Friday, June 26.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GLASGOW POLICE COMMISSIONERS v. J. & J. M'OMISH & ARTHUR.

Burgh—Police—Drainage—Glasgow Police (Amendment) Act 1890 (53 and 54 Vict. cap. 221), sec. 16.

By section 16 of the Glasgow Police (Amendment) Act 1890 it is enacted that if drains in houses have been found defective, and the owners fail, on an order to that effect by the Police Commissioners, "to carry out all necessary operations for removing defects of structure, or in doing such acts as may be requisite to prevent risk to health," the Police Commissioners may execute the work and recover the expense as damages from the owner.

The proprietors of certain tenements having failed, after an order to that effect, to remedy defective drainage, the Police Commissioners proceeded to put the drains into what they were advised by their sanitary engineer was a safe and proper condition. The material of the pipes of the old drain was, in the opinion of their advisers, so defective and broken that new pipes were requisite, while the removal of the drain to a greater distance from the tenement was necessary to prevent risk to the health of the inhabitants. The Commissioners accordingly replaced the existing drain at the back of the tenement by a new one a few feet further from the windows of the tenement. Thereafter they sued the proprietors for the expenses they had incurred.

Held (*diss.* Lord Young) that the section only authorised operations for removing defects upon existing drains, and did not empower the Commissioners to substitute a new drain for the old one, and that their action being *ultra vires*, they were not entitled to recover the expenses they had incurred from the proprietors.

Opinion (by Lord Moncreiff) that the Commissioners were also disentitled to recover in respect that the notices served by them had been inaccurate and misleading.

By section 16 of the Glasgow Police (Amendment) Act 1890 it is enacted—"Whenever the sanitary inspector has reasonable grounds for believing that the drains connected with any house or building are defective so as to cause risk to health, he may, after twenty-four hours' notice, and (except in the case of tenement houses) with the consent of the owner and occupier of such house or buildings, or, in the event of objection by any such owner or occupier, after obtaining the consent of a magistrate, apply the smoke or other test to such drains, for the purpose of discovering the defect, and any owner or occupier who refuses to allow such tests to be made, or to give all reasonable facilities for making such tests, shall be liable to a penalty not exceeding forty shillings, and if the drains be found defective, the owner of the premises shall be bound, immediately on an order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects in structure, or doing such acts as may be requisite to prevent risk to health, and failing compliance with such order, the Police Commissioners may do such work, and recover the expense as damages from the owner."

The Glasgow Police Commissioners raised an action in the Sheriff Court at Glasgow against J. & J. M'Omish & Arthur for the sum of £80, 10s. 8d. The circumstances giving rise to the action were as follows:—Cases of enteric fever occurred in September and October 1893 and March 1894 within a tenement of houses at Garngad Hill, Glasgow, of which the defenders were factors for the owner, and thus owners in the sense of the Glasgow Police Acts. On 16th March the sanitary inspector wrote to the defenders that as he had reasonable ground for believing that the drains connected with the tenement were defective so as to cause risk to health, a test would be applied on 2nd April for the purpose of discovering the defect. The smoke test was applied, and as a result the drains were found to be defective, and notices bearing to be under the Glasgow Police Acts of 1866 and 1890, and the Public Health Act of 1867, were sent to the defenders on 4th April 1894. The notice in regard to Nos. 134 and 140 of the tenement in question, to which the notice affecting the other numbers were similar, was as follows—"The Glasgow Police Commissioners hereby give you notice that within or near the premises situated at 134 and 140 Garngad Hill, Glasgow, of which you are owners, there exists the following nuisance within the meaning of 'The Glasgow Police Acts 1866 to 1890,' viz.—Drains in back court and in wash-houses are very defective, also branch drains from sink conductors and under surface gratings, and in wash-houses untrapped, likewise the whole is discharged into the Monkland Canal. Remedy.—Disconnect from canal and lay down a new drainage system from present drain in court through close at No. 134 Garngad Hill, and insert in drain under foot pavement of street an improved ventilating trap with upright shaft to surface and grating on top, also insert in branch drains from sink conductors a ventilating trap, and undersurface gratings, and in wash-houses syphon traps, making all joints and connections good with best Portland cement, and which you are hereby required to do, and that within ten days from this date. With certification that if you fail to do so, the said Police Commissioners will immediately thereafter take proceedings to enforce the provisions of said Acts."

A meeting took place between the sanitary authorities and the defenders, and correspondence passed between them, but nothing resulted. The negotiations follow-

ing this meeting are narrated in the opinion of Lord Young.

Finally, on 25th September 1894, the following notice was served by the pursuers on the defenders—"By virtue and in terms of Section 16 of the Glasgow Police (Amendment) Act 1890, the Glasgow Police Commissioners hereby intimate to you that the drains connected with the houses or buildings situated at 134, 140, 146, 152, 160, and 164 Garngad Hill, Glasgow, having, after examination thereof, been found to be defective, so as to cause risk to health, and order you, as the owner of said houses or buildings, to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health, and that within seven days from this date, under certification that if you fail to comply with this order within the above period, the said Police Commissioners will, on the expiry thereof, execute the work, and recover the expense thereof as damages from you, all in terms of the section above mentioned of the said Glasgow Police (Amendment) Act 1890."

Nothing was done by the defenders in response to these orders, and the pursuers proceeded to put the drains into what they were advised by their sanitary engineer was a safe and proper condition. In his opinion the existing pipes were of such bad material, and so much broken, that it would be necessary to replace them by new pipes, and further, that it was requisite, to prevent risk to health, that the main drain at the back of the tenement should be laid some feet further back from the windows of the tenement than the old one. New pipes were accordingly laid at that distance. As all parties thought at that time that the old drain had its outflow into the Monkland Canal, which lay some distance off on the south of the tenement (although it actually was connected with the main sewer in the street to the north of the tenement), the pursuers made a new connection between the new drain laid by them at the back of the tenement, and the main sewer in the street.

The expense of the work came to £80, 10s. 8d., and as the defenders refused to pay this sum the present action was raised.

After hearing proof, the Sheriff-Substitute (SPENS) on 14th March 1896 pronounced the following interlocutor:—"Finds that the sanitary inspector for the city of Glasgow had, on or about March 1894, reasonable grounds for believing that the drains connected with the houses or buildings at Garngad Hill, of which defenders were factors, were defective: Finds that he gave notice to defenders on 16th March, having in view the 16th section of the Glasgow Police Act 1890, that the sufficiency of said drains would be tested on 2nd April 1894: Finds on the said 2nd April the smoke-test was applied to the drains in said tenement, with the result of indicating the drains were defective, and finds in point of fact said drains were defective: Finds that certain procedure thereafter went on, but finally on 24th September the pursuers, the Glasgow Police Commissioners, issued an order under the 16th section of the statute above referred to, ordaining the defenders to carry out all necessary operations for removing defects of structure, or to do such acts as might be requisite to prevent risk to health, and that within seven days, under certification that if they failed to comply with said order within said period the pursuers would execute the work at the expense of the defenders: Finds nothing was done by defenders, and the sanitary inspector, on or about 17th October 1894, ordered the witness John Shaw to proceed with the work, which the sanitary authorities specified as in their opinion necessary to put the drainage right: Finds the charge for the work done in connection with the premises by the said John Shaw amounted *in cumulo* to the sum of £80, 10s. 8d., being the amount of the account sued on: Finds, under reference to note, the defenders are liable for said expenditure by pursuers: Therefore repels the defences, and decerns as libelled."

The defenders reclaimed, and argued—The notice of 25th September 1894 was given under section 16 of the Glasgow Police Act 1890. All that could be done under this section was to remedy defects in an existing structure. But the pursuers had made a new drain altogether in a different situation, and with a different outflow from the old drain. They had therefore acted *ultra vires*, and the defenders were not liable to pay for the work executed by them—*Campbell* v. *Leith Police Commissioners*, February 28, 1870, 8 Macph. (H. of L.) 31; *Magistrates of Edinburgh* v. *Paterson*, December 3, 1880, 8 R. 197; *Campbell* v. *Magistrates of Edinburgh*, November 24, 1891, 19 R. 159. If they wished to construct a new drain, the pursuers should have proceeded under section 335 of the Glasgow Police Act 1866.

Argued for the pursuers—They had power under section 16 of the Glasgow Police Act 1890 to do all acts requisite to prevent risk to health. All that they had done was necessary for this object. The local authority were the judges of what was requisite to prevent risk to health, and it would require a very grave case for the Court to interfere on the ground that they had gone beyond their duty. The interlocutor of the Sheriff-Substitute should be affirmed.

At advising—

LORD JUSTICE CLERK—The pursuers ask that the defenders be ordained to pay the expense of certain works executed upon property for which they are responsible as proprietors, the legal ground for the claim being statutory, and statutory only. The pursuers are the public authority which has certain statutory powers in regard to the drainage of house property in Glasgow; that power includes the right to examine drains, and if defects are found, to give notice to the proprietor or his factor to have the defects remedied, and if this be not done, then to execute the works necessary to cure the defects, and to charge the defaulting owner with the expense.

These powers are conferred by the Glasgow Police Act of 1890. In this case the public authority represented by the pursuers proceeded under section 16, and under section 16 only. No notice was given under any other section or under any other Act of Parliament. The procedure was that a notice under section 16 was served, by which the defenders were called upon "to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health." The work was not done by or for the proprietors, and thereupon the pursuers proceeded to do certain works themselves, for the cost of which they now sue. The real question is, whether what they did were works falling under the notice. If they were, then the defenders have no answer to the pursuers' claim. What the pursuers in point of fact did was to substitute an entirely new drain some feet out from where the existing drain was at the back of the premises, and to carry a new drain from the end of the houses to the main drain which was in the road in front of them. I am unable to hold that this work was work which can be held to fall within the notice under section 16. That section bears to relate to the remedying of defects of structure requiring remedy, not to entirely new works. It is true that to the words "removing defects of structure" these words are added "or to do such acts as may be requisite to prevent risk to health," but I cannot hold that these words are to be read as separate from the previous words of the section, which point at remedy of defect in the existing system. The notice indicates that this and nothing more is contemplated, allowing as it does only seven days for the completion of the work. The words are "to carry out" . . . "and that within seven days," which seems quite inconsistent with the idea that proceedings are contemplated in which no portion of the existing works is to be utilised at all, but an entirely new system substituted for them.

It is to be observed that the public authority has power, where this is necessary, to require that a property not drained shall have a system of drainage put in, and to require that a bad system which cannot be made efficient shall have a proper system substituted for it. But in such a case the procedure is different. Whereas under section 16 of the Act of 1890 the proprietor has no option but to submit to the order and do the work for himself or pay for it, if on his failure the Commissioners execute it, the Police Act of 1866 provides that if a proprietor is to be required to put in a new system of drainage the authority of the Dean of Guild Court must be invoked, the matter being thus considered by a judicial tribunal which will deal impartially between the executive authority and the private citizen, and an appeal being open to a higher court where grounds for appeal may exist.

In this case the work done was one entirely of substitution of a new system professedly under a mode of procedure which gave the citizen no protection by judicial inquiry or appeal. The proprietors had no reason to expect that anything more would be done than the notice under section 16 of the Act of 1890 implied. As matter of fact one part of the work, viz., the new drain leading to the main street drain was not made because of any defect in the existing drain, but because the Commissioners were not aware of the existence of the drain, and believed that the sewage of the defenders' houses passed in an opposite direction into the Monkland Canal.

I do not lay any weight upon the fact, although it illustrates the looseness of the Commissioners' procedure, that before the formal notice under sec. 16, notices had been given in which they specified certain works which they required to be done, and which it turned out were based upon a totally erroneous idea that there was a main street drain in front of the defenders' houses, which drain did not in fact exist. I take the case as if the notice on September 25th under sec. 16 was the only notice given. I have not been able to hold that the works done were such as fell under the notice, and therefore, although I agree with the Sheriff-Substitute in thinking that the officials of the Commissioners acted in *bona fide*, still I am of opinion that the works they executed were not such as can, under the notice served upon the defenders, be charged against them.

Lord Young—It is admitted, and indeed is the case of both parties, that the appellants, although only the factors for the owners of the premises referred to in the pleadings, must in this action be regarded and dealt with as if themselves the owners. I am nevertheless of opinion that account can be, and ought to be, taken of the conduct of the owner himself, as to which we have the evidence of his factors and of his own letter of 27th March 1895.

The premises in question consist of a tenement of houses in Glasgow. The tenement comprehends 82 houses of 2 or 3 rooms each, which are occupied by several hundred individuals. It is more than twenty-five years old.

In 1893 and 1894 complaints were made to the sanitary inspector of the condition of the drains connected with the tenement, which are said to be very bad, sending foul and smelling air into the houses and causing enteric fever, which in one case at least ended in death. The inspector, in consequence, communicated with the defenders, the factors of the property, with a view to proceedings being taken under section 16 of the Glasgow Police Amendment Act 1890 for testing the drains, removing defects, and doing such acts as might be requisite to prevent risk to health. (That which the Lord Justice-Clerk referred to was not a notice but an order.) It is not questionable, or I think questioned, that this was his duty. The result was that the drains were found to be very bad indeed. This was found not only by the smoke test,

but by the test of all the eyes and noses which were used for the purpose. The defenders afforded all due facilities for testing and examining the drains, and themselves saw and knew the results. There is not, I think, a statutory duty on the Commissioners of Police or of the Health Committee or sanitary inspector, when informing an owner that his drains are defective and dangerous to health, to point out or suggest remedies; but Mr Fyfe, the chief sanitary inspector of Glasgow, in his evidence says—"The Health Committee desire to do it just out of courtesy to the proprietors before Mr Lang, the proper officer for that purpose, is asked to issue the statutory notice." This course was followed in the intimations made to the defenders in April 1894, and led to a request by the defenders that Mr Fyfe should meet them on the ground on 17th April. The meeting took place accordingly on that day between Mr Crawford, who was then, and is now I suppose, inspector under Mr Fyfe, and Mr Arthur, one of the defenders' firm. An account of the meeting is given by Crawford, the result being that Mr Arthur asked a fortnight's delay, which was granted. Nothing was done by the defenders, and the really trifling pressure afterwards put upou them by the pursuers resulted in Mr M'Omish, one of the defenders, calling on Mr Fyfe on 10th September, and saying to him, "I am afraid you will require to do the work and charge us with the expenses." This is the evidence of Mr Crawford who was present, and of Mr Fyfe. Mr M'Omish explained "that he could not get the proprietor to move in the matter, and do anything." Mr M'Omish's own account of his client's conduct in the matter is very frank, and I think in accord with the evidence of Crawford and Fyfe. The evidence of these witnesses satisfies me that the police and sanitary authorities did not act hastily, but, on the contrary, gave much indulgence to the defenders, or rather perhaps to their seemingly eccentric and impracticable client. Mr Fyfe says that he instructed Mr Shaw to proceed with the removal of the nuisance on 17th October. "That was about seven months after I had first started this case, and after I had been delayed more or less by the factors or the proprietor. On various occasions they requested delay from my inspector and from me."

Thus far the case seems clear. The drains connected with the tenement were "found defective" in the only practical meaning of the word in a clause of a sanitary Act requiring that drains shall not be allowed to continue in a state causing risk to health, viz., so unfit for their purpose as to cause such risk. The duty of the owner of the premises with which these defective drains were connected is prescribed in these very plain words—"The owner of the premises shall be bound, immediately on an order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health." There is nothing whatever in the Act prescribing that this must be done in seven days. It is in the order, but I attach no importance to this. If the work had been begun, or steps taken for its execution within seven days, that would have been sufficient, and no proceedings would have lain against the appellant, because the work was not completed within that time. An order to the above effect was admittedly given by the proper authority on 25th September 1894, and disregarded by the owner of the premises, who took no notice of it, and did nothing in consequence of it. This failure of duty by the owner is not denied or defended. He undoubtedly ought to have ascertained for himself whether any, and if so what, operations were necessary "for removing defects of structure," and what acts, if any, were "requisite" to prevent risk to health." If assured that no such operations or acts were "necessary" or "requisite" he was entitled to prevent the Police Commissioners from executing any work on his property under section 16 of the Act. This is really not doubtful, but it would be unprofitable to pursue this topic, it being clear, and indeed admitted, that some "operations" and "work" were "necessary" and "requisite." The skilled witnesses for the defenders in the proof before us suggest in their evidence the advice they would probably have given if consulted, as to what was necessary to be done to satisfy the reasonable requirements of the sanitary authorities. Now, why was such advice not taken and acted on? Abundance of time to do so was given, but nothing done. It was in these circumstances clearly the duty of the Police Commissioners to ascertain for themselves what operations and acts were necessary, and to execute them. This is what they did, acting throughout as a public body in the discharge of a public duty put upon them by statute. It is of course conceivable that they might have been otherwise and better advised than they were, and so remedied the defective drainage at less cost to the owner. But I am not disposed to give very favourable attention to criticism and complaint of this sort by an owner who declines to do his duty by attending to the matter for himself, and whose conduct is thus very justly, I think, noticed by the Sheriff —"It was admitted at the bar in effect that, beginning with the notice for the application of the smoke test in March 1894, and during the execution of the work, which extended over a period of about a year, no open objection was taken to the operations of the pursuers, and it was not until after the account for the work done had been rendered in March 1895 that any express repudiation of it was intimated to the pursuers. During all that time the defenders seem simply to have held their hands, leaving the pursuers to draw what inference they might from their silence. In such circumstances there may be ground for contending that the defenders are barred by personal exception from disputing liability for the expense of what has been done.

But I do not think that a decision on that question can properly be given at the present stage."

The Commissioners were advised, and acted on the advice, that the pipes in the existing drain were of bad material and bad construction and much broken, that they were not worth lifting, and that the proper thing to do was to get and use new pipes of better material and more efficient construction. They were also advised, and acted on the advice, that it was requisite "to prevent risk to health that the pipes of the main drain should be laid two or three feet further from the windows of the tenement." This was all done openly and slowly on the property, with due notice to and in the sight of the owners' factors, who were themselves fully informed of everything that was intended to be done and was done, and who kept their client duly informed although he did not choose to notice their communications.

It is said that the Commissioners incurred extra expense through a mistake on their part as to where the outlet of the drain was. I attach no importance to this. The owners' letter of 27th March 1895 is rather an important one, and shows where the mistake as to the outlet of the drain sprang from. Mr Macdougall there writes to his agents, the defenders—"You are perfectly aware that I have all along denied the right of the sanitary inspector to order the diversion of the drainage system from the former outlet to the canal into the road at my expense."

I think there is really no good objection to the proceedings of the Police Commissioners or to any of the operations which they executed under presumably competent advice. But if I thought otherwise I should be disposed to hold that the owner was barred from objecting in respect of his own failure of duty, and his conduct in standing by and seeing and allowing without objection what was done by the Police Commissioners, that the public health might not suffer from his failure.

The evidence shows, I think, satisfactorily—first, that the drains were defective in the sense of being so unfit for the purpose to which they were habitually and continuously put by the large population living in the tenement with which they were connected as to be seriously dangerous to health. Second, that the owner of the tenement failing to comply with the statutory order to carry out the necessary operations for removing the defects, the Police Commissioners executed the work which they believed to be necessary "for removing defects of structure" and preventing "risk to health." Third, that the defects were thereby removed and risk to health prevented; and fourth, that there was no extravagance or excess in the extent or cost of the work thus executed. I have already said that I think it would be necessary for an owner who had failed to perform his own duty by executing the necessary work himself to establish a clear and even gross case of extravagance and excess to entitle him to decline to relieve the Police Commissioners of their actual outlay.

I have now to consider another view, which was the last which occurred in the case, namely, that the operations which were executed were not such as were for removing defects of structure. I think it is according to the evidence that the drains were defectively constructed. I do not know what drains consist of except material and structure. The pipes are not the drains. The pipes are the material used in constructing the drains. Nevertheless defects in the pipes are, I suppose, defects of structure, and I suppose defects in the material would be defects of structure, and what other defects can a pipe have except defects of material or structure? What defects can a drain have except such defects? A defective drain is one not so constructed with such pipes so laid as to answer the purpose to which a drain is put consistently with due regard to the health of the inhabitants of the houses in the neighbourhood. When drain-pipes are of bad material, when they have no joints such as drain pipes ought to have, and when they are so bad as not to be worth relaying, what is the remedy for that defect of structure? I think common sense would suggest to put in better material. Can any other remedy occur to any human being? That is what the Commissioners did, and it is according to the evidence that that was a reasonable and proper thing to do. I do not mean that there may not be differences of opinion, that some of the witnesses might not think that some of the pipes might have been made to answer, and other pipes put in for the broken ones, and the asphalt lifted and relaid—in short, that the Police Commissioners might have repaired the existing pipes, putting in new pipes at some places and using the old at some other places, and trying to mend the joints as well as they could. But if the police authorities were advised that the most economical course and the only sensible course — and they believed that the economical and sensible course—was to put in new pipes better jointed, are we to say in point of law that that is a new system of drainage and that it is not removing defects of structure? I know of no authority for that. It does not recommend itself as a reasonable proposition to my mind. Are we to inform the sanitary authorities in Glasgow and elsewhere that they cannot under this clause put in new pipes of good material and good construction in place of old pipes of bad material and bad construction without bringing themselves under a statute thirty years old as to the construction of altogether new drains? I cannot assent to that. I do not think it is reasonable, and in my view of the law, the law is not so unreasonable as to take that view. But then it was said if you remove the drain-pipes, and put them further from the window, that is not within clause 16, because it is not removing a defect of structure. I am not persuaded of that. Structure does not mean merely building. The sense of the word is not limited to that. It means placing and arrangement. But I do

not need to pursue that, because they are not only entitled but bound to do any act which is requisite to prevent risk to health. Now, is it an unintelligible proposition that the sanitary authorities may be rightly advised, and they were advised here, that an act certainly requisite in the opinion of very competent people to prevent risk to health, was to remove these pipes further from the window, and yet that they are not within the statute if they followed this advice? So long as they were perfectly tight they might be under the floor of the house or within the house, but then there is always the risk of leakage at any time, and well-attended-to drains are tested from time to time to see whether leakages are not occurring, and I suppose most sanitary authorities would concur with the witnesses here and say that removing the drains, especially when you are relaying the pipes at anyrate, is an act necessary to prevent risk to health, and if the sanitary authorities do so, are we to say they are not within the statute, which provides for the very thing if it be necessary to prevent risk to health, or are we to decide this case on the footing that that is not necessary to prevent risk to health? There may be conflicting evidence on this point, but I do not think there is. All the witnesses for the sanitary authority are very clearly of opinion that the removal was necessary to prevent risk to health, and I have noted a passage in the opinion of the principal witness for the defender, Mr Glaister, on this subject—"As to whether or not it is objectionable to have a sewer such as this old sewer was within 2 feet of a building line, I say, any drain so close to houses is objectionable even although it is for waste water, but it is a very common thing in Glasgow to have ventilating traps on soil-pipes within 2 feet of windows. I do not, as a sanitary authority, approve of that, but I ask the sanitary authorities if they approve of it." Well, they did not, and in acting upon the reasonable advice which they received, when laying pipes of better material and proper construction, and in removing them further from the window, I say they were acting in accordance with clause 16 of the statute.

Therefore upon the whole matter I am of opinion that the whole proceedings of the sanitary authority here were right and unobjectionable—unobjectionable even at the instance of a proprietor who had done his duty or attempted to do his duty, who had done his best to do his duty. I think there is no ground of complaint on the part of the objector here, either upon the ground that anything superfluous was done, or that what has been done by the sanitary authority was not authorised and required to be done by clause 16 of the statute. I think, therefore, that the judgment of the Sheriff here ought to be affirmed and this appeal dismissed.

LORD TRAYNER—The pursuers in this case sue the defenders for payment of the cost of certain drainage operations executed by the pursuers on or in connection with the defenders' property. Several considerations were urged upon us in the course of the argument why the defenders should not be held liable in the sum sued for, but regarding which I shall make no observation, thinking them, if not irrelevant, at all events not necessary to the decision of the question before us. That question really is whether the pursuer's proceedings (under which the amount sued for was incurred) were or were not authorised by section 16 of the Glasgow Police Act of 1890—the section under which alone the pursuers proceeded, and upon which alone they base their present claim. The facts out of which this question arises are of the simplest, and may be stated in a sentence or two. The pursuers having reason to believe that the drains connected with the defenders' property were defective, gave notice of this to the defenders, and required and ordered them "to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health" within seven days from the date of notice. This notice was dated 25th September 1894, and in express terms bore that it was issued "by virtue and in terms of section 16 of the Glasgow Police (Amendment) Act 1890." The defenders did nothing to the drains of their property in response to this order, and the pursuers proceeded to put the drains in question into what they considered a proper and safe condition. They did not, however, proceed to remedy or remove defects of structure in the then existing drains, but disregarding the existing structure altogether laid down an entirely new drain (the pursuers call it so themselves in the condescendence) in a different site, and with a different outflow. Now, if what the pursuers did is authorised by the section of the statute under which they gave their notice, they must prevail; if otherwise, they fail, their proceedings being unwarranted. Accordingly, the question to be here decided is, as I have already stated, whether the pursuers' proceedings were authorised by that section or not. In my opinion that question must be answered in the negative. It appears to me that the section of the Act referred to only authorises the pursuers to call for repairs on an existing drain in order to remove or remedy defects therein. No doubt the section also authorises the pursuers to call upon the owners of the defective drains to do "such acts as may be requisite to prevent risk to health;" but I read that along with what goes before, and regard it as authorising a demand on the owner of the drains to do such acts of the kind, that is, acts of the nature of repair or other remedy in connection with the existing drain as will prevent risk to health. In short, the statute appears to me to authorise the pursuers to order such repairs or alterations on an existing drain as will make it efficient and safe. But it does not authorise the pursuers to require the owner to make an entirely new drain, or on his failure, to make such a drain at his expense.

It is not without importance, in considering the construction to be put upon sec. 16 of the Act of 1890, to keep in view that the pursuers had authority to call upon the defenders to build a new drain, if that was what they thought necessary in the public interest, under the 335th section of their Police Act of 1866. Accordingly, it is not presumable that the Legislature by sec. 16 of the Act of 1890 was conferring a power on the pursuers which they already possessed, or was merely repeating a clause formerly enacted. It is more reasonable to suppose that these statutory provisions were intended to provide for different cases —for repairs namely in one case, and construction in another. It is also noteworthy that the conditions attending the exercise of the power conferred by these two clauses are materially different. For repairs, "removing defects of structure," under sec. 16 of the 1890 Act, may be ordered wherever the pursuers are satisfied that the drains are defective, and there is no appeal provided for against such an order. It must be obeyed under penalty, and if not obeyed, the pursuers are authorised themselves to execute the work, and recover the expense thereof as damages from the owners of the property. Under sec. 335 of the Act of 1866, however, which authorises the pursuers to call on an owner of property to construct new drains, the pursuers are not left sole judges of the propriety of such an order. Taking secs. 337, 321, and 322 of the Act of 1866 together, it appears that when a new drain is deemed necessary, and is required by the pursuers to be constructed, the owner called on to do this work must be convened before the Dean of Guild, who may, as seems just to him, either enforce by his order the notice which the pursuers have given, or dismiss the application. The judgment of the Dean of Guild is not declared to be final, and therefore either the pursuers or the owner of property convened would have an appeal against the judgment of the Dean of Guild to this Court. Now, I think the difference in procedure under the two statutes may be accounted for in this way. If repairs on existing drains be all that is required, presumably at no great cost—at all events no great cost in comparison with the cost of constructing an entirely new drain—then the pursuers may reasonably enough be allowed to judge of the necessity of such repairs, and to order their execution. But where the greater expense of constructing a new drain is involved, then the owner required to construct it is to have the advantage of being heard by some other judge than the persons who are issuing the requisition upon him. These considerations, taken along with the words of clause 16, appear to me to warrant the construction I have put upon it. It only authorises repairs—the remedy of defects in an existing structure—and does not authorise (what is elsewhere authorised) a new construction. If my construction of sec. 16 of the Act of 1890 is right, then the conclusion I have reached, that the defender is entitled to absolvitor, appears to be the only conclusion possible consistent with the decision in the case of *Magistrates of Edinburgh* v. *Paterson*, 8 R. 197.

Lord Moncreiff—I should have been glad to have been able to arrive at the same conclusion as the Sheriff-Substitute. The drain in question was admittedly out of order, and the expenses incurred by the Police Commissioners—£80, 10s. 8d.—for which they now sue the appellants, are comparatively small. In holding the defenders not liable I have been influenced not only by the character of the works executed, but by the irregular and misleading nature of the procedure followed by the pursuers, which palliates, if it does not wholly excuse, the proprietor's conduct.

Apart altogether from the question of the construction of section 16 of the Glasgow Police Act of 1890, there are serious objections to the pursuers' claim for work executed. In the first place, part of the work, viz., the connection between the drain at the back of the tenements and the main sewer in Garngad Hill, was absolutely unnecessary, because, as the pursuers might and should have ascertained, there was already an existing connection, as shown on the plan, between the letters A and B. The expense of that work could in no view be allowed.

Again, about a fourth of the expense is connected with repairs upon the sink conductors, which were not found to be necessary until December 1894. The pursuers state in cond. 15 that they issued notices to the defenders to remedy the defects in the sink conductors, but it is admitted or proved that those notices, if issued, were not received by the defenders; and if it was necessary to give notices, as the pursuers seem to admit, the pursuers have no claim against the defenders for the expense of that part of the work. If the pursuers had in March 1894 tested these sink conductors and found them defective, and issued their notices stating that fact, and calling upon the defenders in general terms to repair the defects in the drains, the defects in the sink conductors might have been held to be included in the defects in the drains. But in the notices of 4th April 1894 the work ordered to be done was work outside the houses, and did not include the curing of defects in the sink conductors, which, indeed, the sanitary inspector had not at that time discovered.

The remainder of the work charged for was the formation of a new drain several feet further away from the houses than the old drain, and that brings me to the question whether in making that new drain the pursuers exceeded their statutory powers.

When commissioners of police or other public body are empowered by statute to order repairs to be executed or work to be done, and on the proprietors failing to comply, to do the work themselves at his expense, the measure of their claim for recompense if they do the work is that the repairs or works, for the cost of which they charge, are such as the proprietor was him-

self bound to execute under the clause of the statute founded on. If they execute works of a different description they cannot recover, although the proprietor as well as the community gets the benefit; and it will not avail them that the proprietor has stood by and done nothing. They must act strictly within their statutory powers—*Magistrates of Edinburgh* v. *Paterson*, 8 R. 197; *Hillhead Commissioners* v. *Martin & Bruce*, 17 R. 123.

The only statutory warrant upon which the pursuers found is the 16th section of the Glasgow Police Amendment Act of 1890. On reading that section it appears to me that it is confined to repairs upon drains already in existence which may be in a faulty condition owing to defects such as bad material, bad jointing, or the absence of traps, or from having fallen into disrepair, and does not apply to the construction of a new drain. The sanitary inspector is empowered, with a view to discovering whether defects exist, to apply the smoke test or other test to "such drains," that is, to the existing drains. The smoke test will disclose defects (if they exist) in the joints, and also whether, owing to the absence of proper trapping, foul air will penetrate into the building. Against this requisition there is no appeal. All this, I think, points not to a new system of drainage as the remedy contemplated, but to the repair of an existing structure, although no doubt the repairs may require to be more or less extensive according to the condition of the drain. This becomes the more apparent when the provisions of section 16 of the Act of 1890 are contrasted with sections 332 and 335 of the Glasgow Police Act of 1866, and the procedure as to notices under section 321, and also the right of appeal given in such cases by section 332, as made applicable to the formation of drains by section 337. In short, I think that section 16 of the Act of 1890 contemplates repairs which, in the interests of public health, admit of being made in an emergency in a comparatively short time, and not the formation of a new system of drainage which, as here, might require a considerable time for its proper execution.

But when, after applying the smoke test in March 1894, in virtue of powers under the 16th section, the sanitary inspector found that repairs were needed, the pursuers did not content themselves with calling upon the proprietor to remedy the defects in the existing drain and connections. They issued the notices, dated 4th April 1894, which are printed. Now, these notices were irregular and misleading in several respects. In the first place, they called upon the proprietor not to repair the existing drain and connections, but to "lay down a new drainage system." That was the keynote of the notices. Again, this order to construct a new drainage system, proceeded upon two inexcusable mistakes in point of fact. First, the proprietor was told in the case of each tenement to carry a new drain through the close under the house and connect it with a public sewer in front of the house, whereas at that time no such sewer had been formed. Secondly, the proprietor was ordered to disconnect his drain from the Monkland Canal, whereas it did not drain into it, but into the main sewer in Garngad Hill to the west of the defender's properties. This was what the proprietor was called upon to do, and I do not find that the pursuers ever departed from those notices. It is stated in condescendence 8 that on 20th September 1894 the sanitary inspector informed the defenders "that he insisted upon executing the work specified in said notices dated 4th April 1894;" and in condescendence 12 it is stated that after fresh notices of 25th September had been given, the sanitary inspector "issued estimates for the execution of the work remedying or removing the said nuisance as specified in the notices served by the sanitary inspector on the defenders on 4th April 1894." This shows that although the notices of 25th September bear to be issued under section 16 of the Act of 1890, and do not contain particulars of the work to be done, they were not given in order to remedy the mistakes in the earlier notices; the pursuers did not depart from their original demand for a new system of drainage.

The result of all this confusion and the nature of the demand made upon the proprietor in the notices was to enable him to say that the pursuers, who professed to be acting under section 16 of the Act of 1890, under which there is no appeal, would be satisfied with nothing less than the execution of the works specified in the notices of 4th April 1894.

In holding that the pursuers are not in this case entitled to recover, I do not think that we shall throw any difficulties in the way of the sanitary authorities in Glasgow in the execution of their duties. If they had made the necessary investigation as to the lie and outfall of the drain, and followed the course prescribed by the statutes, the difficulty would not have arisen. While I think that the proprietor should have more actively endeavoured to arrange as to the repairs which were needed, I do not think that looking to the demands of the pursuers and the case of *Paterson*, his failure to do anything or to suggest an alternative scheme to that proposed by the pursuers forms a sufficient ground for subjecting him in liability

The Court pronounced the following interlocutor, dated 26th June and signed 11th July:—

> "Find that the pursuers having reason to believe that the drains connected with the defenders' property were defective, by notice dated 25th September 1894, issued by virtue and in terms of section 16 of the Glasgow Police (Amendment) Act 1890, gave notice of this to the defenders requiring and ordering them 'to carry out all necessary operations for removing defects of structure or to do such acts as may be requisite to prevent risk to health:' Find that the defenders did nothing to the drains of their property in response to this order, and that the

pursuers proceeded to put the drains in question into what they considered a proper and safe condition: Find, however, that the pursuers did not proceed to remedy or remove defects of structure in the then existing drains, but disregarding the existing structure altogether laid down an entirely new drain in a different site and with a different outflow: Find that the pursuers' proceedings were not authorised by said section 16 of the Glasgow Police (Amendment) Act 1890: Therefore recal the interlocutor appealed against; sustain the appeal; assoilzie the defenders from the conclusions of the action."

Counsel for the Pursuers—Lees—Salvesen. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders—Ure—Clyde. Agents—Simpson & Marwick, W.S.

Friday, June 26.

SECOND DIVISION.

MARTIN *v.* CRUICKSHANKS.

Reparation—Slander—Privilege—Motion for New Trial—Whether Evidence of Malice Sufficient to Support Verdict.

A clerk and a porter who were employed by a railway company at one of their goods sheds, raised an action of damages for slander against an inspector who had been for thirty years in the employment of the railway company. The action was founded upon a report made by the defender in which he alleged that he had found one of the pursuers using a gimlet in the side of a cask of beer, while the other was sitting upon it with a water-can in his hands, that he had said to them they were in an awkward position, and that they had asked him not to report their conduct. The case went to trial upon an issue in which malice was inserted. The defender swore to the truth of his report. The pursuers denied the acts and conversation alleged, and declared that the whole report was an invention, but did not prove or suggest any motive which could have induced the defender to make a false charge against them.

The jury found for the pursuers and assessed the damages at £100 to each.

The Court *refused* (*diss.* Lord Young) to grant a new trial, on the ground that the question was one of credibility, and that the charge made by the defender, if false, must necessarily have been made maliciously.

William Martin, goods porter, Inverkeithing, and James Stark, railway clerk, Dunfermline both formerly in the employment of the North British Railway Company at Inverkeithing Station, raised an action of damages for slander against William Cruickshanks, a railway inspector in the employment of the company.

Two issues were adjusted for the trial of the cause, one for each of the pursuers, and both in the same terms. That for the pursuer William Martin was—"Whether the defender wrote and transmitted to John Stewart, Burntisland, the report set forth in the schedule hereto annexed, and whether the said report is of and concerning the pursuer William Martin, and falsely, maliciously, and calumniously represents that the said pursuer was, on or about 8th August 1895, pilfering, or attempting to pilfer, from a cask in the custody of the North British Railway Company, at or near their station in Inverkeithing, to the loss, injury, and damage of the said pursuer? Damages claimed by the pursuer William Martin, £250.

"SCHEDULE.

"Goods Department, Dunfermline Station. S. 174,388 10/8	To John Stewart, Esq., Burntisland. Date 12th August 1895.

"Inverkithing, 8th August 1895.

"Dear Sir,—On me visiting the above, and entering goods shed from east end, I came on the clerk Stark using a gamlet in side of a cask, and it on its end. The porter was sitting on it with a watter can in his hands. I went to them and said men you are in a very awkard position, the clerk turned up his head and said they were. I saw another man sitting in shed looking at them, I did not know him, he had on a mixted soot of tweeds. The clerk left shed, so did the porter with can, and the porter returned to me and asked me if I was going to say anything about it. I told him that I would consider what I was to do with that; he was not pleased, and he folled me up the time I was checking three sidings, repeting the same questin. I told him I was afraid it was not his first time, and he said it was. I asked him whatever attemped him to do it, and he said he had been drinking this last two nights. When I put it to him was it his first time, he said he was brought up to it. I went to the hut—there was a party there with clerk, and I did not speak to him, but went to Mr Simpson, and him and me examined cask, and found there had been a spail put in as cask was liking. The cask was addressed Sim, Invkithing.—Yours truly, W. CRUICKSHANKS."

The trial took place on 25th February 1896, before the Lord Ordinary (Low) and a jury.

The defender, who had been thirty years in the employment of the Railway Company, deponed as follows:—"Then I went into goods shed at south end to look at waggons there. I passed one waggon, and on second waggon the clerk, Stark, was sitting, using his right hand on a barrel which was on platform. The porter, Martin, was sitting on cask facing clerk, with can between his legs. Stark was down on his right knee. Martin was sitting on top of cask. It was a common station water pitcher that Martin had. I did not look into it, but by the way Martin was holding it it looked empty. I came on them sud-