pose, to what is it to be applied? Is it to be applied to reduce the principal sum of £550, which there is no obligation to repay except by the prescribed monthly instalments? or is it to be paid over by the party in possession to the proprietor of the subjects? Again, how long is this possession to last, and how may it be brought to an end? There is a clause which provides that the debtor, on giving two months' notice to the manager of the Company, may, at any time during the currency of the six years, redeem the subjects upon certain conditions. Does that mean that he cannot redeem the subjects upon any other condition? Does it mean that he cannot redeem the subjects, and re-enter into possession himself, upon paying up all that is due? Does it or does it not mean that? And again, does it mean that, after the six years have expired, the debtor is then to be entitled to re-enter into possession? or does it mean that he is never to re-enter into possession if he allows the six years to expire? All these are possible constructions of this clause; and it seems to me that it would be against all precedent and practice to allow possession to be taken under a bond of this kind, in virtue of this unprecedented clause, without defining what are the rights of the possessor under a possession so to be taken. Now, that is the proper subject of an action of declarator, and I am not aware of any other form of process by which these rights and powers can be defined; and for that reason, again, it appears to me that this proceeding is entirely incompetent in the Sheriff-court. No doubt the debtor has bound himself to flit without any warning or legal process whatever: but then, if such a removal necessarily presupposes the decision of the questions that I have now been considering,—if it necessarily presupposes that it is clear law that the irredeemable title shall in this matter yield to the redeemable, and that every one of the most unfavourable suppositions which I have suggested as to the meaning of this clause is clearly the right one against the debtor—then I say that it is impossible for a party to bind himself to this effect; nay, if he had said in so many words, "And when this occurs I shall submit to be summarily ejected by warrant of the Sheriff,"—I should have held that to be an incompetent obligation not binding upon the debtor. It is exactly the same thing as if the parties had contracted thus:—"And instead of this obligation being enforced by a declaratory removing in the Court of Session, to which otherwise it would be necessary to resort, we consent that that process shall be had in the Sheriff-court." That is an obligation of no effect. It is an attempt to create a jurisdiction against the law, and no parties can do that. No parties can vest the Sheriff with a jurisdiction to entertain a declarator of property. They may, indeed, make the Sheriff arbiter in a particular event or case. That is a different affair. But they cannot vest him with judicial power to entertain a declaratory process, or pronounce a declaratory judgment affecting questions of real property. For these reasons I come to the conclusion, with all your Lordships, that this petition in the Sheriff-court of Linlithgowshire was incompetent; and I purposely abstain from giving any indication of an opinion as to what the result of a declaratory action in this Court, with conclusions for removing, may be if it shall be resorted to.

The Court accordingly recalled the interlocutors appealed against, and found the petition incompetent.

Agent for Appellant—David Miln, S.S.C.

Agents for Respondents—Murray, Beith, & Murray, W.S,

Saturday, December 23.

MACKNIGHT (CLERK TO THE WATER OF LEITH SEWERAGE COMMISSIONERS) *v.* W. & D. MACGREGOR.

Assessment—Edinburgh and Leith Sewerage Act, 1864. A proprietor whose premises had, subsequent to the construction of the sewers authorised by the Edinburgh and Leith Sewerage Act, 1864, been connected therewith, *held* not entitled to resist payment of the assessment fixed by the Commissioners under the Act as a reasonable sum for the use of the sewers, on the ground that the assessment was unreasonable in amount, and that the expense of construction had been already defrayed.

By section 18 of the Act 27 and 28 Vict. c. 153, it is enacted, that it shall be lawful for the Commissioners to construct and maintain the sewers and works therein enumerated in the burgh of Edinburgh and Leith. By section 65 of the said Act the Commissioners are empowered to estimate and fix the sums which may be necessary from time to time for constructing the works thereby authorised; and also to apportion the same between the Corporation of Edinburgh and the Corporation of Leith.

To meet the expense of construction thus laid upon them, the Corporations are, by section 68, empowered to levy an assessment, not exceeding 2s. 6d. per pound of yearly value, on the owners of lands and heritages within the districts benefited by the works.

Section 87 contains a similar provision for meeting the expense of maintenance.

Section 47 provides—"The owners of all lands, houses, or other property, 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 works, which the Commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property: Provided always that such lands, houses, or other property shall not have been assessed for the expense of making such main or branch sewers or works; but if such lands, houses, or other property shall have been so assessed, and shall have been built upon, enlarged, or altered after the assessment for making such main or branch sewers or works was imposed and levied, the owners thereof shall be liable in payment to the Commissioners of such reasonable sum of money as aforesaid."

Section 85 provides for the disposal of any surplus funds in the hands of the Commissioners by apportionment between the Corporations of Edinburgh and Leith.

The defenders W. & D. Macgregor, who are builders in Edinburgh, are the proprietors of certain buildings recently erected, situated in Balfour Street, Leith, and Valleyfield Street, Edinburgh.

The Commissioners fixed 2s. 6d. per pound of rental as a reasonable sum in terms of section 47, and accordingly laid upon the defenders' premises a sum equivalent to that rate, under deduction of any portion of the original assessment for the construction of the works which they could instruct as having paid by the stances on which their premises were built.

The defenders having refused payment, the Commissioners, in name of their Clerk, raised the present action for payment of the amount of the assessments, amounting to £36, 3s. 6d., under the deduction mentioned above, which they estimated at a trifling sum.

The defence was:—"The defenders are ready and willing to pay a reasonable sum of money to the Commissioners for the use of the drains in question, but the sums sued for are not reasonable sums of money in the sense of the 47th section of the said Act. The pursuer has not stated the data or grounds upon which the said sum was fixed; and the defenders believe and aver that the Commissioners do not require to levy anything like so large a sum for any legitimate purposes of their trust. The cost of making the drains or sewers in question has been already defrayed by previous assessments, and provision is made by the statute for raising otherwise the funds requisite for the maintenance and repair of the drains or sewers. If the Commissioners are permitted to levy the rates which they demand in respect of the defenders' buildings, these would not only defray the whole charges of maintenance, but would lead to the accumulation of a large fund in their hands, which they have no statutory authority to create. Farther, large areas of ground are now being and will be built upon within the districts over which the assessing powers of the Commissioners extend; and the levying of such rates as the Commissioners seek to recover from the present defenders would lead to the entire exemption of the tenements which are being and will be built upon the said ground, or, at all events, to their being assessed at a rate altogether infinitesimal when compared with the rate claimed."

The defenders pleaded:—"(2) The pursuer is not entitled to exact the sums claimed, in respect that the sums are not reasonable sums of money within the meaning of the 47th section of the Act. (3) The defenders having been all along ready and willing to pay a reasonable sum of money for the use of the drains in question, the action is unnecessary, and ought to be dismissed."

The Lord Ordinary (JERVISWOODE) allowed the parties a proof of their averments.

The pursuer reclaimed, and maintained that he was entitled to decree without proof.

WATSON and HALL for him.

LORD ADVOCATE, SOLICITOR-GENERAL, and BALFOUR, for the defenders.

At advising—

LORD PRESIDENT—My Lords, I have never been quite able to understand why the Lord Ordinary allowed a proof in this case. I think there is a sufficient case disclosed on the face of the record to lead me unhesitatingly to a conclusion in favour of the pursuer. The statute provides, in the first place, for the expense of constructing the sewerage works, and that is to be done by means of an assessment, to which there is this limitation, that no one in the district either of Edinburgh or of Leith is to be called on to pay more than 2s. 6d. in the pound on his total rental. The assessment is laid on accordingly, and the 2s. 6d. in the pound is levied and paid to the Commissioners, and used in the construction of the works; and I take for granted that a similar assessment is levied for the maintenance of the works—at least there is such a power given under the statute. But it was foreseen by the Legislature that, while the existing property in the district was to bear the burden of constructing these works, other property would, in course of time, come into existence, which would get the benefit of them and contribute nothing to the expense, unless some provision were made for that purpose. That consideration led to the enactment of the 47th section, the object of which, as I understand it, is to equalise on reasonable terms between the property existing at the time the assessment was first laid on and property since then brought into existence; and I must say it seems to me a good and intelligible piece of machinery for working out that object. It provides that the Commissioners shall have power to impose on such new properties a reasonable assessment for the use of the works, if they have already paid no such assessment; if they have not already paid their natural share for the expense of constructing these works, they are to be liable to the Commissioners in payment of a reasonable sum for the use of them. Accordingly, the defenders having constructed such buildings as this clause contemplates, since the construction of these works, the Commissioners say to them—You must pay us a reasonable sum for the use of these works, to equalise the burden of their construction between you and those who originally bore the expense. But the defenders reply—You do not need the money, because you have already laid on an assessment sufficient to meet the whole expense, and you have no authority to accumulate a fund which is not required. But the statute provides by section 85 that if there is any surplus of the assessment required for the purposes of the Act, it is to be paid over by the Commissioners to the Corporations respectively, in the proportions in which the respective districts contributed to the construction of the works. If the Corporations have borrowed money for the purposes of the Act, such surplus so repaid to them by the Commissioners is to be used towards the repayment of any sums so borrowed; or if these have been repaid, the money so received from the Commissioners is to be applied as seems most expedient to the Corporations respectively, for the benefit of the community in their respective districts; that is, of course, for the purpose of diminishing the existing assessment. The effect is just to relieve the ratepayers who bore the whole expense of constructing the works, to the extent to which it is imposed on those who have built new properties, which now receive the benefit of that expenditure. If that, then, be the object of the statute, the only question is, Whether the demand made by the pursuer is reasonable under section 47? Now, I think nothing could be more reasonable than to put these parties and the original ratepayers on a footing of equality, and under section 85 that will give proportionate relief afterwards, though indirectly, to them as well as to those who paid the original cost of the works. I think, therefore, that the Lord Ordinary's interlocutor must be recalled, and that the pursuer is entitled to decree in terms of the conclusions of the summons.

LORD DEAS—I am clearly of the same opinion

This Act was passed in 1864, for the purposes of improving the sewerage of the district of Edinburgh and Leith. It is not disputed that the existing ratepayers at that time paid 2s. 6d. in the pound on their rental to defray the expense of the works authorised by the Act, and the statute provided that the owners of property coming in the future to enjoy the benefit of these works should pay a reasonable share of the expense of their construction. Now, what is a reasonable share, unless that which puts them on a footing of equality? The argument of the Lord Advocate comes to this—that new buildings are to pay nothing at all of that expense. But the answer is, that the case is the same as that of an individual proprietor who has built houses on a few acres of ground, and for the benefit of these houses has made a drain to the sea at great expense; and a neighbouring proprietor comes and says—I will take the benefit of your drain for nothing, and my doing so will not cost you anything more than you have already paid. The fair answer surely is, that he must pay a reasonable share of the original expense of constructing the drain. I think there is no difficulty created by the existence of a surplus on the assessment, because, as your Lordship has explained, that is expressly provided for by the statute.

Lord Ardmillan—I am of the same opinion. If this system of drainage had been executed very long ago, so as to have fallen into a state of dilapidation, and that the new ratepayers were to be put to the disadvantage of paying for what was originally good, but had ceased to be so,—in that case I think a proof might have been necessary. But these works were executed no longer ago than 1864, and it is impossible to allege that it is any disadvantage to the owners of property created since then to be put on a footing of equality with the ratepayers existing at the time. They receive exactly the same advantage as the original ratepayers. If it could be contended that there were defects in the works, or that the lapse of time had deteriorated them, and that the existing rate was now unreasonable, that would be a ground of argument against equalising the original and the present ratepayers. But nothing of the sort is alleged, and therefore I entirely agree with your Lordship in thinking that the Lord Ordinary has erred in allowing a proof, and that the pursuer is entitled to decree.

Lord Kinloch—I am of the same opinion, and very clearly. It is plain that these gentlemen must pay a reasonable sum towards the cost of these works, notwithstanding that the whole expense of their construction has been defrayed. The only question is, as your Lordship has stated—what is a reasonable sum? and I cannot conceive anything more reasonable than that they should pay the same as other owners of property have done, for the enjoyment of the same benefit. Any surplus thereby created will remain for general behoof. The purpose of the assessment is to furnish a common fund, the benefit of which the whole ratepayers of the district are to share; and I cannot therefore see any ground for exempting the defenders from contributing in the same proportion with the original ratepayers.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the conclusions o the summons, with expenses.

Agent for Pursuer—James Macknight, W.S.
Agents for Defenders—Lindsay, Paterson, & Hall, W.S.

Tuesday, January 9.

HORN *v.* SANDERSON AND MUIRHEAD.

Husband and Wife—Bankrupt—Caution for Expenses—Reparation—Injury to Person—Title to Sue.

By antenuptial contract a husband renounced his *jus mariti* and right of administration over the whole means, estate, and effects of the wife, with a declaration that she should be entitled during the subsistence of the marriage to sue for, uplift, and discharge all debts and sums of money due and to become due to her in her own name. An action of damages was raised by the spouses for bodily injury to the wife, and incidental loss to the husband from her inability to attend to his business. In the course of the action the estates of the husband were sequestrated. The trustee in his sequestration declined to sist himself, and, at the request of the wife, executed, in conjunction with the husband, an assignation in favour of the wife of all claims against the defenders which either the husband or the trustee might have in connection with the subject of the action. The husband having been appointed to find caution for expenses, and having failed to do so, *held* that he was not entitled to sue the action for his own right and interest, or to recover damages in respect of the loss alleged to have been sustained by him, and the action *dismissed* as regards him; but *held* that the wife was, with consent of the husband as her administrator-in-law, entitled to insist in the action for her own right and interest, without finding caution.

This was an action at the instance of Mrs Eliza Horn, wife of Andrew Horn, spirit-dealer in Edinburgh, with consent of her husband as administrator-in-law, and of Andrew Horn for his own right and interest, against Sanderson & Muirhead, Builders, Edinburgh. The conclusions were for £500 of damages for injuries alleged to have been sustained by the fault of the defenders. The pursuers averred that in March 1871 the defenders had been employed to repair a portion of the pavement in Princes Street; that on the evening of the 6th March they had negligently left a piece of the footway unpaved, and without barricade or lamp to warn passengers; that on that evening Mrs Horn was walking along Princes Street, when she stumbled over the place and fell, and was seriously injured in her person. The pursuers further averred (Cond. 7), that in consequence of Mrs Horn not being able to attend to the shop, as she usually did, Mr Horn was obliged to manage the business himself, and that his health suffered from overwork.

After the summons was raised the pursuer Mr Horn was sequestrated.

The Lord Ordinary (Jerviswoode), by interlocutor dated 20th October 1871, ordered the process to be intimated to the trustee in his sequestration, who declined to sist himself.

An antenuptial contract of marriage between Mr and Mrs Horn was produced, in which Mr Horn renounced his *jus mariti* and right of administration