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

and all other rights competent by law to him, in consequence of the intended marriage, "over the real and personal, heritable and moveable, means, estate, and effects of the said Eliza Rankine, and whole rents, interests, and other income arising furth thereof." It was declared that she "should be entitled to sue for, uplift, and discharge all debts, and sums of money, and rents of heritable subjects, due and to become due to her, in her own name, alone, and without the concurrence of me, the said Andrew Horn."

On the 17th November 1871 Mr Horn and the trustee and commissioners on his sequestrated estate executed an assignation in favour of Mrs Horn in the following terms:—

"And now seeing that the said Mrs Eliza Rankine or Horn has required us to execute these presents in terms of the said resolution of creditors, and that it is right and proper that we should do so; Therefore I, the said Andrew Horn, and I, the said William Myrtle, as trustee foresaid, and we, the said Henry Ruddiman Kay, William White, and William Lindsay, as commissioners foresaid, do hereby assign, dispone, convey, and make over to and in favour of the said Mrs Eliza Rankine or Horn, and to her heirs, executors, and assignees, exclusive of the *jus mariti* and right of administration of me the said Andrew Horn, and any right that may be competent to me, the said William Myrtle, as trustee foresaid, all claims which I, the said Andrew Horn, or I, the said William Myrtle, as trustee foresaid, may have against the said Messrs Sanderson & Muirhead, or the individual partners of said firm, in connection with the subject-matter of the said action of damages, or under said action, with all right, title, and interest competent to us, or either of us therein."

On the 17th November 1871 the Lord Ordinary, in respect that the trustee on the pursuer's sequestrated estate had failed to sist himself as a party to the process, appointed "the pursuer" to find caution for expenses within ten days.

On the 5th December the Lord Ordinary, in respect of the failure of "the pursuer" to find caution in terms of the preceding interlocutor, dismissed the action, and found the defenders entitled to expenses.

Mrs Horn reclaimed, and maintained that the action at her instance ought not to be dismissed, and that she was entitled to insist in the action without finding caution.

MACDONALD and RHIND, for her, argued that, in virtue of the renunciation of the *jus mariti* in her antenuptial contract, and the assignation in her favour by her husband's trustee, the right of action, so far as her interest was concerned, was completely vested in herself.

LANCASTER, in reply, argued that the right to sue for pecuniary damages for personal injury to the wife, was competent only to the husband, and that, as he had become bankrupt and had failed to find caution for expenses, the action must be wholly dismissed. In any view, the wife could not sue without a *curator ad litem*.

The following cases were cited:—*Finlay* v. *Hamilton*, Feb. 5, 1748, M. 6051; *Graham* v. *Hunter's Trs.*, March 4, 1831, 9 S. 543; *Milne* v. *Gould's Trs*, Jan. 14, 1841, 3 D. 345; *Smith* v. *Stoddart*, July 5, 1850, 12 D. 1185; *Gall* v. *Bennett*, March 7, 1857, 19 D. 665.

At advising—

LORD PRESIDENT—The claim for damages must be resolved into two heads. The pursuer Mrs Horn complains that by the fault of the defenders she was injured in her person, and is therefore entitled to reparation. It is also alleged that, in consequence of her being disabled, the other pursuer Mr Horn suffered in his business, because he lost the benefit of her assistance, and that his health suffered from consequent over-work. Mr Horn has become bankrupt, and his trustee declines to sist himself. Mr Horn cannot therefore be allowed to pursue this claim on his own behoof, and on account of injuries said to have been sustained by himself, without finding caution for expenses. But with regard to the other part of the claim, viz., for injuries said to have been sustained by Mrs Horn, the question is whether the claim at the instance of the wife is to be dismissed also. The question is one of some delicacy. As a general rule there is no doubt that a wife pursuing a claim of damages for personal injury would be suing only for a sum of money that would at once become the property of the husband. But the circumstances of this case are very special. In the antenuptial contract of Mr and Mrs Horn there is a universal renunciation of the *jus mariti* over the whole means, estate, and effects of the wife. Questions of difficulty might be raised on the construction of the marriage contract. It might be questioned whether it is intended to apply to *acquirenda*, and secondly, whether, supposing it to apply to *acquirenda*, the present claim for damages is of such a nature as to fall under the clause of renunciation. It is only necessary to observe that these would be questions between Mrs Horn and the trustee in her husband's sequestration. But the trustee has assigned any right to pursue this claim which he might have to Mrs Horn. That assignation removes any difficulty, and makes Mrs Horn's right complete. All that the defender is entitled to demand is, that Mrs Horn shall be in a position to discharge the claim. There is no doubt that she is in a position to discharge the claim, taking into consideration the marriage-contract and the assignation together.

A question has been raised whether she should not have a *curator ad litem*. Mr Horn is the proper curator or administrator for his wife. I have yet to learn that a man's bankruptcy disqualifies him from acting as curator to his wife. Mrs Horn is not bankrupt, and therefore she cannot be required to find caution. The result is, that while the Lord Ordinary is right in dismissing the action in regard to the pursuer Mr Horn, he is wrong if he intended to dismiss the action so far as Mrs Horn is concerned.

The other Judges concurred

The Court pronounced the following interlocutor:—

"*Edinburgh*, *7th January* 1872.—The Lords having heard counsel on the reclaiming note for Mrs Horn and spouse against Lord Jerviswoode's interlocutor of 5th December 1871, recall the said interlocutor: Find that the pursuer Andrew Horn, having failed to implement the interlocutor of 17th November 1871 by finding caution for expenses, is not entitled to sue this action for his own right and interest, or to recover damages in respect of the loss alleged to be sustained by him in the 7th article of the condescendence: Therefore, in so far as regards the pursuer Andrew Horn for his own right and interest, dismiss the action and decern: But find that the pursuer Mrs Eliza Horn is entitled, with consent and concurrence of her hus-

band as her administrator in law, to insist in this action for her own right and interest without finding caution for expenses; and remit to the Lord Ordinary to proceed with the cause: Find the pursuer Mrs Eliza Horn, and her husband as her administrator, entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account," &c.

Agent for Mrs Horn—W. G. Roy, S.S.C.
Agents for Defenders—Murray, Beith, & Murray, W.S.

Tuesday, January 9.

SECOND DIVISION.

FLETCHER *v.* CAMERON.

Master and Servant—Gamekeeper—Yearly Engagement—Dismissal—Damages.

In an action at the instance of a gamekeeper against his former master, *held*, on a proof—(1) that the pursuer had been engaged as a yearly servant, although he was to be paid at a certain rate per week, in addition to the rent of his house; (2) that he had been wrongously dismissed; and (3) was entitled to £40 *nomine damni*.

Cameron, in this action, sued his late master Mr Fletcher of Kelton House, Dumfries, for balance of wages due to him as defender's gamekeeper, and for damages in respect of wrongous dismissal. The contract between the parties was constituted by certain letters which passed between them. The letters from Cameron to Mr Fletcher were not produced by the latter, although he did not allege that they had been destroyed. The first letter was merely an application for the situation as advertised, and enclosed testimonials. Mr Fletcher, in reply, sent the following letter:—

"69 *Lowther Street, Whitehaven, 7th April* 1865.

"SIR,—Yours with enclosure to hand this morning. I have not yet engaged a gamekeeper, but have had correspondence about two or three; however, your testimonials are so satisfactory that I have no hesitation in engaging you, if you agree to accept 16s. per week, and commence at once.

"Should this suit you, please to loose no time, but go over to Conheath and see if Mr Leckie (the farmer there) will let you have the house that the late keeper had. I will expect to hear from you by return.—I am, yours truly, JOS. FLETCHER.

"Mr D. Cameron."

Cameron alleged that he replied to this offer by a letter in which he made a house a condition of the engagement.

Mr Fletcher's next letter was as follows:—

"69 *Lowther Street, Whitehaven, 10th April* 1865.

"SIR,—Your reply to hand. I did not mean to find a house, inasmuch as I *have not one;* otherwise would have no objection. If you can arrange with Mr Leckie for the cottage I will pay the rent for you. I may probably be over about the middle of next week, when I can give you instructions.—I am, yours, &c., "JOS. FLETCHER."

Under these letters the pursuer entered the service of the defender as gamekeeper on 19th April 1865, and continued as such until 11th July 1870, when he was dismissed, as was conceded, wrongously. During that term the defender paid the pursuer wages at the agreed-on rate of 16s. a-week, but at irregular intervals, and not at the expiry of each week. The defender also paid the pursuer lodging money from 17th April 1865 until the following term of Whitsunday; and thereafter until 1870, the defender paid the rent of a house occupied by the pursuer.

Cameron accordingly brought the present action in the Sheriff-court of Dumfries, concluding for payment of £36, 10s. 8d., being the money wages alleged to be due to the pursuer at the agreed-on rate of 16s. a-week, from the 11th July 1870 until the 26th of May 1871, when he alleged that his engagement with the defender as a yearly servant would have naturally terminated; (2) for the sum of £5, being the allowance stipulated for a house from Whitsunday 1870 till Whitsunday 1871; or otherwise, for the sum of £50 as damages for wrongous dismissal.

The defender pleaded that Cameron was not a yearly servant, but had been engaged by the week; and secondly, that he had been properly dismissed.

The Sheriff-Substitute (HOPE) repelled the first plea; and after having allowed a proof as regarded the second plea, dismissed it also.

He remarked in his Note:—"It appears to be settled law that the fixing of the rate of wages of a servant will not necessarily determine the duration of the contract of service (Fraser, ii, p. 384). The custom and understanding of the neighbourhood must decide the point where the bargain did not do so expressly.

"This being so, the next question is, What is the rule as to gamekeepers? The only case cited, or apparently to be found about gamekeepers, is that of *Armstrong* v. *Bainsbridge*, Nov. 12, 1846, 9 D. 29, in which it was held by the First Division of the Court of Session that, 'unless a special contract of different endurance be established, a servant in the situation of a gamekeeper, and hired on the conditions here admitted, must be presumed to have been hired by the year, and is not to be held as a monthly servant.'

"This case, however, does not exactly rule the present, because the judgment proceeded *partly* upon the conditions of hiring, which were widely different from those in the present case. But it also proceeded partly upon the fact of the pursuer being a gamekeeper, which to some extent warrants the present judgment.

"Any doubt which the Sheriff-Substitute may have had has been removed by the element of the house rented for the pursuer, which seems to him to point at a yearly service.

"If the engagement had been intended to be by the week, as the defender maintains, it was to be expected that the provision for a house would have been in the form of a weekly allowance of lodging money, as was the case during the few weeks before Whitsunday 1865.

"It was pled for the defender that the case was altered by the pursuer having entered on his service, not at a regular term, but between terms; and that, if he was a yearly servant, it must have been for the year commencing 17th April in each year, which is not what is libelled.

"The Sheriff-Substitute thinks that this is not a sound argument, but that all that can be said is,