charge the expenses of this application, together with the expenses incurred by the said *curator ad litem*, against the trust-estate, as the said expenses respectively shall be taxed by the Auditor."

Counsel for Petitioner—Stuart. Agents—Dalgleish & Bell, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, June 14.

WILSON & ANDERSON *v.* SCOBIE.

Statute—Public Houses Acts Amendment (Scotland) Act 1862—*Breach of Certificate.*

On a case stated by a police magistrate in a complaint charging an offence against the Public Houses Acts Amendment (Scotland) Act 1862, viz., selling or supplying excisable liquor to persons in a state of intoxication, it was argued that there was no distinct proof of the publican's knowledge that the customers were actually drunk; also, that as regarded the only person proved by distinct evidence to be drunk, he was treated by others to whom the liquor had been sold or supplied before he entered the premises.—The Court held that, as the magistrate had not found that the publican did not know his customer to be drunk, no question of law arose on the first point; and that the facts of the case were not sufficient to raise the question of an intoxicated person being "treated" in the public-house by a person not intoxicated, to whom the liquor was sold or supplied.

Counsel for Appellants—Brand. Agent—Adam Shiell.

Counsel for Respondent—Moncrieff. Agent—J. Carment, S.S.C.

Friday, June 15.

APPEAL—THE UNITED KINGDOM TEMPERANCE AND PROVIDENT INSTITUTION AND OTHERS *v.* PAROCHIAL BOARD OF CADDER, &c.

Statute—Public Health (Scotland) Act 1867, *secs.* 17, 18, 19, 22, and 24, *Procedure under.*

In petitions by a Local Authority under the Public Health (Scotland) Act (which were afterwards conjoined) for remedy of a nuisance arising from an open drain, several parties were brought into Court either as owners of lands or as contributors to the nuisance. The Sheriff, being unable to ascertain the true author, ordered the Local Authority to execute the necessary works, and then decerned against the parties jointly and severally for expenses. *Held*, that in the circumstances the proper procedure under the statute was for the Local Authority, after constructing the works, to assess the owners of all premises which contributed to the offence.

This was a case stated by Sheriff-Substitute (GUTHRIE) of Lanarkshire for the respondents in two conjoined petitions under "The Public Health (Scotland) Act 1867" and "The Public Health (Scotland) Amendment Act 1871." The petitions were as follows:—*First*, a petition at the instance of the Parochial Board of the parish of Cadder, being the Local Authority under the said Public Health Acts, and Thomas M'Lelland, sanitary inspector for said parish, against John Lang, residing at No. 9 Crown Gardens, Dowanhill, presented on 12th July 1873, and complaining that upon the 7th July 1873, and for many weeks before, there existed and still existed upon the property of the said John Lang a nuisance consisting of an open drain, gutter, or ditch on the east side of the parish road leading from Lenzie Junction to the village of Auchinloch, so foul as to be injurious to health; that said nuisance was in the parish of Cadder, and that the said John Lang was the proprietor of the ground on which the same was situated, and the author of the nuisance, within the meaning of "The Public Health (Scotland) Act 1867," and, in particular, sections 3 and 16 thereof, and (after founding on the provisions of said Act, and particularly sections 16, 18, 19, 20, and 105) craving the Sheriff to decern and ordain the said John Lang to remove the said nuisance, and that in such manner and within such time as to the Sheriff should seem proper, and in case of non-compliance to find him liable in the penalty of ten shillings per day during his failure to comply; to interdict the said John Lang from causing a recurrence or repetition of the said nuisance; to find him liable in expenses, and, if necessary, to grant warrant for imprisonment. *Second*, A petition at the same instance against (1) The United Kingdom Temperance and General Provident Institution, Hope Street, Glasgow, and James Robertson, their manager in Glasgow; and (2) Murdoch & Rodger, writers, Glasgow, jointly and severally, or severally. This second petition, which was presented on 25th October 1873, repeated the averment contained in the first petition as to a nuisance existing on the property of Mr Lang, and proceeded to narrate that it appeared from a report obtained from Hugh Kirkwood, Esq., Killermont (to whom a remit had been made in the first petition), that the nuisance on Mr Lang's ground complained of was caused in whole or in part by the respondents in the second petition, from whose houses the sewage was allowed to pass to the land of the said John Lang, and that they therefore were the authors of the nuisance in the meaning of the Act. That the Sheriff-Substitute (Galbraith) had in the first action found that it was necessary to a just judgment that the said Institution and Murdoch & Rodger should be called by warrant of the Court, on petition under the statute, and had directed the petitioners to make application to that effect. The second petition therefore craved the Sheriff to decern and ordain the said respondents jointly and severally, or severally, alone or in conjunction with the said John Lang, to remove the said nuisance, and that in such manner and within such time as to the Sheriff should seem proper,

and in case of non-compliance to find them liable in the penalty of ten shillings per day during their failure to comply, and also craved interdict against recurrence, decree for expenses, and, if necessary, warrant for imprisonment, as in the first petition.

The said two petitions were ultimately conjoined, viz., on 8th May 1877.

The following facts were proved or admitted in the cause:—(1) That each of the said three parties were the owners, in the sense of the statute, of property through which a small water-run flowed, in the following order down the water-course:—(1) Murdoch & Rodger; (2) The Institution; (3) John Lang.

2. That in its course through the property of the two first named the water-run was covered or enclosed in pipes, and no nuisance was complained of as existing in their ground.

3. That the water-run was open in Mr Lang's ground, and it was admitted that the nuisance complained of did exist there.

4. That the tenants of Murdoch & Rodger, and of the said Institution, sent the sewage from their houses into the water-run.

5. That Mr Lang did not by himself or by tenants send any sewage or impure matter into the water-run in question.

6. A considerable bulk of sewage was sent into the water-run further up by numerous feuars (not tenants) of lands which had belonged to the said Murdoch & Rodger.

These feuars were not made parties to the cause.

No particular inquiry was made to ascertain who these upper feuars were, or to what extent they were the authors of or contributors to the nuisance in question.

No order was made upon any of the said three defenders to remove the nuisance.

After various reports by men of skill, to whom remits were made, and evidence led, the Sheriff-Substitute, before whom the cases were then pending, on the 17th April 1875 (following out a finding in an interlocutor of 20th August 1874, that it had not been satisfactorily ascertained who was the author of the nuisance in question, and that that question could not be determined without further and probably protracted inquiry, and that the nuisance ought to be removed without delay), decerned and ordained the complainers (the Local Authority) "to execute such works as may be necessary for the purpose of removing the nuisance complained of, in accordance with Mr Wharrie's supplementary report, No. 10 of process, and at the sight of Mr Wharrie."

The suggestions of said report, No. 10, were modified by another report by Mr Wharrie, No. 14, to which the authority of the Court was interponed.

These orders and findings were given in each of the said petitions, they being not then conjoined.

The remedy suggested by Mr Wharrie was not confined to operations on the property of Mr Lang, where the nuisance alone existed, but consisted of—(1) A cesspool and pipe in the property of Murdoch & Rodger; (2) A cesspool and pipe in a road or street opposite the ground of the said Institution; and (3) A pipe in Mr Lang's ground.

Parties were heard on Mr Wharrie's reports before they were given effect to, and although no consent was given by the defenders, no objections were made to Mr Wharrie's proposals or to the order made on the Local Authority to execute the works in question. All the respondents objected to any order being made on them to remove the nuisance.

Questions were raised and discussed between the several defenders as to the rights of the upper proprietors under their titles to compel the lower proprietors to receive their sewage, and to allow drains to be made through their lands. These questions had not been decided.

Mr Wharrie's remedy having been applied, and the Sheriff-Substitute having heard parties on 8th May 1877, conjoined the petitions, and then in the conjoined petitions found that the cost of said remedy, including the fees due to Mr Wharrie for his reports and trouble, amounted to £141, 19s. 4d.; and that the three defenders were primarily liable, jointly and severally, for the cost of the works, and decerned against them jointly and severally in favour of the Local Authority for said sum; and found the Local Authority entitled to expenses.

The grounds of this judgment were—(1) that the defenders in the second petition were proved to be the authors of the nuisance, in respect that they were the owners of houses whose sewage flowed down upon Mr Lang's ground and created the nuisance complained of; (2) that the defender Mr Lang was both the owner of the premises on which the nuisance was found and also the author of the nuisance in the sense of the statute, in respect that the nuisance existed or was continued by his default in not removing it; and (3) that the Act under which the proceedings were taken intended the petitioners, the Local Authority, to be indemnified for the expenditure incurred under the Act by any persons whom they may be able to reach without regard to the rights of those persons *inter se* or against others, provided only these persons were in the sense of the Act responsible for the creation or continuance of the nuisance.

The question of law stated was, *inter alia*—Whether the whole facts warranted the orders, judgments, and decrees pronounced?

Argued for appellants—There was no money decree asked in either petition, and no liability had been established against them.

Argued for respondents—By the interpretation clause the expression "author of a nuisance," was declared to mean the person through whose act or default the nuisance was caused, existed, or was continued, whether he were owner or occupier or both. The respondents were all "authors" in the sense of the statute, liable to a decree to remove the nuisance. The whole operations required might be made on the respondents' land—*Mackay* v. *Greenhill*, July 14, 1858, 20 D. 1251.

At advising—

Lord Young—There are here two petitions, the first against Mr Lang, as the proprietor furthest down on the small water-run which is said to be the scene of the alleged nuisance, and the second against two proprietors further up, through whose property the water-run goes. Both petitions state that this run, being filled with sewage, and being near the public road, is a nuisance, and the Sheriff is asked to ordain the

respondents to abate the nuisance, subject to a daily penalty during non-abatement. The Sheriff is satisfied that the open gutter must be covered over, but he says he is unable to ascertain who is the author, and therefore he cannot order abatement by a particular respondent. Accordingly, under section 22, which applies to the case, he orders the Local Authority to execute the necessary works, and this is done, and the Sheriff proceeds to order the respondents to pay the whole expense thus incurred by the Local Authority. This procedure was totally irregular. If in the original process he could have ascertained the true author, he ought to have ordered the author to execute the works, and expenses would have followed their natural course. But there is here no contumacy possible, for the respondent liable has not been ascertained. The Local Authority is not without remedy, for they might have proceeded under section 24 of the statute, there being a sewer injurious to health, to construct the necessary works, and then to assess for the cost of that the owners of all the premises from which anything except pure water flowed into the sewer.

Lord Adam—I concur in the result. I think that all the appellants were properly brought into Court, either as owner of lands or as contributors to the nuisance. They were all liable to abate the nuisance, and therefore ultimately liable in expenses. I agree that it was out of the question that this nuisance should stand until the parties ultimately liable should be ascertained. The parties might have executed the works ultroneously, or an order might have been pronounced on them. The Sheriff, instead of waiting for a failure to comply, proceeds on the assumption that it is impossible to ascertain the person truly liable.

Lord Justice-Clerk—I concur with Lord Adam. The parties were properly called, and the Sheriff ought to have pronounced an order under sections 17, 18, and 19 of the Act; and on the failure of the respondents he ought to have directed the Local Authority to execute the necessary works. The respondents might then have been found liable in expenses, with rights of relief *inter se*. Instead of that, he has chosen to proceed on the view that the person truly liable cannot be ascertained.

Counsel for Appellants—M'Laren—Black—Keir—Maconochie. Agents—Mason & Smith, S.S.C., &c.
Counsel for Respondent—Kinnear.

Monday, June 18.

ROBERT M'ELFRISH.

Post-Office Act, 7 Will. IV. and 1 Vict. c. 36—Relevancy.

A letter-carrier received an open letter, with instructions to post it with a money-order, which he received money to purchase. He destroyed the letter and kept the money. *Objection*, that this was not a post-letter in the sense of the statute, *repelled*, but charge withdrawn.

This was an indictment charging a high crime and offence under the 26th section of the Post-Office Act, 7 Will. IV. and 1 Vict. c. 36, which provides that "every person employed under the Post-Office, who shall steal, or shall for any purpose whatever, embezzle, secrete, or destroy a post-letter," shall be transported for seven years, or imprisoned for a term not exceeding three years. There were also charges of theft and breach of trust and embezzlement applicable to the letter and money after mentioned. It appeared from the narrative that M'Elfrish, a rural letter-carrier authorised by the Post-Office to receive letters for the post, received from the Inspector of Poor at Ecclesmachan an open letter with addressed envelope and the sum of £1, 16s. 6d., with which he undertook to purchase at Linlithgow a Post-Office order in favour of the addressee, and then deliver the letter with order enclosed to the postmaster at Linlithgow for transmission to the addressee. The panel destroyed the letter and kept the money.

Argued for panel—The indictment, so far as laid on the statute, is irrelevant. There was no post-letter in the sense of the statute. By sec. 41 of the statute, delivery to a letter-carrier is made equivalent to delivery to the Post-Office, but here the panel became the agent of the sender, and until the money-order was purchased and enclosed there could be no implied delivery to the Post-Office.

Argued for the Crown—The objection would apply to every case in which a letter-carrier receives money for the post stamps to be put on the letter. In *Regina* v. *Bickerstaff*, Aug. 14, 1868, 2 Carrington & Kirwan, 761, the plea in precisely similar circumstances, that it was not the panel's duty to procure money-orders, and that he had an act of agency to perform, was repelled by J. Cresswell.

Lord Craighill repelled the objection, but in the course of the trial the statutory charge was withdrawn, and the panel was convicted of theft and sentenced to 10 days' imprisonment.

Counsel for Panel—Mair.
Counsel for Crown—Solicitor-General (Macdonald)—Muirhead. Agent—J. A. Jameson, Crown Agent.