appeal against a conviction under this enactment, *held* (*diss.* Lord Craighill), (1) that an enclosed racecourse, some twenty acres in extent, was not a "house, office, room, or other place," within the meaning of the Act; and, (2) that even if such a racecourse were within the Act, the proprietor thereof, who saw that betting was being carried on by a professional betting man (who had resorted thither, along with others of the general public on the occasion of certain races), and did not attempt to stop the betting, though he gave the betting man no special facilities, was not thereby liable under the Act, as having knowingly and wilfully permitted the racecourse to be used by another person for the purpose of betting. See also Bolton *v.* Murdoch, 23rd Jan. 1890 (17 R., Just., 22).

See Duff *v.* Neilson, 16th Dec. 1892 (not yet reported). On 26th Aug. 1892, Robert Duff, 62 Argyle Street, Glasgow, was, on a complaint at the instance of George Neilson, Procurator-Fiscal, convicted of contravening the Glasgow Police Further Powers Act, 1892, sec. 15, in so far as, upon the 19th August, he kept the office or other premises, 62 Argyle Street, as a gaming or betting house, or had the care or management thereof as a gaming or betting house, or did act as clerk or assistant in managing, conducting, or carrying on gaming or betting therein, or was concerned in the management or conduct thereof, as a gaming or betting house. Bailie Brechin, who tried the case, repelled an objection to the relevancy of the complaint, in respect that it contained no specification of the offence or offences charged. The appellant was convicted of having the care or management of the premises as a betting house, and was fined £20, the alternative being thirty days' imprisonment. The questions submitted to the Court were, (1) whether the complaint was relevant, and (2) whether the applicant was properly convicted of having the care or management of a betting house, in contravention of the Glasgow Police Further Powers Act, 1892, sec. 15.

The Court refused the appeal, and found the respondent entitled to ten guineas of expenses.

Lord Trayner, who gave the leading opinion, said "there was no doubt as to the appellant having been properly convicted on the evidence, and therefore the second question must be answered in the affirmative. With reference to the first question, the appellant's objections to the relevancy of the complaint came to this—(1) that the appellant was charged with keeping, or being concerned in the keeping or management of, a gaming or betting house, and (2) that there was a want of specification of the *modus* in which the offence

had been committed. With regard to the first of these objections, it was maintained that the accused should have been told what kind of house he was said to have kept—whether it was a gaming house or a betting house. His Lordship was not prepared to say that the Statute meant to distinguish between what were charges of gaming and betting. The offence was not gaming or betting, but keeping a house for either or both of these purposes. While it must be averred and proved, in order to a conviction, that the accused kept or managed a house for gaming or betting, it was not necessary to allege for which of these purposes the house was kept or used, or whether it was so kept and used for both. Even if that view were not sound, it was plain enough that the charge, as an alternative charge, was well laid; it was keeping a betting house or a gaming house, and it was unobjectionable. The conviction was quite clear and explicit as to which of these charges was held proved against the appellant. The objection as to want of specification was also unsound. Keeping, conducting, managing, or assisting in the management of a house for the purpose of gaming or betting was an offence, although the keeper had no interest in, or knowledge of, particular bets there made by others. He did not see how such an offence could be charged otherwise than here. The details of the circumstances needed to prove the offence should not be made matter of specific averment. It was contended, further, for the appellant, that the system carried on was not betting, because no money was paid or deposited by the person making the bet. Any such argument was quite untenable, and he should not have dealt with the argument unless he had thought it desirable to say that the Statutes against betting and betting houses would not be voided by the introduction of a system of betting upon credit."

Gaming.—In England, in the case of Searle *v.* Justices of St. Martin's (14 J. P., 276, Middlesex Sessions), it was decided that allowing betting lists of horse races to be exhibited in the alehouse was gaming within the Act 9 Geo. IV. c. 61.

In Awards *v.* Dance (26 J. P., 437), it was held that the offence of gaming does not consist in a mere casual act of a customer; and (*per* Compton, J.) it is not "to be taken for granted that if the keeper of the house leave some one in charge of it, and gaming is carried on, he can escape by saying that he himself knew nothing about it."

In order to justify the conviction of an hotel-keeper for suffering gaming on his licensed premises, it is not enough to show merely that such gaming took place. Actual knowledge is not necessary, but something amounting to constructive knowledge must be shown. Bosley *v.* Davies (45 L. J., N. S., M. C., 27).

Betting Houses.—In Bows *v.* Fenwick (43 L. J., M. C., 107), the defendant had a stool on a racecourse during the races, over which was kept up, open, a large umbrella about seven or eight feet high, capable of covering several persons, the stick of which was fastened in the ground with a spike. The defendant's name, with the addition, "Victoria Club, Leeds," was painted in large letters on

the umbrella, and there was a card with the words, "We pay all bets first past the post." The defendant stood on the stool offering to make, and making, bets, the money being deposited with him at the time, for which he gave a ticket. Upon this it was held that the stool and umbrella constituted a "place" within the meaning of the Act 16 & 17 Vict. c. 119.—See Oke's Magisterial Synopsis, 13th ed., vol. i. p. 1.

SUPPRESSION OF VAGRANTS.

408. Vagrant Beggars, etc., to be Apprehended, and upon Conviction imprisoned.—Every person found begging, or exposing wounds or deformities, or who shall cause or permit the exposure of children of tender age to the inclemency of the weather, or causing children to sing in any street or court or common stair, or otherwise acting so as to induce, or for the purpose of inducing, the giving of alms, and every person conducting himself as a vagrant, having no fixed place of residence, and no lawful means of getting his livelihood, shall be liable, for the first offence, to a fine not exceeding 20s., or to be imprisoned for any period not exceeding thirty days, or to imprisonment for such period, without the option of a fine, and for the second or any subsequent offence, to be imprisoned for a period not exceeding sixty days.

See sub-head (31), sec. 4, for definition of "street;" sec. 487 for imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

See sec. 1, Prevention of Cruelty to, and Protection of, Children Act, 1889, 52 & 53 Vict. c. 44.

In Coyle *v.* M'Kenna, 21st Nov. 1859 (3 Irv., 452), a panel was charged before the Police Court of Glasgow with attempt to steal, and with being a rogue and vagabond. The complaint concluded that, being "convicted of the said *crime*," he should be punished in terms of law. The charge of attempt to steal was found not proven, and the panel was convicted only of being a rogue and vagabond. This conviction was set aside.

Proceedings of Magistrates professedly under their Police Act, but which were *ultra vires* of the Statute, held to be subject to review by the High Court of Justiciary, notwithstanding a clause excluding review by the High Court of proceeding under the Statute, and providing for an appeal to the Circuit Court.

Question, Whether "being a rogue and vagabond" is a relevant charge at common law?

In Scott *v.* Linton, 19th Mar. 1860 (3 Irv., 581), suspension refused of a conviction under sec. 155 of the Edinburgh Police Act, on a charge against the suspender of conducting himself as a vagrant, and consorting with vagabonds, he having no fixed place of residence, and no lawful means of gaining his livelihood.

In England, by the Industrial Schools Act, 1866, 29 & 30 Vict. c. 118, children under fourteen begging and wandering about without any settled home or visible means, and others, may be sent to an industrial school. The provisions of the Reformatory Schools Act, 1866, 29 & 30 Vict. c. 117, are applicable to all offenders under sixteen who are adjudged to be imprisoned for not less than ten days without a fine. By the Pedlars Act, 1871, 34 & 35 Vict. c. 96, sec. 13, "A person shall not be exempt from the provisions of any Act relating to idle and disorderly persons, rogues, and vagabonds, by reason only that he holds a certificate as a pedlar, or assists in, or is accompanying a person holding such certificate; and, by sec. 16, the Justices are to deprive a pedlar of his certificate as such, if he is "convicted of begging."—Oke's Magisterial Synopsis, vol. i. p. 816.

409. Known or Reputed Thieves may be Apprehended, etc.—Every known or reputed thief, or associate of known or reputed thieves, who is found in any house or building, or part of a house or building, or other enclosed place, or who is found frequenting any street, court, house, or building, or place adjacent, with intent to commit any crime, or who is in possession of any picklock, key, crow, jack, bit, or other implement usually employed in house-breaking, or who is found in possession of any money or article without being able to give a satisfactory account of his possession thereof, may be apprehended, and, on conviction, be committed to prison for any term not exceeding sixty days; and it shall not be necessary, in proving the intent to commit a crime, to show that such person did any particular act or acts tending to show his purpose or intent, and he may be convicted if, from the circumstances of the case and from his known character as proved to the Magistrate, it appears to such Magistrate that his intention was to commit a crime. For the purpose of this section, the word "crime" shall mean any description of theft, robbery, housebreaking, reset of theft, and any similar offence involving dishonesty; and any money or article found upon the accused, if not claimed by the owner within twelve months, may be forfeited and applied for the purposes of this Act.

See sub-head (13), sec. 4, for definition of "house," (3) "building," (19) "Magistrates," (31) "street," (10) "court," (22) "owner;" sec. 487 as to imprisonment on failure to pay penalty; secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

See M'Lean *v.* Murdoch, 23rd Dec. 1882 (10 R., Just., 34; 5 Coup., 193), where it was held that, under sec. 15 of the Prevention of Crimes Act, 1871, the whole of sec. 4 of the Act 5 Geo. IV. c. 83 (which was declared not to extend to Scotland) was in force in Scotland. That section enacted that any person committing any one of a variety of offences (thirteen in all, and of the same general character) should be deemed a rogue and vagabond within the meaning of the Act.

Sec. 272 of the Edinburgh Municipal and Police Act, 1879, enacts that every suspected person, or reputed thief, who is found "frequenting any street with intent to commit a crime," shall be deemed a rogue and a vagabond, and liable to be imprisoned for sixty days.

In Linton *v.* Clark, 10th Nov. 1887 (15 R., Just., 25), *held* (*diss.* Lord Craighill, and the Lord Justice-Clerk giving no opinion), that proof that a known thief had been on the street libelled with intent to steal on a single occasion was not sufficient to satisfy the charge of frequenting the street with such intent.

Vagrants.—In England, the Act 5 Geo. IV. c. 83, sec. 4, enacts, that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony," shall be deemed a rogue and vagabond, and may be convicted accordingly. *Held* (*diss.* Pattison, J.), that the words "place adjacent" must be referred to "street or highway" immediately preceding them, and that it is an offence within the meaning of the clause to be in any street or highway with intent to commit felony.

Per Patteson, J., the offence can only be committed by frequenting a street or highway leading to a canal, river, dock, etc., or adjacent to a place of public resort.

Held (*per totam curiam*), that a conviction under this clause need not allege that the person convicted was in the highway, etc., with intent to commit felony there. *Ex parte* Brown (21 L. J., N. S., M. C., 113).

A complaint under the same section stated that the said Thomas Cross, then being a suspected person and reputed thief, frequenting the public streets and places of and in the said city, was found in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal, etc. *Held*, that the commitment was not bad in stating that the prisoner was "found" in a place of public resort, instead of alleging that he was "frequenting" such place. Cross (26 L. J., N. S., M. C., 28).

410. Procedure against Persons sending out Children to beg.—It shall be lawful for any constable to apprehend and bring before the Magistrate any young person found begging, or sent or suffered to go out for that purpose, and also the parents of such young person, or other relations to whose control he is subject, by whom he has been so sent or suffered to go out, and also any other person by whom such young person has been so sent out; and on the complaint being established that such young person has been sent out or suffered to go out for that purpose by his parents, or either of them, or by any other relation to whose control he is subject, or has been sent out for that purpose by any other person, it shall be lawful for the Magistrate to punish such parent, relation, or other person as a vagrant or disorderly person, by a fine not exceeding £5, or by imprisonment for a period not exceeding thirty days.

See sub-head (19), sec. 4, for definition of "Magistrate."

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

See sec. 3, Prevention of Cruelty to, and Protection of, Children Act, 1889, 52 & 53 Vict. c. 44.

411. Beggars and Vagrants to be handed over to Parochial Authorities.—It shall be lawful for any constable to apprehend and bring before the Magistrate all such beggars, vagrants, and idle poor persons, strolling or wandering or seeking relief, or found lying in any outhouse, stair, close, or area, or other place within the burgh; and it shall be lawful for the Magistrate to direct and cause intimation of all such persons as he may not at the time convict of begging and vagrancy, as hereinbefore provided, to be sent to the inspector of the poor of the parish within which such person shall have been found, in order that their claim, if any, as paupers, may be investigated and disposed of according to law; and the Magistrate shall direct and cause all such persons to be detained in custody pending such investigation, and the said inspector shall be bound to report to the Magistrate the result of such investigation.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate." The person apprehended ought to be brought before the Magistrate without any undue delay.

ARTICLES FOUND OR STOLEN OR FRAUDULENTLY OBTAINED.

412. Goods, etc., Found, to be reported to Police Office.—Every person finding any goods, articles, or money shall report the fact, and deposit such goods, articles, or money with the Chief Constable or other officer acting for him, within forty-eight hours after the same shall have been found by such person; and every person failing so to report and deposit shall be liable to a penalty not exceeding £5: Provided always, that if the owner of such goods, articles, or money shall not claim the same, and prove his ownership to the satisfaction of the Magistrate within six months from the date of such report and deposit, the Magistrate may award the same to the finder, under deduction of the expenses incurred for advertising for the owner; and where the owner shall appear and prove his ownership as aforesaid, the Magistrate shall order such goods, articles, or money to be delivered to such owner, under deduction of such expenses and of such reward to the finder as in the circumstances the Magistrate shall determine: Provided also, that if the owner of the same do not prove his ownership, and the finder cannot, within six months and after notice, be found, the Magistrate may order such goods to be sold, and the proceeds thereof, or if the subject be money, such money to be applied to the purposes of this Act.

See sub-head (22), sec. 4, for definition of "owner," (19) "Magistrate;" p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, and secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

413. Goods Stolen or Fraudulently Disposed of to be Delivered up to Owner.—If any goods or articles shall be stolen or unlawfully obtained from any person, or, being lawfully obtained, shall be unlawfully pawned, pledged, sold, or exchanged, and complaint shall be made thereof, and if such goods shall be found in the possession of any broker or other dealer in secondhand property, or of any person who may have advanced money upon the credit of such goods, it shall be lawful to any Magistrate to issue a summons or warrant for the appearance of such broker, dealer, or other person, and for the production of the goods

or articles; and the ownership of such goods or articles being established to the satisfaction of such Magistrate, he shall order such goods or articles to be delivered up to the owner thereof, either with or without payment of any sum, and at such time as the Magistrate shall think fit; and every broker, dealer, or other person who, being so ordered, shall refuse or neglect to deliver up the goods or articles, or who shall dispose of or make away with the same after notice that such goods were stolen or unlawfully obtained as aforesaid, or unlawfully pawned, pledged, sold, or exchanged, shall forfeit to the owner of the goods the full value thereof, to be determined by the Magistrate: Provided always, that no order shall prevent any broker or dealer from recovering possession of such goods by action of law from the person into whose possession they may have come by the Magistrate's order, so that such action be commenced within three months next after such order shall be made.

See sub-head (2), sec. 4, for definition of "broker," (22) "owner," (19) "Magistrate;" p. 5, "person."

414. How Stolen or Unclaimed Goods to be kept.—Where any stolen or unclaimed goods or effects may be brought to the police office, the Chief Constable or other officer of police shall forthwith make an entry of the same in a book to be kept in the police office for that purpose, and of the names of the parties from whom taken or by whom pledged or brought to the police office, in which book the Chief Constable or other officer of police shall also enter the date and manner in which such stolen or unclaimed goods shall be retained till disposed of.

The book here directed to be provided must be regularly kept. It may not be easy to enter the "date" in which the goods "shall be retained till disposed of," but the date at which the goods are brought to the office or retained ought to be entered, and the manner in which they are retained.

415. Unclaimed Stolen Property, etc., to be disposed of.—All goods, articles, or money known or alleged to have been stolen or unlawfully obtained, and of which the owner may be unknown, or which may be unclaimed, shall be taken possession of by the Chief Constable, and the Magistrate, after the expiration of twelve months, or, in the

case of perishable articles, after the expiration of such period as he shall think fit, during which periods respectively no owner shall have claimed the same, shall grant warrant for the sale or disposal of such goods, articles, or money, the proceeds to be applied to the purposes of this Act: Provided always, that except in the case of perishable articles, notice of sale shall be given in two or more newspapers published or circulating in the burgh as the Magistrate may direct: Provided also, that it shall not be necessary before, such goods, articles, or money can be so sold or disposed of, that any apprehension shall have taken place, or that any formal charge before the Magistrate shall have been made against any person for having stolen or unlawfully obtained the same.

See sub-head (22), sec. 4, for definition of "owner," (4) "burgh," (19) "Magistrate."

In Stuart *v.* Cowan & Co., 8th February 1883 (10 R., 581), £40 stolen from A. B. was found upon the thief, and was taken possession of by the Procurator-Fiscal of a burgh. The case having been remitted for trial before the Sheriff and a jury, the indictment was served at the instance of the Procurator-Fiscal for the county. On 28th February the £40 was delivered as a production by the burgh Procurator-Fiscal to the Sheriff-Clerk, in whose custody it remained till the trial on 9th March, when it was handed over to the county Procurator-Fiscal, and remained in his custody. On 22nd and 24th February respectively, a creditor of A. B. used arrestments in the hands of the county Procurator-Fiscal and of the Sheriff-Clerk, while the money was still in the hands of the burgh Procurator-Fiscal. On 29th March and 21st April, when the money was in the hands of the county Procurator-Fiscal, another creditor of A. B. used arrestments in his hands.

The second arrester then raised, in the Sheriff-Court, an action of multiplepoinding in the names of the county Procurator-Fiscal and of the Sheriff-Clerk, and no objection having been taken to the competency of the action by A. B. or by the arresters, who both claimed, the Sheriff preferred the second arrester.

The other claimant appealed, and pleaded that the multiplepoinding was incompetent, as the arrestments alleged to create the double distress were inept to attach stolen money in the hands of a public criminal official. The Court held that no objection to the competency of the action or of the arrestments having been taken by A. B. or by either claimant in the Sheriff-Court, there was no ground for disturbing the Sheriff's judgment, the first arrestment being plainly abortive.

Opinions reserved as to whether arrestments of stolen money in the hands of a public criminal official, such as a Sheriff-Clerk or a Procurator-Fiscal, were competent.

PREVENTION OF FRAUD.

416. Weighing Machines to be Erected.—The Commissioners may erect, so far as not already done, and maintain steelyards, scales, or other weighing machines, upon or adjacent to the streets, or at any other convenient places within the burgh, for the purposes hereinafter mentioned, or they may grant powers to others to that effect, and they may also appoint proper persons to attend the same, with suitable allowances for their trouble: The Commissioners may also sanction and regulate the management of any steelyard or other weighing machines already existing within the burgh and not otherwise regulated by Act of Parliament.

See sub-head (9), sec. 4, for definition of "Commissioners," (31) "street," (4) "burgh."

417. Duty of Keepers of Weighing Machines.—It shall be the duty of the keeper of every public weighing machine, during such hours as shall be fixed by the Commissioners, to weigh every cart or carriage presented to him for that purpose, and to enter in a book, and also to give to the driver a certificate of the contents or load of such cart or carriage, its gross weight, its number, or such other particulars as shall identify it, the tare weight, if marked thereon, and the exact time of weighing. It shall be lawful for the Commissioners from time to time to make bye-laws fixing the charges to be made for the use of the weighing machines.

See sub-head (9), sec. 4, for definition of "Commissioners," (5) "carriage;" see secs. 316 to 324 as to making bye-laws.

418. Rights with respect to Weighing Machines not affected.—Nothing in this Act shall prejudice or affect the rights or powers of any Harbour Commissioners or Trustees with respect to weighing machines lawfully erected or to be erected by them and under their control.

This Act will not affect such Commissioners or Trustees, but the Weights and Measures Acts will apply to these weighing machines, weights, etc.

419. Power to provide Portable Machines for Weighing Coals.—It shall be lawful for the Commissioners to provide, furnish, and maintain such number of portable or movable machines for weighing coals as they may deem necessary, to be kept at convenient places within the burgh, in order that the inhabitants may have access to them for the purpose of re-weighing their coals at their own expense, if they shall be so inclined, and to employ proper persons to attend such machines, and to establish the rates to be payable for such re-weighing; and it shall be lawful for the Chief Constable, or any other officer acting under this Act, to cause coals offered for sale or for delivery to be re-weighed, and to require the driver to produce the ticket thereof, as a check on the conduct of drivers and others, such re-weighing being always done free of expense.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh;" see sec. 499 as to penalty.

420. Retailers of Coals to keep Scales and Weights for Weighing at the time of Delivery.—For the purpose of ascertaining the weight of coals sold in quantities of less than half a ton within any yard or place where they may be kept, or from any cart or carriage on which they may be carried by dealers for sale, such dealers shall be obliged to keep scales and weights or steelyards of the legal standard within such yard or other place, and also attached to the cart or carriage used by them for the sale of such coals, whereby the coals so sold by retail may be weighed at the time of the sale or delivery, and such dealers shall be obliged to weigh the same, upon being required to do so either by the person purchasing the same or by any officer of police; and any such dealer failing to have and keep such scales and weights or steelyards, or refusing to weigh the coals as aforesaid, shall be liable to a penalty not exceeding 40s., and £5 for any subsequent offence.

See sub-head (5), sec. 4, for definition of "carriage;" see p. 5, "person;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

In Lockie *v.* M'Whirter, 15th Feb. 1859 (Shaw, Just., 161), it was held, under sec. 203 of the Glasgow Police Act, that it was necessary

to libel that the coals had been sold *and* delivered within the limits of the Act, and a sentence proceeding on an alternative libel of "sold *or* delivered" suspended. See p. 702.

421. Regulations as to Sale of Coals of half a ton weight.—Any person who shall sell any quantity of coals, equal to or exceeding half a ton weight, shall be bound to deliver to the carter, or person in charge of the said coals, to be given to the purchaser, an account or memorandum specifying the true tare of the cart or carriage conveying the said coals, and the true weight and price of the coals, and the exact time the cart or carriage has left the premises of the seller, under a penalty of 20s. for each offence in any one of such particulars.

See sub-head (16), sec. 4, for definition of "premises," (5) "carriage;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

422. Carter to deliver Memorandum.—The carter or person in charge of the said coals shall be bound to exhibit such account or memorandum to any police constable who may demand the same, and immediately on his arrival at the place of delivery shall deliver the same to the purchaser or inmate, or other person in charge of the house or place of delivery, under a penalty of 20s. for each offence in either of the said particulars.

See sub-head (13), sec. 4, for definition of "house;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

423. Penalty on Driver refusing to Weigh.—If any driver or other person having the charge of any cart or carriage shall not, upon being so required as aforesaid, take the same to any such public weighing machine, or shall refuse to assist in the weighing of the same in such manner as the drivers of carts or carriages are used and accustomed to do, such driver or other person shall for each offence be liable to a penalty not exceeding 40s.

See sub-head (5), sec. 4, for definition of "carriage;" see p. 5, "person;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

424. Small quantities of Coals to be sold from Carts and in Labelled Bags.—Every person who sells or delivers coals in quantities not exceeding two hundredweight in weight from any cart or carriage, shall keep the specific quantities of coals to be sold by him made up in bags or boxes labelled in such a manner as to indicate the weight which such bag or box contains, and any such person failing to comply with this provision shall be liable to a penalty not exceeding 40s.

See sub-head (5), sec. 4, for definition of "carriage;" see p. 5, "person;" see sec. 487 for imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

425. Penalty on Fraudulent Weighing.—If the keeper of any weighing machine used within the burgh for the purpose of ascertaining the weight of coals, or the seller of any coals which shall be weighed at such weighing machine, or any of their respective servants, shall wilfully, on application, refuse duly to weigh or re-weigh any cart or carriage, with or without loading, or shall designedly do or omit to do anything with intent that the true weight or measurement of any coals weighed thereat shall not be ascertained, or if the owner or driver or other person having the charge of any cart or carriage shall place or knowingly have any article, matter, or thing in or about such cart or carriage, other than the proper load therein, or shall alter the tare or weight, or the ticket denoting the weight of any cart or carriage, or the loading thereof, or shall make, use, or be privy to the making or using, any false or fraudulent ticket respecting the weight of any such cart or carriage or loading, or if by re-weighing or otherwise it shall be discovered that any coals have been abstracted by such owner, driver, person in charge, keeper, or servant, from such cart or carriage, after it shall have passed the steelyard or weighing machine where it was originally weighed, or if the owner or driver or person in charge of any cart or carriage, or the keeper of any machine as aforesaid, or his servants, shall make, or give, or use, or be privy to the making, or giving, or using, any false or fraudulent contrivance touching the weight of any cart or carriage,

or the load therein, or shall knowingly assist in or connive at any fraud in or concerning the weight of any cart or carriage, or of the load therein, or if any other person shall knowingly aid or assist in the committing of any fraud respecting the weight of any cart or carriage, or the load therein, weighed, or stated or represented to be weighed, at any such machine as aforesaid, then and in every such case every person so offending shall for every offence be liable to a penalty not exceeding £5, or to be imprisoned for any period not exceeding sixty days, without the option of a fine.

See sub-head (4), sec. 4, for definition of "burgh," (3) "carriage," (22) "owner;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

426. Regulations may be made for preventing Fraud in Weight of Hay, Straw, etc.—In order to prevent fraud in the weight of grain, hay, and straw, or other commodities usually weighed in carts or carriages, it shall be lawful for the Commissioners to make regulations for ascertaining the weight or quantity of grain, hay, or straw, or other commodities brought within the burgh, upon parties voluntarily resorting to the said weighing machines for the purpose, and for the Magistrate to punish persons disobeying such regulations, by seizing, forfeiting, and selling such grain, hay, and straw, or other commodities so brought in contravention of such regulations, or by imposing on the offender a penalty to the extent and in the manner before described in respect of coals which have not been duly weighed, and also to fine any person driving carts or carriages from which grain, hay, or straw, or other commodities shall have been fraudulently taken or embezzled, and any person accessory to such fraudulent taking or embezzlement, in any penalty not exceeding £5, or to sentence him to imprisoment for any period not exceeding sixty days without the option of a fine.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (5) "carriage," (19) "Magistrate;" see p. 5, "person;" sec. 487 for imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

427. Penalty on Committing Frauds in Weight of Bread.—All bakers and dealers in bread shall, on all bread made or exposed by them for sale (except fancy bread or rolls), impress thereon, in large and distinct figures, the imperial weight of such bread; and any person who shall expose or offer for sale, or sell, any bread not so impressed, shall be liable in a penalty not exceeding 40s. for each offence; and any person who shall sell, or offer or expose for sale, any bread which shall be deficient or under the weight so impressed, shall be liable in a penalty not exceeding 40s. for each offence.

See p. 5 as to definition of "person;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

428. Power to seize Diseased Cattle.—In the case of cattle infected with, or suspected of, any disease within the meaning of the Contagious Diseases (Animals) Acts, 1878 to 1890, being exposed or offered for sale, or being brought, or attempted to be brought, through any street, or into any market or fair, any inspector, collector, or constable, may seize any such cattle, and cause the same to be inspected by a veterinary inspector, and may report such seizures to any Magistrate, and such Magistrate may, after hearing the evidence, either order such cattle to be restored, or direct the same, and also any pens, hurdles, troughs, litter, hay, straw, and other articles which he may deem likely to have been infected thereby, to be forthwith destroyed, or otherwise disposed of; and any person bringing, or attempting to bring, any cattle through any street, or into any market or fair, knowing the same to be labouring under any such disease, shall, for every such offence, be liable to a penalty not exceeding £20.

See sub-head (31), sec. 4, for definition of "street," (8) "Collector," (19) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

This section applies only to cattle infected or suspected of any disease within the meaning of the Contagious Diseases (Animals) Acts, 1878 to 1890. By sec. 5 (iii.) of the Act of 1878 (41 & 42 Vict. c. 74), "disease" is defined to mean cattle-plague, pleuro-

pneumonia, foot-and-mouth disease, sheep-pox, or sheep-scab; and the Board of Agriculture have power, by order under sec. 32 (xxxiii.), of the same Act to extend this definition so as to include other diseases of animals.

429. Power to proceed against Original Seller of Diseased Cattle, etc.—Where any person is convicted by any Magistrate of the offence of selling, or exposing for sale, or of having in his possession for sale, any unsound or diseased animal or diseased meat, or any animal or meat unfit for the food of man, and intended for such food, it shall also be lawful for the Burgh Prosecutor to proceed against the original seller of such animal or meat as if he were an offender art and part with the convicted person, and as if he had committed such offence within the burgh, provided that such animal or meat were unsound or diseased, or unfit for the food of man, at the time of the sale thereof by such original seller to the convicted person; and the purchase by the convicted person, or by any one on his behalf, from such original seller, wheresoever made or carried out, shall be taken and held to be a sale by such original seller of the animal or meat in question within the burgh, in premises kept and used for the sale of animals or meat; and the penalty and punishment provided by this Act against the person convicted shall also be applicable to, and be leviable and recoverable from, such original seller, and all the powers, authorities, jurisdiction, and forms of procedure, given and provided by this Act against the convicted person, shall be applicable to the prosecution, trial, and punishment of such original seller.

See sub-head (4), sec. 4, for definition of "burgh," (16) "premises," (19) "Magistrate;" see p. 5, "person." There does not seem to be any penalty or punishment provided by the Act for the selling of any unsound or diseased animal, or diseased meat, etc. By sec. 499 it is provided that every provision of this Act, to the contravention of which no penalty is attached, shall be read and construed as if it were thereby provided that every person contravening the same shall, on conviction, be liable to a penalty not exceeding 40s.; but as the offence is not in the Act, it is very doubtful if this provision can be utilised, and no prosecution can therefore take place against the original seller.

In Nelson *v.* M'Phee, 17th Oct. 1889 (17 R., Just., 1), a person in whose possession were found four carcases of oxen unfit for human food, which he had ordered to be sold for boiling down for the manufacture of soap and similar products, was convicted of a con-

travention of sec. 271 of the Glasgow Police Act, 1866. The Court quashed the conviction, holding that the Statute only prohibited the possession of unsound meat where it was intended to be sold for use as human food.

In Scott *v.* Alexander, 27th Feb. 1890 (17 R., Just., 35), the Glasgow Police Act, 1866, under the general heading "Unwholesome and adulterated food," contains the following clauses: Sec. 268. "Every person who sells, or exposes for sale, or keeps for the purpose of sale for human food, any of the following articles, shall be liable to a penalty not exceeding £10, or,". . . "any animal or part of an animal," . . . "which is unsound or unwholesome or unfit for human food" . . . Sec. 271. "Every person who is found in possession of any animal or part of an animal, or any fruit or vegetable or fish, which is unsound or unwholesome or unfit for human food, shall be presumed to have kept or concealed the same knowingly with a view to sale, until the contrary be shown, and shall be liable to a penalty not exceeding £10, or," etc. *Held* (*per* Lord Shand), that the words "with a view to sale" in sec. 271 were to be construed as meaning "with a view to sale for human food," and that, therefore, a charge of contravening the Act, particularly sec. 271 thereof, in so far as "the accused was at a place and on a day libelled found in possession with a view to sale" of certain meat which was "unsound, unwholesome, and unfit for human food," was irrelevant, in respect that it was not stated that the meat was so kept "for sale for human food."

Opinion, *per* Lord Shand, that sec. 271 was ancillary to sec. 268, and that both should be libelled in such prosecutions.

In Gardner *v.* Dymock, 9th Jan. 1865 (5 Irv., 13), a person was prosecuted in the Burgh Court of Edinburgh, under the authority of the Summary Procedure Act, 1864, for having diseased meat in his possession, in contravention of the Edinburgh Slaughter House Act. The magistrate convicted him of the contravention charged, and adjudged the carcases of the two cows libelled on to be forfeited and boiled down. Sentence suspended as disconform to the Statutes founded on, in respect that no pecuniary penalty had been imposed.

Opinion, that, in adjudging carcases to be forfeited and boiled down, the Magistrate had exceeded his statutory jurisdiction, but that the introduction of this matter was not a ground for quashing the sentence.

Question, Whether the provision in the Summary Procedure Act, dispensing with the necessity of keeping a note of the evidence, has the effect of excluding review, on the merits, of sentences pronounced under the authority of the Act?

In Kennedy *v.* Cadenhead, "24th Dec. 1867 (6 R., 179), upon a petition and appeal against a conviction, and the imposition of a penalty by a local Magistrate for contravention of the Nuisances Removal Act, sec. 18—*held*, (1) that the concurrence of the Procurator-Fiscal is not necessary in a complaint under that Act, although concluding for a penalty, and, failing payment thereof, for imprisonment; (2) that by the Nuisances Removal Act, the Sheriff, local Magistrates, and Justices of the Peace, have a concurrent jurisdiction

conferred upon them to try complaints under the Act, and that the omission in sec. 45 thereof, to extend the executive provisions of the Statute to Magistrates and Justices of the Peace is supplied by sec. 447 of the General Police Act; and (3) that the penalties enacted by the Nuisances Removal Act are directed, not only against the exposure for sale of meat unfit for human food, but also against keeping the same with the intent that it should be used for human food.

The Summary Prosecutions Appeals Act provides for an appeal by either party to a "cause," if dissatisfied with the determination of the inferior Judge in point of law. "Cause" is defined to include "every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge." In Couper *v.* Lang, 12th Dec. 1889 (17 R., Just., 15), *held*, that an application by a Local Authority, under the Public Health Act, for warrant to destroy a carcase which had been seized by the Sanitary Inspector as unfit for human food, and which did not conclude for any fine or expenses, was not a "cause" within the meaning of the definition, and therefore that the inferior Judge was right in refusing to state a case for appeal against his decision.

In Cairns *v.* Linton, Mar. 4, 1889 (16 R., Just., 81), a farmer in Perthshire despatched from Crieff Junction, in the ordinary course of business, the carcase of a bull addressed to the Dead Meat Company, Fountainbridge, Edinburgh. The carcase arrived at the dead meat market, and in consequence of its appearance was examined by the manager of the market, and condemned as unfit for human food. The farmer was charged with, and convicted of, a contravention of sec. 261 of the Edinburgh Municipal and Police Act, in respect he had unsound beef in Edinburgh "in his possession as or for human food."

On appeal, the Court (*dub.* Lord Trayner) quashed the conviction, holding that facts had not been proved sufficient to infer that the accused had the carcase in Edinburgh in his possession either actually or constructively as or for human food.

By sec. 181 of the Police and Improvement (Scotland) Act, 1850, it is provided "that in any shop . . . kept or used for the sale of butchers' meat, poultry, or fish, no animal, carcase, meat, poultry, game, flesh, or fish, which is unfit for the food of man, shall be kept or retained, unless entirely separate and apart from any animal, carcase, etc., "which is intended for such food, nor unless the same be ticketed in large and legible and conspicuous characters as being unfit for such food, and any person who shall keep in any shop, etc., occupied or used by him as aforesaid, any animal, carcase, etc., "which is unfit for the food of man, otherwise than entirely separate and apart, and ticketed as aforesaid, shall be liable . . ." In Cairns *v.* Ferguson, 8th June 1886 (13 R., 83), *held*, in a complaint against a fishmonger, charging him with a contravention of this section, that it was not necessary to libel that the fish were not kept apart, or to state the cause of their unfitness, and

that an order to destroy was not, under the Statute, a condition precedent to a conviction.

The Public Health Act, 1867, enacts, sec. 26, that a Sanitary Inspector may "enter any premises to inspect . . . any carcase, meat, . . . fish . . . exposed for sale, or which there is probable cause for believing to be intended for human food, and in case any such carcase, meat, . . . fish, . . . appear to him to be unfit for such food, the same may be seized, . . . and the person to whom such carcase, meat, . . . fish, . . . belong, or in whose custody the same are found, shall be liable to a penalty. . . ."

Held, in Phillips *v.* Auld, 9th Jan. 1892 (19 R., 29), that to make a relevant charge of an offence under the section, it was necessary to allege that the carcase, etc., was in fact exposed for sale, or was in fact intended to be used as human food, and that it was not sufficient to allege that there was probable cause for believing it to be intended for human food.

A complaint against a fish merchant under this section set forth that on a certain day "he had" in his shop "exposed for sale, or which there was probable cause for believing to be intended for human food," certain fish "which were unfit for human food, which fish were seized . . . by the Sanitary Inspector . . . whereby" the accused "has become liable to a penalty. . . ." The accused was convicted "of the contravention charged." *Held*, that the complaint was irrelevant, as it did not state that the fish were exposed for sale, or were, in fact, intended for human food.

Opinion, per Lord Justice-Clerk, that the conviction was bad as a general conviction on an alternative complaint.

430. Chief Constable or Inspector to have Power to enter Premises and require Articles to be Weighed.—The Chief Constable, or any other constable specially appointed to perform the duty by the Chief Constable, or any Inspector of Weights and Measures in the burgh, may, at all reasonable hours, enter any building or part of a building, or other place within the burgh, in which any article is sold, or is made up, or kept or exposed for sale by weight or measure, or in which articles are sold or are set apart, or kept or exposed for sale in numbers, or in which any article is weighed or measured, or any articles are numbered with a view to their being bought or sold, or he may stop any cart or carriage, or any person carrying or in charge of any basket from which such articles are sold, or kept or exposed for sale, on the street, public or private, and require such article or articles to be weighed, measured, or numbered in his presence; and if the weight, measure, or number thereof ascertained does not correspond with the weight, measure, or number thereof

which has been represented by the person who has sold or made up, or kept or exposed the same for sale, or who weighed, measured, or numbered the same with a view to purchase or sale, such Chief Constable or other constable or Inspector may seize, impound, and convey such article or articles to the police office, or to an office provided for the purpose by the Commissioners, and the Magistrate may sentence the person who has sold or made up, or kept or exposed the same for sale, and who has incorrectly weighed, measured, or numbered the same with a view to purchase or sale, to a penalty not exceeding £5, and declare such article or articles, in so far as belonging to such person, to be forfeited, unless such person shall prove to his satisfaction that the deficiency in weight, measure, or number has arisen without any fraudulent intent.

See sub-head (4), sec. 4, for definition of "burgh," (3) "building," (5) "carriage," (31) "street," (28) "private street," (9) "Commissioners," (19) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 for punishment of abettors.

431. Offences under Weights and Measures Act or Criminal Law Amendment Act. — All offences committed within the burgh under the Weights and Measures Acts, 1878 and 1889, and under the Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels, may be tried by the Magistrate as police offences, under complaint by the Burgh Prosecutor; and the penalties may be recovered and applied in the same way as penalties for police offences under this Act; and the Magistrates shall be the Local Authority, and the word "burgh" in the said Weights and Measures Acts shall include any burgh under this Act.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate," (20) "Magistrates;" secs. 500 and 501 as to recovery of penalties, sec. 461 as to Burgh Prosecutor.

By sec. 74 of the Weights and Measures Act, 1878, 41 & 42 Vict. c. 49, it is provided that "the expression 'burgh' shall include royal burgh and parliamentary burgh." That definition applies also to the Act of 1889, 52 & 53 Vict. c. 21. This section extends the definition so as to include all burghs under this Act.

432. Authority under Sale of Food and Drugs and Bakehouses Regulation Acts.—The Commissioners of any burgh under this Act shall be the Local Authority under the Sale of Food and Drugs Act, 1875, and also under the Bakehouses Regulation Act, 1863, and all offences committed in the burgh under any of the said Acts may be brought before and tried by the Magistrate as police offences under complaint by the Burgh Prosecutor, and the fines and penalties may be recovered and applied in the same way as fines and penalties for police offences under this Act.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (19) "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors; see sec. 614 as to Burgh Prosecutor.

By sec. 33 of the Sale of Food and Drugs Act, 1875, 38 & 39 Vict. c. 63, the word "borough" is defined to mean, as regards Scotland, "any royal burgh and any burgh returning or contributing to return a member to Parliament." This section extends the definition to any burgh under this Act. It further provides that offences under that Act may be brought before the Magistrate and tried as police offences; thus amending sec. 3, sub-head (9), of the Sale of Food and Drugs Act, 1875, which required all proceedings for recovery of penalties to be taken before the Sheriff, either in the Sheriff Court or in the Police Court in places where the Sheriff acts as a Police Magistrate.

The Bakehouse Regulation Act, 1863, 26 & 27 Vict. c. 40, referred to in this section, was repealed by sec. 107 and Schedule VI. of the Factory and Workshop Act, 1878, 41 & 42 Vict. c. 16. The sanitary condition of bakehouses is now under the charge of the Commissioners, as Local Authority under the Public Health Acts, and it will be their duty to see that the provisions of the Factory and Workshops Acts of 1878, 1883, 1891, 41 & 42 Vict. c. 16, 46 & 47 Vict. c. 53, and 54 & 55 Vict. c. 75, are carried out.

The Statute 23 & 24 Vict. c. 84, sec. 1, enacts "that every person who shall sell as *pure* and unadulterated any article of food or drink which is adulterated *or not pure*, shall, for every such offence, . . . forfeit and pay a penalty not exceeding £5."

The Statute 35 & 36 Vict. c. 74, sec. 2, contains an enactment in the same terms, with the omission of the words in italics, and with a maximum penalty of £20. Sec. 4 incorporates both Statutes, and sec. 12 provides that "nothing in this Act shall be held to take away any other remedy against any offender under this Act."

Held, in Bain *v.* Mackay, 16th June 1875 (2 R., 32), that sec. 1 of the earlier Act was not superseded by sec. 2 of the later Act, and that it was still competent to present a complaint under sec. 1 of the Act 23 & 24 Vict. c. 84.

A person was charged before a Burgh Police Magistrate with selling, as pure and unadulterated, milk which was not so. There being no public analyst in the burgh, some of the milk had been sent by the police officials to an analytical chemist, who reported unfavourably. *Held*, that it was within the discretion of the Magistrate to refuse a motion for the accused, that a portion of the milk should be handed to another analytical chemist, whose fee the accused was willing to pay, for an independent analysis, and that his judgment on this point was not subject to review.

BROKERS AND PAWNBROKERS.

433. Brokers to be Licensed.—From and after the commencement of this Act, no person shall within the burgh exercise or carry on the trade or business of a broker (which for the purposes of this Act shall also include dealers in second-hand goods, known as "general dealers") unless he shall have first obtained a licence so to do from the Magistrates, which licence such Magistrates shall have a discretionary power of granting or refusing as they shall see cause, and which, when granted, shall continue in force until the term of Whitsunday in each year, and no longer, unless sooner revoked or suspended, which the Magistrates are hereby authorised to do, on legal conviction of any violation of any of the conditions of such licence, or of the provisions of this Act; and every person applying for such licence, or a renewal thereof, shall pay to the Clerk a sum not exceeding 2s. 6d. as the expense attending such application, and of recording the same, and the deliverance of the Magistrates thereon, and of such licence or renewal, if granted, in a book to be kept by him for that purpose; and if any person shall within the burgh exercise or carry on the trade or business of a broker, without having first obtained such licence as aforesaid, or after the revocation or during the suspension thereof, or shall contravene the terms of such licence or any of the provisions of this Act, such person shall, for each such offence, be liable to a penalty not exceeding £5: Provided always, that it shall not be lawful for the Magistrates to grant any such broker's licence to any licensed pawnbroker carrying on business as such; but nothing in this provision shall be held to apply to the sale of goods *bonâ fide* forfeited in accordance with the Pawnbrokers Act, 1872.

See sub-head (4), sec. 4, for definition of "burgh," (2) "broker," (8) "Clerk," (20) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

In Hunter *v.* Mawlam, 21st Nov. 1883 (11 R., Just., 14), a person was charged at the instance of an officer of the Inland Revenue, before two Justices of the Peace, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, with a contravention of the Pawnbrokers' Act, 1872, in so far as, at a specified place and on a specified day, he did "act as a pawnbroker within the meaning of the said Act, particularly sec. 6 thereof, by taking a watch and chain, with guinea attached, in pawn from" a person named and designed, "without having in force a proper licence from the Commissioners of Inland Revenue, authorising him to carry on the business of a pawnbroker, whereby" he became liable in a penalty.

The accused was convicted of the contravention charged by Justices of the Peace, who ordained him to pay a modified penalty, "and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after a lapse of fourteen days from this date," for a period of fourteen days. He brought a suspension in the High Court of Justiciary, contending that the complaint was irrelevant, in respect that it did not libel the whole particulars necessary to constitute the statutory offence, and that the conviction was bad in respect that under the Summary Procedure Act of 1864, and the Pawnbrokers' Act of 1872, it was competent to award immediate imprisonment only.

The prosecutor objected to the competency of the suspension, on the ground that the only redress under the Revenue Statutes in such a prosecution was by way of appeal to Quarter Sessions, and thereafter by appeal on a case stated for the opinion of the Court of Session as the Court of Exchequer.

The Court, without deciding the question of jurisdiction, refused the Bill.

The Glasgow Police Act, 1866, enacts that every person carrying on the trade of a broker within the burgh without a licence shall be liable in a penalty, and defines "broker" to mean "any person who occupies and uses any building, or part of a building, or other place, including a stall in a public market, as a dealer in second-hand goods or articles, or in old metals, bones, or rags."

In M'Mullan *v.* M'Phee, 9th June 1882 (9 R., Just., 36), a person was charged with having, within or near the premises occupied by him, carried on the trade of a broker within the meaning of the Act, without having obtained a licence so to do, by purchasing from some person or persons, to the complainer unknown, second-hand articles or goods, viz. twenty-two and a half or thereby potato bags, which had been in use.

The Magistrate convicted, and the accused took a case, from which it appeared that his only transaction in second-hand goods proved

was the purchase libelled. *Held*, (1) that the complaint was relevant, but (2) (*diss.* Lord Craighill) that the single act of purchase proved was not sufficient evidence that the accused was carrying on the trade of a broker. Conviction therefore quashed.

In Bissett *v.* Mackay, 3rd March 1855 (2 Irv., 68), a person was convicted before the Police Court of Dundee of having, in contravention of the General Police Act, carried on the trade or business of a "broker, or dealer in second-hand goods," without a previous licence from the Police Magistrates, in so far as he had, on repeated occasions, purchased from a labourer a certain quantity of sheet-lead or other metal. He brought a suspension of that conviction, on the ground, (1) that the complaint had not been duly served upon him, having only been read over to him after he was at the bar of the Police Court; (2) that he was not a broker in the sense of the Statute; (3) that the alternative "or dealer in second-hand goods" was not warranted by the Statute, which had reference solely to "brokers;" (4) that the suspender was merely a servant or shopman of another person who held a regular licence as a hawker; and (5) that the whole proceedings were illegal and oppressive. Suspension refused, and conviction sustained.

In Forrester *v.* Lang, 8th Oct. 1859 (3 Irv., 450), sec. 175 and following secs. of the Glasgow Police Act, providing that the business of broker, or dealer in second-hand goods, shall not be carried on within the police limits without a certificate from the Magistrates, apply to the case of a bookseller dealing in books at second-hand.

Hawker.—In England, where several ladies purchased materials, which they made into aprons, hankerchiefs, and other articles of wearing apparel, and carried these from door to door for sale in a basket, the proceeds being applied to charitable purposes, the ladies were found not to come within the description of "pedlar" in the Pedlars' Act, 1871, and did not require a certificate under that Act. Gregg *v.* Smith (42 L. J., M. C., 121).

434. Brokers to furnish a Description of their Premises, and keep Books.—Every person who shall apply to be licensed as a broker shall, at the time of his application, and at Whitsunday yearly thereafter, furnish to the Clerk in writing a description of his premises, including all cellars, closets, and other places proposed to be used by him in the course of his trade; and all brokers shall enter in books, to be kept by them on the premises, the particulars of each transaction in their business, which particulars shall contain a proper and distinctive description of each article purchased or received by them, the name and place of abode of the person from whom they have purchased or received the same, and the date and hour of the day of each such transaction, and the price paid or agreed to be paid for such

articles; and if any such broker shall fail to keep such book, or to enter therein the particulars before mentioned, he shall for each offence be liable to a penalty not exceeding £5.

See sub-head (2), sec. 4, for definition of "broker," (8) "Clerk," (16) "premises;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

435. Brokers to retain Articles for Fourteen Days after having received them.—All articles purchased or received by such brokers shall be kept by them in their shops or other places where their ordinary business is carried on, for the full period of fourteen days from and after the date on which it shall appear from their books that such articles have been purchased or received; and every broker shall attach to each article a ticket or label with the date of purchase or receipt written thereon; and every broker who shall fail to attach such ticket or label, or who shall sell or otherwise dispose of or remove from his premises as aforesaid any such articles before the expiry of such period of fourteen days, or shall fail at any time in the course of that period to produce such articles to the Chief Constable, or to any constable acting under him, when required so to do, shall for each offence, upon conviction before a Magistrate, be liable to a penalty not exceeding £5; and every broker shall add columns to his books, in which entries shall be made showing to whom the several articles were sold or delivered, giving full name and full address and date of sale, and every broker failing so to do shall for each offence be liable to a penalty not exceeding 20s.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises," (19) "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

436. Brokers to produce Articles and Books on demand.—Every broker shall, at all reasonable times, exhibit and produce, on demand, to the Chief Constable, or to any constable acting under him, all articles in his possession, or which he may have received or purchased, and shall also pro-

duce his books in which the description of any such articles is or should have been entered, when required, in the Police Court, or to the Chief Constable, or any constable acting under him, and having the general or special authority of a Magistrate, in which book the constable requiring and obtaining production thereof shall on every occasion subscribe his name immediately following the last entry therein; and as often as it shall be found that any goods or articles which have been stolen, embezzled, or fraudulently obtained are in the possession of any broker, he is hereby required, on being informed by the Chief Constable or other constable authorised as aforesaid that such goods or articles were stolen, embezzled, or fraudulently obtained, to deposit the same with the Chief Constable, in order that they may be produced in such manner as may be necessary for the ends of justice, or upon proof of ownership, to the satisfaction of the Magistrate, restored to the proper owner thereof; and every broker who shall refuse to produce and show the goods or articles in his possession, or the books in which the same ought to have been described, on being required so to do, or who shall refuse to allow the Chief Constable or constable requiring the said books to subscribe his name therein, or who shall not deposit any such goods or articles stolen, embezzled, or fraudulently obtained as aforesaid, shall, upon conviction before a Magistrate, for every such offence be liable to a penalty not exceeding £5, without prejudice to such broker being also proceeded against as a receiver or resetter of stolen goods according to law.

See sub-head (2), sec. 4, for definition of "broker," (22) "owner," (19) "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

437. Pawnbroker to produce his Books on demand.—Every pawnbroker shall at all times during his hours of business produce on demand to the Chief Constable, or to any constable acting under him, his books in which the articles received by him in pledge are entered, and shall exhibit to such Chief Constable or constable all goods regarding which information shall have been given, tending to show or to render probable that the same have been stolen, embezzled, or fraudulently taken, and if required shall deposit the same

with the Chief Constable for the ends of public justice, on receiving a receipt for such goods; and any pawnbroker who shall refuse to produce his books, or to exhibit and, if required, to deposit any goods as aforesaid, shall for every offence be liable to a penalty not exceeding £5.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

438. Brokers, etc., to report Stolen Goods, under a Penalty for Neglect.—If any goods or articles regarding which written or printed information shall be given by any constable to any pawnbroker or broker as having been stolen, embezzled, or fraudulently obtained, shall then be or thereafter come into the possession of such pawnbroker or broker, such pawnbroker or broker shall, without unnecessary delay, give information at the nearest police station, or to any police officer, if that should be the speediest mode of communicating, that certain goods or articles answering the description of the said goods or articles were offered to him or are in his possession, and shall also state the name and address given by the person by whom the same were offered or from whom the same were received, under a penalty not exceeding £5 for each and every such neglect or offence: Provided always, that in the case of wearing apparel or other articles which it may be difficult for such pawnbroker or broker to trace out and identify, no fine shall be exigible in respect of not reporting such articles, unless it shall appear to the Magistrate that such articles had been knowingly concealed by such pawnbroker or broker.

See sub-head (2), sec. 4, for definition of "broker," (19) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 448 as to punishment of abettors.

439. If Stolen Articles be Altered or Defaced by Broker, he shall be held to be Resetter of Stolen Goods.—If any broker shall, after receiving information of the theft, or the embezzlement or the fraudulent disposal of any metals, goods, or articles of whatsoever description, melt, alter, deface, or put away the same, or shall cause the same

to be melted, altered, defaced, or put away, without having previously received the permission of the Magistrate, and if it shall be found that such metals, goods, or articles were stolen, embezzled, or fraudulently disposed of by the person from whom such broker received the same, or by any other person, then and in such case it shall be held that such broker knew that such metals, goods, or articles were stolen, embezzled, or fraudulently disposed of, and such broker shall be proceeded against according to law as a resetter of stolen goods, or as being a party to the fraud, and punished accordingly; and no other evidence of his guilt shall be necessary than evidence of such melting, altering, defacing, or putting away, after receiving information as aforesaid.

See sub-head (2), sec. 4, for definition of "broker," (19) "Magistrate;" see p. 5, "person."

440. Brokers not to carry on Business of Publicans, nor to purchase Tickets of Pawnbrokers.—It shall not be lawful for any broker or any pawnbroker to carry on business as a publican or retailer of excisable liquors, or for any broker to purchase, receive, or take the note or ticket of any pawnbroker for any goods or articles which have been pawned, or to contract or negotiate in any manner with the holder of any such note or ticket, or any person in his behalf, for the purchase of goods or articles specified therein; and if any broker shall offend herein, either by himself or his servant, or by any other person having the charge of his premises, and for whom in such case he shall be held responsible, such broker shall for every such offence be liable to a penalty not exceeding £5.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

441. Pawnbrokers not to act as Brokers, and Brokers not to take Articles in Pledge.—If any pawnbroker shall act as a broker, except in the sale of articles *bona fide* forfeited in accordance with the provisions of the Pawnbrokers' Act, 1872, or if any broker shall receive or take any goods or articles in pledge, such pawnbroker or

broker shall for every such offence be liable to a penalty not exceeding £5.

See sub-head (2), sec. 4, for definition of "broker;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

442. Pawnbroker and Broker not to carry on Business in the same Premises.—It shall not be lawful for a pawnbroker and broker to carry on their respective trades within the same premises, or in separate premises having a communication with each other; and every pawnbroker or broker who shall offend herein shall, for every such offence, be liable to a penalty not exceeding £5, which penalty shall be in addition to any penalty now payable for the like offence under any Act or Acts now in force.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 as to repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

443. Penalty on Brokers transacting Business with Persons under Fourteen Years of Age.—It shall not be lawful for any broker at any time to sell to or purchase from any person who shall apparently be under fourteen years of age, whether such person is acting on his own behalf or on behalf of some other person; and if any broker shall offend herein, either by himself or his servant, or any other person having the charge of his premises, and for whom in such case he shall be held responsible, such broker shall, for every such offence, be liable to a penalty not exceeding £5.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

444. Penalty on Brokers transacting Business between certain Hours.—It shall not be lawful for any broker to sell to or purchase from, or have any business transaction whatsoever with, any person between the hours of ten o'clock of each Saturday night and nine o'clock in the morning of the following Monday, or between ten o'clock of

any other night and eight o'clock on the following morning; and if any broker shall offend herein, either by himself or his servant, or any other person having the charge of his premises, and for whom in such case he shall be held responsible, such broker shall, for every such offence, be liable to a penalty not exceeding £5.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

445. Penalty on Pawnbrokers, etc., purchasing Tickets or Clothing issued by Charitable Institutions.—Any pawnbroker or broker who shall, either by himself or by his servant, or by any other person having the charge of his premises or business, and for whom in such case he shall be held responsible, and any other person who shall purchase, receive, or take any note or ticket issued by authority of any parochial board or charitable institution, or any article of clothing issued by authority of any parochial board or charitable institution, and legibly marked, or known by him to be so issued, shall for each such offence be liable to a penalty not exceeding £5, without prejudice to such pawnbroker, broker, or other person being proceeded against according to law as a resetter of stolen goods.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

446. Pawnbrokers not to keep Smelting Pots.—Every pawnbroker or broker who shall keep or suffer to be in his premises any smelting pot, or implement for melting, altering, or defacing gold, silver, lead, or other metals, shall for every such offence be liable to a penalty not exceeding £5, and such smelting pot or implement shall be forfeited.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

447. Brokers to have their Names painted over Shop Doors.—Every person licensed as a broker shall have

his name, with the words "licensed broker," painted over the door or principal entrance of his premises, in large characters, either black upon a white ground, or white upon a black ground, and shall from time to time replace the same when removed, obliterated, or defaced, under a penalty not exceeding 20s.

See sub-head (2), sec. 4, for definition of "broker," (16) "premises;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

448. Brokers, etc., may detain Suspected Persons offering Goods for Pledge or Sale.—It shall be lawful for any pawnbroker, or other broker or dealer, or any other person to whom any goods or articles which shall be reasonably suspected to be stolen or illegally obtained shall be offered to be pawned, sold, or delivered, and he is hereby required to detain the person offering the same, and for any officer or constable thereupon to take such person into custody, for the purpose of being examined by a Magistrate, and to take possession of such goods or articles for the ends of justice, and the Magistrate may, on examination, immediately discharge such person, or may, if he shall see any ground for believing that the goods or articles have been stolen or illegally obtained, remand such person to the police office, or commit him to prison for a period not exceeding three lawful days, for further examination, or till bail be given for his appearance within the said term for further examination; and if, on further examination, the Magistrate shall be satisfied that the goods or articles were stolen or otherwise illegally obtained, he may commit the person charged to prison, to be dealt with according to law, and in that case all such goods and articles shall immediately be delivered up to and dealt with by the police as stolen or unclaimed property: Provided always, that the Chief Constable, or other person on duty at the police office to which such person so offering such goods or articles may be taken, shall, without delay, inquire as to the circumstances attending the possession of such goods or articles, in order to his determining, in the absence of the Magistrate or Burgh Prosecutor, whether the party shall be immediately discharged, or liberated on bail in manner herein

provided; and any pawnbroker, broker, or dealer, or any other person, who shall detain any person under this provision, shall be freed from responsibility, unless malice be averred and proved.

See sub-head (2), sec. 4, for definition of "broker," (19), "Magistrate;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

449. Provisions applicable to a Dealer in Marine Stores.—The following provisions shall apply to a dealer in marine stores:

(1.) He must receive a licence from the Magistrates, signed by the Clerk, specifying the particular house and room or rooms in which the business is to be carried on, and which may be granted on application made to them in such form and with such particulars as they may prescribe:

(2.) He shall cause to be painted in capital letters, not less than 4 inches in height and of proper breadth, on the outside of the licensed house, and so that the same shall be at all times plainly legible, his Christian name and surname at full length, with the addition "licensed dealer in marine stores:"

(3.) The licence shall be in force for one year only from its date, or until the next general licensing day (if any):

(4.) It shall be recorded in a register kept for the purpose, and there shall be paid for it such fee not exceeding 5s., as the Magistrate may fix:

(5.) Whenever a licensee changes his place of abode, or the place or room or rooms in which he carries on his business, he shall, within twenty-four hours of the change, give notice thereof to the Clerk, and within three days produce to the Clerk his licence, who shall, if the Magistrate be satisfied as to the suitability of the new premises, endorse thereon a memorandum specifying the particulars of the change:

(6.) The provisions hereinbefore enacted in regard to brokers in secs. 434, 439, 441 to 446, both inclusive, and 448 hereof, shall apply, under the same conditions, to dealers in marine stores.

See sub-head (8), sec. 4, for definition of "Clerk," (13) "house," (16) "premises," (19) "Magistrate," (20) "Magistrates."

450. Penalty on carrying on Business without Licence, and other Offences.—Any person who commits any of the following offences—that is to say, carries on within the burgh the business of a dealer in marine stores, without having obtained a licence for such purpose; or makes any wilfully false statement in any application for a licence; or, having obtained a licence, neglects or omits to give effect to any of the foregoing provisions, shall be liable to a penalty not exceeding £20, and to a further penalty not exceeding £5 for every day during which such business is carried on contrary to the provision of this Act.

See sub-head (4), sec. 4, for definition of "burgh;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

451. Licences may be Suspended or Revoked.—Any such licence may be suspended or revoked by any Magistrate or Court before whom the licensee is convicted of any offence which, in the opinion of the Magistrate or Court, renders it expedient that such licence should be suspended or revoked, and although such revocation may not be craved in the complaint.

See sub-head (19), sec. 4, for definition of "Magistrate."

452. Saving for Ship Chandlers or Ropemakers.—Nothing in this Act contained with respect to dealers in marine stores shall relate to or affect persons who carry on the business of a general ship chandler, or that business and the business of a ropemaker.

See p. 5 for definition of "person." It would have conduced considerably to clearness if definitions had been given of "dealer in marine stores" and "general ship chandler." It may be difficult to discriminate.

453. Offences by Brokers, Pawnbrokers, and Dealers in Marine Stores to be Police Offences.—All offences committed against the provisions with respect to dealers in marine stores and manufacturers of anchors in the Merchant Shipping Act, 1854, and all offences committed

against the provisions of the Pawnbrokers' Act, 1872, except any offence to which a customs or excise penalty is attached, shall be deemed police offences, and may be tried by the Magistrate, at the instance of the Burgh Prosecutor, in the mode provided by this Act for the trial of police offences.

See sub-head (19), sec. 4, for definition of "Magistrate;" see sec. 461 as to Burgh Prosecutor.

JURISDICTION AND RECOVERY OF PENALTIES.

454. Jurisdiction of Magistrates of Police.—The Magistrates of Police of a burgh under this Act, or any one or more of such Magistrates, except where otherwise provided in this Act, including Stipendiary Magistrates and Sheriffs acting in the Police Court, shall, within the burgh, have jurisdiction and power to take cognisance of all crimes, offences, and breaches of the police regulations in this Act contained or referred to, or contained in any other Act in force in the burgh, or of any bye-laws made in virtue of the provisions of this or any other Act, or of any offence against the Public Parks (Scotland) Act, 1878, or any bye-laws made in virtue of the provisions thereof, and of any other crime or offence which is punishable by any Public General or Local Statute or common law, and is within the jurisdiction of the Magistrates of any royal burgh, and shall have the like jurisdiction within the burgh as any Magistrate of a royal burgh, or any Dean of Guild of a royal burgh, has by the law of Scotland, and all jurisdiction to try offences and award punishment conferred on any Justice of the Peace, or two Justices of the Peace, or any Magistrate, by any Act, Public or Local, passed or to be passed, or any bye-laws, orders, or regulations made in virtue thereof and in force in the burgh: Provided always, that such jurisdiction shall not extend to the trial of offences against any of the Inland Revenue or Customs Acts.

The Sheriff shall have power to sit and act in the Police Court, with consent of the Magistrates, on any special occasion, or under any continuing arrangement.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate," (20) "Magistrates," (30) "Sheriff."

This clause, though under the head of "Offences and Penalties," is not limited to offences or crimes. It really divides itself into two parts: the one dealing with criminal or quasi-criminal jurisdiction of Magistrates, and the other with a civil jurisdiction. In the first they have the jurisdiction expressly conferred upon them by the clause, "and of any other crime or offence which is punishable by Public, General, or Local Statute, or common law, and is within the jurisdiction of the Magistrates of any royal burgh." Bankton says (book iv. tit. 19, sec. 4): "The Magistrates of borows-royal have no inconsiderable jurisdiction, whether in civil or criminal cases. In civil, they have the same jurisdiction within the liberties of the burgh as the Sheriff within the shire; and in criminal, likewise in such burghs as are Sheriffs within themselves, as Edinburgh and other borows." And Erskine (book i. tit. 4, sec. 21) says: "In criminal matters they had anciently the same privilege as regalities, of repledging from the Justiciary or Sheriff, for which see Leg. Burg. c. 61; 1488, c. 1; and they had, by special Statute, 1426, c. 75, the cognisance of reckless or undesigned fire-raising: But their criminal jurisdiction hath been much abridged by our later usage. They are still competent to petty riots; but they never had jurisdiction in bloodwits, unless their grants carried an express right of sheriffship, regality, or barony (Leg. Burg. c. 19, and Skene's Notes), which special right hath been granted to Edinburgh, Stirling, Perth, and some other royal boroughs. And, indeed, when a royal borough is entitled to any of those, it continues to enjoy a jurisdiction, not only civil but criminal, as ample as Sheriffs now have, or as barons or lords of regality formerly had; for by the Act 20 Geo. II., all jurisdictions and privileges vested in any royal borough are reserved in their full extent. But this jurisdiction is only cumulative with, not exclusive of that of the Sheriff."

Under the analogous clause of the General Police Act of 1862, the Court held, in Johnston *v.* Laing, 25th March 1876 (3 Coup., 250), in an appeal against a conviction for breach of certificate, pronounced by the Magistrates of a burgh other than a royal burgh, which had adopted the General Police Act of 1862, (1) that such Magistrate had jurisdiction to try the offence charged; and (2) that review on the facts was excluded by sec. 430 of the Police Act.

The Lord Justice-Clerk said that he was of opinion that Magistrates in populous places had the same jurisdiction as Magistrates in royal burghs, under the Public Houses Acts, over all offences which came under the cognisance of the police; and Lord Young said, "the Police Act provided that Magistrates elected under its provisions should have the same jurisdiction as the Magistrates of royal burghs." See sec. 575 of this Act.

But this section further provides that "the Magistrates of Police of a burgh under this Act . . . shall have the like jurisdiction within the burgh as any Magistrate of a royal burgh, or any Dean of Guild of a royal burgh has by the law of Scotland." Thus, therefore, they have not only the criminal jurisdiction of Magistrates of royal burghs, but also the like civil jurisdiction. The civil jurisdic-

tion was formerly extensive (see Bankton, *supra*). On this Erskine (book i. tit. 4, sec. 21) says: "Magistrates of boroughs, though not royal, have the cognisance of debts, and questions of possession between the inhabitants, and it is the general opinion that royal boroughs have as extensive a civil jurisdiction within the borough as the Sheriff hath in his territory. By special Statute, 1644, c. 35, revived by 1663, c. 6, the Provost and Bailies of royal boroughs have power to value and sell ruinous houses to the highest offerer, where the proprietors refuse to rebuild or repair them." In certain towns the Magistrates exercised a very considerable jurisdiction in civil causes, and many cases are in the books on the subject; and in some towns, such as Leith, a new, extensive jurisdiction in maritime matters was exercised by the Magistrates, with a legal assessor sitting with them. The establishment and development of Sheriff-Courts has, however, greatly superseded the exercise of civil jurisdiction by Magistrates, except in small debt and such minor causes, and it is unnecessary, therefore, to quote authorities on the subject.

The Magistrates have still, however, a very important jurisdiction in Dean of Guild matters, which, instead of falling into desuetude, is likely to increase in importance.

In the Act of 1862 there was a clause (408) similar to the present, giving Magistrates a Dean of Guild jurisdiction in almost the same words. On the construction of this, the opinion of the Dean of Faculty (now Lord Watson) and Mr. Balfour (now Lord Advocate) was obtained, to the effect that the Magistrates of a burgh constituted under the Act had no power under clause 408 to form themselves into a Dean of Guild Court. They considered that the object of that clause was not to create a separate and complete jurisdiction, *ad omnia*, but only to confer upon the Magistrates of Police a jurisdiction to try and punish such offences as a Dean of Guild could punish in a royal burgh. The writer then expressed the opinion that "there does not seem to be good ground for so limiting the operation of the clause. . . . A case has been brought into Court to try the question, and the matter is thus likely to be ruled by judicial decision."—Irons' Manual, p. 10. The case referred to was Tainsh *v.* Magistrates of Hamilton, 24th Jan. 1877 (4 R., 315), in which it was held by Lord Curriehill, that, under sec. 408 of the General Police Act, 1862, 25 & 26 Vict. c. 101, the Magistrates of Police of Hamilton, a burgh of regality which had adopted that Act, possessed the powers and jurisdiction relative to buildings pertaining to the Magistrates or Dean of Guild of a royal burgh in Scotland.

In this case Lord Curriehill said: "I think that the intention of the Legislature, in enacting sec. 408 of the General Police Act of 1862, was to confer expressly upon the Magistrates of all burghs of every kind which adopted the Act the aedile jurisdiction, which, in the case of Paisley, a burgh of regality, the Magistrates had acquired by usage. I am, therefore, of opinion that the Magistrates of Hamilton were entitled to constitute themselves a Dean of Guild Court, and to issue and enforce the rules mentioned in the declaratory conclusions of the summons."

The then Dean of Faculty (now Lord Watson) and Mr. Balfour (now Lord Advocate) were both counsel for the pursuer in this case, in which, it is understood, the judgment was acquiesced in on their advice. One Dean of Guild Court at least in a police burgh was formed, and rules and regulations framed for its guidance, under the opinion of the Dean of Faculty (Watson), so that the above construction may be held as settled.

The Airdrie Police Act, 1821, declared certain acts to be offences, and provided that the Provost and Magistrates, or a certain number of them, which was specified in reference to each particular offence, should be the tribunal for trying such offences. An Amending Act, passed in 1849, created a new magistracy, and conferred upon them the jurisdiction in offences under the original Act. The interpretation clause bore that "the word 'Magistrate' or 'Magistrates' shall include the Provost and Bailies, or any one or more of them."

Held, in Paterson *v.* Rose, 12th March 1875 (2 R., Just., 20), that one Magistrate sitting under the Amending Act could exercise the jurisdiction conferred upon the Magistrates, or any two of them, in relation to an offence under the original Act.

455. Stipendiary Magistrates may be appointed in certain Burghs.—The Commissioners of any burgh under this Act may resolve that a Stipendiary Magistrate shall be appointed to officiate in the Police Court or Courts of the burgh, and may fix the salary to be paid to him, and the following provisions shall apply:—

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," (19) "Magistrates," (30) "Sheriff;" see p. 5, "person;" sec. 340 as to burgh general assessment.

(1.) The person to be appointed shall possess the qualifications required for a Sheriff-Substitute in Scotland:

No person can be appointed to the office of salaried Sheriff-Substitute who is not an advocate or a law agent of not less than five years' standing in his profession, 40 & 41 Vict. c. 50, sec. 4.

(2.) The Secretary for Scotland shall make the appointment, on being satisfied with the salary provided:

(3.) The tenure of office of the Stipendiary Magistrate shall be the same as that possessed by a Sheriff-Substitute. He may only be removable from his office for incompetency or misbehaviour, by the like process and by the same authority as is provided by law for the removal of a Sheriff-Substitute:

A salaried Sheriff-Substitute is only removable from office by one

of Her Majesty's Principal Secretaries of State, for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being, 40 & 41 Vict. c. 50, sec. 5.

(4.) Stipendiary Magistrates, whether appointed before or after the passing of this Act, shall be entitled, out of the burgh general assessment, to retiring allowances for like reasons, on the like conditions and of the like amounts, having regard to their salaries and periods of service, as are provided by law in the case of Sheriff-Substitutes:

By 1 & 2 Vict. c. 119, sec. 6, it is provided: "And be it enacted, that Her Majesty, and her heirs and successors, may grant an annuity, payable in like manner as salaries to Sheriff-Substitutes, to any person who has held, now holds, or may hereafter hold, the office of Sheriff-Substitute, according to the proportions and with reference to the amount of their salaries, and the periods of their services, as hereinafter mentioned, if from old age or any permanent infirmity such person has been or shall hereafter be disabled from the due exercise of his office: provided always, that such annuity shall not exceed one-third of the salary payable to such person, in case the period of his service shall have been not less than ten years, and shall not exceed two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards. Provided also, that no such annuity shall be granted unless such Sheriff-Substitute shall have duly fulfilled the duties of his office during one of the periods before mentioned, and is from old age or permanent infirmity disabled from the due exercise of his office, which facts shall be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being, as having been established to their satisfaction by proper evidence."—Public General Statutes, vol. iii. p. 114.

(5.) Stipendiary Magistrates shall possess within the burgh the same jurisdiction, powers, and authorities as the other Magistrates of the burgh acting in the Police Court, or any of them:

(6.) The Commissioners may from time to time increase the salary of the Stipendiary Magistrate.

456. Office of Stipendiary Magistrate may be Renewed or Discontinued.—Upon the death, removal, or superannuation of a Stipendiary Magistrate, it shall be lawful to the Commissioners to resolve that the office shall be dis-

continued, or to resolve then or at any future time that the office shall be continued or renewed, in which case the provisions before mentioned shall again apply.

See sub-head (9), sec. 4, for definition of "Commissioners."

457. Boundaries of Jurisdiction.—In all proceedings for the trial of offences under the jurisdictions conferred by this Act:—

(1.) Where the offence is committed in, or on board, any ship or boat in any harbour, river, arm of the sea, or other water (tidal or other) which runs between or forms the boundary of the jurisdiction of two or more Courts, such offence may be tried by any one of such Courts:

(2.) Where the offence is committed on the boundary of the jurisdiction of two or more Courts, or within the distance of 500 yards of any such boundary, or is begun within the jurisdiction of one Court and completed within the jurisdiction of another Court, such offence may be tried by any one of such Courts:

(3.) Where the offence is committed on any person, or in respect of any property in or upon any cart or carriage whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried by any Court through whose jurisdiction such cart or carriage or vessel passed in the course of the journey or voyage during which the offence was committed, and where the side, bank, centre, or other part of the highway, road, river, lake, canal, or inland navigation, along which the cart or carriage or vessel passed in the course of such journey or voyage, is the boundary of the jurisdiction of two or more Courts, a person may be tried for such offence by any one of such Courts:

See Merchant Shipping Act, 1854, and Amending Acts.

(4.) Any offence which is authorised by this section to be tried by any Court may be dealt with, heard, tried, determined, adjudged, and punished as if the offence had been wholly committed within the jurisdiction of such Court.

See sub-head (5), sec. 4, for definition of "carriage;" see p. 5, "person;" see Simpson *v.* Board of Trade, 29th Mar. 1892 (19 R., Just., 66).

458. Punishment of Abettors.—Where the doing of any act or thing is made punishable by this Act, or by any bye-law thereunder, the causing, procuring, aiding, abetting, or wilfully permitting or suffering such act or thing to be done shall be punishable in like manner, if the nature of the case permits, and if an intention to the contrary does not appear in this Act.

The terms aiding, abetting, are importations from English law. An aider or abettor is one who stirs up, incites, instigates, or encourages, or who commands or counsels another to commit felony. In most cases an abettor is considered as much a principal as the actual felon.—Tomlin's Law Dict.

459. Certain Crimes not to be tried in Police Court.—If it shall appear, either in the preliminary investigation of the charge against any person accused of having committed any crime, delinquency, or offence within the burgh, or during his trial before the Magistrate, that such person has been guilty of or is charged with any of the crimes denominated the pleas of the Crown—*videlicet*, murder, robbery, rape, and wilful fire-raising, or with the crimes of stouthrief, or of theft by housebreaking, or of housebreaking with intent to steal, or of theft to an amount exceeding £10, or of theft by opening lockfast places, or of theft aggravated by having been twice previously convicted of theft, or of theft aggravated by being habit and repute a common thief, or of reset of theft, to an amount exceeding £10, or of reset of theft aggravated by having been twice previously convicted of that crime, or of falsehood, fraud, and wilful imposition to an amount exceeding £10, or of falsehood, fraud, and wilful imposition aggravated by having been twice previously convicted of that crime, or of breach of trust and embezzlement to an amount exceeding £10, or of breach of trust and embezzlement aggravated by having been twice previously convicted of that crime, or of assault to the danger of life, or of assault whereby any limb has been fractured, or of assault with any knife or other lethal instrument where effusion of blood has followed, or of assault with intent to ravish, or of attempt at wilful fire-raising, or of culpable homicide, or of forgery, or of uttering a forged bank or banker's note, it shall not be competent for the Burgh Prosecutor, or those acting

under or for him, to insist in a prosecution against such person before the Magistrate; but the Magistrate shall commit the person accused to prison for examination for any period not exceeding four days, and the Burgh Prosecutor shall forthwith give notice of such commitment to the Procurator-Fiscal of the Sheriff Court of the county, or county of the city, where such exists, in which the offence shall be charged to have been committed, in order that such person may be proceeded against comformably to law: Provided always, that the aforesaid provision shall not apply to chain-droppers, card-sharpers, thimblers, loaded-dice players, keepers of roulette tables and wheels of fortune, and offenders of that description, whom the Magistrate is hereby specially empowered to try and sentence, whatever may be the amount of the sum specified in the charge against them, or however often they may have been previously convicted.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate," (30) "Sheriff;" see p. 5, "person;" secs. 336 to 338 inclusive as to "notice."

In Campbell *v.* M'Lennan, 20th Mar. 1888 (15 R., Just., 55), it was held (*diss.* Lord Rutherfurd-Clark) that a summary complaint, in which the charge against the accused was that having, time and place libelled, "found in money £1, he did deny having found the same, and did appropriate and thus steal the same," was not a relevant complaint, in respect that the facts stated did not necessarily infer the crime of theft.

Assault.—In Anderson *v.* Hutchison, 3rd July 1878 (4 Coup., 64), a complaint which charged an assault "with a billiard cue or other lethal weapon, whereby the person assaulted was cut and wounded to the effusion of blood and serious injury of his person," held to have been competently tried and insisted in before a Police Magistrate, notwithstanding the provision in sec. 214 of the General Police Act of 1862, and suspension of the conviction and sentence thereon refused.

In England, where a prisoner was charged with a common assault, and the evidence tended to show that a rape had been committed, and the Justices convicted of an aggravated assault, it was held that they had acted within their jurisdiction. *In re* Dawson (42 J. P., 456).

A hostile intention is necessary to constitute an assault. Coward *v.* Buddeley (28 L. J., N. S., Exch., 260).

460. Clerk of Police Court.—The Commissioners shall appoint a proper person to be Clerk of the Police Court, with such salary as they may determine, and such person may be

the same person who is Clerk to the Commissioners, and, subject to the approval of the Commissioners of the person or persons to be appointed, he may appoint, by a writing under his hand, a depute or deputes for whom he shall be responsible; and such deputes shall be invested with all the powers appertaining to the office of Clerk of the Police Court.

See sub-head (9), sec. 4, for definition of "Commissioners," (8) "Clerk;" see also secs. 61 and 62 as to "Clerk to Commissioners."

461. Magistrates of Police may appoint Burgh Prosecutor.—The Commissioners under this Act shall appoint from time to time, by writing and during pleasure, a fit person to be Burgh Prosecutor of the burgh, for the purposes of this Act, and such Burgh Prosecutor shall within such burgh have all the powers and privileges appertaining to any procurator-fiscal by the law of Scotland; and they shall fix his salary, and shall pay it out of the burgh general assessment.

Where in any burgh there are more Police Courts than one, the Commissioners may appoint one or more Depute Burgh Prosecutors, and may appoint more than one Police Clerk to officiate in such Courts, and they shall fix their salaries.

Where any Burgh Prosecutor is bound by the terms of his appointment to devote his whole time to the duties of his office, and abstain from other business, his tenure of office and his right to have his salary not diminished, shall be the same as hereinbefore provided with regard to the Chief Constable.

See sub-head (9), sec. 4, for definition of "Commissioners," (4) "burgh," sec. 340 as to "burgh general assessment," (8) "Clerk;" see sec. 78 as to the tenure of office, etc., of the Chief Constable.

It will be observed that the rubric says that the *Magistrates* are to appoint the Burgh Prosecutor, while the text of the clause lays that duty on the Commissioners.

462. Interim Burgh Prosecutor.—Every proceeding or trial before the Magistrate shall be conducted in the official name and at the instance of the Burgh Prosecutor; and any other competent person appointed by the Magistrate for the purpose may, in the absence of the Burgh Prosecutor, act in his stead and name, either at the first or any adjourned diet,

and sign complaints for him, but the Burgh Prosecutor shall not be responsible for his acts.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate."

In Macrae *v.* Cooper, 10th Feb. 1882 (9 R., Just., 11), at a criminal diet in a Sheriff-Court, the Procurator-Fiscal at whose instance the libel proceeded was absent. *Held*, that another person holding an appointment as Procurator-Fiscal of the same Court was entitled to insist in the libel.

In Hill *v.* Finlayson, 13th June 1883 (10 R., Just., 66), a person convicted of breach of the peace in a police court brought a suspension on the ground that the appointment of the prosecutor as Procurator-Fiscal had, some days before the date of the complaint, been found to be null in an action of declarator in the Court of Session, another person being at the same time found entitled to the office. The Court refused the bill, holding that as the prosecutor had been appointed Procurator-Fiscal by the presiding Magistrate, and had, *de facto*, been performing the duties of Procurator-Fiscal at the date of the conviction, the validity of his appointment could not competently be questioned in the suspension of a conviction obtained at his instance.

463. Power to Magistrate to grant Warrant to take into Custody.—The Magistrate may, on a complaint by the Burgh Prosecutor, grant warrant to search for, take into custody, and convey to the police office, in order to be brought before him or some other Magistrate, any person accused or suspected of having committed any crime at common law or any offence against this Act, or any other Act under which the Magistrate has jurisdiction, and such warrant shall entitle the constable executing it to enter any building or part of a building, or other place whatsoever, and to break open lockfast places in which he has reason to believe or may reasonably suspect that such person is to be found.

See sub-head (4), sec. 4, for definition of "burgh," (3) "building," (19) "Magistrate;" see p. 5, "person;" see 461 *supra*, "Burgh Prosecutor."

464. May grant Warrant to Cite, and failing appearance, to Apprehend.—If the Magistrate shall deem it unnecessary or inexpedient to grant warrant for apprehension, he may grant warrant to cite the accused to appear at an appointed time; and in case the accused shall

fail to appear, without proper excuse, when cited, the Magistrate may then issue his warrant for the apprehension of the accused.

See sub-head (19), sec. 4, for definition of "Magistrate."

In Stewart *v.* M'Niven, 2nd Feb. 1891 (18 R., Just., 36), it was held (following Bolton and Murdoch, 23rd Jan. 1890, 2 White, 410, 17 R., Just., 22), that an objection to a complaint, on the ground of want of specification of facts, of which the accused is entitled to notice, which has not been stated before trial, cannot be entertained by the High Court in a suspension of a conviction on the complaint.

In Park *v.* Henderson, 22nd May 1879 (6 R., Just., 48), it was held that the custom which had been adopted by some Procurators-Fiscal, in summary complaints, of requesting the attendance of accused persons at an hour when the Court was expected to be sitting, by means of an informal notice through the police, and then, having obtained an order for apprehension from the sitting Magistrate, of placing the accused at the bar in order to ascertain whether they were going to plead guilty or not guilty to a complaint then read to them, but which they had not seen—the object being to save the expense of bringing witnesses for the prosecution to the diet when panels pleaded guilty—was illegal, and conviction obtained in proceedings so commenced quashed.

In England, if a constable arrest a party under a warrant, which the constable has not with him at the time, the arrest is not justifiable, and the party, should he assault the constable, cannot be convicted thereof. Gulliard *v.* Laxton (5 L. T., N., S. 835).

465. Previous Convictions of Contravention may be Libelled and Proved.—It shall be competent for the Burgh Prosecutor, in any libel charging any person with an offence under or a contravention of any of the provisions of this Act, or any bye-laws, orders, rules, or regulations made under or by virtue of this Act, to include in his libel a charge that said offence or contravention has been aggravated by previous conviction within seven years, for a like offence or contravention of this Act, or any other Act, or any bye-laws made under the same, and to lead proof in support of said last-mentioned charge; and in the event of the said offence or contravention, together with the said aggravation, being proved to the satisfaction of the Magistrate, it shall be lawful for the Magistrate to impose a penalty not exceeding 40s., or thirty days' imprisonment, without the option of a fine, in respect of such aggravation, in addition to the penalty

or imprisonment which he is authorised by this Act to impose for the offence or contravention itself.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate;" see p. 5, "person;" sec. 461, "Burgh Prosecutor;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

See opinion of Acting Sheriff-Substitute Baxter referred to p. 593.

466. Power to Magistrate to grant Warrant to Search.—The Magistrate may, at the instance of the Burgh Prosecutor, grant warrant to search for, seize, and convey to the police office, any article mentioned in any complaint as having been stolen or fraudulently obtained, and any documents or articles likely to afford evidence of the guilt of the accused; and such warrant shall entitle the constable executing it to enter any building or part of a building, or other place whatsoever, and to break open lockfast places in which he has reason to believe or suspect that such articles or documents are to be found.

See sub-head (4), sec. 4, for definition of "burgh," (3) "building," (19) "Magistrate;" see sec. 461, "Burgh Prosecutor."

A warrant was granted by a Justice of the Peace, to search, detain, and inventory certain articles alleged, in the application for the warrant, to be stolen, and to carry away the same to a place of security, and, if necessary, to break or force open all shut and lockfast places; but it did not set forth the person accused of the theft, the time when the theft had been committed, or the particular place to be searched. The warrant suspended, as being an illegal general warrant. Webster *v.* Bethune, 7th Feb. 1857, High Court (2 Irv., 596).

Where the police, having a warrant to search for certain materials went and ransacked the suspect's house for letters, and apprehended him in consequence of what they found, the question was sent to trial on an issue whether they had done so wrongfully and illegally. Pringle *v.* Bremner, 6th May 1867 (5 M., H. L., 55).

467. Officers or Owners of Property on which Offences are committed may take Offenders into Custody. — Any person found committing any offence punishable either by indictment or criminal libel, or upon summary conviction under this Act, or any other Act under which the Magistrate has jurisdiction, may, without a warrant, be taken into custody by any police constable, or be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant or

any person authorised by the owner or his servant, and may be detained until he can be delivered into the custody of a constable, and the person so arrested shall be taken as soon as conveniently may be before some Magistrate, to be examined and dealt with according to law; but the Chief Constable or officer in charge at any police office or police station, to which such person may be brought, may liberate him, if satisfied that there is not sufficient proof of guilt; and any constable may search any premises, and may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained or fraudulently carried away, may be found, and also any person who may be reasonably suspected of having or carrying in any manner anything stolen or fraudulently obtained or carried away; and any constable may seize anything stolen or unlawfully obtained or fraudulently carried away.

See sub-head (22), sec. 4, for definition of "owner," (5) "carriage," (16) "premises," (19) "Magistrate;" see p. 5, "person."

See sec. 86 and cases there referred to.

In Bain *v.* O'Neil, 14th Dec. 1854 (1 Irv., 583), under the Glasgow Police Act, 6 & 7 Vict. c. 99, a person was apprehended without a warrant, and tried summarily for breach of trust and embezzlement, alleged to have been committed eighteen months previously. *Held*, that this proceeding was illegal, and the conviction set aside.

A person against whom a warrant for apprehension for examination had been granted was apprehended at eleven o'clock at night, taken to the police office, and detained there, without being brought before a Magistrate, until the following day, when she was tried summarily and convicted. *Held*, in the circumstances, that this proceeding was oppressive, and the sentence set aside. Crawford *v.* Blair, 17th Nov. 1856, High Court (2 Irv., 511).

In Peggie *v.* Clark, 10th Nov. 1868 (7 M., 89), it was held that at common law a police officer is entitled, under special circumstances, to apprehend without a warrant, it being always a question whether the circumstances justified the apprehension; and the County Police Act, while it defines the duties of constables, gives them no power beyond what they have at common law. Circumstances in which a police officer held to have been justified in apprehending without warrant. See also cases cited in this case, and the observations of the Lord President quoted at p. 159.

In England, when a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.

The appellant was summoned to answer an information charging him with trespass in pursuit of conies. As he did not appear in obedience to a summons, a warrant was issued for his apprehension. The respondent being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him. It was held that the appellant could not be convicted, upon an information charging him with assaulting the respondent in the execution of his duty. Codd *v.* Cabe (1 Ex. D., 352).

468. Horse, Carriage, etc., of Persons taken into Custody may be secured.—When any person having charge of any horse, cart, or carriage, or any animal or thing, shall be taken into the custody of any constable, under the provisions of this Act, it shall be lawful for any constable to take charge of such horse, cart, or carriage, or animal or thing, and to deposit the same in some place of safe custody, as a security for payment of any expenses which may have been necessarily incurred for taking charge of and keeping the same (if the same cannot conveniently and safely be given up to the owner, if known); and unless the same shall be claimed by the owner, and all expenses incurred thereon paid, within four days after such detention, and after notice to the owner, if known, it shall be lawful for any two Magistrates to order the sale thereof, and the proceeds of such sale to be applied towards the necessary expenses incurred, and the overplus, if any, to be paid to the owner if he can be found, and if he cannot be found, to be applied in the same way as fines.

See sub-head (22), sec. 4, for definition of "owner," (5) "carriage," (20) "Magistrates;" see p. 5, "person;" secs. 336 to 338 as to "notice," and sec. 498 as to application of penalties.

469. Persons in Custody, in or passing through Burgh, may be detained.—Any person charged with the commission of a crime or offence, or sentenced to imprisonment, when in the lawful custody of a constable of a county, city, burgh, or place, or of a warder or officer of a prison in the United Kingdom, for the purpose of being conveyed to a county, city, burgh, place, or prison, may, when in or passing through the burgh, be detained for a period not exceeding twenty-four hours, or not exceeding forty-eight hours if Sunday intervene, in a cell or lock-up at any police office or station provided under this Act, if the removal of such person through

or from the burgh is delayed from any cause: Provided always, that the Chief Constable or officer in charge of such police office or station shall be satisfied that the person in custody cannot at once be conveniently removed; and provided also, that any expense incurred for the maintenance of such prisoner shall be defrayed by the Commissioners or others by whom such constable, warder, or officer is appointed.

See sub-head (4), sec. 4, for definition of "burgh," (9) "Commissioners;" see p. 5, "person."

A superintendent has no power, without a warrant, to send a man in custody into another jurisdiction, in order that the case may be investigated there. Hollands *v.* Richardson, 12th July 1843 (5 D., 1532).

470. Watchmen may be placed in charge of Shops, etc., left open.—Where any constable or officer on duty shall discover that the window or door of any house, shop, warehouse, factory, or other premises within the burgh, has been left open or unlocked, or is otherwise insecure, it shall be lawful for such constable or officer to put a watchman in immediate charge thereof, at the expense of the tenant or party occupying such premises, and such expense shall be recoverable by way of penalty before the Magistrate by summary complaint, at the instance of the Burgh Prosecutor, provided the Magistrate considers the charge to be reasonable.

See sub-head (16), sec. 4, for definition of "premises," (4) "burgh," (13) "house," (19) "Magistrate;" sec. 461, "Burgh Prosecutor."

471. Chief Constable in certain cases may accept of Bail or Deposit.—Upon the apprehension of any person charged with any offence under this Act, or with any crime or offence which may be competently tried before the Magistrate, it shall be lawful for the Chief Constable, or other officer of police having charge in absence of the Chief Constable, at any police office or station, to accept of bail or deposit, by a surety, or by such person, that such person shall appear for trial before the Magistrate at some time and place to be specified, and at all after diets of Court, and to liberate the person so apprehended upon bail being found to an amount not exceeding £20, or upon the deposit of any money or article of value to the amount of the bail fixed; and the Chief Constable or other officer of police, if deposit be

accepted, shall immediately enter the same in a book to be kept for the purpose, and grant an acknowledgment for the money or article so deposited: Provided always, that the Chief Constable or other officer of police may refuse, if he see cause, to accept of bail in any shape; and the refusal to accept bail or deposit, and detaining the person so apprehended until the case of such person is tried in the usual form, shall not subject the Chief Constable or other officer of police to any claim for damages, wrongous imprisonment, or claim of any other kind whatsoever: Provided also, that it shall be lawful to liberate any such person without bail, if the Chief Constable or other officer deem it proper so to do; and if any person fail to appear in redemption of his bail or deposit, not only may the same be forfeited, but warrant may be granted for his apprehension.

See sub head (19), sec. 4, for definition of "Magistrate;" see p. 5, "person."

472. Authority to Officers to cite Parties and Witnesses.—This Act shall be a sufficient authority to the constables for citing a party charged with any offence against the provisions of this Act, or of any other Act under which the Magistrate has jurisdiction, or of any bye-law, order, or regulation in force in the burgh, or at common law, and for summoning any witness or haver to give evidence in relation to the same, and for executing within the burgh any warrant granted by a Magistrate in virtue of the powers conferred by this Act, or any Act incorporated herewith, or under which such Magistrate has jurisdiction; and it shall be deemed a legal citation of such accused person or witness or haver, if the citation be delivered personally, or left at his dwelling-house, or if such person or witness has no known dwelling-house, at the hotel, inn, lodging-house, or other place in which he eats and sleeps, or in the shop, warehouse, counting-house, or other place of business occupied by him, or where he is employed, or, in the case of a master of, or seaman or person employed in any ship or vessel, in the hands of a person on board thereof and connected therewith, which citation of an accused person shall state the nature of the charge, and the time and place of appearance; and the citation of an accused person, witness, or haver, whether given by virtue of this Act

or by warrant, may be proved by the execution of the officer or by his oath.

See sub-head (4), sec. 4, for definition of "burgh," (13) "house," (19) "Magistrate;" see p. 5, "person."

It has been held incompetent to proceed in a Police Court against a panel who had been cited on the previous day to that on which the case was heard, to answer a different charge. Craig *v.* Steel, 20th Dec. 1848 (Shaw, Just., 148).

In Robertson *v.* Mackay, 21st July 1846 (1 Arkley, 114), a sentence pronounced in the Police Court of Dundee suspended, in respect that there had been no warrant granted for citing the party.

In Mackean *v.* Wilson, 9th Dec. 1848 (1 Shaw, Just., 132), it was held, (1) that it is not necessary, in a summary case in the Police Court, that the panel should have served upon him a written copy of the complaint before trial; and (2) that it is no ground of suspension that he was not allowed forty-eight hours to prepare his defence, he not having asked delay at the time.

In Chalmers *v.* Webster, 27th Nov. 1871 (2 Coup., 164), where the notice of compearance upon a complaint for a contravention of sec. 154 of the General Police Act, in setting forth the offence, omitted a statement which was contained in the complaint, *held* that, as the statement omitted did not import a separate offence or involve a larger penalty, the omission from the notice was not sufficient to invalidate the sentence.

In a suspension of a conviction by a Police Court, the Court of Justiciary allowed the suspender a proof of his averment, that "for the purpose or to the effect of excluding parties friendly to the complainer, the door of the police hall was shut and kept closed, and all further entrance of the public forcibly excluded, before the court room was nearly full." In the course of the proof, the suspender proposed to ask one of his witnesses, who had been in Court, whether any of the authorities prevented him from going forward to give evidence. *Held*, that the question was incompetent, as not falling within the grounds of suspension or the terms of the remit by the Court.

By sec. 149 of the Greenock Police Act, 3 Vict. c. 127, breaches of the peace are made punishable by imprisonment not exceeding sixty days; and sec. 160 gives authority to police officers to cite persons charged with certain offences incurring pecuniary penalties. A party was cited, under sec. 166, to answer to a charge of breach of the peace, under penalty of £5; and the prayer of the complaint was that he should be punished in terms of law. *Held*, that persons cited under sec. 166 were entitled to presume that they would be prosecuted only for a pecuniary penalty, in terms of that section; and a conviction of a party so cited, of a crime inferring imprisonment under sec. 149, set aside as irregular.

Circumstances in which an averment by a suspender, that sufficient time had not been allowed to him to bring forward his witnesses and to prepare for his defence, was held to have been established by the

proof, and the sentence suspended accordingly. Orr *v.* M'Callum, 25th June 1855 (2 Irv., 183).

473. Offences by Companies, Associations, or Corporations, how to be dealt with.—With regard to offences or omissions by companies, associations, or incorporations, the following provisions shall apply:—

(1.) In the case of an ordinary company, any one or more of the partners thereof, or the manager or person locally in charge of the concern, may be dealt with as if he or they were the persons offending.

(2.) In the case of an association, incorporation, or incorporated company, any one or more of the directors or persons managing the affairs thereof, or the clerk, secretary, or other principal officer thereof, or the person in charge, or locally in charge of the affairs thereof, may be dealt with as if he or they were the persons offending.

See p. 5, "person."

474. Penalty for Witnesses refusing to give Evidence.—If any person refuses to be precognosced by the Burgh Prosecutor, or to give information or evidence concerning the subject-matter of any crime or offence, on receiving a summons or citation to attend for precognition at least twenty-four hours before the diet of compearance, the Magistrate may grant warrant to commit to prison such person for any period not exceeding thirty days.

See sub-head (19), sec. 4, for definition of "Magistrate;" see p. 5, "person;" sec. 461, "Burgh Prosecutor;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

475. Offenders removing from Bounds of Police, how to be proceeded against, etc.—Warrants granted by the Magistrates for apprehending or citing persons accused of having committed crimes and offences, or for citing witnesses for the prosecutor or accused, when such persons or witnesses are beyond the jurisdiction of the Magistrates, shall be sufficient for apprehending or citing the offenders and witnesses within Scotland, and for conveying such offenders as shall be taken into custody in terms of the warrant, to be

dealt with according to law, and the said warrants may be lawfully and competently executed either by an officer of the Court or Magistrate granting the warrant, or by any constable or other officer of the law, although addressed to officers of the Court issuing the warrants; and the provisions of the Acts relative to the execution of sentences and of decrees for penalties and expenses beyond the jurisdiction of the Court or Judge by whom the same have been granted, shall be applicable to the execution of convictions and judgments pronounced under the authority of this Act; and the provisions contained in an Act passed in the eleventh and twelfth years of the reign of Her present Majesty, chapter 42, entitled "An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales, with respect to persons charged with indictable offences," for the enforcement of warrants granted by Sheriffs and Justices in Scotland by endorsation in England and Ireland, and also the provisions of the Act of the thirty-first and thirty-second years of Victoria, chapter 107, for enforcing warrants within the Channel Islands, are hereby extended and made applicable to all warrants issued by the Magistrate.

See sub-head (20), sec. 4, for definition of "Magistrates," (19) "Magistrate;" see p. 5, "person."

In Cairns *v.* Linton, 4th Mar. 1889 (16 R., Just., 81), it was held that under secs. 333 and 335 of the Edinburgh Municipal and Police Act, 1879, the warrant of the Judge of Police in Edinburgh is sufficient for citing or apprehending any person resident in another county, who is charged with an offence which may be tried by him, if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian, or any one of his Substitutes.

476. Persons in Custody to be taken before Magistrates.—Every person who, by virtue of this Act, shall be taken into custody, and who shall be detained, may be detained in the police office or police cells, and shall be taken before the Magistrate not later than in the course of the first lawful day after he shall be taken into custody, such day not being a sacramental fast day, or a day set apart for a general fast, or a public holiday; and if the nature of the crime or offence charged shall admit of its being competently tried before the Magistrate, under the provisions of this Act, it shall be lawful for him to grant warrant to commit

such offender to the police cells or to prison, for affording time to find bail, or for further examination, or for trial, such further examination or trial always taking place as soon as circumstances shall permit, and without any unnecessary delay; or if the crime or offence charged shall, in the opinion of the Magistrate, merit a greater punishment than he can lawfully award, it shall be lawful for him at any stage of the examination or trial to commit such offender to prison for examination; or if the crime or offence charged, from having been committed beyond the limits of the burgh, or from being otherwise excluded from the jurisdiction of the Magistrate, falls to be tried in another jurisdiction, it shall be lawful for the Magistrate to commit such offender to prison until disposed of according to law; in either of which last two cases it shall be the duty of the Burgh Prosecutor to give notice of such commitment to the Procurator-Fiscal or Burgh Prosecutor or other proper officer for the city, county, burgh, or other jurisdiction within which the crime or offence was committed, in order that such offender may be further proceeded against according to law: Provided further, that the Chief Constable or other person on duty at the police office or police station to which any person may be brought in custody, may discharge such person from custody on being satisfied that there is no sufficient evidence to warrant a complaint against him.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate;" see p. 5, "person;" secs. 336 to 338 as to "notice;" sec. 461, "Burgh Prosecutor."

477. Procedure in Police Court. — Without prejudice to the jurisdiction of the Sheriff, Justices of the Peace, Burgh, or Dean of Guild Courts, as herein after provided for, all prosecutions, actions, and proceedings for crimes and offences, or contraventions of this Act, or any bye-laws, orders, rules, or regulations made thereunder, committed within the burgh, or for the recovery of fines, penalties, forfeitures, or expenses under the provisions of this Act, or any other Act under which the Magistrate has jurisdiction (the mode of recovering which is not herein otherwise provided for), shall be instituted, sued for, or carried on before the Magistrates of Police, or any one of them, in the Police Court, at the instance of the Burgh Prosecutor, to be appointed as herein authorised;

and (with the exception of complaints against cardsharpers, chain-droppers, thimblers, loaded-dice players, keepers of roulette tables and wheels of fortune, and offenders of like description) in all cases of theft or of reset of theft, or of falsehood, fraud, and wilful imposition, or of breach of trust and embezzlement, it shall be assumed that the sum of money or the value of the article stolen, resetted, obtained by falsehood, fraud, and wilful imposition, or embezzled, does not exceed £10; and it shall not be competent thereafter to the person accused (except where an offer shall be made at the time of the trial) to prove that the money or article stolen, resetted, obtained, or embezzled, exceeded in value the sum of £10; and the whole procedure before such Magistrates or any of them shall be conducted summarily *vivâ voce*, and without written pleadings; and in describing any offence against this Act, or other Act under which the Magistrate may have jurisdiction, it shall be sufficient to refer to the section of the Act founded on, without setting forth the enactment in words at length, and the description of any offence against the Act founded on in the words of such Act shall be sufficient in law; and no other record shall be kept of the proceedings except the complaint, the plea, the names of the witnesses examined, and the judgment pronounced; and it shall not be competent to any party who shall appear to answer to any complaint to plead want of due citation, or informality in the warrant, citation, or execution.

See sub-head (30) sec. 4, for definition of "Sheriff," (4) "burgh," (19) "Magistrate," (20) "Magistrates;" see p. 5, "person;" sec. 461, "Burgh Prosecutor."

Where, under the authority of the General Police Act, certain rules and regulations, and forms of procedure for the Police Court, were framed and established by the Magistrates and the Sheriff, with the advice and approbation of the Lord Justice-General and Lord Justice-Clerk, these rules required to be strictly adhered to. A party who had been summarily apprehended by the police in such burgh on a charge of theft, and convicted by the sitting Magistrate, having alleged in a suspension that, in violation of the rules established there, the Magistrate had refused to give him time to employ an agent and to lead evidence, and which the Clerk failed to minute,—the Court, before answer, allowed a proof of the allegation, and remitted to the Sheriff forthwith to take and report the proof; and the facts being proved, the sentence was suspended. Blyths *v.*

M'Bain, 12th Jan. and 20th Feb. 1852 (1 Stuart, 242 and 489). See also Stuart *v.* M'Niven (18 R., Just., 36), *supra*, p. 691.

A person was charged with breach of the public peace, in respect that he "did insult and give threatening language to John Inglis, carter and grocer in Kilsyth, and insulted a girl of the late Malcolm Taylor when coming from the grocery shop of John Inglis." A conviction was set aside, as the complaint did not specify anything amounting to breach of the peace. Galbraith *v.* Muirhead, 17th Nov. 1856, High Court (2 Irv., 520).

By the Glasgow Police Act, 6 & 7 Vict. c. 99, sec. 203, the Commissioners of Police were authorised to erect steelyards for weighing coals, and persons attempting to sell and deliver, within the limits of the Act, coals in quantities exceeding 5 cwts., were required to have them weighed at a steelyard. The suspender was a person employed in fetching coals to within the limits of the Act, and refused to comply with the requirement as to weighing. He was convicted of having contravened the provisions of the Statute, and appealed to the Circuit Court. It was argued for him that the words of the complaint against him were different from the clause of the Statute on which it proceeded. The words applicable to completed transactions were, "if such coals shall have been sold *and* delivered," whilst the complaint was that the suspender did "sell *or* deliver" the coals, an alternative not warranted by the Statute. *Held*, that the complaint was not in conformity with the Statute, and appeal sustained. Lockie *v.* M'Whirter, 15th Feb. 1849 (Shaw, Just., 161).

In Mackenzie *v.* Maberly, 21st Nov. 1859 (3 Irv., 459), a person was summarily apprehended, brought before a Justice of the Peace, and convicted of trespassing in pursuit of game, in contravention of the first section of the Statute 2 & 3 Will. IV. c. 68. There was no written complaint, and no oath of the informer. The proceedings were held informal, and the conviction set aside. *Held*, that a written complaint is necessary in a prosecution under the first section of the Statute 2 & 3 Will. IV. c. 68, and that it is incompetent to apprehend a person under the second section of the Statute 2 & 3 Will. IV. c. 68, and, when so apprehended, to try him without further procedure for the offences specified in the first section.

In Whyte *v.* Robertson, 17th July 1891 (18 R., Just., 56,), a person was charged with "an offence within the meaning of the General Police and Improvement Act, 1862." There was no specification of the section said to have been contravened, but the acts said to have constituted the contravention were set forth. The accused stated no objection to the complaint in respect of want of specification, and was convicted. In a suspension, the Court, on the ground of want of specification, set aside the conviction, holding that it was incumbent on the prosecutor to set forth the section said to have been contravened, as well as the acts said to constitute the contravention. Hastings *v.* Charles (2 White, 325, followed), and Stewart *v.* M'Niven (18 R., Just., 36).

The warrant of service of a complaint under the Day Trespass Act,

1832, bore to proceed upon an oath of verity, emitted in presence of a Justice of Peace, and the oath, signed by the person said to have sworn it, was prefixed to the warrant. The accused took no objection to the complaint, and pleaded not guilty. In the course of the trial he led evidence to show that the complaint had never been read to or by the witness who swore to the verity of it, and he maintained that the oath, not having been duly emitted, no conviction could be obtained. He was convicted, and took a case for appeal. *Held*, that the objection being one to competency ought to have been taken before pleading to the complaint, and that it was too late to raise it during the trial on the merits. Munro *v.* Duke of Richmond and Gordon, 12th Dec. 1889 (17 R., Just., 14).

478. Accused may require Adjournment of Diet.—Any person brought before the Court by a warrant of apprehension or under the authority of this Act, shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period of not less than forty-eight hours; and such requisitions shall be complied with, if made before the examination of any witness on the merits shall have commenced; but no such requisition shall be competent where a copy of the complaint, or a summons stating the nature of the charge, shall have been delivered to the accused personally forty-eight hours before the hearing.

See p. 5, "person."

In Pyper *v.* Walker, 10th July 1885 (12 R., Just., 47), it was held to be the duty of a Magistrate before whom any prisoner charged with a serious offence is brought for trial under the Summary Jurisdiction Acts, if no complaint has been previously served upon him, to inform him that he may require the hearing of the case to be adjourned for forty-eight hours.

A person was apprehended at seven o'clock in the evening, and locked up all night in a police cell; at eight o'clock next morning he was asked by a police officer if he wished any witnesses called for him; he mentioned five. At ten o'clock he was placed on his trial, and a complaint, charging him with theft, which had been prepared and was dated that morning, was read over to him. He pleaded not guilty. The Magistrate asked him if he was ready to go on, and the accused not asking for an adjournment, the case proceeded. Three witnesses called for the accused were examined, and other two had been unable to attend. The accused was not represented by counsel or agent. His defence was an *alibi*. He was convicted, and sentenced to fourteen days' imprisonment. This sentence was suspended.

In Gardiner *v.* Jones, 4th March 1890 (17 R., Just., 44), a person accused of breach of the peace was brought up before a Police

Court, on a warrant of apprehension. He was not informed that he was entitled to obtain an adjournment to prepare his defence. He did not ask an adjournment till after the witnesses for the prosecution had been examined. The Magistrate then refused it, "in respect that the evidence for the prosecution had been finished," and convicted the accused. It was held, in a suspension, that the accused ought to have been informed of his right to obtain an adjournment, and that, in the circumstances, the conviction could not be sustained.

479. Court may Adjourn Hearing and Detain Accused, etc.—Subject to the provisions contained in the preceding section, no adjournment of the hearing shall take place when the accused pleads not guilty, or at any other stage of the proceedings, unless the Court shall think fit, for some good reason, to order an adjournment: Provided that, where the accused has been brought into Court upon a warrant of apprehension, it shall be lawful for the Court to grant warrant to detain him in prison or in police cells until the period to which the hearing shall be adjourned, or until he finds sufficient security to appear at all future diets of the Court.

Where an adjournment is granted, the Court may, instead of ordaining the accused to find security to appear, appoint the accused to attend the sitting of the Court to which the case is adjourned, under a suitable penalty, in case he shall fail to appear; and if the accused shall fail to appear at the adjourned diet, not only may the penalty contained in the bond or mentioned in the order of adjournment be forfeited, but warrant may be granted for his apprehension. A penalty contained in an order may be recovered by the like process as is herein provided for the recovery of a penalty in a forfeited bond.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, sec. 458 as to punishment of abettors, and sec. 491 as to forfeited bonds.

In Clark *v.* Stevenson, 19th Nov. 1853 (1 Irv., 309), in a prosecution before a Burgh Court, the prosecutor craved warrant to summon the accused to appear and answer to the complaint, or to apprehend and bring him into Court for examination. The warrant following on this prayer was "to apprehend and bring the defender into Court for examination, and to cite witnesses for both parties." Having been brought into Court under this warrant, the defender pleaded guilty, and at once received sentence of imprisonment.

Held, that this proceeding was incompetent and that the proper course was to have taken and recorded the defender's declaration.

480. Objections to Complaint.—No objection shall be allowed by the Court to any complaint under this Act for any alleged defect therein in substance or in form, or for any variance between any such complaint and the evidence adduced on the part of the prosecutor at the hearing thereof, not changing the character of the offence charged; but if any such defect or variance shall appear to the Court to be such that the accused has been thereby deceived or misled, it shall be lawful for the Court to adjourn the hearing to some future day, and at the same time, or at any stage of the proceedings, to direct such amendment to be made upon the complaint as may appear to be requisite, not changing the character of the offence, and such amendment shall be authenticated by the signature or initials of the Magistrate or Clerk of Court.

See sub-head (8), sec. 4, for definition of "Clerk," (19) "Magistrate."

In Markland *v.* Her Majesty's Advocate, 8th June 1891 (18 R., Just., 50), the Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, sec. 62, enacts: "Where any act set forth in an indictment, as contrary to any Act of Parliament, is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the Statute, but do amount to a crime at common law, it shall be lawful to convict of the common-law crime."

A person was charged with having, while an undischarged bankrupt, within the meaning of sec. 4 of the Bankruptcy, Frauds, and Disabilities Act, 1884, obtained credit exceeding £20 from a firm of bootmakers, without informing them that he was an undischarged bankrupt, contrary to sec. 4 of said Act. The evidence having negatived the charge, the Sheriff-Substitute allowed further evidence to be led of facts not mentioned in the indictment, with the result that a verdict was obtained against the accused of the common-law offence of falsehood, fraud, and wilful imposition, and the accused was sentenced to imprisonment.

The Court suspended the conviction and sentence, holding that sec. 62 of the Criminal Procedure (Scotland) Act, 1887, did not entitle the prosecutor to lead evidence to prove any facts not libelled in the indictment, and thereafter convict of a common-law offence which had not been charged in the indictment.

In summary prosecutions under the Edinburgh Municipal and Police Act, 1879, it is sufficient that the procedure complies with the provisions of that Act, although it does not satisfy the requirements of the Summary Jurisdiction Acts, 1864 and 1881.

Questions of law in appeals on stated cases, in the form, "Whether

in view of the facts found proved the Magistrate ought to have convicted," are not absolutely incompetent, but ought to be avoided.

Case in which Court declined to answer such a question.

Opinions, That to obtain a conviction against the occupier of premises for a contravention of the Edinburgh Police Act, 1879, by being in the possession of unsound meat as or for human food, it is not essential to prove that the accused knew either of the meat being in his premises or of its unsound condition. Dickson *v.* Linton, 1st June 1888 (15 R., Just., 76).

The Prevention of Crimes Act, 1871, sec. 12, enacts that "where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence under this Act."

In O'Brien *v.* M'Phee, 30th Oct. 1880 (8 R., Just., 8), the relevancy of a complaint charging an offence under this section was objected to in the Police Court, on the ground that it did not set forth knowledge on the part of the accused that the persons assaulted were constables in discharge of their duty. The Magistrate repelled the objection, and the accused was convicted and sentenced.

In a suspension, brought on the ground that no offence under the Statute had been relevantly charged, and that the conviction and sentence being outwith the Statute might be set aside by the High Court—*held*, (1) that the complaint set forth a good charge in substance, and that the Magistrate had jurisdiction to decide on the question of relevancy; and therefore, (2) that the jurisdiction of the High Court was excluded by secs. 131 and 132 of the Glasgow Police Act.

Opinions, That the objection to the relevancy of the complaint had been rightly repelled.

481. Procedure at Hearing.—At the hearing of the case the charge shall be read to the accused, and he shall thereupon be required to plead in common form, and the accused may then state objections to the competency or relevancy of the complaint or proceedings; and if no objections are stated, or if such objections are stated and repelled, or are obviated by amendment of the complaint or adjournment of the diet, as hereinbefore provided, the accused's plea shall then, or at such adjourned diet, be recorded, and the plea, if the same be guilty, shall be signed by the Magistrate or person officiating as Clerk of Court, and if the plea be not guilty, the prosecutor shall proceed to establish his complaint by such evidence as is competent, and the accused may, if he think fit, lead such evidence as is competent, after which the Court shall pronounce judgment at the same or any adjourned diet.

See sub-head (8), sec. 4, for definition of "Clerk," (19) "Magistrate;" see p. 5, "person."

In Meekison and Tutor *v.* Mackay, 15th Feb. 1849 (Shaw, Just., 159), circumstances in which it was held to be incompetent to try children, of the ages of ten and twelve, in the Police Court, in the absence of their parents, whose residences were well known.

In M'Kenzie *v.* M'Phee, 28th Jan. 1889 (2 White's Just. Reports, 188), a girl of ten years of age, while with her mother in the City Clothes Market in Glasgow, was found to be in possession of articles missing from the stalls. The mother and child were taken to the police office. No charge was made against them. They were requested to appear at the police office on the following morning, and allowed to go home. Two police officers called at the woman's house the same afternoon, and again told the woman and her daughter to be at the police office on the following morning, but no citation was given them. On obeying this order they were placed at the bar, and a charge of theft (under the Glasgow Police Act, 1866) of the articles found on the daughter having been read over to them, they were asked to plead. No intimation was given them of this charge, nor were they informed of their right to an adjournment. They pleaded not guilty; and evidence having been led, the mother was convicted and sentenced to imprisonment, and the daughter was ordered to be sent to an industrial school. No intimation was given to the husband that his wife and daughter were to be charged with theft, or that the latter was to be sent to an industrial school, and he was not present when the sentence and order were pronounced. *Held*, (*diss.* Lord Adam), that the procedure before the Magistrate convicting the mother was contrary to the principles and practice of the criminal law of Scotland; that the conviction following thereon was *funditus* null, and sentence quashed; that the facts set forth disclosed a case which might be properly brought for review to the High Court by bill of suspension; and that secs. 131 and 132 of the Glasgow Police Act, excluding review, except at the next Circuit Court at Glasgow, in the circumstances did not apply. *Held*, that the order sending the child to a reformatory having been made under the Industrial Schools Act, and not under the Glasgow Police Act, secs. 131 and 132 of that Act did not apply, and that review of that order by bill of suspension was competent.

In Bolton *v.* Murdoch, 23rd Jan. 1890 (17 R., Just., 22), a person was charged, under the Summary Procedure Act, 1864, on a complaint under the Betting Acts of 1853 and 1874. He pleaded not guilty, and the diet was adjourned. At the adjourned diet the accused, who in the meantime had obtained professional assistance, was again asked to plead, but, upon the advice of his agent, he refused to do so, on the ground that his plea had already been recorded. The case went to trial, and he was convicted. He brought a suspension, on the ground that the complaint was irrelevant, for want of specification. The Court refused the suspension, holding that the objection ought to have been stated before the case went to trial, and could not be pleaded in the Court of Appeal to the effect of suspending the conviction.

Opinion, *per* Lord Shand, That a complaint charging a contravention of secs. 1 and 3 of the Betting Act of 1853, as extended to

Scotland by the Betting Act of 1874, ought, in order that the accused may be informed of the case which he is called upon to meet, to set forth, so far as known to the prosecutor, the name or names of the persons with whom the betting transactions are alleged to have taken place in the premises said to be used, and also the nature of the transactions for which the premises were opened, kept, or used.

In Cochrane *v.* Ferguson, 27th Oct. 1882 (10 R., Just., 18), in a Police Court an accused person tendered a modified plea, which was recorded, but was not accepted by the Procurator-Fiscal. The Magistrates convicted the accused of the crime charged, "in respect of the above judicial plea of guilt and the evidence adduced," and imposed a fine, which was paid. The accused, having come to know of the terms of the conviction, brought a suspension. *Held*, that the conviction was null, as bearing to proceed partly on the plea of guilty and partly on the evidence adduced, and that there had been, in the circumstances, no such acquiescence or delay on the part of the accused as to bar him from pleading that nullity. Conviction suspended.

482. In certain cases Magistrate may proceed in absence of Accused, and may allow another Person to appear for him.—Where, in the Police Court of any burgh under this Act, a person accused of an offence for which the punishment is a pecuniary penalty only (recoverable by diligence or enforceable by imprisonment) fails to appear after being duly cited, the following provisions shall be in the option of the Magistrate:—

(*a.*) The Magistrate may adjourn the trial to another diet, and ordain the attendance of the accused at such diet:

(*b.*) The Magistrate may proceed to try the case in the absence of the accused:

(*c.*) The Magistrate may allow any other person to appear and plead for and defend the accused, provided the Magistrate is satisfied that such person has authority from the accused so to do:

(*d.*) The Magistrate, if of opinion that the personal presence of the accused is necessary in order that he may be identified by the witnesses or for any other reason, may require the personal presence of the accused accordingly, and, if need be, grant warrant for his apprehension.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate;" see p. 5, "person;" sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

In Collins *v.* Lang, 3rd Nov. 1887 (15 R., Just., 7), it was held that when a prosecutor deserts a complaint *pro loco et tempore*, the

complaint falls, and it is incompetent again to cite the accused to answer to it, though the prosecutor may raise a new complaint in the same terms.

A person accused before a Glasgow Police Court, having appeared to answer to the complaint, the diet was, on the prosecutor's motion, deserted *pro loco et tempore*, and he was liberated, and a pledge he had left for his appearance was returned to him. The prosecutor, into whose hands the complaint had come subsequently, obtained a warrant to re-cite, and it was again served upon the accused. He did not appear, but was apprehended, tried, and convicted. In a suspension of the proceedings brought by him, it was maintained that a suspension was incompetent, his remedy being under the Local Police Act, which prescribed a different mode of appeal, or being by appeal on a stated case under the Summary Prosecutions Appeals Act, 1875. *Held*, that the objection could not be sustained, because the proceedings against him under the new citation were fundamentally null, and therefore liable to suspension.

In Cogan or Devany *v.* Anderson, 16th Dec. 1854 (1 Irv., Just., 588), the Inverness Burgh Police Act, 1847, authorises the Magistrates and Sheriff to frame regulations for summary proceedings. A panel convicted of reset of theft appealed to the Court of Justiciary, on the ground that the proceeding was irregular, as she had received no notice, before coming to the police office, that she was to be tried for that crime. It was answered by the prosecutor, that the appellant was told five days before that she would be tried for reset, and on the morning of the trial she was told to come up to the police office as she was wanted. *Held*, that this was not sufficient intimation, and the conviction set aside.

In Wright *v.* Dewar, 27th Nov. 1873 (2 Coup., 504), a person convicted and sentenced in a Police Court, under the powers conferred by the General Police Act of 1862, brought a suspension on the ground of illegality and oppression, averring that after the case had been disposed of by his bail-bond being declared forfeited for non-appearance, he was apprehended and tried upon the same complaint at a late hour of the evening of the same day, in the absence of his agent; that adjournment had been refused, and his witnesses excluded from the Court. *Held*, upon a report by the Sheriff-Substitute, on a remit made to him to inquire and report before answer as to the competency of suspension, that although the facts might have warranted suspension, notwithstanding the limitation of review in sec. 430 of the Police Act, the illegality and oppression averred had not been proved, and suspension refused accordingly.

Held, that the adoption of the Summary Procedure Act in a prosecution before the Police Court, has not the effect of superseding or rendering inoperative clauses limiting review, contained in the special Act under which the prosecution is brought.

483. Magistrates may Dismiss with an Admonition.—The Magistrate may in his discretion, if such course appears to meet the justice of the case, dismiss any person

found guilty of a statutory or common-law offence with an admonition.

See sub-head (19), sec. 4, for definition of "Magistrate;" see p. 5, "person."

484. As to Signing of Convictions and Warrants.—Any Magistrate, though out of his jurisdiction, may sign any conviction, judgment, or warrant under this Act, provided the evidence and every other proceeding necessary to support such conviction, judgment, or warrant, shall have been before him when within his jurisdiction.

See sub-head (19), sec. 4, for definition of "Magistrate."

485. Warrants may be issued for Apprehension of Witnesses.—If any person cited as a witness or haver shall neglect or refuse to appear at the time and place appointed by the citation, and no just excuse shall be offered in his behalf, it shall be lawful for the Magistrate to issue a warrant for his apprehension; or, if the Magistrate shall be satisfied by evidence upon oath that it is probable that such person will not attend without being compelled so to do, it shall be lawful for the Magistrate to issue a warrant in the first instance for the apprehension of such person; and any witness or haver who shall wilfully fail to attend after being duly cited, or who shall refuse to be sworn or to be examined on affirmation, or who, after the oath or affirmation has been administered to him, shall refuse to answer any question which the Magistrate shall allow, or to produce documents in his possession when required by the Magistrate, may be summarily punished for his contempt by imprisonment or fine, such punishment not exceeding that which the Magistrate would be entitled to award in case of conviction upon the complaint.

See sub-head (19), sec. 4, for definition of "Magistrate;" see p. 5, "person;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

In Petrie *v.* Angus, 10th Dec. 1889 (17 R., Just., 3), a contempt of Court may be punished by the Court to which the contempt is offered, either incidentally to the proceedings with which the Court is then engaged, or by way of summary complaint presented within a reasonable time after the contempt alleged.

The Summary Procedure Act, 1864, sec. 10, enacts: "Any witness

who shall wilfully fail to attend after being duly cited . . . may be summarily punished for his contempt by imprisonment or fine, such fine not exceeding that which the Court would be entitled to award upon conviction upon the complaint."

A witness, who was duly cited to a diet of a Police Court, having wilfully failed to appear, was within a few days thereafter prosecuted before a different judge in the same Court, at the instance of the public prosecutor for contempt of Court, and was convicted. In a suspension of the conviction, *held*, that it was competent to proceed by way of separate complaint, and conviction upheld.

The Public Houses Amendment (Scotland) Act, 1862, sec. 27, also gives Magistrates trying complaints under the Act power to adjudge witnesses who should "prevaricate or wilfully conceal the truth," to be imprisoned for a period not exceeding sixty days, without formal complaint and in a summary manner; and provides that "the sentence awarding such punishment shall set forth shortly the nature of the offence." *Held*, in Soutar *v.* Stirling, 26th May 1888 (15 R., Just., 62), that under this enactment the particulars of the offence must be specified in the sentence, and that a sentence which merely found the witness "guilty, while under examination on oath, of prevarication and wilfully concealing the truth," fell to be quashed.

The Police and Improvement Act, 1850, sec. 360, gives to Magistrates trying complaints brought under it, power, "if any person, when on examination on oath . . . " before them, "shall prevaricate or wilfully conceal the truth," to adjudge such person, "in open Court and in a summary manner," to imprisonment not exceeding thirty days; "and the sentence awarding such imprisonment shall set forth the nature of such offence." *Held*, in Blake *v.* Macdonald, 5th March 1890 (17 R., Just., 46)—following Soutar *v.* Stirling, 26th May 1888 (15 R., Just., 62)—that a sentence which stated that a witness "wilfully concealed the truth, and persisted in such concealment after having been duly cautioned," did not sufficiently set forth the nature of the offence, and must therefore be set aside.

In Black *v.* Laing, 29th Oct. 1879 (7 R., Just., 1), John Black and William Black were charged at common law with having been guilty of the crime of malicious mischief, "in so far as on 24th July 1879, in or near" the old town green, "within the burgh of Alloa, they did wickedly, feloniously, and maliciously break down and destroy 4 feet or thereby of a paling enclosing a part of the said green, presently occupied by Henry Gray, the said fence being the property of the said Henry Gray."

The case was tried in the Police Court, and the Magistrate found the charge proven, and convicted the accused, who took an appeal to the High Court of Justiciary.

The Court held that though the conduct of the appellant was perhaps not to be commended, yet in the circumstances he was justified in removing the barrier erected across his access, and that any question as to his right fell to be settled by a civil action rather than criminally in the Police Court. They therefore unanimously quashed the conviction, and found the appellant entitled to £7, 7s. of modified expenses.

486. Examination of Witnesses.—Where, from the absence of witnesses for the prosecutor in any complaint, or from any other cause, it becomes necessary to adjourn the diet, and where witnesses for the accused in such prosecutions are in attendance, it shall be lawful for the Magistrate, at the request of the accused person, and if the Magistrate in the circumstances shall deem it proper, to take the evidence of the witnesses for the accused before the proof for the prosecution has been led or concluded; but the accused shall in all such cases be entitled to lead additional evidence after the prosecutor's case has been concluded.

See sub-head (19), sec. 4, for definition of "Magistrate;" see p. 5, "person."

487. In Default of paying Fines, Parties to be Imprisoned. — The Magistrate may sentence any person found liable in a pecuniary penalty to imprisonment until the same is paid, but in no case shall the period of imprisonment for non-payment exceed the respective periods hereinafter specified.

See sub-head (19), sec. 4, for definition of "Magistrate;" p. 5, "person;" see sec. 487 as to imprisonment on failure to pay penalty, etc., secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

In Paton *v.* Linton, 8th June 1880 (4 Coup., 338), objection to a complaint under sec. 278 of the Edinburgh Municipal and Police Act, 1879, that it did not set forth a *modus*, repelled. *Held*, also, competent for a judge of the Police Court, in inflicting a fine for a first offence under said section, to add to the sentence an award of imprisonment, not exceeding sixty days, until the said fine should be paid. Also, that it was within the discretion of such judge, in terms of sec. 338 of the Statute, to adjourn the trial, after evidence for the prosecution has been partly adduced, to enable the prosecutor to procure and adduce evidence for the purpose of laying a foundation for questions to be put to witnesses for the prosecution.

488. Power to order Offenders to find Caution for Good Behaviour in lieu of Punishment.—It shall be lawful for the Magistrate, in lieu of any punishment by imprisonment or fine, to ordain any offender to find caution for good behaviour for any period not exceeding six months, and under a penalty not exceeding £20; and, in the case of any offence committed by a child of not more than twelve years of age, it shall be lawful for the Magistrate to summon the parent

or other guardian of such child to appear in Court, and to ordain such parent or guardian to find caution for the good behaviour of such child as aforesaid; and to sentence the person ordained to find such caution to be imprisoned till caution be found, but not exceeding the respective periods hereinafter specified: Provided always, that no parent or guardian shall be liable, in terms of this section, either to imprisonment for failure to find caution, or to forfeiture of the caution when found, if such parent or guardian prove that he exercised all due care to control the child, and to prevent the commission of offences by such child.

See sub-head (19), sec. 4, for definition of "Magistrate;" p. 5, "person." The expression "month" means calendar month. See sec. 3, Interpretation Act, 1889, 52 & 53 Vict. c. 63.

In Farquharson *v.* Guthrie, 15th July 1884 (11 R., Just., 55), a boy, fifteen years old, pleaded guilty in a Police Court to assaulting a woman by striking her once on the face to the effusion of blood, and was sentenced to be imprisoned for ten days, and thereafter to be sent to a reformatory school for four years, under the provisions of the Reformatory Schools Act, 1866, sec. 14. He brought a suspension, alleging that he had been hurried off to the Court, and without notice to his parents, and without legal advice had been asked to plead, and had in his confusion pleaded guilty, under a misunderstanding as to the nature of the charge. Six previous Police Court convictions of other offences than assault were produced in the High Court.

The Court, in respect of the trifling nature of the offence, and of the want of notice to the boy's parents, suspended the conviction, in so far as regarded the order of detention in the reformatory school.

See also M'Kenzie *v.* M'Phee, referred to under sec. 481.

489. Or to find Caution in addition to Imprisonment or Fine.—It shall be lawful for the Magistrate, in addition to any punishment by imprisonment or fine, to ordain the offender to find caution as aforesaid, from and after the expiry of the term of imprisonment, or from and after the payment of the fine or pecuniary penalty specified in the said sentence, or from and after the expiry of the term of imprisonment for non-payment thereof; and in case such caution shall not then be found, it shall be lawful to sentence the person ordained to find such caution to be further detained in prison beyond the expiry of said term of imprisonment, until such caution be found; but in no case shall the whole period of imprisonment, including the period of

detention for not finding such caution, exceed sixty days, except as hereinafter provided.

See sub-head (19), sec. 4, for definition of "Magistrate;" p. 5, "person;" see sec. 501 as to periods of imprisonment.

490. Punishment for Common-Law Offences.—The Magistrate may either sentence the accused, on conviction for common-law crimes or offences, to imprisonment, with or without hard labour, for any period not exceeding two months, or he may impose a fine not exceeding £10, and, failing payment thereof, award imprisonment, not exceeding the respective periods after specified; and in lieu of, or in addition to, either of these modes of punishment, he may order the accused to find security for good behaviour for any period not exceeding six months, and under a penalty not exceeding £20, and failing the finding of such security, he may award imprisonment, or additional imprisonment not exceeding the respective periods after specified, but in no case shall the total imprisonment exceed sixty days, except as hereinafter provided.

See sub-head (19), sec. 4, for definition of "Magistrate;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors. There is an inconsistency in this section. The first part authorises the Magistrate to award imprisonment for two months, or to impose a fine, and failing payment imprisonment for two months. The latter part authorises the Magistrate in lieu of, *or in addition* to either of these modes of imprisonment, to order the accused to find security for good behaviour under a penalty, failing which he may award imprisonment, *or additional imprisonment*, not exceeding the respective periods after specified, but in no case shall the total imprisonment exceed sixty days, except as hereinafter provided." The "hereinafter provided" evidently refers to sec. 501, wherein the maximum period of imprisonment is two months. There will be great danger in working out these impracticable provisions, and it will be safer to adhere to the maximum of sixty days.

Grant *v.* Grant, 3rd Dec. 1885 (2 Irv., 277). In a prosecution under sec. 3 of the Statute 4 Geo. IV. c. 34, the Justices committed the defender, and sentenced him to be imprisoned for a period not exceeding two calendar months. The conviction was suspended, in respect that no definite term of imprisonment had been awarded.

But see Paton *v.* Linton (4 Coup., 338), *supra*, p. 712.

491. For Recovery of Forfeited Bail-Bonds and Bonds of Caution.—When any person shall be appre-

hended, and afterwards liberated on bail and shall fail to appear, or when any person who shall have found caution for good behaviour, or for keeping the peace as aforesaid, shall commit a new offence inferring forfeiture of such caution, it shall be lawful for the Magistrate, on the motion of the Burgh Prosecutor, to declare the sum contained in the bail-bond or bond of caution to be forfeited, and to order the cautioner to be charged to make payment thereof to the Clerk within six days after the date of such charge, and in default of such payment, after the lapse of such period, to grant warrant for apprehending and imprisoning the cautioner till the said sum be paid, but which period of imprisonment shall not exceed the respective periods hereinafter specified from the time of incarceration, and after such imprisonment no further procedure against the cautioner shall be competent on the bond; and when any money or other article shall be deposited by any person as a security for his appearance, and such person shall fail to appear, it shall be competent to the Magistrate to declare such deposit to be forfeited; and if it be money, it shall be forthwith ordered by the Magistrate to be paid to the Clerk; and if it be not money, such article so deposited shall be ordered by the Magistrate to be sold by public auction, then or at some periodical sale, and the free proceeds shall be paid to the Clerk, and in both cases accounted for by him, along with the forfeitures, penalties, and fines, to the Collector, and applied in the same manner as forfeitures, penalties, and fines are, by the provisions of this Act, directed to be applied.

See sub-head (4), sec. 4, for definition of "burgh," (8) "Clerk," (19) "Magistrate;" see p. 5, "person;" sec. 461, "Burgh Prosecutor;" see sec. 501 as to periods of imprisonment, and sec. 498 as to "application of penalties."

492. Cautioners in Bonds may subscribe by Mark.—Any bail bond, or bond of caution, the cautioner in which is unable, or shall declare he is unable, to subscribe his name, shall be valid and effectual if such cautioner shall adhibit to such bond his mark, in presence of two witnesses, who shall subscribe the said bond in testimony thereof.

The mark must be adhibited to the bond in presence of two witnesses, and the bond should bear a docquet that the cautioner

declared he was unable to subscribe, and that the mark was so adhibited.

493. Warrant of Commitment.—In all cases where imprisonment takes place, a short extract of the charge and sentence, signed by the Clerk of the Police Court or his depute, shall be sufficient warrant of commitment: Provided always, that any person sentenced to imprisonment, or to imprisonment in consequence of non-payment of any pecuniary fine, penalty, forfeiture, or expenses, or for want of caution being found, or otherwise, may be detained in the police office or police cells for a reasonable time, to allow of such extract being made, such time not exceeding in any case twelve hours.

See sub-head (8), sec. 4, for definition of "Clerk;" sec. 460, "Clerk of Police Court;" see p. 5, "person."

494. Police Officers may be dismissed by Magistrates.—It shall be lawful for the Magistrates, on the report of any one Magistrate, without the necessity of any complaint, to direct the Chief Constable to dismiss any constable under him whose conduct in any proceedings that shall form the subject of investigation before the Magistrate shall, in the opinion of the Magistrate, render such constable unfit to be any longer retained in the police establishment, and such constable shall be dismissed accordingly; but the Magistrates may make further inquiry, and may decline to give effect to the report.

See sub-head (19), sec. 4, for definition of "Magistrate," (20) "Magistrates."

See M'Murchy *v.* Campbell, 21st May 1887 (14 R., 725), where a police officer brought an action of damages for slander against an Inspector of Police and a Procurator-Fiscal, stating that they, acting in concert, or one or other of them, had, maliciously and without probable cause, prepared and sent to the pursuer's superior officer, the Chief Constable of the county, a report, falsely stating that there were current in certain parts of the county rumours to the effect that he had been guilty of immoral conduct, and that an official investigation as to his conduct was required, in consequence of which report he had been suspended for a time from duty, and had suffered in feelings and reputation. *Held*, having regard to the nature of the report and its privileged character, that, in order to the relevancy of such an action, a specific statement of the grounds on which malice was to be inferred was required, and that, such not being given, the action was irrelevant.

Opinion, That an action will not lie against a police officer in respect of defamatory statements made in a report sent, in the discharge of his duty, to his superior officer.

495. Proceedings not to be void for want of Form, and Judgments to be final.—No order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted before the Magistrates, shall be quashed for want of form, and no warrant of imprisonment, and no extract of judgment, shall be held void by reason of any defect of form therein, provided it be inferred therefrom that it is founded, or has proceeded, on a conviction or judgment, and there be a valid conviction or judgment to sustain the same; and all judgments and sentences pronounced by the Magistrate shall be final and conclusive, and not subject to suspension, or appeal, or any other form of review, or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the Magistrate, or of such deviations, in point of form, from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the Magistrate; and such suspension, or appeal, or review, or stay of execution, must be presented before the next sitting of the High Court of Justiciary within the circuit, or, where there is no circuit, before the High Court of Justiciary at Edinburgh, in the manner and by and under the rules, limitations, conditions, and restrictions, which shall from time to time be prescribed by the said High Court of Justiciary: Provided that—

(1.) Prosecutions under this Act shall be subject to the provisions of the Summary Prosecutions Appeals (Scotland) Act, 1875, and any Act amending the same:

(2.) Where, by this Act, jurisdiction is given to the Magistrates to try any offence created by a Statute, which expressly provides an appeal, such appeal shall still be competent.

See sub-head (20), sec. 4, for definition of "Magistrates," (19) "Magistrate."

In Lochrie *v.* Molison, 21st June 1854 (1 Irv., 506), objections repelled to the regularity of a conviction under the Airdrie Police Act — (1) That the sentence was vitiated by interlineations and superinductions; (2) That the warrant of imprisonment did not refer with sufficient distinctness to the complaint on

which it bore to proceed, in respect that the complaint was against two defenders, while the extract or warrant of imprisonment made mention only of the suspender; (3) That the warrant of imprisonment did not set forth the sentence awarded against each of the two defenders; (4) That the name of the suspender was not inserted in the warrant of imprisonment in the manner prescribed by the Schedule of the Statute.

In Watson and Another *v.* Stuart, 3rd July 1878 (4 Coup., 67), suspension of a conviction and sentence, on the ground that the public prosecutor had been allowed to speak last at a trial upon a summary complaint for the crime of theft, refused in the circumstances, and in respect there was no objection taken at the time.

Held, also, that an allegation on the part of the accused, that no proof was adduced at the trial to show that the articles stolen were in the possession of the owners during the time libelled in the complaint, was insufficient to entitle them to obtain an order from the Court for production of the notes of the evidence taken by the Sheriff; and *observed*, that the Court has for long treated the judgment in cases brought before a Police Magistrate under the Act 9 Geo. IV. c. 29, as final, unless upon a statement of the occurrence of some substantial error or injustice.

In Murphie *v.* Malcolm, 5th April 1872 (2 Coup., 217), a conviction having followed upon one of two complaints before a Police Court, the other not having been proceeded with, the person convicted appealed; but in his appeal the conviction was erroneously said to have followed upon the complaint, upon which no procedure had been taken — motion to be allowed to amend refused, and appeal dismissed.

In Smith *v.* Graham, 16th July 1873 (2 Coup., 479), an interlocutor of a Police Court, continuing a criminal diet to the 22nd current, bore to be dated 19th May 187 , the day of the month being written on an erasure, and the year omitted to be filled in. The accused appeared at the adjourned diet, pleaded not guilty, and after trial was convicted. A suspension of the conviction, on the ground that no interlocutor continuing the diet was pronounced and signed on the 19th, or, at all events, that such interlocutor was vitiated *in essentialibus*, and the libel had therefore fallen, repelled, and held that the accused, having appeared and pleaded, was barred from founding on the objection.

In Gallie, etc., *v.* Ferguson, 21st Nov. 1883 (11 R., Just., 13), the record of a conviction in a Police Court bore that certain of the accused were "to forfeit and pay the sum of 20s. each of penalty," and that the others were "to forfeit and pay the sum of 15 each of penalty." Fines of 20s. and 15s. respectively were paid. In a suspension, *held* that the omission of the word "shillings" in the second case did not vitiate the conviction. See also Stewart *v.* M'Niven (18 R., Just., 36).

In Boyce *v.* Shaw, 15th Dec. 1891 (19 R., Just., 13), in an appeal, the following statements were made by the appellant: The appellant, a lad of nineteen, was apprehended in the streets of Glasgow shortly after midnight, and taken to prison. Next morning he was brought

before the Magistrate, and asked to plead to a charge of riotous and disorderly behaviour, under sec. 135 of the Glasgow Police Act, 1866, under which section (Art. 5) the penalty for conviction of the offence was £10, or alternatively, without payment, imprisonment for sixty days. He pleaded not guilty, and, after evidence led, he was convicted, and sentenced by the Magistrate to fourteen days' imprisonment. This was his first offence: he appealed under sec. 132 of the Glasgow Police Act, on the grounds, (1) that the sentence was oppressively severe; and (2) that the Magistrate had failed, in terms of sec. 11 of the Summary Procedure Act, 1864, to inform him of his right to an adjournment for the purpose of preparing for his defence.

Held, (1) that the sentence was in the discretion of the Magistrate, and could not be reviewed by the High Court on a mere statement that it was severe; and (2) that there was nothing in the case to suggest to the Magistrate that it was necessary, as a matter of justice, to inform the appellant of his right to an adjournment, and that the conviction could not be set aside on the ground that he had not done so.

Observed, That while there was no legal obligation on a Magistrate to inform an accused of his right to an adjournment for forty-eight hours, there might be circumstances, in particular cases, which might render it proper that he should do so, and that his not having done so might be a material circumstance in considering whether a conviction should be set aside.

Per Lord Justice-Clerk, "In the case of a first offence, it would be very advisable" to inform the accused of his right to an adjournment.

In Jamieson and Others *v.* Mackay, 24th Nov. 1862 (4 Irv., 246), circumstances in which a conviction for theft by a Burgh Magistrate, under the General Police Act, was suspended, on the ground that the proceedings were oppressive. . . . The suspenders were seven boys, sons of respectable parents in the town of Dumbarton, the age of one of them being sixteen, that of the rest varying from eight to thirteen. On Sunday, 13th July 1862, a theft of strawberries was alleged to have taken place from a garden in the neighbourhood. One of the boys was apprehended near the premises, on the charge of having been concerned in the theft, and the others were apprehended on the same charge, without a warrant, on the same evening, while in their homes. They were all lodged in the police office; but, with the exception of one, were allowed to be bailed out by their friends, on their giving security to the amount of £2 for each, that they would bring them back next morning. On Monday, at 10 A.M., they assembled at the Police Court—one of them attended by his mother, one by an elder brother, and the rest without friends. The statement of facts for them bore that, on arriving at the Court, they were separated from their friends, and confined in a room under the charge of an officer, who repeatedly enjoined them to plead guilty, telling them that if they did so they would get off easily. When the case was called they were put at the bar, when

a complaint was read, charging them all with the theft of six pints of strawberries. This was the first notice they had of the existence of such a formal complaint. They were not aware that the case was to be proceeded with that day. The complaint had not been served on them, and they had received no citation to be present to answer it. A citation, with warrant for their apprehension and to cite witnesses for both parties, was, for form's sake, filled up and signed by the Magistrate, after they were in Court. On the complaint being read over to them, they all, with one exception, pleaded "guilty." Thereupon the presiding Magistrate found them guilty as libelled, and sentenced them to imprisonment for fifteen days; and, on the motion of the complainer, deserted the diet, *pro loco et tempore*, against the one who had pleaded "not guilty."

In Charleson *v.* Duffes, 10th June 1881 (8 R., Just., 34), sub-sec. 5 of sec. 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, provides that an appellant shall, within three days of receiving the appeal case from the inferior judge, "give notice of appeal in writing to the respondent." An appellant posted the statutory notice on the third day, but the respondent did not receive it until the morning of the fourth. *Held*, that this was sufficient compliance with the Statute.

Held (following Boyd *v.* M'Jannet, 21st May 1879 (6 R., Just., 43), overruling Scott *v.* Morrison, 9th April 1872 (2 Coup., 218), that a general conviction "of the offence charged," following on an alternative complaint, is incompetent.

In M'Guire *v.* Fairbairn, 9th Nov. 1881 (9 R., Just., 4), a boy, fifteen years of age, pleaded guilty to a breach of the public peace, and was sentenced to be imprisoned for ten days, and was thereafter, in terms of sec. 14 of the Reformatory Schools Act, 1866, sentenced to be sent to a reformatory school for five years. In a suspension of the said sentence, the Court held that such minor offences did not come within the scope of the said section, which was intended to apply to minor grades of serious crimes, and the latter sentence quashed.

In Lawrie *v.* Roberts, 26th May 1882 (9 R., 22), after a Police Court trial, in which the charge was found not proven, the accused, addressing the Magistrate, made use of the following language:—"I am not disappointed. I think it was imprudent of you to have sat in this case, being an interested party." On being found fault with by the Magistrate, the accused at once withdrew the words, but the Magistrate thereupon found him guilty of contempt of Court, and pronounced a sentence of three days' imprisonment without the option of a fine. In a suspension the Court quashed the conviction, being of opinion (1) that the sentence was in the circumstances oppressive; and (2), *per* Lord Young and Lord Craighill, *diss.* Lord Adam, that the language used did not amount to contempt of Court.

In Cochran *v.* Ferguson, 27th Oct. 1882 (10 R., Just., 18), in a Police Court an accused person tendered a modified plea which was recorded, but was not accepted by the Procurator-Fiscal. The

Magistrate convicted the accused of the crime charged, "in respect of the above judicial plea of guilty and the evidence adduced," and imposed a fine, which was paid. The accused having come to know of the terms of the conviction, brought a suspension. *Held*, that the conviction was null, as bearing to proceed partly on the plea of guilty and partly on the evidence adduced, and that there had been, in the circumstances, no such acquiescence or delay on the part of the accused as to bar him from pleading that nullity. Conviction suspended.

In Bell *v.* M'Phee, 18th July 1883 (10 R., Just., 78), a summary charge of assault (in the Glasgow Police Court), in so far as the accused did, at a certain time and place, "wickedly and feloniously assault, strike on the face, or otherwise abuse," two persons, "to their hurt and injury respectively," was followed by a general conviction "of the crime libelled." The accused brought a suspension in the High Court of Justiciary, and the Court, repelling an objection to their jurisdiction that the provisions of the Glasgow Police Act, 1866, excluded review except to the Circuit Court (*diss.* Lord Justice-Clerk), suspended the conviction.

In Farquharson *v.* Guthrie, 15th July 1884 (11 R., Just., 55), a boy, fifteen years old, pleaded guilty in a Police Court to assaulting a woman by striking her once on the face to the effusion of blood, and was sentenced to be imprisoned for ten days, and thereafter to be sent to a reformatory school for four years, under the provisions of the Reformatory Schools Act, 1866, sec. 14. He brought a suspension, alleging that he had been hurried off to the Court, and without notice to his parents, and without legal advice had been asked to plead, and had in his confusion pleaded guilty, under a misunderstanding as to the nature of the charge. Six previous Police Court convictions of other offences than assault were produced in the High Court.

The Court, in respect of the trifling nature of the offence, and of the want of notice to the boy's parents, suspended the conviction in so far as regarded the order of detention in the reformatory school.

See also M'Kenzie *v.* M'Phee, referred to under sec. 481.

In Nicol *v.* M'Neill, 13th July 1887 (14 R., Just., 47), a complaint in a Police Court at the instance of the Procurator-Fiscal, charging a contravention of the Act 1661, c. 18, "for the due observation of the Sabbath day," set forth that the accused was "liable, on conviction, to pay a penalty of £10, in Scots money, or 16s. 8d. in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days," and prayed that the accused should be punished "according to law." The complaint did not bear to proceed under any of the Statutes relating to summary procedure. The evidence of the witnesses was recorded, and the recorded depositions were signed by the respective witnesses and by the presiding Magistrate. The accused was convicted. On a suspension, conviction quashed, *per* the Lord Justice-General, Lord Young, and Lord M'Laren, on the ground that the case of Bute *v.*

More, 24th Nov. 1870 (1 Coup., 495; 9 Macph., 180), decided that a summary complaint for a contravention of the Act 1661, c. 18, was incompetent, and *per* Lord Justice-Clerk, Lord Mure, Lord Craighill, and Lord M'Laren, on the ground that, even if a summary complaint were competent, the present complaint could not be sustained, not being brought under the Summary Jurisdiction Acts, 1864 and 1881.

Observation, On the question whether the Act 1661, c. 18, was in desuetude.

In Walker *v.* Lang, 25th Nov. 1867 (5 Irv., 507), it was held that a suspension of a conviction obtained before the Glasgow Police Court, under the Glasgow Police Act, on the ground of misconstruction of that Statute by the Magistrate, and want of jurisdiction, was incompetent, and that the proper mode of obtaining review under the Act was by appeal to the Circuit Court, in terms of secs. 131 and 132 thereof.

In Duffy *v.* Lang, 5th March 1869 (1 Coup., 238), it was held that a suspension of a conviction obtained in the Glasgow Police Court upon a complaint brought in pursuance of the provisions of the Glasgow Police Act, 1866, 29 & 30 Vict. c. 273, was incompetent before the High Court of Justiciary in the first instance, no reason being stated why appeal to the next Circuit Court was not taken, as provided for by the Act.

In Jacques François de Belmont *v.* John Lang, 28th June 1871 (2 Coup., 95), it was held that, in terms of the limitations of review contained in secs. 131 and 132 of the Glasgow Police Act, 1866, the proper mode of obtaining review of a conviction and sentence obtained upon a complaint for an offence at common law before the Magistrates of Glasgow, under sec. 135 of the Act, is by appeal to the next Circuit Court to be held at Glasgow, and a bill of suspension before the High Court dismissed.

In Mackenzie *v.* Lang, etc., 9th Nov. 1874 (2 R., Just., 1), it was held that it was incompetent for the High Court of Justiciary to entertain a suspension of a sentence of the Police Court of Glasgow, sitting under the Glasgow Police Act, 1866, on grounds which amounted to defect of jurisdiction, and malice and oppression on the part of the judge, in respect that in such cases the Statute had provided an exclusive remedy by appeal to the Circuit Court.

Observed, That if the proceedings had been beyond the Statute, the primary jurisdiction of the High Court would not have been excluded.

In Kirkpatrick *v.* Police Commissioners of Dumbarton (Glasgow Circuit), 29th April 1870 (1 Coup., 434), the appellant, Kirkpatrick, previous to the appeal being heard, presented a bill to the High Court against Mackay, the procurator-fiscal, for suspension of a conviction by the Magistrates of Dumbarton, for a contravention of sec. 130 of the General Police and Improvement Act, 1862, which bill of suspension was, on 4th February 1870, refused, the Court were of opinion that, by secs. 430 and 437 of the General

Police and Improvement (Scotland) Act, 1862, review of a conviction obtained in a prosecution instituted "by virtue of" sec. 130 of the Act, was competent only on the grounds specified in sec. 430 thereof, and by appeal to the next Circuit Court of Justiciary of the district. The appeal was according brought and sustained.

In Sinclair *v.* Hollis, 9th Nov. 1881 (9 R., Just., 1), it was held that the additional Circuit Courts established by Order in Council dated 18th May 1881, and relative Act of Adjournal under sec. 3 of the Act 9 Geo. IV. c. 29, have the same criminal and civil jurisdiction as the ordinary Circuit Courts.

In Couper *v.* Lang, 12th Dec. 1889 (17 R., Just., 15), the Summary Prosecutions Appeals Act provides for an appeal by either party to a "cause," if dissatisfied with the determination of the inferior judge in point of law. "Cause" is defined to include "every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior judge." *Held*, that an application by a Local Authority under the Public Health Act, for warrant to destroy a carcase which had been seized by the Sanitary Inspector as unfit for human food, and which did not conclude for any fine or expenses, was not a "cause" within the meaning of the definition, and, therefore, that the inferior judge was right in refusing to state a case for appeal against his decision.

496. No Suspension or Stay of Execution, etc., to prevent Payment of Penalties.—Such suspension, or appeal, or review, or stay of execution, shall not operate as a suspension or stay of execution of any order or sentence of the Magistrate requiring the payment of any penalty, unless on consignment thereof in the hands of the Clerk of Court, nor of any order or sentence of the Magistrates awarding imprisonment, unless on sufficient caution to the satisfaction of the Magistrate for the appearance of the person appealing at such time and place as he shall direct; and in all cases of prosecution before the Magistrate, it shall be lawful for the Magistrate whose sentence shall be brought under review in another Court, to authorise the expenses incurred in the proceedings in such other Court to be defrayed out of the burgh general assessment: Provided always, that at the first meeting of the Commissioners after any such sentence shall have been brought under review as aforesaid, the Burgh Prosecutor shall make a report of the facts and circumstances of the prosecution on which any such sentence shall have

been pronounced and brought under review, and the Commissioners shall thereupon direct such sentence so brought under review to be defended or not, as to them shall seem proper; and if they shall direct such sentence not to be defended, then no expenses incurred in defending such action subsequent to such meeting shall be defrayed out of the said assessment.

See sub-head (8), sec. 4, for definition of "Clerk," (9) "Commissioners," (4) "burgh," (19) "Magistrate," (20) "Magistrates;" sec. 460, "Clerk of Police Court," 461, "Burgh Prosecutor;" see p. 5, "person."

497. Fines to be paid to the Clerk or other Person.—Except as hereinbefore provided, all forfeitures, penalties, fines, and expenses imposed by the Magistrates, and recovered, shall be paid to the Clerk or such other person as the Magistrate may direct, and shall be accounted for by him once every month, or such other time or times as the Commissioners may direct, to the Collector, to be disposed of as herein mentioned; and the Burgh Prosecutor is hereby directed, on the first Monday of every month, to intimate to the Collector the amount of the forfeitures, penalties, and fines imposed in the previous month, stating the amount thereof recovered.

See sub-head (8), sec. 4, for definition of "Clerk," (9) "Commissioners," (8) "Collector," (19) "Magistrate," (20) "Magistrates;" see sec. 461, "Burgh Prosecutor." It is not stated whether the fines are to be paid to the Clerk of Court or the Clerk to the Commissioners. Where the offices are held by one person, there will be no difficulty. When this is not so, the matter should be made clear by an order of the Magistrate.

498. Application of Penalties.—The whole forfeitures, penalties, and fines imposed by the Magistrate and paid to the Clerk or other person as aforesaid, shall be applied in payment of the expenses incurred in alimenting prisoners detained in custody in the police office or station houses: Provided always, that if such forfeitures, penalties, and fines shall not be sufficient for these purposes, whatsoever further sum may be required shall be paid from the burgh general assessment; and if such forfeitures, penalties, and fines shall be more than sufficient for these purposes, the surplus

shall be applied to the same purposes as the burgh general assessment.

See sub-head (8), sec. 4, for definition of "Clerk," (13) "house;" see p. 5, "person;" sec. 340 as to burgh general assessment.

499. Penalty where no Penalty is otherwise stated.—Every provision of this Act, to the contravention of which no penalty is attached, shall be read and construed as if it were thereby provided that every person contravening the same shall, on conviction thereof, be liable to a penalty not exceeding 40s.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 500 and 501 for penalty on repetition of offences and power to mitigate, and sec. 458 as to punishment of abettors.

500. Penalties on Repetition of Offences.—Where by this Act any pecuniary penalty or other punishment is imposed in respect of any offence described in this Act, then and in every such case, if the nature of the case permits, and if an intention to the contrary does not appear in this Act, such penalty or punishment may be inflicted for every repetition of such offence.

See sec. 487 as to imprisonment on failure to pay penalty, secs. 499 and 501 for penalty for offences, periods of imprisonment, and power to mitigate, and sec. 458 as to punishment of abettors.

501. Power to mitigate Penalties. Periods of Imprisonment in proportion to Fines, etc.—In all proceedings under the jurisdictions conferred by this Act,—

(*a.*) Where the punishment of imprisonment is imposed by this or any other Act under which the Magistrate has jurisdiction, the Magistrate may, if he thinks the justice of the case demands it, substitute for imprisonment a fine not exceeding £25, or reduce the period of imprisonment, and, notwithstanding any enactment to the contrary, impose the same without hard labour, and when the punishment of a penalty or fine is imposed he may reduce the amount of such fine, and when in the case either of imprisonment or a fine the accused is required to come under his own obligation, or to find caution or security for keeping the peace and observing some other condition, or to do any of such things, he may dispense with any such requirement or any part thereof.

(*b.*) Where a warrant of imprisonment is granted, whether in default of payment of a penalty or sum specified in a forfeited bond, or for failure to find caution or security, when the amount adjudged to be paid, or for which security is to be found—

Does not exceed 10s. .	The period of imprisonment shall not exceed seven days.
Exceeds 10s. but does not exceed £1 . . .	Fourteen days.
Exceeds £1 but does not exceed £5 . . .	One month.
Exceeds £5 . . .	Two months.

Provided always, that nothing in this Act contained restricting the amounts of fines or periods of imprisonment shall apply to or affect the prosecutions authorised, or the penalties enforceable under the Licensing (Scotland) Acts, 1828 to 1887, or to the Prevention of Crimes Act, 1871, or to any Act other than this Act, under which the Magistrate has jurisdiction to impose fines for greater amounts, or imprisonment for longer periods, than those of this Act.

See sub-head (19), sec. 4, for definition of "Magistrate;" see sec. 487 as to imprisonment on failure to pay penalty, secs. 499 and 500 for penalties, and sec. 458 as to punishment of abettors. "Month" means calendar month, see sec. 3, 52 & 53 Vict. c. 63.

In Gallie *v.* Ferguson, 21st Nov. 1883 (11 R., Just., 13), the record of a conviction in the Police Court bore that certain of the accused were "to forfeit and pay the sum of 20s. each of penalty," and that the others were "to forfeit and pay the sum of 15 each of penalty." Fines of 20s. and 15s. respectively were paid. In a suspension, held that the omission of the word "shillings" in the second case did not vitiate the conviction.

See also Stewart *v.* M'Niven (18 R., Just., 36), *supra*, p. 691.

502. Chief Constable to keep Register of Persons convicted.—The Chief Constable shall cause to be kept a register of the name, description, crime, and sentence of persons charged with and convicted before the Magistrates of crimes and offences, and shall cause to be entered therein such particulars as he may from time to time be directed to enter by the Magistrates, or as may be necessary for supplying judicial statistics; and the entries in such register, or any

extracts therefrom, certified by the Chief Constable, shall be taken and received as evidence of every sentence and conviction, and of any previous conviction and the particulars thereof.

See sub-head (20), sec. 4, for definition of "Magistrate;" see p. 5, "person." This is a new provision. A register ought to be carefully framed. It would have been a convenience if a form had been given, so that uniformity might have prevailed.

503. Proceedings subsequent to Conviction.—Where, in consequence of the requirements of this Act, it is necessary that any warrant of imprisonment or other warrant should be granted, subsequent to the conviction or judgment, or where any other ulterior proceeding is enjoined, all such warrants or ulterior proceedings may be taken without the presence of the respondent.

This is merely a permissory clause, of which advantage ought not to be unduly taken. It is a sound rule in criminal practice that every proceeding affecting a person ought, as far as practicable, to be done in presence of that person.

504. Signature of one Magistrate sufficient in certain Proceedings.—In cases in which any matter or proceeding shall be cognisable by two or more Magistrates, it shall be sufficient that any warrant of imprisonment or other warrant or proceeding prior or subsequent to the conviction or judgment shall be subscribed by one Magistrate, and it shall not be necessary that such Magistrate shall be or shall have been present at the hearing of the complaint, but the conviction or judgment shall in all cases be signed by such number of Magistrates present at the hearing, and concurring in the result thereof, as may be required by this Act; and in case of an equal division of opinion among the Magistrates present, the complaint shall be held to be not proved, and judgment shall be given for the accused.

See sub-head (19), sec. 4, for definition of "Magistrate," (20) "Magistrates."

In Lock and Doolen *v.* Steel, 6th Feb. 1850 (Shaw, Just., 307), it was held that it was necessary that every sentence should be signed by two Justices; and a note of suspension passed, in respect the sentence under review had been signed by one only, although two were present when it was pronounced.

The Glasgow Police Act, 6 & 7 Vict. c. 99, provides that any

person aggrieved by any sentence pronounced under that Act may appeal to the next Circuit Court, and it excludes all other modes of review. *Held*, (1) In Gray *v.* M'Gill, 27th Feb. 1858 (3 Irv., 29), that the High Court of Justiciary has jurisdiction to quash a conviction under the said Act, where such conviction labours under a fundamental nullity, appearing *ex facie* of the proceedings. (2) That a conviction was fundamentally null, in respect (*a*) that it bore to proceed partly on evidence adduced, and partly on the admission of the accused person; (*b*) that it was not signed until after the accused person had been removed from the bar, and was undergoing his sentence; (*c*) that the complaint did not libel upon the Statute, which was the only basis for the summary proceedings adopted, and that it ought to have been restricted in its conclusions to the special punishment authorised by that Statute.

Observed, That, in the circumstances of the case, several days having elapsed between the date of the alleged offence and the apprehension of the accused, who was a mere child, and law-abiding, a written complaint ought to have been served upon him, and time ought to have been given to him to lead evidence; and that the Glasgow Police Act did not authorise the summary mode of procedure adopted where the accused was not found in the commission of the offence charged.

In Williamson *v.* Thomson, 29th Nov. 1858 (3 Irv., 295), the sentence of a Police Court was suspended, in respect that it was signed by one Magistrate only, whereas the case was tried before a Court of two Magistrates.

The Airdrie Police Act, 1821, declared certain acts to be offences, and provided that the Provost and Magistrates, or a certain number of them, which was specified in reference to each particular offence, should be the tribunal for trying such offences. An amending Act, passed in 1849, created a new magistracy, and conferred upon them the jurisdiction in offences under the original Act. The interpretation clause bore that "the word 'Magistrate' or 'Magistrates' shall include the Provost and Bailies, or any one or more of them."

In Paterson *v.* Rose, 12th March 1875 (2 R., Just., 20), it was held that one Magistrate sitting under the amending Act could exercise the jurisdiction conferred upon the Magistrates, or any two of them, in relation to an offence under the original Act.

505. Limitation of Police Prosecutions.—All prosecutions, actions, or proceedings for recovery of fines, penalties, or forfeitures, by virtue of the provisions of this Act, shall be commenced within three months from the time the facts on which such prosecutions, actions, or proceedings were brought shall have been discovered and known to the Chief Constable or Burgh Prosecutor, and not thereafter.

See sec. 78 as to "Chief Constable," and sec. 461 as to "Burgh Prosecutor;" see Hill *v.* Dymock, 7th July 1857 (19 D., 955), p. 731.

506. As to Actions of Damages against Public Prosecutors.—No Burgh Prosecutor, or other party prosecuting for the public interest, by complaint under the provisions of this Act, shall be liable to pay, or be found liable by any Court in a greater sum than £5 as damages for or in respect of any proceedings taken, or anything done on such complaint, or on any judgment following on such complaint, unless the person prosecuting for damages shall aver and prove that such proceeding was taken or done maliciously, and without probable cause; but the party suing such damages shall not be entitled to have any decree or verdict pronounced against such Burgh Prosecutor or other party prosecuting for any damages, or return or repetition of penalty or costs, in case such prosecutor shall prove at the trial that the party suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater or other punishment than was assigned by law to such offence; and any such prosecutor sued as aforesaid may at any time put an end to the action, in so far as not founded on acts done maliciously and without probable cause, by tendering payment of the sum of £5 as damages, with the amount of the penalty, if recovered, and the expenses of such action to the date of the tender.

See sec. 461 as to "Burgh Prosecutor;" see p. 5, "person." See also a similar provision in the Summary Procedure (Scotland) Act, 1864, 27 & 28 Vict. c. 53, sec. 30.

(1) It will be observed that the benefit of this section is limited to the Burgh Prosecutor, or other party prosecuting for the public interest. It is probable that the clause would apply to any Burgh Prosecutor appointed under sec. 461, as well as to any competent person appointed by the Magistrate to conduct prosecutions in the absence of the Burgh Prosecutor, in terms of sec. 462. The section will not, however, protect a private party prosecuting in the Police Court.

(2) It will further be observed that the section is limited to cases raised "by complaint, under the provisions of this Act." This will give protection to proceedings which may be otherwise irregular, if they really be brought under the provisions of the Act.

In Russell *v.* Lang, 25th June 1845 (7 D., 919), a Procurator-Fiscal obtained the conviction of a party before a Justice of Peace

Court under the Act 1 & 2 Will. IV. c. 68; the party was imprisoned in terms of the sentence pronounced by the Justices, but, on presenting a bill of suspension and liberation to the Court of Justiciary, the sentence was set aside, and he was liberated from prison; he then raised an action of damages against the Procurator-Fiscal, but neglected to give him notice of the action a month before its commencement, in terms of sec. 17 of the Act. *Held*, that the action was incompetent.

In this case the Court carefully considered the analogous phrase, "anything done in pursuance of this Act," and Lord Fullerton says, "The fair and even necessary construction of the words in this clause is, that they denote things done, not *de jure* but *de facto*, in carrying out the Statute. Indeed, but for this construction, the protection would be nugatory, as there is hardly a conceivable case in which things done *de jure*, in terms of the Statute, could be even made the subject of prosecution at all." In fact it is such irregularities which the section is intended to cover.

See also in Murray *v.* Allan, 29th Nov. 1872 (11 M., 147). A complaint, instituted under the Summary Procedure Act, charged a contravention of the Day Trespass Act, which authorises a Justice of Peace to grant warrant for the apprehension of a person accused, before service of the complaint, "if he shall have reason to suspect from information upon oath that the party is likely to abscond," and set forth that the two persons accused were found trespassing in search of game, and had refused to give their names or addresses. On a deposition on oath by one witness to the truth of these statements, a Justice of the Peace, before the complaint had been served, issued a warrant for the apprehension of the accused, and they were accordingly apprehended. Five months after one of the accused raised an action of damages for wrongous apprehension against the complainers' law agent and two officers of police, on the ground that the Justice was not entitled, under the Day Trespass Act, to issue the warrant of apprehension before the complaint was served, without having information on oath that the accused was likely to abscond. *Held* that, although the proceedings had been irregular, there had not been such a deviation from the Statute as to deprive the defenders of the protection of sec. 35 of the Summary Procedure Act, which requires that all actions arising out of proceedings under it shall be brought within two months, and therefore that the action fell to be dismissed.

But, on the other hand, it will not protect cases not really brought under the Act, though bearing to be so, or complaints so patently erroneous or absurd as not to be a *bona fide* judicial proceeding.

In Ferguson *v.* M'Nab, 12th June 1885 (12 R., 1089), the Lord President said: "Indeed, as regards the protecting clause of the Summary Procedure Act, it is sufficient that the complaint should bear that it is brought under that Act.

"It may be necessary, however, to add that a prosecution bearing to be under that Act may be so absurd in character that it cannot, with propriety, be said to be under any Statute at all. A complaint

might be brought professedly under the Statute, not setting forth any known offence either statutory or at common law, but some indifferent or ludicrous act inferring no legal consequences of any kind. Then *in scena non in foro res agitur*. It is not a judicial proceeding at all, and can receive no protection from any Statute. But that is not the kind of case with which we have to deal here, and I therefore concur with the Lord Ordinary in thinking that, under both these Statutes, the action has been brought too late, and that it ought to be dismissed."

(3) But this protection is not accorded if "the person prosecuting for damages shall aver and prove that such proceeding was taken or done maliciously, and without probable cause."

The question as to what will amount to malice and want of probable cause is always attended with difficulty. On this, see Munro *v.* Taylor, 25th Feb. 1845 (7 D., 500). (1) Summons of damages against a Procurator-Fiscal, setting forth that he had applied for and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, held to be irrelevantly laid, in respect it did not also libel that this had been done maliciously. (2) In an action of damages against a Procurator-Fiscal, on the ground that, in the course of executing a criminal warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a cruel and oppressive manner—*held* that, as it was not alleged that the wrongous act complained of had been done by the defender's instructions, or with his knowledge, or that the general directions he had given to the officers were other than proper and suitable in the circumstances, it was to be regarded as the individual act of the officers, which he could not, in the circumstances, have anticipated or guarded against, and for which he was not in law responsible.

In Sheppeard *v.* Fraser, 26th Jan. 1849 (11 D., 446), (1) Summons of damages against a party for having caused the pursuer to be apprehended by a constable on a criminal charge, and having thereafter given information of the charge to the Procurator-Fiscal, held not to be relevant, without an averment of malice and want of probable cause. (2) The Court refused to allow the summons to be amended by the insertion of an averment of malice and want of probable cause, but dismissed the action.

In Bell *v.* Black & Morison, 28th June 1865 (3 M., 1026), in an action of damages against Procurators-Fiscal for obtaining and putting into execution an illegal warrant, it was held not necessary to allege or put in issue malice and want of probable cause. Terms of issue adjusted.

In Hill *v.* Dymock, 7th July 1857 (19 D., 955), in an action of damages against a burgh Procurator-Fiscal for wrongous imprisonment under a police sentence which was found null, plea in defence repelled (*aff.* judgment of Lord Neaves), that the statutory limitation of three months within which the action must be brought, applied not to the issuing but the execution of the warrant, and issues were appointed to be lodged.

In O'Connell *v.* Barclay, 4th March 1885 (1 Scot. Law Rev., 153), it was held that a police constable, in making an apprehension, acted maliciously and without probable cause.

In this action the pursuer, Mrs. O'Connell, Schoolhill, Aberdeen, sued Robert Barclay, a constable in the Aberdeen City Police, for £100 damages, in consequence of the defender having apprehended the pursuer and taken her to the police office, and there slandered her by calling her a prostitute, or using words to that effect; and that in doing so, the defender acted maliciously and without probable cause. The defence was a denial of the pursuer's averments, and a plea that the defender's actings were within the sphere of his duty. The Sheriff-Substitute (Brown) found that, between ten and eleven P.M. of Thursday, the 25th of September last, while the pursuer was in Bridge Street of Aberdeen, on her way home, she was taken into custody by the defender, a police constable in the Aberdeen City Police, and taken to the police office; that in so apprehending and removing the pursuer, the defender acted falsely, maliciously, and without probable cause, and that the pursuer was entitled to damages; assesses these at £10.

See also Barclay *v.* Barclay, 1853 (16 D., 714); Melvin *v.* Wilson, 1847 (9 D., 1129); Christie *v.* Thomson, 1858 (20 D., 1114); Grant *v.* Harper, 6th Feb. 1810 (F. C.); Edwards *v.* Parochial Board of Kinloss, 1891 (18 R., 867). See cases referred to under sec. 78, p. 140, *et seq.*

507. Provisions as to Proceedings brought against Burgh Prosecutor.—Where any order or sentence following on an application by the Burgh Prosecutor is brought under review, or where any action is brought against the Burgh Prosecutor, or against any officer or constable, in consequence of anything done in pursuance of this Act, or of such order or sentence, the Burgh Prosecutor shall immediately make a report of the facts and circumstances to the Commissioners, who shall thereupon resolve either that such order or sentence so brought under review, or such action, shall be defended at the expense of the Commissioners, or that it shall not be so defended, and if they resolve that it shall be so defended, the Commissioners shall thenceforth take the superintendence and control of the case, and the Commissioners shall relieve the Burgh Prosecutor or other defender from liability for all or any of the conclusions thereof; and if the Commissioners resolve that it shall not be so defended, they may, if they see cause, agree that they shall relieve the Burgh Prosecutor or other defender from the consequence of not defending the same,

and the Commissioners shall in such case relieve them accordingly.

See sub-head (9), sec. 4, for definition of "Commissioners;" sec. 461 as to "Burgh Prosecutor."

In M'Gowan *v.* Bell, 18th July 1865 (3 M., 1097), it was held that it is competent for Commissioners of Police, acting under the Act 3 & 4 Will. IV. c. 46, to instruct their Procurator-Fiscal to defend police convictions when challenged in a suspension, and to pay from the police funds expenses incurred by or awarded against him in the action.

In M'Culloch *v.* Magistrates of Airdrie, 20th December 1845 (8 D., 321), it was held that the Procurator-Fiscal of a burgh was not entitled to relief out of the funds of the burgh of expenses incurred by him in defending himself against an action of damages which had been directed, *inter alios*, against him, on account of an act done by him in his official character, which action had been dismissed with expenses, but no expenses recovered from the pursuer.

It has been held that the Commissioners of Police, under the Police Statutes are liable to be sued for wrongous acts alleged to have been done by the Superintendent, although it be not alleged that the acts were done or ordered to be done by them. Mitchell *v.* Stuart, 1st Feb. 1838 (16 S., 409); Lawson *v.* Stuart, 2nd Feb. 1839 (14 F., 507).

In Robertson *v.* Magistrates and Council of Glasgow, 25th May 1887 (3 Scot. Law Rev., 345), a person having brought an action of damages against the Magistrates of a burgh, on the ground that they had disregarded a complaint by him that their Chief Constable had declined to institute an inquiry as to a charge of perjury preferred by him against an Inspector of Police—*held*, that these circumstances did not disclose any relevant ground for his claim of damages, and that in any event it would have been necessary for the pursuer to instruct patrimonial loss.

In Young *v.* Magistrates of Glasgow, etc., 16th May 1891 (18 R., 825), in an action for damages for wrongous apprehension against two police constables and the Magistrates and Town Council of Glasgow as Police Commissioners, the Magistrates and Town Council were assoilzied on the ground that the constables were not their servants, the control and management of the police being vested in another statutory body—a committee of the Police Commissioners and the Sheriff.

An action of damages for wrongous apprehension, on a charge of importuning, under the Glasgow Police Act, 1866, was brought against two constables, the pursuer alleging that the defenders had at first declined to state any ground for her arrest or to allow her to acquaint her mother, who lived close by; that the apprehension had been made with unnecessary violence; that she had been roughly treated and hustled in presence of a large crowd on the way to the police station; that the charge preferred against her was utterly groundless; and that the defenders had acted maliciously and with-

out probable cause. *Held*, that malice and want of probable cause must be put in issue, and that the averments were sufficient to infer malice.

See also Blair *v.* Aberdeen Town Council, etc., 16th March 1885 (1 Scot. Law Rev., 217). It was held that the Town Council not being the employers of the police force are not liable for their acts.

In this case, Mrs. Jane Garrow or Blair and husband sued the Lord Provost, Magistrates, and Town Council of Aberdeen, and George Robertson, one of the police force for the city, for £100 damages, in consequence of the defender Robertson having slandered and assaulted the pursuer. The defenders, the Town Council, denied liability, in respect that the constables in Aberdeen are not their servants, but are appointed by the Superintendent of Police, in terms of the Aberdeen Police and Water-Works Act, 1862, sec. 113. The pursuer, on the other hand, maintained that they were answerable for the conduct and proceedings of their officers in the discharge of their duty. The Sheriff-Substitute assoilzied the Town Council on the ground above stated.

508. Parties presently entitled to Prosecute may do so.—The prosecutions authorised by this Act, under complaint by the Burgh Prosecutor, shall be without prejudice to complaints at the instance of any party or parties who are at present entitled to make the same.

See sec. 461 as to "Burgh Prosecutor."

509. Jurisdiction of Sheriffs and Courts of Guild to be Preserved.—No jurisdiction conferred by this Act shall be held to exclude the jurisdiction of the Sheriff, Justices of the Peace, Burgh or Dean of Guild Court, where the case shall in the first instance have been brought before or taken up by such Sheriff, Justices of the Peace, Burgh or Dean of Guild Court.

See sub-head (30), sec. 4, for definition of "Sheriff," (4) "burgh."

510. Forms of Procedure.—The forms in Schedule VII. to this Act, where they are applicable, or forms as near to them as are found convenient, shall be the forms of procedure under this Act until the same be altered or amended by the High Court of Justiciary, in terms of this Act: Provided that the Magistrate may add to any of the forms of conviction or judgment a direction that the accused shall be kept to hard labour during the whole or part of the term of

his imprisonment, and execution upon any judgment or warrant may proceed, either upon such judgment or warrant itself or upon an extract issued and signed by the Clerk of Court.

See sub-head (8), sec. 4, for definition of "Clerk," (19) "Magistrate;" sec. 460 "Clerk of Court," sec. 513 as to alteration of forms, and sec. 493 as to extract of sentence.

511. Form when Sum Recoverable as Civil Debt.—Where under this Act a sum is awarded which is declared by the Act to be recoverable as a civil debt, the forms to be followed in the recovery thereof shall be those provided for enforcing decrees pronounced in the Small Debt Courts of the Sheriff, and there shall be added to the finding of the Magistrate in such case a warrant for execution in the following form:—"And the Magistrate decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale after a charge of ten free days." Any officer, by this Act authorised to execute the warrant of a Magistrate, may carry out the procedure authorised by this section.

See sub-head (30), sec. 4, for definition of "Sheriff," (19) "Magistrate."

512. Proceedings may be either in Writing or Printed.—The several forms of procedings prescribed by this Act may be either in writing or printed, or may be partly written and partly printed, and all such forms as bear reference to any antecedent form may be either on the same sheet of paper therewith, or on a separate sheet attached to it.

By sec. 20 of the Interpretation Act, 1889, 52 & 53 Vict. c. 63, it is provided that "in this Act, and in every other Act, whether passed before or after the commencement of this Act, expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form."

513. High Court of Justiciary may Make or Amend Forms.—It shall be lawful for the High Court of Justiciary, on the application of the Lord Advocate, from time to time to pass such Acts of Adjournal as may be neces-

sary or proper for altering or amending the forms of proceedings in the Police Courts of burghs under this Act, or under this part of this Act, or providing forms for proceedings in said Courts not supplied by this Act.

See sub-head (4), sec. 4, for definition of "burgh."

514. Juvenile Offenders may be Sentenced to Whipping.—In any case where the Magistrate may award sentence of imprisonment, or of fine with the alternative of imprisonment, it shall be lawful for the Magistrate, in the case of any juvenile offender, being a male whose age in the opinion of the Magistrate shall not exceed fourteen years, to adjudge such offender, instead of imprisonment, or in addition to imprisonment, to be punished by private whipping, in such manner and according to such regulations, as have been or shall be made by the Lord Advocate of Scotland in that behalf, and approved by the Secretary for Scotland.

See sub-head (19), sec. 4, for definition of "Magistrate."

In Stevenson *v.* Lang, 7th Sept. 1878 (4 Coup., 76), upon a complaint brought under sec. 135, sub-sec. (5), of the Glasgow Police Act of 1866, charging an accused with "the crime of being riotous and disorderly in his conduct, by throwing peasemeal or soot, or otherwise creating a noise or disturbance," and concluding for a fine, or, alternatively, imprisonment, a Stipendiary Magistrate sentenced a youth of fifteen years of age to receive fifteen stripes, in terms of the Acts 14 & 15 Vict. c. 27, and 25 Vict. c. 18. The conviction and sentence quashed upon appeal, in respect that the Act 14 & 15 Vict. c. 27, had been repealed, and that the Act 25 Vict. c. 18 gave no warrant for whipping, except in the case of boys who are not above fourteen years of age; and, second, that whipping was not sanctioned by the common law in such a case as that in question.

515. Offences for Breaches of Certificates under Public Houses Acts to be tried in Police Court.—All offences under or against the Public Houses Acts Amendment (Scotland) Act, 1862, and the Acts therein recited, or any of them, or of any Act or Acts amending or superseding the same for any breach of or offence against the terms, provisions, or conditions of any certificate granted under the said Acts, or any of them, may be prosecuted and tried before and by any Magistrate or Magistrates of Police of any burgh, officiating in any court for the trial of police offences, under

the provisions of any Local or General Police Act, in the same way and manner in all respects as may be provided for the trial of police offences by any such Local or General Police Act in force in the county, district, burgh, or place where the offender shall reside, or the offence shall have been committed, and such Magistrate or Magistrates shall have power to impose the penalties and punishments, and declare the forfeitures provided in that behalf by the said Public Houses Acts, or any of them.

See sub-head (4), sec. 4, for definition of "burgh," (19) "Magistrate," (20) "Magistrates," (17) "Local Police Act."

In Johnston *v.* Laing, 25th Mar. 1876 (3 Coup., 250), in an appeal against a conviction for breach of certificate pronounced by a Magistrate of a burgh, other than a royal burgh, which had adopted the General Police Act of 1862,—*held*, (1) that such Magistrate had jurisdiction to try the offence charged; and (2) that review on the facts was excluded by sec. 430 of the Police Act.

516. Summary Jurisdiction Forms may be used in certain Cases.—If it should be found convenient in any prosecution under this Act or any Special Statute, any of the provisions or forms of the Summary Jurisdiction Act, or of the provisions or forms of the Criminal Procedure (Scotland) Act, 1887, may be used.

See also Dickson *v.* Linton, *supra*, sec. 480.

Opinion, per Lord Justice-Clerk, that sec. 28 of the Summary Procedure Act was intended as a test of jurisdiction only in questions of review, and did not exclude an ordinary action in the Civil Courts with regard to the subject-matter of such summary complaints as were thereby rendered criminal in relation to review. Lowson *v.* Police Commissioners of Forfar, 16th Mar. 1877 (4 R., Just., 35).

517. Exemption of Railway Companies' Buildings.—The provisions of secs. 166 to 209, both inclusive, of this Act, shall not apply to the railways or stations of any railway company, or buildings connected therewith, other than dwelling-houses.

See sub-head (3) sec. 4, for definition of "building," (13) "house."

In North British Railway Company *v.* Commissioners of Supply for Lanark, 10th Dec. 1868 (7 M., 201), a Railway Act provided that the ground conveyed to the Company should "not be liable for any duties or casualties to the superiors, nor for land-tax, nor any public or parish burdens,"—*held*, in conformity with Scottish

North-Eastern Railway Company *v.* Gardiner (2 M., 537), that the Company was exempt from assessment for police, prison, and county rates.

518. Saving of Local Authorities Loans Act.—Nothing in this Act shall prejudice or affect the provisions of the Local Authorities Loans (Scotland) Act, 1891.

This is an Act to provide increased facilities for the raising of money by Local Authorities in Scotland, by the issue of debentures, stock, or otherwise.

SCHEDULES

TO WHICH THIS ACT REFERS.

SCHEDULES.

In Campbell *v.* Leith Police Commissioners, 28th Feb. 1870 (8 M. H. L., 34), the Lord Chancellor (Hatherley), said: "Now, there is a Schedule at the end of the Act, Schedule E, and all the rates which are leviable under the Act are directed to be put into the Schedule in the form there mentioned, with the exception of one distinct rate, to which I shall have to make reference presently; but the other rates are directed to be inserted in this way—'Description of objects, general sewer rates or special sewer rates, and private improvement assessment.' Then the whole is carried out. The description of the objects, the names of the owners and occupiers, and the dates at which the rate is to be payable are all given; and all these qualifications and directions as to the rates are applicable to a private improvement assessment exactly in the same manner as they are applicable to a general sewer rate or to a special rate; and the Act evidently contemplates one general and complete process of rating.

"Then, that being so, we find here for what purposes a private improvement assessment rate may be made, namely, in a case where the neglect of the owner has thrown some obligation or duty upon the Commissioners, which they have to perform, and where consequently they have incurred expense in so performing it. That will constitute a private improvement assessment."

But see Laird *v.* Clyde Navigation Trustees, 6th Mar. 1879 (6 R., 756). The Clyde Navigation Consolidation Act, 1858, enacted by sec. 98 that "it shall be lawful for the trustees to levy on and in respect of all goods shipped at or unshipped in the river or harbour, the rates specified in the first and second columns of

Part I. of the Schedule H to this Act annexed." Schedule H, Part I., was titled, "Rates on goods conveyed upon or shipped or unshipped in the river or at the harbour, or using any transit shed or warehouse," and contained a long list of goods chargeable, including timber, which, prior to 1858, had been exempt from river dues. The limits of the river, for the purposes of the Act, extended westward to Newark Castle, a short distance above Port-Glasgow.

Timber arriving from abroad in logs was in use to be discharged into the water at Greenock or Port-Glasgow, and floated or towed up in loose rafts to the ponds of the timber merchants, which were within the limits of the river, as defined for the purposes of the above Act, and there stored till the timber was sold. In 1877, the Clyde Trustees for the first time proposed to charge dues on the timber on its being thus floated up to the timber ponds.

In a suspension at the instance of a firm of timber measurers, who were owners of certain of the ponds, *held*, (by a majority of seven judges, *diss.* Lords Gifford and Shand and *rev.* judgment of Lord Adam), that the timber so floated up to the ponds not being either shipped or unshipped within the limits of the "river," did not fall within the scope of sec. 98 of the Act, and that the words "conveyed upon" occurring in the Schedule, in addition to "shipped or unshipped," could not be used to extend the enactment in the body of the Act, and that therefore the dues were not leviable.

Lord Justice-Clerk (Moncreiff), who delivered the leading opinion, after quoting the title of the Schedule says: "Now, in the first place, as this Schedule derives its authority entirely from sec. 98, and as that authority is limited in sec. 98 to the specification of the rates leviable on goods shipped or unshipped within the river or harbour, it would be wholly inadmissible on any canon of construction to give it a wider interpretation. But I think it unnecessary to say more on this head, because the words thus introduced into the title, although not very accurate, are manifestly intended to meet exactly the same circumstances as those in sec. 99, and to give the authority of the Schedule to levying these rates at the different stages."

Lord Gifford said: "In getting at the true meaning of the words 'shipped' or 'unshipped,' I think I am entitled to look, not only to the Schedule of Rates, but also to all the other clauses of the

Statute, and I find important light from these sources. The Schedule of Rates, which is specially referred to in sec. 98, is entitled, 'Rates on goods conveyed upon, or shipped or unshipped in the river or at the harbour, or using any transit shed or warehouse.' Here the words 'conveyed upon' the river are used, apparently as explanatory or as synonymous with 'shipped or unshipped in the river.' I do not say that the title of the Schedule is incorporated as a proper part of sec. 98, but it is surely important to see what the Legislature meant when they used the words 'shipped' or 'unshipped,' and when we find in the Schedule the words 'conveyed upon' used apparently in connection with shipped or unshipped, it points very directly to what the true meaning is."

And Lord Shand said: "But I think assistance may be obtained as to the meaning of the terms 'shipped or unshipped' there used, from the Schedule referred to in that section, as well as from secs. 99 and 119 of the Statute. It was maintained that this question must be determined on the terms of sec. 98 alone—that the Schedule can only be looked at for the sole and limited purpose of ascertaining the particular rate payable on each class of goods specified, and that the other sections can be referred to only for the particular purpose of the special enactment. I am clearly of opinion that this argument is unsound, and that in a question as to whether the words 'shipped or unshipped,' in sec. 98, are to be taken in the literal, restricted, and primary sense contended for, or ought to receive a somewhat wider meaning, it is legitimate to look at other expressions in the Statute relating to the transit of goods on the river, particularly where these occur in a Schedule or clause of the Act relating to the very subject of rates. Turning then to the Schedule, the goods which in the section are described as shipped or unshipped are there referred to in the title as 'Goods conveyed upon, or shipped or unshipped in the river.' Had these words been in sec. 98 itself, of which the Schedule is really a part, even the argument for a literal construction only of the language of the section would, I think, have been fatal to the complainers, for undoubtedly timber towed in rafts is 'conveyed upon the river.'"

And in Lang *v.* Kerr, Anderson, & Company (5 R., H. L., 65), the Lord Chancellor (Cairns), said: "The 27th division of this

long Statute is headed in this way—'Buildings, their erection, alteration, and use.' And, my Lords, I may observe that these headings in this Act are not to be looked upon as marginal notes inserted not by Parliament, but perhaps by the printer, because they are referred to in the body of the Act itself. The 386th clause (the second clause after the one I am going to read) itself takes notice of the headings of different parts of the Act, and shows that Parliament had carefully and analytically divided the Act into these different parts. Sec. 384 is, as I have said, in the part which relates to 'Buildings, their erection, alteration, and use.' And, my Lords, that part, extending from sec. 364 to sec. 386, has reference—in, I may say, every section of it—to buildings in some shape or form."

SCHEDULE I.

SECTION 1.

GENERAL POLICE ACTS.

Session and Chapter.	Title of Act.
3 & 4 Will. IV. c. 46, .	An Act to enable burghs in Scotland to establish a general system of police.
10 & 11 Vict. c. 39, .	An Act to amend an Act to enable burghs in Scotland to establish a general system of police, and another Act for providing for the appointment and election of magistrates and councillors for certain burghs and towns of Scotland.
13 & 14 Vict. c. 33, .	An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for paving, draining, cleansing, lighting, and improving the same.
25 & 26 Vict. c. 101, .	An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for lighting, cleansing, paving, draining, supplying water to and improving the same, and also for promoting the public health thereof.
31 & 32 Vict. c. 102, .	The General Police and Improvement (Scotland) Act, 1862, Amendment Act.
40 & 41 Vict. c. 22, .	The General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1877.
41 & 42 Vict. c. 30, .	The General Police and Improvement (Scotland) Amendment Act, 1878.
45 & 46 Vict. c. 6, .	The General Police and Improvement (Scotland) Act, 1882.
52 & 53 Vict. c. 51, .	The General Police and Improvement (Scotland) Act, 1862, Amendment Act, 1889.

SCHEDULE II.

SECTIONS 5, 15, 373.

Edinburgh.	Dundee.
Glasgow.	Greenock.
Aberdeen.	

SCHEDULE III.

SECTION 5.

PORTIONS OF LOCAL ACTS SAVED.

I.—*Airdrie.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
1 & 2 Geo. IV. c. 60, .	An Act for erecting the Town of Airdrie, in the County of Lanark, into a Burgh of Barony; paving, lighting, and improving the same, and establishing a Police therein.	Sec. 13.
12 & 13 Vict. c. 89, .	The Airdrie Police and Municipal Act, 1849.	Secs. 7, 10, 59, 76.
48 & 49 Vict. c. 40, .	The Airdrie Burgh Extension Act, 1885.	The whole Act, except secs. 3, 50, and 51, and the First Schedule.

II.—*Ayr.*

36 & 37 Vict. c. 200, .	The Ayr Burgh Act, 1873.	The whole Act, except secs. 132 to 137.
48 & 49 Vict. c. 73, .	The Ayr Burgh Act, 1885.	The whole Act, except secs. 13 and 14.

III.—*Broughty-Ferry.*

43 & 44 Vict. c. 39, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Broughty - Ferry) Act, 1880.	The whole Act.
46 Vict. c. 19, . .	The Broughty-Ferry Paving Act, 1883.	The whole Act.

IV.—*Burntisland.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
39 & 40 Vict. c. 139, .	The Burntisland Burgh Act, 1876.	The whole Act, except secs. 101 to 106.

V.—*Campbeltown.*

39 & 40 Vict. c. 167, .	The Campbeltown Burgh and Harbour Act, 1876.	The whole Act and Schedules, except secs. 12, 133, 134, and 136.

VI.—*Coatbridge.*

48 & 49 Vict. c. 41, .	The Coatbridge Burgh Act, 1885.	Secs. 1 to 32 inclusive; secs. 37, 38, and 88 to 97 inclusive, and 103.

VII.—*Dumbarton.*

46 & 47 Vict. c. 148, .	The Dumbarton Waterworks, Streets, and Buildings Act, 1883.	The whole Act.

VIII.—*Dunfermline.*

33 & 34 Vict. c. 115, .	The General Police and Improvement (Scotland) Supplemental Act, 1870.	The whole Act and the Schedule, so far as they relate to the Burgh of Dunfermline.

IX.—*Falkirk.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
22 & 23 Vict. c. 123, .	The Falkirk Police and Improvement Act, 1859.	The 7th and 8th clauses of the Preamble, and secs. 2 (so far as regards the definition of "The Stintmasters of Falkirk;" "The Feuars of Falkirk;" "The District of Grahamstown;" and "The District of Bainsford"), 7, and from 11 to 18, both inclusive, and 20 and 21.

X.—*Galashiels.*

39 & 40 Vict. c. 60, .	The Galashiels Municipal Extension Gas and Water Act, 1876.	The whole Act, except secs. 3, 4, 7, 13, 17, 18, 21, 22, 24, 26, 27, 34, 37–39, 52, 56, 57, 66, 85–87, 90–93, and Schedules III. and IV.

XI.—*Hamilton.*

41 & 42 Vict. c. 137, .	The Hamilton Burgh Act, 1878.	The whole Act, except secs. 141, 142, 143, and 148 to 165.

XII.—*Inverness.*

10 & 11 Vict. c. 208, .	The Inverness Burgh Act, 1847.	Secs. 1, 39, 133, 134, 142, 143, 149, 150, and Schedule A.

XIII.—*Irvine.*

44 & 45 Vict. c. 71, .	The Irvine Burgh Act, 1881.	The whole Act.

XIV.—*Kilmarnock.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
10 & 11 Vict. c. 207, .	An Act for amending the Acts relating to the Police and Improvement of the Burgh of Kilmarnock, and for other purposes in relation thereto.	Sec. 131, in so far as it relates to the application of the fines, penalties, and forfeitures.
34 & 35 Vict. c. 71, .	The Kilmarnock Municipal Extension and Improvement Act, 1871.	The whole Act, except secs. 4, 28, 40, 42, 43, 48 to 84, 152, 153, 180, 188, 222, 223, 225 to 227, the Second Schedule, the Fifth Schedule.

XV.—*Kirkcaldy.*

39 & 40 Vict. c. 179, .	The Kirkcaldy Burgh and Harbour Act, 1876.	The whole Act, except secs. 134 to 137.

XVI.—*Leith.*

11 & 12 Vict. c. 123, .	The Leith Municipal and Police Act, 1848.	Secs. 1, 3, 4, and 5, 16, 17, 70 (as regards Lochend Loch), 262, 271.
40 & 41 Vict. c. 200, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Leith) Act, 1877.	Sec. 1, and secs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 21 of the Order thereby confirmed, and the Schedule to the Order.

XVII.—*Lerwick.*

39 & 40 Vict. c. 163, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Lerwick) Act, 1876.	Sec. 1, and secs. 7, 8, and 9 of the Order thereby confirmed.

XVIII.—*Oban.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
44 & 45 Vict. c. 178, .	The Oban Burgh Act, 1881.	The whole Act.

XIX.—*Paisley.*

40 & 41 Vict. c. 149, .	The Paisley Improvement Act, 1877.	The whole Act.
38 & 39 Vict. c. 171, .	The General Police and Improvement (Scotland) Act, 1862, Orders Confirmation Act, 1875.	The whole Act.
39 & 40 Vict. c. 157, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Paisley) Act, 1876.	The whole Act.
41 & 42 Vict. c. 103, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Paisley) Act, 1878.	The whole Act.
42 Vict. c. 3, . .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Paisley) Act, 1879.	The whole Act.

XX.—*Perth.*

19 & 20 Vict. c. 138, .	An Act to provide for the arrangement of the financial affairs of the City of Perth, for the maintenance of the Port and Harbour, and for other purposes therewith connected.	The whole Act and the Schedules.
28 Vict. c. 7, . .	The General Police and Improvement (Scotland) Supplemental Act, 1865.	The whole Act, and also the Provisional Order contained in the Schedule, excepting secs. 2 to 7 of the Provisional Order.

XX.—*Perth—continued.*

Session and Chapter.	Title or Short Title.	Portions of Acts saved, Sections numbered inclusively.
31 Vict. c. 11, . .	An Act to confirm certain Provisional Orders under the General Police and Improvement (Scotland) Act, 1862, relating to the Burghs of Perth and Brechin.	The whole Act and the Schedule, so far as they relate to the Burgh of Perth.
33 & 34 Vict. c. 115, .	The General Police and Improvement (Scotland) Supplemental Act, 1870.	The whole Act and the Schedule, so far as they relate to the Burgh of Perth.
39 & 40 Vict. c. 158, .	The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Perth) Act, 1876.	The whole Act and the Schedule.

XXI.—*Port Glasgow.*

28 & 29 Vict. c. 254, .	The Port-Glasgow Police Act, 1865.	The whole Act and Schedule, except secs. 7 and 48 of the Act.

XXII.—*Renfrew.*

18 Vict. c. 72, . .	The Renfrew Police and Improvement Act, 1855.	Secs. 1 to 5. Interpretation clause of sec. 6, secs. 7, 8, 11, 12, 16, 17, 18, 22, 23, 28 to 42.

XXIII.—*Rothesay.*

9 & 10 Vict. c. 299, .	Rothesay Police Act.	Sec. 12.

SCHEDULE IV.

SECTION 177.

RULES FOR NEW BUILDINGS.

1. Excavations. — The site of the intended building shall be dug out to such depth as shall be necessary, in the opinion of the Commissioners, for the removal therefrom of soil or refuse; and it shall not be lawful for any person to build upon any site until such soil or refuse is so removed.

2. The walls of every new building to be used as a dwelling-house shall have a damp course of durable material, impervious to moisture; the damp course for external walls to be at the level of the ground directly abutting upon the external wall, or at such other level as the Commissioners shall order. Party walls to have the damp course at a level of not less than the under side of the joisting of the lowest floor; and where, in the judgment of the Commissioners, the nature of the soil or subsoil requires it, the whole internal area of the site shall be covered with a layer of asphalt, cement, concrete, or suitable material to their satisfaction.

3. The outer walls and the party walls or separate side or end walls, and the joisting and principal timber and ironwork, shall be of sufficient strength and stability.

4. There shall be, to the satisfaction of the Commissioners, sufficient ashpit and W.-C. or privy accommodation in connection with the building.

5. The plan of the building shall not contemplate the raising or lowering of any article from windows or openings towards any public streets by hoists or other appliances outside the building line.

6. Walls and gables to be built solid.—All party walls and gables shall be built solid, except at vents, fireplaces, presses, and where the Commissioners may allow them to be built otherwise.

7. Party walls to be carried through roof, etc. — All external walls, party walls, passage walls, partition walls dividing separate houses, staircases, stairs, and landings, shall be constructed with incombustible materials; and all party walls shall be carried through and above the roof to form a parapet. The parapet to be finished on top with a cope, and the height of parapet to be not less than 12 inches, measured at right angles with the slope of the roof, above the covering of the roof of the highest building to which such party wall belongs.

8. Wall strapping.—All walls of dwelling-houses shall be so constructed as to prevent damp.

9. Lime mortar.—The mortar to be used in the construction of new or altered buildings shall be composed of fresh burnt lime and clean sharp pit sand, grit or ground bricks, or freestone shivers, without earthy matter, and no sea or ballast sand shall be used.

10. Joists to be bridled.—The joists under every hearth shall be

bridled, and, where practicable, the hearth shall be supported by a brick arch or concrete under its whole area, or to be otherwise constructed or supported as the Commissioners may direct. Every fireplace shall have jambs and lintels or arches of incombustible material projecting at least to the flush of the plaster work. No timber, joist, beam, or safety lintel shall be inserted into a wall nearer to the fireplace or vents, where practicable, than 12 inches.

11. Buildings to have gutters and spouts.—Every building shall have rhones, gutters, or spouts along the eaves thereof, with down spouts and perforated gratings, to carry all water falling on the roof thereon to the drains.

12. Chimney heads to be stayed.—No part of a built chimney or flue must be less than 9″ × 9″, and no part of a wall on the outside or house side of the chimney to be of less thickness than 9 inches. Every chimney head shall have a stone cope, into which chimney cans can with safety be inserted, and such chimney cans shall be sufficiently guarded.

13. Floors to be deafened.—The floors between each flat of a tenement shall be deafened.

14. Plaster work.—All apartments in every dwelling-house shall be plastered with three coats plaster.

15. Plumber work.—All plumber work connected with sanitary arrangements and house drains shall be ventilated, trapped, and otherwise constructed and tested to the satisfaction of the Commissioners.

16. Filling up at ground floors.—In ground floors where the space from surface has to be filled up to level of floors, the same shall be filled up, subject always to sufficient space being left for ventilation, with dry stone shivers or such other materials as the Commissioners may appoint.

17. Passages and courts, etc., to be paved.—All private courts, common passages, and common areas (other than bleaching greens) shall be paved with natural or artificial stone, or such other material as the Commissioners shall approve, and be provided with proper and sufficient means for taking off the surface water.

18. Roofs not to be covered with combustible materials.—No external covering of any roof shall be constructed of combustible materials; and it shall not be lawful for the owner of any building having, at the date when this Act comes into operation, a roof covered with thatch, or other combustible material, and contiguous to or adjoining to any other building, to suffer such covering to such roof to remain for a longer period than seven years thereafter, unless with the consent in writing of the Commissioners. And every person who shall suffer the covering of any roof to continue, contrary to the provisions herein contained, and who shall not remove or alter the same within one month after notice given to him for that purpose by the Commissioners, shall be liable to a penalty not exceeding one pound for every day that such building or covering to such roof shall so continue.

Any person failing to comply with any of these conditions in a

good and sufficient manner shall be guilty of an offence, and be liable for each offence to a penalty not exceeding five pounds.

SCHEDULE V.

SECTION 271.

REGULATIONS FOR HACKNEY CARRIAGES.

1. What to be hackney carriages —Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street, within the prescribed distance, and every carriage standing upon such street, within such prescribed distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of the Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage; but no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed, shall be deemed to be a hackney carriage.

2. Provisions applicable to licences for hackney carriages. —The following provisions shall apply to a licence for hackney carriages:—

a. A requisition for the licence shall be made to the Magistrates in such form and containing such particulars as they may prescribe, and shall be signed by the proprietor or one of the proprietors of the carriage for which the licence is sought.

b. Any person who makes a false statement in such requisition shall be liable to a penalty not exceeding ten pounds.

c. The licence shall specify the name and place of abode of every person who is proprietor or part proprietor, or who is concerned in letting the hackney carriage (and such persons are hereinafter referred to as the licensee), and shall specify the number to be marked on the plates of the carriage, and any other particulars which the Magistrates may think fit.

d. The licence shall be confined to one carriage, shall be made out by the clerk, signed by one of the Magistrates, and a fee not exceeding five shillings shall be paid therefor.

e. The licence shall be entered in a book kept by the clerk, and open to public inspection without fee; and in such book shall be made entries of any offence committed by the licensee, or the driver, or person attending the carriage.

f. The licence shall be in force for one year, or until the next licensing day (if any).

g. Any licensee who changes his place of abode shall within seven days thereafter give notice thereof to the Magistrates, and shall produce his licence to the clerk, who shall endorse thereon the particulars of the change. For any failure to comply with

this enactment the licensee shall be liable to a penalty not exceeding forty shillings.

h. Any person plying within the prescribed distance any hackney carriage for hire without a licence, or without having the number of the carriage corresponding with the number of the licence therefor displayed on the carriage, or the owner of the carriage employing such person, shall for every such offence be liable in a penalty not exceeding forty shillings.

3. Provisions as to drivers' licences.—The following provisions shall apply to any driver of a hackney carriage within the prescribed distance:—

a. He shall not act as driver without first obtaining a licence from the Magistrates, and which shall remain in force till revoked, except during the time it may be suspended.

b. The licence shall be registered by the clerk, and a fee of one shilling paid for the same.

c. If any person shall act as such driver without a licence or during the time his licence is suspended, or shall lend or part with his licence except to the licensee of the hackney carriage, or if the licensee of a hackney carriage employ any person as the driver thereof who has not obtained such licence, or during the time that his licence is suspended, as hereinafter provided, every such driver and every such licensee shall for every such offence respectively be liable to a penalty not exceeding twenty shillings.

4. Licensee to retain licence of drivers when in his employ, and to produce the same when summoned. Magistrates may endorse convictions upon licence. Penalty on licensee for neglect.—In every case in which the licensee of any hackney carriage permits or employs any licensed person to act as the driver thereof, such licensee shall cause to be delivered to him, and shall retain in his possession, the licence of such driver while such driver remains in his employ; and in all cases of complaint, where the licensee of a hackney carriage is summoned to attend before a Magistrate, or to produce the driver, the licensee so summoned shall also produce the licence of such driver, if he be then in his employ; and if any driver complained of be judged guilty of the offence alleged against him, such Magistrate shall make an endorsement upon the licence of such driver, stating the nature of the offence and the amount of the penalty inflicted; and if any such licensee neglect to have delivered to him and to retain in his possession the licence of any driver while such driver remains in his employ, or if he refuse or neglect to produce such licence as aforesaid, such licensee shall for every such offence be liable to a penalty not exceeding forty shillings.

5. Licensee to return licence to drivers when quitting his service if they behave well; if otherwise, licensee to summon them. Compensation in case of licence being improperly withheld.—When any driver leaves the service of the licensee by whom he is employed without having been guilty of any misconduct, such licensee shall forthwith return to such driver the licence belong-

ing to him; but if such driver have been guilty of any misconduct, the licensee shall not return his licence, but shall give him notice of the complaint which he intends to prefer against him, and shall forthwith cause such driver to be summoned to appear before a Magistrate to answer the said complaint; and such Magistrate, having the necessary parties before him, shall inquire into and determine the matter of complaint; and if upon inquiry it appear that the licence of such driver has been improperly withheld, such magistrate shall direct the immediate redelivery of such licence, and award such sum of money as he thinks proper to be paid by such licensee to such driver by way of compensation, and the payment of which may be enforced as a penalty.

6. Licences to be suspended or revoked for misconduct.—The Magistrates may, upon the conviction for the second time of the licensee or driver of any hackney carriage for any offence under the provisions of this Act with respect to hackney carriages, or of any bye-law made in pursuance thereof, suspend or revoke, as they deem right, the licence of any such licensee or driver.

7. Number of persons to be carried in a hackney carriage to be painted thereon.—No hackney carriage shall be used or employed, or let for hire, or shall stand or ply for hire, within such prescribed distance, unless the number of persons to be carried by such hackney carriage, in words at length, and in form following (that is to say)—"To carry persons," be painted on a plate placed on some conspicuous place on the outside of such carriage, and in legible letters, so as to be clearly distinguishable from the colour of the ground whereon the same are painted, one inch in length, and of a proportionate breadth; and the driver of any hackney carriage shall not be entitled to carry in or by such hackney carriage a greater number of persons than the number painted thereon.

8. Penalty for neglect or for refusal to carry the prescribed number.—If the licensee of any hackney carriage permit the same to be used, employed, or let to hire, or if any person stand or ply for hire with such carriage, without having the number of persons to be carried thereby painted and exhibited in manner aforesaid, or if the driver of any hackney carriage or omnibus shall carry a greater number of persons in or by such hackney carriage or omnibus than the number of persons painted thereon, or shall refuse, when required by the hirer thereof, to carry in or by such hackney carriage the number of persons painted thereon, or any less number, every licensee or driver so offending shall be liable to a penalty not exceeding forty shillings.

9. Penalty on driver for refusing to drive.—Any driver of a hackney carriage standing on any of the stands for hackney carriages appointed by the Magistrates, or in any street, public or private, who refuses or neglects, without reasonable excuse, to drive such carriage to any place within such prescribed distance, or any distance to be appointed by any bye-law of the Magistrates, not exceeding such prescribed distance, to which he is directed to drive by the person

hiring or wishing to hire such carriage, shall for every such offence be liable to a penalty not exceeding forty shillings.

10. Penalty for demanding more than the sum agreed for, though less than the legal fare.—If the licensee or driver of any hackney carriage, or any other person on his behalf, agree beforehand with any person hiring such hackney carriage to take for any job a sum less than the fare allowed by this Act or by any bye-law made thereunder, such licensee or driver shall be liable to a penalty not exceeding forty shillings if he exact or demand for such job more than the fare so agreed upon.

11. Agreement to pay more than the legal fare not to be binding, and sum paid beyond the proper fare may be recovered back.—No agreement whatever made with the driver, or with any person having or pretending to have the care of any hackney carriage, for the payment of more than the fare allowed by any bye-law made under this Act, shall be binding on the person making the same; and any person may, notwithstanding such agreement, refuse, on discharging such hackney carriage, to pay any sum beyond the fare allowed as aforesaid; and if any person actually pay to the driver of any hackney carriage, whether in pursuance of any such agreement or otherwise, any sum exceeding the fare to which such driver was entitled, the person paying the same shall be entitled, on complaint made against such driver before a Magistrate, to recover the sum paid beyond the proper fare, and, moreover, such driver shall be liable to a penalty for such exaction not exceeding the sum of forty shillings; and in default of the repayment by such driver of such excess of fare, or of payment of the said penalty, the Magistrate shall forthwith commit such driver to prison, there to remain for any time not exceeding one month, unless the said excess of fare and the said penalty be sooner paid.

12. Driver to carry, under an agreement for a discretionary distance, the distance to which hirer is entitled for the fare.—If the licensee or driver of any hackney carriage, or any other person on his behalf, agree with any person to carry in or by such hackney carriage persons not exceeding in number the number so painted on such carriages as aforesaid for a distance to be at the discretion of such licensee or driver, and for a sum agreed upon, such licensee or driver shall be liable to a penalty not exceeding forty shillings if the distance which he carries such persons be under that to which they were entitled to be carried for the sum so agreed upon, according to the fare allowed by any bye-law made under this Act.

13. Overcharge by hackney coachmen, etc., to be included in conviction, and returned to aggrieved party.—Every licensee or driver of any hackney carriage who is convicted of demanding or taking as a fare a greater sum than is authorised by any bye-law made under this Act shall be liable to a penalty not exceeding forty shillings; and on the conviction of such licensee or driver an order may be included for payment of the sum so overcharged, if paid, over and above the penalty of costs; and such

overcharge shall be returned to the party aggrieved, whose evidence shall be admissible in proof of such offence.

14. Penalty for permitting persons to ride without consent of the hirer.—Any licensee or driver of any hackney carriage which is hired who permits or suffers any person to be carried in or upon or about such hackney carriage during such hire, without the express consent of the person hiring the same, shall be liable to a penalty not exceeding twenty shillings.

15. No person to act as driver of any carriage without the consent of the licensee.—No person authorised by the licensee of any hackney carriage to act as driver of such carriage shall suffer any other person to act as driver of such carriage without the consent of the licensee thereof, and no person, whether licensed or not, shall act as driver of any such carriage without the consent of the licensee; and any person so suffering another person to act as driver, and any person so acting as driver, without such consent as aforesaid, shall be liable to a penalty not exceeding forty shillings for every such offence.

16. Penalty on drivers misbehaving.—If the driver or any other person having or pretending to have the care of any hackney carriage be intoxicated while driving, or if any such driver, or other person, by wanton and furious driving, or by any other wilful misconduct, injure or endanger any person in his life, limbs, or property, he shall be liable to a penalty not exceeding five pounds.

17. Penalty for leaving carriages unattended at places of public resort.—If the driver of any hackney carriage leave it in any street or at any place of public resort or entertainment, whether it be hired or not, without some one proper to take care of it, any constable may drive away such hackney carriage, and deposit it, and the horse or horses harnessed thereto, at some neighbouring livery stable or some other place of safe custody; and such driver shall be liable to a penalty not exceeding twenty shillings for such offence; and in default of payment of the said penalty upon conviction, and of the expenses of taking and keeping the said hackney carriage and horse or horses, the same, together with the harness belonging thereto or any of them, shall be sold by order of the Magistrate before whom such conviction is made; and after deducting from the produce of such sale the amount of the said penalty, and of all costs and expenses, as well of the proceedings before such Magistrate, as of the taking, keeping, and sale of such hackney carriage, and of such horse or horses and harness, the surplus (if any) of the said produce shall be paid to the proprietor of such hackney carriage.

18. Damage done by drivers may be recovered from the licensee.—In every case in which any hurt or damage has been caused to any person or property as aforesaid by the driver of any carriage let for hire, the Magistrate before whom such driver has been convicted may direct that the licensee of such carriage shall pay such sum, not exceeding five pounds, as appears to such Magistrate a reasonable compensation for such hurt or damage; and every licensee who pays any such compensation as aforesaid

may recover the same from the driver; and such compensation shall be recoverable from such licensee, and by him from such driver, as damages; but this provision shall not prevent the injured party suing for damages without restriction as to amount before any competent Court.

19. Improperly standing with carriage, refusing to give way to or obstructing any other driver, or depriving him of his fare.—Any driver of any hackney carriage who suffers the same to stand for hire across any street or alongside of any other hackney carriage, or who refuses to give way, if he conveniently can, to any other carriage, or who obstructs or hinders the driver of any other carriage in taking up or setting down any person into or from such other carriage, or who wrongfully in a forcible manner prevents or endeavours to prevent the driver of any other hackney carriage from being hired, shall be liable to a penalty not exceeding twenty shillings.

20. Compensation may be awarded to drivers for loss of time in attending to answer complaints not substantiated.—If the driver of any hackney carriage be summoned or brought before any Magistrate to answer any complaint made on information given by any private person touching or concerning any offence alleged to have been committed by such driver against the provisions of this Act or of any bye-law made under this Act, and such complaint or information be afterwards dismissed, or if such driver be acquitted of the offence charged against him, such Magistrate, if he think fit, may order the informer to pay to such driver such compensation for his loss of time in attending such Magistrate touching or concerning such complaint or information as to such Magistrate seems reasonable; and in default of payment of such compensation such Magistrate may commit such informer to prison for any time not exceeding one month, unless the same shall be sooner paid.

21. Penalty for refusing to pay the fare.—If any person refuse to pay, on demand, to any licensee or driver of any hackney carriage the fare allowed by any bye-law made under this Act, such fare may, together with costs, be recovered before any Magistrate as a penalty.

22. Penalty for damaging carriage.—Any person using any hackney carriage plying under a licence granted by virtue of this Act, who wilfully injures the same, shall for every such offence be liable to a penalty not exceeding five pounds, and shall also pay to the licensee of such hackney carriage reasonable satisfaction for the damage sustained by the same; and such satisfaction shall be ascertained by the Magistrate before whom the conviction takes place, and shall be recovered by the same means as the penalty.

23. Magistrates may make bye-laws for regulating hackney carriages.—The Magistrates may from time to time (subject to the restrictions of this Act) make bye-laws for all or any of the purposes following; that is to say—

For regulating the conduct of the licensees and drivers of hackney carriages plying within such prescribed distance in their

several employments, and determining whether such drivers shall wear any and what badges, and for regulating the days and hours within which they may exercise their calling.

For regulating the manner in which the number of each carriage corresponding with the number of its licence shall be displayed.

For regulating the number of persons to be carried by hackney carriages, and in what manner such number is to be shown on such carriage, and what number of horses or other animals is to draw the same, and the placing of check strings to the carriages, and the holding of the same by the driver, and how hackney carriages are to be furnished or provided.

For fixing the stand of hackney carriages, and the distance to which they may be compelled to take passengers, not exceeding such prescribed distance.

For fixing the rates or fares, as well for time as distance, and for securing the due publication of such fares.

For securing the safe custody and redelivery of any property accidentally left in hackney carriages, and fixing the charges to be made in respect thereof.

24. The Magistrate may suspend or revoke any licence granted to the licensee or driver of a hackney carriage on such licensee or driver being convicted of any offence, in addition to or in lieu of the penalty applicable to such offence.

SCHEDULE VI.

SECTION 367.

*Name of Burgh*_____.

GENERAL SEWER RATE [*or* SPECIAL SEWER RATE AND PRIVATE IMPROVEMENT EXPENSE ASSESSMENT, *as the case may be*].

DESCRIPTION OF SUBJECTS.	Name of Owner.	Name of Occupier.	Rental.	Rate or Private Improvement Expense due and chargeable at						
				15 May 18 .	15 May 18 .	15 May 18 .	15 May 18 .	15 May 18 .	15 May 18 .	15 May 18 .
General Sewer Rate, .										
Special Sewer Rate, .										
Private Improvement,										

*Date*_____ *A. B., Collector.*

SCHEDULE VII.

SECTION 510.

FORMS OF PROCEDURE.

I.

FORM OF COMPLAINT FOR STATUTORY CONTRAVENTIONS, OFFENCES, ETC.

Unto the Magistrates of the Burgh of .

The Complaint of Burgh Prosecutor [*or other party entitled to prosecute with or without his concurrence*].

HUMBLY SHEWETH,—

That [*name and designation of accused*] did on [*here give date*] at (*or* in) [*here name place, and state act done*] contrary to the Act sec. whereby the accused is liable [*state shortly the nature of the forfeiture or penalty*].

May it therefore please your Honours to grant warrant to officers of law to apprehend and bring the said accused [*or* to summon the said accused to appear personally] before the Magistrate officiating in the Police Court of the said Burgh [*in using this or any of the succeeding forms, if there are more than one Police Court in the Burgh state the particular Court*] to answer to this complaint; to cite witnesses for both parties; to convict the accused of the aforesaid contravention [*or* offence]; and to adjudge said accused to suffer the penalties provided by the said Act.

According to justice, etc.,

_____ *B. P.*

II.

FORM OF COMPLAINT FOR AN OFFENCE AT COMMON LAW.

Unto the Magistrates of the Burgh of .

The Complaint of Burgh Prosecutor [*or other party entitled to prosecute with his concurrence*].

HUMBLY SHEWETH,—

That [*name and designation of accused*] did on the [*here give date*] at (*or* in) [*here state the act*].

May it therefore please your Honours to grant warrant to officers of law to apprehend and bring the said accused [*or* to summon the said accused to appear personally] before the Magistrate officiating in the Police Court of the said Burgh to answer to this complaint; to cite

witnesses for both parties; to convict the said accused of the aforesaid crime; and to adjudge said accused to suffer the pains of law.

According to justice, etc.,

_____ *B. P.*

NOTE.—*If a search warrant be required, the craving therefor may be included in the prayer of either of the preceding two forms, and may be in the following terms:—*

Further, to grant warrant to search the person, dwelling-house, and repositories of the said accused, and place in which the accused may be found, and to take into custody the property mentioned or referred to in the complaint, and all documents, articles, or property of whatever kind likely to afford evidence of the accused's guilt in the premises; and if necessary for that purpose, to open all shut and lockfast places.

[*And such warrant may also be subsequently applied for by writing on the original complaint "Warrant of search is craved," which will be sufficient for the Magistrate to grant the warrant in the above terms.*]

WARRANT FOR APPREHENSION OF AN ACCUSED PARTY.

[*Place and date.*] Grants warrant to officers of law to search for and apprehend the said [*name of accused*]; and if necessary for that purpose, to open all shut or lockfast places, and to bring said accused before the Magistrate officiating in the Police Court of the Burgh of to answer to the foregoing complaint; and in the meantime, if necessary, to detain said accused in a police station-house or other convenient place; and also to cite witnesses and havers for both parties for all diets in the cause.

_____ *Magistrate.*

WARRANT TO SUMMON AN ACCUSED PARTY AND WITNESSES.

[*Place and date.*] Grants warrant to officers of law to summon the said [*name of accused*] to appear personally before the Magistrate officiating in the Police Court of the Burgh of upon the day of at o'clock to answer to the foregoing complaint, and to cite witnesses and havers for both parties for all diets in the cause.

_____ *Magistrate.*

WARRANT TO APPREHEND AND SEARCH.

[*Place and date.*] Grants warrant to officers of law to apprehend and bring the said [*name of accused*] before the Magistrate officiating in the Police Court of the Burgh of to answer to the

foregoing complaint; and, if necessary, in the meantime to detain the accused in a police station-house or other convenient place; also to cite witnesses and havers for both parties for all diets in the cause; and to search and secure, and for that purpose to open all shut and lockfast places, all as craved.

_____ *Magistrate.*

SUMMONS TO AN ACCUSED PARTY.

To [*name and designation of accused*].

You are hereby summoned to appear personally before the Magistrate officiating in the Police Court of the Burgh of upon the day of at o'clock, to answer to a complaint at the instance of the Burgh Prosecutor [*or other party entitled to prosecute with or without his concurrence*] charging you with [*state the nature of the crime, contravention, or offence, as in principal complaint*].

This summons served by me on the day of 18 .

_____ *Constable.*

[*A note in the following terms to be subjoined to all Summonses.*]

If the accused desires to have witnesses cited for the defence, every reasonable assistance for citing such witnesses will be given on application at the police office.

All accused persons failing to appear in answer to a summons, without lawful excuse, are liable to be apprehended.

CITATION TO A WITNESS OR HAVER.

To [*name and designation*].

You are hereby cited to appear before the Magistrate officiating in the Police Court of the Burgh of upon the day of at o'clock, to give evidence for the prosecution [*or* defence] in the complaint at the instance of the Burgh Prosecutor [*or other party entitled to prosecute with or without his concurrence*] against [*name and designation of accused*]; and you are required to produce [*state what the haver is to produce*].

This citation served by me on the day of

_____ *Constable.*

[*Note to be subjoined to all Citations.*]

Witnesses or havers failing to attend the Court, without lawful excuse, are liable to be apprehended.

CONSTABLE'S EXECUTION OF SUMMONS OF AN ACCUSED PERSON.

I, a constable or officer of police of the Burgh of upon the day of lawfully summoned [*name and designation of accused as in complaint*] to appear before the Magistrate officiating in the Police Court of the Burgh of on the day of at o'clock, to answer to a complaint at the instance of the Burgh Prosecutor [*or other party entitled to prosecute with or without his concurrence*], charging him with [*state name by which crime, offence, or contravention known, such as "Theft," "Assault," "Breach of the public peace," etc.*].

This I did by delivering a Summons to that effect [*state how served upon accused, whether personally, or left at dwelling-house, or how.*]

_____ *Constable.*

CONSTABLE'S EXECUTION OF CITATION OF A WITNESS OR HAVER.

I, a constable or officer of police of the Burgh of upon the day of lawfully cited [*name and designation of witness or haver*] to appear before the Magistrate officiating in the Police Court of the Burgh of on the day of at o'clock, to give evidence for the prosecution [*or* defence] in the complaint at the instance of the Burgh Prosecutor [*or other party entitled to prosecute with or without his concurrence*] against [*name and designation of accused*].

This I did by delivering a Citation to that effect [*state how served, whether personally, or left at dwelling-house, or how*].

_____ *Constable.*

WARRANT TO APPREHEND AN ACCUSED PARTY IN RESPECT OF FAILURE TO OBEY SUMMONS.

[*Place and date.*] The Magistrate, in respect the said [*name of accused*] has failed to appear to answer to the foregoing complaint, after having been duly summoned to this diet, grants warrant to officers of law to search for and apprehend the said accused; and if necessary for that purpose, to open all shut and lockfast places; and to bring said accused before the Magistrate officiating in the Police Court of the Burgh of to answer thereto; and to detain said accused in a police station-house or other convenient place until brought before the said Magistrate; and also, if necessary, to cite witnesses and havers of new.

_____ *Magistrate.*

WARRANT TO APPREHEND A WITNESS IN RESPECT OF FAILURE TO OBEY CITATION; ADJOURNMENT OF DIET; AND DETENTION OF ACCUSED.

[*Place and date.*] The Magistrate, in respect [*name and designation*] witness in the cause, has failed to appear after having been duly cited, adjourns the diet till the day of at o'clock , and orders the accused to be detained in the police cells or in the prison of till that time [or until sufficient security to the amount or value of £ be found for his appearance at all diets of Court]; and grants warrant to officers of law to search for and apprehend the said witness; and if necessary for that purpose, to open all shut and lockfast places; and to detain said witness in the said cells [*or* in said prison] until the hearing of the cause, unless sufficient security be found for appearance at all diets of Court, to the amount or value of .

Magistrate.

FORFEITURE OF PLEDGE IN RESPECT OF FAILURE TO APPEAR.

[*Place and date.*] The Magistrate, in respect of the failure of the accused to appear, declares a pledge of [*amount or description of pledge*] deposited as security for appearance at this diet to be forfeited; and appoints the same to be applied in terms of the statute.

Magistrate.

FORFEITURE OF PLEDGE IN RESPECT OF FAILURE TO APPEAR; AND WARRANT TO APPREHEND.

[*Place and date.*] The Magistrate, in respect of the failure of the accused to appear, declares a pledge of [*amount or description of pledge*] to be forfeited; appoints the same to be applied in terms of the statute; and, on the motion of the complainer, grants warrant to officers of law to search for and apprehend the said accused; and if necessary for that purpose, to open all shut and lockfast places; and to bring said accused before the Magistrate officiating in the Police Court of the Burgh of to answer to the foregoing complaint; and to detain the accused in the police cells [*or* in the prison of] in the meantime.

Magistrate.

ADJOURNMENT OF DIET.

[*Place and date.*] The Magistrate adjourns the diet till at o'clock noon; and ordains the accused and witnesses to appear personally at that time.

Magistrate.

ADJOURNMENT OF DIET, AND WARRANT TO DETAIN ACCUSED.

[*Place and date.*] The Magistrate adjourns the diet till at o'clock ; and grants warrant to detain the accused in the police cells [*or* in the prison of] until that time; and also, if necessary, to cite witnesses of new.

Magistrate.

ADJOURNMENT OF DIET, AND WARRANT TO DETAIN ACCUSED FAILING SECURITY FOR APPEARANCE BEING FOUND.

[*Place and date.*] The Magistrate adjourns the diet till at o'clock ; and grants warrant to detain the accused in the police cells [*or* in the prison of] until that time, or until sufficient security to the amount or value of sterling be found for his appearance at all diets of Court.

Magistrate.

FORM OF PROCEDURE AT HEARING.

[*Place and date.*] In presence of *A.B.*, one of the Magistrates of the Burgh of , appeared the said [*name of accused*], and the charge being read over he pleads [not] guilty [*or* appeared *C.D.* for the accused and on his behalf pleads [not] guilty], *or* [*Place and date.* The accused having failed to appear, although duly cited, the Magistrate proceeded to try the case in his absence]. (Where witnesses are examined, add) Whereupon the following witnesses were examined in support of the complaint, viz.: and the following witnesses were examined in exculpation, viz.:

FORM OF CONVICTION, FINE, AND FAILING PAYMENT, IMPRISONMENT.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore fines and amerciates said accused in the sum of [*amount*] payable to , and in default of immediate payment thereof, sentences and adjudges the said accused to be imprisoned for the space of from this date [with hard labour], unless said fine be sooner paid, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey the said accused to the prison of , thereafter to be dealt with in due course of law. words deleted.

Magistrate.

CONVICTION.

IMPRISONMENT.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore sentences and adjudges said accused to be imprisoned for the space of from this date [with hard labour], and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey said accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

TO FIND CAUTION FOR GOOD BEHAVIOUR.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore ordains said accused to find sufficient caution acted in the books of Court for good behaviour for the period of months from this date; and in default of said caution being immediately found, sentences and adjudges said accused to be imprisoned for the space of from this date unless said caution shall be sooner found; and for that purpose grants warrant to officers of law to convey said accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

FINE OR IMPRISONMENT, AND TO FIND CAUTION FOR GOOD BEHAVIOUR OR FURTHER IMPRISONMENT.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the said accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore fines and amerciates the said accused in the sum of payable to ; and in default of immediate payment thereof, sentences and adjudges said accused to be imprisoned for the space of from this date [with hard labour], unless said fine shall be sooner paid: Further, ordains the accused to find sufficient caution acted in the books of Court for good behaviour for the period of months from and after the date of payment of said fine or of the expiration of said period of imprisonment, under a penalty of ; and in default of said caution being found, sentences and adjudges

said accused to be imprisoned for the further space of from the date of the payment of said fine or the expiration of the term of imprisonment for non-payment thereof; and for these purposes grants warrant to officers of law to convey the said accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

IMPRISONMENT, AND TO FIND CAUTION FOR GOOD BEHAVIOUR.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore sentences and adjudges the said accused to be imprisoned for the space of from this date [with hard labour]. Further ordains the accused to find sufficient caution acted in the books of Court for good behaviour for the period of months from and after the date of the expiration of said term of imprisonment, under penalty of ; and in default of said caution being found, sentences and adjudges said accused to be imprisoned for the further space of , unless said caution shall be sooner found; and for these purposes grants warrant to officers of law to convey said accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

SENTENCE OF WHIPPING.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*]; also that in his opinion the said accused does not exceed fourteen years of age, therefore sentences and adjudges said accused to suffer the punishment of private whipping according to the regulations applicable thereto, and that to the number of stripes, and ordains the accused to be conveyed to the prison of , there to undergo said punishment; but if it shall be the opinion of the surgeon of said prison that the said accused is unfit to endure the punishment of whipping, then and in that event [*state terms of alternative, whether imprisonment, or imprisonment with the option of a fine in the appropriate form*].

_____ *Magistrate.*

FORM WHEN COMPLAINT FOUND NOT PROVED.

[*Place and date.*] The Magistrate, having heard the cause, finds the complaint not proved, and discharges the accused accordingly.

_____ *Magistrate.*

DESERTION OF DIET.

[*Place and date.*] The Magistrate, on the motion of the Burgh Prosecutor, deserts the diet *pro loco et tempore.*

_____ *Magistrate.*

REMIT TO SHERIFF, OR MAGISTRATE OF ANOTHER BURGH.

[*Place and date.*] The Magistrate remits this case to the Sheriff of , and grants warrant to officers of law to convey the accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

Note.—If the remit is made to the Magistrates of another Burgh, it will be so stated.

BOND OF CAUTION FOR THE APPEARANCE OF AN ACCUSED PARTY.

I [*name and designation of cautioner*] do hereby judicially enact, and bind and oblige myself as cautioner and surety, that [*name and designation of accused party*] shall appear personally before the Magistrate officiating in the Police Court of the Burgh of , on the day of at o'clock, in the hour of cause, or at any other diet to which the cause may be adjourned, and answer to a complaint at the instance of the Burgh Prosecutor [*or other party entitled to prosecute with his concurrence*], and that under a penalty of to be paid by me in case of failure, and to be recovered in the manner prescribed by the "Burgh Police (Scotland) Act, 1892."

In witness whereof, etc.,

_____ *Cautioner.*

_____ *Witness.*

_____ *Witness.*

BOND OF CAUTION FOR GOOD BEHAVIOUR.

I [*name and designation of cautioner*] in terms of a sentence pronounced by one of the Magistrates of the Burgh of on the day of do hereby judicially enact,

and bind and oblige myself as cautioner and surety for the good behaviour of [*name, etc., of accused as in complaint*], for the period of months from the day of , and that under the penalty of to be paid in the event of contravention, and recovered in the manner prescribed by the "Burgh Police (Scotland) Act, 1892."

In witness whereof, etc.,

_____ *Cautioner.*

_____ *Witness.*

_____ *Witness.*

FORFEITURE OF A BOND OF CAUTION IN RESPECT OF CONTRAVENTION, AND WARRANT TO CHARGE AND IMPRISON CAUTIONER FAILING PAYMENT OF THE PENALTY.

[*Place and date.*] The Magistrate, in respect of the judicial confession above recorded [*or* evidence adduced], finds the accused guilty of the crime [contravention or offence] charged [*or state to what extent accused found guilty*], and therefore [*insert sentence of Court*]: Further, declares a bond of caution, dated , granted for the good behaviour of the accused under a penalty of forfeited; appoints the penalty to be applied in terms of the Statute; and orders the cautioner in said bond to be charged to make payment to of the penalty therein contained within six days after such charge; and in default of payment thereof within said period, ordains the said cautioner to be imprisoned for the period of days from the date of incarceration, unless payment of said penalty be sooner made, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to apprehend and convey the said cautioner to the prison of , thereafter to be dealt with in due course of law.

_____ *Magistrate.*

FORFEITURE OF BOND OF CAUTION IN RESPECT OF NON-APPEARANCE; WARRANT TO CHARGE AND IMPRISON CAUTIONER FAILING PAYMENT OF THE PENALTY.

[*Place and date.*] The Magistrate, in respect the accused has failed to appear to answer to the foregoing complaint, declares a bond of caution granted for the appearance of the accused at this diet under a penalty of forfeited, and appoints the said penalty to be applied in terms of the Statute: Further, orders [*name and designation of cautioner*], the cautioner in said bond, to be charged to make payment to the clerk of Court of said penalty within six days after such charge; and in default of payment thereof within

said period, ordains the said cautioner to be imprisoned, etc. [*and so on as in preceding form*].

_____ *Magistrate.*

CHARGE TO A CAUTIONER TO MAKE PAYMENT OF A PENALTY IN A BOND FORFEITED IN RESPECT OF CONTRAVENTION OR FOR NON-APPEARANCE.

To [*name and designation of cautioner as in bond*].

I, a constable or officer of the Police Court of the Burgh of , hereby charge you to make payment of the sum of , being the penalty contained in a bond of caution enacted by you in the said Court for the [good behaviour of] [*name and designation of accused as in bond*] for the period of months from the day of [*or* appearance personally before said Court of] [*name and designation of accused as in bond*] [to answer to a complaint at the instance of the Burgh Prosecutor thereof] [*or other party entitled to prosecute with his concurrence*], which bond has been declared forfeited by the Magistrate officiating in said Court in respect of a conviction for an offence committed in contravention thereof [*or* in respect of the non-appearance of the accused to answer to said complaint], the said sum to be paid by you to within six days after the date of this my charge, under pain of imprisonment for the period of days from the date of incarceration, unless said sum shall be sooner paid.

This charge served by me on the day of .

_____ *Constable.*

CONSTABLE'S EXECUTION OF A CHARGE UPON A CAUTIONER.

I, a constable or officer of the Police Court of the Burgh of , upon the day of , lawfully charged [*name and designation of cautioner as in charge*] to make payment to of the sum of , being the penalty contained in a bond of caution enacted for the good behaviour of [*or* for the appearance personally before the said Police Court to answer to a complaint at the instance of the Burgh Prosecutor] [*or other party prosecuting with his concurrence*], which bond has been declared forfeited, and that within six days after the date of my said charge, under the pain of imprisonment for a period of from the date of incarceration.

This I did by delivering a charge to the effect aforesaid [*state how served, whether personally, or left at dwelling-house, or how*].

_____ *Constable.*

NOTE.—*Where the penalty forfeited is contained in an Adjournment Order, and due by the accused, the necessary alterations will be made on the foregoing forms.*

PETITION TO MAGISTRATES FOR RESTORATION OF STOLEN, ETC., GOODS.

Unto the Magistrates of the Burgh of

The Petition of [*name, etc., of claimant*].

HUMBLY SHEWETH,—

That [*state circumstances regarding the goods, etc., and by whom claimed*].

May it therefore please your Honours, after intimation to and hearing any parties interested, to order the property above described to be restored to the petitioner upon *viva voce* evidence being adduced to your satisfaction that such property was stolen [fraudulently obtained, or disposed of in breach of trust], and that the petitioner is the true owner or possessor thereof; or to do otherwise as to your Honours may seem meet.

According to justice, etc.,

_____ *Petitioner.*

or

_____ *Agent for Petitioner.*

EXTRACT OF CHARGE AND SENTENCE.

[*Place and date.*] [*Name and designation of accused*] having this day been brought before the Magistrate officiating in the Police Court of the Burgh of on the complaint of the Burgh Prosecutor, charged with the crime of (*or*) [with a contravention of sec. of the Burgh Police (Scotland) Act, 1892], (*or*) [with an offence within the meaning of sec. of the Burgh Police (Scotland) Act, 1892, *or other Act contravened*], and having been found guilty, the said Magistrate [fined and amerciated the accused in the sum of and failing immediate payment thereof] sentenced and adjudged the said accused to be imprisoned for the space of from this date [unless said fine should be sooner paid]; and granted warrant to officers of law to convey the said accused to the prison of , thereafter to be dealt with in due course of law.

_____ *Clerk.*

GENERAL DIRECTIONS.

Where the accused is summoned or apprehended, or witnesses are cited by virtue of the Act, it shall not be necessary to pray for or grant warrants for these purposes.

Whoever may be the presiding judge in the Police Court, the name "Magistrate" shall be used in all proceedings.

SCHEDULE VIII.

SECTION 353.

PETITION AND CERTIFICATE BY THE COLLECTOR TO BE WRITTEN AT THE END OF EACH VOLUME OF THE ROLL OF ASSESSMENTS.

Unto the Honourable the Sheriff of [*or* Magistrates] of the Burgh of].

The Petition of A.B., Collector of Assessments for the Burgh of .

HUMBLY SHEWETH,—

That the assessments specified in the foregoing book (which is the volume of the Roll of Assessments for said Burgh) have been duly imposed on the persons and companies therein mentioned for the year from to , and became due and payable at the term of (as the case may be).

That the petitioner hereby certifies that the said persons or companies received notices from the petitioner to pay the assessments set against their names respectively, within fourteen days hereafter, and that the said period has in each case expired.

Further, that certain of the said persons and companies have failed to pay the assessments due by them respectively, being those against whose names no marking of payment has been made in said volume, and the sums specified after their names are still truly due.

May it therefore please your Lordship [*or* your Honours] to grant summary warrant to the petitioner or officers of Court to enter into any premises in the occupancy of any of the said persons or companies so in arrear, and to poind, seize, remove, or secure any goods and effects therein belonging to, or in the lawful possession of, such persons or companies, or so much thereof as will fully satisfy the arrears of assessments due by them respectively with the addition of ten per centum thereon; and warrant also to the petitioner or officers of Court or any licensed auctioneer, after the lapse of four days, in the event of the non-payment of said arrears and ten per centum thereon, to sell and dispose of said goods and effects by public auction, on three days' notice of the sale [*by the common crier, or by such mode as the Sheriff or Magistrate may prescribe*], either on the premises or at the Market Cross [*or such other public place as may be fixed by the Sheriff or Magistrate*], and apply the proceeds in payment of the said arrears and ten per centum, returning any balances to the owners; and the petitioner further craves your Lordship [*or* your Honours] to decern and ordain instant execution by arrestment of the goods, debts, and sums of money of the said persons or companies in satisfaction of the

said assessments due by them respectively, and of ten per centum thereon. A. B., *Collector.*

[*Place and date.*] The Sheriff [Sheriff-Substitute *or* Magistrate] grants warrant and decree, all as craved. C. D.

SCHEDULE IX.

SECTION 39.

We, A.B. [*here insert name and place of abode as in the Municipal Register for the Burgh*] and C.D. [*here insert name and place of abode as aforesaid*] hereby propose and nominate E. F. [*here insert name and place of abode as aforesaid*] for election as a Councillor [*when the Burgh is divided into wards, add here,* "for the ward," *specifying such ward*] at the next ensuing municipal election in the Burgh of [*specify Burgh*].

Given under our hand this [*insert date*].

A. B._____

C. D._____

We, the undersigned, being registered municipal electors of the Burgh of [*or* "for the ward" [*specify ward*], *as the case may be*], do hereby assent to the nomination of the said *E. F.* as Councillor as above mentioned.

G. H._____ of_____
I. J. _____ of_____
K. L._____ of_____
M. N._____ of_____
O. P. _____ of_____

Insert places of abode as in Municipal Register.

I, the nominee for election, consent.

E. F._____

To Town Clerk of_____

SCHEDULE X.

SECTION 40.

The intimation or nomination of E. F. [*here insert name and place of abode of candidate as in the Municipal Register for the Burgh*] for election as a Councillor [*when the burgh is divided into wards, add here,* "for the ward," *specifying such ward*] at the

next ensuing municipal election in the Burgh of [*specify Burgh*] is hereby withdrawn.

Given under our hand this [*insert date*].

To be signed by

× *Candidate.*

× *Proposer* or *Seconder.*

or by

× *Proposer.*

× *Seconder.*

× *Assenter.*

To_____

Town Clerk of

APPENDIX.

I.

FORMS FOR CARRYING THE ACT INTO OPERATION.

FORM OF NOTICE TO BE GIVEN BY CLERK FOR ELECTION OF COMMISSIONERS.

The notice to be issued by the Clerk for the election of the Commissioners may be made in the following terms, or as near thereto as circumstances may require:—

BURGH OF _____

MUNICIPAL ELECTIONS.

In terms of the Burgh Police Act, 1892, the Act 3 & 4 Will. IV. c. 77, and other Statutes thereanent, notice is hereby given that the annual election of Commissioners for the Burgh of will, if, and so far as may be, necessary, take place on Tuesday, the 3rd day of November next; and the following are the polling places appointed for the several wards, viz:—

First Ward—(*Here specify place*).
Second Ward,
And so on according to number of wards.

The Poll will be open between the hours of 8 *o'clock a.m. and* 8 *o'clock p.m.*
Each Ward returns *Commissioner or Commissioners.*

And notice is also given, that no person can be elected a Commissioner whose name is not intimated to me, in the manner provided by "The Burgh Police (Scotland) Act, 1892," at my office, Town Hall, "on or before four of the clock afternoon, on the Tuesday immediately preceding the day of election," in an intimation paper, signed by two registered electors, assented to by five other registered electors, and signed by the person nominated, or his mandatory, forms of which may be obtained here.

And notice is further given, that any intimation so made may be withdrawn by giving notice of withdrawal to me, before four o'clock afternoon, on the Thursday immediately preceding the said first

Tuesday of November, signed by the person nominated and by his proposer or seconder, or signed by both his proposer and seconder, and also by one of the five assentors to the nomination; but no such withdrawal will be allowed where its effect will be to reduce the total number of persons nominated below the number necessary to supply the vacancies to be filled up.

And notice is further given, that, in terms of the Burgh Police (Scotland) Act, 1892, where the number of persons so intimated (and not competently withdrawn) for any ward, does not exceed the vacancies to be supplied in such ward, there will be no poll in such ward; and the persons so proposed will, on the day appointed for declaring the election, be declared to be elected Commissioners of the burgh.

A. B., *Clerk.*

[*Place and date.*]

FORM OF INTIMATION BY CLERK OF PERSONS PROPOSED FOR ELECTION.

BURGH OF_____

In terms of the Burgh Police (Scotland) Act, 1892, I hereby give notice, that I have received intimation that the following persons are proposed for election as Commissioners in this burgh at the Municipal Election on Tuesday next:—

No. of Ward.	Name of Candidate.	Place of Abode of Candidate.	Names of Proposer and Seconder.	Places of Abode of Proposer and Seconder.
First, .	Andrew Archibald,	1 Restalrig Terrace, .	John Wright, ...	7 Claremont Park.
			William Turnbull, . .	144 Duke Street.
Second,	John G. Holborn, .	330 Leith Walk, . . .	Daniel William Kemp, .	Ivy Lodge, Laverockbank Road.
			Robert Robertson, . .	52 Easter Road.
"	James Waldie, . .	The Grove, Laverockbank Road, ...	Thomas Macpherson, .	144 Duke Street.
			David Hogg, sen., . .	24 Glover Street.
Third, .	Jacob Ormond Garland, . . .	14 Easter Road, . . .	John Sellar Matheson, .	24 East Hermitage Pl.
			William Tulloch, . .	10 Hermitage Place.
Fourth,	George Robertson, .	1 Hawthorn Bank Ter.,	Charles Mitchell, . .	35 Madeira Street.
			Andrew Gowans, .	46 Madeira Street.
Fifth, .	John Gosman, . .	36 Park Road, Groves Cottage, ...	William Merrilees, . .	7 Trinity Road, East.
			Alexander Ward, . .	26 Dudley Avenue.
"	William M'Creadie,	164 Queensferry Road, .	Ebenezer Chalmers, .	7 Summerside Street.
			James Dickson, . . .	Willowbank, Whale Brae.

And I further give notice, in terms of the Burgh Police (Scotland) Act, 1892, that in respect the number of persons proposed for election as Commissioners in the First, Second, Third, and Fourth Wards does not exceed the number of vacancies to be supplied in

these wards, there will be no poll in these wards, and the persons so proposed will, on the day appointed for declaring the election, be declared to be elected Commissioners of the burgh.

Given under my hand, at this day of October 18 .

A. B., *Clerk.*

FORM OF ELECTION MINUTES.

At , the day of November 18 :

Which day, , Esquire, Provost of the Burgh of , considering that the election of Commissioners for the said burgh, in room of the Commissioners who go out of office in terms of the Burgh Police (Scotland) Act, 1892, and relative Acts regulating the election of Councillors or Commissioners for the several burghs and towns in Scotland which now return or contribute to return members to serve in Parliament, and are not royal burghs, takes place on Tuesday, the day of November current, and that it is necessary he should appoint proper presiding officers to officiate at the polling stations in the First, Third, Fourth, and Fifth Wards of the burgh (there being no poll this year in the Second Ward): Therefore the said Provost did, and hereby does, nominate and appoint D. M. L., A. W., J. P., W. M. M., J. R., R. S., W. I. H. S., and F. C. M'I., Esquires, all solicitors in , to be presiding officers at the said election for the said wards, as follows:—The said D. M. L. and A. W. to preside at the election for the First Ward; the said R. S. and W. I. H. S. to preside at the election for the Third Ward; the said J. P. and F. C. M'I. to preside at the election for the Fourth Ward; and the said J. R. and W. M. M. to preside at the election for the Fifth Ward.

Further, the said Provost did, and hereby does, nominate and appoint Messrs. E. H., F. J. G., G. S., R. R. L., J. A. G., G. M., A.G., and R. F., writers in , to officiate as poll-clerks at the said election for the said wards, as follows:—The said E. H. and F. J. G. to officiate at the election for the First Ward; the said G. S. and R. R. L. to officiate at the election for the Third Ward; the said J. A. G. and G. M. to officiate at the election for the Fourth Ward; and the said A. G. and R. F. to officiate at the election for the Fifth Ward.

And the said parties, being present, accepted the office to which they had respectively been appointed, and severally made the statutory declaration of secrecy.

T. A., *Provost and Returning Officer.*

At , the day of November 18 :

In presence of , Esquire, Provost of the Burgh of .

The persons appointed to preside at the election of Commissioners for the First, Third, Fourth, and Fifth Wards of the burgh, having yesterday transmitted the ballot-boxes of these wards and other documents, sealed up in terms of law; and the said boxes having been opened by the said Provost, and the votes therein counted by him, with the assistance of the Town-Clerk, the Depute Town-Clerk, and others, it was found that, in the First Ward, there were 135 votes for Mr. W. F., 230 votes for Mr. R. M., and 516 votes for Mr. M. C. R.; that, in the Third Ward, there were 317 votes for Mr. W. B., 762 votes for Mr. A. G., 568 votes for Mr. W. K., 272 votes for Mr. T. M., and 149 votes for Mr. J. M'N.; that, in the Fourth Ward, there were 697 votes for Mr. W. B., and 542 votes for Mr. W. W.; and that, in the Fifth Ward, there were 453 votes for Mr. W. S., and 366 votes for Mr. J. T.

The Clerk certified that the following was the name of the only person intimated to him as Clerk of the burgh, in the manner provided by the Burgh Police (Scotland) Act, 1892, for election as Commissioner in the Second Ward of the burgh, at the election of Commissioners, which was appointed to take place yesterday, being the first Tuesday in the month of November current, and which person, by virtue of the Burgh Police (Scotland) Act, 1892, falls, on the day appointed for declaring the election, to be declared to be elected a Commissioner, *videlicet*:—

Second Ward—Mr. A. F.

Whereupon the said Provost declared, and hereby declares, that the election of a Commissioner for the First Ward has fallen upon the said M. C. R.; that the election of a Commissioner for the Second Ward has fallen upon the said A. F.; that the election of Commissioners for the Third Ward has fallen upon the said A. G. and W. K.; that the election of a Commissioner for the Fourth Ward has fallen upon the said W. B.; and that the election of a Commissioner for the Fifth Ward has fallen upon the said W. S.

The Clerk was directed to intimate his election to each of the gentlemen declared elected, and to require each of them to attend in the Council Chamber to-morrow, at eleven o'clock forenoon, in order that he may declare whether he accepts, or declines accepting, the office of Commissioner, all in terms of the Statute.

T. A., *Provost.*

At , the day of November 18 :

In presence of , Esquire, Provost of the Burgh of .

The Clerk stated that there had been written, and delivered, to each of the gentlemen on whom the election of Commissioner had been declared to have fallen, as set forth in the minute of yesterday, a letter in the following terms:—

"TOWN-CLERK'S OFFICE,
" , *November* 18 .

"SIR,—I have been directed to intimate to you that you have been elected a Commissioner of this burgh, and to require you to appear in the Council Chamber, here, to-morrow (Thursday), at eleven o'clock forenoon, in order that you may declare whether you accept, or decline accepting, the office of Commissioner.

"I beg to bring under your notice that, by the Burgh Reform Act, 1833, incorporated in the Burgh Police (Scotland) Act, 1892, it is provided that, 'If any person elected as Commissioner shall fail to attend on the day appointed for declaring his acceptance, he shall be held to have declined accepting the said office, unless he then transmit to the meeting a sufficient written explanation, signed by himself or his agent, of the cause of his absence, and intimating his acceptance.'—I am, Sir, your most obedient servant,

"(Signed) T. B. L., *Clerk.*"

Thereafter, compeared Mr. M. C. R., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

Compeared Mr. A. F., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

Compeared Mr. A. G., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

Compeared Mr. W. K., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

Compeared Mr. W. B., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

Compeared Mr. W. S., who accepted of the office of Commissioner to which he had been declared elected; and made and subscribed a declaration *de fideli administratione officii.*

T. A., *Provost.*

T. A., *Provost.*

BURGH OF_____

Year 18 - .

1. *Statutory Meeting—Friday,* *November* 18 .

MINUTES.

At , the day of November 18 :
Present,—[*here give sederunt*], and T. B. L., *Clerk;* Bailie A., Senior Magistrate, in the chair.

Before proceeding to the business of the meeting, Commissioner B., who had intimated his acceptance of office by letter, now made and subscribed a declaration *de fideli administratione officii.*

The Chairman stated that this meeting had been called, in terms of the Statute, to elect a Provost of the burgh, in room of Provost B., whose term of office had expired; and two Bailies of the burgh, in room of Bailies S. and G., whose term of office had also respectively expired; also to elect any other office-bearers rendered necessary by the foregoing; and a representative in W.'s Trust; and further, if so resolved, for the appointment of the Standing, or other, Committees for the year.

Thereupon, Bailie A. moved that Commissioner B. be re-elected Provost of the burgh; which was unanimously agreed to.

Whereupon, the Commissioners re-elected, and hereby elect, Commissioner T. B. to be Provost of the burgh; and he, being present, accepted of the office, and made and subscribed the declaration appointed by the Act 31 & 32 Vict. c. 72, and also a declaration *de fideli administratione officii;* and thereupon took the chair.

Thereafter, the Provost moved that Commissioner I. be re-elected a Bailie of the burgh; which was unanimously agreed to.

Thereafter, the Provost moved that Commissioner H. be elected a Bailie of the burgh; which was unanimously agreed to.

Whereupon the Commissioners elected, and hereby elect, the said Commissioners J. O. G. and J. H. to be Bailies of the burgh; and they, being present, accepted of the office, and respectively made and subscribed the declaration appointed by the Act 31 & 32 Vict. c. 72, and also a declaration *de fideli administratione officii.* (See opinion of counsel, pp. 75, 76.)

The Bailies were appointed to stand thus:—Bailie A., first Bailie; Bailie G., second Bailie; Bailie I., third Bailie; and Bailie H., fourth Bailie.

It was stated, in view of what was said at the beginning of the meeting, that no election of any other office-bearers was rendered necessary by the above appointments.

It was intimated that, in consequence of Provost B. falling, by virtue of his election as Provost, to hold office for three years, it was unnecessary to determine the order of his and Commissioner D.'s retirement from the Council, in case anything should hereafter arise necessitating the retirement from the Council of the one before the other.

The Commissioners, in terms of the Act 3 & 4 Will. IV. c. 77, nominated and elected, and hereby nominate and elect, Provost T. B., one of their own body, to be a Patron, Trustee, Governor, and Manager of J. W.'s Hospital, established in terms of the trust-disposition and settlement of the late J. W., Esquire, merchant in , executed the day of , and that from and after this date, until the completion of the annual elections, under the said Act, in the year 18 ; and the Clerk was directed to intimate the appointment in the usual manner.

Read the following representation by the Clerk:—

" , *November* 18 .—The Clerk begs to lay before the Council the Roll of Commissioners for the different wards:[1]—

First Ward.	Third Ward.
1888. Richard Millar.	1887. Charles Groves (elected Treasurer, 1889).
1889. Andrew Archibald.	1889. Andrew Gibson.
1890. Thomas Aitken.	1890. Jacob Ormond Garland.
1890. John Blackie.	
Second Ward.	**Fourth Ward.**
1888. Archibald Fisher.	1888. William Wells.
1889. George Craig.	1889. George Robertson.
1890. James M. Manclark.	1890. John Bennet.

Fifth Ward.

1888. John Thynn.
1889. John Gosman.
1890. Andrew Scott.

"T. B. L., *Clerk.*"

The Council having so resolved, proceeded to the appointment of, and appointed, the Standing Committees for this year; their days of meeting, the quorum for each, and their powers, being fixed as follows:—

1. Provost's,—Provost, *Convener;* four Bailies, and Treasurer.

[1] See Thomson *v.* Magistrates of Rutherglen, 17th Feb. 1876, 3 R. 457, referred to on p. 77.

2. TREASURER'S,—including Law and Assessments.—The whole Council—Treasurer, *Convener*.

3. GENERAL,—including Drainage, Paving, Steelyards, General Improvements, "The Improvement Scheme," Slaughter-houses, and Links.—The whole Council—Provost, *Convener*.

4. POLICE,—including Cleaning, Lighting, Watching, Water, and Fire Engines.—Bailies G. (*Convener*), A., G., and B.; Treasurer G.; Commissioners M., B., C., M., G., W., R., T., and S.

5. PUBLIC HEALTH,—including Bowling-Greens and Public Parks.—Provost A., *Convener;* Bailies A., G., and B.; Treasurer G.; Commissioners M., B., etc.

1. Provost's Committee to meet as occasion may require.
2. Treasurer's Committee to meet on 3rd Tuesday of each month
3. General Committee to meet on 2nd and 4th Tuesdays of each month.
4. Police Committee to meet on 2nd Thursday of each month.
5. Public Health Committee to meet on 3rd Tuesday of each month.

Five to be a quorum of each of the above Committees, other than the Provost's Committee, of which three to be a quorum.

Committing to each of the said—Treasurer's (including Law and Assessments), General (including Drainage, Paving, Steelyards, General Improvements, "The Improvement Scheme," Slaughter-houses, and Links), Police (including Cleaning, Lighting, Watching, Water, and Fire Engines), and Public Health (including Bowling-Greens and Public Parks)—Committees, in each of their respective departments, full powers for carrying the various purposes of the Burgh Police (Scotland) Act, 1892, the Public Health (Scotland) Act, 1867, the Public Parks (Scotland) Act, 1878, and relative Acts into execution, so far as competent to do so.

And the Commissioners renewed all outstanding remits to the several Committees.

NOTICE TO LIGHT COMMON STAIRS.

LIGHTING AND CLEANSING DEPARTMENT,
POLICE CHAMBERS,

_____ 18 .

SIR,—In terms of the Burgh Police (Scotland) Act, 1892, sec. 104,[1] and of the Order of the Commissioners of the burgh of , dated 18 , a copy of which, so far as applicable to your property, is also herewith attached, I, A. B., Inspector of Lighting of the said burgh, in name, and on behalf of,

[1] See *ante*, p. 161.

and as specially authorised and directed by the said Commissioners, hereby require you, as one of the owners of the common stair at No. , to comply with the said Order by providing lamps or brackets [*state position*]. [*When lamps or brackets are provided, the Order for supplying the gas will run*] the necessary supply of gas required by the Commissioners for lighting lamps or brackets in the said common stair or premises.

And I further give you notice that if you fail to comply with said Order, within seven days from the date of this service, you will be liable under the said recited Act to a penalty not exceeding forty shillings.

A. B., *Inspector of Lighting.*

ORDER BY THE COMMISSIONERS OF THE BURGH OF .

Meeting 18 .

There was presented representation by the Inspector of Lighting of the following tenor:—

Police Chambers, 18 .—The Inspector of Lighting begs to represent to the Commissioners that the lighting of the common stairs and passages herewith enumerated has [*or* has not] been sanctioned under the previous Police Acts; but he craves, if they should see fit, that the enumeration be covered by a new Order under the Act of 1892.

A. B., *Inspector of Lighting.*

Inter alia,—No. and Name of Street ;
No. of Lights .

In terms of the foregoing representation, the Commissioners ordered the owners in the above-mentioned common stairs and common passages to erect lamps and provide gas; and the occupiers to light and keep the same lighted from sundown till 11 P.M., and thereafter to extinguish the lights by turns.

BYE-LAWS AS TO THE SWEEPING AND WASHING OF COMMON STAIRS AND PASSAGES.

BURGH OF _____

Cleansing Department.

See sec. 115 of the Burgh Police (Scotland) Act, 1892,[1] and 316 B (9).[2]

[1] See *ante*, pp. 171, 172.

[2] See *ante*, p. 498.

NOTICE TO PAINT STAIRS AND COMMON PASSAGES.

POLICE CHAMBERS, SANITARY DEPARTMENT,

_____ 18 .

The Commissioners, in terms of the Burgh Police (Scotland) Act, 1892, sec. 117,[1] require you, within seven days from the date of this notice, to cause the stair and passages leading to your property, No. , to be painted, under the penalty of forty shillings.

A. B., *Sanitary Inspector.*

NOTICE TO CLEANSE PREMISES.

POLICE CHAMBERS, SANITARY DEPARTMENT,

_____ 18 .

In virtue of the powers conferred by sec. 119 of the Burgh Police (Scotland) Act, 1892, I have to intimate to you that the situated at No. , are not in a cleanly condition, and I hereby order you to cleanse and purify the same within *forty-eight* hours from date hereof, under a penalty of forty shillings in case of your non-compliance.

A. B., *Sanitary Inspector.*

NOTICE TO REMOVE STABLE MANURE.

POLICE CHAMBERS, CLEANSING OR SANITARY DEPARTMENT,

_____ 18 .

In terms of the Burgh Police (Scotland) Act, 1892, I have to request that you will cause the manure from your stables in , to be *entirely removed every* , with certification that, if you fail to comply with this Order, you will be proceeded against in terms of the Statute.—I am, your obedient servant,

A. B., *Inspector of Cleansing or Sanitary Inspector.*

[1] See *ante*, p. 173.

NOTICE TO PAVE AND CAUSEWAY PRIVATE STREET.

Paving Department.

Notice is hereby given to the owners of the lands and heritages fronting or abutting on the private street of , that the Commissioners of the burgh of call upon them to free the carriageway of the said street from obstructions, and to properly level, make-up, construct, causeway, pave, channel, and complete the same, in terms of the specification hereto annexed, all to the satisfaction of the Commissioners, within from and after the date of this notice; and in case this notice is not complied with within the time specified, the Commissioners shall themselves, on the expiry of said period, cause the said private street, or part thereof, to be freed from obstructions, and to be properly levelled, made-up, constructed, causewayed, paved and channelled, and completed in such way and manner and with such materials as the Commissioners may think fit; and the costs and expenses which may be incurred by them in connection therewith shall be charged as a private improvement assessment against the owner or owners in default: all in terms of secs. 133, 137, and 365 of the Burgh Police (Scotland) Act, 1892.

Given under my hand, at , this day of 18 .

A. B., *Clerk.*

NOTE.—Mr. , Burgh Surveyor, will give any additional information required by owners, on application to him at his office, City Chambers, and will exhibit a plan of the street.

SPECIFICATION REFERRED TO IN PRECEDING NOTICE.

The road or street to be excavated and prepared for the new paving, so as not to leave hollows or irregularities of any kind, and the new bottom to be thoroughly beat down and consolidated with heavy iron-shod beaters, so as to make it uniform and solid throughout. The finished surface to have a rise, from the sides to the centre, of a quarter of an inch upon each foot, or thereby.

The carriageway to be paved with good solid whinstone mashed rubble causeway of sound rock, set on a bed of clean sharp sand, not less than two inches in depth, the causeway to consist of stones of fairly uniform size, from six to nine inches long, from three and a-half to five inches broad, and from six to seven inches deep, square cut on the tops, ends, sides, and bottoms, and of such size and weight that one ton of stones shall cover three superficial yards or thereby when laid hard to hard. The causeway to be carefully beat down three-quarters of an inch after being laid in position, and thereafter jointed, packed, and filled with quarter-inch gravel.

Channels to be formed on both sides of carriageway, of whinstone or concrete, twelve inches broad by seven inches deep, hollowed on the surface three-quarters of an inch.

If whinstone be used, the stones to be in three to four feet lengths and nidged on the surface; and squared all round on joints and sides, flat-bedded, laid on lime mortar, and jointed with cement.

If concrete be used, the channels shall be made in suitable moulds four to six feet long, with a four-inch bottom layer, one part best London Portland cement, and four parts stones, broken to pass through a one-inch riddle; and a two-inch surface layer, equal parts cement and three-eight-inch ground granite.

Street gratings to be also provided and set in position, each upon a stone sill. The gratings to be two feet long, one foot three inches wide, and two feet six inches deep, made of the best cast metal. Suitable outlet drains shall also be provided, of six-inch diameter fireclay pipes, from the gratings to the main sewer.

Paving Department.

Notice is hereby given to the owners of houses and buildings, or of gardens and grounds adjoining to or fronting the private street called , that the Commissioners of the burgh of call upon the said owners to sufficiently form and pave or surface the foot-pavements or footpaths of said street, to the extent of their respective houses and buildings, or of gardens and grounds, in terms of the specification hereto annexed; and that if any owner shall fail to comply with this order to form and pave or surface as aforesaid the foot-pavement or footpath of said street to the extent of his houses and buildings, or of gardens and grounds, and to complete the same within from the date of this notice, the Commissioners shall cause such foot-pavements or footpaths to be laid and put in a proper state, at the cost of such owner; and such cost may be recovered by the collector as a private improvement assessment debt at common law: all in terms of the Burgh Police (Scotland) Act, 1892.

Given under my hand at , this day of 18 .

A. B., *Clerk.*

NOTE.—Mr. , Burgh Surveyor, will give any additional information required by owners, on application to him at his office, City Chambers, and will exhibit a plan of the street.

SPECIFICATION REFERRED TO IN PRECEDING NOTICE.

Pavement to be either granitic concrete, Caithness flags, or Hailes flags.

If granitic concrete be used, the ground to be excavated and all rubbish removed, and the bottom carefully beat and consolidated,

and prepared to receive a foundation of small broken stones, free-stone or whinstone, four inches deep. The bottoming to be covered with a layer of fine concrete two inches thick, consisting of small-broken stone, passed through a one-inch riddle, and the best London Portland cement, in the proportion of three measures of stone to one measure of cement; all thoroughly mixed and laid down to form the bed. The surface-finishing to be done at the same time and while the bed is soft and moist, with a finer coating of small granite, passed through a three-eighth-inch riddle, and cement in equal proportions, one inch in thickness, laid to the adjusted levels, dusted over with pure cement, gauged, floated, and finished by experienced workmen, and to be carefully protected, lighted, and watched until thoroughly set and hard.

Concrete kerb to be laid down along with the concrete pavement, in four-and-a-half feet lengths, or thereby, and ten inches deep by six inches broad, composed of three-eight-inch ground granite and cement, in equal proportions, carefully laid and finished against face boards, straight or curved, and the edge of the kerb to be slightly rounded.

If Caithness flagstones be used, these to consist of first-class pavement, from two-and-a-half to three-and-a-quarter inches thick, of the blue hard solid rock.

If Hailes flags be used, the flags to be of the best white rock, not less than four inches thick, scabbled on the surface and square-jointed.

If whinstone kerb be used, the same to be made from the best rock, of the ordinary lengths, by twelve inches deep and six inches thick, all carefully nidged.

All stone pavement and kerb to be laid on a bed of lime mortar and jointed with cement.

STATUTORY NOTICE AS TO REPAIRING RHONES AND PIPES FOR CONVEYING RAIN WATER FROM ROOFS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

I hereby intimate to you that the rhones or pipes necessary for conveying the water from the roof of your property, No. , are in a state of disrepair, and in terms of the Burgh Police (Scotland) Act, 1892, sec. 164,[1] require you to put the same in a proper condition, within six days from this date. I beg further to intimate that, failing due attention being given to this notice within six days from this date, further proceedings will be adopted, and the penalties fixed by the Act will be enforced.

A. B., *Burgh Surveyor.*

[1] See *ante*, p. 265.

Relative Warrant.

Burgh of _____

The Commissioners of the burgh of hereby give their consent during their pleasure to C. D. to open the street at for the purpose of [*specify purpose*], but not exceeding the period of days from this date. This warrant is granted always with and under the whole conditions and obligations specified in his application, and under the conditions, obligations, and restrictions contained in the Burgh Police (Scotland) Act, 1892, and particularly sec. 164 thereof.

A. B., *Clerk or Burgh Surveyor.*

Special Conditions.

The foot-pavement or carriageway to be carefully restored and left in good repair, same as before the opening was made. When pavement is lifted, the same must be relaid on a good bed of lime mortar, and jointed and grouted with Portland cement. When causeway is lifted, the same must be relaid on a two-inch bed of clean sand, and the joints filled with quarter-inch gravel or asphalt or cement, as may happen on the street when the opening is made; and where a concrete foundation has been cut through, the same must be carefully restored with fresh cement concrete. The earth refilled into the drain tracts or openings must be thoroughly beat down, and the whole finished, complete, within the time specified in the warrant. All the openings must be carefully fenced, watched, and lighted at night with red lights, and every care taken to prevent accident.

The above conditions must be carefully attended to.

STATUTORY NOTICE FOR REPAIRING RAILINGS OF STAIRS.

Burgh Surveyor's Office, Police Chambers,

_____ 18 .

I hereby intimate to you that the railings of the stairs, landing-places, and passages in connection with the common stair at or within your property, No. , are in a state of disrepair; and in terms of the Burgh Police (Scotland) Act, 1892, sec. 174,[1] require you within days from this date to put the same in a proper state of repair. I beg further to intimate that, failing due attention being given to this notice, further proceedings will be adopted, and the penalties fixed by the Act enforced.

A. B., *Burgh Surveyor.*

[1] See *ante*, p. 283.

STATUTORY NOTICE AS TO FENCING WINDOWS OF COMMON STAIRS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

I hereby intimate to you that the windows of the common stairs, passages, and basements at your property, No. , require to be fenced; and in terms of the Burgh Police (Scotland) Act, 1892, sec. 174,[1] require you within days to cause the same to be sufficiently fenced. I beg further to intimate that, failing due attention being given to this notice, further proceedings will be adopted, and the penalties fixed by the Act enforced.

A. B., *Burgh Surveyor.*

STATUTORY NOTICE AS TO COMMON STAIR.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

I hereby intimate to you that the of the common stair in connection with your property, No. , are in a state of disrepair; and in terms of the Burgh Police (Scotland) Act, 1892, sec. 174,[2] require you within days to put the same in a proper state of repair. I beg further to intimate that, failing due attention being given to this notice, further proceedings will be adopted, and the penalties fixed by the Act enforced.

A. B., *Burgh Surveyor.*

STATUTORY NOTICE TO REMOVE PROJECTIONS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

The Commissioners for the burgh of , in pursuance of powers conferred on them by the Burgh Police (Scotland) Act, 1892, have ordered the removal of within fourteen days from the date of this notice.

I have therefore to intimate that, failing your compliance with this order of removal, you render yourself liable in the penalties fixed by the Act.

A. B., *Burgh Surveyor.*

See sec. 19 of the Burgh Police (Scotland) Act, 1892.[3]

[1] See *ante*, p. 283. [2] See *ante*, p. 283.
[3] See *ante*, p. 86. This may be adapted to secs. 160 and 161 of the Act.

STATUTORY NOTICE AS TO VENTILATING COMMON STAIRS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

I beg to intimate to you that the common stair and passage at _____ are not provided with proper means of ventilation, and you are hereby required to have the same provided to the satisfaction of the Commissioners for the burgh of _____, in terms of the Burgh Police (Scotland) Act, 1892, sec. 185.

Should you fail to have the work commenced within six days from this date, proceedings will be taken in terms of the Statute.

A. B., *Burgh Surveyor.*

See sec. 185 of the Burgh Police (Scotland) Act, 1892.[1]

WARRANT FOR HOARDING.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS.

_____ 18 .

On behalf of the Commissioners acting in and for the burgh of _____, under and in virtue of the Burgh Police (Scotland) Act, 1892, I hereby grant you permission to enclose part of [*here specify place*].

And, further, I hereby require you to form a convenient footway _____ feet broad, all round, on the outside of the hoarding, with a proper handrail placed _____ feet above the surface of street; said footway to be formed of planks, or in such other manner, to my satisfaction. And you are further required to light the hoarding in a sufficient manner with lamps having red glass in same, in order to prevent accidents; and such hoarding, footway, and handrail shall at all times, during the currency of this warrant, be subject to my control and superintendence; and should you fail to keep such in good condition, and sufficiently lighted from sunset to sunrise, I may cause the whole to be removed, or any alteration or arrangement made thereon, that I may consider necessary for the safety and convenience of the public, and charge the expense incurred in respect thereof against you.

A. B., *Burgh Surveyor.*

[*Name and address.*]

See secs. 187 to 190 of the Burgh Police (Scotland) Act, 1892.[2]

[1] See *ante*, p. 294.

[2] See *ante*, pp. 297–301.

STATUTORY NOTICE AS TO RUINOUS BUILDINGS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____, 18 .

In terms of the Burgh Police (Scotland) Act, 1892, sec. 191, I hereby require you, as owner of the to take down, secure, or repair such building, wall, or thing, the same being dangerous to occupiers or passengers, so as to prevent the same being or becoming the cause of nuisance or danger to the inhabitants. Failing due attention being given to this notice within three days from this date, further proceedings will be adopted, and the penalties fixed by the Act will be enforced.

A. B., *Burgh Surveyor.*

See sec. 191 of the Burgh Police (Scotland) Act, 1892.[1]

NOTICE AS TO CONTINUATION AND ALTERATION OF SEWERS.

BURGH OF _____

No. *District Sewerage.*

Notice is hereby given, that the Commissioners for the purposes of the Burgh Police (Scotland) Act, 1892, acting in and for the burgh of , intend to make the following sewers in No. District of the drainage districts into which the burgh has been divided (and which division has been approved of by the Sheriff), viz. :—[*here set forth an accurate description of the sewers to be constructed, with the names of the places through or near which it is intended they shall pass, and also the places of the beginning and end thereof*].

And notice is further hereby given, that the said Commissioners intend to alter the course or level of, or abandon or stop up the drains or sewers presently existing in the parts of the roads or places after-mentioned, viz. :—[*here give the same particulars as in the case of the construction of a new sewer*].

All according to plans of such intended works, to which reference is hereby made, and which plans may be seen in the Burgh Surveyor's office, No. Street [*place*].

And notice is further given, that the said Commissioners will meet within the Town Hall [*place*], on [*day of week*], the day of 18 , at o'clock , where and when

[1] See *ante*, p. 301.

all persons interested in such intended works may be heard thereupon.

A. B., *Clerk of said Commissioners.*

BURGH CHAMBERS,
[*Place, date.*]

NOTE.—The form of appeal is of no consequence—a simple letter, setting forth the grounds of appeal, and addressed to the Commissioners or their Clerk, is quite sufficient.

INTRODUCTION OF WATER AND WATER-CLOSET.

STATUTORY NOTICE.

To _____

Owner of houses or parts of houses, No. .

Now or lately occupied by .

_____ 18 .

In virtue of powers conferred by the Burgh Police (Scotland) Act, 1892, the Commissioners of this burgh require you, within from this date, to introduce water and water-closets into the houses or parts of houses above described, in terms of the said Act.

I annex copy of sec. 246 of the said Act relating to the same.[1]—I am, your most obedient servant,

A. B., *Clerk of* .

NOTE.—All communications in regard to this notice to be addressed to Mr. A. B., Burgh Surveyor, Police Chambers.

STATUTORY NOTICE TO CLOSE DANGEROUS OPENINGS IN STREETS.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____ 18 .

In terms of sec. 156 of the Burgh Police (Scotland) Act, 1892,[2] the Commissioners require you as of premises, No. to cause the ; and, failing your at once giving due

[1] See *ante*, p. 402.

[2] See *ante*, p. 250.

attention to this notice you render yourself liable to the penalties fixed by the Act.

A. B., *Burgh Surveyor.*

NOTE.—This form of notice may also be used for sec. 158, adapting the order to the circumstances.

STATUTORY NOTICE TO NUMBER HOUSE.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____18 .

The Commissioners for the burgh of , in pursuance of the powers conferred upon them by sec. 145 of the Burgh Police (Scotland) Act, 1892,[1] having resolved to cause the houses and buildings in certain streets and places to be numbered, the owner of these premises is requested to take notice that the new number on the same will be .

The owner is also requested to take notice that this number will be painted on some conspicuous part of the premises, unless he shall, within one week, cause the same to be done in a manner consistent with his own taste; and that failing this being done, he shall be liable to a penalty not exceeding forty shillings.

A. B., *Burgh Surveyor.*

STATUTORY NOTICE TO PROVIDE RAIN WATER RHONES OR PIPES.

BURGH SURVEYOR'S OFFICE, POLICE CHAMBERS,

_____18 .

I beg to call your attention to sec. 164 of the Burgh Police (Scotland) Act, 1892,[2] and have to intimate that unless measures are taken within six days to provide and fix up in a proper manner the rhones and pipes necessary for conveying the water from the roof of your property at No. , further proceedings will be adopted, and the penalties fixed by the Act enforced. Should you propose to have the work done, your informing me of that intention within six days will oblige.—Your obedient servant,

A. B., *Burgh Surveyor.*

[1] See *ante*, p. 231.

[2] See *ante*, p. 265.

NOTICE AS TO IMPOSING PRIVATE IMPROVEMENT ASSESSMENT.

BURGH OF _____

Private Improvement Assessment.

POLICE COLLECTOR'S OFFICE,

_____ 18 .

Notice is hereby given, that a "Private Improvement Assessment," under the Burgh Police (Scotland) Act, 1892, was, on imposed by the Commissioners for the burgh of , upon you, in respect of premises of which you are owner within the meaning of the Act, situated at or near No. , said assessment amounting, as per allocation, to £ for ; and that the Commissioners have appointed as the day on which the same shall be payable; and that they have appointed at o'clock noon, within the Council Chamber, here, for hearing appeals by any parties complaining that they have been improperly rated or assessed, which appeals must be lodged with me, in terms of the resolution of the Council, on or before .

The amount is subject to the addition of legal interest from the day fixed for payment of the assessment.

By order of the Commissioners,

C. D., *Collector.*

HAND-BILL FOR BURGH GENERAL ASSESSMENT.

BURGH OF _____

Burgh General Assessment.

TOWN HALL,

_____ *15th October* 18 .

Notice is hereby given, that the Commissioners of the burgh of have, under the Burgh Police (Scotland) Act, 1892, assessed all occupiers of lands or premises within the burgh, according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions provided in the said Act of 1892, in the sum of shilling and pence sterling in the pound, of the rental or value of such lands or premises, for the year from the 15th day of May 18 to the 15th day of May 18 being the sum

necessary for the purposes of said Act[1] (including the amount required for carrying out the provisions of the Roads and Bridges (Scotland) Act, 1878, within the burgh, or by the Local Authority thereof).

Further, a "General Improvement Rate" has been imposed by the Commissioners, under the said Police Act, at the rate of one halfpenny per pound of the rental of all lands or premises within the burgh, as stated in the said valuation roll, and for said year; one half payable by owners, and the other half by occupiers.

And the Commissioners have fixed the 11th day of November next as the day on which the said assessments shall be payable; the 3rd day of November next as the day on which appeals by any parties complaining that they have been improperly rated or assessed therefor may be lodged with me; and the day of November next, at three o'clock afternoon, within the Council Chamber, here, as the day on which such appeals shall be heard by the Commissioners.

A. B., *Clerk.*

[1] If this be so or otherwise.

II.

UNREPORTED JUDGMENTS APPLICABLE TO CONSTRUCTION OF ACT.

Opinion of Lord Rutherfurd-Clark in Wright *v.* The Police Commissioners of Lockerbie, 1st July 1876.

Tenure of Office of Clerk.

It was held in this case that it is *ultra vires* of Commissioners to appoint a Clerk under the Police Act of 1862 *ad vitam aut culpam*. The facts of the case and the grounds of the Lord Ordinary's judgment are stated in the following note to his interlocutor :—

"The purpose of this action is to have it declared that the pursuer was appointed *ad vitam aut culpam* to the office of Clerk to the Commissioners of Police of Lockerbie, conform to their resolution, dated 23rd April 1875. The burgh of Lockerbie was created under 25 & 26 Vict. c. 101. It need hardly be said that the powers and duties of the Commissioners of Police, as well as the right of any Clerk whom they may appoint, must be regulated by that Statute. On the 23rd April 1875, the then Commissioners of Police appointed the pursuer to be their Clerk '*ad vitam aut culpam*, that is to say, during his life and good behaviour.' The annual election of Commissioners took place on the 21st February 1876, and shortly thereafter the Commissioners rescinded the pursuer's appointment, on the ground that it was beyond the power of the Commissioners. The pursuer has raised the present action to declare the validity of his appointment, and to reduce the rescinding resolution. By sec. 67 of the Act, the Commissioners are required to appoint a Clerk 'for keeping the record of the proceedings of the Commissioners and their committees.' The office which the pursuer claimed is the office created by this section of the Statute, and the duties of it seemed to be limited to the matters therein mentioned; but it is probable that, in addition to the discharge of these duties, the Clerk may advise the Commissioners in the matters which come before them. The pursuer does not maintain that the Commissioners were bound to make the appointment *ad vitam aut culpam*, but only pleaded that they were entitled to do so if they chose, and that having made the appointment, it was binding upon their successors. He founds on the case of Hamilton, as deciding, (1) that sec. 64 of the Statute does not apply to an office created by sec. 67; and (2) that such an appointment may be made for a term of years. From this he argues that it might be made *ad vitam*

aut culpam. The defenders, on the other hand, maintain that sec. 64 related to all clerks whom the Commissioners may appoint, including the Clerk appointed under sec. 67, and contend that the Commissioners can only make the appointment during their pleasure. The view which they take of the case of Hamilton is, that it was decided on the ground that the appointment was made for a year only, and that any opinions which were expressed to the effect that the Clerk might be appointed for a term of years were *obiter*, and not necessary for the decision. They further maintain that, even though sec. 64 does not apply, the resolution of the 23rd April 1875 was *ultra vires.* If the point were open, the Lord Ordinary would be disposed to hold that sec. 64 is of universal application. It is the introductory section of that part of the Act which relates to the powers and duties of Commissioners. It includes clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not otherwise provided for; that is to say, one set of persons whose appointment is specially provided for, and another set whose appointment is not specially provided for. Sec. 67 deals with the appointment of a clerk to perform a certain function, and sec. 69 with the appointment of treasurers and collectors. But the purpose of these sections, as distinguished from sec. 64, which confers and defines the power, is to require the exercise of the power by the appointment of certain officers for the due performance of the work of the burgh. It is true that sec. 69 enacts that the appointment of the treasurer and collector shall be during pleasure, and that sec. 67 is silent on this matter; but that difference cannot, it is thought, make either the one or the other independent of sec. 64. It was urged by the pursuer that the office created by sec. 67 was to be assimilated to the office of the Town-Clerk of a royal burgh, and that it could not be the intention of the Legislature that the Clerk of a police burgh was to hold his office at the pleasure of the Commissioners. It appears to the Lord Ordinary that this was little more than an assumption. It was not urged that the appointment must be made in such terms as to give the Clerk the same tenure of office as belongs to a Town-Clerk. The argument went no further than that it was competent to do so; or, in other words, that it lay with the Commissioners to decide whether the appointment should be held at pleasure, or for a term of years, or *ad vitam aut culpam.* But this is to distinguish it altogether from the office to which it is assimilated; for it was conceded that the clerkship of royal burghs was a public office which the Town Council must fill up, and to which they could not appoint during their own pleasure. The office of Town-Clerk in a royal burgh is one of long standing, and has grown up under the common law. It is generally understood that it is held *ad vitam aut culpam*, though it cannot be said that the question has been definitely settled, at least in the sense that a clerk could, like a minister or parochial schoolmaster under the old law, hold the office after he had ceased to be capable of discharging the duties belonging to it. But it is one of a peculiar character, and does not exist in all burghs. For the case of Dykes

(2 D. 1274; 15 F. 1388) shows that the Clerk of a burgh of barony, or of a parliamentary burgh, does not, and may not, hold his office *ad vitam aut culpam*, but may hold it at pleasure only. If this be so, it does not appear in any way anomalous that the Clerk to be appointed to keep the records of the proceedings of the Police Commissioners and their committees shall be appointed during the pleasure of the Commissioners; or, in other words, that sec. 64 shall be held to specify the powers of the Commissioners in making such an appointment. But it is doubtful whether this question is open. In the case of Hamilton, a plea founded on sec. 64 was repelled *in hoc statu*, and the Lord Ordinary indicated an opinion that that section did not apply to the appointment required to be made under sec. 67. The interlocutor was affirmed; and although the decision of the case ultimately turned on the fact that the pursuer had been appointed for no more than a year, the opinion of the Lord President, in which the Court concurred, indicates that he held that the appointment could be made for a term of years. If it had been clear that the judgment of the Court had finally repelled the plea founded on sec. 64 of the Act, the Lord Ordinary would not have thought it proper to enter upon it for the second time; but as it may be regarded as uncertain how far the Court meant to deal with that plea, he has thought it right to express the opinion on which, as an individual judge, he would have acted. Assuming that sec. 64 does not apply to the Clerk appointed under sec. 67, the next question is, whether the Commissioners had power to appoint the pursuer to the office *ad vitam aut culpam*, so that he might hold it and perform its duties irrespective of the will of the Commissioners. On the one hand, the pursuer claimed right to hold office so long, at least, as he was able to discharge its duties; on the other hand, the defenders contended that the Commissioners could give him no such right, and, besides, that he was no better than a servant who might be removed from office, however long the contract endured, although the Commissioners, as his employers, might make themselves liable in damages for breach of contract. As the question related to the powers of the Commissioners, it is necessary in the first place to ascertain what they did. The pursuer was not very clear as to the legal effect of the resolution under which he was appointed, but ultimately he seemed to admit that it must be construed as meaning that he should hold his office for life or good behaviour, but only so long as he could discharge the duties of it. He further admitted that if there was any ambiguity in the resolution by which he was appointed, the decree must be qualified according to the construction which he now puts on the appointment. It is not in favour of the validity of the appointment that there is uncertainty as to its meaning, and that the pursuer cannot ask decree without an important qualification. According to its natural meaning, an appointment to a public office *ad vitam aut culpam* gives the holder a right to retain it during his lifetime and good behaviour, irrespective of his capacity to discharge the duties of it. Such is the case with respect to a parish minister, and, until recent legisla-

tion, with respect to a schoolmaster. If the Town-Clerk of a royal burgh cannot hold his office when he becomes incapacitated, the consequence may be that he holds his office on a different tenure; but it is plain that whatever may be the construction which is put on an appointment *ad vitam aut culpam*, it excludes the power of removal for reasonable causes, consisting neither in *culpa* nor in incapacity. An appointment of this intermediate class is known to the law, as, for instance, in the case of a burgh schoolmaster (Montrose, M. 13,118) and of a session-clerk (M. 13,126). The appointment of the pursuer is of such a kind that, if legal, he could not be removed from his office, however desirable in the interests of the burgh his removal might be; and according to one construction of it, he might retain his office even though he could not discharge the duties of the office. The Lord Ordinary is of opinion that the Commissioners were not entitled to appoint the pursuer on such a footing as to give him right to retain his office after he had become incapacitated. It has been said that public offices might be held on such a tenure, but such an appointment can be only justified by inveterate usage. To give a man a title to hold an office when he is no longer fit for it, is repugnant to common sense, and in the opinion of the Lord Ordinary is beyond the powers of the Police Commissioners. Whether the pursuer's appointment, according to its true construction, does or does not give such a title, is a matter of uncertainty. The pursuer does not maintain that it does, and, as has been seen, he expressed willingness to submit to a qualification of the decree which he asks. But this very uncertainty seems to the Lord Ordinary to invalidate the appointment. He thinks that an appointment, in order to be legal, must be supported according to the terms in which it is made, and that it cannot be sustained by introducing qualifications or limitations in the decree. But, further, the Lord Ordinary is of opinion that the appointment was beyond the powers of the Commissioners, even though it should be qualified by the condition that it should cease when he became incapacitated. Many reasons short of fault may make it necessary for the advantage of the community that he should be removed. To place the Clerk in such a position as to make his title superior to any such considerations, appears to his Lordship beyond the powers of the Commissioners. An appointment *ad vitam aut culpam*, even with the qualification above referred to, is one of an exceptional kind. There is nothing in the duties of the Clerk which require that such an appointment should be made. It might give rise to serious public inconvenience, and in the absence of express statutory authority, the Lord Ordinary thinks that the Commissioners have no power to make it. It was urged by the pursuer that, if the appointment might be made for a term of years, it could also be made for life. The Lord Ordinary is not satisfied that this is sound, and that an appointment for a term of years would mean the same thing during the period for which it was made as an appointment *ad vitam aut culpam*. Assuming the holder to be capable of discharging the duties of the office, the latter appointment excludes

every cause of removal except that of *culpa*, which it is thought an appointment for a term of years would not do."—Marwick on Municipal Elections, 419.

KIRK'S TRUSTEES *v.* LEITH POLICE COMMISSIONERS.

Drainage Works and Assessments.

This case, which has not been reported, elucidates so clearly the procedure which may be taken in connection with drainage questions, that a note of it may be of use in connection with the construction of the clauses in this Act.

The trustees of the late George Mackintosh Kirk were proprietors of several acres of ground, all contiguous, in the burgh of Leith, on which the streets known as Union Street and Kirk Street were erected. In laying out and building upon the said streets, in or about the year 1862, the said George Mackintosh Kirk expended on sewers and drainage about £300. The said sewers were used by the said George Mackintosh Kirk and his tenants for several years till the proceedings hereinafter related were taken by the Police Commissioners of Leith. In 1865 the Leith Police Commissioners resolved to divide the burgh into separate drainage districts, in terms of sec. 185 of the General Police Act; and this division was duly approved of by the Sheriff, as required by the Statute. In terms of clause 186 of the said Act, the Commissioners, after due compliance with the provisions of the Statute, caused such sewers to be made as were necessary for the effectual drainage of district No. 4.

At the meeting, where all parties interested were entitled to be heard before the Commissioners in regard to the contemplated drainage operations, the trustees of the late George Mackintosh Kirk objected to the proceedings of the Commissioners, and particularly objected to their being included in the said district No. 4, in respect, *inter alia*—(1) that their lands and premises were already sufficiently drained into No. 3 district; and (2) that the Commissioners had disregarded the terms of clause 185, in so far as they had failed to take into account the nature of the ground, the main line of sewers, and the equal benefit of the lands comprised within the drainage district. The Commissioners refused the appeal, whereupon, in terms of clause 396 of the General Police Act, the said trustees appealed to the Sheriff of Midlothian. To that appeal—the Leith Police Commissioners having lodged answers—a remit was made to David Stevenson, civil engineer, Edinburgh, who, after hearing parties, and making full investigation, reported to the Sheriff that the appeal of the said trustees, inasmuch as the drain proposed to be constructed in Union Street is at too high a level properly to drain the houses for which it is intended, and also because the drainage of Union Street might be more effectually provided for by retaining its present outfall into Leith Walk main drain, and improving the gradients of the Kirk Street sewer, was well founded. Thereupon the Police Commissioners altered their line of sewers; and on a remit again to Mr. Stevenson to examine and report upon the plan and

section showing the proposal to connect the Union Street and Hope Street sewers with the sewer in Junction Street, Leith, and whether the same is satisfactory, and to describe the course of the sewer and point of connection thereof by measurement or otherwise, Mr. Stevenson reported that he had examined the plan, and was satisfied that the scheme of drainage therein shown will effect the proposed object. The drain commences in Hope Street at a point marked A on plan, about 30 feet from Hope Street Lane, and passing along Hope Street, Union Street, and the unfeued ground between Union Street and Junction Street Lane at a point marked B on plan, distant about 380 feet from the north-west side of Leith Walk at the commencement of Junction Street. The Commissioners accordingly executed their drainage works in terms of the alteration suggested by Mr. Stevenson, the result whereof was, that although the lands and premises of the said George Mackintosh Kirk were situated within district No. 4, the outfall thereof really drained into district No. 3.

By clause 96 of the said General Police Act the Commissioners are entitled, on making any new sewer, to charge the owners of all the lands and premises liable to contribute to the rates for making the same, with special sewer rates; and by clause 98 they are entitled to make assessment in respect to the said special sewer rate and general sewer rate authorised to be levied on the owners of all lands or premises within the burgh, or within separate and distinct districts, and that in reference to the valuation of such lands and premises as fixed by the valuation roll. They accordingly charged the owners of all the lands or premises in the district known as No. 4 with a special rate or assessment for the year from Whitsunday 1878 at the rate of 2s. per £ on the rental of their property as stated in the valuation roll of the year, and fixed that the same should be payable on the 11th November 1878. The said trustees of the said George Mackintosh Kirk were the owners of lands or premises situated in Union Street and Kirk Street, Leith, which were within and formed part of the said drainage district No. 4, and were accordingly duly charged by the Commissioners with the said sewer rate or assessment at the foresaid rate. The rental or valuation of their property in Union Street Lane, as stated in the valuation roll of 1877–78, was £664, 9s., and the assessment therefor amounted to £66, 8s. 11d. The rental or valuation of their lands or premises in Kirk Street, as stated in the valuation roll of said year, was £17, and the assessment for the said year charged upon and payable by the said trustees in respect thereof amounted to £1, 14s., which, together with the foresaid sum of £66, 8s. 11d., made a sum of £68, 2s. 11d. payable to the defenders on 11th November 1877. The Police Commissioners also claimed interest thereon from the date of payment to the date of raising the action, amounting to £2, 0s. 4d., making the sum due from the said trustees altogether £70, 3s. 3d.

The said trustees refused to pay the said assessment, and the Police Commissioners raised an action against them for payment thereof in the Sheriff-Court of Midlothian. The said trustees defended the

action, and pled (1) that in respect that drainage district No. 4, constituted by the order of the Commissioners, having, as regards the defenders' property, been constituted in violation of the provisions of sec. 185 of the Police Act, the same was illegal; (2) that their lands and premises having been well and sufficiently drained before the resolution of the Commissioners of 16th February 1865, the said resolution was unnecessary, and *ultra vires* of the Commissioners; (3) that the defenders' sewers having been, in the sense of sec. 182 of the General Police Act, within the private property of and used as a private right by the defenders, the said sewers never vested in the Commissioners, and they had no right to use the same or connect their sewers or drains therewith without contracting for such use, in terms of sec. 183 of said Act; (4) that even assuming that the defenders' property was assessable, the assessment not having been made, laid on, or notified to the defenders, as required by the Statute, no assessment was exigible from the defenders for the year in question; (5) that the Commissioners having failed to apply any judgment, as required by sec. 100 of the Act, or to give the defenders any deduction in respect of their sewers, they were outwith the Statute, and that having, against the protest of the defenders, uplifted their main sewers throughout Union Street, and refused to restore the same, the defenders were entitled to set off the value thereof and the compensation for the use of their property against the assessment, as the same might be ascertained in the process; and (6) that in any view, according to a sound construction of clause 100 of the Statute, the defenders were entitled to deduct said value of their sewers as thereby provided. A record having been made up, and duly closed, parties were heard, and the following interlocutor was issued:—

"*Edinburgh*, 21*st Oct.* 1878.—The Sheriff-Substitute, having considered the closed record and productions, repels all the defenders' pleas except the fourth, so far as they complain thereby that sufficient notice of the assessment in question was not given them in terms of the Statute; allows the pursuers a proof that sufficient notice was given, and to the defenders a conjunct probation.

"FREDERICK HALLARD.

"*Note.*—There is no question of rental here, and no question as to the amount proposed to be levied. What is asked is a setting aside of the result of formal statutory proceedings conducted before the Sheriff in 1876, and of which the extract, No. 23 of process, is the last step. It is thought that such a proposal is not justified either by the 8th or the 11th sections of the Sheriff-Courts (Scotland) Act, 1877; and the Sheriff-Substitute has therefore declined to entertain it. F. H."

"*Edinburgh*, 1*st Nov.* 1878.—The Sheriff-Substitute fixes Wednesday the 13th day of November current, at 2 o'clock P.M., within the Sheriff-Court, Edinburgh, as a diet for taking proof in the cause:

and, on the motion of the pursuer, appoints the evidence to be taken in shorthand, as prescribed by the Act. FREDERICK HALLARD."

"*Edinburgh*, 13*th Nov.* 1878.—The Sheriff-Substitute nominates and appoints Mr. William Lane, shorthand writer, to take down and record thee vidence in shorthand, to whom was administered the oath *de fideli administratione officii*. WILLIAM LANE;
"FREDERICK HALLARD."

"*Edinburgh*, 25*th Nov.* 1878.—The Sheriff-Substitute, having heard parties' solicitors upon the proof adduced, finds, in point of fact, that the notice referred to in the interlocutor of 21st October last was duly sent by the pursuer to the defender Mrs. Kirk, as representing Kirk's trustees, in conformity with the practice which had prevailed, without objection of sending such notices from the pursuer's office in reference to the trust property in question: Therefore repels the only remaining plea of the defenders, and decerns in terms of the libel; finds the pursuer entitled to expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor of Court to tax and report. FREDERICK HALLARD."

"*Note.*—The question at issue is a very narrow one. Is it more likely that the defender, Mrs. Kirk, mislaid the notice, or that the pursuer failed to send it? In the absence of anything like habitual inaccuracy proved against the pursuer, the Sheriff-Substitute prefers the former alternative. The address of Mrs. Kirk was a matter of notoriety in the pursuer's office. It was also known that she strongly objected to the assessment. Nothing therefore is more unlikely, considering the large space which her name occupies in the assessor's books, than that she should have been omitted when the notices of the sewerage assessments were sent.

"On the whole, the Sheriff-Substitute is of opinion, on the evidence, that the duty laid upon the pursuer in respect of notice has been complied with by him in terms of the Statute. It is not easy to see what other and stronger evidence could, in the circumstances, be forthcoming. F. H."

The defenders appealed to the Sheriff, who issued the following judgment:—

"*Edinburgh*, 13*th Dec.* 1878.—The Sheriff, having considered the appeal for the defenders, with the proof and whole process, and heard parties' procurators, dismisses the said appeal; finds the pursuer entitled to additional expenses, and decerns. ARCHD. DAVIDSON.

"*Note.*—This is an appeal against the interlocutor of 25th November last only. The defenders maintained that, though they did not expressly appeal against the interlocutor of 21st October last, which repelled all their pleas except the fourth, they were yet entitled now, and without any express appeal notified against that

interlocutor, to bring the question therein involved under review. The Sheriff has grave doubts if that is the meaning of sec. 29 of the 39th & 40th Vict. c. 70. The interlocutor of 21st October was 'a final judgment' with reference to these pleas. Under sec. 27 and the interpretation clause, the defenders might have appealed that interlocutor at the time of its being pronounced; and, if they meant to object to it, they ought to have so appealed, instead of going into a proof on their fourth plea, which would have been unnecessary if their other pleas had been sustained. If the right reading of sec. 29 is to entitle them still, at this late stage, to be heard on the pleas previously disposed of, it is an unfortunate provision, and may be the source of much unnecessary expense; but the Sheriff is inclined to read the clause differently. The object of it seems rather to have been to throw the whole proceedings in a cause taken previous to an appeal open to the Sheriff himself, 'to the effect of enabling him to do complete justice' if it appeared to him there had been error. This is a very different thing from allowing a party to bring up at a late stage of the cause questions which had long ago been disposed of, and which, if not acquiesced in, should at once have been appealed. But it is not necessary to decide this point in this instance, for the Sheriff is very clear these pleas were rightly repelled on 21st October. The formation of the drainage districts carried out under the Statute cannot be reconsidered and altered, or set aside in such an action as this.

"On the merits of the fourth plea of the defenders, the Sheriff concurs in holding it is sufficiently proved that Mrs. Kirk, as representing Kirk's trustees, duly received notice of assessment. If Kirk's trustees returned themselves as represented by Mrs. Kirk, and she was so entered in the valuation roll, notice to her was notice to the party assessed. A. D."

The defenders appealed to the Court of Session, and on the appeal coming into the Second Division, parties were heard, when, in respect the appellants stated that, with the view of having the various objections stated by them brought properly before the Court, they were to raise an action of reduction of the whole proceedings of the Commissioners into the Court of Session, thereupon the Second Division sisted the present process.

The said trustees accordingly raised an action against the Police Commissioners for reduction of "(*First*) A minute of the Drainage Committee of the Commissioners of Police of the burgh of Leith for the purposes of the General Police and Improvement (Scotland) Act, 1862, dated on or about 3rd February 1865, proposing to divide the Burgh of Leith into nine separate drainage districts, as defined and described on a relative map of the said burgh. (*Second*) A pretended act or resolution of the Magistrates and Council of the burgh of Leith, acting as Commissioners of Police as aforesaid, passed or made on or about 7th February 1865, whereby the said Commissioners approved of the said minute of the Drainage Committee, and resolved to divide the said burgh into

nine separate drainage districts, as defined and described on the said map; and, in particular, resolved to include the heritable property in or near Union Street, Leith, and also in or near Kirk Street, Leith, in so far as situated in the south side thereof, then belonging to the said George Mackintosh Kirk, and now to the pursuers, and condescended on, in drainage district No. 4, as laid down on the said map, and remitted to the said Drainage Committee to take such steps as might be required to obtain the approval of the Sheriff of the county of Edinburgh to the said map, and districts described and delineated thereon. (*Third*) Summary petition or application presented to the Sheriff of the county of Edinburgh, on or about 3rd March 1865, at the instance of the said Commissioners and their Clerk, praying the Sheriff to approve of the said division of the burgh of Leith into the said separate drainage districts, defined and described on the said map. (*Fourth*) Interlocutor or decree, dated on or about 14th March 1865, pronounced by Frederick Hallard, Esquire, advocate, Sheriff-Substitute of the county of Edinburgh, in the said summary petition or application, whereby he approved of the said division of the burgh of Leith into the said separate drainage districts. (*Fifth*) An order or resolution of the said Commissioners of Police, dated on or about 25th November 1875, repelling objections, craving to be disjoined from district No. 4 and added to and included in district No. 3, made by the pursuers against the drainage works proposed to be executed by the said Commissioners in No. 4 district of the said burgh, and resolving to proceed with the works, and to execute the same, and ordering the execution thereof. (*Sixth*) Interlocutor or decree, dated on or about 25th July 1876, pronounced by Archibald Davidson, Esquire, Sheriff of Midlothian and Haddington, anent a note of appeal, dated on or about 2nd December 1875, presented by the pursuers against the said order or resolution of the Commissioners of Police, dated on or about 25th November 1875, whereby the said Sheriff, *inter alia*, repelled the objections stated by the pursuers, with the exception mentioned in the said interlocutor, and confirmed the said order in so far as the pursuers' appeal was concerned, and found them liable in expenses. (*Seventh*) An act or resolution of the Magistrates and Council of the burgh of Leith, dated on or about 15th October 1877, professing to be made under and in virtue of the powers conferred by the said General Police and Improvement (Scotland) Act, 1862, whereby they imposed, and agreed to levy during the year then current, from the owners of all lands and premises liable to contribute to the rates for making new sewers, and other works therewith connected, in the said district No. 4, including the pursuers' said property, certain assessments therein specified. (*Eighth*) An act or resolution of the Magistrates and Council of the burgh of Leith, dated on or about 15th October 1878, professing to be made under and in virtue of the powers conferred by the said General Police and Improvement (Scotland) Act, 1862, whereby they imposed and agreed to levy during the year then current, from the owners of all lands and premises liable to contribute to the rates for making new sewers, and

other works therewith connected, in the said district No. 4, including therein the pursuers' said property, certain assessments therein specified."

Defences were lodged for the Police Commissioners, in which they pled—"1. The pursuers' averments are neither relevant nor sufficient to support the conclusions of the summons. 2. The defenders having proceeded, in the minute and resolutions complained of, in the exercise of the powers conferred upon them by Statute, the Court has no jurisdiction to reduce or set aside the same, or interfere with the execution thereof. 3. The division of the burgh into drainage districts complained of having been duly made by the defenders, and approved of by the Sheriff, in terms of the Statute, and the pursuers or their author having failed to object thereto, the whole proceedings are now final, and the pursuers are barred from insisting in the reduction thereof. 4. The judgment of the Sheriff, under the Statute founded on by the pursuers, being final and conclusive, the present action, which seeks to set aside, review, or affect such judgment, is excluded by the Statute, and is incompetent. 5. The declaratory conclusions of the action cannot be entertained, unless and until the judgment of the Sheriff be set aside; and the same being final, and not subject to review in any way, this action is incompetent. 6. The judgment of the Sheriff being *res judicata* as to the matters embraced in the conclusions of the summons, the action is incompetent. 7. The whole proceedings of the defenders being in terms of the Statute, the defenders should be assoilzied, with expenses. 8. The sewers referred to by the pursuers not being within their private property, nor used by them as of private right for their own benefit, and being useless for the drainage of the district, they are not entitled to declarator and interdict as concluded for, nor to have the defenders ordained to purchase, restore, pay for, or allow compensation for said sewers. 9. The defenders being entitled, in the exercise of their statutory powers, to impose and levy the assessments complained of, the pursuers are not entitled to interdict and repetition as concluded for. And 10. Generally, in the circumstances, the statement of pursuers being unfounded in fact, and untenable and irrelevant in law, the defenders should be assoilzied, with expenses."

The record having been made up and closed, the Lord Ordinary (Adam) pronounced the following interlocutor:—

"*Edinburgh*, 16*th June* 1880.—The Lord Ordinary, having heard counsel for the parties, assoilzies the defenders from the whole reductive conclusions of the action; further assoilzies the defenders from the first declaratory conclusion of the action, and from the conclusion by which it is sought that they should be decerned and ordained to rectify their division of the burgh of Leith and relative map, to the effect of excepting the pursuers' properties from drainage district No. 4; and also assoilzies the defenders from the relative conclusion for interdict, and decerns. *Quoad ultra*,

appoints the cause to be put to the roll, to be further proceeded with. JAMES ADAM.

"*Note.*—The pursuers are proprietors of certain heritable subjects in the burgh of Leith.

"In the year 1865 the burgh was, in terms of sec. 185 of the General Police and Improvement (Scotland) Act, 1862, divided into nine separate drainage districts. The first matter which the pursuers complain of in this action is, that the subjects belonging to them are included in district No. 4 in place of district No. 3. The proceedings of the Commissioners in dividing the burgh into the several drainage districts seem to have been carried out in conformity with the Statute. They had the approval of the Sheriff. The division has been acted on ever since. They were acting *intra vires* in the matter, and there appears to the Lord Ordinary to be no ground whatever for reducing these proceedings.

"The next matter complained of relates to certain drainage works executed in district No. 4, and the pursuers seek to have reduction of the resolution of the Commissioners ordering these works, and of an interlocutor by the Sheriff, of date 25th July 1876, confirming generally the resolution of the Commissioners.

"The matter of these drainage works is regulated by the 392nd and subsequent sections of the Act. By sec. 396 a right of appeal to the Sheriff is given to any person aggrieved by any order of the Commissioners relating to such works. The pursuers appealed to the Sheriff against the order of the Commissioners, in so far as the proposed drainage works affected their property. The Sheriff remitted to Mr. David Stevenson, civil engineer, to inquire and report; and, after full consideration he, to some extent, varied the order of the Commissioners, and, *quoad ultra*, confirmed it. It is this judgment of the Sheriff that is now sought to be reduced. It is, however, declared by the 397th section of the Statute that the judgment of the Sheriff shall be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way.

"Assuming that the division of the burgh into nine districts is not to be set aside, there seems to be no relevant objection to the resolutions of the Commissioners of 15th October 1877 and 15th October 1878, assessing the owners of lands and premises in the district No. 4. J. A."

"*24th June* 1880.—LORD ADAM.—*Act.* MONCREIFF—*Alt.* HARPER.—Having heard counsel on the motion of the pursuers, grants leave to them to reclaim against the preceding interlocutor of 16th June current. JAMES ADAM."

"*29th June* 1880.—LORD ADAM.—*Act.* HARPER—*Alt.* .—Of new appoints the cause to be enrolled in the Procedure Roll on the points undisposed of by the previous interlocutor of 16th June 1880. JAMES ADAM."

"25*th Nov.* 1880.—LORD ADAM.—*Act.* J. C. SMITH *et* MONCREIFF. —Having heard counsel, makes avizandum. JAMES ADAM."

"9*th Dec.* 1880.—The Lord Ordinary, having resumed consideration of the cause, and heard parties, Finds that the sewers and drains interfered with by the defenders were not within the private property of the pursuers, and that the said sewers and drains vested in the defenders in terms of sec. 182 of the General Police and Improvement (Scotland) Act, 1862: Therefore assoilzies the defenders from the conclusions of the action, whereby the pursuers seek to have it found and declared that the said sewers and drains were within their private property, and did not vest in the defenders; and, further, assoilzies the defenders from the whole subsequent conclusions of the action, and decerns. *Quoad ultra* sists the cause *in hoc statu;* finds the defenders entitled to expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report. JAMES ADAM.

"*Note.*—The only question remaining to be disposed of in this action would appear to be those involved in the second branch of the pursuers' third plea.

"With reference to the first of these pleas, the question whether or not the pursuers received statutory notice of the assessments is raised in an action presently in dependence before the Second Division of the Court, on appeal from the Sheriff-Court. The question depends upon matters of fact, with regard to which a proof has been led in that action, and is before the Court. It appears therefore to the Lord Ordinary that he cannot properly dispose of the conclusions of the present action, which depend on that question, until the appeal case shall have been decided.

"With reference to the pursuers' fifth plea-in-law, it appears to the Lord Ordinary that the sewers and drains interfered with by the defenders were in a street or streets not within the private property of the pursuers, and therefore that they vested in the defenders; the plea therefore must be repelled. It was alleged by the pursuers that the sewer constructed by the defenders was carried through a part of their private property at the end of Union Street, and that they were entitled to compensation therefor; but no question of this kind is raised in this record. J. A."

The pursuers thereupon reclaimed to the Second Division against the judgments of the Lord Ordinary in the reduction case, whereupon both cases—the appeal and the reduction—were heard by the Court, and the following opinions were delivered:—

LORD YOUNG said: "My Lords, the case has been argued, in so far as it is disposed of by the Lord Ordinary's interlocutor of the 16th June, whereby he assoilzies the defenders from the whole reductive conclusions of the actions, and further assoilzies them from the first declaratory conclusion of the action relating to the assessment, and from the conclusion by which it is sought to be decerned and

ordained to rectify their division of the burgh of Leith, and relative order to the effect of excepting the pursuers' properties from drainage district No. 4. It also assoilzies the defenders from the relative conclusions of interdict, and decerns. Now, it appears that the Magistrates divided Leith into drainage districts in the year 1865; and there is no doubt that the Act of Parliament gave them power to divide it into districts, and the division then made was in accordance with the provisions of the Statute; and it was afterwards submitted to the Sheriff for his consideration, and was by him approved of. It may have been a judicious and discreet division or not, but it was made by the statutory authority and approved, as the Statute required, by the Sheriff of the county, and it has been acted upon since 1865. But it appears that the pursuers' property was included in the district called No. 4, in the view, which the engineer of the Commissioners of Police thought the right view, that the property should be drained into the general drainage system included in the drainage district No. 4. The property, in short, was included in that district No. 4 in the view that, by the main system of drainage, that property was so to be drained. However, the pursuers complained that this was not the most convenient way of draining their property, and thought it was better it should be drained through the district No. 3, and that chiefly by means of a drain made by themselves or their predecessors in the title. The result under other clauses of the Act of Parliament was that the Sheriff has final authority in that matter. He remitted to Mr. Stevenson to report, not only which was the best mode of draining the pursuers' property, but whether that which was proposed by the Commissioners—and it was upon their engineer's recommendation that they had included the property in district No. 4—was practicable. Mr. Stevenson reported, stating it was not practicable, and the result was that the mode of draining the pursuers' property—which was the reason for including it in district No. 4, and so far as has been stated, and so far as we know, the only reason—was abandoned, and another mode was substituted for it, and by this new mode it was drained into No. 3 district, upon Mr. Stevenson's recommendation, approved by the Sheriff. In No. 3 district, hitherto at least, there has been little or no expense in the matter of making drains, one reasonable account of which is that a predecessor of the pursuers, a Mr. Kirk, himself had made a drain into which their property was, and is now, sufficiently well drained. The pursuers therefore complain of the hardship of being included in the heavily assessed district into which they were put, with the erroneous notion that they were to participate in the benefit of the drainage system of that more heavily taxed district, and of being made to pay after the mistake has been discovered, and when their property has been actually drained in another direction in conformity with that discovery. Now, when that which appears *prima facie* to be a reasonable ground of complaint was brought under the notice of the Court some weeks ago, we delayed the case, thinking that, either there must be some explanation of the matter, or that upon reconsideration of it the rectification would be made

without encountering legal difficulties at all. We allowed the case to stand over in order that the Commissioners might consider the matter, and either give effect by this modification of the arrangement of 1865 to what was, *prima facie*, an equitable view of the matter, in so far as it had been presented to us, or explain to us—as we had no doubt they would be able to do, in the event of their desiring to adhere to things as they were—what was their reason for it; and when the case was brought before us to-day, I must say I was surprised to find that the Commissioners had never met at all, and had never considered the matter; and I can hardly refrain from repeating the remark I made when we were informed of that abstinence, that it was hardly treating this Court with proper respect. I am willing meanwhile to consider that there was no intention of treating us with disrespect. I should be extremely unwilling to think the Commissioners capable of such conduct. However, as the matter stands, and we are put to decide the case upon the strict law of it, and upon the strict law of it I am almost sorry, having reference to the particular circumstances to which I have adverted, that I must express my opinion adversely to the pursuers—adversely upon the grounds upon which they seek reduction of the resolution of the Commissioners in 1865, and approved by the Sheriff. I am of opinion that we cannot reduce that—that no valid reason of reduction is alleged, in respect the division was made by the proper statutory authority, and approved by the Sheriff of the county, as the Statute required, and that neither at common law nor under the Act itself have we any authority to review or to set aside or to deny effect to what was so done. Then, with reference to the mistake, for I call it so, to which I have adverted, discovered however recently, I can say no more than that that was a proper occasion for the Commissioners to meet and consider whether or not they would, under the power which the Statute undoubtedly gives them, make a new arrangement, or modify the arrangement they made in 1865. They did not do that. I think they did not do it as they ought to have done; but that gives us no jurisdiction to reduce what was done in 1865, or to deny the consequences of what was done in 1865. The pursuers may address the Commissioners, and require them to meet and consider the altered circumstances, and to say whether or not they think it fitting to make a new arrangement in consequence of these altered circumstances; and I shall not say, without prejudice to the question of our jurisdiction afterwards, that if they refuse to do that, we should not, upon a proper application, hold that they refuse to do their duty, to address themselves to the discharge of their duty, and order them to do it. If they met and considered the matter, and said upon their responsibility as the Commissioners having statutory authority in the matter when they did not, all things considered, hold it fitting to make any change, I am to express no opinion as to our authority to interfere further. We should then have secured that the proper authority had met and addressed itself to the discharge of its duty, and had discharged its duty to the best of its ability. That is all that generally could be obtained in such a

case, which merely asks reduction of what was done in 1865, and to prevent the legal consequences of that—consequences attending it now. It also asks us to order the Commissioners to make a new arrangement. I am of opinion with the Lord Ordinary that there we have no jurisdiction. A new arrangement, if it is to be made, and I can see very strong grounds for the Commissioners meeting and considering the question and declaring their minds upon it, although there may also be reasons the other way,—I say a new arrangement can only be made by the Commissioners. It is for them to meet and make application to the Sheriff of the county to approve. Under the Act of Parliament nothing can be substituted for their action or for the approval of the Sheriff. We can make both them and the Sheriff do their duty if it appears to us they are abstaining from doing their duty, but we cannot, in a matter of this kind, substitute our judgment or discretion for theirs, if the Statute has committed to them to determine the districts with only the check which I have referred to—namely, the approval of the Sheriff of the county. I am therefore of opinion that the interlocutor of the Lord Ordinary of 16th June 1880 should be affirmed."

LORD CRAIGHILL said: "I have arrived at the same conclusion as that which has been reached by Lord Young, and as the reasons which his Lordship has given, forming the basis of the opinion which he has arrived at, are precisely those which govern me in coming to the conclusion which I have reached, I think it neither expedient nor necessary that these reasons should be repeated."

The LORD JUSTICE-CLERK said: "I entirely concur in what Lord Young has said in all parts of his opinion. The case, as far as the Commissioners are concerned, stands in a position eminently unsatisfactory. They ought to have told us in candour and propriety the grounds of their decision in continuing the system of drainage which appears on the face of it not to be everything that could be wished; and although I can hardly believe that they would continue that system for no other purpose than to embrace valuable property within the bounds of a particular drainage district, and thus lessen the assessment, yet I am bound to say that no reasonable or intelligent ground has been stated for holding to that course which they adopted. If they had stated those reasons, I can quite conceive that it would have removed a good deal of the unpleasant feeling which I have. I can quite well understand that if they were imposing a general and catholic assessment over the whole of their drainage districts, they would be adverse to alter an arrangement which had subsisted for fifteen years. That would be, to my mind, quite intelligible; but they have never said so. They have never even met to consider whether they should say that or anything else. Well, it is for them to consider whether this system of draining into one district and assessing in another is to continue. It may depend upon whether any application is made to them to give the matter their attention. At present, at all events, we refrain from interfering, because no grounds have been stated to us to satisfy us we are entitled to do anything in this matter. That is a question on which I can give no opinion,

excepting this, that I think they are bound to consider the matter I have adverted to as a serious one, and that, as far as I at present see, they ought to act upon some such suggestion. There must be grounds which they have refrained from stating, but which they may be able to state, that may entirely alter my impression. On the main question of jurisdiction, I imagine there can be no doubt that we cannot reduce these proceedings, because *ex facie* they are not inconsistent with any provision of the Statute. If the parties had gone out of the Statute, or refused to exercise their statutory jurisdiction, we might have interfered. But all that is said is, that they have exercised the power and discretion of the Statute in a way not consistent with the rights of parties, of which, however, the Commissioners are the sole judges, subject to the Sheriff's opinion and approval."

The appeal case was continued in view of the opinions delivered by the judges in the reduction case, to give the Commissioners an opportunity of reconsidering the position of matters, and whether they should afford any redress to the pursuers in the circumstances. The Commissioners accordingly met and remitted the matter to the burgh surveyor, the burgh assessor, and the law agent of the burgh to investigate and report on the whole matter. These gentlemen prepared and submitted an elaborate report narrating the whole circumstances connected with the division of the burgh into drainage districts, the appeal against the execution of the work with regard to drainage district No. 4, and the general bearing of the whole questions raised by Kirk's trustees, and concluding that they could not recommend the Commissioners to change the premises of the pursuers from one district to another. This report, after being sent to and approved of by the Commissioners, was printed and boxed to the Court; whereupon parties were again heard by the Second Division, and the following opinions were delivered by the judges:—

Lord Justice-Clerk.—"My Lords, this case has already been before us; and in the month of February, when it was here last, we gave expression to some recommendations, which seem to have been deliberated upon by the Police Commissioners. We were then of opinion that there was a certain amount of hardship and hurry in the previous proceedings of the Police Commissioners from which these trustees may have suffered. We sent it back to the Commissioners, to see if they would take up the matter again. They did take it up, and remitted it to a committee of three qualified persons —no doubt, persons in their employment, but still persons whose qualifications were not to be disputed. That committee considered the whole subject, and they have issued a formal report, in which they say, after giving various reasons for the conclusion to which they have come: 'Upon the whole matter, we really cannot see our way to recommend the Magistrates and Council to run such risks as appear imminent upon a change of premises from one district to another.' And then they go on to speak of other matters. Of this report the Commissioners have approved. They have adopted it. Therefore it seems to me that, as far as our recommendation to the Commissioners is concerned, the Commissioners have taken it up

and reconsidered the matter, and the result is unfavourable to those parties, Kirk's trustees, who oppose them. I think that terminates any procedure possible in the circumstances, seeing that we were of opinion that we had no power to make the Commissioners use their discretion or exercise their jurisdiction to any further extent than they have done, or to any different effect. I cannot see that we have any other alternative than to give effect to what they find. At all events, we must refuse the appeal upon that matter. In the second place, what shall be done about the private property? There is no doubt a little particle of land at the end of the street which is said to be the private property of Kirk's trustees. Excepting that bit of land, Union Street is manifestly to my mind a private street under the Act, and under the cognizance of the Police Commissioners, and in their drainage powers. But I think at the end of this long litigation it would be extravagant to have a valuation merely in order to ascertain the valuation of this little bit of ground, which probably is as valuable now as before the operations were commenced or performed. The claim for compensation should have been made long ago, if it were to be insisted in. As for the failure of the post, it is an unfortunate circumstance if, as the trustees say, the notice was not received. But the presumption, I think, on the proof is that notice was sent in the ordinary way. It was very probably sent to the address in Leith; but I cannot conceive that that would not find anybody who lived in Leith Walk, even although their residence was in Cassells Place, at the foot of it. Therefore I do not think we can negative the contentions of the Commissioners."

LORDS YOUNG and CRAIGHILL concurred.

LORD TRAYNER said: "I wish to make an observation of a somewhat personal character. At the advising of the case on the 2nd of February, there were some observations made from the bench as to the Commissioners not having had a meeting in consequence of a suggestion which had fallen from the Court. That was thought, and not unreasonably thought, to be conduct indicating some want of respect to the Court. Now the Commissioners desire me to say, that they were entirely unaware of the suggestion until the case came before them, and under consideration, otherwise they would have had a meeting at once. I believe that arose entirely from a misapprehension behind the bar as to the import of the suggestion made by the Court. But it was no disrespect at all, but a mere misapprehension."

LORD JUSTICE-CLERK.—"It is very right for you to make that explanation."

The following interlocutor was pronounced in the appeal case:—

"*Edinburgh, 21st June* 1881.—The Lords, having heard counsel for the parties, dismiss the appeal and affirm the judgment of the Sheriff appealed against, and decern: Find the appellants (defenders) liable in expenses to the respondents (pursuers), and remit to the Auditor to tax the same, and to report."

And the following interlocutor was pronounced in the reduction:—

"*Edinburgh*, 21*st June* 1881.—The Lords, having heard counsel for the parties on the reclaiming note for the pursuers against Lord Adam's interlocutor of 9th Dec. 1880, recall the said interlocutor, repel the pleas of the pursuers, assoilzie the defenders from the whole conclusions of the action, and decern; find the defenders entitled to expenses, and remit to the Auditor to tax the same, and to report.

MAGISTRATES OF LEITH *v.* M'CASKIE & BROWN, ETC., 11TH JULY 1883.

Construction of "Owner" in Act.

This case is an important practical illustration of the right of Commissioners to recover a reasonable sum for the use of their sewers vested in them, and also to private improvement assessment from law agents who had actually recovered rents from a factor employed by them, as explained in the judgment.

"The Sheriff-Substitute having heard parties' procurators, and having considered the proof, with the record and productions, Finds as matter of fact—(1) that Graham Street and Stanley Street within the burgh of Leith are accessible to the public from Newhaven Road, which is a public road; that the said streets were not paved and flagged prior to the adoption by the said burgh of the General Police and Improvement (Scotland) Act, 1862, and have not been maintained as public streets; (2) that in the year 1878, Richard Bishop & Son, builders, Edinburgh, erected upon a piece of ground feued by the said Richard Bishop at the corner of Graham Street and Stanley Street aforesaid, two tenements of shops and dwelling-houses having a frontage abutting upon the said streets of 165 feet 6 inches or thereby; (3) that in the month of December 1878 the said Richard Bishop & Son, with the authority of the pursuers, the Magistrates and Council of the burgh of Leith, as coming in place of the Leith Police Commissioners, caused the drains of the tenements aforesaid to be connected with the district sewers previously made by the said Commissioners in or about the year 1865; (4) that in the month of April 1881 the said pursuers, as coming in place of the Commissioners, and as authorised by sec. 190 of the General Police and Improvement (Scotland) Act, 1862, fixed and determined the sum of £28, 7s. 6d. as a reasonable sum of money to be paid by the owner of the said tenements for the use of the said district sewers; (5) that in the months of April and May 1881 the said pursuers, after previous advertisment in the *Leith Burghs Pilot* and *Leith Herald* newspapers, caused Graham Street and Stanley Street aforesaid, and the footways thereof, to be levelled and paved at a cost of £885, 6s. 1d., whereof £114 was ascertained and fixed by the said pursuers as the proportion corresponding to the frontage of the tenements aforesaid, but subject to an abatement of £43, 11s. 4d. in respect of work which had been executed by the owner, leaving a balance of £71, 7s. which the said pursuers declared to be payable on the 31st October 1881;

(6) that the defenders, Messrs. M'Caskie & Brown, S.S.C., acted as law agents for the said Richard Bishop for the years 1881 and 1882, and received from the defenders, James Galloway & Son, who were employed by them as factors, payment of the rents due at Martinmas 1882, but that the rents due at Whitsunday 1883 are still in the hands of the said James Galloway & Son; (7) that the defenders, Allan M'Caskie and Marcus John Brown, are entered in the valuation roll for the burgh of Leith for the years 1881–82 and 1882–83, as proprietors of the shops and dwelling-houses comprised in the said tenements, in accordance with instructions to that effect contained in a letter from the firm of M'Caskie & Brown to the said James Galloway, dated 23rd May 1881; (8) that the defenders received notice from the pursuers of the said drainage assessment of £28, 7s. 6d. in or prior to the month of September 1881, and of the said paving assessment of £71, 7s. in the course of October 1881, and that neither of the said assessments has been paid, although the defenders have been repeatedly called upon by the pursuers to make payment thereof: Finds in fact and in law, that Graham Street and Stanley Street aforesaid are private streets within the meaning of the General Police and Improvement (Scotland) Act, 1862, and the General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Leith) Act, 1877; and in law, that the defenders, having drawn and intromitted with the rents of the tenements aforesaid, are liable in payment of the said assessments as 'owners' of the subjects within the meaning of the General Police and Improvement (Scotland) Act, 1862: Therefore decerns and ordains the defenders, jointly and severally, to make payment to the pursuers of the said sum of £28, 7s. 6d., with interest thereon at the rate of £5 per centum per annum from the 30th September 1881 until payment, together with the sum of £71, 7s., with interest thereon at the rate of £5 per centum per annum from the 31st October 1881 until payment: Finds the defenders jointly and severally liable to the pursuers in the expenses of process; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor of Court to tax and report.

"AND. RUTHERFURD.

"*Note.*—A proof in this case was rendered necessary in consequence of the defenders' non-admission of the pursuers' averments upon record with reference to the circumstances in which the assessments in question were imposed by the Magistrates and Council; but at the discussion after the proof was concluded, the only ground on which the defenders disputed their liability for these assessments was, that they cannot be regarded as owners of the subjects within the meaning of the General Police Act of 1862. It does not clearly appear who is now the actual proprietor of the two new tenements built by Bishop & Son in 1878; but looking to the terms of the interpretation clause and sec. 104 of the Act, it seems to the Sheriff-Substitute to be beyond all doubt that the defenders, having intromitted with the rents of the property

since the assessments became payable, have become liable as owners. Unquestionably it was just to provide for cases like the present, where the real owner cannot be found, that the word 'owner' is extended by the Statute to any person who shall intromit with or draw the rents. The case is analogous to that of trustees and others intromitting in a fiduciary capacity with the property of persons deceased, who are liable under the Revenue Acts for the duties payable to the Crown, although not beneficially interested.

"The pursuers allege upon record (Condescendence, Article 9), that the drainage assessment became payable on 23rd March 1881; but this date has not been proved. On the contrary, the minutes of the Town Council show that instructions were only given to the collector to issue notices to the parties liable on the 11th April 1881. It appears from a letter of Messrs. M'Caskie & Brown to J. & J. Galloway, dated 26th Sept. 1881, that the defenders had received notice of the assessment prior to that date, and there can be no doubt that it was then payable; the Sheriff-Substitute has therefore allowed interest on the amount, £28, 7s. 6d., from 30th September 1881. A. R."

The defenders appealed to the Sheriff, who issued the following interlocutor:—

"31*st Oct.* 1883.—The Sheriff having considered the appeal for the defender, Marcus John Brown, and having heard the procurators for the said appellant, and the pursuers and the defenders James Galloway & Sons, and considered the proof productions and whole process, adheres to the interlocutor appealed against; finds the said defenders jointly and severally liable in additional expenses, and decerns. ARCHD. DAVIDSON."

"*Note.*—There is substantially no difficulty in this case. There may, perhaps, be questions between the defenders, M'Caskie & Brown, and the other defenders, Galloway & Sons, but there is really no question between the defenders and the pursuers. M'Caskie & Brown were factors and agents, and they seem to have employed Galloway & Son the house factors to collect the rents, and both intromitted with the rents, and so they both fall within sec. 3 of the Statute, which interprets 'owner' to include any factor or agent or any other person who shall intromit with the rents of assessable subjects. A. D."

PORTOBELLO POLICE COMMISSIONERS *v.* THE VESTRY OF ST. MARK'S CHAPEL.

This is an important illustration of the view taken as to the construction of the words "fronting and abutting," and the absence of any right of Commissioners to recover private improvement expenses from an owner who was held not to front or abut, as explained in the judgment, which was acquiesced in.

"*Edinburgh, 8th Feb.* 1888.—The Sheriff-Substitute, having heard counsel for the parties, and having considered the proof with the

record, productions, and whole process: Finds, as matter of fact, that the defenders have been assessed by the Commissioners of Police of the burgh of Portobello under the General Police and Improvement (Scotland) Act, 1862, for a proportion of the expense of forming a street known as St. Mark's Place, Portobello, in respect that the defenders are the owners of lands or premises alleged to front or abut on the said street: Finds in fact and in law, that the defenders' property does not front or abut on the street aforesaid, and that the defenders are not liable to or for the said assessment or any part thereof: Therefore, sustains the defenders' third plea in law; assoilzies them from the conclusions of the libel, and decerns; finds the pursuer liable to the defenders in the expenses of process; and remits the account thereof, when lodged, to the Auditor to tax, allowing fees to counsel, and to report.

"AND. RUTHERFURD.

"*Note.*—This action has been brought to recover payment of a sum of £82, 8s. 6d. as the defenders' proportion of an assessment levied by the Commissioners of Police of the burgh of Portobello, under the General Police and Improvement (Scotland) Act, 1862, upon the defenders and other persons alleged to be the owners of premises fronting or abutting on a private street, which has recently been improved or repaired by the Commissioners, in consequence, it is said (Cond. Art. 2), of complaints made to them of its insufficient state.

"It appears from the proof that the street or roadway in question, which is now known as St. Mark's Place, was originally laid out in the year 1879 by the Benhar Coal Company, on the requisition of some of the Company's feuars, who complained that they had not a sufficiently convenient access to their property; and it was not made with any view to the convenience or benefit of the defenders who did not require any such road, and who have no occasion to use it. In these circumstances, it is not surprising that the defenders should resist payment of the assessments upon every possible ground, and they have stated pleas upon record, raising questions of more or less difficulty with regard to validity and regularity of the proceedings on the part of the Commissioners of Police. Several of these pleas were forcibly and ingeniously maintained in argument; but the Sheriff-Substitute does not consider it necessary to express any opinion upon the points which they involve, for he is of opinion that the defenders' property cannot be held in terms of the Statute of 1862 to front or abut on the street in question.

"St. Mark's Church, the property and management of which is vested in the defenders, stands facing the High Street of Portobello, from which it is approached through a gateway leading up to the principal entrance. There is no opening or approach to the defenders' premises from St. Mark's Place, which runs at right angles to the High Street, along the east side of their property, and it is separated from it by a stone wall. In similar circumstances it was held in the case of the Magistrates of Leith *v.* Gibb, 1882 (9 R.

627), that premises facing Leith Walk, from which they were approached by a passage, did not front a street or road on one side of the property and at right angles to Leith Walk. The point appears to have been assumed as almost too clear for argument, and the Sheriff-Substitute does not think that in this respect the case cited can be distinguished from the present. The question therefore comes to be, whether the defenders' property can be held as abutting on St. Mark's Place. It appears that the defenders' church was built in or shortly before the year 1826 upon a piece of ground, a portion of Broadlea Park, part of the lands of Easter Duddingston, the property of the Marquis of Abercorn. From the narrative to a feu charter produced by the defenders (No. 11 of process), it seems that the church had been built shortly before the defenders' predecessors obtained a title to the ground, the reason being apparently that the Marquis of Abercorn was then in minority, and had not chosen curators, or appointed any one with power to grant feus of the land on his behalf. But in 1826, Mr. Guthrie Wright, who was then empowered to act as commissioner on behalf of his lordship and his curators, feued to the defenders' predecessor, Mrs. Eliza Holland or Hallyburton, 'all and whole that lot or piece of ground, being lot 14 of the feus of the field in the farm of East Duddingston, called Broadlea Park, lying upon the south side of the high road leading from Edinburgh to Musselburgh, and at the east end of the village of Portobello, the said piece of ground extending along the said high road to 24 feet 11 inches, and backwards therefrom to 280 feet or thereby, and consisting of one-eighth part of an acre Scots measure or thereby, as the same is laid down on a feuing plan of the said ground made out by Robert Brown, architect in Edinburgh, and bounded as follows. viz. :—On the north, by the said high road; on the west, by lot 13 of the feus of said park; on the south, by a lane 25 feet broad; and on the east, by lot 15 of the said feus, lying within the parish of Duddingston, barony thereof, and sheriffdom of Edinburgh.'

"The plan by Mr. Brown, referred to in the feu charter, has not been produced, but it seems that the feuing lot No. 15 adjoining the defenders' property on the east has not been feued, and it continued to be occupied for agricultural purposes until a very recent date. In 1875 the lands of Easter Duddingston were acquired by the Benhar Coal Company, and that company having resolved to feu the ground in the neighbourhood, and to the south of the defenders' property, prepared a feuing plan (No. 21 of process), on which the feu No. 15 was laid down as a proposed road or street under the name of St. Mark's Place, leading to the company's feus from the High Street of Portobello. Down to Whitsunday 1879, however, it was occupied by the witness Mr. Inglis, a dairyman in Portobello, in connection with his business. In these circumstances, and if there were nothing more in the case, it appears to the Sheriff-Substitute very questionable whether the defenders could be held to have that 'undoubted right of access' to the street in question which the Lord President, in the case, The Magistrates of Leith *v.*

Gibb, regarded as essential in order that one property may be said to abut upon another within the meaning of the Act 1862. For it is manifest that the defenders under their titles had no right whatsoever to enter upon the adjoining property to the east; and the fact that lot 15 has now been converted by the Benhar Coal Company into a private road or street, cannot give the defenders a right of access which they did not otherwise possess. The matter, however, does not stop there, for the feu charter (No. 11 of process) contains an obligation on the defenders' predecessor, Mrs. Hallyburton, 'to enclose the ground hereby feued on the east and south with a stone wall at least 5 feet in height, and towards the said high road by a wall which shall be 3 feet 3 inches in height, and shall have a stone coping and iron railing thereon; and in case the ground adjoining the said lot on the east shall be enclosed by the person or persons who may feu the same, the said Mrs. Eliza Holland or Hallyburton and her foresaids shall be obliged to pay one half of the expense thereof as a mutual wall, to the extent of 5 feet in height, she and her foresaids being in like manner entitled to relief from the feuars of the ground adjoining the said lot on the east to the same extent for the mutual boundary wall to be erected by her.' The Sheriff-Substitute does not think that there either is or can be much doubt as to the meaning of this clause in the feu charter, which merely expresses the ordinary rule, in accordance with which the proprietor of a lot or portion of ground dedicated to building purposes is held entitled to build beyond his own property one half of the thickness of a mutual wall, and then, when this wall comes to be made use of by the adjoining proprietor, the builder can recover payment from his neighbour of one half of the cost. In the present instance the ground immediately to the east of the defenders' property was also to be feued, and it was uncertain by which of the feuars the mutual boundary wall between the two properties might be erected. It was therefore provided that whichever of them should do so should be entitled to relief from the other to the extent of one half of the expense. From this the Sheriff-Substitute thinks that it follows by necessary implication that the wall which was erected by the defenders' predecessor is to the extent of one half of its thickness built upon the adjoining feu (lot No. 15), the property of the Benhar Coal Company, and is thereby separated from the private street in question. The Sheriff-Substitute is therefore of opinion, that upon this point also the case of the Magistrates of Leith *v.* Gibb is a direct authority for the judgment which he has pronounced, and that the defenders' property cannot be held either as fronting or as abutting upon St. Mark's Place. The Sheriff-Substitute is glad to be able to arrive at this conclusion, for it seems to him that it would be most inequitable if the defenders were liable for the assessment in question, and he cannot help thinking that the present demand on the part of the Commissioners of Police would never have been made had it not been that the Benhar Coal Company has gone into liquidation.

"A. R."

As the question of the right of County Councils to assess police burghs is one of very considerable importance, the following may be of some practical use :—

OPINION OF LORD LOW IN SUSPENSION AND INTERDICT, THE CORPORATION OF THE BURGH OF GALASHIELS *v.* THE COUNTY COUNCIL OF THE COUNTY OF SELKIRK, 23RD FEBRUARY 1893.

"The question in this case is, whether the County Council of the county of Selkirk has right to levy the county general assessment upon lands and heritages within the burgh of Galashiels.

"The burgh of Galashiels is said to have been originally a burgh of barony, and after the passing of the Police and Improvement Act of 1862, it adopted that Act, and became a police burgh. By the Reform Act of 1868, Galashiels, Hawick, and Selkirk were constituted a district of burghs. By sec. 11 of the Municipal Elections Amendment Act of the same year, 31 & 32 Vict. c. 108, it was provided 'that each of the burghs or towns of Hawick and Galashiels shall have fifteen councillors, whereof one shall be provost, four shall be bailies, and one a treasurer, and the said provost, councillors, bailies, and treasurer shall be elected, and the affairs of the said burghs or towns shall be administered, in every respect, except as herein provided, as if they had been classed with Paisley, Greenock, Leith, and Kilmarnock in the Act 3 & 4 Will. IV. c. 77, and had been made expressly subject to the whole provisions of the said Act.'

"The Act of Will. IV. here referred to is the Parliamentary Burghs Election Act of 1833, which followed the Reform Act of 1832.

"The Act of 1833 proceeded upon the preamble, that whereas by the Reform Act 'the right of sending, or contributing to send, members to Parliament was conferred on divers burghs and towns in Scotland which were not royal burghs, and whereas there are in these burghs and towns no proper Magistracy or Council, and the constitution of such Magistracies and Councils, and the mode of electing the same where they do exist in such burghs or towns, is defective, and has given occasion to much inconvenience, for remedy whereof it is expedient that provision be now made for the due appointment and election of such Magistrates and Council in all such burghs.' The Act then provided that, in each of Paisley, Leith, Greenock, and Kilmarnock there should be sixteen councillors, whereof one should be provost, and so on; and in each of certain other burghs there should be a certain number of councillors. The Act then made provision for the qualification of the electors, the division of certain burghs into wards, the first and subsequent elections, the method of supplying vacancies, and kindred matters; and by sec. 30 it was enacted, that the Magistrates and Town Council to be elected under the authority of the Act 'shall have such and the like rights, powers, authorities, and jurisdiction as is or are possessed by the Magistrates and Council of any royal burgh in Scotland.'

"In 1868, therefore, Galashiels became a parliamentary burgh, with Magistrates and Council having rights, powers, authorities, and

jurisdiction coextensive with those of the Magistrates and Council of a royal burgh.

"In 1868 also, the County General Assessment Act, 31 & 32 Vict. c. 82, was passed, whereby 'rogue money' was abolished in counties, and the Commissioners of Supply were authorised to impose an assessment, 'to be called the county general assessment, upon lands and heritages within such county, according to the yearly value thereof as established by the valuation roll for the year.' *Prima facie*, the Act applies only to the county, exclusive of burghs. It is the Commissioners of Supply of the county who are authorised to impose the assessment; it is to be imposed upon all lands and heritages within 'such county,' and according to the valuation roll. Now the valuation roll here referred to seems to me to be plainly the valuation roll of the county. The Valuation of Lands Act of 1854 directed the Commissioners of Supply of every county and the Magistrates of every burgh (royal or parliamentary) respectively, to make up a valuation roll showing the yearly value of the whole lands and heritages within such county or burgh respectively. In the Valuation Act, therefore, the lands and heritages within the county are kept distinct from those within the burgh, and it is a valuation roll of the former only which the Commissioners of Supply are directed to make up. Therefore when the Act of 1868 authorises the Commissioners of Supply of a county to impose an assessment upon all lands and heritages in the county according to the valuation roll, I think that that can only refer to the valuation roll which the Commissioners of Supply are directed to make up by the Act of 1854, and the lands and heritages appearing in that roll.

"This view of the scope of the Act is, in the case of burghs which, like Galashiels, have adopted the General Police Act, strengthened by the consideration that the Magistrates have power to assess for almost every purpose to which the county general assessment can be applied; and if that assessment were to be levied in such burghs it would involve a double assessment, or at least a power of double assessment, for a great variety of purposes.

"Thus the expenses of the Explosives Act, 1875; the Sale of Food and Drugs Act, 1875 and 1879; the Prisons Act, 1877–78; the Weights and Measures Act of 1878, and of various other Acts of Parliament, are thrown upon the county general assessment in the landward part of the county, and upon the police assessment in burghs. In addition to the purposes of such special Acts, the general purposes enumerated in the County General Assessment Act to which the assessment may be applied, are analogous to purposes to which the the police assessment in burghs may be applied under the General Police Act; for example, the payment of officials, expenses occasioned by damage done by riot, and the providing of premises for public purposes. Thus the police assessment in burghs which have a separate police establishment, covers nearly the same ground of the police assessment and the county general assessment in counties.

"But it is said that burghs, even in the position of those to which I

have been referring, may, and in many cases do, take benefit from what is paid for by the county general assessment. No doubt burghs may get the benefit of the services of some officials—such as the procurator-fiscal—whose salaries are paid out of the county assessment, or of the use of old court-houses maintained by the county; but such benefits appear to be few in number, and not of great importance, and will only, in regard to one or two matters which the Legislature has left untouched when building up, by a series of enactments, separate local government in burghs. The fact that there are a few such exceptional cases does not appear to me to be sufficient to necessitate the conclusion that the general county assessment is leviable in burghs contrary to the natural interpretation of the Act of 1868, and to the inference arising from the fact that the Magistrates have power to levy assessments for purposes analogous to all the leading purposes to which the county general assessment can be applied.

"I am therefore of opinion that, prior to the passing of the Local Government Act of 1889, the Commissioners of Supply of a county had no power to levy the county general assessment within burghs in the position of Galashiels.

"I shall now consider the position of matters under the Local Government Act. Under that Act a burgh (royal or parliamentary) may be in one of four positions.

"(1.) If a burgh has a population of under seven thousand, it is represented upon the County Council (sec. 8). The administration of the Police and of the Contagious Diseases (Animals) Acts are transferred to the County Council (secs. 13 and 14); and the burgh is bound to contribute to the county fund a certain amount in a certain way (secs. 60 and 66).

"(2.) A royal burgh with a population of more than seven thousand, but which does not return or contribute to return a member to Parliament, is in the same position as a burgh with a population under seven thousand, except as regards the administration of the police.

"(3.) If a burgh has a population of more than seven thousand, but does not maintain a separate police force, it is represented upon the County Council (sec. 8). It is not, however, subject to the provisions as to contribution to the county fund, but, I apprehend, continues to be dealt with, as regards police expenditure, in the same way as prior to the passing of the Act.

"(4.) All other burghs appear to be outwith the scope of the Act. They are not represented on the County Council; they do not contribute to the county fund; and none of the powers of the Magistrates are transferred to the County Council.

"The burgh of Galashiels falls under the fourth of the above categories, and I am of opinion that the County Council has no power to enforce an assessment within it.

"I do not think that it was seriously disputed that the County Council could not impose assessments within the burgh under the Local Government Act itself, but it was contended that they could do so under the County General Assessment Act of 1868, as by

sec. 11 of the Local Government Act they were vested with all the powers and duties of the Commissioners of Supply; and by sec. 27, sub-sec. (1) of that Act, it is provided that 'the rate in respect of each branch of the expenditure for which provision is made under an Act of Parliament in force at the passing of this Act, shall be deemed to be imposed under the powers and subject to the provisions of that Act, in so far as these are not inconsistent with the provisions of this Act.' The argument is that the County General Assessment Act was an Act in force at the passing of the Local Government Act, and that the County Council, as coming in place of the Commissioners of Supply, can assess under the former Act. Of course, if the opinion which I have expressed, that the Commissioners of Supply had no right to levy the county general assessment within the burgh, is sound, then this argument falls to the ground; but it is proper that I should consider how the matter stands under the Local Government Act, on the assumption that the Commissioners of Supply could impose the county general assessment within the burgh. Upon that assumption the provision which I have quoted from sec. 27 (1), coupled with the transfer of the powers of the Commissioners of Supply to the County Council, would empower the latter to levy the county general assessment in the burgh, unless that was 'inconsistent with the provisions of this Act.' Now it seems to me that the leading provisions and general scope of the Local Government Act are altogether inconsistent with the idea that a County Council has power to levy assessments in a burgh in the position of Galashiels. In the first place, the Council created by the Act is the Council of the county, and 'county' is defined by sec. 105 as 'a county exclusive of any burgh wholly or partly situate therein.' Further, in the Act there is nothing to suggest that the Council has anything whatever to do with the burghs except those mentioned in secs. 8, 13, and 14. Again, the Act proceeds upon the principle that liability for assessment by the County Council, or for contribution to the county fund, is accompanied by the right of representation upon the Council. That appears to me to be a principle which lies at the foundation of the scheme of local government introduced by the Act. The anomalous result, however, of sustaining the contention of the respondents would be that parliamentary burghs like Galashiels would be liable to an important assessment by the County Council, without any representation upon that Council. I therefore think that for the County Council to levy the county general assessment within a burgh such as Galashiels would be inconsistent with the provisions of the Act, and that power to do so is not conferred by sec. 27.

In any view, the provisions of the Local Government Act strengthen me in the opinion, that the Commissioners of Supply had not power to levy the county general assessment in Galashiels and burghs in a like position. If they had not such power, then the provisions of the Local Government Act (so far as bearing upon the matter) are unambiguous and consistent throughout; but if they had such power, then there is at all events one striking anomaly in the

Act, and various inconsistencies which the framer of the Act could hardly have failed to notice, and could not, I think, have intended.

"I am therefore of opinion that the complainers are entitled to decree of suspension and interdict."

Opinion of A. Asher, Esq., Q.C., and Charles Scott Dickson, Esq.

A similar point was raised in the Argyll County Council as to the Oban county general assessment, and the following queries and opinion of counsel on memorial for the County Council of the county of Argyll in regard to the liability of lands and heritages in the burgh of Oban for county general assessment, under the Act 31 & 32 Vict. c. 82, and the Local Government (Scotland) Act, 1889, was obtained :—

"Queries.

"1. Are lands and heritages in the burgh of Oban liable for the county general assessment under the County General Assessment Act, 1868, and Local Government (Scotland) Act, 1889? And if so, (*a*) are proprietors and occupants within the burgh liable to assessment for their proportions in terms of the Local Government (Scotland) Act? or (*b*) is the burgh of Oban in its corporate capacity liable for its quota of the assessment?

"2. Are the lands and heritages in the extended area of the burgh liable for said assessment directly, or as part of the corporation of Oban?"

"Opinion.

"1. In our opinion this question falls to be answered in the affirmative. Rogue money was levied from owners of property in Oban prior to the passing of the County Assessment Act of 1868, and, in our opinion, was lawfully levied from them. The Act of 1868 practically substituted for rogue money the county general assessment; but, in our opinion, it did not free from liability for that assessment any persons who had previously been liable to be assessed for rogue money. We do not consider the argument as to the valuation roll, which appears to have influenced Lord Low so strongly, to be well founded, and we find nothing in the Statutes dealing with the question which appears to us to be sufficient to relieve the Oban proprietors, who had prior to 1868 been liable to pay rogue money, from liability to pay the county general assessment.

"The Act of 1889, in our opinion, so far as the question under consideration is concerned, merely transfers to the County Council the power to levy the county general assessment which had previously been vested in the Commissioners of Supply, and in no way affects the incidence of that burden.

"The burgh of Oban, however, is not, in our opinion, liable merely as a burgh to contribute to the general county assessment;

although, of course, so far as the burgh owns property, it is liable as such owner to pay all assessments lawfully imposed thereon.

"In our opinion the owners of property in the extended area are liable to pay the county general assessment in the same way as proprietors within the former limits of the burgh are liable to do so.

"EDINBURGH, *7th Oct.* 1892."

OPINION OF LORD ADVOCATE AND DEAN OF FACULTY.

Liability of Police Burghs for Salaries and Allowances to Medical Officers and Sanitary Inspectors appointed for the County.

A question having arisen as to whether the salaries and allowances to Medical Officers and Sanitary Inspectors appointed for a county ought to be charged to the public health rate or to the general purposes rate, a memorial was submitted to the former Lord Advocate (now Lord Robertson) and the present Lord Advocate (Mr. Balfour), then Dean of Faculty, in which they gave the following opinion in answer to these

"QUERIES.

"(*a*) Are the salaries and allowances to Medical Officers and Sanitary Inspectors appointed for the whole county to be charged to the public health rate or to the general purposes rate?

"(*b*) May councillors or members of district committees appointed to represent a burgh or an electoral division, consisting of a police burgh or part of a police burgh, act or vote in the election of these officials?"

"OPINION.

"(*a*) We are of opinion that the salaries and allowances to Medical Officers and Sanitary Inspectors appointed for the whole county are chargeable to the general purposes rate, not to the public health rate. There was no provision for the appointment of such officers under the Public Health Acts, and it appears to us that the following words at the end of sec. 27, sub-sec. (1), 'the rate necessary in respect of any branch or branches of expenditure for which no provision is made, as last mentioned, shall be imposed as a general purposes rate under this Act,' apply to the case. It is true that in the prior part of this section an exception is made of the laws relating to public health, and that by sec. 26, sub-sec. (3), the administration of the laws relating to public health is excepted; but it appears to us that these words have reference to the existing laws relating to public health, assessments for the administration of which are to be imposed within the districts only, and we find no provision for assessing upon the districts as such the rates required to pay the salaries of Medical Officers and Sanitary Inspectors appointed for the whole county.

"(*b*) We answer this question in the affirmative."

The question was again raised on 4th January 1893 by Mr. William Cæsar, solicitor, Carnoustie, Clerk to the Police Commissioners of that burgh, by an appeal to the County Council of Forfarshire, in which he objected to the payment of a tax for the salaries of the county Medical Officer and Sanitary Inspector, in respect "that he, as a ratepayer in Carnoustie, was assessed for the Medical Officer and Sanitary Inspector of the burgh."

The foregoing opinion was before the County Council, and after hearing counsel for the appellant, and the Clerk to the Council, the County Council declined to accede to the appeal in view of the opinion of counsel submitted, but agreed to recommend "the County Council in future to place the payment of the salaries of the Medical Officer and Sanitary Inspector on the public health rate instead of on the general purposes rate."

Opinion of Charles Scott Dickson, Esq.

Power of Commissioners to add to List of Highways under Roads Act of 1878.

"In my opinion the Commissioners have not the power of adding streets or roads to the highways. The County Trustees have this under sec. 42 of the 1878 Act, but I do *not* find that any similar power is given to the Local Authority by sec. 47. Their powers appear to me to be confined to the highways existing at the date of the transference.

"I am, however, of opinion that the desired result as to the incidence of the assessment may be obtained by adopting the procedure authorised by sec. 55 of the 1878 Act. I consider that, by the adoption of the 1862 Act, the management and control of the streets and roads in the burgh, and the power to levy rates and assessments in respect thereof, was vested in the Commissioners.

"Edinburgh, 21*st July* 1892."

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