provides for the case of a nuisance created by the operations of the Local Authority. If such a nuisance be created, *then* is the time for the petitioners to apply for redress to a court of law. It is a totally different inquiry whether a nuisance exists, from what it is, whether a nuisance will be created. The Sheriff, or any other unskilled layman, could quite fitly determine the former question, and be left at sea in casting the balance of conflicting evidence of engineering witnesses in regard to a mere matter of opinion. If the Local Authority by their operations created a nuisance, the whole work may require to be undone. But in the meantime the drainage operations in Gourock will go on, in place of their being delayed, it may be, while this case is running the course of appeal from court to court.

"The petitioners have mistaken their remedy. If they consider that the scheme of drainage for their village, devised by the Local Authority, is a bad one, they must just turn out their representatives at the Local Board at the next election, or wait until a nuisance actually exists, and then compel the Local Authority to remove it.

"The Sheriff has disposed of this case without the aid of any direct authority or precedent in the judgments of the Supreme Court. None of the cases which he can find directly rule the present one, and therefore he thinks it unnecessary to analyse those cases where somewhat similar questions have been mooted. They seem to be the following—*Lord Advocate* v. *Police Comrs. of Perth*, Dec. 7, 1869, 8 Macph., p. 244; *Smeaton* v. *Police Comrs. of St. Andrews*, May 17, 1865, May 30, 1867, and Dec. 10, 1868, and also in House of Lords, March 20, 1871, 9 Macph., p. 24, H.L.; *Blantyre* v. *Trustees of Clyde Navigation*. March 3, 1871, 9 Macph., p. 6; *Bremner* v. *Huntly Friendly Society*, Dec. 4, 1817, F.C.; *Dunbar* v. *Levack*, Feb. 10, 1858, 20 D., p. 538; *Guthrie* v. *Miller*, May 25, 1827, 5 Sh., 711; *Nicol* v. *Magistrates of Aberdeen*, Dec. 20, 1870, 9 Macph., p. 306; *Douglas* v. *Dundee and Newtyle Railway Company*, Dec. 22, 1827, 6 Sh., p. 329."

The petitioners appealed.

TRAYNER for them.

SOLICITOR-GENERAL and BURNET, for the respondents, were not called upon.

At advising—

LORD PRESIDENT—If the statute of 1867 had given to the inhabitants, or the proprietors, or the ratepayers, a right to appeal against a resolution of the Local Authority, either to the Sheriff or to this Court, we should be bound to listen to this appeal; and if relevant statements were made, to allow an inquiry. But the statute has given no such right of appeal. It is true that this action is not in the form of an appeal. It is an application to us, at common law, to interdict the Local Authority from carrying their resolutions into effect. If it were made out, or relevantly averred that the Local Authority were about to violate the statute, this course would be justified. But the allegations do not amount to more than that the proposed system of drainage is a bad one for the interests of the burgh, not for the interests of the individual petitioners, as distinguished from the general interests. It is really an application to the Sheriff to consider the question how the burgh of Gourock should be drained. I do not say that the Sheriff has no jurisdiction to entertain this petition, but the spirit of the statute certainly excludes him from anything like a review of the resolutions of the Local Authority. If a nuisance was actually created there is no doubt that those affected by it would have a right to complain. The Sheriff has taken the right view.

LORD DEAS concurred.

LORD ARDMILLAN—There is nothing here of a proved personal injury, or dread of injury to person or property, or any such invasion of private rights as to entitle the Sheriff to interfere.

LORD KINLOCH concurred.

The Court refused the appeal.

Agent for Petitioners—William Mason, S.S.C.
Agent for Respondents—L. M. Macara, W.S.

Thursday, July 11.

SECOND DIVISION.

SPECIAL CASE — ALLAN GILMOUR AND OTHERS (BOYD GILMOUR'S TRUSTEES AND OTHERS).

Trust-Settlement—Construction—Aliment.

Terms of trust-settlement under which trustees *held* entitled to pay a yearly sum for maintenance of three pupil children out of the income of general trust-estate.

By trust-disposition and settlement, dated 19th March 1869, Boyd Gilmour, coalmaster at Galston, who died on 26th March 1869, conveyed to trustees his whole heritable and moveable estate for the uses and purposes after-mentioned, viz.,—"First, that my trustees shall, from the produce of my means and estate, pay all my just and lawful debts, and funeral expenses, and the expenses of executing this trust: Secondly, that my trustees shall continue to carry on, for behoof of my estate, the trade or business in which I am at present engaged, in company with the said Allan Gilmour, until the expiry of the copartnership entered into, and at present subsisting, betwixt him and me, conform to contract of copartnery executed by the said Allan Gilmour and me upon the 21st day of April 1862; but declaring that in the event of differences arising betwixt my said trustees and any of my family in regard to the terms and provisions of this deed, whereby my said trustees may be prevented from continuing to carry on the said business in a satisfactory manner, then, and in that case, they may, if they think fit, and with the concurrence of the said Allan Gilmour, withdraw from the said business, and realise my share therein by disposing of the same to the said Allan Gilmour, in manner provided by article ninth of said contract of copartnery: Thirdly, that my trustees shall allow Elizabeth Howatson or Gilmour, my wife, in the event of her surviving me, the liferent use and enjoyment of my house in Titchfield Street, Galston, at present occupied by me; and also my trustees shall make payment to her of a free yearly annuity of £120 sterling, till such time as my youngest child shall attain the age of twenty-one years, after which event they shall pay her a free annuity of £60 sterling, to which the said annuity of £120 shall then be restricted and reduced, payable, the said annuity and restricted annuity, half-yearly, in advance, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my

death for the half-year succeeding, and so forth half-yearly thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure, and the legal interest of each term's payment from the time the same becomes due, and till payment; as also, my trustees are hereby directed to pay to my wife such a sum as they shall think reasonable and proper for the maintenance of her and such of my children as she may be bound to support, as hereinafter provided, from the date of my death till the commencement of the said annuity, and also for providing her and them with mournings; but declaring, as it is hereby specially provided and declared, that in the event of the said Elizabeth Howatson or Gilmour entering into a second marriage, she shall cease to be entitled to the liferent of the said house above provided to her, and the said annuity and restricted annuity hereby provided to her shall also be further reduced and restricted to the sum of £20 sterling, payable, the said restricted annuity, at the terms, in the manner, and with interest and penalties, as provided with regard to the said annuity of £120, and restricted annuity of £60, and which annuity and restricted annuities hereby provided to the said Elizabeth Howatson or Gilmour shall be alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors; and declaring further that the said Elizabeth Howatson or Gilmour shall, by acceptation of the said annuity of £120 above provided to her, bind and oblige herself, as she is hereby bound and obliged, to maintain and upbring, in a manner suitable to their station, such of my children as have not attained majority, or been married, or are in a position to maintain and support themselves, till such time as the youngest child reaches the age of twenty-one years: Lastly, that upon the expiry of the said copartnership betwixt the said Allan Gilmour and me, whether by the natural expiration of the term of copartnership, or by my said trustees withdrawing therefrom, my said trustees shall realise and convert into cash my whole estates hereby conveyed, heritable and moveable, with the exception of my said house in Titchfield Street, Galston, if the said Elizabeth Howatson or Gilmour should then be alive and entitled to the liferent thereof as hereinbefore provided to her; and whatever residue or remainder there may be of my said estates after providing for the annuity or restricted annuity herein provided to the said Elizabeth Howatson or Gilmour, if she should then be alive, my said trustees shall pay and divide the same to and among my whole children, equally, share and share alike, payable, the respective shares of the said residue, to such of my children as may not then be of age, or married, upon their respectively attaining majority or being married, whichever of these events shall first occur, but as to such of them as shall then be of age or married, their share or shares alike shall be paid to them as soon as convenient for my said trustees; and upon the death of the said Elizabeth Howatson or Gilmour, should she have survived me and the expiry of the said contract of copartnery, my said trustees shall sell and dispose of my said house in Titchfield Street, Galston, and shall pay and divide the proceeds thereof, and the capital sum which may have been set apart to meet the annuity or restricted annuity provided to the said Elizabeth Howatson or Gilmour, equally to and among my whole children, in the same manner and at the respective periods as is provided with regard to the said residue or remainder; declaring that if any part of the said capital sum should be previously set free by the second marriage of the said Elizabeth Howatson or Gilmour, my said trustees shall have full power to pay and divide such sum so set free whenever they may find it convenient and suitable to do so, but always in the same manner and at the respective periods foresaid; and declaring further, that my said trustees, if they think it necessary and advisable, may from time to time advance and pay before the arrival of the terms of payment foresaid such sums as they may think fit to any or for behoof of any of my children who may require the same—if a son, for entering upon business, or if a daughter, for fitting her out on marriage, or otherwise for behoof of my children—and which sum or sums shall be accounted as in part-payment of the share to which such child or children may be prospectively entitled to." The truster was survived by his second wife and by nine children. At the date of his death three children were living in family with him. These children were in pupillarity at the date of the action. The value of the estate at the date of the action was estimated at about £8000. From the date of the truster's death down to 20th February 1871 Mrs Gilmour received the annuity of £120, and her two daughters and son, parties to this case, and also the two unmarried daughters of the truster by his first marriage, continued to reside with her and be maintained by her. Her annuity, however, proved unequal to the maintenance of herself and these children, and the trustees paid certain debts incurred by her during this period on account of the children. On 20th February 1871 Mrs Gilmour entered into a second marriage with Hugh Wilson, flesher, Galston, and removed with her pupil children to his house. The two youngest daughters of the truster by his first marriage have taken a house for themselves, and are each receiving an allowance out of the trust-estate for their maintenance to account of their shares of the trust-estate. Since Mrs Gilmour's second marriage, she has intimated a claim on behalf of the pupil children of the truster by his second marriage that they shall be maintained out of the trust-estate till such time as they are of age, so as in this respect to place them on an equality with the children of the first marriage. The trustees have intimated that they are willing to advance out of the trust-funds a yearly sum of £50 for the maintenance of the three children, to account of their shares of the trust-estate, but that they cannot pay any sum for the children's maintenance out of the general trust-estate. The parties of the second part maintain that the allowance ought to be paid out of the general estate of the truster; and further, contend that the annual sum of £50 proposed by the trustees is inadequate for the maintenance, clothing, and education of the three pupils.

In these circumstances this Special Case was presented, and the opinion of the Court requested on the following questions:—

"1. Are the pupil children, parties to this case, entitled to a yearly allowance from the general estate of the truster for their education and maintenance till such time as they are able to maintain themselves or attain majority, or until the period for distributing the trust-estate, whichever of these events shall first happen?

"2. Have the parties of the first part power to

advance a yearly sum out of the general trust-estate for the education and maintenance of the said children?

"3. What is the amount of the yearly allowance to which the said children are presently entitled for their education and maintenance? or, What yearly sum have the parties of the first part power to advance for that purpose?"

FRASER and ROBERTSON for parties of the first part (Gilmour's trustees).

WATSON for Gilmour or Wilson and husband.

REID for the tutor *ad litem* to pupil children.

At advising—

LORD JUSTICE-CLERK—Our opinion is not asked here as to the vesting of this provision. The only question is, Whether these trustees are restricted to payments out of capital? or Whether these children are entitled to payment for maintenance out of the income of the general estate? I am clear that they are entitled to make the payment out of the general estate. This is manifest from the conception of the deed, and especially the clause with regard to capital which might be set free in the event of the second marriage of Mrs Gilmour.

LORD COWAN—The question is, Are these children to be left to starve? We cannot arrive at the conclusion that the truster intended them to be left without any provision. Surely the income of this estate, which is not directed to be accumulated, is the proper source of their aliment, and one hundred pounds of that income has now been set free by the marriage of Mrs Gilmour.

LORDS BENHOLME and NEAVES concurred.

The first and second questions were accordingly answered in the affirmative, and twenty pounds per annum fixed as the yearly allowance to each of the three pupil children.

Agents for Gilmour's Trustees—A. & J. Bruce, W.S.

Agent for Mrs Wilson and Children—J. Galletly, S.S.C.

Friday, July 12

FIRST DIVISION.

BUDGE (SMITH'S TRUSTEE) *v.* BROWN'S TRUSTEES AND OTHERS.

Bankruptcy—Heritable Creditor—Preference—Maills and Duties—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), § 118.

A creditor of a bankrupt, who held a bond and disposition in security over the bankrupt's heritable estate, on which he had obtained a decree of maills and duties which was not extracted till within sixty days of the sequestration, entered into possession of the subjects and drew the rents. *Held*, in accordance with section 118 of the Bankruptcy Act, 1856, that he was bound to account to the trustee in the sequestration for the rents (deducting necessary expenses), after charging them with the interest due on his debt for the half-year current at the date of the sequestration, and any arrears of interest for the year preceding that half-year.

On 23d January 1868, the estates of Alexander Gordon Smith, residing at No. 20 Gardner's Crescent, Edinburgh, were sequestrated. The pursuer Mr Henry Budge, C.A., was elected trustee in the sequestration on 3d February 1868, and confirmed on the 7th.

The estate of the bankrupt chiefly consisted of house property in Edinburgh, yielding a gross rental of about £600 a-year, and burdened with heritable securities to the extent of £7082, 14s. 11d.

The first or leading security over the subjects was a bond and disposition in security for the sum of £6000, dated 13th May 1863, granted by the bankrupt in favour of Thomas Dall, C.A., as *curator bonis* and *factor loco tutoris* to the children of the late John Blair.

The subjects were also burdened with postponed bonds and dispositions in security in favour of Sutherland's trustees, Miss Margaret Johnston, and Miss Agnes Muir, for £282, 14s. 11d., £250, and £550 respectively. The bankrupt having failed to pay the interest due on the first-mentioned bond at Whitsunday 1867, Mr Dall, on 29th October 1867, raised an action of maills and duties, on which he obtained decree in absence on 19th November 1867, and thereupon entered into possession. The decree was extracted on 4th December 1867.

By assignation, dated 8th, and recorded 10th February 1868, Mr Dall assigned the bond and disposition in security in his favour to the defenders, Brown's Trustees and Thomas Balfour. He also assigned to the same parties the decree of maills and duties in his favour.

The rents of the subjects falling due at Martinmas 1867 were drawn partly by Mr Dall and partly by his assignees, and since that term down to and including the term of Whitsunday 1870, they were drawn by his assignees.

On 25th April 1871 Mr Budge, as trustee on the sequestrated estate, raised an action of count and reckoning against Brown's trustees and Mr Balfour, for their intromissions with the rents of the estate.

The pursuer founded on the 118th section of the Bankruptcy Act, which provides:—"No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties on which a charge has not been given sixty days before the sequestration, shall (except to the extent hereinafter provided), be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from executing or poinding of the ground, or obtaining a decree of maills and duties after the sequestration; but such poinding or decree shall, in competition with the trustee, be available only for the interest of the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

The defenders maintained that they were entitled to appropriate the whole rents drawn by them in extinction of their debt.

The pursuer maintained that the defenders were only entitled to appropriate the rents to the extent of satisfying their preferable claim for interest accruing during the year and a-half allowed by section 118 of the Bankruptcy Act, and that they were bound to account for the surplus to him.

After the action was raised the subjects were sold by Miss Agnes Muir, one of the postponed bondholders, for £7150.